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Observing Elections in “Long-Standing Democracies”: Added Value or Waste of Money?

Introduction

Election observation has been the signature activity of the OSCE Office for Democratic Institutions and Human Rights (ODIHR) since its establishment in the early 1990s. ODIHR has sent experts and observers to over 200 electoral events during the past two decades. The presence of international observers serves to increase the transparency of election processes, deter fraud, identify shortcomings, and provide recommendations on improvements.

Initially, election observation focused on the new democracies that emerged in Central and Eastern Europe, South-eastern Europe, and on the territory of the former Soviet Union in the early 1990s. In fact, the development of the instrument of election observation by the OSCE’s participating States was intrinsically linked to the historic transition processes in this region. The presence of international election observers was considered an important component of domestic and international efforts to advance democratic reforms. Given the region’s legacy – a decades-long submergence under bogus “people’s democracies” or outright dictatorships – the initial geographic focus responded to the needs on the ground and was uncontroversial at the time.

But more recently – and largely unnoticed by the broader public – ODIHR has also sent observers to an increasing number of countries with longer democratic traditions in Western and Southern Europe and North America. As of August 2010, ODIHR had been engaged in various types of election assessments in a staggering 52 out of 56 participating States.¹

Recognizing that democracy and institution-building are processes devoid of finality in all countries, the deployment of monitoring missions² to what is generally referred to as “long-standing” democracies has in the meantime become routine. Nevertheless, it still raises eyebrows among polit-

Note: This article reflects the authors’ opinions and not necessarily those of the OSCE or the Office for Democratic Institutions and Human Rights (ODIHR).

1 This includes needs assessment missions, the assessment of European Parliament elections at the national level, and other forms of assessment. No election activity of any sort has so far taken place in the following participating States: Andorra, Monaco, San Marino, and the Holy See. For a list of all election reports published, see <http://www.osce.org/odihr/elections/43772>.

2 The terms “observation” and “monitoring” are generally used in a broader sense in this article, encompassing all forms of activities aimed at observing or assessing electoral processes. For a discussion of the different formats used by ODIHR and the related terminology, see the section of this contribution on *Methodological Developments*.

icians, the media, and the general public in some of the countries that find their election processes subjected to international scrutiny.

For example, the first-ever deployment of an ODIHR election mission to Austria in the spring of 2010 sparked heated debate in the Austrian media. A prominent columnist for the country's most-read newspaper asked: "Do you, OSCE, believe our functioning Austria is a post-communist filthy mess, a banana republic of south-American character, a central-African pseudo-republic of dull machinations and corruption whose citizens and functionaries need you to conduct a clean presidential election?"³ Although such strong reactions are the exception, the columnist expressed sentiments that in various forms have occasionally surfaced in conversations, comments, and media reports on international observers in "established democracies".

The questions most often asked are: Why is it necessary to send observers to assess elections in countries where democracy is already firmly rooted? Where is the added value? Does this not infringe on national sovereignty? Is it really, as one commentator put it, "one way of de-funding ODIHR by forcing it to spend limited resources on unnecessary missions"?⁴

This article aims to give answers to these questions by probing more deeply into the rationale for observing elections in "long-standing democracies". The assessment of the 2009 *Bundestag* elections in Germany will serve as a case study.

Normative Basis

The 1990 CSCE Copenhagen Document established a set of election-related commitments, obliging participating States to follow certain rules of conduct and to support, protect, and promote individual rights necessary for achieving democratic elections. The consensus of Copenhagen, inspired by the political changes of 1989, aimed at creating democratic conditions across the whole continent within the foreseeable future. Democratic elections were framed as a function of legitimate government – "the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government"⁵ – and democracy was, in the same year, confirmed as "the only system of government of our nations".⁶ This almost-complete triumph of the democratic method in the northern hemisphere may have been among the most profound events of the twentieth

3 Post von Jeannée, *Kronen Zeitung*, 31 March 2010, p. 12 (author's translation).

4 Vladimir Socor, Moscow Prepares OSCE "Reform" Proposals for the Summit in Kazakhstan, in: *Eurasia Daily Monitor*, 4 August 2010.

5 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, in: Arie Bloed, (ed.), *The Conference on Security and Co-operation in Europe. Analysis and Basic Documents, 1972-1993*, Dordrecht 1993, pp. 439-465, here: p. 444 (para. 6).

