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Anything New Since the End of the Cold War? or International Law Goes Domestic: International Electoral Standards and Their Legitimacy

¿Nada nuevo desde el final de la Guerra Fría o se hace el Derecho Internacional derecho doméstico? Las normas electorales internacionales y su legitimidad

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Abstract: After the end of the Cold War and the collapse of the Soviet Union, democratic *Zeitgeist* swept the globe. International law seemed no longer indifferent to how domestic regimes were formed. Part of this post-1989 development was a considerable increase in the jurisprudence of the European Court of Human Rights concerning the right to political participation as well as a proliferation of election observation missions by the OSCE/ODIHR. Both developed and implemented international standards for domestic electoral processes with increasing effectiveness. The dynamism inherent in this phenomenon of «international law going domestic in electoral matters» raises legitimacy questions insofar as the original state consent –the main source of legitimacy in traditional international law– appears to be an insufficient basis for the broad exercise of the international institutions' authority. Accordingly, this paper proposes a wider approach to examining the phenomenon. Through source, procedure, and result-oriented elements of legitimacy, it assesses and compares the development and implementation of international electoral standards in the regional context of Europe.

Key words: Electoral Standards; Legitimacy; Right to Political Participation; European Court of Human Rights; Election Observation.

Resumen: Con el final de la guerra fría, en 1989, el derecho internacional comenzó a mostrar un mayor interés por la conformación democrática de los regímenes nacionales. Se constata un aumento de la jurisprudencia de la Corte Europea de Derechos Humanos dedicada al derecho de participación política y una notable proliferación de las misiones de observación electoral por parte de la OSCE/ODIHR. Ambas instituciones han acabado por desarrollar e implementar estándares internacionales para las elecciones nacionales con una efectividad constatada. Sin embargo, el dinamismo consustancial a este fenómeno de «intervención ius internacionalista en cuestiones electorales nacionales» ha derivado en problemas de legitimación, en el entendido de que el originario consentimiento del Estado –principal fuente de legitimación del tradicional derecho internacional– parece constituir una base insuficiente para el ejercicio de la autoridad de las citadas instituciones internacionales. Justamente por ello, este estudio se ha propuesto analizar este fenómeno de manera más amplia. Mediante el estudio de las fuentes, de los procedimientos y de los argumentos orientados al resultado, se procederá a analizar y a comparar el desarrollo y la implementación de los estándares electorales internacionales desde el punto de vista de su legitimidad en el contexto regional europeo.

Palabras clave: estándares electorales; legitimidad; derecho de participación política, Corte Europea de Derechos Humanos, observación electoral.

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1. Introduction

After the end of the Cold War and the collapse of the Soviet Union democratic *Zeitgeist* swept the globe.[1] International law seems no longer indifferent to the way a regime is formed and an emerging right to democratic entitlement is perceivable. This comes along with an increased development and implementation of international electoral standards.

The phenomenon of «international law going domestic» in electoral matters post-1989 is symptomatic for a growing expansion of international law into the internal ambit of states which also has taken place in other areas, such as environmental and economic law.[2] One aspect of this extension into the domestic realm is that international law increasingly addresses not only states but also non-state actors.[3] It likewise is accompanied by the growing authority of international institutions,[4] which increasingly have developed a life of their own, drawing on the competences attributed to them in their founding documents.

These developments imply new demands to justify the rule of international law. In legitimacy terms –with legitimacy being understood as «a quality that leads people (or states) to accept authority– independent of coercion, self-interest, or rational persuasion –because of a general sense that the authority

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[1] L. Diamond/M. Plattner *et al*., *Consolidating the Third Wave Democracies. Themes and Perspectives* (1997).

[2] See D. Bodansky, «The Legitimacy of International Governance: A Coming Challenge for International Environmental Law», 93 *American Journal of International Law* (1999) 596; R. Wolfrum, «Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations», in R. Wolfrum/V. Röben (eds.), *Legitimacy of International Law* (2008) 1, 12; see also J.H.H. Weiler, «The Geology of International Law – Governance, Democracy and Legitimacy», 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004) 547; A.M. Slaughter, W. Burke-White, «The Future of International Law is Domestic. (Or 'The European Way of Law')», 47 *Harvard International Law Journal* (2006) 327.

[3] W. Friedmann, *The Changing Structure of International Law* (1964) 60 *et seq*; C. Tomuschat, «International Law: Ensuring the Survival of Mankind on the Eve of a New Century», 281 *Recueil des Cours* (2001) 13, 70. See generally M. Kumm, «The Legitimacy of International Law: A Constitutionalist Framework of Analysis», 15 *European Journal of International Law* (2004) 907.

[4] For a definition of the exercise of international public authority, see A. von Bogdandy, P. Dann, M. Goldmann, «Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities», in A. von Bogdandy/R. Wolfrum/J. von Bernstorff/P. Dann/M. Goldmann (eds.), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (2009) 3, 11 *et seq*.

is justified»[5]– it raises the question as to the basis on which the operation of international law is accepted by its addressees.

In traditional international law, in the Westphalian system, state consent and legality were considered largely sufficient bases for the acceptance of the rule of international law. As international law was traditionally perceived as law *between* states, sovereign states mutually bound each other when consenting to international obligations.[6] To the extent that states subjected themselves to the authority of international institutions, legality played a further legitimating role as it connected the institutions' continuing authority to their original basis in state consent.[7] However, these traditional justifications seem increasingly insufficient in view of the phenomenon of «international law going domestic» with different addressees, *i.e.* non-state actors, than those which consented, and an increasingly active role of international institutions.[8]

The insufficiency of state consent and legality characterises also development and implementation of international electoral standards by international human rights monitoring organs, especially regional courts (the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights[9]), as well as by international organisations conducting election observation missions. Their dynamism makes it difficult to firmly ground the international institutions' action in the original state consent through its participation in human rights treaties and the invitation of election observation

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[5] See e.g. Bodansky, *supra* n. 2, 600. For similar views on legitimacy as justification of authority see Wolfrum, *supra* n. 2; D. Bodansky, «Legitimacy», in E. Hey, J. Brunnée and D. Bodansky (eds.), *Oxford Handbook of International Environmental Law* (2007) 704. See also J. Delbrück, «Exercising Public Authority beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?», 10 *Indiana Journal of Global Legal Studies* (2003) 29.

[6] The separation between domestic and international law, as affirmed by Krisch/Kingsbury, has long been a means for limiting legitimacy demands on international law. (See N. Krisch/B. Kingsbury, «Introduction: Global Governance and Global Administrative Law in the International Legal Order», 17 *European Journal of International Law* (2006) 1, 11). See also B. Kingsbury, «Sovereignty and Inequality», 9 *European Journal of International Law* (1998) 599.

[7] See e.g. Bodansky, *supra* n. 5, 712.

[8] See Bodansky, *supra* n. 2, 596 *et seq*., 610. See also R. Wolfrum, «Legitimacy of International Law and the Exercise of Administrative Functions: The Example of the International Seabed Authority, the International Maritime Organization (IMO) and International Fisheries Organizations», 9 *German Law Journal* (2008) 2041, 2044.

[9] See e.g. Int.-American Court of Human Rights, *Yatama vs. Nicaragua*, Judgment, 23 June 2005, Serie C, No 127. See A. Aguiar, *El Derecho a la DEMOCRACIA. La Democracia en el Derecho y la Jurisprudencia Interamericanos. La Libertad de Expresión; Piedra Angular de la Democracia* (2008) 125, 355 *et seq*. for further reference.

missions. This seems particularly sensitive as both institutions touch upon the very core of a state's functioning with potentially far-reaching impact: the electoral arrangements in its constitutional order.

Thus, additional ways to explain and assess the exercise of their authority are warranted. Put differently, it seems necessary to examine whether the development and implementation of international electoral standards may be considered legitimate for other reasons than the basis in state consent and legality. In fact, in addition to legitimacy derived from source –state consent– further dimensions of legitimacy were proposed in literature to justify the exercise of international authority. Among these are procedural and outcome-oriented/substantive aspects of legitimacy.[10] This paper proposes to examine and compare the development and implementation of international electoral standards in both strands of law[11] from these additional legitimacy perspectives.[12] Such investigation seems particularly promising given the parallel and largely unrelated development of standards in international human rights law and the election observation practice of international organisations, making them good test cases for «international law going domestic» in the same field but by different means.

