

Challenging the Norms and Standards of Election Administration: External and Absentee Voting*¹

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I. Introduction

An estimated 175 to 250 million persons currently reside outside of their home communities or countries of citizenship, and are therefore outside of their regular electoral constituencies.² Some left their homes unwillingly due to war or civil strife; others left freely but continue to maintain citizenship and often pay taxes or otherwise contribute to the economies of their home countries and communities.

This paper examines the extension of franchise to these people. While an increasing number of countries provide absentee voting services, practices and procedures vary widely. Furthermore, human rights instruments and election standards initiatives provide limited, if any, guidance on ensuring the transparency and integrity of absentee voting. As a result, parliamentarians and election management bodies (EMBs) confront a knowledge and skills gap regarding who should be eligible for absentee voting and how to best design a workable, cost-effective, and transparent program.

Many democracies have struggled with the logistical and political difficulties associated with external voting. In the United States, the 2000 presidential election was marred by accusations that election officials at the state level used different standards to determine the validity of absentee ballots depending on where they were counted.³ In the 2004 presidential elections in Ukraine, the OSCE/ODIHR reported serious abuse of absentee voting, noting widespread reports of persons voting multiple times by absentee ballot. It further noted that the Central Election Commission maintained inadequate controls and supervision of the 1.5 million absentee ballots that were printed.⁴ Less destructive to the integrity of the electoral process, but still problematic, participation rates among absentee voters in the 2006 Mexican presidential elections were far lower than many had expected. According to a poll conducted by the Pew Hispanic Center, less than one percent of eligible Mexican nationals in the United States registered to participate. The

¹ This paper was first drafted for IFES in 2004 and presented at OSCE Human Rights Dimension Meetings, Vienna, November 2004. The research is based on a review of the literature on absentee voting, reports and analyses of EMB and election observations groups, and the author's experiences administering absentee programs on behalf of IOM and IFES. The original paper was also posted online at IFES (www.ifes.org) and formed the basis of several topical pages of the ACE Project at www.aceproject.org. This re-write updates the paper and incorporates new cases and research.

² The IOM identified 175 million migrants in 2000 and extrapolates from recent trends that the figure has likely reached 185 to 192 million as of 2005. That figure only includes persons outside of their home state and does not include internally displaced persons (IDPs). The Internal Displacement Monitoring Center (IDMC) estimates a global population of 23.7 million IDPs as of 2005. See IOM at http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/wmr_sec03.pdf and IDMC at <http://www.internal-displacement.org>.

³ David Barstow and Don van Natta, Jr., "How Bush Took Florida: Mining the Overseas Absentee Vote," *New York Times*, 15 July 2001.

⁴ OSCE Office for Democratic Institution and Human Rights, *Ukraine Presidential Elections: Second Round Re-Run*. 2004. Available at <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN019222.pdf>.

survey cited “[s]trict requirements, insufficient information about registration procedures and lack of public interest” as the chief reasons for the disappointing turnout.⁵

Despite these well publicized challenges, a forthcoming (2007) study by the International Institute for Democracy and Electoral Assistance (IDEA) identifies over 100 countries that “...expressly allow their citizens or electors who are residing outside the country, permanently or temporarily, to exercise the right to vote from abroad.”⁶ Several major migrant-sending states such as Mexico and the Philippines are recent additions to this number and have implemented highly publicized external voting programs. Other countries, including Angola, Nicaragua, and Greece, have legal provisions for absentee voting in place but have yet to implement them.⁷

The trend is especially prominent in the context of post-conflict elections. In Iraq, Afghanistan, Kosovo, East Timor, and Bosnia and Herzegovina, absentee voting by refugees and internally displaced persons (IDPs) has been viewed by the international community as important to national reconciliation and to the building of democratic political institutions. However, these processes have not been free from irregularities.⁸

The issues surrounding external voting can be divided into four general questions: First, is the provision of franchise to citizens abroad a “right” protected by international law? Second, who should be eligible to vote from outside of their home districts? Third, what sorts of systems of representation should be established for these voters? Fourth, how can the secrecy of the ballot and election transparency be protected and costs contained when election activities occur on the territory of a foreign state? The first three questions are political, requiring a consultative process between parliamentarians and stakeholders. The final question is technical, requiring the application of best practices by EMBs.

