

Accountability of International Election Observers

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*“While democracy must be more than free elections, it is also true ... that it cannot be less.”*¹

1. Introduction

Democracy entails election as the peaceful procedure for the change of government but it is often endangered especially when a government assumes that it may not be re-elected and lose power. Democratic governments are defined as being representative of and accountable to their electorate. Within a well functioning democracy, they must also be subject to restraint and oversight by other public agencies: this is the idea of checks and balances.² It does not suffice that citizens control the state (vertical accountability): The state organs must also mutually control themselves (horizontal accountability).³ But even this might be insufficient. Another accountability dimension which has become ever more important is the international one. In the context of elections, this can mean the obligation of governments to comply with political commitments made by a country through its membership in international organizations such as the United Nations, the Organization of American States (OAS), the African Union, the Organization for Security and Co-operation in Europe (OSCE) or international legal commitments through its ratification of universal or regional treaties such as the International Covenant on Civil and Political Rights.⁴ The compliance of many States’

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¹ Former UN Secretary General Kofi Annan, Speech at the International Conference „Towards a Community of Democracies“ (Warsaw, 27th June 2000). Press Release SG/SM/7467, <www.un.org>.

² Early on J. Madison, "Federalist Papers, No. 51", 6 February 1788, available at: <www.constitution.org/fed/federa51.htm>, visited on 20 July 2009.

³ On the notion of vertical and horizontal accountability, see L. Diamond et al., "Introduction", in A. Schedler et al (ed.), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers, Boulder, Colo., 1999) pp. 1-10. Whereas vertical accountability refers to the control of government through mass media, civil society and citizens, horizontal accountability refers to the capacity of state institutions to check abuses by other public agencies and branches of government.

⁴ A right to democratic governance is regarded as an emerging human right. Seminal T. M. Franck, "The Emerging Right to Democratic Governance", 86 *American Journal of International Law* (1992) pp. 46-91. See also the references to International Human Rights law, especially Art. 25 International Covenant on Civil and Political Rights as well as Art. 21 Universal Declaration of Human Rights, Art. 3 of the Protocol No. 1 to the

obligations in relation to civil and political rights is increasingly monitored by international election observer missions (EOMs) of International Organizations (IOs), namely the OSCE, the European Union and many other regional IOs as well as Non Governmental Organizations (NGOs). Furthermore, electoral assistance by IOs or NGOs takes place: classical tasks of conducting and supervising an election are by now partially outsourced to IOs: “national elections have become international affairs”.⁵

Thus, IOs send their observers to other, oftentimes developing or transition countries, to monitor their elections in accordance with international standards. These observer missions are widely thought to give non-partisan advice and assessments on the fairness of elections and have supposedly a great impact on the country concerned, be it because the label of “free and fair” (or its opposite) influence the internal political processes (as in Kenya) or because the international legitimacy of the elected government is at stake, sometimes with reputational or monetary consequences in the form of foreign aid for the respective country. The dicta of EOMs thus have considerable influence and power on internal political processes as well as on the international standing of a government. Whereas the influence of EOMs is largely undisputed, their independence, impartiality and accountability have been less discussed. But power and accountability are two sides of the same coin.⁶ Whereas in national law, national electoral commissions act under the law and the constitution and are usually accountable to judges or parliaments to a certain extent,⁷ independence and accountability of EOMs has not yet been explored.

European Convention on Human Rights, Art. 23 American Convention on Human Rights, Art. 13 African Convention on Human and Peoples’ Rights, Art. 21 Universal Declaration of Human Rights (UDHR) states that: “(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. [...] (3) 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.” Furthermore, democracy is often held to foster all kinds of desirable things, such as rule of law, development, welfare, autonomy, and security. See for a survey, U. Sunde, “Wirtschaftliche Entwicklung und Demokratie – Ist Demokratie ein Wohlstandsmotor oder ein Wohlstandsprodukt?” 7 *Perspektiven der Wirtschaftspolitik* (2006) pp. 471–499.

⁵ A. Santa-Cruz, “Constitutional Structures, Sovereignty, and the Emergence of Norms: The Case of International Election Monitoring”, 59 *International Organization* (2005) pp. 663-693, p. 663.

⁶ As the Final Report of the International Law Association, Accountability of International Organisations, Berlin Conference (2004) states at p. 5: „accountability is linked to the authority and power of an IO Power entails accountability, that is the duty to account for its exercise.“

⁷ For details, see A. v. Aaken, “Independent Electoral Management Bodies - Any Impact on the Observed Level of Democracy? A Conceptual Framework”, *Constitutional Political Economy*, forthcoming (2009).

Differing from classical subjects of Global Administrative Law (GAL),⁸ such as “security, the conditions on development and financial assistance to developing countries, environmental protection, banking and financial regulation, law enforcement, telecommunications, trade in products and services, intellectual property, labor standards, and cross-border movements of populations”⁹, elections are mostly not considered to be a transnational problem *per se*, but rather a purely national affair.¹⁰ Although the classical rationale for GAL is thus missing, international election observation may well be classified as a subject of GAL, since the tasks of EOM partially comprise genuine national administrative tasks. International law generally and GAL especially seek accountability mechanisms. Commonly, legal, political and administrative accountability are distinguished, sometimes financial, institutional and reputational accountability is added.¹¹ This could also constitute an issue for EOMs and therefore, the relative importance of these mechanisms will be assessed in the context of EOMs. Therefore, in this paper, issues of independence of EOMs, as the most important mechanism for impartiality, and accountability mechanisms currently used, are explored. Mirroring those against the commonly discussed accountability standards, enables us to take a critical stance and identify possible concerns and shortcomings. It is no easy task to transpose commonly used concepts of independence and accountability from national law to international law. In the international context, we are faced with multipolar constellations of actors and relationships – the IO, its member states, and within the country concerned the incumbent government, the opposition, electoral commissions, the electorate, etc. The analysis for EOMs thus is rendered more difficult, since it is unclear from whom independence should be guaranteed and to whom EOMs should be accountable. Specific problems of a conflict of interest may, e.g., emerge where the IO has taken a partisan stance against one of the contestants in the election or provided support or financial assistance to the elections being observed. Here, we shall focus only on EOMs sent by IOs. There might be

⁸ B. Kingsbury et al., "The Emergence of Global Administrative Law", 68 *Law and Contemporary Problems* (2005) pp. 15-61, p. 17 define „global administrative law as comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make.“ See also N. Krisch and B. Kingsbury, "Introduction: Global Governance and Global Administrative Law in the International Legal Order", 17 *European Journal of International Law* (2006) pp. 1-13.

⁹ Kingsbury et al., *supra* note 8, p. 16.

¹⁰ Nevertheless, for the diaspora of many countries, the dicta of EOMs may as well be very important.

¹¹ For an overview on the accountability discussion in international law, see D. Curtin and A. Nollkaemper, "Conceptualizing Accountability in International and European Law", XXXVI *Netherlands Yearbook of International Law* (2005) pp. 3-20.

other concerns for non-governmental election observer missions.¹² These shall not be discussed here.

The paper is organized as follows: First, the common legal basis and institutional set-up on which EOMs operate are shortly discussed. Here, also the relationship between the EOM and the country observed will be analyzed from a legal point of view (2.). Second, common mechanisms to ensure independence of electoral commissions used in national law will be described in order to find parameters for comparison for the EOMs. But independence is just one side of the coin; to ensure the proper functioning of certain kind of (national or international independent) agency accountability mechanisms must also be available. These mechanisms are taken as criteria against which the institutional set-up of EOMs can be judged. Furthermore, accountability mechanism for IO have been developed, which might provide a useful benchmark also for EOMs. Here, a distinction will be made between the independence and accountability of the Mission as an institution and the persons acting in the Mission (3.). That part is followed by an assessment of current accountability mechanisms of EOMs as well as some concrete suggestions for institutional set-up, based on administrative accountability mechanisms as proposed in GAL, but reflecting the distinct nature of EOMs (4.). The last part concludes (5.).

2. The Set-Up of EOMs

The set-up of EOMs can be viewed upon from many angles; we will focus here on the legal set-up. The legal framework for EOMs, especially concerning their accountability mechanisms are predominantly soft-law, that is, non-binding law.¹³ We will first describe the international instruments available for EOMs through the mandates of the respective sending IO and second the legal relationship between the IO and the country to which the mission is sent as well as the national laws of the respective country.

2.1. The Legal Framework for Election Observation by the EU and the OSCE

As alluded to above, there are several IOs sending EOMs, several of them regional, such as League of Arab States, the African Union, the Parliamentary Assembly of the Council of Europe, the Organization of American States, the OSCE Parliamentary Assembly, the

¹² International non-governmental organizations involved in observing elections include; *e.g.* the Carter Center, the International Human Rights Law Group, the Washington Office on Latin America, the National Democratic Institute of the United States, the International Republican Institute, the International Foundation for Electoral Systems, the Asia Foundation, etc.

¹³ See for the notion D. Thürer, "Soft Law", in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 4 (Elsevier, Amsterdam, 2000) pp. 452-460.

