

# CHAPTER 9

CHAPTER 9

# 9. Observation of external voting

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## 1. Observing elections: general background

Observation of elections in transitional or post-conflict democracies became increasingly common during the 1990s. In the early 1990s it had something of the character of a ‘guided tour’ rather than an assessment against agreed standards that follows a solid methodology. During the 1990s, however, more precise standards for elections were developed by regional organizations—including the Organization for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR), the European Union (EU), the Southern African Development Community (SADC) Parliamentary Forum and the African Union (AU)—based on interpretations of international conventions and declarations, and observation methodologies were developed by regional organizations and by the United Nations (UN). As regards guidelines for election observation, International IDEA together with the UN built on regional standards and developed codes of conduct in the mid-1990s. More recently, the Carter Center, the United Nations Electoral Assistance Division (UNEAD) and the US-based National Democratic Institute brought together global and regional organizations, culminating in the signature of a Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers in October 2005.

International election observation was initially conceived as necessary for a transitional period until general trust in electoral processes had increased and observation would no longer be needed. However, in the past five years it has become more common to send international teams to assess or observe even the elections of ‘old’ democracies. Such countries have developed processes and legislation over a long period of time which are to a large extent a result of tradition rather than an effort to meet objective standards. While no formal global standards for electoral processes exist, there is a broad common understanding of what constitutes an acceptable election. This understanding has, however, been developed on the basis of the needs of new democracies, implying

standards which are meant to create trust between parties who have had little reason to trust each other in the past. Assessments of the electoral processes of traditional democracies against such new standards may therefore add to the electoral process, provide more comparative data and prepare even old democracies for new challenges both in their political environment and regarding new elections technology.

External voting is implemented in many of the older democracies, and the security and secrecy aspects have not been maintained to the same degree as they have for personal voting at in-country in polling stations. The postal voting system used in the United Kingdom (UK) in 2004—not only to accommodate external voters—was a system based on trust, and it was not designed in such a way that it could prevent wilful fraud or the perception of wilful fraud. In 2005 the OSCE/ODIHR launched an election assessment mission to the UK where not least the postal voting came under scrutiny.

However, even though elections in established democracies are sometimes the target of election observation missions, post-conflict countries and fledgling democracies are still receiving most of the attention from observers. Many of the challenges of observing external voting operations are linked to elections in these countries. There is often pressure in these situations to observe the operations due to the perception that the eligibility criteria can be easily manipulated or twisted outside the host country.

## **2. Types of observation and their purpose**

Election observation has two main purposes: to assess the election against agreed or accepted standards, and to provide a presence and visibility which will provide fewer opportunities for irregularities and deter fraud. The first purpose can be achieved with a limited number of observers, since conclusions may be drawn from samples. The second objective is likely to require a much larger presence.

Election observation can be carried out by domestic non-governmental organizations (NGOs), or by intergovernmental organizations or international NGOs. While both domestic and international observation can produce effective assessments of elections, domestic observation is usually the only practical way to achieve widespread presence and visibility. Domestic observation is thus—together with the participation of the parties and the review of a critical press—the main instrument for transparency in electoral processes. Even if the electoral process has little or no credibility in the country concerned, domestic observation can contribute to a long-term process of improving the elections. In addition such observation may secure a good electoral process beyond the point when elections have gained general credibility.

Observation reports have a number of targets. These include the domestic electorate and key domestic stakeholders—legislators, the electoral management body (EMB), political parties, the media and commentators. At the same time, donors, intergovernmental organizations and the international public may also be important audiences.

The checks and balances in older democracies are normally taken care of either by appointing representatives of political parties or candidates (party agents) who may observe all parts of the process (which is carried out by independent bureaucrats), or by ensuring that the staff of electoral bodies at all levels are non-partisan, or at least represent a balance of political party sympathies. In new democracies it has become common to allow civil society to observe elections on a more neutral (non-partisan) basis and such practice may prove useful even in older democracies. In addition, international organizations such as the UN, the SADC, the OSCE, the Council of Europe, the AU and the EU, as well as governments and international NGOs, may be invited to observe elections.

### 3. The assessment prior to observation

It is now better understood that it is not worthwhile for all elections to be observed by international organizations, in particular the intergovernmental organizations. It may be the case that elections are run under conditions where the overall conclusions of observation are inevitable from the outset. If, for example, the conditions for standing as a candidate are so exclusive that much or all of the real opposition is eliminated before the elections start, the rest of the electoral process may have limited significance, as in the presidential election in Iran in 2005. Iran is also an example of a case of elected bodies being overshadowed by the powers of the non-elected Council of Guardians, and where international observation, if conducted, could have had the effect of rubber-stamping a result in a situation where even a correctly conducted election did not support a multiparty democracy.