6 Charter of Paris for a New Europe, Paris, 21 November 1990, A new Era of Democracy, Peace and Unity, in: *ibid.*, pp. 537-566, here: p. 537.

century. It was, in the words of Thomas Franck, “the unanswerable response to those who have said that free, open, multiparty, electoral parliamentary democracy is neither desired nor desirable outside a small enclave of western industrial states”.⁷

The Copenhagen Commitments require states to periodically conduct genuine elections that are free and fair, based on universal and equal suffrage, and in which the secrecy of the ballot is ensured.⁸ The then 35 CSCE/OSCE participating States took a historic step in Copenhagen, agreeing on a set of criteria for democratic elections that at the time were more advanced than any undertaken by any other intergovernmental agreement.⁹ It represented a yardstick for measuring the quality of electoral events, consisting of clear principles against which to evaluate an electoral process regardless of its ultimate outcome. The Copenhagen Document thus crystallized the evolution of an international system that defined the minimal prerequisites of an electoral process capable of validating the exercise of power.

The Copenhagen Document also introduced the notion of monitoring compliance with the novel rule system: The participating States agreed to invite international observers to assess their elections.¹⁰ At the 1994 Budapest Summit, the participating States specified that ODIHR should play an enhanced role in election monitoring “before, during and after elections”.¹¹ At the 1999 OSCE Istanbul Summit, the participating States specifically committed themselves to invite ODIHR to observe their elections. Recognizing that observation of elections is not an end in itself but is designed to lead to improved electoral practices, they added another important new commitment, namely the commitment to “follow up promptly the ODIHR’s election assessment and recommendations”.¹²

These commitments, voluntarily undertaken by all OSCE participating States, are not limited in terms of geography, history, socio-economic trajectory, or cultural specificities. They apply to all participating States equally and without exception. This means that all participating States – new and “long-standing democracies” alike – are bound by the same election-related

7 Thomas M. Franck, *The Emerging Right to Democratic Governance*, in: *American Journal of International Law* 1/1992, pp. 46-91, here: p. 49 (para. 5).

8 Copenhagen Document, cited above (Note 5), paras 6, 7.

9 For a comprehensive collection, see: ODIHR, *Existing Commitments for Democratic Elections in OSCE Participating States*, Warsaw 2003, which gives an annotated inventory organized along the different stages of an electoral process.

10 Cf. Copenhagen Document, cited above (Note 5), para. 8; Organization for Co-operation and Security in Europe, *Charter for European Security*, Istanbul, November 1999, in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook 2000*, Baden-Baden 2001, pp. 425-443, here: p. 433 (para. 25).

11 Organization for Security and Co-operation in Europe, *Budapest Document 1994*, Budapest, 6 December 1994, in: Arie Bloed, (ed.), *The Conference on Security and Co-operation in Europe. Analysis and Basic Documents, 1993-1995*, The Hague 1997, pp. 145-189, here: p. 177 (para. 12).

12 *Charter for European Security*, cited above (Note 10), p. 433 (para. 25). See also the ODIHR discussion paper *Follow up on the Implementation of OSCE/ODIHR Recommendations*, 24 May 2007.

standards and are obliged to accept international scrutiny of their electoral processes. The CSCE/OSCE participating States thus clearly linked the recognition by governments of a democratic entitlement to the validity of their right to govern, implying the illegitimacy of regimes that deny their citizenry basic democratic rights.¹³ As a consequence, the new commitments created expectations on the part of citizens that looked to an international organization to guarantee their democratic entitlement.

Observation-Related Issues in the International Constitutional Conversation

International organizations regularly serve as platforms for what has been termed the “international constitutional conversation”.¹⁴ They interpret norms and promote their implementation by states that have consented to them. A state, on the other hand, evaluates the interpretation of norms under its internal constraints and agrees – or disagrees – with the interpretation offered. In ideal circumstances, a domestic agreement results in a change of behaviour in conformity with the norm; in the vernacular employed by international organizations, behavioural change of this kind is termed “follow-up”.

As part of an international organization mandated to observe elections across the northern hemisphere, ODIHR promotes norms of democratic governance agreed by all of its members, and can therefore be understood as falling within the definition of “norm entrepreneur”. It conducts election observation as a form of assistance to bring states’ laws and practices in line with the norms to which they themselves have agreed. ODIHR’s mandate was conceived around the objective of linking international and domestic norm tables – a process which has been described as “norm cascades”.¹⁵ Election observation can, and has, set in motion such norm cascades in a way that domestic decision-making becomes positively linked to the recommendations of international experts. In order to ensure that norms continue to “cascade”, cooperation between the domestic and the international levels is crucial.

This, in a few words, summarizes the rationale behind election observation and ODIHR’s assistance work. The pattern of international constitutional conversation between the country holding elections and the organization observing them indicates a strong positive correlation between norm promotion by election observation bodies and domestic change. Although primarily a benign compliance tool lacking any enforcement role, election observation

13 See Copenhagen Document, cited above (Note 5), para. 6.

14 Andraž Melanšek, *Election observation in Europe: A case of the impact of implementation procedures on norm development*, M. Phil Thesis on file with the University of Cambridge, July 2007, p. 22.