European Parliament, the Economic Community of West African States, etc. We will focus as an example on the EU and the OSCE EOMs, since they are representative and have a long tradition of election monitoring.

2.1.1. International Legal Frameworks for Election Observation

The EU and the ODIHR have both endorsed the Declaration of Principles for International Election Observation (hereinafter “Declaration”),¹⁴ which was commemorated in 2005 at the United Nations. It is a non-binding instrument and thus its violation does not lead to international legal responsibility. In addition to providing the first formal definition of what amounts to international election observation,¹⁵ the Declaration commits its signatories to a number of core principles and methodological standards including the monitoring frame for a mission for the pre-election phase, the election itself and the post-election phase, the statement of findings and recommendations, the relationship with the host country, especially that EOMs are expected to “issue timely, accurate and impartial statements to the public (including providing copies to electoral authorities and other appropriate national entities), presenting their findings, conclusions and any appropriate recommendations they determine could help improve election related processes. Missions should announce publicly their presence in a country...”.¹⁶ It also states clearly under which conditions a Mission should be sent (or not) and the minimal guarantees which need to be given to the EOM by the host state to enable it to make an impartial assessment of the elections.

The Declaration also includes a Code of Conduct for observers. They are held to strict political impartiality and absence of conflicts of interest; have to base their judgments on accurate, factual and verifiable sources of evidence, although where relevant, to protect the confidentiality of sources; have to prevent interference or obstruction in the election process; have to provide transparency through public reporting and information on mission structures and funding sources; and have to respect the laws of the country and the authority of electoral

¹⁴ Declaration of Principles for International Election Observation (2005), available at: <www.osce.org/documents/odihr/2005/11/16968_en.pdf>, visited on 20 July 2009.

¹⁵ “International election observation is: the systematic, comprehensive and accurate gathering of information concerning the laws, processes and institutions related to the conduct of elections and other factors concerning the overall electoral environment; the impartial and professional analysis of such information; and the drawing of conclusions about the character of electoral processes based on the highest standards for accuracy of information and impartiality of analysis. International election observation should, when possible, offer recommendations for improving the integrity and effectiveness of electoral and related processes, while not interfering in and thus hindering such processes. International election observation missions are: organized efforts of intergovernmental and international nongovernmental organizations and associations to conduct international election observation.” Ibid., para. 4. As of 1 March 2009, the Declaration had been endorsed by 33 inter-governmental and non-governmental organizations involved in election observation.

¹⁶ Ibid., para. 7.

bodies. Observers have to follow proper personal behavior and should show cultural sensitivity towards the country being observed. Furthermore, the observers are to refrain from making comments to the public or the media before the Mission speaks. The Declaration commits signatory organizations “to use every effort to comply with [its] terms”¹⁷ and every person participating in EOM must read and understand the Code of Conduct and must sign a pledge to follow it. Nevertheless, there is no legal responsibility of the Mission, or the IO sending it, if the terms are not complied with. Rather, the Declaration states that in a case of concern about the violation of its Code of Conduct, the EOM shall conduct an inquiry into the matter. If a serious violation is found to have occurred, the observer concerned may have their observer accreditation withdrawn or be dismissed from the EOM. The authority for such determinations rests solely with the leadership of the EOM. Those guidelines and Codes of Conduct are referred to by the IOs we will deal with, namely the EU and the OSCE.

2.1.2. Institutional Mandates of the Sending International Organization

The EU’s involvement in elections in partner countries stems from its commitment to “develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedoms” as part of its Common Foreign and Security Policy.¹⁸ The Cotonou Agreement between the EU and its partner countries in Africa, the Caribbean and Pacific regions recognizes that “the rule of law and transparent and accountable governance [as] an integral part of sustainable development.”¹⁹ In 2000, the European Commission issued a Communication on EU Election Assistance and Observation²⁰ to establish a coherent policy approach for the EU’s electoral interventions as part of its broader policies on human rights, the rule of law and democracy.²¹ Endorsed by the European Parliament²² and the EU Council of Ministers,²³ the Communication provides the mandate for the EU to engage in election observation in a systematic manner.²⁴ In particular, the Communication states that “the

¹⁷ Ibid., para. 22.

¹⁸ Art. 11 of the Treaty of the European Union (1992).

¹⁹ Art. 9 of the Cotonou Agreement (2000).

²⁰ Communication from the Commission COM(2000) 191 final. See also the follow up Working Document on the Implementation of the Communication on Election Assistance and Observation, SEC(1472) of 19 December 2003.

²¹ See <ec.europa.eu/external_relations/human_rights/index_en.htm>, visited on 20 July 2009.

²² European Parliament Resolution on the Commission Communication on EU Election Assistance and Observation (COM(2000) 191- C5-0259/2000-2000/2137(COS)).

²³ Council Conclusions on Election Assistance and Observation of 31 May 2001 Doc 9990/01.

²⁴ The Communication identified the four main objectives of EU election observation: to strengthen respect for fundamental freedoms and political rights; to undertake a comprehensive assessment of an election process in accordance with international standards; to enhance public confidence in the electoral and democratic processes, including providing a deterrence to fraud; and to contribute, where relevant, towards the prevention or resolution of conflict.

criteria for the validation of observed elections” are those contained in international human rights treaties.²⁵ Although the mandate for sending EOMs forms part of the Common Foreign and Security Policy and is thus intergovernmental, “mission creep”, as being seen in other IOs which extend their powers beyond their “constitutions” through implied competences, seems not to be the case here, since there is an explicit mandate by the Council and the European Parliament. Nevertheless, one should be aware that in this field, the Commission plays the crucial role and the Member States are basically not directly involved in the EOMs, in spite of the intergovernmental character of the Common Policy.

In the Document on the 1990 Copenhagen Meeting on the Human Dimension, the participating States of the then Conference for Security and Cooperation in Europe (CSCE)²⁶ made a series of election-related commitments “to ensure that the will of the people serves as the basis of the authority of government.”²⁷ Specific reference is made that “the presence of observers, both foreign and domestic, can enhance the electoral process” and a standing invitation is offered to “observers from any other participating State ... to observe the course of their national election proceedings.”²⁸ In later agreements, the CSCE established the Office for Free Elections,²⁹ which in 1992 became the ODIHR, with a mandate to carry out “comprehensive election monitoring”³⁰ and to play an “enhanced role in election monitoring before, during and after elections.”³¹

2.1.3. Formalized Institutional Methodologies

Both the EU and the OSCE/ODIHR have formalized their methodologies for the observation of elections through the development of ‘observer handbooks’.³² These provide detailed guidelines for EOMs to undertake their work in a manner that respects the principles of

²⁵ The Communication specifically refers to Article 21 of the Universal Declaration of Human Rights and Article 25 of the Covenant on Civil and Political Rights. These recognize the right of citizens to participate in government through elections that are held inter alia by secret ballot and universal suffrage and which freely express the will of the electorate.

²⁶ The CSCE became the Organization for Security and Cooperation in Europe at the 1994 Budapest Summit.

²⁷ Para. 7 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990) on available at: <www.osce.org/documents/odihr/2006/06/19392_en.pdf>, visited on 20 July 2009 (hereinafter “Copenhagen Document”).

²⁸ Para. 8 of the Copenhagen Document.

²⁹ The Office for Free Elections was established by the CSCE following the 1990 Charter of Paris.

³⁰ Fourth Meeting of the CSCE Council of Ministers, Rome, 30 November 1993, CSCE and the New Europe - Our Security is Indivisible, available at: <www.osce.org/documents/mcs/1993/11/4165_en.pdf>, visited on 20 July 2009 (“Rome Document”), para. IV.4.

³¹ Fourth Heads of State Summit, Budapest. Budapest Document 1994: Towards a Genuine Partnership in a New Era, available at: <www.osce.org/documents/mcs/1994/12/4048_en.pdf>, visited on 20 July 2009, Ch. VIII, para. 12.

³² The EU Handbook for EU Election Observation (2nd Edition, 2008) is found at <ec.europa.eu/external_relations/human_rights/eu_election_obs/docs/handbook_en.pdf>, visited on 20 July 2009. The OSCE ODIHR Election Observation Handbook (5th Edition, 2005) is found at <www.osce.org/odihr-elections/17783.html>, visited on 20 July 2009.

impartiality and non-interference in the election process. To this degree, the handbooks impose Codes of Conduct upon observers, modeled on the Code of Conduct of the Declaration, as well as prescribing consistent areas of long-term assessment from which an EOM will be able to draw its conclusions on the conduct of an election process.³³

The EU poses stringent reporting requirements on the EOM through its very detailed Reporting Guidelines which request the EOM to provide a non-public overview³⁴ on the electoral developments weekly to the Commission.³⁵ These are an interesting example of how accountability of an EOM through information requirements is established. They are meant to give an overview of the political context and technical framework of the election(s) being observed and the role of the EU EOM; to provide updated information and preliminary analysis on all issues relevant to the electoral process including political developments, administrative preparations for the elections, voter registration, candidate registration, campaigning, media environment, election-related complaints, and human rights issues (including participation of women and minorities). Furthermore, their purpose is to provide key information that may be useful for an understanding of the elections being observed; to highlight areas of concern that may require political action by EU structures and, last but not least to provide a basis for the findings and conclusions the EU EOM will make in its post-election (public) Preliminary Statement and Final Report. The Commission is well aware of the sensitivity of the internal reports.³⁶ Before the internal reports become final, there is a consultation phase taking place, involving the Commission as well as the Member States. Following the Chief Observer's (CO) approval of the draft, the Deputy Chief Observer (DCO)

³³ These areas of long-term assessment of an electoral process include: legal framework; election administration; voter registration; candidate/party registration; the campaign; media; complaints and appeals; participation of civil society; election day; and the processing of results. In some cases EOMs also review the participation of women and/or the inclusion of national minorities.