However, even though the conditions for an election are such that an assessment of the legal framework may conclude that the playing field cannot be level, observation may still be organized, not least to show the civil society of the country concerned that there is a focus on the elections, and there may be a long-term objective in building up capacity for the conduct of fair elections in the country. It has therefore been seen to be worthwhile to observe elections in Belarus, Pakistan or Zimbabwe, even though the conditions at the outset might have been assessed to be far from ideal.

### 4. When should external voting be observed?

External voting can often be controversial. For example, opposition parties may claim that it is being used by the incumbents in support of the governing parties, either by allowing (or not allowing) the external vote, or because in the way the process is implemented, which may not be seen to be sufficiently transparent.

If an election is being observed, an assessment of the external voting is an integral part of the process. That does not, however, mean that the process needs to be assessed by observers at every step, even if this is practically possible. One example would be the external voting in Croatia. Shortly before the legislative elections in 1995 the election

law was amended to include 12 members of the parliament to be elected by Croatians living abroad. The citizenship law permitted any ethnic Croat to obtain Croatian citizenship without having a family or territorial connection to the Republic of Croatia and without having any intention to move to Croatia. The only condition was that the person issued a written statement stating 'that he or she considers himself or herself to be a Croatian citizen'. The result and intention of the rule were that more than 300,000 Croats from neighbouring Bosnia and Herzegovina acquired Croatian citizenship and were given the right to vote. The opposition claimed that the incumbents allowed this trusting that the Croats in Herzegovina would vote in favour of nationalistic parties. The political and legal conditions for the external voting were therefore more important than the technical conduct of the election.

For the Croatian presidential elections in 1997, the OSCE/ODIHR decided not to observe the external voting. The voting took place in polling stations across Herzegovina and some other cities in Bosnia and Herzegovina and, with an OSCE mission well established in Bosnia and Herzegovina, a high-quality observation operation would have been possible to organize. Given the general framework and the unusual (and, seen from Bosnia and Herzegovina, one would argue, unfriendly) citizenship rules, the main issue was not how the elections were carried out, but rather that they were allowed to happen at all.

For the Croatian legislative elections in 2000, the external voting was observed by the OSCE/ODIHR, partly because there was some development in the discussions between Croatia and Bosnia and Herzegovina regarding the citizenship issue, and partly because the parties to the discussions wanted this part of the process to be observed as well.

Even if there is general agreement on allowing external voting, the process itself may be difficult to observe. External votes are often not cast in person, and the arrangements can cover a large geographical area. The considerations regarding the observation of external voting would therefore involve logistical and practical issues. In the end it is important that an observation mission does not draw conclusions that cannot be substantiated by the evidence that has been collected from the process.

## **5. External voting: controlled and uncontrolled environments**

In transitional democracies, where trust in the electoral processes is low, there has been some reluctance to offer citizens living abroad a possibility to vote without returning to the country to cast their vote in person. However, post-conflict countries have been an exception to this rule, as it has often been important to allow those who fled the war the right to vote. The idea would be that those who fled would have an intention of returning and they should be given the right to participate in the democratic process of rebuilding. The 1995 Dayton Agreement which ended the war in Bosnia and Herzegovina specified the right of the refugees to vote (see the case study).

For the first elections in Bosnia and Herzegovina in 1996, the external votes were cast in person. In 23 countries the external voting was observed by the OSCE. In later elections, the external voting was by post, and the observation was limited to the counting in centres inside the country. In the first presidential election held in Afghanistan (2004) refugees in Pakistan and Iran were allowed to vote (although they were not in the legislative elections in 2005), and during the first elections in Iraq (2005) after the 2003 war there were extensive arrangements for external voting (see the case study). However, for the Palestinian elections in 1996 and 2005, the diaspora were not allowed to vote, partly for practical reasons and partly because of the lack of Palestinian citizenship and clear documentation to show who is a 'Palestinian'.

The types of external voting observers will have to assess include:

- voting in a controlled environment, that is, in a place where the secrecy of the ballot is guaranteed by the presence of election staff, and where the vote can be cast without undue influence or intimidation. This means personal voting in the embassies or diplomatic missions of the home country; and
- voting in an uncontrolled environment, without supervision by election staff, and where the secrecy and security of the vote cannot be guaranteed. This voting can include: (a) postal voting, where the voter will be issued with a ballot paper and accompanying documentation which is to be returned by post; (b) electronic voting (e-voting), for example, over the Internet: after a person's identification and right to vote electronically have been verified, the vote is submitted via a computer program to a central computer for counting; and (c) voting by proxy.