Accordingly, in the following, we will start with a brief overview of the emerging right to democratic entitlement in international law. We will then give an appraisal of electoral standards in the European regional context by examining the jurisprudence of the ECtHR and the election observation practice of the Office for Democratic Institutions and Human Rights (ODIHR) of the Organisation for Security and Cooperation in Europe (OSCE).[13] It will be argued that state consent, by ratification of the European Convention on Human Rights (ECHR) and the invitation of election observation missions in the 1990 Copenhagen Document, is a rather

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[10] See Bodansky, *supra* n. 2; Wolfrum, *supra* n. 8; Bodansky *supra* n. 5 for further reference; see also T. Treves, «Aspects of Legitimacy of Decisions of International Courts and Tribunals», in R. Wolfrum/V. Röben (eds.), *Legitimacy in International Law* (2008) 169. For a not merely international law perspective on legitimacy, see S. Bernstein, «Legitimacy in Global Environmental Governance», 1 *Journal of International Law and International Relations* 2004-2005, 139.

[11] «Law» is broadly defined, also including soft law standards.

[12] It is beyond the scope of this paper to examine further legitimation strategies discussed in literature, such as concepts of transnational democracy. For further reference see e.g. Delbrück, *supra* n. 5, 34 *et seq;* Kumm, *supra* n. 3.

[13] The region of the OSCE geographically exceeds Europe as its 56 participating states comprise also North American and Central Asian states.

thin basis for the development and implementation of international electoral standards by the ECtHR and ODIHR, especially given the potential impact of their findings (Part Two). That is why in Part Three additional procedural and outcome-related legitimacy dimensions will be used to assess and compare the development and implementation of international electoral standards in both strands of law. Part Four concludes.

2. International electoral standards post-1989

The development of international electoral standards after the end of the Cold War took place in the context of a growing international concern for democratic governance at the national level. The following section will thus first give a general overview of changes concerning democratic entitlement in international law post 1989 (2.1.) to then scrutinize the development and implementation of international electoral standards in Europe (2.2.).

2.1. *Normative background: democratic entitlement in international law*

The emerging right to democratic entitlement in customary international law is a recent phenomenon. For many years, international law was perceived as being strictly neutral towards domestic constitutional orders, especially with regard to how national governments are formed.[14] In 1986, in its famous *Nicaragua* decision, the International Court of Justice still seemed to affirm the «blindness» of international law towards the domestic structure of state power, *i.e.*, the form of government in a given state, stating: «However the regime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law.»[15] As James Crawford emphasized, «the Court's negative reaction even to the idea that Nicaragua was subject to international supervision or accountability in

[14] Early attempts to introduce the notion of «legitimacy» as a criterion for the recognition of governments under international law include the 1907 *Tobar*-doctrine in Latin America. Still, it had no lasting effect in international practice.

[15] See ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs. United States)*, Judgment, 27 June 1986, *ICJ Reps.* 1986, 98, 133.

the conduct of elections reflects the emphasis of traditional international law on non-intervention in the internal affairs of states.»[16]

The major human rights instruments vaguely frame the right to political participation at both universal and regional levels, using terms such as «genuine periodic elections» or «guaranteeing the free expression of the will of the electors».[17] What is more, the provisions on political rights were not seriously adjudicated until the wave of democratizations after the end of the Cold War[18]. In fact, they were rarely relied upon before 1989. The ECtHR, for instance, did not issue its first judgment concerning the right to free elections until 1987.[19] Likewise, there was little election observation or monitoring prior to 1989, and that was mainly in the process of decolonization: the UN supervised plebiscites, independence referenda and elections in about 30 non-self-governing territories between 1956 and 1989[20].

This lack of international concern for domestic electoral processes changed dramatically after the end of the Cold War. The successor states of the Soviet Union, especially those in Central and Eastern Europe, largely chose democracy as their form of government, democratically elected regimes replaced military dictatorships in Latin America, and democratic reforms took place in various parts of Africa. Recent state practice as well as law and practice of international organizations clearly indicate that international law is no longer indifferent to the character of regimes exercising effective control within national borders[21].

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16 J. Crawford, «Democracy and International Law», 64 *British Yearbook of International Law* (1993) 113, 121. See C. Pippan, «International Law, Domestic Political Orders and the «Democratic Imperative»: Has Democracy Finally Emerged as a Global Legal Entitlement?», Jean Monnet Working Paper No 2/10 (New York, 2010), http://centers.law.nyu.edu/jeanmonnet/papers/papers10.html, 23 for further reference.

17 Art. 25 CCPR (1966); see also the similar provisions of Art. 23 ACHR (1969); Art. 13 Banjul Charter (1981) and the weaker framed right to free elections of Art. 3 of the 1st P to the ECHR (1952). On the general indeterminacy of political rights see M. Nowak, *UN Covenant on Civil and Political Rights. CCPR Commentary* (2nd ed., 2005) 562, 590. See furthermore G. Fox, «The Right to Political Participation in International Law», in G. Fox/B. Roth (eds.), *Democratic Governance and International Law* (2000) 48; H. Steiner, «Political Participation as a Human Right», *Harvard Human Rights Yearbook* (1988) 77, 131.

18 See Fox, *supra* 17, 69.

19 ECtHR, *Mathieu-Mohin and Clerfayt vs. Belgium*, 2 March 1987, A 113 (1987).

20 See C. Binder/C.Pippan, «Election Monitoring, International», in R. Wolfrum (ed.), *Encyclopedia of Public International Law* (2nd ed., 2008), http://www.mpepil.com/, para 8.

21 G. Fox/B. Roth, «Introduction: the Spread of Liberal Democracy and its Implications for International Law», in G. Fox/B.Roth (eds.), *Democratic Governance and International Law* (2000) 1, 2.

From an international law perspective, Thomas Franck referred already in 1992 to an «emerging right to democratic governance».[22] Niels Petersen, in 2008, slightly reframed Franck's proposition and identified a «right to the emergence of democratic governance»[23]. Petersen thus developed a principle of democratic teleology, in accordance with which states would be obligated to develop towards democracy, consolidate democratic institutions and prevent regressions in the process of democratization[24].

These studies on an emerging right to democratic governance evidence a growing trend of «international law going domestic» in terms of national governance[25] post-1989 and depict the normative background of this analysis. Still, the development and implementation of international electoral standards is not directly dependent on the existence of such right, as they are grounded in states' participation in human rights treaties and the invitation of election observation missions.[26] On this basis, we will now proceed to examine how «international law has gone domestic» in the regional context of Europe, with special focus on the jurisprudence of the ECtHR and ODIHR's election observation practice.

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[22] T. Franck, «The Emerging Right to Democratic Governance», 86 *American Journal of International Law* (1992) 46.

[23] N. Petersen, «The Principle of Democratic Teleology in International Law», 34 *Brooklyn Journal of International Law* (2008) 33, 84. J. d'Asprémont, *L'État Non Démocratique en Droit International. Étude Critique du Droit International Positif et de la Pratique Contemporaine* (2008); see also C. Pippan, «Gibt es ein Recht auf Demokratie im Völkerrecht?», in E. Riefler (ed.), *Popper und die Menschenrechte* (2007) 119. For the regional context of Europe, see S. Wheatley, «Democracy in International Law: a European Perspective», 51 *International and Comparative Law Quarterly* (2002) 225.

[24] N. Petersen, *Demokratie als teleologisches Prinzip. Zur Legitimität von Staatsgewalt im Völkerrecht* (2009) 2, 21 *et seq*, 49. The principle, according to Petersen, however suffers indeterminacy and is process-oriented.

[25] For critics of such right to democratic entitlement see D. Schindler, «Völkerrecht und Demokratie», in G. Hafner *et al.* (eds.), *Liber Amicorum Professor Seidl-Hohenveldern* (1998) 611; B. Bauer, *Der völkerrechtliche Anspruch auf Demokratie* (1998); T. Carothers, «Empirical Perspectives on the Emerging Norm of Democratic Governance», *ASIL Proceedings* (1992) 261; see also M. Koskenniemi, «Whose Intolerance, which Democracy?» in G. Fox/B.Roth (eds.), *Democratic Governance and International Law* (2000) 436.

[26] See N. Petersen, *supra* n. 24, 106.

2.2. *Development and implementation of international electoral standards in Europe*

The ECtHR, in its interpretation of the right to free elections, and ODIHR election observation missions have adopted an increasingly proactive stand in electoral matters since the end of the Cold War. Notwithstanding the institutions' different focuses –the protection of individual rights (ECtHR) and the overall assessment of the election process (ODIHR election observation missions)– both have engaged in a dynamic development and implementation of electoral standards. First, both have *developed* electoral standards: The ECtHR's jurisprudence evolved and considerably broadened the scope of application of Article 3 of the 1st Protocol (P) to the ECHR in the over 40 cases which have been brought before the Court since its first decision in 1987.[27] Likewise, the more than 230 election observation missions deployed so far[28] have applied and concretised the electoral commitments contained in the 1990 Copenhagen Document[29], therewith generating soft law and best practices. Second, both institutions have furthered compliance with and implementation of electoral standards: the ECtHR by means of binding judgments on political rights, the execution of which is supervised by the Committee of Ministers, and ODIHR election observation missions through political pressure exercised on states to conduct elections in accordance with international law through the publication of their observations as well as in the follow-up to an election.

