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## **An internationally recognised status of election observers**

Report<sup>1</sup>

Committee on Legal Affairs and Human Rights

Rapporteur: Mr Frans WEEKERS, The Netherlands, Alliance of Liberals and Democrats for Europe

### *Summary*

Observation of elections plays an important role in enhancing the democratic electoral process. It is an effective instrument for identifying shortcomings of the electoral process, for deterring fraud and for increasing the confidence of the electorate in the electoral process. Nevertheless, bearing in mind the large number of international organisations (both governmental and non-governmental) involved in this activity, there is a growing risk of forum shopping among election observers.

There are many international instruments governing the status of election observers, such as the Declaration of Principles for International Election Observation and the Code of Conduct for International Observers, as well as the relevant Guidelines adopted by the OSCE/ODIHR, the Commonwealth of Independent States, the European Union and the Council of Europe. However, most of these are fragmentary, soft-law instruments.

Furthermore, in most member states, election observer status is often not covered, or only partially covered, in national electoral legislation.

The Committee on Legal Affairs and Human Rights therefore considers that more uniform rules should be introduced at both international and national level. The Council of Europe should consider giving legal recognition, in particular through a recommendation, to the Guidelines on an internationally recognised status of election observers, published by the Venice Commission in December 2009. This document sets out the rights and duties of election observers; it also recommends that member states should avoid duplication with the Declaration of Principles for International Election Observation and the Code of Conduct for International Observers, which should also be implemented in the national electoral systems.

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<sup>1</sup> Reference to committee: Bureau decision, Reference 3322 of 16 March 2007.

## A. Draft resolution<sup>2</sup>

1. The Parliamentary Assembly refers to its previous work relating to the electoral process, in particular Resolutions 1320 (2003) on the Code of Good Practice in Electoral Matters; 1546 (2007) on the Code of good practice for political parties; 1591 (2007) on distance voting; 1590 (2007) on secret ballot – European code of conduct on secret balloting, including guidelines for politicians, observers and voters, 1705 (2010) on thresholds and other features of electoral systems which have an impact on representativity of parliaments in Council of Europe member states and 1736 (2010) on the Code of good practice in the field of political parties.
2. Democratic elections are a manifestation of fundamental, civil and political rights and they are a key pillar of political stability. The Assembly has already stressed that the holding of free, equal, universal, secret and direct elections at regular intervals remains a *sine qua non* for recognising a political system as democratic and that its objective is to establish the world's largest "free and fair election" zone.
3. Observation of elections plays an important role in enhancing the democratic electoral process and promoting the protection of human rights. Election observers monitor elections that are held according to domestic and international law standards. They also scrutinise the existing electoral legal framework. Therefore, election observation is an effective instrument for identifying shortcomings of the electoral process and deterring fraud. It is also a tool to increase the confidence of the electorate in the electoral process.
4. Nowadays, election observation is a widely accepted procedure. At the international level, there are many organisations, like the Organisation for Security and Co-operation in Europe (OSCE) and the European Union, which are engaged in election observation, and most of them have adopted guidelines on election observers.
5. The Assembly notes that although several organisations are interested in promoting free and fair elections and consequently several guidelines govern the status of election observers in various ways, these guidelines are not congruent. In its Resolution 1320 (2003), the Assembly, noting that "every European or international organisation has tended to follow its own criteria on the observation and evaluation of elections, and that there is neither a formal text setting out all the underlying principles of European electoral systems nor a permanent European body responsible for electoral monitoring", considered that "the Council of Europe, owing to its specific role as the guardian of democracy in Europe, should play a pioneering role in codifying election rules".
6. The Assembly recalls its long-standing experience of election observation and draws attention to its own role in promoting democratic elections.
7. The Assembly also draws attention to the *acquis* of other Council of Europe bodies in the field of electoral law, in particular the work of the European Commission for Democracy through Law (Venice Commission), its Council for Democratic Elections and the Congress of Local and Regional Authorities. It welcomes, in particular, the election-related Guidelines adopted by the Venice Commission, such as the Code of Good Practice in Electoral Matters, and its recent documents on the status of election observers.
8. On the basis of the Venice Commission recommendations and guidelines, the Assembly considers that there are no common rules on election observers, although several instruments of international law, and mainly of soft-law, deal with their rights and duties. At the international level, these rules are still fragmentary. The Assembly considers that there is a need for congruent international rules on the status of election observers.
9. Concerning domestic regulations on the status of election observers, the Assembly acknowledges that, in the majority of member states, there exist no legislative provisions on this issue. Although certain states have incorporated rules on this subject, these provisions vary greatly from country to country, and electoral practice is still affected by various national traditions. The Assembly reiterates that this situation should not be used as a pretext to undermine the basic principles governing the conduct of free and fair elections.

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<sup>2</sup> Draft resolution adopted unanimously by the committee on 24 June 2010.

10. The Assembly considers that the adoption of congruent rules at the European level could strengthen the status of election observation, as well as the credibility and legitimacy of elections and prevent certain practical problems, such as the risk of forum shopping among election observers. Such rules should be based on the Declaration of Principles for International Election Observation and on the Code of Conduct for International Election Observers.

11. The Council of Europe should strengthen its efforts to maintain confidence in electoral systems. The implementation of the above guidelines and a uniform status for election observers would be one of the means to achieve this objective.

12. The Assembly therefore calls on the Council of Europe member states to:

12.1. implement in their national legislation the Declaration of Principles for International Election Observation and the Code of Conduct for International Election Observers, if they have not yet done so;

12.2. promote the knowledge of the rules contained therein among the relevant stakeholders, by organising seminars, training and providing relevant and up-to-date documentation;

12.3. step up international co-operation with other organisations, such as the OSCE/ODIHR and the European Union, as well as other stakeholders involved in election observation.

13. The Assembly supports the Venice Commission in its valuable work in the field of electoral law and, in particular, in codifying and setting up rules on the status of election observers. It encourages it to work further on this issue.