³⁴ The reports are internal EU documents. They are not to be distributed publicly or to any persons or organization outside the EU structures. They are exclusively aimed at the following readership: European Commission Directorate for External Relations (RELEX), the European Commission Directorate for Development, the European Union Member States (EU MS), specifically the EU Presidency and all Ministries of Foreign Affairs of EU MS and embassies and diplomatic representations of EU MS present in the country being observed and the European Parliament (EP) and lastly the EU EOM Chief Observer and Core Team.

³⁵ EU EOM Reporting Guidelines, available at: ec.europa.eu/external_relations/human_rights/election_observation/docs/2007_eu_eom_reporting_guidelines_en.pdf, visited on 20 July 2009.

³⁶ Ibid., para. B.: "As internal reports, and with these audiences in mind, Weekly Reports should be considered as confidential documents whose contents have political and diplomatic implications. A Weekly Report may be 'leaked' and could cause immense harm to the credibility of the Mission if it contains assessments that are premature or appear to be based on partisan or unverified sources. Weekly Reports should therefore be drafted carefully to ensure that all information provided is accurate, objective and, so far as possible, verifiable. The Weekly Reports should avoid making premature conclusions. The Weekly Reports should simply report on facts and stress that its analysis of those facts is preliminary. Where factual information is unverified or from a partisan source, the report should clearly indicate it as such. The EU EOM should also have concrete examples to substantiate all that it reports on."

sends a copy of the report to the RELEX Elections Desk Officer (EDO) for comments on content or structure. The EDO may consult within the Commission (including the local EC Delegation) for their comments. On many occasions, the comments from the EDO may ask for clarification on the issues raised in the Weekly Report, which may require re-drafting. Generally, this stage is a consensual process and the CO and DCO usually consider adopting the comments received from the EDO into the final draft of the report. After the report has been formally distributed within the EU institutions and to the focal points of the EU Member States by RELEX, it is common that the EU EOM should provide a briefing on its contents to the Heads of Mission of the local diplomatic representation of EU MS and the EC Delegation. Usually issued on the day following the election, both the EU and the OSCE will release Preliminary Statements of their findings and conclusions at a press conference, followed several weeks later by a Final Report. Those are public documents and often attracts significant political and media attention. The Final Report provides the overall assessment of the EU EOM on the electoral process, addressing all relevant findings and conclusions on the pre-election, election day and post-election phases. It is usually drafted as the Mission closes and then goes through a consultative review process. A copy of the Final Report is formally submitted to the State authorities. The EU has developed a policy of holding a press conference for the release and stakeholder roundtables to mark the release of an EOM final report. Usually, the CO and the DCO will return to the host country to present the Final Report. The EU and OSCE publish all public reports on their websites.³⁷

2.1.4. Alternatives to Election Observation Missions

In recent years, the ODIHR has deployed Election Assessment Missions (EAMs) to countries that are generally expected to meet OSCE commitments on elections and there is widespread public confidence in the electoral process. EAMs tend to be deployed with a smaller team of experts and for a shorter period of time. Since 2008, the EU has also developed a basis for EAMs although these may be deployed to countries where large-scale deployment is prevented by security concerns.³⁸ In general, EAMs are considered to have the same legal and methodological basis as EOMs except in their reduced level of countrywide coverage.

³⁷ The OSCE reports webpage is <www.osce.org/odihr-elections/14207.html>, visited on 20 July 2009. The EU reports webpage is <ec.europa.eu/external_relations/human_rights/eu_election_ass_observ/index.htm>, visited on 20 July 2009.

³⁸ EU EAMs have been deployed to the Maldives, Zambia (2008) and Iraq (2009).

2.2. *The Legal Relationship between the EOM and the Host Country*

While they both have similar and comparable methodologies, a key distinction between the EU and the ODIHR is the countries to which they will deploy EOMs. The EU observes elections in its partner countries, with whom it has bilateral development agreements. The ODIHR will observe in the OSCE participating States, which includes all EU Member States and EU candidate and potential candidate countries.³⁹

2.2.1. Agreements with Host Countries

The EU's procedural framework for election observation requires that a written invitation from the government or the election authorities of the host country to observe the elections must be received before an EOM is deployed.⁴⁰ It is also common practice for the EU to agree a Memorandum of Understanding (MoU) with the host country outlining the rights and responsibilities of the EOM as well as obligations upon the host country in relation to the issuing of accreditation, access to information and geographical areas and, where relevant, guarantees of security protection. They are meant to ensure adequate co-operation and allow host governments to have a clear understanding of what an EOM will do in a country. With few exceptions EU EOMs have worked on the basis of a MoU. It should be noted that the MoU is of course not binding.

The MoUs follow closely the Declaration which sets out detailed guarantees.⁴¹ The Declaration provides an outline of “basic conditions” that must be met by a host country to allow for a signatory organization to deploy an EOM that can “effectively and credibly conduct its work”.⁴² These minimum standards include guarantees for: unimpeded access to all stages of the election process and all electoral actors; freedom of movement countrywide; freedom to issue statements; freedom from interference from State authorities; commitments against reprisals against EOM interlocutors. In most cases, the presence of these basic conditions will be determined by an advance mission of election experts.⁴³ It is possible that

³⁹ In 2004 and 2005, the ODIHR also assessed elections in Afghanistan, which is an OSCE Asian Partner for Cooperation. For the 2004 Afghan presidential elections, the EU provided a Democracy and Election Support Mission (DESM) and for the 2005 parliamentary elections, a standard EU EOM was deployed.

⁴⁰ The experiences with EOMs which were launched on the basis of ambiguous or oral invitations proved difficult (Zimbabwe 2002, Pakistan 2002). See Working Document on the Implementation of the Communication on Election Assistance and Observation, *supra* note 20, p. 6.

⁴¹ Declaration, *supra* note 14, para. 12.

⁴² *Ibid.*

⁴³ The EU has Exploratory Missions (EXM) and the ODIHR has Needs Assessment Missions (NAMs). These meet with a range of State authorities, political parties, civil society and other stakeholders to determine whether or not an EOM should be deployed and, if so, its size and parameters. The reports of ODIHR NAMs are published. In line with the Communication of 2000, the EU EXM assesses whether an EOM is “useful, feasible and advisable” and issues internal reports only.

the EU and OSCE may choose not to deploy an EOM where these conditions are not met.⁴⁴ However, despite many instances of difficult security conditions, or the introduction of restrictions on observers, there has not been an occasion where an EOM has withdrawn from deployment because of the absence of basic conditions, although restrictions have been placed for security reasons.⁴⁵

Normally, the EU EOM will not have special diplomatic status, although the MoU may provide for related privileges, such as a waiver of visas or payment of taxes. This also implies that the members of the EOM do not enjoy diplomatic immunity. The role of the EU EOM is distinct from the presence in the host country of any EU diplomatic representation, such as a European Commission Delegation or embassies of EU Member States, although, as described, consultation takes place with the diplomatic missions of EU Member States.

In line with the Copenhagen Commitments, the ODIHR EOMs have a standing invitation to observe in OSCE-region countries, although it is normal practice for a formal letter of invitation to deploy an EOM to be also issued by State authorities. Because of the nature of the OSCE as an association of participating States, a formal MoU is rarely entered into between the ODIHR and the host country unless there are specific technical requirements (such as procurement of equipment); however, diplomatic *notes verbale* can be used to establish a basis for visa issuance etc. The ODIHR EOM will also be formally distinguished from any in-country diplomatic mission of the OSCE or the embassies of OSCE participating States.

The EOMs thus usually do not enjoy the classical privileges and immunities as available to IOs although a corresponding problem of their accountability remains.⁴⁶ The same applies for the observers themselves. Nevertheless, the MoUs give them certain protection for carrying out their work adequately.

2.2.2. National Legal Framework for Observers

In most cases, a host country has a legal framework for the observation of elections that establishes the rights and duties of observers that will apply to local observers and also to

⁴⁴ The ODIHR did not observe the 2008 presidential elections in the Russian Federation because of “restrictions imposed on its planned EOM” (<www.osce.org/item/29599.html>, visited on 20 July 2009). The EU does not appear to have decided against deploying an EOM on such grounds.

⁴⁵ E.g. security restrictions limited the deployment of observers to some areas of Pakistan in 2008 and to parts of Gaza in 2006.