Also, as will be argued in the following, both institutions considerably draw on the competences originally attributed to them in their founding documents (ECHR and its Protocols; OSCE documents) in their dynamic development and implementation of electoral standards.

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[27] See D.J. Harris/M.O'Boyle/E.P.Bates/C.M.Buckley, *Harris, O'Boyle & Warbrick. Law of the European Convention on Human Rights* (2nd ed., 2009) 711. See also S. Golubok, «Right to Free Elections: Emerging Guarantees or Two Layers of Protection?», in 27 *Netherlands Quarterly of Human Rights* (2009) 361.

[28] OSCE/ODIHR, *Election Observation Handbook* (6th ed., 2010) 8. While the formats of election observation missions differ, the following assessment will be based on a «standardized» mission.

[29] Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990, http://www.osce.org/documents/odihr/1990/06/13992_en.pdf.

2.2.1. Jurisprudence of the European Court of Human Rights (ECtHR)

To firmly base the ECtHR's evolutionary jurisprudence on the right to free elections in Article 3 of the 1st P to the ECHR is, at first, hampered by the indeterminate wording of the provision which reflects the controversial incorporation of political rights in the Convention.[30] In fact, some experts questioned during drafting whether «issues of constitutional and political character» should be included at all in the ECHR. In the end, the right to free elections was enshrined in Article 3 of the 1st P to the ECHR which was adopted in 1952.[31] Still, the weak wording of the provision is remarkable:[32] Instead of granting individual rights, Article 3 merely provides for state obligations, requiring state parties to hold free elections at reasonable intervals by secret ballot.[33]

The ECtHR's early case law on political rights reflects the provision's weak wording. The Court exercised considerable self-restraint, left a broad margin of appreciation to states, and merely controlled whether the essence of the right was violated in combination with a check whether the interference of the state was disproportionate or arbitrary.[34] In its more recent jurisprudence, though, the Court has adopted a more affirmative approach,[35] subjecting the respective states' electoral frameworks to ever closer scrutiny. With many of the cases concerning the right to stand for elections, the Court adopted an increasingly tight proportionality test, weighing the individual interests at stake against the respective state interest in a measure.[36] In its evolutionary inter-

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[30] See S. Marks, «The European Convention on Human Rights and its 'Democratic Society'», 56 *British Yearbook of International Law* (1995) 209, 221.

[31] 213 UNTS 262; ETS 9; adopted 1952, entry in force 1954. With 45 parties, the 1st P to the ECHR is ratified by all Council of Europe member states except Switzerland and Monaco. Status of ratifications as of August 2011, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=009&CM=7&DF=11/09/2011&CL=ENG.

[32] The *travaux preparatoires* are unclear as to whether the states intended to create an enforceable right to free elections or rather stipulate a general –if unenforceable– obligation upon states to maintain democratic structures. (See Marks, *supra* n. 30, 221).

[33] Art 3 of the 1st P: «The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of their legislature.»

[34] See e.g. *Mathieu-Mohin and Clerfayt vs. Belgium*, *supra* n. 19, para. 52. The decisions of the ECtHR are available at: http://cmiskp.echr.coe.int/tkp197/search.asp.

[35] See Harris *et al.*, *supra* n. 27.

[36] See for instance the following three recent cases which were decided by the ECtHR: *Zdanoka vs. Latvia* (16 March 2006), *Adamsons vs. Latvia* (24 June 2008) and *Tanase vs. Moldova* (27 April

pretation of Article 3 of the 1st P to the ECHR, the Court considerably broadened the provision's scope.[37] The Court reasoned this development of electoral standards by comparing, among others, the legal systems of the Council of Europe's member states to scrutinize whether a new European standard had emerged.[38] What is more, in two recent cases on prisoners' voting rights, *Hirst vs UK* (2005)[39] and *Frodl vs Austria*[40] (2010), the ECtHR resorted to an even more extensive interpretation of Article 3. Notwithstanding that legislation in the state parties to the ECHR on the matter was not uniform –the basis for a dynamic interpretation of the ECHR as a living instrument–[41] the Court found that the *ex lege* deprivation of the prisoners' voting rights in both countries constituted a breach of Article 3.[42]

The Court's dynamic development of electoral standards evidences a certain tension with its mandate to interpret and apply the ECHR and its Protocols[43] in order to ensure the compliance with the state parties' obligations[44]: The Court engaged in a development of electoral standards, which in some instances was not even based on a common European standard, especially in the cases on prisoners' voting rights. In fact, the Court's majority view in *Hirst* was criticized in a joint dissenting opinion by eminent judges such as Wildhaber and Costa, affirming that «the Court [was] not a legislator and should

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2010). For an extensive appraisal of the Court's jurisprudence on the right to free elections see Harris et al., *supra* n. 27.

37 Such interpretation considers the ECHR (including its Protocols) as «a living instrument which... must be interpreted in the light of present day conditions» provided that a right has found sufficiently wide acceptance among member states as to affect the meaning of the Convention. (See e.g. ECtHR, *Tyrer vs. UK*, 25 April 1978, Serie A). For further reference see Harris et al., *supra* n. 27, 7 *et seq*.

38 See e.g. ECtHR, *Tanase vs. Moldova*, *supra* n. 36, paras. 87 *et seq*.

39 ECtHR, *Hirst vs. The United Kingdom*, 6 October 2005; see also the ECtHR's pilot judgment *Greens and M.T. vs. UK* where the ECtHR reiterated its findings of *Hirst* (ECtHR, *Greens and M.T. vs. UK*, 23 November 2010, paras. 77 *et seq*.).

40 ECtHR, *Frodl vs. Austria*, 8 April 2010.

41 See Joint Dissenting Opinion of the Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens to *Hirst vs. UK*, para. 6.

42 Likewise in *Hirst*, the ECtHR aimed at identifying «common European standards». Problematically, the Court disregarded though that only 18 out of 45 contracting states had no restrictions on prisoners' voting rights. (See criticism in Joint Dissenting Opinion to *Hirst*, *id*., para. 6; see generally *Hirst vs. UK*, *supra* n. 39, paras. 33 *et seq*.).

43 Art. 32 ECHR.

44 Art. 19 ECHR.

be careful not to assume legislative functions».[45] Such dynamic development of standards seems particularly delicate in the field of political rights which are intrinsically linked to a country's electoral arrangements and domestic constitutional dispensations.

2.2.2. OSCE/ODIHR election observation practice

It is likewise difficult to firmly base the development and implementation of international electoral standards through the ODIHR election observation practice firmly on state consent and the institution's broad mandate.

The main basis for the conduct of ODIHR election observation missions is the standing invitation of OSCE participating states in paragraph 8 of the Copenhagen Document[46], which states in broad and general terms:

> «The participating States consider that the presence of observers, both foreign and domestic, can enhance the electoral process for States in which elections are taking place. They therefore invite observers from any other CSCE participating States... Such observers will undertake not to interfere in the electoral proceedings.»[47]

In general OSCE practice, no additional invitation is required for observation missions to be deployed to a specific election.

The commitments of OSCE participating states concerning the standards of domestic electoral processes, which are contained in the Copenhagen Document, include the principles of universal and equal suffrage, secrecy of vote, the necessity of free elections at reasonable intervals where the seats of at least one chamber of the national legislature are contested by popular vote, freely established political parties, the need to ensure campaigning in a free and fair atmosphere, and the essential unimpeded access to the media for all political groupings.[48] Although OSCE documents do not constitute interna-

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[45] See criticism in the Joint Dissenting Opinion to *Hirst*, *supra* n. 41, paras. 6 and 9.

[46] Copenhagen Document, *supra* n. 29.

[47] *Id*., para. 8. The commitment to receive observers was strengthened in subsequent summit resolutions and outcome documents. (See *infra* n. 53 *et seq*.).