The balance of the paper explores each of these questions in turn, comparing state practices and identifying areas where the development and application of standards would result in better management of external voting programs. The paper concludes by discussing the challenges of implementing external voting, reviewing existing literature on the subject, and suggesting areas for further investigation.

⁵ Pew Hispanic Research Center, *Pew Hispanic Center Survey of Mexicans Living in the U.S. on Absentee Voting in Mexican Elections*. (Pew Hispanic Center, 2006). Available at <http://pewhispanic.org/files/execsum/60.pdf>.

⁶ International IDEA, “A Preview of the Forthcoming International IDEA Handbook on External Voting.” (International IDEA, 2006). Available at http://www.idea.int/elections/upload/External_voting_Preview_withlayout_07june06_final.pdf.

⁷ Note that expatriate Greek nationals are eligible to vote in person if they return to Greece on election day. This paper does not address issues of in-person voting by expatriates.

⁸ See International Organization for Migration, “Case Studies on the Participation of Conflict Forced Migrants in Elections,” IOM Participatory Elections Project, Desk Research Package Background (May 2003): 3-34. Available at <http://www.geneseo.edu/~iompress>.

II. Democracy and Election Standards

Article 25 of the 1976 International Covenant on Civil and Political Rights (ICCPR) holds that:

Every citizen shall have the right and the opportunity ... without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; [and] (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free will of the electors...

Similar language is common in global and regional human rights instruments,⁹ has been upheld by international human rights commissions and tribunals,¹⁰ and is becoming standardized in the practice of international organizations. As a result, a number of scholars argue that the human rights system now guarantees a “democratic entitlement,” or the right of all citizens resident in their state to vote in free and fair elections.¹¹

However, holding elections does not necessarily imply the full realization of democratic rights; elections can be manipulated to legitimate pre-ordained outcomes. Thus, the international community has sought to develop standards to ensure that elections meet the twin tests of “free and fair.”¹² Two types of standards initiatives are important. The first stems directly from global and regional treaty-based mechanisms, such as the Human Rights Committee (particularly its General Comment 25) and the other charter-based human rights mechanisms. These initiatives aim to provide better reporting and commentary on periodic state reports regarding their obligations on the relevant covenants or, in some instances, to apply specific rights in cases brought by individuals against their own state. The second type derives from the work of global and regional intergovernmental organizations such as the Inter-Parliamentary Union, the Organization for Security and Cooperation in Europe Office of Democratic Institutions and Human Rights (OSCE/ODIHR), the Council of Europe (particularly the Venice

⁹ Article 13 of the “African [Banjul] Charter on Human and Peoples’ Rights,” adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986; Article 23 of the American Convention on Human Rights, OAS. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978 (available at <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm>), OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992); and Article 3 of the Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS 9), 213 U.N.T.S. 262, entered into force May 18, 1954 (available at <http://www1.umn.edu/humanrts/euro/z20prot1.html>).

¹⁰ Relevant cases include Human Rights Committee, Communications: 760/1996 *J.G.A. Diergaardt et al. v. Namibia*, 500/1992 *Jozsef Debreczeny v. the Netherlands*; 034/1978 *Jorge Landinelli Silva et al. v. Uruguay*; 932/2000 *Marie-Hélène Gillot et al. v. France*; 923/2000 *Istvan Mátyus v. Slovakia*. At the regional level, see *X v. United Kingdom*, App. Nos. 7730/76 (1979) and 7566/76 (1976) and *Mathews v. United Kingdom*, App. No. 24833/94, Secretariat of the European Commission of Human Rights, Decisions/Reports of the Council of Europe by the European Commission on Human Rights, and Secretariat of the European Commission of Human Rights.

¹¹ See Gregory H. Fox and Brad R. Roth, eds., *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000).

¹² There has been a general trend towards the use of “genuine” instead of “free and fair.” This paper uses the terms interchangeably. For an overview of basic issues associated with “genuine elections,” see Jørgen Elklit and Palle Svendsen, “What Makes Elections Free and Fair?” *Journal of Democracy* 8: 3 (July 1997). See also Guy S. Goodwin-Gill, *Free and Fair Elections: New and Expanded Edition* (Geneva: Inter-Parliamentary Union, 2006). Available at http://www.ipu.org/PDF/publications/Free&Fair06_e.pdf#search='goodwin%20gill%20free%20and%20fair. See also Office of the United Nations High Commissioner for Human Rights, *Compilation of documents or texts adopted and used by various intergovernmental, international, regional and subregional organizations aimed at promoting and consolidating democracy*. Available at http://www.ohchr.info/english/law/compilation_democracy/index.htm.