⁴⁶ In the vast majority of cases, IOs operate on the territory of States. Since they are subject to the latter's sovereign powers, IOs need protection against inadequate interference of the host State and other attempts to influence the fulfillment of the international mandate. To prevent this, international organizations and their personnel enjoy jurisdictional immunity before the domestic authorities and courts. See for details Reinisch, *supra* note 69.

international EOMs. The right of observers will often be protected in law and supplemented by administrative regulations issued by the relevant election management body.⁴⁷ Such regulations will often outline accreditation procedures, the level of access to electoral bodies as well as providing a formalized Code of Conduct for observers that may also provide for sanctions in case of violations. Almost all countries, e.g., allow for the presence of candidate/party representatives to monitor polling and counting on election day and thus also the observers have a right to access for monitoring. The United Nations Human Rights Committee has also stated that State signatories to the ICCPR should allow for “independent scrutiny of the voting and counting process ... so that electors have confidence in the security of the ballot and the counting of the votes.”⁴⁸ The EU has nevertheless observed in some countries where there was no legal right for election observers to monitor the election process.⁴⁹ Often, countries can rely on their own legal framework also for the EOMs but the MoUs assure additionally that there is no undue interference with the work of an EOM. Since EOMs and their members do not enjoy immunities, national courts may review behavior of observers under national law, especially if it is not connected to their work, e.g. drunken driving.

3. Accountability and Independence of Election Observation Missions

If independence of IOs from Member States and the host states of their headquarters, secured through privileges and immunities, has been for a long time at the forefront of discussions, accountability of IOs has become now an ever greater concern. The question is how to balance these two concepts (i.e., independence and accountability). They are deeply intertwined and partially conflicting principles, since accountability to certain stakeholders also fosters dependence from them. Putting it the other way around: Independence may foster unaccountability.

Independence and accountability of EOMs, that is, international missions, cannot easily be compared either to national administrative agencies or national electoral commissions, which are ideally thought to be independent of political forces, whose task they may support and supplement. Nevertheless, we will try to filter some independence mechanisms which might

⁴⁷ *E.g.*, the United Kingdom Political Parties, Elections and Referendums Act 2000 (Section 6C) and the Lebanese Law on the Election to the Chamber of Deputies (2008) introduce legal guarantees on the rights of observers. The Palestinian Central Election Commission’s regulatory procedures on observers are at <www.elections.ps/template.aspx?id=14>, visited on 20 July 2009.

⁴⁸ See General Comment No. 25 to the ICCPR: The Right to Participate in Public Affairs, Voting Rights etc (Article 25) (1996).

⁴⁹ *E.g.* in Lebanon in 2005, an EU EOM was deployed despite the fact that there was no legal right for observers to have access. For the 2007 parliamentary elections in Jordan and Morocco, the absence of a legal guarantee for observers was sufficient for the EU to rule out deploying an EOM.

be useful for the assessment of EOMs (3.1.) and mechanisms of accountability of IOs as proposed in international legal scholarship and in EOMs (3.2.).⁵⁰

3.1. Independence Mechanisms

EOMs, as has been stated, fulfill partially national administrative or even judicial tasks by monitoring elections and/or by giving technical advice. The conduct of an election is to a great extent an administrative task, e.g. voter registration, vote count etc., and much of the credibility of an election hinges on the correct fulfillment of this administrative task. National electoral management bodies (EMBs) are therefore often created as independent bodies in order to ensure that there is transparency in distinguishing between deliberate electoral fraud and mere inept administration of an election. EOMs are a classical example of delegating those partially administrative functions to the international sphere in order for the government to gain more credibility. Even if there is no complete delegation taking place, since the elections are still conducted nationally, the incumbent government, by inviting EOMs, seeks to enhance its or the administrative credibility in elections.⁵¹

3.1.1. Independence in National Law

Independence of agencies has been mostly discussed in the national sphere. Clearly at the forefront of the discussion has been the independence of the judiciary and central banks.⁵² But the discussion on the proliferation of independent administrative agencies (IAAs) in certain issue areas, such as central banks, audit courts, anti-trust bodies, anti-corruption commissions and other (economic) regulatory agencies has been proliferating.⁵³ There, the main rationale for making agencies independent is the time inconsistency problem of politicians (central banks), potential conflict of interests (e.g. audit courts, and data protection officers) as well as the necessity of expert knowledge. Independence here refers to the independence from other branches of government, especially the executive branch. In the national realm, also EMBs

⁵⁰ For an overview, see Curtin and Nollkaemper, *supra* note 11. See also K. Wellens, *Remedies Against International Organisations* (Cambridge: Cambridge University Press, 2002).

⁵¹ See Aaken, *supra* note 7.

⁵² Generally, see S. Voigt and E. Salzberger, "Choosing Not to Choose: When Politicians Choose to Delegate Powers", 55 *Kyklos* (2002) pp. 247-268, for courts, see S. Voigt et al., "Improving Credibility by Delegating Judicial Competence – the Case of the Judicial Committee of the Privy Council", 82 *Journal of Development Economics* (2007) pp. 348-373.

⁵³ Instead of many, M. Quintyn, "Independent Agencies - More than a Cheap Copy of Independent Central Banks?" *Constitutional Political Economy*, forthcoming (2009); A. Alesina and G. Tabellini, "Bureaucrats or Politicians?" *NBER Working Paper 10241* (2004), available at: <www.nber.org/papers/w10241>, visited on 20 July 2009.

tend ever more to be at least *de iure* independent from the incumbent government,⁵⁴ although much institutional diversity and degrees of independence are to be found.⁵⁵ Usually several criteria for independence are used: institutional, personal, financial and functional.⁵⁶ Institutional independence is the legal independence from government: the agency is set-up as a distinctive legal entity and there is no hierarchy, that is, no direct right of instruction by the government. Drawing an analogy for EOMs, the independence of the EOM from the sending IO as well as the member states of the IO is in question. Concretely, the point is whether the IO sending the EOM has a direct influence and may issue detailed instructions to the Mission. Personal independence refers to the way the highest members of the body are appointed, their status and whether and under what circumstances they can be removed. Here, one finds the usual safeguards variables: are appointments for one time only or can there be re-appointment? How are the heads protected against arbitrary removal, do they have the usual immunity of judges, etc.? Here, the status of the CO of a Mission is in question. How and by whom is she appointed, how easily can she be removed, and what kind of immunity does she enjoy?

Financial independence refers to the ability of having own accounts (usually in combination with institutional independence), as well as the question of who decides on the budget. It is well known that influence on budgets is a (more or less subtle) way of influencing an IAA. Here again, the question is who and how the budget of a Mission is allocated, whether the IO can have an influence on the budget during the Mission, and whether the funding provided is sufficient.

Functional independence defines the competences an IAA has; or put differently, the level of delegation to the IAA. Looking at it through a principal-agent framework, it might be that the principal, the government or the legislator, constrains the IAA through detailed regulation by writing almost “complete contracts”.⁵⁷ The discretion of IAA would therefore be curtailed. The extent of competences thus embraces the question if and how far the agency is able to set and specify its own goals. Applying this framework to EOMs, the question arises, what

⁵⁴ International Institute for Democracy and Electoral Assistance, *Electoral Management Design: The International IDEA Handbook* (2006).

⁵⁵ For an overview, see Aaken, *supra* note 7.

⁵⁶ For a more thorough discussion on different types of independent administrative agencies, A. v. Aaken, "Independent Administrative Authorities in Germany", in R. Caranta et al (ed.), *Independent Administrative Authorities: The European Way(s)* (British Institute of International and Comparative Law, London, 2005) pp. 65-91. For independent courts, see E. Salzberger, "A Positive Analysis of the Doctrine of Separation of Powers, or: Why do we have an Independent Judiciary?" 13 *International Review of Law and Economics* (1993) pp. 349-379, p. 352 who distinguishes substantive and structural independence. This article focuses on structural independence, that is, the institutional arrangements which enable the existence of substantive independence.

⁵⁷ See S. Mozaffar and A. Schedler, "The Comparative Study of Electoral Governance—Introduction", 23 *International Political Science Review* (2002) pp. 5-27, p. 17.

discretion an EOM has in assessing elections and how it is controlled by the IO sending it. How far, e.g., are the standards against which elections are to be judged specified and how far is the Mission controlled by the IO. All those questions will be taken up in the following when dealing with the independence of EOMs.

3.1.2. Independence of Election Observers and Observation Missions

Independence of EOMs refers to their independence from the sending IO or its Member States respectively. The question of independence of an EOM is mostly relevant to ensure that there is no ‘hidden agenda’ to its work. Recent ODIHR EOMs have been challenged by some participating States for having “double standards and prejudiced approaches”⁵⁸ while COs of EU EOMs have also been personally attacked in media articles.⁵⁹ In most cases, the challenges have been thinly veiled attempts by authorities of States where EOMs have produced critical reports on the quality of an electoral process to undermine those reports. Nevertheless, it establishes the need for EOMs to ensure they are seen as being credible through their independence from external influence.