[48] Copenhagen Document, *supr*a n. 29, para 7. See also the 1990 Charter of Paris. For a discussion see F. Evers, «OSCE Election Observation. Commitments, Methodology, Criticism», 15 *OSCE Yearbook 2009*, 235, 236 *et seq*.

tional treaties in the classical and formal sense –in fact, their legal nature is still controversial–[49] they are based on the consensus of all OSCE participating states;[50] are aimed at producing strong commitments, at the very least; and are very effective.[51] ODIHR is the institution tasked with monitoring elections, having been «created by participating States to assist them in implementing their human dimension commitments, including those related to elections.»[52] Still, ODIHR's concrete mandate and the actions it can undertake are described vaguely: ODIHR is mandated to carry out «comprehensive election monitoring»[53] and to play an «enhanced role in election monitoring before, during and after the elections».[54] In the Charter for European Security, adopted at the OSCE Istanbul Summit in 1999, the participating States also committed themselves to follow up promptly on ODIHR's recommendations.[55]

Based on the standing invitation in the Copenhagen and subsequent OSCE documents, ODIHR election observation missions analyse a country's electoral process from different legal, electoral, political, and media perspec-

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[49] Some scholars consider OSCE documents as international treaties without the classical state responsibility and jurisdiction (J. Klabbers, *The Concept of Treaty in International Law* (1996) 126); others view them as soft law with binding political effect (U. Fastenrath, «The Legal Significance of CSCE/OSCE Documents», *OSCE Yearbook 1995/1996*, 411, 418; T. Schweisfurth, «Die juristische Mutation der KSZE», in U. Beyerlin (ed.): *Recht zwischen Umbruch und Bewahrung* (1995) 213, 224); again others consider them to be strictly non-binding political commitments (K. Ipsen/V. Epping, Völkerrecht (5th ed., 2004) 529 *et seq*. See generally A. Farahat, «Regulating Minority Issues through Standard Setting and Mediation: the Case of the High Commissioner on National Minorities», in A. von Bogdandy/R. Wolfrum/J. von Bernstorff/P. Dann/M. Goldmann (eds.), *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (2009), 343, 346 for further reference.

[50] According to Röben, unanimity favours legitimacy. (V. Röben, «What about Hobbes? Legitimacy as a Matter of Inclusion in the Functional and Rational Exercise of International Public Power», in R. Wolfrum/V. Röben (eds.), *Legitimacy in International Law* (2008) 353, 357 *et seq*.).

[51] See A. Farahat for comparative findings on the High Commissioner on National Minorities, *supra* n. 49.

[52] EOM Handbook, *supra* n. 28, 7. ODIHR was originally established as the Office for Free Elections by a decision taken at the 1990 Paris Summit of the CSCE, the OSCE's predecessor.

[53] Fourth Meeting of the CSCE Council of Ministers, Rome, 30 November 1993, «CSCE and the New Europe – Our Security is Indivisible», http://www.osce.org/documents/mcs/1993/11/4165_en.pdf, para. IV.4.

[54] OSCE Budapest Summit, «Budapest Document 1994: Towards a Genuine Partnership in a New Era», http://www.osce.org/documents/mcs/1994/12/4048_en.pdf, Ch. VIII, para. 12. See also clarifications brought by the Decision 19/06 at the 2006 OSCE Ministerial Council in Brussels, 5 December 2006, «Strengthening the Effectiveness of the OSCE», Sec. 2, para. 13.

[55] OSCE Istanbul Summit, «Istanbul Document 1999: Charter for European Security», http://www.osce.org/documents/mcs/1999/11/4050_en.pdf, para. 26.

tives. Their assessment focuses not only on election day but also includes the pre- and post-electoral phase. The missions' findings are published in statements and reports,[56] which go into considerable detail, concretising the commitments of the Copenhagen Document in their application to a specific election.[57] Election reports also contain recommendations and guidelines of action for non-state actors such as political parties and the media.[58] The publication of the preliminary statement, in particular, immediately after election day, which usually receives strong media attention, exercises considerable pressure on national authorities to conduct elections in accordance with international standards.[59]

Accordingly, ODIHR election observation missions exercise authority mainly by distributing information and through their judgment of an election.[60] They provoke states quite effectively to implement electoral standards through their, in Anne van Aaken's and Richard Chambers' terms, «governance through information.»[61] While election observers focus on the technicalities of the process and are guided by the principles of impartiality and non-interference, they may (de-)legitimize governments through their observations. This is perhaps best exemplified with the so-called «colour revolutions» in Georgia (2003), the Ukraine (2004), and Kyrgyzstan (2005), where ODIHR observers' criticisms gave credibility to the fraud allegations brought forward by the opposition, thus contributing to a regime change[62].

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56 OSCE/ODIHR Website, http://www.osce.org/odihr-elections/14207.html.

57 Evers refers to «practically implemented interpretive standards» which are developed as a result of interpretation and implementation by ODIHR and the participating states, «creating a kind of customary law in the process» (Evers, *supra* n. 48, 236, 239). See Section 3.2 *infra* for details. See also C. Binder, «International Election Observation by the OSCE and the Human Right to Political Participation», 13 *European Public Law* (2007) 133, 148 *et seq*.

58 See e.g. ODIHR recommendations on the activities of the election administration, on voter education programmes or women's and minority participation in the election observation reports. (*Supra* n. 56). See furthermore the requirement to disclose and report on campaign funds as well as the rules concerning campaigning in the media in OSCE/ODIHR, Existing Commitments for Democratic Elections in OSCE Participating States, Warsaw (2003), http://www.osce.org/odihr/publications.html?lsi=true&limit=10&grp=243, paras. 7.8, 7.13, 7.14.

59 See Binder, *supra* n. 57, 150.

60 See A. van Aaken/R. Chambers, «Accountability and Independence of International Election Observers» 6 *International Organizations Law Review* (2009) 541.

61 *Id*., 28.

62 See e.g. M. Meyer-Resende, «Exporting Legitimacy: The Record of EU Election Observation in the Context of EU Democracy Support», CEPS Working Document March 2006, 12. See also Binder, *supra* n. 57, 150.

This potentially far-reaching impact of a mission's assessment stands in certain contrast to the indeterminate bases of the observers' activities, namely the vaguely framed invitation of election observers in the 1990 Copenhagen Document and ODIHR's broad mandate. It is exacerbated by the fact that, politically, it is *de facto* impossible for OSCE participating states to withdraw the standing invitation of election observers given in the Copenhagen Document. In fact, ODIHR's activities were challenged within the OSCE. Since 2003/04 Russia and other members of the Commonwealth of Independent States (CIS) have consistently criticized ODIHR for applying «double standards» and exercising an «unchecked autonomy».[63]

2.3. *Appreciation*

The above appraisal shows that both the ECtHR and ODIHR election observation missions have developed and implemented international electoral standards post-1989 with increasing dynamism. In so doing, both institutions expanded the reign of international law and contributed to the fact that «international law went domestic» in electoral matters in Europe.

The actions of the ECtHR and ODIHR have some basis in state consent as the ECtHR only exercises jurisdiction when a state has ratified the ECHR and its 1st P, and OSCE participating states have consented to receiving election observers in relevant OSCE documents. The original states' consent, however, does not cover all aspects of the institutions' actions. This may be explained by the indeterminacy of the applicable regulatory framework (i.e. vague electoral standards, ODIHR's broad mandate), which provide

[63] See e.g. the statement of the Russian Foreign Minister: «...Autonomy of the ODIHR has turned into a complete absence of control and decent governments cannot accept this; otherwise members of the OSCE will also want to seek 'autonomy' from ODIHR.» (S. Lavrov, Minister for Foreign Affairs of the Russian Federation, at the OSCE Ministerial Council, Ljubljana, 5-6 December 2005, http://www.osce.org/conferences/mc_2005.html?page=documents&group=author.) See also the Moscow Declaration on the State of Affairs in the OSCE, where ODIHR was accused of muddling through politicization. (Moscow Declaration on the State of Affairs in the OSCE, 8 July 2004, PC.DEL/630/04, a text endorsed by all CIS states except Georgia, Azerbaijan and Turkmenistan). See generally V-Y Ghébali, «Debating Election and Election Monitoring Standards at the OCSE: Between Technical Needs and Politicization», 11 *OSCE Yearbook 2005*, 215.

little guidance for the institutions' activities.[64] Furthermore, the generality and continuous manner of the exercuse of, the institutions authority –the permanent jurisdiction of the ECtHR and the standing invitation of observers– reduces the legitimating role of original consent, especially in view of both institutions' activism.[65] The legality link is weakened since, as stated, the ECtHR considerably broadened its standard of review in a wide interpretation of Article 3 of the 1st P to the ECHR and likewise, the multiple activities of ODIHR election observers are only loosely grounded on ODIHR's broad mandate and states' general invitation of observers.

The broad exercise of both institutions' authorities is particularly sensitive in view of the potential far-reaching impact of their findings at domestic level. In fact, the ECtHR's judgments may impact on the electoral arrangements of states, in matters such as voting rights for out-of-country citizens,[66] the threshold of votes required to gain seats in parliament[67] or the right of former communists to stand for elections in countries emerging from communist past.[68] As mentioned, ODIHR election observation missions may delegitimate governments through their assessments. Thus, the activism of both institutions in electoral matters brought them into the somehow paradoxical situation to serve –through the implementation of electoral standards– the realisation of democratic self-rule, i.e., the emerging right to democratic entitlement mentioned before. This, however, at the prize of possible severe interventions in domestic legal orders.