Commission), and others. Unfortunately, given the wide divergence in state practice regarding who should be eligible for absentee voting and how to implement such a program, these initiatives have yet to provide comprehensive guidance on organizing a transparent process.

III. Justifications for External Voting

Persons living outside of their home communities and/or countries of nationality left for a variety of reasons, and this diversity affects decisions regarding whether they should retain the right to vote. In general, three categories of potential absentee voters can be distinguished:

- Forced-migrants: These persons are outside of their home community against their will. There are two distinct types: refugees or asylum seekers who flee across an international border because of a “well founded fear of persecution” and are “unable to avail themselves of the protection of their home state government;”¹³ and internally displaced persons (IDPs), who have fled natural or man-made catastrophes, including war and persecution, but do not cross an international frontier.¹⁴
- Expatriates and migrant laborers: These persons are outside of their home states for reasons of economic remuneration, diplomatic/military service, educational opportunities, or personal preference. In general, they maintain their citizenship, intend to return to their home states, and often continue to pay taxes and/or send remittances home. They may be absent only temporarily, or for long periods of time. Most importantly, they retain citizenship in their home states.
- Non-citizens claiming a linkage through “ethnic kinship” or descent. This group includes members of a diaspora or other individuals sharing a common conception of belonging to a national group based on perceptions of ethnic or cultural identity. These persons often maintain an abiding interest in the affairs of the state of origin, yet do not retain citizenship. Few countries extend voting rights to these non-citizen, non-resident persons.

Should any or all of these populations retain their right to political participation while abroad? Opponents of absentee voting for expatriates and migrant laborers advance a number of arguments against the practice, including 1) because external voters reside outside of the jurisdictions where their votes will help determine who wields power, they do not live with the direct consequences of the vote and may therefore vote less responsibly than those who do; 2) external voters may lack the information needed to make an informed decision because of difficulties in presenting candidate platforms and positions to non-residents; 3) the costs associated with reaching voters who have voluntarily chosen to reside abroad and may be widely dispersed places an undue burden on those who remain; and 4) election administrators must confront issues of ballot secrecy and transparency in territories where they lack jurisdictional capacity.¹⁵

¹³ “Convention Relating to the Status of Refugees,” Art. 1(A)(2), 19 U.S.T. 6259, 6261, 189 U.N.T.S. 137, 152, 28 July 1951, entered into force 22 April 1954.

¹⁴ External voting is generally conceived as a procedure related to those outside of their country. In the case of IDPs, and even many economic migrants or students, however, it could potentially refer to persons within their state of citizenship but outside their normal electoral constituency. This paper concentrates primarily on voting while abroad.

¹⁵ For more detailed consideration and analysis of these arguments, see: Rainer Baubock, “Expansive Citizenship – Voting Beyond Territory and Membership,” *PS, Political Science and Politics*, 38: 4 (October

Some of these arguments have also been advanced in particular national contexts in relationship to conflict-forced migrant external voting programs.

1. Forced-Migrants

The legal, political, and peace-building arguments for Forced-migrant voting rights are clear.¹⁶ Denial of Forced-migrant voting rights during their displacement rewards those who use large-scale displacement to achieve political legitimacy in an election in which the displaced are not provided a voice. The international community has recognized the gravity of this problem and included refugee and IDP voting programs in many post-conflict elections.