15 Martha Finnemore/Katharyn Sikkink, International Norm Dynamics and Political Change, in: Peter J. Katzenstein/Robert O. Keohane/Stephen D. Krasner (eds), *Exploration and Contestation in the Study of World Politics*, pp. 247-277, Cambridge, Mass., 1999, here: pp. 262-264.

turned out to employ the mechanics of “legitimacy pull” for the spread of human rights, hence impacting upon the substance of norms of democratic governance themselves.¹⁶

Two decades into norm promotion, ODIHR has collected a robust repertoire of practices and norm interpretations, and developed a wide array of observation formats to fit almost every aspect of an election process,¹⁷ ranging from the review of legal frameworks of elections, mostly in co-operation with the Venice Commission of the Council of Europe, via observation of the vote count and tabulation, to following complaints and challenges to election results. ODIHR offers concrete advice for improving a given state’s electoral performance (“change of behaviour”) through targeted recommendations in the following areas:

- effective protection of fundamental freedoms, such as the freedoms of association, peaceful assembly, and expression;
- effective protection of the civil and political rights of candidates and voters, as well as of election workers and journalists;
- compilation of accurate and up-to-date voter lists;
- equal opportunities for candidates to campaign in a free environment;
- equitable access to the media for all candidates;
- unbiased coverage by the media, especially state-controlled media;
- unhindered access for international and domestic election observers;
- effective representation and participation of women;
- inclusion of national minorities;
- access for disabled voters;
- honest and transparent counting and tabulation of votes;
- effective complaints and appeals processes through an independent judiciary;
- overall transparency and accountability that instils public confidence;
- development and application of new voting technologies in a manner that is transparent, accountable, and in line with OSCE commitments.

These component parts of an electoral cycle have been thus disaggregated to enable the systematic determination of whether key rights are ensured and whether the performance of an election management body is in line with OSCE norms.¹⁸ Broadly speaking, these issues represent the topics of an “international constitutional conversation” in the context of an election as-

16 Cf. *ibid.*, pp. 77, 81.

17 For an entirely new format employed to observe an electoral event in the 27 member states of the European Union see OSCE Office for Democratic Institutions and Human Rights, *Elections to the European Parliament, 4-7 June 2009, ODIHR/OSCE Expert Group Report 11-30 May 2009*, Warsaw, 22 September 2009, available at: <http://www.osce.org/odihr/elections/eu/38680>.

18 Cf. Jørgen Elklit/Andrew Reynolds, *Analysing the impact of election administration on democratic politics*, in: *Representation* 1/2001, pp. 3-10, here: p. 8.

assessment. When ODIHR deploys a mission, each issue defines an area through which norm interpretation is communicated to a state; the state, in turn, responds to critiques, remarks, and recommendations, either rejecting or accepting ODIHR's specified assessment of compliance with OSCE norms, which sometimes results in the reform of domestic law and/or changes to administrative practice.

Origins of Election Observation in "Long-Standing Democracies"

In the years following the creation of ODIHR in 1991, countries undergoing democratic transition were the natural focus of election observation. This reflected the assumption that the need for independent observation was greatest in states with limited experience and capacity to organize democratic elections. In contrast, "long-standing democracies" with their highly developed and differentiated systems of governance and effective horizontal accountability mechanisms were deemed able to effectively resolve the problem of leadership succession without turmoil and without extraordinary discontinuities in policy and political organization; their elections were hence not eligible for priority observation.

The argument was not always self-evident. Indeed, a large canon of literature on democratic overload posits that democracy engenders costly and destabilizing power-struggles among subgroups – particularly in countries with unresolved minority issues.¹⁹ But given that the institutionalization of power in developed democracies is closely linked to the establishment of the rule of law, it was automatically assumed that an election process and its results would either not be subject to contestation, or that any dispute that did arise would necessarily be resolved in a peaceful and equitable manner. Election resources, including access to money, the media, and voters, were also presumed to be allocated in a fair manner, thus apparently making the effort of observation in "long-standing democracies" pointless.

Two major developments led to a departure from a practice that saw OSCE's observation activities focusing exclusively on elections in countries that emerged from a non-democratic past in the early 1990s, and to a revision of the earlier assumptions underlying the operationalization of election observation. First, the contested 2000 presidential election in the United States revealed numerous shortcomings, particularly in Florida, and thus made clear that elections in "established democracies" are by no means immune to severe problems. Second, a number of participating States began to argue more forcefully that in order to avoid double standards, ODIHR should observe elections not only in one particular subregion, but across the entire OSCE

19 Cf. e.g., Michael Crozier/Samuel Huntington/Joji Watanuki, *The Crisis of Democracy*, New York 1975; Jack Snyder, *From Voting to Violence: Democratization and Nationalist Conflict*, New York 2000.

area. At a minimum, they argued, “long-standing democracies” should not be shielded from an objective assessment of, and regular check-ups on, the state of their democracy, and particularly the state of their election-related procedures and practices. Excluding one group of countries by default from election-related scrutiny would run against the principle of sovereign equality of all states enshrined in the 1975 Helsinki Final Act.²⁰

These arguments were convincing. The OSCE, priding itself on the quality of its systematic political dialogue, could not engage in “norm entrepreneurship” and “constitutional conversation” in a geographically biased manner. The assumption that “long-established” democracies regularly employ well-tested practices that enjoy the overall confidence of their electorates was challengeable.

