
.....Chapter XIII
**TRIAL OBSERVATION
AND MONITORING THE
ADMINISTRATION OF
JUSTICE**

Key concepts

The principal fair trial standards are found in Article 14 of the Covenant on Civil and Political Rights, which require, inter alia, the right to:

- | *be informed promptly of any charges upon arrest;*
- | *be brought promptly before a judge or similar judicial officer;*
- | *a fair and usually public hearing by a competent, independent and impartial tribunal established by law;*
- | *have adequate time and facilities for the preparation of a defence;*
- | *communicate with counsel of one's own choosing;*
- | *be tried without undue delay; and*
- | *not to be compelled to testify against one's self or to confess guilt.*

Human rights officers who serve as trial observers should:

- | *conduct preliminary research on the facts and law of the trial;*
- | *interview the judge, prosecutor, defence counsel, and others;*
- | *obtain the key documents and review the trial dossier;*
- | *be seated in the courtroom so as to preserve impartiality;*
- | *take copious notes;*
- | *promptly produce a full report applying international standards of fairness.*

Trial observation may serve as a tool for a broader analysis of the administration of justice, including an assessment of the actual functioning, qualifications, and training of the judges, court clerks, prosecutors, lawyers, other court personnel, police, prison officials and other law enforcement personnel.

A. Introduction

1. This chapter covers international human rights standards on fair trial and techniques related to another possible function of HROs of a UN field operation — that of observing trials to assess their consistency with such standards. It also underlines how trial observation may serve as a tool to appraise the functioning of the system for the administration of justice of the country of operation and identify needs for reform to be discussed with the host Government and possibly become the object of United Nations or other assistance to this effect.

B. International standards for fair trials

2. The right to a fair and open trial has been *established in several international human rights instruments*. Article 10 of the Universal Declaration of Human Rights provides that “[e]veryone is entitled in full equality to a fair and public hearing... of any criminal charge against him.” Article 11 adds that “[e]veryone charged with a personal offence has the right to be presumed innocent until proven guilty according to law in a public trial...”. Moreover, Article 14 of the International Covenant on Civil and Political Rights provides that:

[I]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

3. In addition, *regional treaties guarantee the right to a fair and open trial*. Article 8(5) of the American Convention on Human Rights provides that criminal proceedings shall be public, while article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms establishes the right to public hearing for everyone in the “determination of his civil rights and obligations or of any criminal charge against him...”. Furthermore, Article 7 of the African (Banjul) Charter on Human and Peoples’ Rights guarantees that every individual has the right to have his or her cause heard.

4. Pursuant to Article 14(3) of the International Covenant on Civil and Political Rights, in the determination of any criminal charge, every person shall be equally entitled to the following **minimum guarantees necessary for defence**:

- (a) To be **informed** promptly and in detail in a language the person understands of **the nature and cause of the charge** against him/her;
- (b) To have adequate time and facilities for the **preparation of a defence**, and to communicate with counsel of his/her own choosing;
- (c) To be **tried without undue delay**;

- (d) To be tried **in his/her presence**, and to defend him/herself in person or through **legal assistance** of his/her own choosing; to be informed, if s/he does not have legal assistance, of this right; and to have legal assistance assigned to him/her in any case where the interests of justice so require, and without payment by him/her in any such case where the interests of justice so require, and without payment by him/her in any such case if s/he does not have sufficient means to pay for it;
 - (e) To examine, or have examined, the **witnesses** against him/her and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her;
 - (f) To have the free assistance of an **interpreter** if s/he cannot understand or speak the language used in court;
 - (g) **Not to be compelled to testify against him/herself** or to confess guilt.¹
5. The *right to a fair trial* should be seen as *only an aspect of the rights which will permit the effective functioning of the administration of justice*. Rights relevant to the administration of justice are discussed more fully in **Chapter IV–E: “Rights in the administration of justice”**.

C. Objectives of trial observation and monitoring the administration of justice

6. There are **six primary objectives of trial observation**. The first objective is first-hand monitoring in order to **prepare an independent and impartial report** on the proceedings. Second, an HRO’s presence **makes the participants** — particularly the judge and prosecutor — **aware that they are under scrutiny**; this awareness may then *influence them to be fair*. Third, the HRO represents the UN, and therefore **expresses international concern about the fairness** of the proceedings. Fourth, the HRO’s presence **gives the defendant, the defence attorney, and the defendant’s supporters a sense of international assistance and renewed confidence**. Fifth, the HRO’s presence should help to **make sure that justice is both done and seen to be done**.

7. These objectives may *substantially affect the choice of trial*, the selection of the HRO, and other steps in the process of trial observation. Furthermore, these objectives *may conflict*. For example, if the HRO overtly attempts to influence the conduct of the trial or openly comforts the defendant, his or her impartiality and independence become suspect.

¹For a more detailed discussion of international fair trial standards, see the report submitted by Sub-Commission members Stanislav Chernichenko and William Treat, UN Doc. E/CN.4/Sub.2/1994/24 (1994).

8. If the HRO consciously attempts to fulfil all five of these objectives, s/he must carefully consider each step in the trial observation process so as to minimize the potential for conflict. Because of the *inherently contradictory functions of HROs*, and because it is impossible to predict the precise situation in which they may be placed, past experience teaches that they *should use their own judgement in the situations which they encounter*.

9. The fifth objective requires further explanation. Historically, trial observers have largely been sent to assure fairness — principally out of concern for the rights of the defence. More recently there has been an *increasing need for trial observers to make sure that justice is done and that impunity is not afforded human rights abuses*. Perpetrators of human rights abuses are, of course, entitled to a fair trial. But equally, the society needs to be assured that human rights violators are brought to justice. (See **Chapter IV-Q: “Impunity principles”**.) Hence, trial observers have a new function: to make sure that justice is done and perpetrators of human rights abuses are not given impunity.

10. Trials, however, are only a very small, albeit usually more visible, part of the functioning of the system of justice. Accordingly, a *sixth, more general objective* would be for HROs to view trial observation as **part of a much more complete review and description of all the functions and structures in the administration of justice**. For example, trial observations may be a means for *assessing the needs of the legal system*. A broader assessment would require a knowledge and description of all the various courts at each governmental or regional level, the prosecutor’s office, the police, prison officials, etc. and their role in each step of court procedure from arrest or filing of a complaint, through investigation, court decision and appeal. What sorts of academic and professional training have the various personnel in the legal system received? What are their working conditions? What are their material resources? To what extent is the system actually functioning? How do the various actors in the legal system perceive their roles and what assistance/training do they believe would be useful?

D. Selection of trials

11. It is obviously **impossible to observe all trials**. In general, UN HROs will be sent to **observe those trials which raise the greatest human rights concerns**. They will also observe trials in which it would be appropriate to express UN concern in a visible way. In developing a regular monitoring of the administration of justice in the country, the human rights field operation *may need to establish a pattern of regularly attending court proceedings* and maintaining contacts with judges, prosecutors, lawyers, etc.

12. The *UN presence lends credibility to a proceeding*; hence, if the UN is considering the possibility of observing a proceeding, the UN must determine independently whether human rights overall would be benefited. In any event, these decisions are usually made by the field operation or other sending organization and not by the individual HRO.

E. Selection of HROs to serve as trial observers and qualifications

13. The factors to be considered in the selection of an HRO to serve as an observer include **expertise** or professional experience, for example, *as judges, prosecutors, lawyers*, and others with experience in the administration of justice. The HRO should also have **knowledge of the legal system** in which the trial will occur, as well as **knowledge of international fair trial standards**. HROs generally come from a different country than from the location of the trial, which comports with the general practice for preserving the **independence** and **impartiality** of the observer. In regard to particularly important trials in which an observer might be specially requested to attend the proceedings and even come from abroad, the observer's qualifications should also include prestige, **credibility**, **language abilities**, visibility, **reputation for fairness** and impartiality.

14. The HRO should conduct him/herself with impartiality and seriousness. The HRO should keep in mind the sensitive nature of trials in general, and the UN's objectives regarding this particular trial.

F. Informing the authorities about the observation

15. In the case of field operations, the HROs will ordinarily be present in the country before they observe a trial, but it may be **useful to notify the Government** of the operation's intent to send an observer to the proceeding. In the case of observers coming from abroad, rather than asking permission to send an observer, a general practice has developed of notifying the authorities in the country which is holding the trial that an observer will attend. The observer does not need to wait for permission to enter since the trial would generally be public and since the Government's silence is taken as an assent. Often the Government is informed about the observation just before the observer departs.

G. Briefing and research prior to observation

16. The HRO who serves as a trial observer should be as informed as possible of the **history, politics, economics, law, and human rights conditions of the locality of the trial**. The observer should also obtain background information about the specific events which led to the trial. If possible, the observer should review **past**

observer reports, the *criminal procedure code*, criminal code, relevant **constitutional provisions**, legal documents and press reports. In addition, the observer should receive the **names of people** who can serve as **contacts** and informants in the location where the trial will occur.