A case for the enfranchisement of forced-migrants is also based on international human rights obligations, although the protections appear stronger for IDPs than for refugees. IDP political participation is grounded in the non-discrimination principles contained in Article 2 of the ICCPR and in most other global and regional human rights instruments.¹⁷ The Guiding Principles on Internal Displacement, although not treaty law, also address this issue, declaring in Principle 22 that:

Internally displaced persons ... shall not be discriminated against as a result of their displacement in the enjoyment of the following rights: (a) The rights to freedom of thought, conscience, religion or belief, opinion and expression; ... (c) The right to associate freely and participate equally in community affairs; (d) The right to vote and to participate in governmental and public affairs, including the right to have access to the means necessary to exercise this right...¹⁸

However, the 1951 Refugee Convention does not address the political rights of refugees vis-à-vis their home states, so the legal case must be deduced. As Gallagher and Schowengerdt argue:

Refugees have not in any way relinquished their citizenship by seeking asylum, but rather cannot avail themselves of the protection of their country of origin because current conditions therein pose a threat to either their lives or livelihood. As citizens, therefore, they have the right to participate in the electoral processes of their country.¹⁹

2005): 683 – 689. PSONline available at: http://infoalert.usembassy.de/01-06/politics_gov.htm. See also Dieter Nohlen and Florian Grotz, "Legal Framework and Overview of Electoral Legislation" in *External Voting Handbook*, Unpublished Draft. (International IDEA, 2000). See also Peter J. Spiro, "Perfecting Political Diaspora," *New York University Law Review*, 81 (April 2006). Available at SSRN, <http://ssrn.com/abstract=876955>.

¹⁶ For a detailed analysis of the international rules and norms surrounding this issue, see Jeremy Grace, "The Electoral Rights of Conflict Forced Migrants: A Review of Relevant Legal Norms and Instruments," IOM/PEP Discussion Paper No. 1 (June 2003). Available at <http://www.geneseo.edu/~iompress/>.

¹⁷ Article 5(c) of the Convention on the Elimination of Racial Discrimination (CERD) holds that "States Parties undertake to ... guarantee the right of everyone, without distinction ... Political rights, in particular the right to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service..."

¹⁸ "Guiding Principles on Internal Displacement," United Nations Office for the Coordination of Humanitarian Affairs, U.N. Doc. E/CN.4/1998/53/Add.2, 2 November 1998. Available at http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html.

¹⁹ Dennis Gallagher and Anna Schowengerdt, "Participation of Refugees in Postconflict Elections" in *Postconflict Elections, Democratization, and International Assistance*, ed. Krishna Kumar (Boulder: Lynne Rienner Publishers, 1998):199.

In line with this reasoning, the 1999 Istanbul Summit Declaration of the Organization for Security and Cooperation in Europe (OSCE) declared: "We are committed to secure the full right of persons belonging to minorities to vote and to facilitate the right of refugees to participate in elections in their countries of origin."²⁰

However, not all post-conflict elections have included programs to provide refugees with absentee balloting programs. The chief impediments include cost and timelines. These elections are often partially or wholly financed by the international community and resources may be limited. Regardless of how the program is administered, the cost per vote is higher outside of the country than inside. In addition, the political imperative to conduct elections may conflict with the extended timelines necessary to implement a transparent and inclusive program. While the general rule should be to organize absentee registration and voting programs for refugees who remain displaced at the time of the election, political actors and international donors often need to weigh the causes and scale of displacement against available resources.

2. Expatriates and Migrant Laborers

For expatriates and migrant laborers, the case for inclusion is not clear. The most commonly advanced argument holds that citizens living abroad often pay taxes or provide remittances to their home states and should therefore have some say in how these resources are collected and re-distributed. In 2002, for example, the Philippine Parliament approved the "Absentee Voting Bill," which enfranchised the substantial Filipino migrant community, provided they intend to retain their citizenship. This decision followed years of campaigning by expatriate Filipinos and was largely attributed to the growing recognition of the economic and social benefits that flow from an estimated 7.4 million Filipinos abroad who send home an estimated USD six billion per year.²¹ Similar initiatives by economic migrants from Turkey, Mexico, Nigeria, and elsewhere have also resulted in national legislation that expands suffrage to these populations.

From the perspective of international law, there is no universal obligation to enfranchise non-refugee expatriate nationals.²² The only relevant instrument is the 1990 International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families,²³ which declares in Article 41 that "Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State..." However, as of September 2006, only 34 states have ratified this convention, mostly migrant-sending states.²⁴ Nevertheless, states party to the Convention have found that domestic human

²⁰ OSCE, "Istanbul Summit Declaration," SUM.DOC/2/99, 19 November 1999: Para. 26.