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64 The determinacy of a rule is, according to Thomas Franck, vital for its perceived legitimacy as it is decisive for the degree to which its application will correspond to the original consent given. See T. Franck, «The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium», 100 *American Journal of International Law* (2006) 88, 94; See also T. Franck, *Fairness in International Law and Institutions* (1995) 30 *et seq*.

65 When considering the legitimating role of state consent, Bodansky distinguishes between specific consent to particular obligations or decisions (*e.g.*, by ratifying a treaty with specific obligations or accepting a Court's jurisdiction to a specific case) and general consent to an ongoing system of governance, which, once set up, develops a legal life of its own (*e.g.*, the general submission to the jurisdiction of a court; the ratification of the UN Charter with its permanent institutions). (Bodansky, *supra* n. 2, 604). See also Wolfrum, *supra* n. 8, 2042.

66 *Sitaropoulos et al. vs. Greece*, 8 July 2010.

67 In *Yumak and Sadak vs. Turkey* (8 July 2008) where the ECtHR had to deal with the 10 percent threshold of votes required to gain a seat in the Turkish parliament, the Court did not establish a violation though. See Golubok on the significance of the ECtHR examination of electoral systems. (Golubok, *supra* n. 27, 376 et seq.)

68 See *Zdanoka vs. Latvia*, *supra* n. 36, *Adamsons vs. Latvia*, *supra* n. 36.

In view of the *prima facie* insufficiency of source legitimacy as well as the potential impact of the institutions' dynamism in electoral matters, a broader look into the legitimacy of their activities will be undertaken in the following section. Beyond state consent, how else can they be justified?

3. Legitimacy perspectives on international electoral standards: a comparison

Recalling the definition of legitimacy as «quality that leads people (or states) to accept authority –independent of coercion, self-interest, or rational persuasion– because of a general sense that the authority is justified», legitimacy not only is a general justification and requirement for the exercise of authority.[69] The strength of a norm perceived as legitimate lies also in the fact that it pulls, in Thomas Franck's terms, those to whom it is addressed towards consensual compliance.[70] This seems particularly crucial in international law, for which there are often no effective enforcement mechanisms.

Confronted with the increasing insufficiency of state consent to justify the authority of international institutions, doctrinal interest in legitimacy has grown.[71] Scholars have suggested different models and elements that may induce legitimacy for the exercise of a particular authority.[72] They distinguished broadly between source, procedure, and result-oriented approaches, or a combination thereof.[73] Put differently, authority can be legitimated by its origin or source (traditionally state consent); it can also be considered as legitimate because it involves procedures which are adequate and fair or because of its success in producing desired outcomes.[74] Functional aspects, including the ex-

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[69] Bodansky situates legitimacy «somewhere between rational persuasion and compulsion» as a basis for action. (Bodansky, *supra* n. 5, 707).

[70] T. Franck, *The Power of Legitimacy among Nations*, 1990.

[71] In addition to those already mentioned, see also Bodansky, *supra* n. 5. Critical of legitimacy M. Koskenniemi, «Legitimacy, Rights and Ideology: Notes Towards a Critique of the New Moral Internationalism», 7 *Associations* (2003) 349.

[72] See e.g. Wolfrum, *supra* n. 8, 2040; Bodansky, *supra* n. 2, 611 *et seq*. As indicated *supra* n. 12, it is beyond the scope of this paper to refer to further legitimatory approaches such as concepts of transnational democracy.

[73] Wolfrum, *supra* n. 8, 2040; Bodansky, *supra* n. 2, 612.

[74] *Id*. See also Delbrück, *supra* n. 5, 42.

pertise of the respective institution or the existence of adequate accountability mechanisms, may also be taken into account.[75]

The following part will draw on procedure- (3.1) and outcome- (3.2) related legitimacy dimensions to assess and compare the development and implementation of international electoral standards in both human rights law and election observation practice. Due to space constraints, the discussion will remain rudimentary and only highlight the most relevant aspects.[76] It is done in the awareness that legitimacy is a matter not of all or nothing but of more or less.

3.1. *Procedural legitimacy*

As stated, authority can be legitimated because it involves procedures considered to be adequate and fair,[77] including the composition of the deciding authority and the procedures guiding deliberation (decision-making).

To begin, the composition of both institutions lays a reasonable foundation for an impartial and independent development and implementation of electoral standards. The ECtHR benefits especially from its judicial character, with its judges enjoying the judicial guarantees of impartiality, independence, and legal expertise.[78] The involvement of the Council of Europe's Parliamentary Assembly in the (s)election of judges also provides for some democratic

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[75] Bodansky distinguishes between legal legitimacy, participatory legitimacy, and expert legitimacy. (*Id*., 623). Treves establishes detailed clusters to assess the legitimacy of judicial decisions, including the way the judicial body was established; concerning the members of the judicial bodies; the basis of jurisdiction; the way how judgments are reached; the characteristics of the decision; and the decision's effects. (Treves, *supra* n. 10, 171 *et seq*.).

[76] Likewise, it is beyond the scope of this paper to address the legitimacy of the underlying norms –the applicable electoral standards. This seems less problematic though, as states have generally consented through their ratification of the ECHR and its 1st P as well as in their adoption of the Copenhagen Document. For further reference see generally L. Fuller, *The Morality of Law* (2nd rev. ed. 1969); See also J. Brunnée and S. Toope who, drawing on Lon Fuller's theory, propose internal morality based on criteria such as avoidance of contradiction, generality and congruence with underlying rules. (See J. Brunnée/S. Toope, «International Law and Constructivism: Elements of an Interactional Theory of International Law», 39 *Columbian Journal of Transnational Law* (2000) 19).

[77] See e.g. Wolfrum, *supra* n. 8, 2040.

[78] Arts. 21, 23.1 ECHR. The judges' independence was further strengthened with the entry in force of Protocol No. 14 in June 2010, which extended the terms of office to 9 years and abolished the possibility of re-election.

legitimacy.[79] The requirements for independence and impartiality of ODIHR observers are less formalized.[80] Still, a Code of Conduct,[81] which must be signed by all observers, obliges them to impartiality and enhances professionalism.[82] Furthermore, the members of the core team are independent experts with a high degree of technical expertise in electoral matters, which is generally considered a safeguard against politicization.[83] The core team is recruited in open competition from a variety of states.[84] Finally, the multinational composition of ODIHR election observation missions –observers come from all OSCE participating states, with not more than 10% of observers from one country, and nobody may observe elections in his own country–[85] favours a balanced observation.

Turning to the procedures involved to reach a judgment, one may roughly distinguish between procedural safeguards aiming at a decision's normative correctness and the institutions' capacities to reach factually comprehensive decisions. Concerning the former, the ECtHR finds legitimacy in its general fair trial requirements.[86] The Court's interpretative technique, basing its dy-

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79 In accordance with Art. 22 ECHR, the Parliamentary Assembly can elect on the basis of a list of 3 candidates nominated by a state. (See A. von Bogdandy/I. Venzke, «In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification», 2010, http://ssrn.com/abstract=1593543, 37 *et seq*.).

80 For a general overview, see J. Misk, «Standardizing the Principles of International Election Observation», 13 *Vanderbilt Journal of Transnational Law* 2010, 763.

81 Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers, 27 October 2005, http://ec.europa.eu/europeaid/observer/declaration_of_principles_code_of_conduct_en.pdf.

82 See also Venice Commission, «Guidelines on the Internationally Recognized Status for Election Observers», CDL-AD(2009)059, Strasbourg, 14 December 2009, http://www.venice.coe.int/docs/2009/CDL-AD(2009)059-e.asp.

83 In favour of legitimacy by independent experts Wolfrum, taking the example of the Legal and Technical Commission of the International Seabed Authority. (Wolfrum, *supra* n. 8, 2045). For critical views see M. Koskenniemi, «Global Governance and Public International Law», 37 *Kritische Justiz* 2004, 241; J. Klabbers, «Two Concepts of International Organization», 2 *International Organizations Law Review* 2005, 277. For a differentiated view see Bodansky, *supra* n. 5, 718 *et seq*.

84 Some see still room to improve the transparency of the recruitment procedures. (See e.g. the OSCE Ministerial Council Decision 2006, *supra* n. 54. See also ODIHR's reply: OSCE/ODIHR, «Common Responsibility. Commitments and Implementation», November 2006, 51, http://www.osce.org/publications/odihr/2006/11/22321_761_en.pdf).