Postal voting is the most common method for uncontrolled voting: although voting over the Internet may become common in future (see chapter 10), it is not in use for external voting anywhere yet. Voting in an uncontrolled environment may be vulnerable to impersonation, intimidation and fraud, and observation of the process needs to take such possibilities into account. Voting by proxy is used in some countries, such as the UK. Most countries, however, regard the vote as a personal matter. All votes cast in an uncontrolled environment raise important and controversial issues regarding the secrecy and security of the vote; see chapter 3 for a more extensive discussion.

If the external votes are cast in person, how far voting can be observed is basically a question of resources. If voting is done by post or electronically via the Internet, observation becomes more difficult.

## 6. Data collection

Election observation methodologies describe how information is collected, how to analyse it and how to assess it against agreed standards. The data collection includes:

- the legal framework;
- the procedures and instructions;
- interviews with main stakeholders such as election administrators and representatives of candidates and civil society; and
- first-hand information from the actual processes.

The first three points can always be covered provided there is a free flow of information and possibilities for meeting all involved. The collection of first-hand information is dependent on the transparency of the process and the manner in which the voting is implemented. The purpose is to assess whether the processes are implemented according to their descriptions and intentions. In order for the first-hand observation to be reliable, the evidence needs to be collected according to a plan which will provide a representative sample of information covering all parts of the processes.

## **7. The observation process: possibilities and limitations**

Observing external voting may be difficult as a result of the reduced transparency of the process and the costs involved. Collection of first-hand representative evidence from all steps of the process may be impossible. In principle the observation should take the following steps:

- an assessment of the political environment in which external voting is implemented. Is there a general agreement on the terms for external voting and is there general confidence in the process?;
- assessment of the legal framework and the checks and balances worked into the system;
- assessment of the pre-election campaign. The election laws of the country will not apply, but it would still be of interest to assess what is being done to help voters make an informed choice from abroad;
- if the voting is done in person, observing the voting, reconciliation, packing and sealing of the voting material on the basis of a reasonable sample. The assessment of how big the sample needs to be would depend on whether one wants to draw conclusions about the external voting as a separate process in its own right, which would require good coverage, or whether the external voting is only a small part of the overall assessment of the elections;
- if the voting is done by post, observing the verification of the lists of external electors, the distribution of voting material, the reception and verification of the same, and the count; and
- if the voting is electronic, assessment of the process of implementing the system, including the rules for verifying the identity of the voters, audit trails, and the validation performed by the EMB.

All external voting constitutes a challenge from an observation point of view. Domestic observation is often based on wide coverage rather than sampling, and local NGOs may

therefore want to cover all polling places. However, domestic observer organizations may not have the resources needed for proper observation of voting in embassies and consular offices (although a worldwide network of Indonesians, mainly students, succeeded in achieving wide-ranging coverage of voting at Indonesian embassies in the 1999 transitional elections). International missions may have an easier task in terms of resources to observe external voting if it takes place in a controlled environment, not least because the sample may be more limited.

Postal and Internet voting would be more complicated to observe. The first problem is the identity of the voter. In Bosnia and Herzegovina a number of attempts to impersonate postal voters allegedly living abroad were exposed in 1998 and 2000. In the case of Internet voting some of the security problems may be solved in the future, but the basic paper trail—the ballot paper—will be missing. In paper-based voting it is always possible to order a recount, and the actual voting will have been followed by observers and party agents.

The most important condition for reliable voting in an uncontrolled environment is general trust in the EMB. Even external voting in a controlled environment requires such trust, since full observation is difficult for parties and NGOs.

### **7.1. The political environment**

External voting in transitional democracies is often controversial, either for political or for technical reasons, as discussed above in relation to Croatia. In Zimbabwe, the opposition sought a more liberal ruling for external voting, possibly believing that President Robert Mugabe would have less support among those who have left the country. On the other hand, the same opposition criticized the implementation of the rather limited external voting for its lack of transparency and control.

The key issues for observers to assess are the political environment under which external voting is being conducted and the independence and integrity of the EMB. In particular the arrangements for external voting should be subject to a high degree of consensus, since the transparency of external voting will almost inevitably be less than that of in-country voting. Any dictate from a political majority is likely to attract charges of fraud and manipulation unless the administrators' integrity is beyond doubt.