H. Translators/interpreters

17. Ideally the HRO should speak the local *language* used at trial. As this language ability is not always possible, observers often need translators or interpreters to aid in observation, interviews, etc. It is generally best to find a translator/interpreter before arrival in the locality of the trial.

18. The considerations made in **Chapter VIII: “Interviewing”** on the use of interpreters are generally applicable here too. Because the **choice of a translator/interpreter** will substantially **affect the independence**, impartiality and impact of the observer, the translator/interpreter should be selected with great care. The translator/interpreter should be **knowledgeable, trustworthy and familiar with legal terminology**. He or she should also be **impartial and perceived as such**. When a translator/interpreter comes from an organization, political party, or group to which the defendant belongs, the observer (1) may appear biased and (2) may be unable to verify the translations. In addition, the selection of a translator sympathetic to the defendant may place the translator (and possibly the observer) at considerable risk. Conversely, the observer should not rely on the services of a Government translator.

I. Public statements before, during and after the observation

19. In general, **no public statements** should be made regarding the observer’s findings **before the end of the trial**. In some situations, however, a public statement may be needed at the beginning of a visit to explain the purpose of the trial observation. The human rights field operation may decide that a public statement may also be necessary at the end of an observation to report on the findings and announce the next steps to be taken. A public statement made during the appeal process may have the effect of keeping international attention on the case. In each case, the expected usefulness of a public statement must be weighed against the potential consequences.

20. Most public statements are made by the field human rights operation based on information provided by observers, but they are not identified with the observers themselves.

J. Travel and living arrangements

21. If the HRO must travel to the locality of the trial, the officer must be circumspect when making travel and living arrangements. As far as possible, for example, the **HRO should avoid visibly identifying with either side**, for example, by staying at the same hotel.

K. Contacts and interviews after arrival at the place of trial

22. Before the trial observation starts, the HRO should make contact with and interview a number of people who can provide information and details necessary for his/her understanding of the case and the surrounding situation. Before arrival to the site of the trial the HRO should have an idea of whom to interview. The observing HRO should try to **maintain a balance** by making contact with the prosecutor, judge, Government officials and others who can provide useful information, as well as the accused and defence counsel. As always, the observer must remain **impartial, independent and a bit aloof**.

23. The observing HRO should take the opportunity to **interview Government officials**, since such discussions may help inform the observer of all the circumstances surrounding the trial. Contacts with Government officials may also increase the observer's impact on the trial process. The observer, however, should not overstep his or her mandate.

24. When **interviewing the defendant**, the HRO should attempt to do so in a location that would permit maximum confidentiality while allowing the officer to ascertain the defendant's mental and physical state and the conditions of confinement. The HRO should decide whether to conduct the defendant's interview alone or, if necessary, with defence counsel present.

L. Access to the trial file (dossier)

25. The HRO should **obtain the key documents** that will be used in the courtroom and that will be essential to a full understanding of the trial. It is critical, especially in civil law countries, that the observer obtain **access to the defendant's trial file**. Also, the defence counsel should have access to the file and should be able to make available the necessary documents. The court clerks should also make sure the trial file is available to the observing HRO. Even if the dossier is not publicly accessible, trial observers have sought and received the right to review the file because their quasi-judicial task is to verify that the proceedings are being fairly pursued. Similarly, trial observers have been admitted to closed military or security proceedings from which the public is ordinarily excluded.

M. Seating in the courtroom, introduction in court and taking notes

26. The HRO has the **right to enter the courtroom because the trial is public**. Also, the agreement between the field operation and the Government will *ordinarily* contain a provision for HROs to enter any building or facility to assure or monitor human rights protection. If the HRO must extraordinarily obtain permission to enter and get a seat in the courtroom, the observer *may need to present his or her Order of Trial Observation* to the Ministry of Foreign Affairs, the Ministry of Justice, or to the presiding judge. Having entered the courtroom, the HRO must **decide where to sit**. Because every courtroom has its own architecture and configuration, the HRO must be very sensitive to the **importance of seating** and should, if necessary, seek some accommodation **to preserve an appearance of impartiality** and to facilitate observation of the trial. The observer should choose to sit in a prominent, neutral location in the courtroom.

27. Trial observers sometimes ask to be introduced in open court so that their presence is officially recognized by the participants and the public. This tactic may increase the observer's impact. The HRO must take care to preserve the appearance of impartiality by arranging to be introduced by a neutral party, such as the president of the local bar association. If the HRO only intends to remain for part of the trial, an introduction would underscore the later absence and might be unwise.

28. One of the best ways for an HRO to make an impact is to **take copious notes** during the trial. The HRO should be aware, however, that a few countries forbid anyone from taking notes except for participating lawyers and the press. Another difficulty with taking notes, particularly after talking with informants, is that notes may be subject to seizure or surreptitious review by the police or other authorities. Hence, HROs in less secure settings should take very sketchy notes and begin preparing their reports only after reaching a secure location.

N. Timing, preparation and substance of the observer's report

29. After observation, the principal responsibility of the HRO is to **produce a report promptly**. If the HRO's observation is to be effective, a report must be received while the prosecuting Government is still sensitive to authoritative, independent criticism and to public opinion. While promptness is vital, the observer should for security reasons generally not begin writing the report until the HRO is in a secure location. The report should be written in a language which can be used by the field operation.

30. To the extent that time permits, HROs should **include the following information** in their reports:

- (1) the HRO's **instructions or terms of reference**;
- (2) **background of the case**;
- (3) **facts of the case** as revealed at trial and by independent monitoring with particular emphasis on the prosecution and defence evidence, charges, applicable laws, pre-trial procedures, trial process, judgement (if any), and subsequent proceedings;
- (4) the **mental and physical condition of the accused** and the conditions of confinement;
- (5) an **evaluation of the fairness** of the proceedings, applicable laws and treatment of the accused under national and international standards; and
- (6) a **conclusion** (with recommendations).

31. The **report might append**:

- (1) a copy of the Order of Trial Observation or similar instructions showing the terms of reference for the HRO undertaking the observation;
- (2) copies of relevant procedural rules, court decisions and laws;
- (3) copies of charges, transcripts and the court's judgement;
- (4) a description of the HRO's methodology of observation, including materials studied and persons interviewed (to the extent consistent with security concerns);
- (5) sensitive material such as the names, addresses and telephone numbers of contacts who might be endangered by public disclosure (this material should be omitted from any published report);
- (6) copies of newspaper articles referring to the trial and to the HRO's presence, with the names of the newspapers and the dates of publication;
- (7) additional information not strictly within the HRO's terms of reference (such as information about other prisoners, forthcoming trials, changes in the law, etc.); and
- (8) practical observations for the guidance of future HROs who will serve as observers.

O. Trial observation combined with other monitoring

32. Besides reporting what they see at trial, HROs who serve as trial observers often need to make factual determinations as to events which occurred out of their presence. Frequently, observers function as fact-finders who assess the evidence presented at

trial, add outside information, and *reach an overall decision as to the fairness of the proceedings*, which may necessarily require a judgement on the guilt or innocence of the accused.

33. While the trial is a source of formally presented evidence, the *HRO cannot personally question the witnesses in open court, nor assure the fairness of the fact-finding procedure*. Hence, whenever possible, the HRO should observe the proceedings while conducting a parallel, informal monitoring inquiry. For example, the *HRO should gather relevant information* if s/he suspects that the judge is prejudiced, the defence lawyers are under governmental pressure not to pursue a vigorous defence, or the prosecution is giving impunity to perpetrators of human rights abuses by not adequately seeking justice for past abuses. Observer inquiries outside the trial should resemble interviews rather than adjudicative hearings. (See **Chapter VIII: “Interviewing”**).

34. International monitoring is not restricted by jury-oriented evidentiary rules. Instead of using the exclusionary approach of a common-law court, the *HRO should consider all available evidence and weigh that evidence carefully*. The observing HRO should assure the reliability of the fact-finding process by using techniques such as cross-checking information from different sources and carefully questioning individuals who provide information.

35. As mentioned above, *assessments of the fairness of trials, as well as visits to places of detention, constitute only two ways of checking to see whether the system of justice is functioning adequately*. Human rights field operations are often given a mandate to monitor the administration of justice and to provide technical assistance. An understanding of the strengths and weaknesses of the justice system as it is actually functioning can assist the human rights field operation not only in identifying those responsible for violations, but more importantly in working with the host Government to identify technical assistance projects which will have a chance of improving the administration of justice — even after the field operation has departed the country.