85 On the structure of election observation missions see Election Observation Handbook, *supra* n. 28, 37 *et seq*.

86 Such as public hearings, Art. 40 ECHR; see also the welcome possibility to allow for third party intervention in accordance with Art. 36 ECHR.

namic interpretation of Article 3 of the 1st P to the ECHR on the detection of a common European standard,[87] seems –if applied properly and grounded in true European consensus which arguably was not the case in *Hirst vs. UK*–[88] an adequate concretisation of the Convention's indeterminate provision on political rights: the coherent methodology favours consistency. Likewise, the possible referral of cases raising serious legal questions of general interests to the Grand Chamber[89] in second instance contributes to legitimacy, given the inclusive composition of the Grand Chamber's 17 sitting judges. Several cases concerning political rights were Grand Chamber decisions.[90] Still, the legitimacy of such judgments is arguably reduced in cases of strong dissenting opinions, as was the case in *Hirst vs. UK*.

While the ECtHR has strong procedural safeguards and methodological techniques to reach normatively correct decisions and this accordingly results in the development of legitimated electoral standards, its fact-finding possibilities are limited. The Court usually appreciates facts as established by national courts[91] on the basis of written applications by the parties, and, because it lacks resources, only most exceptionally engages in fact-finding or on-site visits itself.[92] In fact, it is simply beyond the capacities of an international judicial institution to obtain a comprehensive picture of a domestic election, notwithstanding the welcome liberal practice of the ECtHR concerning the admissibility of *amicus curiae*, which provide additional insights into a country's situation.[93] This may hamper the Court's capacity to resort to a comprehensive consideration of facts, especially given the complexity of electoral processes with a variety of stakeholders involved. Weighing individual interests against

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87 See e.g. *Tanase vs. Moldova*, *supra* n. 36, paras. 87 *et seq*; *Hirst vs. UK*, *supra* n. 39, paras. 33 *et seq*.; see the Court's comparative law approach also in *Yumak and Sadak vs. Turkey*, supra n. 67, paras. 61 *et seq*. See generally *supra*, section 2.2.1.

88 *Supra*, section 2.2.1.

89 Art. 43 ECHR.

90 See e.g. ECtHR *Hirst vs. UK*, *supra* n. 39; ECtHR, *Zdanoka vs. Latvia*, *supra* n. 36; *Yumak and Sadak vs. Turkey*, *supra* n. 87.

91 While investigations *ex officio* are in principle possible in accordance with Art. 38 ECHR, they are rarely effectuated.

92 See Harris *et al*., *supra* n. 27, 846 *et seq*. for further reference.

93 Art. 44 of the Rules of the Court. (See *id*., 854 for further reference). For instance, in *Hirst vs. UK* two briefs were submitted by NGOs in favour of prisoners' voting rights. (*Hirst vs. UK*, *supra* n. 39, paras. 53 *et seq*.). Positive on the submission of *amicus curiae* briefs as means to increase the subjective legitimacy of findings: Wolfrum, *supra* n. 2, 7.

relevant state interests may be prevented accordingly, as was shown, for instance, in the Court's problematic decision *Sukhovetskyy vs. Ukraine*.[94] In the judgment, the Court did not find a violation of the applicant's political rights, notwithstanding that the disproportionately high deposit required to stand for elections arguably had impeded him from running.[95]

The (procedural) safeguard ensuring the normative correctness and lack of bias of ODIHR election observation missions' assessments is the institution's elaborate and formalized methodology.[96] It is laid down in «observer handbooks» which provide detailed guidelines for election observation missions to undertake their work in a way that respects the principles of impartiality and non-interference in the election process. In response to criticism, ODIHR has also diversified the range of countries to which observation missions are deployed, now observing elections not only in countries emerging from a non-democratic past but also –albeit at a smaller scale– in longer established democracies.[97] As the missions' reports are prepared in cooperation with ODIHR headquarters, the independence of ODIHR election observation missions from their «mother» organisation resides mainly in the fact that ODIHR is an independent institution within the OSCE.[98] However, the accountability mechanisms of election observation missions still are not sufficiently formalized.[99] Election observation missions' most important asset is their extensive capacity for fact-finding, largely due to the long-term presence of observers throughout the country. Election observation missions, therefore, base their findings on comprehensive observations that draw on contacts with all relevant electoral stakeholders (members of the election commission, political parties, representatives of civil society, etc.).

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94 ECtHR, *Sukhovetskyy vs. Ukraine*, 2006-VI, 44 *EHRR* 1185.

95 For criticism of the judgment see Harris et al., *supra* n. 27, 721.

96 See e.g. EOM handbook, *supra* n. 28; Declaration of Principles for International Election Observation, *supra* n. 81; see Evers, *supra* n. 48, 243 *et seq*.; see also Aaken/Chambers, *supra* n. 60, 551.

97 See Evers, *supra* n. 48, 241 *et seq*. for details.

98 *Id*., 18. Evers goes more into detail, specifying that ODIHR's independence is based in OSCE documents tasking ODIHR with carrying out independent election observation as well as ODIHR's constant affirmation of its own independence which was also accepted by the majority of OSCE Participating States, whereas according to OSCE Rules of Procedure, ODIHR was not a decision making body but an executive structure or OSCE institution. (*Id*., 244 *et seq*.).

99 Aaken/Chambers, *supra* n. 60, 570 *et seq*.

3.2. *Substantive/outcome legitimacy*

Substantive/outcome based legitimacy –most bluntly speaking– is concerned with an institution's «output», its doing «a good job in governing», which also relates to its effectiveness.[100] Drawing on Treves' discussion of legitimacy of judicial decisions, we will particularly address the inherent qualities/characteristics of a decision (*i.e.*, consistent application of relevant law and quality of legal reasoning)[101] and the relation between a decision and its implementation (in more general terms to what extent the outcome is accepted by the respective community).[102] An examination of these dimensions follows.

When applying Article 3 of the 1st P to the ECHR, the ECtHR extensively refers to its previous case law.[103] Such references are welcome as they have the practical effect of system building by informal precedent,[104] furthering the consistency of the Court's judgments and stabilising normative expectations.[105] The Court's interpretational technique of comparing different states' legal orders to inquire whether a new European standard on a matter has emerged –documented in the Court's considerations– furthers transparency.[106] The coherence of ODIHR election observation missions' standard setting, inversely, is facilitated by the numerous missions deployed during the last 20 years. The missions have consistently concretised indeterminate electoral standards in their interpretation and application. With the participating states being involved in implementation, this contributed to the development of best practices or, in Evers' terms, «interpretive commitments».[107] This

[100] Bodansky, *supra* n. 5, 711. See generally Bodansky, *supra* n. 2, 612; Wolfrum, *supra* n. 8, 2041.
[101] See Treves, *supra* n. 10, 172.
[102] *Id.*, 173.
[103] See e.g. *Tanase vs. Moldova*, *supra* n. 36, paras. 104 *et seq*.; *Frodl vs. Austria*, *supra* n. 40, paras. 22 *et seq*. See also the Court's general obligation to give reasons, Art. 45 ECHR.
[104] The Court is not formally bound by its previous decisions. For further reference on precedent and system building see M. Jacob, «Lawmaking Through International Adjudication», 12 *German Law Journal* (2011) 1005, available at: http://www.germanlawjournal.com/index.php?pageID=11&artID=1351.
[105] Even if a rule is indeterminate, general consistency in its application may nonetheless add to its perceived legitimacy. As stated by Franck, a rule that is vague may still be seen as quite legitimate if its application in given, contested instances, is open to a process that yields specificity. (Franck, *supra* n. 64, 94).
[106] See also the Court's increasing reference to soft law standards as evidenced for instance in *Sitaropoulos vs. Greece*, *supra* n. 66, para. 44.
[107] Evers even refers to «a kind of customary law». (Evers, *supra* n. 48, 236, 255).

soft law[108] provides for detailed yardsticks to assess an electoral process. In addition, as missions are generally sent to consecutive elections in the same country, country-specific benchmarks are established to compare the electoral performance of a country with respect to previous elections. [109] Elections are thus assessed in a detailed and consistent way which improves the quality of an election observation mission's findings.

The examination of the relation between a decision and its implementation is under the obvious caveat that compliance by *state* authorities with a judgment can only be a partial guide to the institutions' substantive/outcome legitimacy in case of human rights, where ultimately individuals are the addressees/beneficiaries.[110] This seems to be even more so the case with regard to electoral/political rights, where implementation should serve democratic self-rule including the possible replacement of authoritarian regimes (which might oppose the implementation of a decision). Thus, the «concerned community» refers to, most evidently in case of political rights, individuals. Accordingly, special focus will be laid on the efficiency of the institutions' means to further compliance.

When it comes to the relation between a decision and its implementation, the ECtHR's means are limited. Indeed, a state is obliged to implement the Court's judgments in accordance with Article 46 ECHR. However, the effective implementation of electoral standards with respect to a particular election is, at first, prevented by the *ex post*-character of the Court's judgments and the long time-span between the filing of an application and the Court's decision.[111] To exemplify, the *Yumak and Sadak vs Turkey* case, which

[108] Existing Commitments, *supra* n. 58. The document was drafted by a group of international law experts with experience in electoral and human rights practices in the West as well as the CIS and the states of the former Yugoslavia and was also endorsed by the Permanent Council. (PC/Dec 509, 5 December 2002).