²¹ "Filipino Overseas Workers Given Vote," *BBC News Online*, 13 February 2003. Available at <http://news.bbc.co.uk/2/hi/asia-pacific/2756791.stm>

²² While Article 25 of the ICCPR cited above would seem to indicate such an obligation, it should be read in relation to Article 2 of the Covenant, which holds that states must "respect and ensure to all individuals within its territory and subject to its jurisdiction..." all the rights identified. Expatriate nationals would meet neither of these criteria. Nevertheless, Rainer Baubock argues that, although international treaty law does not support the conclusion that external voting rights are a universal requirement of public international law, a sufficiently widespread change in state practice might eventually be recognized as constituting a new international standard in customary international law.

Rainer Baubock, "Towards a Political Theory of Migrant Transnationalism," IWE Working Paper Series, October 2002. Available at <http://www.iwe.oeaw.ac.at/workingpapers/WP34.pdf>

²³ United Nations, General Assembly, "International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families," G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990). Available at <http://www.ohchr.org/english/law/cmw.htm>.

²⁴ An additional 14 states have signed the Convention, but not yet ratified it. For a list of signing and ratifying states, see <http://www.ohchr.org/english/countries/ratification/13.htm>.

rights and migrant advocacy groups use the Convention's language to advocate for legislative reform to establish external voting programs.

The Convention clearly establishes a legal obligation on states party. In its consideration of Mali's periodic report submitted under Article 74 of the Convention, for example, the Committee on the Protection of Migrant Workers noted, "...with satisfaction that many expatriate Malians have the opportunity to participate in presidential elections thanks to mechanisms established in certain countries. The Committee suggests that this opportunity be extended to a larger number of Malian migrant workers living abroad."²⁵ Since the Committee only became operational in 2004, with only three ratifying states that have thus far submitted periodic reports (Mali, Egypt, and Mexico), it remains to be seen whether the Committee will continue to pay particular attention to voting rights and broaden the scope of its attention to include the processes of absentee voting in its examination of state reports.

The only multilateral human rights mechanism to have issued specific rulings related to an expatriate's right to vote while abroad is the European Commission of Human Rights.²⁶ In a case involving British nationals, the Commission ruled that:

this right [universal suffrage] was neither absolute nor without limitations but subject to such restrictions imposed by the Contracting States as are not arbitrary and do not interfere with the free expression of the people's opinion.²⁷

The Commission reasoned that the European Convention on Human Rights and Fundamental Freedoms and its related protocols did not guarantee the right to an absentee ballot. Furthermore, the fact that some nationals abroad were provided franchise while others were not did not violate the principle of non-discrimination. The Commission observed that:

...servicemen and diplomats are not living abroad voluntarily but have been sent to a country other than their own by their government in the performance of services to be rendered their country. They therefore remain closely linked to their country and under the control of their government, and this special situation explains that they are not regarded as being non-residents although physically outside their country. As a consequence of the control referred to above there is also no risk of electoral fraud in their use of postal votes.²⁸

3. Members of a National Group or Diaspora

The issue of non-citizen, non-resident enfranchisement is the most politically sensitive. Arguments in favor emphasize the important role these communities might play in advancing a country's interests at the international level and their contribution to cultural and economic development. Many countries even maintain government

²⁵ United Nations, General Assembly, "International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families," A/45/49 (1990).

²⁶ Protocol No. 11 of the ECHR, which came into force on 1 November 1998, folded the Commission and Court into a single institution, now referred to as the European Court of Human Rights.

²⁷ *X v. United Kingdom*. As a consequence, the fact that the United Kingdom did not allow absentee voting was interpreted as a function of practical expediency, and the European Convention and First Optional Protocol, both of which require universal suffrage, could not be interpreted to guarantee expatriate electoral rights. The United Kingdom has since instituted external voting.

²⁸ *X v. United Kingdom*.

ministries in charge of diaspora relations.²⁹ Yet few countries have formally enfranchised non-resident non-citizens. Notable exceptions include Eritrea and Iraq. In Eritrea, the issue stemmed from the fact that the state had yet to come into existence and the 1993 referendum on independence required the identification of persons who could claim descent from persons who were linked to the Eritrean nation through *jus sanguines* conceptions of citizenship. In Iraq, the 2005 elections were conceptualized as a new start to the basic nature of the state, and Iraqi leaders pushed for the inclusion of persons who could potentially become Iraqi citizens under the new citizenship law by claiming descent from someone born in Iraq.