36. A **broad analysis of the administration of justice requires** a review not only of trial observation, but also an **assessment of the actual functioning, qualifications, and training** of the judges, court clerks, prosecutors, lawyers, other court personnel, police, prison officials, and other law enforcement personnel, etc. **in each locality of the country**. It also requires a **review of the court rules, penal code, code of penal procedure**, and other dispute resolution mechanisms to analyse whether reforms might be useful in light of international standards. In addition, regular meetings with officials from the Ministry of Justice may be useful in helping them to develop programmes for improvement of the administration of justice, such as training of judges, police, etc.² The human rights field operation may further be able to help seek or identify external resources for supporting such efforts.

37. If such is the mandate of the human rights field operation, the operation should not only report on specific trials in which concerns arise and prepare a broad analysis of the functioning of the administration of justice with recommendations for improvement, but should also prepare **periodic updates on the functioning of the legal system**, which can then be the subject of **regular meetings** with the Ministry of Justice as well as relevant local officials and judges. (See **Chapter XIX:**

²These observations are based principally upon William G. O’Neill, “Monitoring the Administration of Justice in Human Rights Field Operations” in Hege Araldsen and Øyvind W. Thiis eds., *Manual on Human Rights Monitoring* (Norwegian Institute of Human Rights 1997).

“Following-Up and Seeking Corrective Action”.) Some of the issues which might be discussed in the broad analysis and then might be updated in periodic reports from area offices include:³

- (a) *Numbers of judges, prosecutors, etc.; needs for training of judicial officials, training received, improvements and difficulties.*
- (b) *Presence or lack of materials necessary for functioning of judges, clerks, etc. (Without basic equipment of a prosecutor’s or judge’s office — typewriters, paper, pens, tables, chairs, a vehicle, etc. — they cannot operate and thus cannot protect the rights of others.)*
- (c) *Lack of the will to pursue tasks, appear for work, conduct investigations, create dossiers, etc.*
- (d) *Interference or threats by administrative officials, military, police and others.*
- (e) *Instances of corruption, bribes, etc.*
- (f) *Frequency of or statistics on arrests, filing of charges, hearings, trials, etc.*
- (g) *Assessments of whether arrests are legally authorized.*
- (h) *Assessments of whether police or judicial inquiries are actually occurring.*
- (i) *Assessment of the fairness of trials which are held.*
- (j) *What efforts at management and improvement are being undertaken by the leadership of the courts, the Ministry of Justice, etc.*
- (k) *What efforts at reform have been undertaken and with what effect?*

³*Id.*

Appendix 1 to Chapter XIII

Checklist: The Elements of a Fair Trial¹

1. All persons shall be equal before the courts².
2. In the determination of any criminal charge, or rights and obligations in a suit at law, everyone shall be entitled to a fair hearing³.
3. Trials shall be public⁴.
4. Trials shall be conducted by a competent, independent and impartial tribunal⁵.
5. Trials shall be conducted only by tribunals established by law⁶.
6. Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law⁷.
7. In the determination of any criminal charges against him or her, everyone shall be entitled to the following minimum guarantees, in full equality⁸:
 - (a) to be informed promptly and in detail of the nature and cause of any charges in a language which he or she understands⁹;
 - (b) to have adequate time and facilities for the preparation of a defence¹⁰;
 - (c) to communicate directly with counsel of his or her own choosing¹¹;
 - (d) to be tried without undue delay¹²;
 - (e) to be tried in his or her own presence, and to defend him or herself in person or through legal assistance of his or her own choosing¹³;
 - (f) to be informed, if he or she does not have legal assistance, of the right to legal assistance¹⁴;

¹OHCHR Internal document (1995). See also the sections on arrest and detention in **Chapter IX: “Visits to Persons in Detention”**, for additional information relevant to rights before trial.

²ICCPR, Art. 14(1).

³Id.

⁴The press and public may be excluded from part or all of the trial only for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly required in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. The judgement, however, shall always be made public, except where the interests of juvenile persons otherwise requires or where the proceedings concern matrimonial disputes or the guardianship of children. ICCPR, Art. 14(1).

⁵ICCPR, Art. 14(1).

⁶Id.

⁷ICCPR, Art. 14(2).

⁸ICCPR, Art. 14(3).

⁹ICCPR, Art. 14(3)(a).

¹⁰ICCPR, Art. 14(3)(b).

¹¹Id.

¹²ICCPR, Art. 14(3)(c).

¹³ICCPR, Art. 14(3)(d).

- (g) to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her if he or she does not have sufficient means to pay¹⁵;
 - (h) to examine the witnesses against him or her, and to examine the witnesses on his or her behalf under the same conditions¹⁶;
 - (i) to have the free assistance of an interpreter if he or she cannot understand or speak the language used in court¹⁷;
 - (j) not to be compelled to testify against him or herself or to confess guilt¹⁸.
8. Everyone convicted of a crime shall have the right to have the conviction decision and sentence reviewed by a higher tribunal according to law¹⁹.
 9. If someone is convicted by a final decision, but the conviction is subsequently reversed, or a pardon granted on the ground that a new or newly discovered fact shows conclusively that their has been a miscarriage of justice, the person who has suffered punishment as a result of the conviction is to be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partially attributable to the person convicted²⁰.
 10. No one shall be liable to be tried or punished again for an offence for which he or she has already been convicted or acquitted in accordance with the law and penal procedure of the country²¹.
 11. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed²².
 12. A penalty heavier than the one that was applicable at the time when the criminal offence was committed shall not be imposed²³.
 13. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby²⁴.
 14. No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation²⁵.

¹⁴Id.

¹⁵Id.

¹⁶ICCPR, Art. 14(3)(e).

¹⁷ICCPR, Art. 14(3)(f).

¹⁸ICCPR, Art. 14(3)(g).

¹⁹ICCPR, Art. 14(5).

²⁰ICCPR, Art. 14(6).

²¹ICCPR, Art. 14(/). This is known as the principle of *ne bis in idem*, or “double jeopardy”.

²²ICCPR, Art. 15(1). This does not prejudice the trial or punishment of a person for acts committed which were criminal under general international law, including violations of customary international law such as war crimes, torture, slavery, genocide, etc. (see ICCPR Art. 15(2)).

²³ICCPR, Art. 15(1). This does not prejudice the trial or punishment of a person for acts committed which were criminal under general international law, including violations of customary international law such as war crimes, torture, slavery, genocide, etc. (see ICCPR Art. 15(2)).

²⁴ICCPR, Art. 15(1). This does not prejudice the trial or punishment of a person for acts committed which were criminal under general international law, including violations of customary international law such as war crimes, torture, slavery, genocide, etc. (see ICCPR Art. 15(2)).

²⁵ICCPR, Art. 11.

.....Chapter XIV ELECTION OBSERVATION

Key concepts

The right of everyone to participate in his or her Government through free and fair elections is a fundamental human right to be enjoyed without discrimination.

Free and fair elections require respect for the right to freedom of expression and opinion, peaceful assembly, freedom of association, freedom of movement and other rights.

Human rights officers serving as election observers should:

- | *be sufficiently numerous to ensure presence at enough polling places and events;*
- | *have a reputation for independence, impartiality, objectivity, language skills and experience in electoral administration;*
- | *be present from the beginning of the electoral process;*
- | *arrange meetings (prior and subsequent to the election) with Government officials, party leaders, candidates, NGOs, and others to know whether their rights have been respected and whether they have concerns about the election process;*
- | *examine the laws and infrastructure;*
- | *be afforded free movement and access;*
- | *monitor the pre-election preparations and campaign period, any registration process, any civic education, the media, the vote, the count, the results and follow-up.*

A. Introduction¹

1. There are at least *four ways the UN has been involved in elections*. First, the UN has organized and *conducted elections* in such countries as Namibia. In this situation, the UN organizes virtually every aspect of the electoral process. Second, the UN has *supervised elections by selecting a Special Representative of the Secretary-General to certify the validity* of certain

¹The material in this part is based principally on United Nations Centre for Human Rights, *Human Rights and Elections — A Handbook on the Legal, Technical and Human Rights Aspects of Elections*, Professional Training Series No. 2, UN Doc. HR/P/PT/2 (1994).

crucial aspects of the electoral process. Third, the *electoral process is organized and administered by a national organ and the UN is asked to observe the election and verify* whether the election process is *free and fair*.

2. For the above-mentioned categories of UN involvement, all of the following *five elements must be present*:

- (1) A *formal request* has been received from the State concerned;
- (2) *Broad public support* exists for UN involvement;
- (3) *Sufficient advance time* remains for comprehensive UN involvement;
- (4) There exists a *clear international dimension* to the situation;
- (5) A *favourable decision has been rendered by an authoritative body of the UN (i.e., the General Assembly or the Security Council)*.