14. Furthermore, the Assembly calls on Council of Europe member states to implement the Venice Commission Guidelines on an internationally recognised status of election observers, while avoiding duplication of standards set up in the Declaration of Principles for International Election Observation and in the Code of Conduct for International Election Observers. In fixing explicit rules on the rights and duties of election observers, member states should in particular:

14.1. provide that election observers' tasks should cover areas of assessment of the whole electoral process, including the pre-voting phase, the voting day phase and the post-voting phase;

14.2. ensure that election observers are invited sufficiently well in advance;

14.3. clearly define and harmonise the accreditation procedure; rules on accreditation should be implemented in a flexible manner;

14.4. provide for remedies if election observers' rights are not respected;

14.5. ensure that observers' freedom of movement is not restricted;

14.6. guarantee the security of election observers while carrying out their duties.

15. It invites the members of parliamentary delegations to the Assembly to:

15.1. introduce the question of the status of election observers into the work of their national parliaments;

15.2. promote the work of the Venice Commission and of the Assembly in the area of electoral matters, including election observation.

**B. Draft recommendation<sup>3</sup>**

1. The Parliamentary Assembly refers to its Resolution .... (2010) on an internationally recognised status of election observers, in which it calls on the Council of Europe member states to implement carefully the Declaration of Principles for International Election Observation, the Code of Conduct for International Election Observers, as well as the Venice Commission's Guidelines on an internationally recognised status of election observers.

2. The Assembly recommends that the Committee of Ministers:

2.1. ensure that member states give appropriate recognition to the Declaration of Principles for International Election Observation, the Code of Conduct for International Election Observers and the Guidelines on an internationally recognised status of election observers, with respect to domestic and international observers;

2.2. ensure that they promote the above-mentioned documents, in particular by circulating them to all stakeholders involved in the organisation and observation of elections;

2.3. initiate further work on the regulatory framework governing the status of election observers and, in particular, consider transforming the Guidelines on an internationally recognised status of election observers into a recommendation of the Committee of Ministers.

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<sup>3</sup> Draft recommendation adopted unanimously by the committee on 24 June 2010.

## C. Explanatory memorandum by Mr Weekers, rapporteur

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## 1. Introduction

### 1.1. *My mandate*

1. The present report stems from a decision of the Bureau of the Parliamentary Assembly of the Council of Europe of 15 March 2007 to mandate the Committee on Legal Affairs and Human Rights to prepare a report on “an internationally recognised status of election observers”. On 19 April 2007, the Committee appointed me as rapporteur.

2. The above-mentioned decision of the Assembly's Bureau was preceded by the “Conference on the parliamentary dimension of election observation: applying common standards”, organised by the Assembly on 15-16 February 2007 in Strasbourg.<sup>4</sup> The Conference brought together a wide range of participants from the election-observing community, such as parliamentarians, international organisations, the civil society, and electoral administrators, not only from Europe, but also from Africa and the Americas. The Conference conclusions were drawn up by the [then] President of the Parliamentary Assembly, Mr René van der Linden. Among areas for further work referred to in the conclusions of the President, two specific issues were highlighted: distance voting and the need for an internationally recognised status of election observers (both international and national observers) which could then be embodied in domestic legislation. The Assembly indicated that it was ready to initiate this process. During this Conference, the representative of the Association of European Election Officials (ACEEEO) expressed the view that the “status of international observers should be unified, universal, and clarified in a single specific document, to prevent different interpretations”.

<sup>4</sup> Available at [http://assembly.coe.int/Conferences/2007Elections/Programme\\_EN.pdf](http://assembly.coe.int/Conferences/2007Elections/Programme_EN.pdf).

3. Following the decision of the Assembly's Bureau, on 6 May 2008 the Committee on Legal Affairs and Human Rights asked the European Commission for Democracy through Law (Venice Commission) to prepare an opinion on a number of questions concerning the status of election observers, "... indicating, in addition, which Council of Europe member states and observer states, if any, do not provide for election observation in their domestic legislation", in order to assist the Committee's work on this report.<sup>5</sup> On 20 May 2009, the Venice Commission published its report on an internationally recognised status of election observers, which had been adopted at its 78<sup>th</sup> plenary session in Venice on 13-14 March 2009.<sup>6</sup> The document aimed at making an inventory of international and national texts and standards related to the rights and duties of election observers. It was followed by a "Summary of recommendations on an internationally recognised status of election observers",<sup>7</sup> published by the Venice Commission on 15 June 2009, and the "Guidelines on an internationally recognised status of election observers" (hereinafter "Guidelines"), published on 14 December 2009.<sup>8</sup>

### 1.2. Aim of this report

4. Free elections are a crucial part of democratic governance and a fundamental principle of human rights, especially civil and political rights.<sup>9</sup> The right to vote and to participate in elections is guaranteed in many international documents, such as the Universal Declaration of Human Rights (Article 21), the International Covenant on Civil and Political Rights (Article 25) and the European Convention on Human Rights (Article 3 of First Protocol).<sup>10</sup> Genuine democratic elections are an expression of sovereignty, as they allow individuals to influence governmental decision-making. Therefore, the fairness of elections and, accordingly, the role of election observers are crucial in promoting democracy and human rights.<sup>11</sup>

5. An analysis of the current documents on election observers shows that the criteria and rules with respect to their status differ at the national level and are still fragmentary at the international level, even though there are several guidelines on international observers, adopted by various international instances. For this reason, there is an increased need to introduce an internationally recognised status of election observers.

6. In my report, I will focus, first of all, on existing international guidelines concerning the status of election observers and the disparities in national legislation concerning this issue, to demonstrate the need to adopt unified standards in respect of international election observers. In so doing, I will refer to the existing texts on the rights and obligations of observers. At the same time, on the basis of the Venice Commission's Guidelines on an internationally recognised status of election observers, I will strive to indicate how best their status should be elaborated and which rights and duties, also those relating to the accreditation, should be incorporated in national electoral systems. Once again, I would like to pay tribute to the work the Venice Commission has done in this field, and in particular its three above-mentioned documents, which facilitated the preparation of this report.