Since the early 2000s, ODIHR has therefore gradually expanded its activities to follow electoral developments in a much broader range of participating States. The first time ODIHR conducted an election assessment in a longer-standing democracy was in Cyprus in the spring of 2001. A small *technical mission* visited Cyprus to assess the pre-election environment in light of OSCE commitments. On the basis of this assessment, the mission recommended that no *election observation mission* be deployed.²¹ In the following year, ODIHR sent *election assessment missions* to France (for the 21 April presidential election), Turkey (for the 3 November parliamentary elections), and the United States (for the 5 November general elections).²² These missions consisted of small teams of up to a dozen election experts who stayed in the country for about a week around election day. Unlike standard election observation missions, which provide a comprehensive assessment of the entire electoral process, these early assessment missions focused on selected issues and aimed at highlighting good practices. For example, the mission to the United States was tasked to “assess the measures the authorities and civil society had undertaken to address the challenges of the 2000 presidential election and to learn from any examples of good practice that may

20 Criticism of ODIHR observation activities began after its assessments of the Duma and Presidential elections in the Russian Federation in 2003 and 2004, and its reporting on fraud in the Georgian parliamentary elections of 2 November 2003, and was reflected in the CIS Summit Document of June 2004 which claimed that ODIHR’s election observation activities were politically motivated. Criticism towards ODIHR has largely focused on its election observation mandate and methodology, rather than on the substantive findings of its reports. Calls for more transparency and accountability, combined with allegations that ODIHR applies “double standards” – i.e. a lack of “geographic balance” or “equal treatment of participating States” in regard to election observation – continue. For a recent account see Frank Evers, OSCE Election Observation. Commitments, Methodology, Criticism, in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook 2009*, Baden-Baden 2010, pp. 235-255.

21 Cf. OSCE Office for Democratic Institutions and Human Rights, Republic of Cyprus, Parliamentary Elections, 27 May 2001, *Report of OSCE/ODIHR Technical Mission, 13-16 March, 2001* Warsaw, 6 April 2001.

22 The relevant reports can be found at: <http://www.osce.org/odihr/elections/43772>.

have been put in place.”²³ It focused on Florida, given the problems that occurred there in 2000, but also visited federal institutions and representatives of civil society in Washington, DC.

The reports on the missions to Turkey and the United States explicitly state that ODIHR accepted the invitation to send observers “in line with its new program of assessing electoral practices in established democracies in addition to observation missions deployed in countries in transition”.²⁴

From 2002 onwards, the assessment of elections in longer-standing democracies has become a routine exercise. During the following years, assessment missions were deployed to an increasing number of countries falling in this category.

Methodological Developments

In parallel to the expansion of its monitoring activities, ODIHR adjusted and developed its election observation methodology in order to be able to respond appropriately to the needs identified in specific circumstances, including those typically connected with elections in countries with longer democratic traditions. The results of this process were described for the first time in the fifth edition of ODIHR’s Election Observation Handbook, published in 2005, and further developed in the Handbook’s sixth edition, which was published in June 2010.²⁵ In addition to traditional full-scale *election observation missions* (EOMs) with core teams of experts and long-term and short-term observers, the ODIHR standard methodology was expanded to include various other assessment/observation mission formats. Most prominent among these are *limited election observation missions* and *election assessment missions*.²⁶

The development of new formats was necessary as the standard EOM – the tool developed in the 1990s for the specific needs of countries in transition – turned out to be of limited use in other contexts. For example, in a country with high levels of public confidence in the electoral process, a credible domestic observation effort, effective checks and balances, and little concern about possible irregularities during voting and the vote-count, a large-scale observation mission with the presence of hundreds of short-term observers on election day is not needed.

In order to determine which format may be most useful for a specific national context, ODIHR developed the *needs assessment missions* (NAMs)

23 OSCE Office for Democratic Institutions and Human Rights, United States of America, General Elections, 5 November 2002, *OSCE/ODIHR Election Assessment Mission Report, Implementation of Election Reforms*, Warsaw, 15 January 2003, p. 1, available at: <http://www.osce.org/odihr/elections/usa/16362>.

24 *Ibid.*, p. 2.

25 OSCE/ODIHR, *Election Observation Handbook*, fifth edition, Warsaw 2005, sixth edition, Warsaw 2010, available at: <http://www.osce.org/odihr/elections/68439>.