A related problem stems from regional tensions that can occur when a state grants dual-nationality to ethnic kin who constitute national minorities in contiguous states. In the aftermath of the fall of the Berlin Wall, several Eastern European states (Croatia, Hungary, Poland, Romania, and Bulgaria) offered or contemplated the offer of citizenship to “national minorities” in neighboring states. The Hungarian offer of citizenship contributed to regional tensions as Romania and Slovakia viewed the move as staking an irredentist claim to territory, and a referendum on the issue was ultimately defeated by Hungarians in 2004.³⁰ Similarly, Croatia’s extension of dual citizenship and suffrage rights to some 300,000 ethnic Croats residing in Bosnia and Herzegovina was widely viewed by the international community as complicating the implementation of the Dayton Peace Accords and contributing to electoral manipulation by the ruling Croatian nationalist party.

4. Considerations for the Development of Standards

Observers have noted that “[t]he introduction of external voting is enabled by legislation passed by elected politicians. While there have been a variety of reasons for the adoption of external voting legislation, almost all have been the result of political impetus, and many have been controversial and even nakedly partisan.”³¹ The purpose of election standards is to promote public confidence in electoral outcomes by ensuring that the electoral process remains free from bias and results in a genuine expression of the will of the voters. In terms of future work on this issue, the following general propositions can be advanced:

- For states with a substantial displaced population as a result of conflict, human rights abuses, and/or natural disasters, absentee voting should be considered a fundamental right protected by international human rights law. Electoral processes that exclude significant numbers of these populations should be considered suspect, and election observers and the international community should work with governments to ensure their inclusion, on terms of full equality, with non-displaced populations. In addition, forced-migrants should remain analytically separate from other categories or potential voters, as obligations regarding eligibility requirements, systems of representation, and the procedural elements of absentee balloting will differ based on their unique status.
- For states party to the Migrant Rights Convention, emphasis should be placed on transforming the suffrage rights embedded in article 41 into enabling legislation

²⁹ Armenia, Mali, Pakistan, and France (among others) have special divisions in their foreign ministries dedicated to diaspora relations.

³⁰ Michael A. Weinstein, “Hungary’s Referendum on Dual Citizenship: A Small Victory for Europeanism” *Power and Interest News Report* (December 2004). Available at http://www.pinr.com/report.php?ac=view_report&report_id=245&language_id=1.

³¹ International IDEA, “A Preview of the Forthcoming International IDEA Handbook on External Voting.”

at the domestic level. Priority should be placed on ensuring that the legislative reform process is conducted transparently and in consultation with stakeholders.

- For states that meet neither of the above criteria, there is no international legal obligation to provide absentee voting to expatriate nationals. Therefore, the process through which absentee voting is enabled should be widely inclusive of the country's political forces. It is reasonable to demand that the process of enabling an external voting program should reflect wide-scale public approval, and initiatives that are clearly motivated by partisan interests should be noted by observers when evaluating the integrity of the process. Similarly, initiatives to enfranchise national diasporas or national minorities who share ethnic kinship in neighboring states should be subject to special scrutiny.

IV. Election Standards and Eligibility Requirements

The right of all citizens to vote is not absolute, and voter eligibility is often based on criteria related to age, citizenship, residency, mental competence, and criminality.³² The requirement of citizenship in order to obtain voting rights has historically been universal to nearly all electoral codes.³³ In terms of residency, these requirements can take two forms. For states that do not allow absentee voting, the requirement will generally state that the voter prove residence in the electoral constituency on a fixed date prior to the election and on election day. For states that allow absentee voting, the requirement generally states that they must prove they were resident in the electoral constituency at some date prior to the election, although the length of time varies between states.