## 2. The role of election observers

7. Observation of elections is a crucial tool to assess an election process. It has proved to be a powerful instrument for identifying shortcomings and for ensuring the credibility and legitimacy of the electoral process. It is a yardstick by which the democratic development of a country can be measured.<sup>12</sup>

8. The observation of elections is both technical and political in nature. The technical observation of elections focuses on the adequacy of the corpus of laws that govern an election, as well as the actual conduct of these elections in accordance with these laws. However, elections cannot be seen as being separate from the political context in which they take place.

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<sup>5</sup> European Commission for Democracy through Law (Venice Commission), report on an internationally recognised status of election observers, CDL-AD(2009)020rev, p. 2.

<sup>6</sup> Ibid.

<sup>7</sup> Adopted on 12-13 June 2009 by the Council for Democratic Elections, document CDL-AD(2009)026.

<sup>8</sup> Adopted on 11-12 December 2009 by the Council for Democratic Elections, document CDL-AD(2009)059.

<sup>9</sup> *Election observation handbook*. 5<sup>th</sup> edition, OSCE/ODIHR 2005, p. 11.

<sup>10</sup> Other fundamental rights like freedom of speech and expression, as well as the prohibition of discrimination, are also very closely related to elections.

<sup>11</sup> Declaration of principles for international election observation, pp. 1-2.

<sup>12</sup> ACE. The electoral Knowledge Network. ACE Encyclopaedia Version 1.0. Facilitating observer activities. Available at: <http://aceproject.org/main/english/em/eme09.htm>.

9. The role of election observation is to promote and protect the right to free elections. Its aim is to secure that the election process is democratic and there are no irregularities. Observers keep watch on the election process to ensure that elections are carried out in accordance with national and international law, but their role is only to observe. They do not actually take part in the election administration.<sup>13</sup> By the same token, the verdict of the election observers alone does not make an election valid or invalid.<sup>14</sup>

10. After the Cold War, international election observation has experienced a “veritable boom” and many international organisations have their own election observers.<sup>15</sup> International election observation has also become an important mechanism for ensuring election integrity in countries undergoing a transition to democracy or in post-conflict societies.<sup>16</sup>

11. Usually, the role of election observers includes increasing the confidence of the electorate in the electoral process, reassuring voters as to secrecy and deterring fraud.<sup>17</sup> Recent examples in Ukraine,<sup>18</sup> the Russian Federation,<sup>19</sup> Georgia<sup>20</sup> and other countries<sup>21</sup> show the need for international election observers’ participation in the electoral process.

### 3. Types of election observers

12. One should first distinguish between international and national election observers. According to the Venice Commission,<sup>22</sup> “there are three different types of observers: partisan national observers, non-partisan national observers and international (non-partisan) observers. In practice, the distinction between the first two categories is not always obvious. This is why it is best to make the observation procedure as broad as possible at both the national and the international level.” International observers come from outside the country where the election is being held. Usually they are appointed by or on behalf of national governments or international organisations. Domestic observers are citizens of the country and they may be members of an NGO. It is clear that both kinds of election observers are needed. Domestic observers have better insight of their home country and knowledge of the language, whereas international observers can be seen as more likely to be impartial.<sup>23</sup>

<sup>13</sup> Declaration of principles for international election observation, 27 October 2005, pp. 1-2.

<sup>14</sup> A. Kvakkestad, *Cancellation of election results – Lessons learned from election observation*, in: “The cancellation of election results. Science and Technique of Democracy”, No. 46, Venice Commission, Council of Europe Publishing 2010, p. 16.

<sup>15</sup> Ch. Binder, *International Election observation by the OSCE and the Human Right to Political Participation*, ‘European Public Law’, vol. 13, Issue 1, 2007, p. 133.

<sup>16</sup> International Institute for Democracy and Electoral Assistance, *The Future of International Electoral Observation: Lessons Learned and Recommendations*, 1999, pp. 1-3.

<sup>17</sup> A. Kvakkestad, *op. cit.*, p. 16.

<sup>18</sup> Following the presidential election in Ukraine in January 2010, the election observers considered these elections fair and democratic, even though there had been allegations of fraud by both parties in the second round of the election; see the United States Mission to the OSCE Statement on 17 January, Presidential Election in Ukraine, PC.DEL/41/10, 21 January 2010 ([www.osce.org/documents/pc/2010/01/42460\\_en.pdf](http://www.osce.org/documents/pc/2010/01/42460_en.pdf)), *Ukraine’s presidential election meets most international commitments*. See <http://home.coe.int/Wires/WiresLectureE.asp?WiresID=139199>.

Previously, in 2004, Ukrainian elections had been far more problematic for observation, since allegations of widespread fraud in the presidential election led to the mass protests nowadays known as the Orange Revolution. Still, at that time some election observers had declared that the elections were fair and free from fraud. (Like the OSCE, which had already declared that the election was fair. OSCE Press release: *Run-off confirms that Ukraine’s presidential election meets most international commitment* ([www.osce.org/odihr-elections/item\\_1\\_42681.html](http://www.osce.org/odihr-elections/item_1_42681.html)).

<sup>19</sup> In 2007, during the Duma elections, the Russian Federation first tried to limit the number of observers by saying it would accept only 70 observers. It also delayed the issue of visas to the observers. The OSCE Office for Democratic Institutions and Human Rights (ODIHR) concluded that the observation of the elections would be impossible in these circumstances. See in particular: N. Popescu, *Observing Russian Federation’s elections, 2 December 2007*. European Council on Foreign Affairs: [www.ecfr.eu/content/entry/commentary\\_observing\\_russias\\_elections/](http://www.ecfr.eu/content/entry/commentary_observing_russias_elections/) and OSCE press release: *ODIHR unable to observe Russian Duma elections*, [www.osce.org/item/27967.html](http://www.osce.org/item/27967.html).

<sup>20</sup> The elections in Georgia in 2003 ended with the “Rose Revolution”. The first problem appeared during the pre-election phase, before election day. The independence of the courts was questioned and there were reports of violence used during the electoral campaign. There were also doubts as to whether Georgia was able to establish a realistic list of persons entitled to cast their vote in the elections. Problems with the voters’ lists appeared on the election day, because there were up to three lists that could be taken into consideration in the polling station. And when the turnout was reported, the numbers did not add up. See A. Kvakkestad, *op. cit.*, pp. 20-21.