26 Other formats include expert support teams and ad-hoc formats for specific electoral events such as European Parliament elections.

as an important element of its expanded methodology. In the run-up to an election, ODIHR sends a small team of experts to the country in question to assess the overall electoral framework and advise on the usefulness and scope of observation. In making its recommendation, the NAM takes the following criteria into account:

- the extent to which recommendations from previous ODIHR election observation activities have been implemented;
- the pre-election environment, including the extent to which human rights and fundamental freedoms, as they relate to the upcoming election, are respected by the state;
- the legal framework for elections, including any amendments made since the last election;
- the composition and structure of the election administration, the status of its preparations for the election and the extent of public and political confidence in its impartiality, independence, efficiency, and professionalism;
- the level of political pluralism and whether the field of candidates and parties expected to contest the elections represents a genuine choice for voters;
- the status of the media and their expected role in the elections;
- the existence of effective check-and-balance mechanisms, such as pluralistic and independent media, access to effective legal remedies, a vibrant civil society, and domestic observation;
- any election-related concerns expressed by election stakeholders and other issues of particular relevance, such as voter registration, the candidate/party registration process, the participation of women, the participation of minorities;
- the degree to which interlocutors believe that ODIHR election-observation activity can serve a useful purpose and add value; and
- the overall security situation.²⁷

The systematic use of NAMs to determine observation needs across the entire region marked the end of the exclusive post-Cold War focus on elections in “transition countries”. It institutionalized, on a sound methodological basis, the broadening of the geographic scope of election observation. In a political environment characterized by significant sensitivities surrounding the issue of election observation, this new approach was also meant to dispel concerns about regional bias or “double standards”. As the NAMs base their recommendations on a set of objective and transparent criteria that are applied to all OSCE countries equally, irrespective of whether they are “new” or “old” democracies, the decision on where to observe and what format to apply is made

27 Cf. *Election Observation Handbook*, cited above (Note 25), pp. 27-28.

in response to real needs (rather than by default on the basis of categories of countries).

On the basis of their findings, NAMs generally recommend the use of one of the three main formats foreseen in ODIHR's methodology.²⁸ Full-scale EOMs are deployed in cases where the NAM identifies limited confidence among election stakeholders in the election administration, the long-term process, and election-day proceedings, and where the presence of observers could enhance public trust in the process. EOMs are the most frequent and comprehensive form of ODIHR observation activity. An EOM assesses the conduct of elections for their compliance with OSCE commitments, other international standards for democratic elections, and national legislation. It also offers concrete recommendations for possible improvements. A standard EOM is composed of a core team of analysts, long-term observers, and short-term observers. It is usually deployed from six to eight weeks before election day and follows all key aspects of an electoral process: the legislative framework, candidate and voter registration, the campaign, the role of the media (including comprehensive media monitoring), the election administration, election dispute resolution, participation of women and national minorities, and the voting, counting, and tabulation process on election day, as well as post-election complaints and appeals. An EOM issues *interim reports* before election day and a *statement of preliminary findings and conclusions* immediately afterwards. A comprehensive *final report* is issued approximately two months following the completion of the election process. The final report provides concrete recommendations for improving the process.

A *limited election observation mission*, or LEOM, may be deployed where the NAM determines that serious and widespread problems on election day at the polling-station level are unlikely, but that observation of the entire long-term process throughout the country might still produce useful recommendations. LEOMs do not include short-term observers, as there is a high level of public confidence in election-day activities and little concern about systematic election-day problems. Conversely, the decision to deploy an LEOM may be made when the NAM has concluded that conditions have not been established for a meaningful election-day process and that the deployment of short-term observers will not bring any added value. However, the electoral process may nonetheless benefit from a comprehensive assessment and subsequent recommendations, especially where there is political will to engage in a post-election dialogue about recommendations for improving the general conduct of elections. LEOMs consist of a core team of analysts in the capital and long-term observers deployed across the country. While LEOMs do not conduct systematic election-day observation, the duration of the mis-

28 For the following, see *ibid.*, pp. 29-32.

sion, the composition of the core team, and other aspects follow the model of a standard EOM.