3. *Before becoming involved* in an election, the UN Headquarters (or the UN human rights field operation) will have carefully considered the following:

- (1) Does a *situation of gross violations of human rights* exist?
- (2) Is the *scope of assistance requested* appropriate?
- (3) *Will UN involvement encourage unwarranted confidence* in a flawed or disingenuous process?
- (4) *Will UN advice be implemented by the Government* and major political actors?

4. A *fourth type of UN involvement is improving the national capacity* with regard to the material, infrastructural, legal and human rights aspects of elections. Requests for technical assistance can be granted quickly, without the need for consideration by a political decision-making body of the UN.

5. *Strategic choices must be made about which form UN involvement should take*. Obviously, the role of the UN field operation changes with the nature of its mandate. Frequently, the UN and other election observers are asked to play several roles during an election, including, for example, both assistance in preparing for the election and then observing it. Having assisted with the preparation of election process, it is difficult for the same individuals to be entirely impartial when observing the results of their own efforts. *In general, however, the field operation and its officers should — particularly with regard to election observation — be and be seen to be neutral as to the result of the voting*.

6. No matter what the UN election observer's specific role is, his/her presence can assist in ensuring the integrity of the election process. *HROs who serve as election observers are in a position to report on a country's respect for political rights*. In addition, HROs can assess the degree to which the Government respects the rights to freedom of expression, freedom of association, hold opinions without interference, peaceful assembly, etc. Moreover, officers may take advantage of the relative openness of an election period to make inquiries into specific reports of human rights violations.

7. *This chapter of the Manual focuses primarily on the third type of UN involvement — election observation and verification, in which a human rights field operation is more likely to participate than in the other kinds of UN involvement*. While running an election, as in the case of Namibia, demands tremendous resources and great expertise, election observation and

verification also requires both resources and considerable expertise. In addition, observing an election may place the human rights field operation in a very sensitive position, which may interfere with its other monitoring functions and might risk its maintenance of the requisite neutrality. Hence, the decision to assist in election monitoring must be the subject of careful reflection. Nonetheless, several human rights field operations have been given a mandate to pursue election observation and verification.

8. This chapter includes an overview of international human rights standards related to free and fair elections and an analysis of the issues and techniques related to election observation. The chapter is mainly based on the publication “*Human Rights and Elections — A Handbook on the Legal, Technical and Human Rights Aspects of Elections*” of the (then) United Nations Centre for Human Rights². **Appendix I** reproduces *OHCHR Guidelines for Electoral Assistance, Monitoring and Observation — A Human Rights Checklist for Examination of Electoral Arrangements*.

B. International standards for free and fair elections

1. Participation in Government and non-discrimination

9. The **right of everyone to participate in the Government of his or her country** is a fundamental human right.³ *Elections play an important role in ensuring adherence to the right of political participation.* Article 21(3) of the Universal Declaration of Human Rights states, “The will of the people shall be the basis of the authority of Government; this will shall be expressed in **periodic and genuine elections** which shall be **by universal and equal suffrage** and shall be **held by secret vote** or by equivalent free voting procedures.”

10. In addition, the Covenant on Civil and Political Rights guarantees in Article 25(b) that every citizen shall have the **right** and opportunity, “[t]o **vote and to be elected** at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors...”.

11. Regional organizations have also affirmed the right to participate in free and fair elections. Pursuant to Article 3 of Protocol I of the European Convention on Human Rights, States Parties undertake to *hold free elections at reasonable intervals by secret ballot*. The final document issued by the Conference on Security and Co-operation in Europe

²See Note 1. See also Larry Gerber, *Guidelines for International Election Observing* (1984); Guy D. Goodwin-Gill, *Free and Fair Elections: International Law and Practice* (1994); OSCE/ODIHR Election Observation Handbook (1996); Hege Araldsen and Oyvind W. Thiis, “Election Observation”, *Manual on Human Rights Monitoring* (Norwegian Institute of Human Rights 1997).

³Universal Declaration of Human Rights, Art. 21(1).

Meeting on the Human Dimension in Copenhagen states that *free elections held at reasonable intervals by secret ballot are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings*. Furthermore, in 1994 the Council of the Inter-Parliamentary Union in Europe unanimously adopted the Declaration on Criteria for Free and Fair Elections.

12. Article 20 of the American Declaration of the Rights and Duties of Man and Article 23(b) of the American Convention on Human Rights guarantee the right of citizens to vote and be elected in genuine periodic elections. In addition, Article 13(1) of the African (Banjul) Charter on Human and Peoples' Rights provides that every citizen shall have the right to participate freely in Government.

13. Moreover, the **right to participate in free and fair elections** is to be applied universally and without discrimination. Article 1 of the Convention on the Political Rights of Women and Article 7(a) of the Convention on the Elimination of All Forms of Discrimination against Women state that **women are entitled to vote in all elections on equal terms with men**. Pursuant to Article 5 (c) of the Convention on the Elimination of All Forms of Racial Discrimination, "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of... [p]olitical rights, in particular the rights to participate in elections — **to vote and to stand for election** — on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service...". (See also, Universal Declaration of Human Rights, Article 2; and Covenant on Civil and Political Rights, Article 2.)

2. Pre-requisite rights⁴

14. International human rights instruments also protect a number of basic rights, the enjoyment of which is crucial to a meaningful electoral process. The **right to participate in free and fair elections implicates** these rights, including:

- ✓ **the right to freedom of expression** — The electoral process is a mechanism whose very purpose is the expression of the political will of the people. The right to express partisan ideas must, therefore, be firmly guarded during electoral periods⁵.
- ✓ **the right to freedom of opinion** — The unconditional freedom to hold a political opinion is imperative in the context of elections, since the *authentic* assertion of popular will is impossible in an environment where such freedom is absent or restricted in any way⁶.
- ✓ **the right to peaceful assembly** — The right of assembly must be respected, since public demonstrations and political rallies are an integral part of the election process and provide an effective mechanism for the public dissemination of political information⁷.

⁴Human Rights and Elections, UN Centre for Human Rights, Chapter III, pp. 6-8.

⁵Idem. p- 7.

⁶Idem. p. 7.

⁷Idem, p.8.

- ✓ **the right to freedom of association** — This right clearly includes the right to form and participate in political organizations. Respect for this right is vital during the electoral process, as the ability to form and join political parties is one of the most important means by which people can participate in the democratic process⁸.

15. See **Chapter IV: “Overview of International Human Rights and Humanitarian Law Standards”** for more details on international standards related to these rights. Other rights relevant to the electoral process include the rights to freedom of movement, to organize trade unions, to participate in one’s Government, to be free from discrimination on political grounds, and — in particularly difficult circumstances — the right to be free from arbitrary killing.

C. Objectives of election observation

16. Election monitoring can serve at least seven important purposes:

- ✓ The *first*, and indeed primary purpose is **ensure** to that an **independent, impartial and objective evaluation** of the electoral process is conducted.
- ✓ *Second*, monitoring can be done to **encourage acceptance of election results**.
- ✓ *Third*, election observation can be done to **encourage participation and build voter confidence** in the electoral process.
- ✓ The *fourth* objective is to **ensure the integrity of the electoral process**, including deterring and detecting violence, intimidation and fraud.
- ✓ *Fifth*, there is a need to **monitor the protection of all human rights** during the election period.
- ✓ *Sixth*, election monitoring **facilitates dispute resolution** — particularly as to issues related to the election process.
- ✓ *Seventh*, election monitoring can **provide indirect support for civic education** and the building of a civil society.

D. Selecting HROs to serve as election observers

17. An election observer delegation should consist of a minimum of two members. Ideally, however, there will be far more than two HROs. It is important to allow for a **sufficient number of observers to ensure their presence at an adequate number of polling places and election events**. When determining the size of the observation

⁸Idem, p.8.

delegation, factors such as the size of the country, population and number of polling stations should be considered.

18. Several factors should be considered when selecting observers. The fewer the number of observers, the more important it is for the individuals to have a **reputation for independence, impartiality and objectivity** beyond the normal qualifications for HROs. Language skills are also important. Another factor is experience in electoral administration or politics.

19. Election observers should understand the mandate and methods of the field operation. In addition, they should be already knowledgeable or *briefed as to the history, current politics, local culture and electoral process of the country holding the election.*

E. Length of observation

20. The meaningful involvement of HROs as observers requires their **presence from the beginning of the electoral process**. If the HROs serving as observers are not regularly located in the country, it is preferable to visit the site of the election at least twice — once to review the preparations for the election and the political campaign and a second time to observe the election and vote count. *At a minimum, HROs observing an election should plan at least a seven-day visit.* Election observers should use this time to meet the major actors in the political process, travel outside of the capital city, assess preparations for the election including registration proceedings, observe election day activity, and monitor the vote count.