3.1.2.1. The Political Independence of a Mission

Under the institutional framework established by the EU Communication 2000, all EU EOMs are formally independent from other EU agencies. An EU CO – in almost all cases a Member of the European Parliament – is appointed by the European Commissioner for External Relations and members of the EOM Core Team are selected by Commission staff upon open competition. The CO is required to consult with the Commission on issues of EOM management and policy and, in addition, is expected to liaise closely with EU agencies present in the host country, including the Commission Delegation and EU Member State embassies. However, a fundamental tenet of the EU policy on EOMs is that the findings and conclusions of the EOM are officially within the sole jurisdiction of the CO and the EOM core team. This means that an EU EOM shares advance copies of its reports with the Commission, as described above, but the final text will be issued in the name of the EOM and the CO. This policy of independence brings two contrasting risks. The first is that it can provide an opportunity for a CO to exploit their position for their own political agenda or

⁵⁸ Statement by the Foreign Ministry of Belarus, 6 March 2007, see <www.mfa.gov.by/en/press/news/2007-03-06-1.html>, visited on 20 July 2009.

⁵⁹ “Gomez, Clarke: neutral observers or hidden dealers?” Ethiopian Herald, 17 August 2005. This article was roundly condemned by the European Commission as “without foundation and totally unacceptable”. See <www.nazret.com/php/uploadnews/search.php?misc=search&subaction=showfull&id=1125057931&archive=&cnshow=news&ucat=3&start_from=&misc=search>, visited 20 July 2009.

national interests. While there are many anecdotal cases within the election observation community that such problems have occurred, there is no direct evidence of occasions where an EOM has issued unsubstantiated conclusions or overtly partisan statements. The second risk is that it is an independence policy in name only and that the Commission retains influence over the CO and the core team and may pressurize the findings of the EOM through having the advance view of its weekly and post-election reports, or where also EU Member States seek to influence the findings on an EOM. In practice, it is likely that there will be negotiations on the tone of an EOM's public reports and also beforehand on the weekly reports since they serve a basis for the former. The influence might thus be subtle, but existent. But, as shown in Ethiopia in 2005 and Palestine 2006, there are examples of where EOMs have produced credible and independent reports that ran contrary to the policy direction of the Commission and most EU Member States towards those host countries at the time of the election. Nevertheless, the Commission stresses that

“[w]hile the independence of EU EOMs means that there is always a risk that the assessment of any given electoral process does not suit particular political interests vis-à-vis the country in question or, indeed, that the European Union may itself choose to interpret the electoral process differently, nonetheless this factor is critical to the credibility of EU EOMs.”⁶⁰

The ODIHR is an independent institution within the OSCE. The ODIHR Director has the mandate to personally appoint the head of mission – normally, a recognized election expert and/or a professional diplomat – of an ODIHR EOM, while core team members are also selected from open competition. An ODIHR Head of Mission has relatively less personal independence than an EU CO, and an EOM's policy and reports will be prepared in close coordination with the ODIHR headquarters. Thus, the perceived independence of an ODIHR will reflect the level of independence that the ODIHR itself is able to show.

One potential risk against the independence of an EOM is in cases where the sponsoring organization – either the EU or the OSCE – has been heavily involved in the management of the election process. The EU is a significant funder of technical assistance on elections while the OSCE has run elections in Bosnia-Herzegovina and Kosovo. In both cases, an EOM may come under pressure to look favorably on the financial and political investment colleagues

⁶⁰ Working Document on the Implementation of the Communication on Election Assistance and Observation, *supra* note 20, p. 7.

have made to the electoral process.⁶¹ Concerns have also been raised where an EOM may be sent to a country where the IO may be seen as having a partisan stance against one of the contestants in the election.⁶²

3.1.2.2. The Financial Independence of a Mission

EU EOMs are financed by the EU general budget, i.e. more precisely the European Instrument for Democracy and Human Rights, and thus subject to strict rules of sound financial management. Having the sending IO alone financing the mission strengthens the independence of EU EOMs vis-à-vis host countries and Member States as it requires no agreement from neither on how the EOM is to be managed. Budgetary interference of the EU in the process of the election observation is also difficult since the funds are allocated at the very start of a mission and the EU also publishes the amount of funding for an EOM at the start of a mission.⁶³ Responsibility for the financial and operational management of an EOM is delegated to an Implementing Partner, who is contracted by the Commission to undertake logistical set-up for the EOM. The Implementing Partner is contractually required not to interfere in the political and observational work of the EOM.⁶⁴ However, under the administrative framework for EU EOMs, the Implementing Partner is also responsible for the contracting of the observers, a situation which may give rise to problems whereby EU observers are, in employment law terms, consultants of another organization.

The ODIHR funds its EOMs from the OSCE Unified Budget that receives contributions from participating States according to agreed scales. The financial management of each EOM is directly run by the ODIHR. There have been no instances of where EU or OSCE funding has restricted observers in their freedom to meet with all electoral actors, something which is not to be taken for granted. For example, the EU EOM in Palestine 2006 was able to meet with representatives of Hamas despite restrictions that prevented European Commission staff from doing so. During the same election, observers from the National Democratic Institute (NDI) and the Carter Centre could not meet with Hamas because of US Congress restrictions on

⁶¹ The ODIHR did observe elections in Bosnia in 1998 but did not do so again until responsibility for elections were taken over by an independent body in 2002. The ODIHR has not observed elections organized under the UN auspices in Kosovo but did deploy observers for elections administered by Serbian authorities in 2000-2008.

⁶² *E.g.* in Ukraine in 2005, the OSCE/ODIHR EOM was joined by a delegation of Members of the European Parliament, some members of which openly supported one side in that election.

⁶³ The funding for the 2009 EU EOM to Bolivia, comprising 7 core team and 22 observers, was €1.4 million. See press release:

<europa.eu/rapid/pressReleasesAction.do?reference=IP/08/2010&format=HTML&aged=0&language=EN&guiLanguage=en>, visited on 20 July 2009.

⁶⁴ The Implementing Partner is usually an inter-governmental agency such as the UN Development Program or the International Organization for Migration, or agencies such as the German governmental enterprise 'Gesellschaft für Technische Zusammenarbeit' (GTZ).

their source of funding. An additional issue where funding may risk the credibility an EOM's independence is where the budget is not sufficient enough to allow for appropriate levels of coverage.

3.1.2.3. The Personal Independence of Observers

For both the EU and the OSCE, individual observers have limited guarantees for their personal independence for their role on an observation mission. All observers are required to work within specific terms of reference that places them into a hierarchical management structure under the CO and to act at all times in compliance with a Code of Conduct. All observers are expressly restricted from making any public statements on the work of the EOM without the permission of the CO in order to preserve the credibility of the EOM. Observers may be asked to leave the Mission by the CO or by the Commission and have their accreditation status removed if they are in breach of these conditions. However, a problem in this area may emerge if the observer has been seconded by a Member/participating State who could object to the removal of the observer from the EOM. There have been occasions when observers have been reprimanded for improper behavior and violations of the Code of Conduct, including refusals to follow EOM guidelines.

A common problem is that some observers may strongly disagree with the reports published by the EOM as not being reflective of what that observer saw personally. This is especially problematic when short-term observers see a localized election event in isolation from the picture countrywide or if the observer has partisan interests in the country or perceives the EOM to have a hidden agenda. This problem can often arise as long-term and short-term observers are nominated by EU Member States and by OSCE participating States; many observers are nominated despite having limited training or experience in elections or observation methodology. It is arguably preferable that all observers on an EOM are required to show 'collective responsibility' for the findings of the Mission and those criticisms, if there are any, are addressed internally rather than publicly.

3.2. *Accountability Mechanisms for International Organizations*

Since accountability is the flip-side of the coin of independence, the question of accountability arises equally with EOMs. A long discussion has been going on the responsibility of IOs.⁶⁵ *Responsibility* is a legal notion and it is well defined as referring to the legal consequences of non-compliance with an international obligation by conduct that is

⁶⁵ Curtin and Nollkaemper, *supra* note 11.

attributable to the organization.⁶⁶ Since only non-binding law governs the EOMs, international legal responsibility in the traditional sense, that is, state responsibility and state liability or also responsibility of IOs⁶⁷ are inapplicable, since it is triggered only if, *inter alia*, there is a breach of binding international law and it applies only to breaches of international law by or attributable to a state⁶⁸ or an IO. Nevertheless, under certain circumstances, an EOM, or rather members thereof, may be subject to legal responsibility in their host state.⁶⁹ The term *accountability*, in contrast, is not a legal notion *per se*, neither in national nor in public international law. Rather, it is still a fairly elusive term used by political scientists,⁷⁰ by administrative science⁷¹ and ever more by (international) lawyers as well.⁷² Accountability needs a broader understanding of what constitutes relevant norms of behavior, that is, not only classical sources of international law are relevant to the analysis, but also internal rules of procedure, codes of conduct, etc.⁷³ Accountability has been defined as a relationship “in which an individual, group, or other entity makes demands on an agent to report on his or her activities, and has the ability to impose costs on the agent.”⁷⁴ Accountability thus “implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met.”⁷⁵ For Grant and Keohane, accountability

“presupposes a relationship between power-wielders and those holding them accountable where there is a general recognition of the legitimacy of (1) the operative standards for accountability and (2) the authority of the parties to the relationship (one to exercise particular powers and the other to hold them to account).