Unlike an EOM or an LEOM, an *election assessment mission*, or EAM, does not observe the entire election process, but focuses on specific issues identified by the NAM. An EAM does not draw an overall conclusion about the compliance of an election with OSCE commitments, other international standards, and national legislation, but assesses selected issues based on these standards and provides recommendations for improvements. An EAM is normally deployed in situations where election stakeholders express full confidence in the election process and the impartiality and transparency of the election administration, and where political pluralism, respect for fundamental freedoms, effective democratic institutions, free, independent media, and a vibrant civil society are noted by a NAM. Although there may be no added value in a long-term presence or the deployment of short-term observers, there may still be issues worth examining. This could include the legal framework for elections, the media environment, minority rights, campaign finance, the use of new technologies in voting and counting processes, and election dispute resolution. Conversely, an EAM can also be deployed in a situation where there is a willingness to engage in co-operation, but where the current political spectrum does not offer the electorate a genuine choice between competing political alternatives, where previous OSCE/ODIHR recommendations remain unaddressed, where there is no progress in bringing the legal framework closer in line with OSCE commitments, or where observation activities, even of limited nature, are unlikely to add any significant value. An EAM generally consists of a team of around a dozen analysts, who visit a country and some of its regions for approximately two weeks, including election day. However, the format and the scope of an EAM are issue-driven, so the size, composition, and duration may differ from mission to mission. Team members are generally deployed in pairs for several days outside the capital to collect information, and to assess election preparations and the conduct of the campaign at the regional level. Team members also visit a few polling stations on election day but do not conduct any systematic and comprehensive election-day observation. An EAM, due to its limited scope and shorter duration, does not attempt to comment on an election process in the same comprehensive manner as an observation mission. An EAM does not issue interim reports or a public statement immediately following election day, nor does it hold press conferences. An EAM does, however, issue a final report approximately two months following the completion of the election process. The final report provides concrete recommendations for improving the process.

Case study: Assessment of the 2009 Parliamentary Elections in Germany

The assessment of the September 2009 parliamentary elections in Germany can serve as an illustration of how ODIHR's expanded methodology works in practice.²⁹

In conformity with Germany's OSCE commitments, on 9 January 2009, the government – through its delegation to the OSCE – invited ODIHR to monitor the elections. Following the receipt of the invitation, ODIHR conducted a NAM in Germany from 15 to 17 July 2009. The NAM was composed of one ODIHR staff member and two external election experts. The mission met with representatives of the structures responsible for organizing the elections as well as with representatives of political parties and the media to assess the pre-election environment and the preparations for the elections.

In a report published on 5 August, the NAM noted a “high level of confidence in the overall integrity of the electoral process”³⁰ among all interlocutors and concluded that the legal framework “appears to provide a sound basis for the conduct of democratic elections”.³¹ According to the report, political parties confirmed that they are able to compete on a level playing field and have equitable access to the media. However, the report also highlighted that campaign financing is left unregulated by the election legislation, with no ceilings on total campaign expenditure and no restrictions on sources of income. It also stated that while a number of legal provisions emphasize the public nature of the electoral process and do not preclude election observation by any interested parties, the electoral legislation does not contain explicit provisions for the presence of observers. The NAM further reported that interlocutors welcomed the possibility of an observation activity, stating that such an activity would underscore the overall transparency of the process and would present an opportunity to review the existing electoral practices in Germany.

Based on these findings, the NAM recommended the deployment of an election assessment mission, saying that the mission should focus particularly on the legal framework, administration of elections, campaign financing, postal voting, and access for observers. Given that none of the interlocutors expressed any concerns related to the conduct of election day itself, the NAM concluded that comprehensive and systematic observation of election day was not necessary.

29 See also Hans-Jörg Schmedes, Wählen im Blick Europas. Die Beobachtung der Bundestagswahl 2009 durch die OSZE [Voting under Europe's Gaze, The Observation of the 2009 Bundestag Elections by the OSCE], in: *Zeitschrift für Parlamentsfragen* 1/2010, pp. 77-91.

30 OSCE Office for Democratic Institutions and Human Rights, *Federal Republic of Germany, Elections to the Federal Parliament (Bundestag), 27 September 2009, OSCE/ODIHR Needs Assessment Mission Report, 15-17 July 2009*, Warsaw, 5 August 2009, p. 2, available at: <http://www.osce.org/odihr/elections/germany/38397>.

31 *Ibid.*, p. 1.

The decision to send an election mission to Germany for the first time received significant attention from the German public. The decision coincided with a debate in Germany about the exclusion of a number of small parties from the elections. Several media reports tried to establish a link between the two issues, implying – incorrectly – that the controversial exclusions triggered ODIHR’s decision to send observers to Germany.³² This episode raised public awareness of the presence of international observers in the country and brought about a level of media interest in the work of the mission that is unusual for countries where ODIHR deploys EAMs. Due to their small size, their technical nature, and the fact that there is no public statement immediately after election day, EAMs generally receive little public attention.

During the following weeks, ODIHR recruited a team of 15 election experts from 13 OSCE participating States. The mission, led by the former ODIHR Director and Swiss diplomat Ambassador Gérard Stoudmann, commenced work on 13 September and remained in the country until 1 October. During these two-and-a-half weeks, the experts analysed the electoral legislation and met with all key stakeholders in the election: representatives of the election administration at all levels, the judiciary, political parties, and the media. Regional experts visited all 16 states (*Länder*).