F. Informing the authorities about the observation

21. If HROs are to serve as *election observers*, their presence *should be expressly permitted by the field operation's mandate, electoral laws, procedures and/or officials*. Because of the visibility of the election process, the role of the observer should be clearly described in public information materials.

22. At the beginning of the election observation process, the HROs should announce their presence at the site of the election. They should explain the specific goals of the observation. They should also stress the independence and impartiality of the HROs in their role as election observers, and the human rights field operation's willingness to receive comments.

G. Contacts and interviews

23. HROs serving as election observers should try to meet with a number of the participants in the political process. It is important to arrange meetings (both prior and subsequent to the election) with Government officials, party leaders and candidates. HROs serving as election observers should also try to meet with members of the Government body administering the election, and representatives of organizations such as labour unions, professional organizations, human rights groups, etc. When meeting with members of organizations, the HROs should inquire as to specific complaints about the electoral process.

1. Key human rights issues

24. In general, HROs who serve as **election observers need to know** whether⁹:
- (1) **freedom of movement, assembly, association and expression** have been respected throughout the election period;
 - (2) all parties have conducted their **political activities within the law**;
 - (3) any political party or special interest group has been subjected to **arbitrary and unnecessary restrictions regarding access to the media** or generally with regard to their freedom to communicate their views;
 - (4) *parties, candidates* and supporters have enjoyed equal security;
 - (5) voters have been able to **cast their ballots freely**, without fear or intimidation;
 - (6) the **secrecy of the ballot** has been maintained;
 - (7) the overall conduct of the ballot has been such as to **avoid fraud and illegality**.

2. Interested groups

25. HROs should attempt to **determine the position and impressions of interested groups** by asking the following questions:
- (1) What are the **concerns of each of the contending political parties**?
 - (2) What are the **concerns of the local non-governmental human rights organizations**?
 - (3) What are the **concerns of interested international human rights organizations**?
 - (4) What are the **concerns of the legal community**?
 - (5) Have all **major national players agreed publicly to abide by the outcome** of the elections?
 - (6) What are the **concerns of the diplomatic community**?

⁹Guy S. Goodwin-Gill, *Free and Fair Elections: International Law and Practice* 62 (1994).

3. National infrastructure

26. The HROs serving as election observers should also **examine the country's existing infrastructure** and ask:

- (1) Is the national administrative structure **experienced in the organization of free and fair elections**?
- (2) Are the political **parties experienced in contesting multi-party elections**?
- (3) Are the political parties **able to contest the forthcoming election**?
- (4) Is the **judiciary sufficiently independent and well-functioning** to allow it to adjudicate electoral matters?

27. Furthermore, HROs serving as election observers are making the following **determinations about the country's laws and procedures**:

- (1) Do the **laws and procedures respect international standards**?
- (2) Do they **reflect the particular needs, aspirations and historical realities** of the people involved?
- (3) Do they **give voice to the political will** and rights to self-determination of the people?

H. Travel

28. It is particularly important for HROs serving as **election observers to be afforded free movement and access**. Under the basic mandate of the field operation, they should also be protected from harm or interference with their official duties.

29. As campaign abuses and election fraud may occur throughout the country, officers should travel as widely as possible in order to obtain an accurate assessment of the electoral process. During their travels, HROs should not use Government or military escorts. Travelling with Government security forces, Government officials or party representatives may have an intimidating effect on the individuals to be interviewed.

I. Monitoring elections¹⁰

30. In observing an election process, a human rights field operation might divide its efforts into four periods: pre-election preparations and campaign period, voting, counting and post-election follow-up.

¹⁰This part is based principally on United Nations Centre for Human Rights, *Human Rights and Elections*, UN Doc. HR/P/PT/2 (1994).

1. Monitoring the pre-election preparations and campaign period

a. *The development of election law and procedures*

31. The **process of identification of electoral districts and boundaries should respect the international norm of equal suffrage**. Such delimitation should not be designed to dilute or discount the votes of any particular groups or geographic areas.

32. **Fair constituency-delimitation procedures** will take into account a range of information, including available demographic information, territorial integrity, geographical distribution, topography, etc. If delimitation is based on census data, the HROs should determine *whether the census was accurate*. Moreover, **polling stations** should be distributed so as to **guarantee equal access** within each constituency.

33. Electoral laws and procedures should guard against unfair advantage being bestowed upon Government-supported candidates. **Provisions concerning candidate qualifications must be clear and must not discriminate against women or particular racial or ethnic groups**. Disqualifications should be subject to independent review.

34. **Political parties should not face unreasonable restrictions** on participation or campaigning. There should be protection under the law for party names and symbols. Procedures for designation of party agents, for nomination time and place requirements, and for campaign financing should be clearly established by law. In addition, the **electoral calendar** should provide adequate time for campaigning and public information efforts.

b. *Monitoring the electoral administration*

35. Provisions of the law should ensure that an **objective, unbiased, independent and effective administrative structure** is in place. HROs should pay careful attention to *provisions for appointment, remuneration, duties, powers, qualifications and reporting structure of electoral staff*. The HRO should ask: (1) Is a single line of ultimate authority established?; (2) Is the method of appointment objective and unbiased?; and (3) Is the means of compensation potentially corrupting?

36. At all levels, **staff must have the necessary qualifications** to perform well; staff should also **be insulated from bias and political pressure**. Adequate advance training is imperative for all election officials. All electoral activities, including the decision-making process, the legal process, and the organization of events, should be conducted in a wholly transparent manner. In addition, public consensus should exist on the administrative structure.

c. *Monitoring registration*

37. If **advance registration** of voters is proposed, the process must be **carefully constructed to ensure fairness and effectiveness** of *provisions concerning elector qualifications, residence requirements, election lists, registers, and the means provided for challenging those documents*. *Voter lists should be available to interested parties*. If no registration is to take

place in advance of polling, **alternative measures for the prevention of double-voting** (for example, the use of indelible ink) and of voting by unqualified persons must be put in place.

38. Disqualifying factors must not represent impermissible discrimination, and should be limited so as to provide the maximum reasonable enfranchisement of the people. Procedures for **registration should accommodate broad participation**, and should not create unnecessary technical barriers to participation by otherwise qualified persons.

d. Monitoring civic education

39. Funding and administration should be provided for **objective, non-partisan voter education and information campaigns**. The voter education campaign should be based upon the voting experience of the population. The **public should be well informed as to where, when and how to vote**. The public should also be educated as to why voting is important.

40. Literature should be widely available and should be published in the various national languages to help ensure the meaningful participation of all eligible voters. **Voter education should encourage participation by all, including members of ethnic groups and women**. Multimedia methods should be employed to provide effective civic education to people with various levels of literacy. Voter education campaigns should extend throughout the territory of the country, including rural and outlying areas.

e. Monitoring the media

41. Arrangements for **fair media access** by candidates and parties is especially important where the major information media are Government-controlled. Media **regulations** should provide for **safeguards against political censorship, unfair Government advantage, and unequal access during the campaign period**. Fair media access implies not only equality of time and space allotted, but also attention to the hour of broadcasting and the placement of printed advertisements. HROs should also try to determine if broad agreement exists on the media regulation system.

42. HROs serving as election observers should monitor both national and local media. Monitoring political broadcasts, broadcast civic education programmes, and allocation of time to various political parties permits an evaluation of participants' access to the political process.

2. Monitoring the vote

43. HROs should try to **cover as many polling stations as possible on election day**. HROs should pay particular attention to observance of the following principles.

44. Free and fair elections should be guided by **detailed provisions regarding the form of ballots**, the design of ballot boxes and voting compartments, and the manner of polling. These provisions should *protect the process from fraudulent practices* and should respect the secrecy of the vote.

45. **Ballots should be worded clearly and contain information that is identical in all native languages.** *To avoid fraud and to give each participant an equal chance, however, the positions of candidate and party names should be rotated on the ballot.* Moreover, the ballot form should **take into account various levels of literacy** in the country. Proxy and absentee voting provisions should be designed to encourage the broadest possible participation, without compromising electoral security. **Voters with special needs** (such as the disabled, elderly, students, conscripts, workers, foreign service personnel and prisoners who have retained voting rights) **should be accommodated**, without compromising electoral security.

46. **Sufficient quantities of voting materials should be available at each polling place.** Polling personnel should have clear guidance in admitting and identifying qualified voters. The questions that are put to the voters should be limited by statute. In addition, HROs should *watch for evidence of voter intimidation or discriminatory treatment of voters.*

47. HROs should not interfere with the polling process, unless assistance is requested by the authorities. Whether or not an HRO should respond to such requests for assistance depends upon the circumstances at hand. In taking such a decision, the HRO should be mindful of his/her “observer” status and ensure that no action taken could possibly be perceived as partisan or otherwise misconstrued. Serious problems should be reported to the central electoral authorities.