[109] For many, see e.g. the report of the ODIHR election assessment mission to Uzbekistan 2009 which comments on the country's electoral performance by comparing it to previous recommendations made in the report on the 2004 parliamentary elections and the 2005 assessment of the country's legal framework (OSCE/ODIHR Election Assessment, Final Report, Republic of Uzbekistan, Parliamentary Elections 27 December 2009, 7 April 2010, 6, http://www.osce.org/documents/odihr-el/2010/04/43367_en.pdf.) (For a general discussion, see C. Binder, «Möglichkeiten und Grenzen der Wahlbeobachtung in unsicheren Demokratien am Beispiel Usbekistans», 4 *Verfassung und Recht in Übersee* (2010) 418.

[110] See Bodansky, *supra* n. 5, referring to the increased importance of non state addressees.

[111] See Treves, *supra* n. 10, 173.

was brought with respect to the 2002 Turkish parliamentary elections, was not decided until after the 2007 elections.[112] The Court's judgments therefore seem most useful to addressing specific insufficiencies in a state's regulatory framework governing an election on a long-term basis. In addition, the Court's tools for furthering the implementation of electoral standards are necessarily reduced. The Committee of Ministers monitors the execution of the Court's judgments. The publication of the compliance records of individual states on the Council of Europe's website and the increase of the Committee of Minister's supervisory powers with the entry into force of the Protocol No. 14 –the Committee may now re-refer cases of non-compliance to the ECtHR–[113] exercises considerable pressure on states to abide by judgments. Still, as a judicial institution, the Court does not have the means to support or technically assist a state in remedying criticized insufficiencies in its electoral framework[114]. In practice, the states' compliance with the judgments of the ECtHR seems mixed: Most states abided by the Court's judgments or at least indicated their willingness to do so.[115] In some cases, however, one has been faced with delays in implementation,[116] and other countries failed to provide the relevant information on the status of compliance to the Committee of Ministers.[117]

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[112] Wolfrum, *supra* n. 8, 2041: another aspect of substantive legitimacy may be efficiency; although, as argued by Wolfrum, this should not be overrated.

[113] Art. 46.4 ECHR.

[114] In fact, the Council of Europe's Venice Commission gives legal opinions –sometimes together with ODIHR– on a country's electoral framework and adopts recommendations. (See e.g. the Venice Commission-OSCE/ODIHR Joint Opinion on the Draft Law on Amendments and Supplements to the Law on Election of Councillors and of Members of Parliament of Montenegro as amended through July 2006, 3 and 4 June 2010, http://www.venice.coe.int/docs/2010/CDL-AD(2010)023-e.asp).

[115] See generally the status of compliance and the execution of judgments, Council of Europe, Supervision of Execution. Implementation of Judgments of the European Court of Human Rights, http://www.coe.int/t/dghl/monitoring/execution/.

[116] For example, as of August 2011 the UK had not implemented the required legislative changes concerning prisoners' voting rights in the follow-up to *Hirst* in 2004. (Supervision of Execution. Implementation of Judgments of the European Court of Human Rights, 74025/01 Hirst No. 2, Judgment of 06/10/2005 – Grand Chamber. Interim Resolution CM/ResDH(2009)160; see also *Greens and M.T. vs. UK*, *supra* n. 39).

[117] For instance, as of August 2011 the Committee of Ministers was still waiting for information by Latvia of how the country intended to implement the Court's *Adamsons* Judgment of 2008 as regards the required legislative changes and the applicant's possibility to stand for elections). (Supervision of Execution. Implementation of Judgments of the European Court, http://www.

ODIHR's assessments of elections (*e.g.*, preliminary statement, final report) are not legally binding, although OSCE participating states have politically committed themselves to follow-up on ODIHR's recommendations in relevant OSCE documents.[118] As stated, election missions exercise considerable political pressure on states to hold elections in accordance with international standards through the publication of their assessments. The follow-up in the OSCE Permanent Council concerning the implementation of the findings of a mission was, however, criticized for being weak and insufficient,[119] which makes ODIHR's effectiveness depend on the political will of states and governments.[120] In fact, the implementation of electoral standards is most effective in states that are willing to improve their electoral record, as the observers' reports provide for recommendations of how to tackle detected deficiencies. In addition, ODIHR, in some cases, also technically assists states in the follow-up of a mission.[121] The positive potential of this cooperative implementation in exchange and dialogue with the country concerned should be enhanced[122] by systematically introducing a post-election dialogue with states after an observation mission.[123] Still, the country's motivation remains vital to what extent ODIHR's recommendations are implemented; in practice, not only the political but also the geo-political situation of a country seems decisive. A study from 2001 on electoral trends in countries where ODIHR had observed elections saw the most progress in improving electoral standards being made in Central/

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coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=adamsons&StateCode=&SectionCode=).

[118] See Istanbul Summit, *supra* n. 55.

[119] See e.g. ODIHR Common Responsibility, *supra* n. 84, para. 147. In this sense generally Binder, *supra* n. 57, 157.

[120] See e.g. *H. Balian*, «Ten Years of International Election Assistance and Observation», 12 *Helsinki Monitor* (2001) 197, 201.

[121] See e.g. ODIHR Common Responsibility, *supra* n. 84, paras. 148 and 149. Also, various election observation reports directly refer to the possibility of electoral assistance. (See for instance the OSCE/ODIHR, Final Report, Russian Federation, Presidential Election, 14 March 2004, http://www.osce.org/documents/odihr/2004/06/3033_en.pdf, 2; for further information on election assistance see ODIHR's website, http://www.osce.org/odihr/?page=elections&div=assistance. See Binder, *supra* n. 57, 151 *et seq*. for further reference.

[122] See e.g. 2003 Maastricht Ministerial Council, tasking ODIHR to «consider ways to improve the effectiveness of its assistance to participating States in following up [its own] recommendations.» (OSCE, 11th Meeting of the Ministerial Council, Maastricht, 1 and 2 December 2003, Decision No 5/03, 81).

[123] See e.g. ODIHR Common Responsibility, *supra* n. 84, paras. 145 *et seq* on follow up and post electoral dialogue.

Eastern Europe, slow but steady improvements in the Balkans, limited progress in the Caucasus, and found the most challenging situation in Central Asia.[124]

3.3. *Appreciation*

This very comprised appraisal indicates that in cases of both institutions' development and implementation of electoral standards procedural and outcome related aspects of legitimacy complement the somehow deficient legitimacy derived from state consent. The ECtHR's and ODIHR's activities are governed by considerable procedural safeguards aiming at impartial and balanced decisions. Likewise, the quality and consistency of reasoning/assessment legitimate, in principle, the exercise of their authority.[125] These procedural and substantive dimensions of legitimacy are important to guide the ECtHR's development of the indeterminate electoral standards of Article 3 of the 1st P to the ECHR as well as ODIHR's activities, within its broad mandate. This is particularly crucial for international action in areas as sensitive as domestic electoral processes. For ODIHR,[126] a continuous emphasis and strengthening of these additional legitimacy dimensions seems vital also in response to Russia's and other CIS states' criticisms, and their allegations of its «unchecked autonomy»,[127] which, from another perspective, may also be viewed as attempts to de-legitimize the institution after ODIHR had produced critical reports on the quality of their electoral processes.[128]

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[124] See Balian, *supra* n. 120, 202 *et seq*. For similar findings see the 2010 analysis of regional trends by Freedom House. (Freedom House/A.Puddington, «Freedom in the World 2010: Erosion of Freedom Intensifies», Survey, http://www.freedomhouse.org/uploads/fiw10/FIW_2010_Overview_Essay.pdf, 7 *et seq*.) For South-Eastern Europe more generally on democracy building see also S. Richter, «How Effective Is the OSCE's Promotion of Democracy? Analytical Considerations of the Effectiveness of the Long-Term Missions in South-Eastern Europe», *OSCE Yearbook* 2008, 191.

[125] When the legal reasoning is poor, dissenting opinions are a strong tool to highlight such deficiencies. (See e.g. the Joint Dissenting Opinion to *Hirst*, *supra* n. 45).

[126] See ODIHR Common Responsibility, *supra* n. 84. For general criticism on international organisations' «hidden agendas» see e.g. M. Ottaway, «Should Elections Be the Criterion of Democratization in Africa?», 145 *CSIS Africa Notes* (1993) 1, 3; R. Abrahamsen, *Disciplining Democracy: Development Discourse and Good Governance in Africa* (2000).