### **7.2. Personal voting in a controlled environment**

External voting may be difficult to observe at all stages. If the voting is done in person in a controlled environment (such as embassies or consular offices), observation may be possible but will be expensive. If the resources are available, the observation of this kind of voting will be rather similar to the observation of in-country voting, where a sample is chosen for collection of first-hand evidence and the process is observed, from the opening to the close of voting to the reconciliation and sealing of the ballot

material. However, there may be significant differences from the observation of in-country voting. Observers may stay in the same polling station throughout the voting, rather than moving from one polling station to another during election day. If the count does not take place in the polling station but in counting centres in the country itself, questions of the integrity of votes in transit arise. In such cases it becomes a task for observers to follow the processes of packing and sealing, reconciliation, and reception at the counting centre, as well as the count itself.

### **7.3. Postal voting**

If voting is done by post, the actual voting may not be observed, but other processes such as the maintenance of the registers of external electors, the form of the letters sent out to the voters, the documentation required to accompany the ballot paper on its return, the checking of whether ballot papers are genuine and the count may be observed. However, the process may be spread over a period of time and may therefore be difficult to observe throughout.

### **7.4. Electronic voting**

If the external voting is done electronically, for example over the Internet, it will be an even bigger challenge to observe all steps of the process. Confidence in the process will depend on the level of trust in the IT system, which in turn to a great extent is dependent on confidence in the EMB.

IT systems should meet a number of criteria, such as being reliable, user-friendly, secure (meaning that they can resist deliberate attacks from outside and inside at all times) and verifiable (meaning that they can be checked). IT systems may be manipulated from inside and from outside. Insiders may build in functions which may change the result in a certain direction. Such manipulation may in theory be conducted by the election administration itself. In transitional democracies, if the general trust in the election administration is low, an electronic voting system may add to the lack of confidence in the electoral process.

Full validation will be next to impossible for any observation mission to perform. One should therefore be very careful not to give the impression that an independent validation of the system has been carried out even though IT experts may have assessed parts of the process. Bringing in such expertise may give a false impression that the systems have been validated against international standards.

In particular, manipulation from inside is in practice almost impossible for an observation mission to assess. Even if the observation mission has IT expertise available, the experts should concentrate on the process which the EMB has carried out when acquiring the systems, rather than pretending to carry out an independent validation of the system. Such assessment of the process should include:

- the choice of supplier, including the requirements for certification against recognized standards for quality and security;
- the validation of the requirements specification and overall design;
- the use of quality auditing during implementation; and
- the strategies for testing the system.

In addition, the audit trails and all possibilities for recovering data in the event of a failure should be assessed. However, the main audit trail in traditional elections, namely the ballot paper, will be missing. It will therefore not be possible to reconstruct the results on the basis of a 'paper trail'. This is why observers need to put much emphasis on the assessment of whether there is a general consensus on the introduction of Internet-based voting and on the integrity of the EMB. A prototype of the IT system may have been validated by the EMB, and it is only the EMB which can ensure that the system being used for the elections is actually the validated system, without any manipulation from election administrators.

## 8. Conclusions

Observing external voting may be difficult both because of lack of transparency in the process and because of lack of resources to be able to collect first-hand information from a wide geographical area. Observation may therefore in some cases be limited to the overall assessment of the conditions for external voting, or to parts of the processes.

The political conditions for external voting should always be assessed. If the very fact that external voting is permitted is controversial, it is likely that general trust in its implementation will be low.

External voting will always be less transparent than in-country personal voting in polling stations. Voting outside controlled environments will be less easy to observe than voting in controlled areas, and e-voting will produce fewer audit trails (such as ballot papers). Therefore general confidence in the EMB and the election administrators is the first criterion for observers to assess when observing external voting.

Should such confidence not be in place, it is difficult to create it by observing the elections. Even if part of the process can be checked, it is difficult to ensure that the process cannot be manipulated by insiders. However, if there is general trust in the intentions of the election administrators, some parts of the process are possible to check and can be observed. They include:

- the registers of external electors;
- the validation of the voters;
- the content of the ballot material used for postal votes, and the manner in which the return of voting material is checked for correctness and against impersonation;

- the way an e-voting system is procured and validated by the EMB;
- the available audit trails; and
- security measures taken against attacks from outside and against technical failure in the case of electronic voting.

In addition, the issues regarding the secrecy of the vote and the possibility of systematic intimidation of voters should be assessed.