<sup>21</sup> Problems also arose in 2005 in Moldova and Azerbaijan, and in some countries, like Kazakhstan, which is not a member of the Council of Europe, but which has observer status with the Venice Commission. See A. Kvakkestad, *op. cit.*, pp. 21-23.

<sup>22</sup> CDL-AD (2002)23rev, Code of Good Practice in Electoral Matters; Guidelines and explanatory report (paragraph 87).

<sup>23</sup> ACE. The electoral Knowledge Network. ACE Encyclopaedia Version 1.0. Facilitating observer activities, *supra* note 12.

13. The 'community' of international observers includes (*inter alia*):

- Members of international parliamentary assemblies (Parliamentary Assembly of the Council of Europe, OSCE Parliamentary Assembly, European Parliament, NATO Parliamentary Assembly, Pan-African Parliament, Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States (CIS IPA), Interparliamentary Union (IPU), etc.);
- Representatives of international organisations and institutions (OSCE Office for Democratic Institutions and Human Rights (ODIHR), Congress of Local and Regional Authorities of the Council of Europe, European Commission, Organisation of American States (OAS), etc.);
- Think tanks and international NGOs involved in election observation and administration (the Carter Centre, National Democratic Institute (NDI), the former "International Foundation for Election Systems" (IFES), European Network of Election Monitoring Organisations (ENEMO), etc).

#### 4. The existing framework for election observation

##### 4.1. At the international level

14. Since there are many international organisations that deploy election observers, the status of election observers and rules concerning election observation are dispersed across a considerable number of documents in various fora. However, these documents are not fully congruent with each another.

15. Nevertheless, the existing texts relating to election observation generally underline the importance of a long-term "approach" in the observation of elections (namely evaluation of pre-election, election-day and post-election periods). They also refer to rights and obligations of observers.

##### 4.1.1. *The Declaration of principles for international election observation and the Code of conduct for international observers*

16. The Declaration of principles for international election observation ("the Declaration") and its accompanying Code of Conduct for international observers ("the Code") are the most detailed international documents concerning the rights and duties of election observers. They were prepared by the United Nations Electoral Assistance Division (UNEAD), the National Democratic Institute and the Carter Center and endorsed by 22 international governmental and non-governmental organisations on 27 October 2007.<sup>24</sup> Since then, other organisations,<sup>25</sup> all of which are involved in continuous informal discussions of best practices, have endorsed this document, which still remains open to future endorsement.<sup>26</sup>

17. The above-mentioned Declaration and Code provide a global framework for election observation.<sup>27</sup> Article 20 of the Declaration stipulates that international observer missions should include persons of "... sufficiently diverse political and professional skills, standing and proven integrity ...". This Declaration also lists the relevant requirements to the host state, including those concerning observers' unimpeded access to its territory and the people involved in the organisation of elections, as well as their right of reporting (Article 7). It also imposes duties on election observers, such as the obligation to establish communications with all political competitors in the election process (Article 15), to observe the laws of the host country and to be politically impartial.<sup>28</sup>

##### 4.1.2. *The European Convention on Human Rights*

18. The importance of an efficient democratic system has been stressed in the Preamble of the European Convention on Human Rights, which states that fundamental human rights and freedoms are best maintained by an effective political democracy. Article 3 of Protocol No. 1 to the Convention enshrines the

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<sup>24</sup> [www.ndi.org/files/1923\\_declaration\\_102705\\_0.pdf](http://www.ndi.org/files/1923_declaration_102705_0.pdf).

<sup>25</sup> The Council for Democratic Elections and the Venice Commission endorsed them in October 2005.

<sup>26</sup> Available at: [http://cartercenter.org/peace/democracy/des\\_declaration.html](http://cartercenter.org/peace/democracy/des_declaration.html).

<sup>27</sup> The OSCE/ODIHR, the Venice Commission, as well as the Parliamentary Assembly's Bureau have endorsed the Declaration and the Code of conduct for international observers, unlike the Parliamentary Assembly of the OSCE, which, on the occasion of the Assembly's Conference on the Parliamentary dimension of election observation in February 2007, regretted, *inter alia*, that it makes no mention of parliamentarians or parliamentary assemblies and their role in election observation.

<sup>28</sup> Unlike other documents in this field, the Declaration of principles for international election observation refers only to international observation, as is highlighted in its title. Therefore, it is not applicable to national election observers. The document emphasises that "international election observation is conducted for the benefit of the people of the country holding the elections and for the benefit of the international community".



right to free elections.<sup>29</sup> This provision grants an individual the right to live and participate in a democratic society, which includes the right to vote for representatives and to stand for election.<sup>30</sup> However, this freedom is not absolute, which the European Court of Human Rights has acknowledged in several cases (for example, in the case of *Mathieu-Mohin and Clerfayt v. Belgium*<sup>31</sup>). The Court allows a wide margin to the contracting states in fulfilling the duties resulting from Article 3 of Protocol No 1<sup>32</sup> (see, in particular, *Labita v. Italy*,<sup>33</sup> *Hirst No. 2 v. the United Kingdom*<sup>34</sup> and *Yumak and Sadak v. Turkey*<sup>35</sup>).

#### 4.1.3. *The OSCE Copenhagen Document and Election Observation Handbook*

19. The OSCE Copenhagen Document<sup>36</sup> emphasises the “elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings” (Article 5). According to this document, the participating states invite observers to observe their national election proceedings, to the extent permitted by law. International observers shall endeavour to facilitate similar access for election proceedings held below the national level. Such observers will undertake not to interfere in the electoral proceedings. The Copenhagen Document makes a distinction between domestic and foreign observers (Article 8).

20. Moreover, the OSCE/ODIHR has also issued the “Election Observation Handbook”,<sup>37</sup> which contains practical guidelines for the conduct of ODIHR election observation missions.