3. Monitoring the count

48. It is especially important for **HROs to be present at the closing of the polls and the counting of the ballots.** Counting should be open to official observation by concerned parties, including national and international observers. All issued, unissued or damaged ballot papers must be systematically accounted for. **The processes for counting votes, verification, reporting of results, and retention of official materials must be secure and fair.** Recount procedures should be available in case of questionable results. Ideally, alternative, independent verification procedures such as parallel vote tabulation will be in place.

49. HROs should **determine whether individuals who are denied voting rights have access to substantive redress.** The right to challenge election results and for aggrieved parties to seek redress should be provided by law. The petition process should set out the scope of available review, procedures for its initiation, and the powers of the independent judicial body charged with such review.

4. Monitoring results and follow-up

50. Immediately after the election, the media usually asks the UN and other international observers to pronounce whether or not an election was free and fair. **Making a final judgement regarding the election so quickly is impossible** as complaints have not yet been filed and information from the countryside has not yet been received. To capitalize on the media attention, however, it is *usually necessary for UN Headquarters or the Special Representative of the Secretary-General to make a tentative and qualified statement* based on the information available at the time.

51. *Only after complaints have been received from opposing political parties, voters and others can HROs get a full picture of what has transpired. After HROs have inquired into complaints to determine whether they are justified and determined whether they affected the results, the leadership of the human rights field operation monitoring the election can assess whether or not the election was free and fair. Any **announcement of such an assessment**, however, is usually **made by UN Headquarters**, the Special Representative of the Secretary-General, or after consultation and authorization, by the leadership of the human rights field operation. **Under no circumstances should an HRO or election observer take it upon him/herself to address the media evaluating or otherwise judging the election** or its outcome.*

Appendix 1 to Chapter XIV

Guidelines for Electoral Assistance, Monitoring and Observation

UN Office of the High Commissioner for Human Rights
*A Human Rights Checklist
for Examination of Electoral Arrangements*
(OHCHR Internal document, 1993)

*The will of the people shall be the basis of
the authority of government.
article 21 (3), UDHR*

Purposes of UN involvement include:

- confidence building
- deterrence of violence and intimidation
- facilitation of dispute resolution
- deterrence of fraud
- detection of fraud
- encouragement of acceptance of results
- support for civic education
- promotion and protection of human rights

Subjects for monitors and advisors include:

- the development of election law and procedures
- the electoral administration
- registration
- voter list preparation
- campaign period
- civic education
- the vote
- the media
- the count
- the results and follow-up (hand-over of power, etc:)
- the situations of minorities and other vulnerable groups before, during and after elections

Questions for monitoring, observation and verification include:

- is the presence of observers expressly provided for?
- will national observers be allowed?
- will international observers be allowed?
- is their role clearly set out by law?
- is their role described in voter education materials?
- are they to be afforded free movement within the country?
- will they have access to all important events?
- how will they be protected from harm?
- how will interference with their duties be prevented?
- how will they be trained and oriented?
- will they be sufficient in numbers?
- how will they be housed and otherwise accommodated?
- what will be their specific role?
- will they have standing to file complaints and petitions?

Advance questions for United Nations involvement:

- has a formal request/mandate been received from the government?
- does broad public support exist for UN involvement?
- is there sufficient advance time for meaningful UN involvement?
- is there a clear international dimension to the situation?
- human rights concerns to be advanced?
- conflict resolution potential?
- has a decision in favour of UN involvement been rendered by an authoritative UN body (e.g., the security council, the general assembly)?
- does a situation of gross violations of human rights exist?
- is the scope of assistance requested appropriate?
- should it be expanded?
- should it be reduced?
- will UN involvement encourage unwarranted confidence in a flawed or disingenuous process?
- will UN involvement improve the process?
- will UN advice be implemented by the government and major political actors?

Enquiring about positions and impressions of interested groups:

- what are the concerns of each of the contending political parties?
- what are the concerns of the local non-governmental human rights organizations?
- what are the concerns of minority groups?

- what are the concerns of women's groups?
- what are the concerns of interested international human rights organizations?
- what are the concerns of the legal community?
- what are the concerns of the diplomatic community?
- have all major players agreed publicly to abide by the outcome of the elections?

Examining the existing infrastructure:

- is the national administrative structure experienced in the organization of free and fair elections?
- are the political parties experienced in contesting multi-party elections?
- is the judiciary sufficiently independent and well-functioning to allow it to adjudicate electoral matters?

Reviewing electoral laws and procedures:

- do the laws and procedures respect international standards?
- do they reflect the particular needs, aspirations, and historical realities of the people involved?
- do they give voice to the political will and rights to self-determination of the people?

Judging whether the elections are to be free :

- will they allow unfettered expression of the will of the people?
- will they be set in an atmosphere free from intimidation?
- will they be accompanied by mechanisms for the protection of human rights?

Determining whether the prerequisite rights are secured:

- free expression?
- free opinion?
- free information?
- free assembly?
- free association?
- free movement?
- independent judicial procedures?

Examining arrangements for the secrecy of the ballot:

- are booths, shields, ballots, and boxes adequate for secrecy? (objective analysis)
- are the voters secure that they are safe to vote as they wish? (subjective analysis)

Measuring arrangements for fairness:

- is equal suffrage established?
- is universal (adult) suffrage established?

- is non-discrimination in political rights guaranteed?
- what are the technical safeguards to protect fairness?

Evaluating adequate periodicity:

- are there reasonable intervals for new elections?
- is there adequate preparation time for each phase of the process?
- are there adequate limitations on permissible emergency interruptions?

Projecting whether elections will be “genuine”:

- are there genuine *procedures* to accommodate the will of the people?
- will there be genuine *effects*, including a transfer of power?
- is there to be a genuine *choice* of different parties or candidates?

Evaluating equal access to candidature and service:

- do the laws, procedures or facts on the ground operate to discriminate against possible candidates?

Measuring potential for an informed choice by the electorate:

- has campaigning been adequate to make people understand issues and positions?
- have understandable voter education materials reached all sectors of the voting public?
- do voters in fact understand the central issues and parties?

Evaluating plans for the electoral administration:

- is the administrative structure independent and objective?
- is it effective?
- is a single line of ultimate authority established?
- is the method of appointment objective and unbiased?
- is the means of compensation potentially corrupting?
- will staff have the necessary qualifications to perform well?
- are all levels of staff insulated from bias?
 - from political pressure?
 - from politically motivated salary adjustment or denial?
- are legal guarantees in place to prevent corruption ?
 - to prevent bias?
 - to prevent fraud?
- is there public consensus on the administrative structure?
- will there be adequate advance training of officials?

Examining constituency delimitation:

- do the districts and boundaries respect equal suffrage?
- are they drawn to discount the votes of a particular group?
- a particular geographic area?
- do they take into account available demographic information?
- is there an accurate census?
- do they take topography into account?
- do they take geographic distribution into account?
- will polling stations be distributed evenly?

Evaluating registration of electors:

- is advance registration proposed?
- are provisions for qualifications fair?
- are resident requirements fair?
- are procedures for lists and registers fair?
- are they effective?
- are procedures established for challenges to the lists?
- for appeals on such decisions?
- are lists accessible to interested parties?
- do disqualifying factors represent impermissible discrimination?
- do they allow maximum reasonable enfranchisement?
- are there technical barriers to voting by qualified persons?
- procedures for registration of those approaching minimum age?
- is the registration period long enough for maximum access?
- if no advance registration, will there be other means of:
 - preventing double voting?
 - preventing unqualified voting?

Looking at nominations, parties, and candidates:

- is unfair advantage given to government-supported candidates?
- are provisions for candidate qualifications clear?
- are they fair?
- do they discriminate against women?
- do they discriminate against particular racial groups?
- against certain ethnic groups?
- is disqualification subject to independent review?
- do parties face unreasonable restrictions on participation?
 - on campaigning?
- are party names and symbols protected under law?

- are procedures for party agents, if allowed, fair and clear?
- are nomination times and places clearly provided?
- does the law fairly address campaign financing?
- is there adequate time for political campaigning?

Examining polling, tabulation, and reporting:

- are there detailed provisions form the form of ballots?
- for the design of ballot boxes?
- for the design of voting compartments?
- for the manner of polling?
- do these designs protect the process from fraud?
- do they respect the secrecy of the vote?
- are ballots clearly worded?
- are proxy and absentee voting procedures in place?
- do such procedures facilitate broad participation?
- do they compromise electoral security?
- are disabled voters accommodated?
- are others with special needs accommodated?
- elderly or infirm voters?
- students?
- conscripts?
- workers?
- refugees and displaced persons?
- foreign service personnel?
- prisoners who have retained voting rights?
- do polling staff have clear guidance on identifying voters?
- are questions to be put to voters limited by statute?
- is the attendance of observers provided for?
- is counting open to official observation?
- are all ballot papers to be systematically accounted for?
- is the counting process secure and fair?
- are there provisions for safe storing of election materials?
- are recount procedures established for questionable results?