The final report, published on 14 December, concluded that the elections “confirmed a solid experience in conducting democratic elections”.³³ The mission noted that the elections demonstrated an “open, pluralistic and competitive process, founded on the respect for fundamental freedoms, equitable conditions for all contestants, the efficiency and professionalism of the election administration as well as a high level of public confidence in the overall integrity of the electoral process”.³⁴

While it confirmed that the legal framework is comprehensive and provides a sound overall basis for the conduct of democratic elections, the report highlighted some aspects that could benefit from revision.

In particular, the mission expressed concern that the legislation does not provide for the judicial review of decisions made by the election administration before election day. Final decisions by courts on complaints pertaining to the election are only possible *after* the election, at which point the only course of action available to rectify a mistake or violation identified would be to invalidate the results of the election and repeat the polling. The report con-

32 See, for example: OSZE-Wahlbeobachter prüfen Nichtzulassung von Parteien zur Bundestagswahl [OSCE Election Monitors Examine Exclusion of Parties from Bundestag Election], in: *Financial Times Deutschland*, 10 August 2009; Parteien-Zulassung: OSZE schickt Wahlbeobachter nach Deutschland [Admission of Parties: OSCE Sends Observers to Germany], in: *Spiegel Online*, 9 August 2009, at: <http://www.spiegel.de/politik/deutschland/0,1518,641353,00.html>.

33 OSCE Office for Democratic Institutions and Human Rights, *Federal Republic of Germany, Elections to the Federal Parliament (Bundestag), 27 September 2009, OSCE/ODIHR Election Assessment Mission Report*, Warsaw, 14 December 2009, p. 1, available at: <http://www.osce.org/odihr/elections/germany/40879>.

34 Ibid.

cluded that this diminishes the access of citizens to timely and effective remedy as prescribed by OSCE commitments and other international standards, and recommended revising the appeals arrangements so that at least certain types of complaints, in particular those related to the eligibility of parties and the registration of candidates and voters, could be adjudicated by a judicial body before the election.

The mission also commented on provisions for the registration of political parties, saying that the existing criteria are formulated in overly general and merely descriptive terms, and do not set specific and measurable requirements. In addition, the body in charge of party registration is composed largely of party nominees, making the process essentially a “peer review” in which members of established parties make decisions affecting their competitors. The report noted that this arrangement is not immune from conflicts of interest, and recommended the elaboration in law of a set of precise, objective, and measurable criteria to determine which parties and associations are eligible to participate in elections.

Furthermore, the experts found that there are no specific legal provisions regulating campaign financing and no limits on campaign expenditure. The report recommended introducing requirements for the immediate publication of information on large donations and the speeding-up of the publication of parties’ annual reports.

Although in practice there are no restrictions on observers following the election process, the mission recommended amending the election legislation so as to explicitly provide access for international and domestic non-party observers to all stages of the electoral process.

The 26-page final report, which includes a total of twelve recommendations, was submitted to the German authorities and made public. There was some coverage of the report in the German media, mostly focusing on the mission’s recommendations on party financing.³⁵ In early January 2010, the German interior minister confirmed in a letter to ODIHR that the German authorities would take the report’s recommendations into account in the context of a planned electoral reform initiative.

The mission’s findings and recommendations as well as the German authorities’ positive reaction and the strong interest exhibited by the media represent an example of the usefulness of election assessments in countries with a tradition of democratic elections. The example shows that the presence of international experts can indeed lead to the identification of areas where improvements may be warranted, and that the experts’ analysis and recommendations can initiate or renew the momentum on electoral reform efforts.

35 See, for example, OSZE bemängelt Transparenz von Parteispenden [OSCE Complains at Lack of Transparency in Party Donations], in: *Zeit Online*, 15 December 2009, at: <http://www.zeit.de/wirtschaft/unternehmen/2009-12/parteispenden-transparenz>.

Concluding Observations

The importance of elections for human rights and security is indisputable. If held in line with international standards, elections are vital expressions of the exercise of key human rights and fundamental freedoms; they grant legitimacy to government and thus contribute to ensuring stability and security. Within the OSCE system, it has been understood that the imposition of undemocratic electoral processes upon a people by their government is to be regarded as a violation of commitments and not beyond the purview of international institutions. Yet election observation has never been an end in itself; it serves as a tool to identify shortcomings and weaknesses and assist states with improving processes in line with commitments.

Observing over 200 electoral events over the past two decades has undoubtedly made a contribution to developing, strengthening, and securing democratic processes across the OSCE region. In addition to identifying weaknesses and shortcomings, it has allowed the identification of good electoral practice for the global community. Furthermore, this process enabled the development of a professional methodology for observations. Overall, these observations have helped to ensure peaceful transition processes from communist totalitarian pasts in a number of countries; they have also contributed to improving the legal frameworks and administration of elections, and to creating public awareness of electoral challenges.