[127] *Supra* n. 63.

[128] Russia had started to particularly oppose ODIHR after the institution had strongly criticized Russia's 2003 parliamentary elections and also other countres' criticism seems to have been fuelled by the so-called «colour revolutions». (Evers, *supra* n. 48, 235).

Still, a comparison of the development and implementation of electoral standards from procedural and outcome-related legitimacy perspectives evidences divergences in the institutions' strengths. The ECtHR's judicial character and its interpretative technique of system building by informal precedent and standard setting by comparing the legal orders of state parties, seem to particularly legitimate the Court for the identification of evolving electoral standards. While formally the Court's judgments are only binding on the parties to a dispute,[129] they are nome generally a strong indication as to the relevant state of law. However, these standards based on the detection of a common European standard have to be necessarily broad.[130] If not, the Court will be reproached for having «legislated» as was the case in *Hirst vs. UK*. More generally, the inevitably wide standards reflect the ECtHR's difficult position as an international court that must involve itself in matters as delicate as the electoral arrangements of state parties. Judge Levits called this the Court's «dilemma» observing that, «on the one hand, it is the Court's task to protect the electoral rights of individuals; but, on the other hand, it should not overstep the limits of its explicit and implicit legitimacy and try to rule instead of the people on the constitutional order which this people creates for itself.»[131] Because the Court is, in principle, limited to assessing only whether there has been a violation, this «dilemma» is exacerbated by the binding and binary character of the Court's decisions.[132]

Inversely, the comparative advantage of election observation missions is their «softer» way of standard setting. The concretisation of electoral standards in the missions' reports is based on an extensive set of «soft law» documents and best practices. The ample possibilities of contextualisation (*e.g.*, by explaining the non-compliance with electoral standards against the back-

[129] Art. 46 ECHR.

[130] See also Golubok's «two layers of protection», distinguishing between the ECtHR's function of safeguarding the «core» of electoral rights and a more general body of soft law developed by other bodies of the Council of Europe such as the Venice Commission. (Golubok, *supra* n. 27, 390).

[131] Judge Levis, dissenting opinion in *Zdanoka* (Chamber judgment), para 17.

[132] In *Zdanoka vs. Latvia* and *Yumak and Sadak vs. Turkey*, the ECtHR resorted to an additional means: While not establishing a violation, it nevertheless signalled in its reasoning that the laws in place were unsatisfactory and in need for amendment. (*Zdanoka vs. Latvia*, *supra* n. 36, para. 135; *Yumak and Sadak vs. Turkey*, *supra* n. 87, para. 147). See Harris et al. *supra* n. 27, 724, 728 *et seq*. for a discussion of the cases.

ground of a specific country's situation)[133] and the non-binding nature of their recommendations seem particularly adequate to accommodate the need for unified international standards with the diversity of different states' electoral systems at domestic level.

Concerning the implementation of electoral standards, factors such as long delays until a decision is rendered and the ECtHR's limited means to support states in the implementation of a judgment hamper the Court's action. In addition, because the Court is limited to the grounds on which the application is brought, it will only deal with the subject of the alleged violation, rather than more generally addressing the adequacy of a country's electoral framework.

Conversely, ODIHR's reports assess the entirety of a country's electoral process and issue recommendations on the legal, electoral, political, or media-related aspects of an election. These provide an excellent basis for embarking on a post-election dialogue with the country concerned and relevant state authorities, but also including non-actors such as political parties, civil society, the media, or women's candidates. The flexibility of this cooperation-based compliance model pushes for the implementation of international electoral standards, all while allowing for diversity at national level. It seems most appropriate to tackle deficiencies in the multilayered domestic electoral processes with a variety of stakeholders involved. Given their potential, ODIHR should increase and broaden its activities in the follow-up of observation missions.[134]

Finally, to further enhance their legitimacy, both institutions could consider increasing mutual reliance and cross-referencing. For example, references to the ECtHR's judgments –as for example can be found in the election observation mission reports on UK and Austria– improved the authority of ODIHR's findings[135]. Also, the ECtHR could, if available, draw in its reasoning on the extensive documentation provided in election observation reports,[136] which would facilitate its consideration of the facts[137]. Given

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[133] See e.g. ODIHR Report on Uzbekistan, *supra* n. 109.

[134] See also ODIHR Common Responsibility, *supra* n. 84.

[135] See e.g. the reference to *Frodl* in the OSCE/ODIHR EAM Final Report on Austria Presidential Election, 25 April 2010, 4 and the reference to *Hirst* in the OSCE/ODIHR EAM Final Report on the United Kingdom General Election, 6 May 2010, 6.

[136] In accordance with Art. 38 ECHR, the Court may engage in investigations *ex officio*.

[137] The ECtHR draws considerably on soft law instruments. See e.g. *Tanase vs. Moldova*, where the Court referred in its analysis of the 2008 Moldovan electoral reform to the Council of Europe's

the growing number of cases on the right to free elections delivered by the ECtHR, and the diversification of countries to which ODIHR election observation and assessment missions are deployed, now also including consolidated democracies, there seems to be ample room for future interaction.

4. Concluding remarks

So, anything new since the end of the Cold War? It was argued here that «international law has gone domestic» with respect to domestic electoral processes in the period post-1989 and has started to rule also in internal affairs, at least at the European regional level.

Still, the above appraisal shows the challenges of such expansion of international law in an area as delicate as domestic electoral processes and constitutional orders. The inherent tension and sensitive task to accommodate (unified) international standards with diversity at national level, in the very core of a state's functioning, is particularly evident in electoral matters, with different states' electoral systems being a very direct expression of the specific historic, cultural, legal, social, and political conditions of a state. The procedural- and outcome-related legitimacy dimensions bolstering the ECtHR's and ODIHR election observation missions' development and implementation of international standards are important, but may only contribute to ease this tension.

What is more, elections are an essential but not a sufficient condition for genuine democracy.[138] Democratic governance is a complex and difficult concept, in need of strong institutions, participation and accountability mechanisms, including elements such as parliamentary processes, justice, the rule of law, human rights, transparency, access to information, and accountable and

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Commission against Racism and Intolerance, the Venice Commission and the Council of Europe Parliamentary Assembly's reactions to Moldova's legislative changes (*Tanase vs. Moldova*, *supra* n. 36, paras. 45 *et seq*.). See Golubok on the role of soft law instruments in the ECtHR's jurisprudence on the right to free elections. (Golubok, *supra* n. 27, 386 *et seq*.).

[138] G. O'Donnell/J.V. Cullellet al. (eds.), *The Quality of Democracy. Theory and Applications* (2004); L. Diamond/L.Morlino, *Assessing the Quality of Democracy* (2005). See also relevant UN General Assembly Resolutions, e.g. UN GA Res 55/96, «Promoting and Consolidating Democracy», UN Doc. A/RES/55/96, calling on states to take action in a wide range of areas including human rights, electoral systems, the rule of law or civil society participation. See C. Pippan, *supra* n. 16, 15, for further reference.

effective public administration.[139] An effective realisation of electoral standards is thus vital, but not enough for true democratic governance. The electoral standards discussed here address the *vertical* relation between citizens and their governments, the possibility of a state's people to hold its government accountable through elections. A next step towards the realisation of democratic governance would be to deal with *horizontal* accountability, including the separation of powers, the relationship between legislative and executive, the independence of the judiciary, or the civilian control of the security sector. Given their complexity, the development of international standards in this area is still at an embryonic stage.[140] Nonetheless, in view of the increasing expansion of international law into the domestic arena over the past two decades, one may wonder whether the legitimacy of international standards on the horizontal accountability of democratic governance will be the topic of a next article in the *Anuario Español de Derecho Internacional*: perhaps in 2021?

[139] See UNDEF, «Situating the UN Democracy Fund in the Global Arena. The Elements of Democracy», http://www.un.org/democracyfund/XSituatingDemocracy.htm. In fact, the Freedom House Survey 2010 concluded that: «... despite the vote-rigging, fraud, and other manipulations that occurred in a number of countries in 2009, the global picture over the last five years suggests that governments are more likely to permit relatively honest elections than to allow an uncensored press, a robust civil society, and an independent judiciary.» (Freedom House, *supra* n. 124, 3).

[140] See for a first appraisal DRI, «Discussing International Standards for Democratic Governance. A Preliminary Research Report», September 2007, http://www.democracy-reporting.org/standards.html. As to international standards for democratic legislatures, see NDI, «Toward the Development of International Standards for Democratic Legislatures», January 2007. See also OSCE/ODIHR propositions for further commitments by OSCE participating states as regards the necessary components of genuine democratic government, including separation of powers, clarification of the role of the executive branch, independence of the judiciary and legislative transparency and efficiency. (ODIHR Common Responsibility, *supra* n. 84).