The complaints, petitions and appeals process:

- is standing provided to all aggrieved parties?
- is substantive redress available?
- does petition process set the scope of available review?
- does the law clearly establish procedures for petitions?

- are petitions the sole means of challenging results?
- are the powers of the body charged with review clear?
- is that body an independent judicial body?
- are multiple levels of review available where appropriate?
- what is the effect of confirmed irregularities on outcome?
- is there redress for individuals denied voting rights?

Attention to respect for fundamental human rights:

- is free expression guaranteed?
- free opinion?
- free information?
- free assembly?
- free association?
- free movement?
- respect for the rights of the person?
- respect for other human rights?
- is there a prevailing atmosphere of intimidation?
- are there other laws which may discourage participation?
- is a state of emergency in effect?
- is other exceptional legislation in effect?
- are any exceptional measures strictly required by the exigencies of the situation?
- are exceptional measures calculated to corrupt the process?
- are exceptional measures calculated to unnecessarily delay the process?
- are there problems with discrimination on the basis of race, colour, gender, language, religion, opinion, origin, property, birth or other status?

Offenses, penalties, and maintenance of order:

- does the law protect the process from corruption?
- from official nonfeasance, misfeasance, and malfeasance?
- from obstruction?
- from undue influence?
- from personation?
- from bribery?
- from treating?
- from intimidation?
- evidence of disappearances?
- allegations of torture?
- cases of arbitrary arrest and detention?
- cases of summary or arbitrary executions?

- any such cases brought to the attention of the various thematic mechanisms of the UN commission on human rights?
- does the law guard against all forms of illegal and corrupt practices?
- do penalties and procedures respect international standards for the administration of justice?
- are police to be present at the polls?
- if so, is this only to the extent absolutely necessary?
- will it have an intimidating effect on voters?
- could polling officials fulfil the police function in some cases?
- is criminal liability imposed for official misconduct?
- is civil liability imposed for recovery against officials?

Evaluating media access and regulation:

- are arrangements in place for fair media access?
- by all parties?
- by all candidates?
- are the major information media government-controlled?
- are the major information media government-licensed?
- are safeguards provided against censorship?
- against favouritism?
- against unfair government advantage?
- against unequal access during campaign periods?
- are there provisions for equal time?
- for equal priority of broadcasts?
- is there broad agreement on the regulation system?

Public information and voter education enquiries:

- is a voter education campaign planned?
- is it sufficiently funded?
- is it unbiased?
- is it based upon the level of voting experience of the population?
- is it educationally appropriate?
- is it culturally appropriate?
- is it targeted to all qualified age groups?
- does it encourage participation by women?
- does it encourage participation by all ethnic groups?
- does it explain where to vote?
- does it explain when to vote?
- does it explain who can vote?

- does it explain how to vote?
- is it conducted in all native languages?
- does it encourage confidence in the process?
- is literature widely available?
- is programming widely broadcast?
- are outlying and rural areas reached?

Examining issues of legal authority and structure:

- are political rights enshrined in the constitution?
- in other high organic law of the state?
- does this expressly include the right to free elections?
- to periodic elections?
- to universal, equal, nondiscriminatory suffrage?
- to a secret ballot?
- to stand for office and be elected?
- to have access to public service on equal terms?
- to free expression, opinion, information, assembly, and association?
- for pluralism and political parties?
- is statutory language clear and concise?
- is it specific enough to forestall potential abuse of discretion?
- to forestall discriminatory application?
- to forestall interpretations which discourage free speech?
- to forestall interpretations which discourage full participation?
- is statutory language gender neutral?
- does it encourage participation by women?
- are laws and regulations translated into all languages?
- has subsidiary legislation be promulgated?
- are regulations sufficiently detailed?
- are administrative instructions clear and comprehensive?
- have manuals been produced to guide staff at all levels?

International legal responsibility analysis:

- is the state a member of the United Nations (charter)?
- is it a party to the international covenant on civil and political rights? (Art. 25).
- is it a party to the international convention on the elimination of all forms of racial discrimination? (Art. 5).
- is it a party to the international convention on the elimination of all forms of discrimination against women? (Art. 7).
- is it a party to the convention on the political rights of women? (Arts. I, ii.iii).

- is it a party to the international convention on the suppression and punishment of the crime of apartheid? (Art. ii).
- is it a party to the first optional protocol of the covenant on civil and political rights?
- if so, has the human rights committee considered any complaints regarding article 25 of the covenant on civil and political rights?
- is the state a party to any regional human rights instruments providing for political rights?
- do the laws and procedures for elections conform with all of the requirements of the above instruments?
- do they meet the requirements of art.21 of the universal declaration of human rights?
- do they meet the requirements of the charter of the United Nations, where applicable?
- do they respect art. 4 of the declaration on the elimination of discrimination against women?
- do they respect art. 5 of the proclamation of Teheran?
- do they respect arts. 2 and 5 of the declaration on the granting of independence to colonial countries and peoples?
- do they respect arts. 5 and 18 of the declaration on social progress and development?

NOTES:

.....Chapter XV
**MONITORING
DEMONSTRATIONS AND
PUBLIC MEETINGS.....**

Key concepts

While all international and regional human rights treaties grant individuals the rights to freedom of association and peaceful assembly, they allow States to impose certain restrictions on those rights, for the reasons and at the conditions specified in the treaties themselves.

In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.

Human rights officers monitoring demonstrations should:

- | *recognize that their role may be complicated by the actions of the demonstrating crowd and law enforcement officials;*
- | *realize that their role is to verify that the authorities are not interfering with freedom of assembly and peaceful association;*
- | *neither encourage nor discourage holding a peaceful assembly;*
- | *never participate in or associate themselves with demonstrations;*
- | *establish contact with the organizers and collect information about the planned activities, route, number of participants, duration, goals, etc.;*
- | *stay at a prudent and sufficient distance from the demonstration;*
- | *be aware of their location and have an escape plan;*
- | *devote special attention to persons arrested or beaten; and*
- | *write a detailed report on any assemblies or public meetings observed.*

A. Introduction

1. Monitoring demonstrations can be a rather common task of HROs, especially in periods of political and electoral campaigns in the country of operation. This chapter covers the international human rights standards the respect of which HROs seek to ensure in performing this specific function, and a number of practical and technical aspects which need to be kept in mind to professionally and effectively monitor demonstrations.

B. International standards for free assembly, association and expression

2. As discussed earlier in **Chapter III: “Applicable International Human Rights and Humanitarian Law: The Framework”**, the **right to freedom of peaceful assembly and association** is guaranteed by international human rights law. Article 20 of the Universal Declaration of Human Rights states, “Everyone has the right to freedom of peaceful assembly and association.” Article 21 of the Covenant on Civil and Political Rights secures the right to peaceful assembly and Article 22 protects freedom of association. Article 11(1) of the European Convention declares, “Everyone has the right to freedom of peaceful assembly and to freedom of association with others...” In addition, Articles 15 and 16 of the American Convention guarantee the rights of peaceful assembly and freedom of association.

3. The Covenant on Civil and Political Rights, the European Convention, and the American Convention provide that States may impose certain lawful restrictions on the exercise of freedom of association. The limiting language found in the two regional conventions is similar to Article 22(2) of the Covenant on Civil and Political Rights: “No **restrictions** may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of rights and freedoms of others.”

4. The rights of freedom of association and assembly are also set forth in the African (Banjul) Charter, but in a slightly different manner. Article 10(1) states, “Every individual shall have the right to freedom of association provided that he abides by the law.” Article 11 provides that, “Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.”

5. While all international and regional human rights conventions grant individuals the right to freedom of association and peaceful assembly, they allow States to impose certain permissible restrictions on those rights. **European jurisprudence**, however, suggests that European States (and probably other States with similar human rights treaty obligations) may have an obligation to take further steps to guarantee those

rights. In *Plattform 'Ärzte für das Leben' v. Austria* (Judgement of 21 June 1988 (No. 139), 13 E.H.R.R. 204), the European Court of Human Rights noted that,

A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The **participants must, however, be able to hold the demonstration without having to fear that they will be subject to physical violence by their opponents**; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate.

Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11 [of the European Convention]... Article 11 sometimes requires **positive measures to be taken**, even in the sphere of relations between individuals, if need be.

6. See also *Ezgin v. France*, Judgement of 26 April 1991 (No. 202), 14 E.H.R.R. 362 and Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted at a conference convened by Article 19 on October 1, 1995.