1. Residency Requirements

Absentee voting rights can be denied either actively or passively.³⁴ Where the prohibition is active, a constitutional provision, an act of parliament, or the election law specifically prohibits voting abroad. For example, Article 29 of the 1953 Danish Constitution reserves voting rights only to "[a]ny Danish subject whose permanent residence is in the Realm..."³⁵ However, a number of amendments to the constitution have subsequently expanded voting rights to certain categories of expatriates. In 1970, employees of the state abroad on official business were granted external voting rights. In 1988, voting rights were extended to any employee of a Danish firm, international organization of which Denmark is a member, and humanitarian relief organization as well as to students and those abroad for health reasons. Currently, the only Danes who cannot vote from abroad are employees of a non-Danish private sector firm or unemployed Danes who do not meet any of the other exceptions.

³² For an overview of various restrictions imposed by democracies on the right to vote, see Andre Balis, Louis Massicotte, and Antoine Yoshinka, "Deciding Who has the Right to Vote: A Comparative Analysis of Election Laws," *Electoral Studies* 20 (2001): 41-62. For a global overview of restrictions employed on voting rights by country, see "Regions and Countries" *ACE Electoral Knowledge Network* at <http://www.aceproject.org/regions-en>.

³³ Nevertheless, a small, but growing number of states have begun to grant voting rights to resident non-citizens. This move is often contingent on satisfying a period of residence in the state. Some European states extend municipal voting rights only on a reciprocal basis (i.e., if a national from state A can vote for local elections while resident in State B, then state A will extend the same right to nationals of state B resident in State A).

³⁴ Dieter Nohlen and Florian Grotz, "External Voting: Legal Framework and Overview of Electoral Legislation," *Boletín Mexicano de Derecho Comparado*, nueva serie, año XXXIII, núm. 99 (Sept./Dec. 2000): 1115-1145.

³⁵ Constitution of Denmark, available at http://www.oefre.unibe.ch/law/icl/da00000_.html.

Passive denial can take two forms. First, the election law or constitution might impose a residency requirement that effectively prohibits external participation. Prior to the 2002 "Absentee Voting Bill," for example, Filipino voters were required by Article 5 of the constitution to have resided in the Philippines for a minimum of one year and in their electoral constituency for a minimum of six months prior to the election.³⁶ The constitution makes no mention of explicitly denying the franchise to those abroad, but the residency requirement did exactly that, resulting in a Supreme Court challenge to the constitutionality of the Absentee Voting Bill.³⁷ Second, passive denial of franchise occurs when the relevant electoral legislation contains no formal residency requirement for participation, but the state simply does not implement enabling legislation or procedures to make absentee voting possible (as in Nicaragua and Ireland).

States that allow absentee voting sometimes condition eligibility by the length of a citizen's absence. Canadian voters may vote by absentee ballot for up to five years following their departure from Canada, so long as they "intend" to resume permanent residence at some point in the future. In the United Kingdom, voters are automatically removed from the electoral rolls 15 years after moving abroad, regardless of their intent to return (this number was reduced from 20 years in 2001). In Germany, voters may reside abroad up to 25 years before losing eligibility, although German nationals residing in member states of the Council of Europe retain their voter eligibility indefinitely. New Zealand maintains no fixed time-away threshold but does require that citizens return to their home constituency at least once every three years in order to remain on the voting rolls.

In situations of forced-migration, residency requirements can become especially problematic. As states have a far stronger obligation to enfranchise forced-migrants than expatriates, national authorities may need to develop eligibility criteria that differentiate refugees from expatriates and internal migrants. In general, this requires arriving at a date at some point just prior to the conflict at which refugees and IDPs must prove residence in the constituency they wish to vote in. The notional goal is to guarantee the voting rights of refugees and IDPs while limiting the ability of settler populations to stack the electoral roles. The debate over specific residency dates is often hotly contested in post-conflict elections, as the choice of a date can dramatically alter the balance of power in specific municipalities and constituencies.³⁸

³⁶ Constitution of the Philippines, available at <http://www.chanrobles.com/philsupremelaw1.htm>.

³⁷ Commission on Elections (Philippines), *ATTY. ROMULO B. MACALINTAL, petitioner, vs. COMMISSION ON ELECTIONS*, July 2003. Available at <http://www.supremecourt.gov.ph/jurisprudence/2003/jul2003/157013.htm>.