⁶⁶ G. Hafner, "Accountability of International Organizations", 97 *American Society of International Law Proceedings* (2003) pp. 236, p. 236. See also J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge University Press, Cambridge, 2002), Commentary to Article 1. For a detailed account of responsibility with further references, see Brunnée, *supra* note 68.

⁶⁷ See for the International Law Commissions Draft Articles on Responsibility of International Organizations, Official Records of the General Assembly, Sixty-third Session, Supplement No. 10 (A/63/10), chap. VII, sect. C, para. 164. See as well the latest Seventh Report by the Special Rapporteur G. Gaja, International Law Commission, Sixty-first Session, 27 March 2009, U.N. Doc. A/CN.4/610.

⁶⁸ J. Brunnée, "International Legal Accountability through the Lens of the Law of State Responsibility", XXXVI *Netherlands Yearbook of International Law* (2005) pp. 21-56, p. 25 *et seq.*

⁶⁹ Cf. A. Reinisch, "Accountability of International Organizations according to National Law", XXXVI *Netherlands Yearbook of International Law* (2005) pp. 119-168.

⁷⁰ Seminal, R. W. Grant and R. Keohane, "Accountability and Abuses of Power in World Politics", 99 *American Political Science Review* (2005) pp. 29-43.

⁷¹ P. Barberis, "The New Public Management and a New Accountability", 76 *Administration* (1998) pp. 451-470.

⁷² See instead of many International Law Association, Accountability, *supra* note 6. For Development Aid Law and Accountability, see P. Dann, "Accountability in Development Aid Law: The World Bank, UNDP and Emerging Structures of Transnational Oversight", 44 *Archiv des Völkerrechts* (2006) pp. 381-404.

⁷³ See for a reconstruction of the concept of law in global administrative law on the basis of legal positivism, B. Kingsbury, "The Concept of 'Law' in Global Administrative Law", *IILJ Working Paper 2009/1 (Global Administrative Law Series)*; NYU School of Law, *Public Law Research Paper No. 09-29* (2009). Available at SSRN: <ssrn.com/abstract=1397308>, visited on 20 July 2009.

⁷⁴ R. Keohane, "Accountability in World Politics", 29 *Scandinavian Political Studies* (2006) pp. 75-87, p. 77.

⁷⁵ Grant and Keohane, *supra* note 70, p. 29.

The concept of accountability implies that the actors being held accountable have obligations to act in ways that are consistent with accepted standards of behavior and that they will be sanctioned for failures to do so.”⁷⁶

Note, that this says nothing *ex ante* on the nature of accepted standards (legal or social norms, expectations) and on the nature of sanctions (legal, informal, reputational). Since the accountability mechanisms for EOMs are largely informal and there is no legal responsibility, we will concentrate on those other mechanisms. Curtin and Nollkaemper use a notion of accountability based on a social relationship which we will follow, since it fits especially the case of EOMs. For them, “[i]t refers to a process in which an actor explains conduct and gives information to others, in which a judgment or assessment of that conduct is rendered on the basis of prior established rules or principles and in which it may be possible for some form of sanction (formal or informal) to be imposed on the actor.”⁷⁷

There are two preliminary questions,⁷⁸ namely what constitutes an abuse of power, and why? This refers to the discretion an IO, or the respective EOM, may have and whether it binds itself to standards which help define an abuse and distinguish it from correct exercise of discretion.⁷⁹ The second question is even more complicated in international law: who is entitled to hold power-wielders accountable, and why? Curtin and Nollkaemper conceptualize accountability through formulating five questions.⁸⁰ These relate to the aims of accountability, the actors who are held accountable, the persons or institutions to which accountability is rendered, the process of accountability and the level of accountability. As regards the first, the aims of legal responsibility, namely protection of the rule of law as well as compensation of victims, are complemented i.a. by enhancing legitimacy, the protection of democratic values or inducing learning processes. Traditionally, the actor to be held accountable was the state or parts thereof, e.g. the executive. In the international realm, states continue to be one relevant actor but is now complemented by IOs, NGOs, and, in our case, by EOMs. Also the circle of actors to whom accountability must be rendered is broadened and extends to NGOs and private actors as well as the international community at large. In election observation by IOs, many actors come to mind: the IO sending the EOM, its member states, the government of the host country, its opposition, the electorate of the receiving state,

⁷⁶ R. W. Grant and R. Keohane, "Accountability and Abuses of Power in World Politics", 99 *American Political Science Review* (2005) pp. 29-43p. 29 *et seq.*

⁷⁷ Curtin and Nollkaemper, *supra* note 11, p. 8.

⁷⁸ Keohane, *supra* note 74, p. 78 *et seq.*

⁷⁹ Instructive on the delineation of the legitimate exercise of discretion and abuse, A. Vermeule, "Our Schmittian Administrative Law", 122 *Harvard Law Review* (2009) pp. 1095-1149 for US law. This debate has had a long history in German administrative thought, though not necessarily connected to Carl Schmitt.

⁸⁰ Curtin and Nollkaemper, *supra* note 11, p. 9 *et seq.*

the international civil society or public.⁸¹ In this case, furthermore, the actors to whom accountability has to be rendered and those which owe accountability are overlapping. The IOs, e.g., owes accountability to the electorate of the host country and its electorate but at the same time the EOM is accountable to its IO. Member States of the IO are accountable as well to the host state but the IO owes them accountability. The relationships are thus overlapping depending on the viewpoint and form a matrix.

The fourth aspect of accountability, namely the processes or mechanisms of accountability are again manifold. Traditional concepts are judicial review as well state responsibility and liability as legal responsibility. In the national realm, accountability of IAAs arises often through the control of courts and before that through certain procedural prerequisites, e.g. reason giving, consultation with affected parties etc. Judicial control – so far – is inapplicable to EOMs *de lege lata*. Further accountability mechanisms are political, administrative and financial accountability. Political accountability in the classical sense of democratic accountability is not the issue for EOMs (only for the host governments inviting them), but administrative and financial accountability clearly are. Furthermore, reputational accountability may play a role with EOMs. The level of accountability, i.e. regional, national, international plane and private v. public will be taken up in the course of the discussion when analyzing the relevant actors.

Clearly, the discussion on accountability has proliferated and cannot be repeated here. We will present those mechanisms as discussed by the International Law Association (ILA) and by the proponents of GAL in the following using those as a benchmark for EOMs.

3.2.1. Mechanisms of Accountability for International Organizations proposed by the International Law Association and GAL

The ILA Report on Accountability of International Organizations gives so far the most comprehensive overview on accountability mechanisms. Although much of it refers to field operations with potentially great possibility of infringement of rights, such as peace-keeping missions, it is also partially applicable to EOMs, although no legally binding basis for the EOMs exist and the potential for directly harmful activities (in the course of lawful operations) is much lower in EOMs than in other kinds of field operations. The accountability mechanisms and remedies proposed are thus only partially applicable.

⁸¹ See N. Krisch, "The Pluralism of Global Administrative Law", 17 *European Journal of International Law* (2006) pp. 247-278, more extensively on the question to whom accountability is due in international relations. As he correctly states, sometimes not an accountability deficit is the problem, but rather accountability to the wrong constituencies, e.g. as is often claimed, the World Bank should be accountable not only to its shareholders but to those people affected by its decisions (p. 250).

The ILA Report identifies different levels of accountability, the first level stating general principles of accountability in internal and external scrutiny in general. Here, the following principles are listed: the principle of good governance, which comprises (1) transparency in both the decision-making process and the implementation of institutional and operational decisions; (2) participatory decision-making process; (3) access to information; (4) well-functioning international civil service; (5) sound financial management; (6) reporting and evaluation. Furthermore, it lists the principle of good faith, the principles of constitutionality and institutional balance, the principle of supervision and control, the principle of stating the reasons for decisions or a particular course of action, the principle of procedural regularity, the principle of objectivity and impartiality and the principle of due diligence.⁸²

The research project called GAL, presupposes that “global governance can be understood and analyzed as administrative action: rulemaking, administrative adjudication between competing interests, and other forms of regulatory and administrative decision and management.”⁸³ EOMs supervise and sometimes support national elections and validate the results by judging them “free and fair” (or not), they are thus partially fulfilling genuine administrative functions, since elections are to a large extent an administrative task.⁸⁴ As *Kingsbury et al.* state: “global administrative law effectively covers all the rules and procedures that help ensure the accountability of global administration, and it focuses in particular on administrative structures, on transparency, on participatory elements in the administrative procedure, on principles of reasoned decisionmaking, and on mechanisms of review.”⁸⁵ The mechanisms for accountability are posed in a taxonomy, comprising (1) domestic institutions as checks on global administration, that is, e.g., domestic courts of the host state would review the legality of actions of an IO. This accountability mechanism is only minimally relevant for EOMs. (2) GAL proposes internal mechanisms adopted by global institutions for participation and accountability. They are similar to those proposed by the International Law Association’s Final Report, e.g. procedural transparency and participation. In the set-up of the missions by the IOs, we already find such kinds of internal mechanisms. In principle, these latter accountability mechanisms are suitable for EOMs. We will analyze below to what extent those principles are met in the operation of an EOM *de lege lata*, to what extent they might not be suitable and whether there are accountability deficits to be ameliorated in point 4.