This article has framed these activities as part of an international constitutional conversation through which points of reference for electoral reform are identified and followed up by an international organization mandated to observe and assist, upon request. While the underlying commitments on democratic elections have always been shared by all OSCE participating States, and have always applied to all equally, the contribution has explained the extent to which institutional mechanisms designed to monitor their implementation were initially focused on the region deemed to have by far the greatest needs for election observation.

Meanwhile, the acceptance of observers has evolved from a voluntary practice on the part of states to a customary means of satisfying the democratic entitlement of citizens within the OSCE region. It has occurred through incremental steps and adaptations of the observation methodology, and has ceased to be focused on one group of countries. The expansion of the geographic scope of the ODIHR's activities has not been an artificial exercise undertaken for purely political reasons. Rather, it has been a logical consequence of the nature of the new security challenges the OSCE is facing across the board. The OSCE, and ODIHR as its main institution in the "human dimension", could not survive as an organization focusing only on a few subregions. Indeed, the challenges of terrorism, trafficking in human beings, and the proliferation of intolerance and hate crimes pose a threat to all societies across the entire region, and not just to one particular part of it.

Yet most importantly in the present context, dozens of election missions undertaken by ODIHR have confirmed that “long-standing democracies” are not immune from election-related problems. As Philippe Schmitter has recently observed, “communism’s collapse and democracy’s spread have not brought an ‘end of history’ rooted in democracy’s insuperability. Far from enjoying a smooth sailing, today’s really existing democracies face storms of criticism from many directions.”³⁶

The almost exclusive monitoring focus employed by the OSCE (and indeed other international organizations, such as the Council of Europe) towards its eastern periphery in the 1990s implied in essence that societies in longer-standing democracies had arrived at a “point of no return” in the establishment of stable and transparent laws and institutions, and were beyond the need for monitoring. Yet as we know from painful episodes in recent European history, democratic progress has a reverse gear and can suffer setbacks. Democracy does not necessarily improve with age; it needs constant care and maintenance.

An international security co-ordination framework such as the OSCE is motivated not only by individual state interest but, to a large extent, by a collective interest in preserving and promoting the system as a whole.³⁷ For those states fortunate enough to have lived under democratic constitutions for longer than two decades, these propositions require them to fully embrace the OSCE as an organization working in countries throughout the entire region, including their own. Should those “long-standing democracies” wish to encourage commitment-abiding behaviour throughout the region, they should be ready to submit their own practices to the scrutiny of an impartial and professional international body, and to peer-review.

Notwithstanding considerations of sovereign equality in the application of rules, this contribution has attempted also to emphasize that different sets of tools need to be employed to observe elections in different contexts. Applying the same tools to countries with vastly different needs would not serve any useful purpose and would be a wasteful use of resources. The needs identified – using a standardized methodology and in a non-politicized manner – must be the basis for the selection of the most suitable election observation activity.

On a practical level, in the field of election observation, the realization that “long standing democracies” should submit their practice to international scrutiny has not yet completely sunk in. When ODIHR has in the past requested the secondment and deployment of observers, both long-term and short-term, e.g., to European Union member states or the United States, its calls have been met by these states with a wall of silence. Indeed there

36 Philippe C. Schmitter, *Twenty-Five Years, Fifteen Findings*, in: *Journal of Democracy* 1/2010, pp. 17-28, here: p. 21.

37 Cf. Jonathan Charney, *Universal International Law*, in: *American Journal of International Law* 4/1993, pp. 529-551, here: p. 532.

seems to be a silent understanding among EU member states not to second observers to each others' electoral events. Election observation, it seems, has not yet become a coherent and utterly normal manifestation of the "universal democratic entitlement".

In the specific multilateral context of the OSCE, this observable reluctance has negative consequences on system-wide norm promotion. Given the continuing tendency by "longer-established democracies" to call for engagement by others while appearing impenetrable to advice on improving aspects of their own electoral practice, charges of double standards risk becoming substantiated. If one country or a group of countries disregards the recommendations offered by one international institution while, at the same time, insisting on the transfer of good practices to other countries, one can reasonably speak of a process of politicization that undermines the co-operation and trust among international partners. As has been pointed out in this contribution, the equal adherence of all parties to OSCE commitments is key to maintaining a collective system of security that aspires to legitimacy; as a corollary, rules that only apply to some will cease to be credible and will thus lose their legitimacy pull.

While ODIHR has made progress in recent years in widening the geographic scope of its activities with regard to the observation of electoral practices, "long-standing democracies" will have to demonstrate greater readiness to undergo the level of scrutiny and follow-up to recommendations that they expect from their peers that, only two decades ago, liberated themselves from the authoritarian yoke. Only if monitoring and electoral assistance evolves into a system-wide practice will the OSCE be a coherent and fully effective asset in Europe's security order.