#### 4.1.4. *European Union documents*

21. The European Union has issued its own guidelines regarding election observers: “The Communication on Election Assistance and Observation” and the “Handbook for European Union Election Observation”.<sup>38</sup> These guidelines contain mainly regulations on the conduct of election observation, but there are also some regulations about rights and duties of election observers. All European Union observers are required to sign a contract that contains the guidelines for observers. Observers must respect the laws of the host country and they have no special immunities.<sup>39</sup>

#### 4.1.5. *Reference documents for the Commonwealth of Independent States*

22. In 2002, the Russian Federation initiated the preparation and adoption of the Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms in the member states of the Commonwealth of Independent States (“CIS Convention”), which includes provisions on the status and powers of national and international observers and defines their rights and obligations. This Convention has been ratified to date by Armenia, Kyrgyzstan, Moldova, the Russian Federation and Tajikistan and is now in force.

<sup>29</sup> “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

<sup>30</sup> Conference on the parliamentary dimension of election observation. Working Session 1. International Standards for Free Elections: the Basis for an Objective Assessment, 15 February 2007. Chair: Mr Spencer Oliver, Secretary General of the OSCE Parliamentary Assembly, p. 33.

<sup>31</sup> Application No. 9267/81, judgment of 2 March 1987. See, in particular, paragraphs 46-54. The Court stated that Article 3 of Protocol No. 1 embodies a characteristic principle of an elective political democracy and is accordingly of capital importance in the Convention system. It does not give rise merely to inter-State obligations like other substantive clauses in the Convention and Protocols. It is more an individual right to vote and stand for election.

<sup>32</sup> For more information, see, for example, M. O’Boyle, Electoral disputes and the ECHR: an overview, in: “The cancellation of election results”, Science and Technique of Democracy, No. 46, Venice Commission, Council of Europe Publishing 2010, pp. 39-55.

<sup>33</sup> Application No. 26772/95, judgment of 6 April 2000.

<sup>34</sup> Application No. 74025/01, judgment of 6 October 2005.

<sup>35</sup> Application No. 10226/03, judgment of 8 July 2008.

<sup>36</sup> Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990 (hereinafter, “the OSCE Copenhagen Document”). Available at:

[www.osce.org/documents/odihr/1990/06/13992\\_en.pdf](http://www.osce.org/documents/odihr/1990/06/13992_en.pdf).

<sup>37</sup> It may also be deduced (again without any details) that the OSCE Copenhagen Document admits involvement both of domestic and international observers at any elections regardless of their level (national, regional or local).

<sup>38</sup> Council Decision 9262/98, PESC 157, COHOM 6; available at:

[http://ec.europa.eu/europeaid/observer/council\\_decision\\_9262\\_en.pdf](http://ec.europa.eu/europeaid/observer/council_decision_9262_en.pdf).

<sup>39</sup> Handbook for European Union Election Observation Missions, pp. 18-19, [http://ec.europa.eu/europeaid/what/human-rights/election\\_observation\\_missions/documents/eu\\_election\\_observation\\_handbook\\_en.pdf](http://ec.europa.eu/europeaid/what/human-rights/election_observation_missions/documents/eu_election_observation_handbook_en.pdf).

23. This document contains some details concerning the legal status of international and national observers, in particular its Articles 14 and 15<sup>40</sup> and the status of international observers is generally in line with other international documents. However, in its Opinion adopted in March 2007, the Venice Commission expressed some doubts concerning certain restrictions to the rights of observers.<sup>41</sup>

24. Furthermore, in September 2002, the Association of Central and Eastern European Election Officials (ACEEEO), now the Association of European Election Officials, approved a Draft European Convention on the Standards of Elections, Electoral Rights and Freedoms, which also includes provisions on “Status and Powers of national observers” and “international observers”. In 2004, the Venice Commission expressed a number of reservations with regard to the draft convention.<sup>42</sup> A revised version of the draft convention was then drawn up, which took into account some of the remarks of the Venice Commission.

25. Finally, it should also be added that the Inter-Parliamentary Assembly of the CIS approved Recommendations for International Observers of the Commonwealth of Independent States for Observation of Elections and Referendums, which represent a methodological guide for practical elections observation and a manual for training national and international observers and election officials in the CIS member states.<sup>43</sup>

#### 4.1.6. Guidelines adopted within the Council of Europe

##### 4.1.6.1. Parliamentary Assembly guidelines on the observation of elections

26. The Parliamentary Assembly has a rich experience in observing parliamentary and presidential elections, as well as national referenda, in certain member states of the Council of Europe, such as Armenia, Monaco, the Russian Federation and Serbia. In addition, the Assembly has observed a number of elections outside the Council of Europe geographical area, such as in Chile, Mexico, the territories controlled by the Palestinian authorities, and Kazakhstan.<sup>44</sup>

27. While, initially, the Assembly observed elections independently, since the second half of the nineties, as a rule elections are observed by the Assembly in the framework of an International Election Observation Mission (IEOM) composed of parliamentary delegations from the Parliamentary Assembly of the Council of Europe, the Parliamentary Assembly of the OSCE, the European Parliament and, on occasion, the NATO Parliamentary Assembly, as well as representatives of the OSCE Office for Democratic Institutions and Human Rights (ODIHR).

28. Bearing in mind the objectives and the political nature of the Parliamentary Assembly observation missions, as well as the problems deriving from past co-operation arrangements with other international institutions, the Assembly's Bureau adopted a set of guidelines in 2004. They were updated in 2005, 2006 and in 2007. The guidelines cover: the elections to be observed, co-operation in the field, the practical organisation of the observation, and the different forms of election observation by the Assembly: (a) election observation missions; (b) election assessment missions and (c) presence on the occasion of elections without a formal observation or assessment of them.

29. The guidelines provide that the “observation of parliamentary and presidential elections as well as of referenda in an applicant state or a state under the monitoring procedure should be an inalienable right of the Assembly”. A state's lack of co-operation with the Assembly may result in sanctions (paragraph 2 of the guidelines) and “any refusal to send an invitation will constitute an evaluation criterion in itself” (paragraph 10).

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<sup>40</sup> The rights of these groups are roughly similar in this convention.