7. The right to **freedom of expression** is a fundamental right that is necessary for the enjoyment of the rights to freedom of association and peaceful assembly. Article 19 of the Universal Declaration of Human Rights states, “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through the media and regardless of frontiers.” The right to freedom of expression is also set forth in Article 19 of the Covenant on Civil and Political Rights, Article 9 of the African (Banjul) Charter, Article 13 of the American Convention, and Article 10 of the European Convention. For a more detailed discussion of freedom of expression, see **Chapter III: “Applicable International Human Rights and Humanitarian Law: The Framework”** of this Manual and *The Article 19 Freedom of Expression Manual* (1993).

C. Standards for use of force by law enforcement officials

8. Generally, both local and national **authorities have the power to control demonstrations in the interest of restoring public order**. In some countries (including continental Europe, Japan, and the United States), police forces have specialized para-military riot control squads trained to handle demonstrations.¹

9. Some international standards for the use of force by law enforcement officials are set forth in the Code of Conduct for Law Enforcement Officials, adopted by

¹Robert Reiner, “Forces of Disorder: How the Police Control “Riots””, 52 *New Society* 914, 951 (1980).

General Assembly resolution 34/169 of 17 December 1979. Pursuant to Article 2 of the Code of Conduct for Law Enforcement Officials, “In the performance of their duty, law enforcement officials shall **respect and protect human dignity and** maintain and uphold the **human rights** of all persons.” Article 3 states that, “Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty”. Commentary (b) to Article 3 discusses the proportionality principle and proclaims, “In no case should this provision be interpreted to authorize the use of force which is disproportionate to the legitimate objective to be achieved.”

10. Principle 12 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990) states,

“As **everyone is allowed to participate in lawful and peaceful assemblies**, in accordance with the principles embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Governments and law enforcement agencies and officials shall recognize that force and firearms may be used only in accordance with principles 13 and 14.”

11. Pursuant to Principle 13, “**In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.**”

12. Principle 14 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that, “**In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary.** Law enforcement officials shall not use firearms in such cases, except **under conditions stipulated in principle 9.**”² For more detailed and very pertinent standards on the use of force by law enforcement officials, see **Chapter IV-2-C: “Limits on the use of force by government officials to prevent arbitrary executions”**.

D. Challenges in monitoring demonstrations

1. Purpose of monitoring demonstrations

13. Monitoring demonstrations may be one of the most difficult tasks for HROs. The **goal** of the HRO is to **monitor respect for freedom of assembly and peaceful**

²Principle 9 states that, “Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”

demonstration. Yet the role of the HRO may be complicated by the actions of the demonstrating crowd and law enforcement officials.

14. The HROs' presence is intended to ensure freedom of expression and assembly. *It is the officers' duty to verify that the authorities are not interfering with freedom of assembly and peaceful association.* Also, assemblies are a common means of expressing opposition to human rights abuses and thus can be an important step towards improving the situation.³ In any case, the **presence of HROs is not affected by the legality or illegality of the demonstration or meeting under national or local law, or whether the authorities have been notified.** Hence, HROs **should not express any opinion** on the legality or illegality of demonstrations under national or local law. In addition, HROs should **neither encourage nor discourage** people who express their intention or desire to hold a meeting or to form a peaceful demonstration. HROs are only authorized to observe whether rights are respected and to detect violations. **HROs should never participate in or associate themselves with demonstrations.**

15. Unfortunately, past experience has shown that in some situations, *the mere presence of UN HROs may be enough to spark a spontaneous demonstration.* HROs need to be cognizant of the fact that the UN insignia on clothing and vehicles may actually create a demonstration. Demonstrators may gather in the belief that the UN symbol offers protection and authorizes an assembly. HROs may, therefore, decide to observe a particular demonstration from a distance. In any event, *HROs should be constantly aware of their location; they should have an escape plan in case the crowd overcomes or attempts to surround them.*

2. Before the demonstration

16. Upon receipt of information that a demonstration is being organized, the HROs **should be available to proceed to wherever the demonstration is taking place** — whether it is in a public place or on private property.

17. If possible, the HRO should **establish contact in advance with the organizers and collect information** about the scenario, including the site, planned activities, route, number of participants, duration, goals, expected response of the authorities, and alternative courses of action.

18. The HROs should **explain** to the organizers **that the officers and their vehicles will stay at a prudent and sufficient distance** from the demonstration. If possible, HROs should request that the organizers advise demonstrators to avoid approaching the field operation vehicles and to avoid behaviour that could involve the officers in the demonstration, and impede them from carrying out their task.

19. During the days preceding the demonstration, HROs **should acquaint themselves with the route planned by the organizers.** Familiarity with the route will assist the HROs in identifying possible difficulties, dangers, and escape routes. In addition, officers can identify the best radio frequency or means of communication for the area.

³See Diane Paul, *Beyond Monitoring and Reporting, Strategies for the Field-level Protection of Civilians Under Threat* (1996).

20. Such a preliminary visit to scout the route should, however, be **carried out with the utmost prudence and discretion**. It should not be carried out on the day of the demonstration. In addition, to avoid revealing the proposed route, the preliminary visit should include other streets and areas of the town. For the same reason, HROs should avoid any conversation, sign, or indication that might enable anyone to identify the route. Furthermore, nothing should be communicated to the civilian or military authorities about the demonstration or the HROs' plans regarding the demonstration, except with regard to the matters mentioned in para. 16 above.

21. When studying the route during the preliminary visit, the HRO should give the driver specific instructions to take into consideration all possible scenarios for the demonstration, the approach of the UN officers, and **escape routes**. If at all possible, driver(s) who are well acquainted with the area should be used.

3. During the demonstration

22. On the day of the demonstration, HROs must **avoid participating or being seen to participate in any way**. They must make every effort to be *viewed as observers, and not as demonstrators*. The HROs must avoid encouraging the demonstration with their presence. They must take actions that discourage the demonstrators from taking risks which could have uncontrollable consequences. For example, HROs should not photograph or video tape demonstrations. The use of a camera could lead some people to “act for the camera”.

23. The HROs should **keep a prudent and sufficient distance between themselves and the demonstrators**, as well as between themselves **and the military and/or the police**. The *observers should be both visible and discreet*. Too much exposure could be perceived as participation, and encouragement, or could aggravate the situation. Too little visibility, however, would hinder monitoring and limit any potential deterrence of repression.

24. If the HROs risk serious danger, they should leave the scene and take a position outside the danger zone. In all cases, officers should avoid remaining in the same place; they should attempt to maintain a certain mobility. If possible, officers should use several vehicles and park them at different points near the demonstration route.

25. HROs **should be aware of** or inquire as to **the identity of the police chief or of the responsible authority**, so that they know who to approach about difficulties and should later include this information in the report.

26. HROs should discuss in advance and **decide whether it would be prudent to park a vehicle or station a UN officer near the barracks or jail in order to observe the arrival of any arrested demonstrators**. This suggestion is optional because: (1) parking near the barracks/jail could be considered as provocative by the authorities and could trigger reprisals; (2) this observation post is not necessarily the best as there is no way to verify that the people brought in were arrested during the demonstration; and (3) implementing this suggestion could be particularly difficult in a locality where there are many potential places of detention.

27. If arrests take place during or after a demonstration, it is essential to **try to obtain the name(s) of persons arrested**, and possibly the names of witnesses to the arrest. In order to do so, the HRO should proceed cautiously and avoid any behaviour or language likely to exacerbate an already tense situation. HROs should **visit detention centres** where the arrested persons have or might have been brought. If HROs are refused entry to detention centres, they should neither impose themselves nor remain outside waiting for admission. (See **Chapter IX: “Visits to Persons in Detention”**.)

28. HROs should **keep frequent and regular radio contact with the operational base**. Officers should use coded messages and avoid the use of important words of which the sense can easily be understood by the authorities or the demonstrators who may overhear the radio. Furthermore, if possible, the officers should verify that they are not being taped.

4. After the demonstration

29. Following the demonstration, the HROs who attended the demonstration should **write a detailed report**. The written report should be as precise as possible and include the following information:

- ✓ place;
- ✓ date;
- ✓ hour;
- ✓ organizations calling for the demonstration;
- ✓ reasons;
- ✓ goals;
- ✓ slogans;
- ✓ number of demonstrators;
- ✓ attitude and behaviour of armed forces, and;
- ✓ subsequent threats or provocations against the UN HROs.

30. Any additional information on the demonstration and its effects which reaches the HROs in the days following the demonstration should also be included in follow-up reports.

31. **Special attention** should be devoted to **cases of persons arrested, beaten, ill-treated, etc., during a demonstration**. The HROs should visit them where they have been taken: hospital, detention centre, etc. The same rules apply to the follow-up of cases in which persons are hospitalized or detained after a demonstration as apply to inquiries and reports about individual cases (see **Chapter VIII: “Interviewing”**). With regard to detained persons, the rules concerning prompt visits to prisons to see individual prisoners (see **Chapter IX: “Visits to Persons in Detention”**) should be followed.