⁸² International Law Association, Accountability, *supra* note 6.

⁸³ Kingsbury et al., *supra* note 8, p. 17.

⁸⁴ For details of the tasks what national electoral management bodies carry out, see Aaken, *supra* note 7.

⁸⁵ Kingsbury et al., *supra* note 8, p. 29. See for the concept of law in GAL, allowing for the inclusion of soft-law, Kingsbury, *supra* note 73.

3.2.2. Mechanisms of Accountability of Observers and Observation Missions

Since no binding international law exists concerning the legal accountability of IOs sending Missions, that is, responsibility of EOMs attributed to IOs, we are left with other, more informal, mechanisms of accountability to different constituencies. Political accountability is, as mentioned, traditionally understood to be democratic accountability. In the context of EOMs, political accountability is thus not applicable. Nevertheless, EOMs are highly politicized undertakings in the public realm and thoroughly influence the national political process. Nevertheless, their rationale is exactly to be apolitical, that is, EMOs are meant to be technical accountable, that is, their expertise and non-partisan judgment is the main criterion for accountability. We will first deal with the actors to whom accountability is owed by the EOM and then deal with further means of accountability. Lastly, the accountability of individual observers will be discussed.

3.2.2.1. Accountability to National and International Actors

EOMs should not only be accountable to their IO or the respective Member States but also to the host country, its opposition and its electorate, since these are the most affected constituencies by the EOM. The way to achieving the latter is primarily publicity, that is, a process form of accountability. The primary route for EOM accountability is thus through their public reports. EOM reports are studied closely by media and by State authorities in the immediate aftermath of an election and, over the longer-term, by civil society, election authorities and international organizations. The reports follow standard template structures and, where necessary, will usually refer to statistical analysis of e.g. election day observations and media monitoring results. The ODIHR also publishes regular Interim Reports ahead of election day although the EU restricts all pre-election reporting to internal reports only. In recent years, there has been a growing tendency by election observers, especially the EU, to hold regular press briefings during the course of the observation in order to maximize transparency and public awareness of their work.

There have been isolated instances of where the findings of EOMs have been directly challenged by State authorities where the EOM has allowed for limited access to observer reports from election to enable verification of the Mission's analysis.⁸⁶ There is no definitive policy by the EU and the OSCE on whether they are prepared to enable access to their

⁸⁶ *E.g.* In Armenia for the 2003 Presidential Election when the ODIHR EOM had reports of election day fraud that were disputed as facts by the State authorities and in Ethiopia in 2005 when EU EOM reports of results discrepancies were disputed by the election authorities.

observers' internal reports in order to clarify issues or verify allegations, although if they were to do so, it may compromise the confidentiality of observer sources, an issue referred to in the Declaration. This is especially relevant in countries where there may be concerns at retaliation against sources.

Furthermore, there is second form of substantive accountability. The Declaration, as well as the detailed methodologies employed by the EU and OSCE, outlined in their respective handbooks for observers, would appear to provide clear benchmarks by which an EOM can be held accountable in its work, especially if it was found to be acting contrary to the Declaration or to the organization's specified methodology. It would allow the host countries' constituencies to judge the EOM against the set benchmarks. So far, however, there has been no test of this measure of accountability.

Review by national courts of personal behavior of observers might well be a suitable, if traditional accountability mechanism depending on the circumstances, especially for cases involving the wrongdoing of e.g. single observers in their personal capacity.⁸⁷ But reviewing the legality of the genuine task of a Mission, that is the validation of electoral processes and results, is rather difficult to imagine, since that would mean giving power to national institutions, including courts, which was meant to be outsourced to the international level in order to secure an independent assessment. The very rationale of EOMs could thereby be undermined. Thus, a trade-off may arise between a domestic check on EOMs and their task, namely to assess elections independently of the government in power as well as possibly dependent courts.

3.2.2.2. Within International Organizations

The most direct accountability is rendered to the sending IO and its respective Member States. Here, we find not only the setting of standards by Codes of Conduct but also accountability through informational duties as well as financial accountability. The internal weekly reports of an EU EOM enable the Commission as well as the Member States to have a subtle influence on the Mission and check also for if something is going wrong within the Mission. Furthermore, the financial accounting provides for financial accountability towards the sending IO. The published reports of an EU EOM will generally distributed to all EU agencies and Member States and to relevant inter-governmental organizations. It is usual that the final report will be discussed at Council meetings as well as the sessions of the Foreign Affairs and Development Committees of the European Parliament. There have been occasions

⁸⁷ See generally on the review of IOs conduct by national courts, Reinisch, *supra* note 69.

when the CO has been asked to debrief EU institutions on the conclusions of their report.⁸⁸ It is common also that the EOM will be asked to brief Commission officials responsible for EU election assistance to identify relevant areas for supporting electoral reform and for other forms of follow-up.

Final reports of the ODIHR will be formally submitted to the host country and distributed to all OSCE institutions and participating States. In recent years, it has been common for the final report to be discussed at sessions of the OSCE Permanent Council. There have been some examples of where the host country and other participating States have chosen to formally respond to or comment on the final report at such a session.

3.2.2.3. Accountability through Election Observation Methodology

In recent years, the methodology employed by the EU and OSCE has come under review. Over 2005-2007, the EU sponsored a review of its methodology in order to provide a more detailed and consistent basis for an EU EOM to undertake an assessment in line with international standards and for its reporting structures. The new methodological approach was adopted in 2008 through the publication of the 2nd Edition of the EU handbook.

The ODIHR, which had very much been in the forefront of developing observation methodology from 1996 onwards, has routinely undertaken a comprehensive review of its work.⁸⁹ The ODIHR has recently received strong criticism by some OSCE participating States in relation to the credibility of its methodology, including a proposal to change fundamental aspects that contradict the Declaration.⁹⁰

3.2.2.4. Accountability of Individual Observers

Each EU observer receives a review of their work by the CO or a member of the EOM core team. The review is based on criteria to assess the suitability of the observer and is aimed to identify the observer's suitability for continued work as an observer, including options for a recommendation that further training may be required.⁹¹ These reviews are often shared with

⁸⁸ *E.g.* the CO of the EU EOM to Yemen in 2006, Baroness Nicholson MEP, presented the mission's final report to the European Parliament and the Council.

⁸⁹ See the ODIHR publication "Common Responsibility: Commitments and Implementation" submitted to the OSCE Ministerial Council (November 2006).

⁹⁰ A "Draft Decision of ODIHR Observation of National Elections" (PC.DEL/8989/07 of 18 September 2007) which was prepared for discussion at the OSCE Permanent Council by the governments of Armenia, Belarus, Kazakhstan, Kyrgyzstan, Russian Federation, Tajikistan and Uzbekistan. The draft, which was not adopted, proposed inter alia a requirement for no reports to be published until the official announcement of election results, and enabling a host country to have full access to internal reports of observers.

⁹¹ Since 2002, the European Commission has supported training courses for observers through the NEEDS Network, currently being implemented by the International Institute for Democracy and Election Assistance (International IDEA).

EU Member States responsible for secondment of the observers, many of whom act essentially as volunteers for their position. Core team members and long-term observers, who are paid as consultants for their work, are also required to attend debriefings on their findings and conclusions, as well as to review their relevant observation skills. Unsatisfactory observers are likely not to be re-hired, although an EU Member State may continue to nominate them for service. In cases where an observer acts inappropriately or in violation of the Code of Conduct, the only effective remedy for an organization is to dismiss the person; there appears to be no other sanction. However, it is unclear whether an observer has any mechanism for challenging the decision of an EOM or the observing institution for any decision.

4. An Assessment of the Accountability Mechanisms for EOMs

As in the discussion of the accountability of IOs in general, the problem arises to whom EOMs are accountable. They may be accountable to the IOs which are sending them, to the member states of the IO, to the government in the host country, to the public in the host country, to the public in general as well as – in certain circumstances – to the members of the Mission. Some accountability mechanisms analyzed in this paper enhance accountability of the EOM to several constituencies, not only to one, others create a trade-off.

Which are the main mechanisms of accountability with EOMs? Firstly, the publicity of reports of the EOM and the need to state the reasons for the assessment of the election in question is a mechanism of accountability to all constituencies mentioned (process accountability). There is thus a partial transparency of the decision of an EOM, as required by the ILA report. Nevertheless, the weekly reports of the EU EOMs are only internal, although highly influential. Here, only the IO and its Member States may take influence, but not the host states' constituencies. Partially, as has been stated, no transparency may be granted in order to protect sources, but this is common also in national law.