<sup>41</sup> See Opinion No. 399/2006, CDL-AD(2007)007, 19 March 2007: “The Convention is a contribution to the definition and implementation of the international standards of electoral law. It includes some elements which reproduce other international – or, more specifically, European – international documents; some others which might pose a few difficulties. They will not be repeated here in detail, but some may be reminded, such as the restrictions to the rights of observers, the prohibition of any involvement of foreigners in the electoral process, or the obligation to accept the results of elections. ... Irrespective of the particular questions addressed in this opinion, the general shape of the Convention raises a number of questions ...”.

<sup>42</sup> See Opinion No. 253/2003, CDL-AD(2004)010, 17 March 2004, paragraph 91: “It should be underlined, in a general way, that all restrictions to the rights enshrined in the Convention should be clearly submitted to the principle of proportionality.”

<sup>43</sup> See [www.cikrf.ru/eng/aboutcik/chairman/doklad\\_AAV\\_220506\\_en.jsp](http://www.cikrf.ru/eng/aboutcik/chairman/doklad_AAV_220506_en.jsp).

<sup>44</sup> B. Haller, *Election observation by the Parliamentary Assembly of the Council of Europe*, Human Rights Law Journal Vol. 26, No. 5-8, 30 November 2005, p. 162.

#### 4.1.6.2. *The Venice Commission's Guidelines: the Code of Good Practice in Electoral Matters, the Code of Good Practice on Referendums and the Election Evaluation Guide*

30. In response to a request from the Parliamentary Assembly, the Venice Commission adopted a Code of Good Practice in Electoral Matters in 2002,<sup>45</sup> which contains, *inter alia*, provisions on observation of elections.

31. Its Guidelines require that both international and national observers should be given the widest possible right to participate in an election observation exercise. The election observation should contain all phases of the election. The election observers should have freedom of movement, and the place they are not allowed to enter should be clearly specified by law. Observation should cover respect by the authorities of their duty of neutrality.<sup>46</sup>

32. In 2007, this Code was completed by a Code of Good Practice on Referendums, which contains similar provisions on election observation.<sup>47</sup>

33. In 2006, the Venice Commission also adopted an "Election evaluation guide"<sup>48</sup>, which stressed, *inter alia*, the fundamental principle of non-interference of observers in the election process.

#### 4.1.6.3 *The role of the Congress of Local and Regional Authorities*

34. The Council of Europe Congress of Local and Regional Authorities (the Congress) regularly observes local and/or regional elections in member states and applicant countries, and occasionally in third states (Israel is a recent example). According to Rule 4.6 of the Bureau of the Assembly's guidelines – Observation of elections by the Parliamentary Assembly –, the observation of regional and local elections is the responsibility of the Congress. If the Assembly receives an invitation to observe such elections and the Bureau decides to observe them, an Assembly *ad hoc* committee for elections is constituted to co-operate with the election observation mission the Congress may deploy.

#### 4.2. *At the national level*

35. An overview of existing national legislation shows that there are no coherent rules on the status of election observer, although the latter has been internationally recognised. In its report on this subject,<sup>49</sup> the Venice Commission examined the national electoral legislation in the Council of Europe member states and came to following conclusions.

36. Only 20<sup>50</sup> of the 47 member states have implemented domestic provisions on election observation. Of these 20 States, only eight<sup>51</sup> have provisions within their electoral legislation describing the status of the election observers. Six do not provide for an explicit status but mention observers' activities in the provisions describing the electoral process. Three give competence to their national election authorities to provide this status – such as "the former Yugoslav Republic of Macedonia", which provides a partially legal status to observers and also requests election authorities to provide a code of the rules for election monitoring. Four states merely mention election observation without developing any rights or duties, modalities or

<sup>45</sup> Document CDL-AD(2002)023rev.

<sup>46</sup> Section II.3.2 – Observation of elections

- a. Both national and international observers should be given the widest possible opportunity to participate in an election observation exercise.
- b. Observation must not be confined to the election day itself, but must include the registration period of candidates and, if necessary, of electors, as well as the electoral campaign. It must make it possible to determine whether irregularities occurred before, during or after the elections. It must always be possible during vote counting.
- c. The places where observers are not entitled to be present should be clearly specified by law.
- d. Observation should cover respect by the authorities of their duty of neutrality.

<sup>47</sup> CDL-AD(2007)008, section II.3.2.

<sup>48</sup> CDL-AD(2006)021.

<sup>49</sup> Document CDL-AD(2002)020rev, paragraphs 65-81.

<sup>50</sup> Albania, Azerbaijan, Armenia, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Georgia, Hungary, Latvia, Lithuania, "the former Yugoslav Republic of Macedonia", Moldova, Montenegro, Poland, Romania, Russian Federation, Slovak Republic, Turkey and Ukraine. This is also the case for Belarus.

<sup>51</sup> Article 6, Electoral Code of Albania; Article 30, Electoral Code of Armenia; Article 42, Electoral Code of Azerbaijan; Articles 17-1 and 17-2, Election Law of Bosnia and Herzegovina; Article 70, Election Code of Georgia; Articles 105 to 117, Electoral Code of "the former Yugoslav Republic of Macedonia"; Articles 31-12 and 31-13, Federal Law on the State Automated System of the Russian Federation "Vybory"; Article 70, Law of Ukraine on the Elections of the President.

accreditation procedure. Internationally recognised principles exist in very different ways within national legislation, however none quotes them in an exhaustive manner.<sup>52</sup>

37. It can be stated that national electoral legislation differs on various provisions. It may be that there are no provisions at all concerning participation of observers in the election process, for example in the Netherlands and in the United Kingdom. In some states, such as Poland and the Slovak Republic, observers are admitted, but it is not ascertained who may be appointed in such a capacity. Some countries only admit either national or international observers (for example, Hungary, Latvia, Romania and Turkey). There are also countries who admit both national and international observers (for example, Montenegro, the Russian Federation or Ukraine).<sup>53</sup> Even if some countries do not provide for election observation in their domestic legislation, this is not an obstacle for international election observation (for example, Monaco and Serbia).<sup>54</sup>

38. The fundamental principles, like free access to electoral documents, the accreditation process and the possibility to observe all the stages of an electoral process as well as wearing the prescribed identification, are generally well-covered.<sup>55</sup> Freedom of movement and unimpeded access to all polling stations is guaranteed, but the freedom of movement may be limited to the constituency. In addition, the accreditation may be valid only in an electoral district or constituency.<sup>56</sup> The possibility for core-team missions to issue public statements is seldom mentioned in domestic electoral legislation.<sup>57</sup> Thus, there are cases when constraints are imposed by the authorities on international observers.