Secondly, the reasons for the assessment can only be checked, if there is a methodology for the missions which they are supposed to use (substantive accountability). This desideratum comes close to a "rule of law" provision in the sense that EOMs are held accountable to a certain checklist for the assessment which they have to adhere to when judging the election. Both the EU and the ODIHR have taken steps to develop detailed checklists of issues which will be reviewed by EOMs, published in their respective handbooks which are often distributed to stakeholders and made publicly available. While the checklists are designed to address core issues that are key to identifying issues relevant to determining whether an

election meets international standards, neither organization requires that their checklist is prescriptive as there is a need to grant sufficient flexibility for the EOMs to adapt to the distinctions that each country's electoral process will have. The less detailed the check-lists are, the more discretion is given to the EOM for its assessment, and the lower the respective accountability. Since in the judgment of the EOM on the election there might remain a rest of a "political question doctrine", this is not reviewable, certainly not by courts or by arbitration. The internal review mechanisms, like the issuance of weekly reports may nevertheless allow the IO to control limits of discretion and the technical adequacy of the Mission.

Furthermore, the methodology requests the EOMs to give reasons and facts for the judgment in a very detailed manner. This also guarantees greater objectivity and impartiality, since the single EOM is not free to choose its own criteria on judging an election. By the duty of reason and facts giving, due diligence is achieved. The ILA report has called for participatory decision-making. In our context that would include the host countries as stakeholders. But the extent that stakeholders are told in advance that the checklist of issues is to be reviewed is unclear; there is no "notice-and-comment" rule making procedure.

Furthermore, the issuance of a Code of Conduct for the observers serves as an accountability mechanism for all constituencies. It is an enhanced control mechanism for the sending IO since it can sanction a violation through not re-nominating the respective observer, it is thus a hierarchical accountability mechanism.⁹² The World Bank as well as UNDP have established similar kind of mechanisms. The World Bank's Independent Evaluation Group (IEG), rates the efficacy and efficiency of the World Bank's operational programs. It reviews projects, country programs, performs sector and thematic reviews as well as undertakes impact evaluations. Also the UNDP has a so-called Evaluation Office. The findings are reported to the respective Senior Management of the IO as well as to the representatives of the Member States and the reports are made public.⁹³ Those two IOs also have internal investigation offices to investigate corruption and fraud.⁹⁴ Those units have the power to investigate alleged misconduct. If they prove substantiated, sanctions can involve the termination of the contract, a debarment from re-hiring or disciplinary actions. Although both of them might be much more susceptible to fraud and corruption than an EOM, since they distribute money, corruption may also be an issue within EOMs. Here, the mechanisms of the EU as well as the

⁹² Grant and Keohane, *supra* note 70, p. 36.

⁹³ Dann, *supra* note 72, p. 392 *et seq.*

⁹⁴ See for an overview P. Dann, "Accountability in Development Aid Law: The World Bank, UNDP and Emerging Structures of Transnational Oversight", 44 *Archiv des Völkerrechts* (2006) pp. 381-404 and C. DeCooker, "Ethics and Accountability in International Civil Service", in C. DeCooker (ed.), *Accountability, Investigation and Due Process in International Organizations* (Nijhoff, Leiden, 2005) pp. 42-49.

OSCE seem further behind, since there are no institutionalized hierarchical control mechanisms. Given that investigations into fraud or corruption within the country observed is not desirable due to huge potential of misuse by the incumbent government of the country,⁹⁵ an institutionalized process of dealing with those issues within the IO would be desirable. In the EU, OLAF can fulfill this function.⁹⁶ Within the OSCE, the comparable mechanism would appear to be the Office of Internal Oversight. The requirement of a well functioning civil service as stated in the ILA Report is thus partially fulfilled by the Code of Conduct for the Missions' members. Nevertheless, the oversight is less institutionalized than in other IOs. This raises an additional problem, namely the accountability of the IO vis-à-vis the single observer.⁹⁷ There is currently no formal mechanism or procedures that the authors are aware of for observers which feel unduly treated for alleged misconduct or have complaints about Mission decisions or contracts. Here again, internal complaint mechanisms, guaranteeing due process, would be desirable.

More difficult is the accountability vis-à-vis the observed country, including the opposition and the electorate. As stated above, accountability to the host country's government (or courts) is problematic since that would contradict the very rationale of the EOMs. Since that domestic legal review mechanisms are not advisable, internal mechanisms adopted by global institutions for participation and accountability become more important. As stated, accountability here works mainly through standards set for the Mission, the published and reasoned reports as well as consultations. Again here, we might think about other conflict resolution mechanisms, like e.g. arbitration clauses in the MoU as the World Bank has them.⁹⁸ Since the dicta of the Mission can have severe consequences for a country, e.g. the withdrawal of development aid, a voice mechanism for the countries concerned might be necessary.

Apart from those mechanisms which are more or less modeled on the national idea of administrative accountability, there might be other, more informal accountability mechanisms at play. First of all, the reputation of a Mission and of the sending IO concerning their credibility might be at stake if grave mistakes occur. Reputation has been well established as a

⁹⁵ Since the MoU between the IO and the observed country usually does not grant immunity to the Mission, prosecution of single observers is possible. Nevertheless, no case has come to our knowledge.

⁹⁶ European Anti-Fraud Office, see Commission Decision of 28 April 1999 to establish OLAF (OJ 1999, L136).

⁹⁷ For the right of staff in these investigations, see H. Dean, "Due Process: The Rights of World Bank Staff in Misconduct Investigations", in C. De Cooker (ed.), *Accountability, Investigation and Due Process in International Organizations* (Nijhoff, Leiden, 2005) pp. 97.

⁹⁸ See Dann, *supra* note 72, p. 388 *et seq.*

device for making states adhere to international law.⁹⁹ The same may work for IOs (and their EOMs) under certain circumstances, namely publication of the misconduct, a national or international public and the possibility of substitution of certain Mission.¹⁰⁰ Given that by now there are many EOMs, be it from IOs, be it from NGOs, competition as a disciplining device between the different Missions might also work, since all Missions have an interest to get invited to other countries and not be thrown out of “business” for an unreliable judgment or misconduct of its members. Since usually more than one Mission is assessing a country, some kind of informal “peer-review” takes place since the dicta might not be issued *unisono* and the quality of the assessment and the reports might vary widely. Basically, one can compare EOMs to rating agencies with the difference that they do not get paid by those they rate.

To sum-up: we find similar mechanisms in principle with EOMs as with other IOs, with the difference that domestic review of the EOMs conduct in the exercise of its competence by governments or national courts is not desirable *per se*. This is different for *ultra vires* conduct as well as for the personal behavior of observes, although there is a fine line between legitimate control by the host state and possible interference with the conduct of the EOM. Nevertheless, the elaboration of codes of conduct and standards against which the EOMs can be judged by the different constituencies has been a rather recent phenomenon. Although being the primary mechanisms for accountability, it might be useful to ask further questions, namely: who is drafting the codes, what are the review mechanisms for the codes etc. Here, the request of the ILA Report on participatory decision-making comes to the fore. Are host states or NGOs to be consulted in the drafting and revising process of the Codes? Or is this a task better left to the Member States of the sending IO? And more generally: to which extend should those primarily affected be integrated in the process? Are other accountability mechanisms desirable? Or is too much accountability possible? Would, e.g. the oversight of the IO and the EOM by national parliaments be desirable in our context? Should there be an external validation of EOMs, something akin to the PWC test for financial accounts and codes of conduct? Clearly, there is no easy answer to those questions: many trade-offs occur between securing the independence of an EOM and holding it to account at the same time.

⁹⁹ A. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press, Oxford, 2008).

¹⁰⁰ For competition in markets as a disciplining device in international law, see A. v. Aaken, "Effectuating Public International Law through Market Mechanisms", 165 *Journal of Institutional and Theoretical Economics* (2009) pp. 33-57.

5. Conclusion and Outlook

EOMs have become ever more important in judging the freeness and fairness of national elections; they thus judge on the quality of democracy in states. Their dicta can have important consequences for the state monitored – either internally or on the international plane. EOMs thus exert considerable power. Is this power matched by accountability? We have delivered a first assessment of what mechanisms are used for the accountability of EOMs. As EOMs have increased in number and profile, it is clear that the IOs have responded by seeing the need to ensure consistency of criteria, professionalism of observers and a clear framework for the running of missions: but their success now gives rise to the other challenges facing all organizations. The EU and the OSCE, in their diplomatic work, recognize the importance of accountability and independence of institutions, but this paper shows that they must also start formalizing those relevant issues for the EOMs too. These issues need also to be considered for NGOs who wield considerable power in the world of election observation. Given the comparative similarity between the methodologies being followed, and the success of the universal support to the Declaration, it is the next priority for the IO community to come together to address these concerns. A theoretical framework of accountability mechanisms, based on the comparison with general standards of accountability of IOs as well as those mechanisms proposed in GAL will be helpful to elaborate the next steps for accountability in EOMs.