## 5. Election observers according to the Venice Commission Guidelines

### 5.1. General status

39. By proposing its Guidelines on an internationally recognised status for elections observers, the Venice Commission does not intend to duplicate the already existing Declaration of principles for international election observation and the Code of conduct for international observers. It recommends that member states implement them carefully.<sup>58</sup>

40. Moreover, since the rights and duties of election observers are not always sufficiently ensured in existing domestic legislation, another main recommendation of the Venice Commission is that its own Guidelines on an internationally recognised status for the election observers should be carefully implemented in domestic legislation.

41. It should be also noted that the Venice Commission Guidelines do not deal with fundamental rights such as the right to participate in public affairs, freedom of association, the right to access to information, freedom of expression, of speech, of movement or any other election-related right as enshrined in the international instruments on human rights protection and others. However, these rights do apply to election observation organisations and to the observers.<sup>59</sup> The Venice Commission stresses that both international and domestic observers should enjoy all fundamental rights considered as basic conditions for holding democratic elections.<sup>60</sup>

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<sup>52</sup> Ibid., paragraphs 65-68.

<sup>53</sup> Ibid., paragraphs 82-85.

<sup>54</sup> Ibid., paragraphs 65-68.

<sup>55</sup> At least in the 13 countries which go into detail on the observation process; see, for instance, Articles 40-13 and 40-16, Electoral Code of Azerbaijan; Article 17-2, Election Law of Bosnia and Herzegovina; Article 70-2-d', Election Code of Georgia. The other principles are more or less developed in other parts of the legislation.

<sup>56</sup> CDL-AD(2009)020rev, paragraphs 71-73.

<sup>57</sup> Article 44-8, Electoral code of Azerbaijan; Article 32-8, Federal law on the State Automated System of the Russian Federation "Vybory"; Article 70-5, Law of Ukraine on the Election of the President.

<sup>58</sup> CDL-AD(2009)059, paragraph 5. The Venice Commission points out that these two documents do not cover domestic observers and that to date there is no existing international instrument that guarantees similar rights and duties for both domestic and international election observers. Thus, the Venice Commission recommends that the rights and duties of international and domestic election observers should be as similar as possible.<sup>58</sup> They should have common principles, rights and duties.

<sup>59</sup> Ibid., paragraph 7.

<sup>60</sup> Ibid., section III.1.1.

## 5.2. Accreditation

### 5.2.1. General rules

42. The requirements for accreditation may be different for international and domestic election observers in different states, as well as in the documents of international organisations.<sup>61</sup> Therefore any attempt to create common rules for the status of election observers should also aim at harmonising accreditation procedures. According to the Venice Commission, the credibility of the election observation could be enhanced by stating that election observers should be given the widest possible opportunity to participate in an election observation process. The accreditation must cover geographical, chronological and material aspects of the observation.

43. The invitation to observe the election should be sent to international observers sufficiently well in advance of election day to ensure timely preparations and allow long-term observation of the various election phases.<sup>62</sup> In addition, accreditations should be delivered to all observers in a timely manner and within a short time-limit after application and in any case before election day. Accreditation procedures should be simple and free of charge to observers. In other words, there should not be any artificial obstacles to the election observation. Observers should have the right to an effective appeal in case of refusal of accreditation.

44. Guarantees should be given that no governmental, security, or electoral authority will interfere in the selection of members of international or national election observation missions, or attempt to limit the scope and duration of election observation missions or the number of observers. It would be advisable to have these guarantees also written in national legislation. The national authorities should not have the right to refuse accreditation based on discriminatory criteria, such as, in particular, the political opinion of an observer or the nationality of an international observer.

### 5.2.2. Geographical accreditation

45. In practice, geographical accreditation means the freedom of movement in all areas where the elections take place.<sup>63</sup> According to the Venice Commission, observers should enjoy the freedom of access to all official places connected to the election process, including those open to the public (in particular, polling stations), to observe the election throughout a country without the need to give prior notice to the authorities.<sup>64</sup>

46. Places where observers are not allowed to enter should be clearly specified in the law in conformity with the principle of proportionality.<sup>65</sup> Observation should be made possible in places other than the electoral premises, such as courts, district or regional election commissions or the Central Election Commission. Observers should be able to attend any public activity as part of their observation mission.<sup>66</sup> Observation of elections should cover every possible level of elections, namely national, regional and local elections.<sup>67</sup>

### 5.2.3. Chronological accreditation

47. The purpose of election observation is also to ascertain whether any irregularities occurred before, on or after election day. The only way to ensure that elections have been conducted according to domestic law and international rules and standards is to observe the whole election process, that is to say the pre-voting, the voting and the post-voting phases.<sup>68</sup>

48. In the pre-voting phase the observers should be allowed to assess the process of drafting or amending the electoral law. This does not mean that the observers should be there personally; this phase can also be done through consultation. This phase also covers, among others, registration of the voters and political

<sup>61</sup> IDEA. Institute for Democracy and International assistance. International Electoral Standards: Guidelines for reviewing the legal framework of elections, pp. 90-92. See [www.idea.int/publications/ies/upload/15.%20Election%20observers.pdf](http://www.idea.int/publications/ies/upload/15.%20Election%20observers.pdf).

<sup>62</sup> CDL-AD(2009)059, section III.1.2.

<sup>63</sup> CDL-AD(2009)059, sections II and III.1.4.

<sup>64</sup> Reasons should be provided if areas within a country are not available for election observation (e.g. security situation) and any wider restrictions on the abilities of election observers to do their work should be provided by law in an objective and reasonable manner.

<sup>65</sup> CDL-AD(2009)059, section III.1.5.

<sup>66</sup> Ibid., section III.1.5.

<sup>67</sup> Ibid., section III.1.3.

<sup>68</sup> Ibid., paragraphs 12-13.

parties as well as electoral campaign matters. The voting phase covers the whole period of voting from the opening process to the closing process. The post-voting phase covers the verifying and endorsing of candidates and political parties/entities/coalitions who have been elected.<sup>69</sup> The post-voting phase is as important as the pre-voting and voting phases. It must be ensured that the state does not put the elected persons in jail or otherwise restrict their right to represent the people.

#### 5.2.4. *Material accreditation*

49. Besides access to all electoral materials, accredited observers should also have unimpeded access to all persons concerned by the electoral process, such as candidates, parties and also those parties and candidates who have been disqualified or have withdrawn from the election. This also means that they have to have right to contact and interview any person on the electoral premises (providing those persons are willing).<sup>70</sup>

50. The Venice Commission Guidelines also cover rules on reporting. Observers should be guaranteed the freedom to issue, without any interference, public statements and reports in respect of their findings and recommendations concerning election-related processes and developments. They should also have the right to hold press conferences on their work and make public their findings concerning a particular election. Election observers should have the right to express freely to the mission head – through forms, notes and other technical means – their opinion about the development of the electoral process. Election observation missions should have the right to make suggestions or comments to the authorities in charge of the electoral process, if they observe any irregularity that should be rectified. Election observers should have the right to make and/or obtain copies of electoral documents.<sup>71</sup>

51. Guarantees should be provided that no governmental authority will apply pressure on any national or foreign citizen who works for, or provides information to, an international or national election observation mission (including through reprisals or incentives). Guarantees should be provided by governmental authorities to enable election observers to carry out their duties.<sup>72</sup>

#### 5.3. *Duties of international and domestic election observers*

52. The Venice Commission documents also focus on observers' duties. Election observers should always carry their identification and accreditation documents with them. They should comply with all national laws and regulations of the country where they observe and should never obstruct the conduct of the election process in any of its elements.<sup>73</sup>

53. Election observers should be politically impartial and they must not interfere with the electoral process. They should never exhibit any personal bias or preference related to issues that may have political or electoral implications and should abstain from any political, partisan activity. They should be free from any conflicts of interest and, at all times, should uphold the principles of strict impartiality by not expressing preference for any participant or party.<sup>74</sup>

54. Election observers must have a respectful attitude towards electoral officials, other national authorities and all other participants in the process. They should behave in a professional and irreproachable manner at all times, including in their leisure time. The status of election observer implies a strict respect for the legal framework of the country holding the elections, and the principle of impartiality and non-interference. Election observers must base their reports and conclusions on factual and verifiable evidence, with professional accuracy and strict respect to impartiality. Therefore, if an election observer does not respect these principles (even when he or she is acting anonymously, in his or her leisure time), he or she could be deprived of his or her accreditation. Nevertheless, the principle of proportionality must be respected when such a decision is taken.<sup>75</sup>

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<sup>69</sup> *Ibid.*, paragraphs 15-16 and section III.1.6.

<sup>70</sup> *Ibid.*, section III.1.6.

<sup>71</sup> Such as protocols of voting results.

<sup>72</sup> CDL-AD(2009)059, sections III.1.7.vi and vii.

<sup>73</sup> *Ibid.*, section III.2.

<sup>74</sup> Nevertheless, domestic observers should not necessarily be constrained by the same requirements of non-partisanship, since party agents have an accepted role to play in the electoral process.

<sup>75</sup> CDL-AD(2009)059, section III.2.

## 6. Concluding remarks

55. There are many international instruments governing the status of election observers, such as the Declaration of principles for international election observation and the Code of conduct for international observers, as well as the relevant guidelines adopted by the OSCE/ODIHR, the Commonwealth of Independent States, the European Union and the Council of Europe.

56. However, most of these are soft-law instruments, and these texts deal with the involvement of observers in the electoral process in different ways. Some of the documents only state a general declaration of importance of the observers' role, while others regulate their functions in a more detailed manner. Furthermore, most of them do not regulate the status of domestic observers.

57. At the level of national electoral legislation, an election observer status is lacking in the legislation of the majority of member states or is only partially catered for in certain states. As the Assembly has already noted, this might be due to the fact that electoral practice in member states is still influenced by various national traditions.<sup>76</sup> However, the latter should not be used as a pretext for certain practices that undermine the basic principles governing the conduct of free and fair elections.

58. Therefore, more congruent rules are needed both at the international and domestic level and a specific reference to election observers should be introduced in domestic electoral legislation.

59. In its guidelines on an internationally recognised status of election observers, the Venice Commission presented the rights that observers should enjoy, as well as their duties. It has recommended a careful implementation of these Guidelines in national legislation. In so doing, member states should avoid duplication with the Declaration of principles for international election observation and the Code of conduct for international observers, which should be also implemented in the national electoral systems.

60. Once again, I would like to stress the importance of the conclusions and recommendations of the Venice Commission concerning the status of election observers. Consequently, I am of the opinion that the Assembly should promote the implementation of the above-mentioned Guidelines in member states. In this context, a question springs to mind in the light of the diversity of situations with respect to election observation. One could question whether an international – or, more specifically, European – codification of the status of election observers, which would include their rights and obligations, is indeed feasible and/or appropriate. I consider this question as one of minor importance, since in any case all states should be encouraged to provide for domestic and international election observation in their legislation and to facilitate such observation in practice. The Guidelines on an internationally recognised status of election observers do not deal in detail with this problem either. They only put emphasis on the need to avoid duplication of the existing internationally accepted standards (namely the Declaration of principles for international election observation and the Code of conduct for international election observers) and stress the need for their careful and rigorous implementation. Therefore, I consider that each member state should itself consider how best to introduce them into its national system. The Council of Europe should also consider providing legal recognition for these Guidelines, in particular through a recommendation.

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<sup>76</sup> Resolution 1590 (2007), paragraph 7.