³⁸ "In Bosnia and Herzegovina, the 1996 electoral code defined eligible voters as: 'Any citizen of Bosnia and Herzegovina age eighteen or older whose name appears on the 1991 census ...' Thus, any person, whether inside BiH or not, could be registered to vote provided their name was included on the 1991 Census. Since the war in BiH did not begin until April of 1992, this rule also allowed a small portion of the non-conflict-forced Diaspora to participate. In addition, Bosnian economic migrants who maintained their linkages to BiH (by holding a "Certificate of Citizenship" or through entry into the municipal records books) were also eligible for participation. In fact, the only Bosnians outside of the country in 1996 that could not potentially vote were those not listed on the census, had received citizenship in another country or had no documentation, and came from a municipality where all municipal records had been destroyed. The eligibility requirements had a greater impact during the 1997 Municipal Elections. In this case, persons who were not listed on the 1991 census had to prove residence in a specific municipality in 1991, essentially eliminating Bosnians who had migrated abroad, not been included on the census, and did not maintain documentary proof of residence in a specific municipality while abroad. In sum, however, the Bosnian elections were, for all intents and purposes, also a Diaspora election." Jeremy Grace and Jeff Fischer, "Enfranchising Conflict Forced Migrants: Issues, Standards and Best Practices," IOM PRESS, 29 September 2003. Available at http://www.geneseo.edu/%7Eiompress/Archive/Outputs/Standards_Final.pdf.

IDPs can also be discriminated against in the realization of their voting rights by ill-conceived residency requirements. In the Republic of Georgia, for example, until a 2003 revision of the election law, IDPs were permitted to vote only for the nationwide list and are specifically precluded from voting for representatives in either the district from which they were displaced or the district in which they currently resided. As a consequence, their voting rights were not equal to non-displaced citizens, and they were largely barred from exercising a political voice in the search for a solution to their displacement.

2. Citizenship Requirements

External voting by non-citizens is exceptionally rare. Instances of this phenomenon, however, can be identified in Eritrea, East Timor, Kosovo, and Iraq. It is important to note that all of these cases except that of Iraq relate to non-self-governing territories. In the case of Eritrea and East Timor, the elections involve the question of independence. In Kosovo, the elections involved constituting power structures in a UN-administered province that is formally part of Serbia, although its future status is yet to be determined. Iraq is the only clear case of a recognized sovereign state (although under occupation) that allowed for broad external voting rights for non-citizens.

In each of these cases, a mechanism for determining eligibility needed to be identified that defined the electorate, and thus potential members of a new state. With the exception of Kosovo, which simply employed a residence requirement in order to demonstrate that a voter was a "habitual resident" of Kosovo, each case resulted in a definition of eligibility that relied on *jus sanguines* and/or acquisition by marriage conceptions of national belonging. In Iraq, for example, eligibility for out-of-country voting included anyone "eligible to gain an Iraqi citizenship," according to the interim Iraq Citizenship law. This law, in turn, included all persons whose father is or was a citizen. Subsequently, non-citizens, even those who did not intend to acquire citizenship, were eligible to participate.

In some instances, states have attempted to prohibit voting by their dual nationals who are resident abroad. In 1967, the U.S. State Department sought to revoke the citizenship of a naturalized citizen who voted in an Israeli election. The U.S. Supreme Court overturned the decision, effectively affirming not only the right of American citizens to vote in foreign elections, but establishing the right of dual nationality in the United States.³⁹ Given the difficulties in monitoring whether a state's dual nationals are participating in elections in more than one country, few states explicitly deny voting rights to their dual citizens residing abroad on the basis that they are able to participate in elections of more than one state.

3. Considerations for the Development of Standards

Election standards efforts have yet to set forth clear guidelines on residency requirements. The Venice Commission's "Guidelines on Elections" notes, "Universal suffrage means in principle that all human beings have the right to vote and to stand for election. This right may, however, and indeed should, be subject to certain conditions [including] ... residence." However, the Human Rights Committee's General Comment 25 limits a country's latitude in applying these restrictions, holding that "if residence requirements apply to registration, they must be reasonable, and should not be imposed

³⁹ *Afroyim v Rusk*, 387 U.S. 253; 87 S. Ct. 1660; 18 L. Ed. 2d 757; 1967 LEXIS/NEXIS 2844 [Database Online].

in such a way as to exclude the homeless from the right to vote.”⁴⁰ Furthermore, the Comment requests that states party to the ICCPR justify and explain “...legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable.”⁴¹ Similarly, the OSCE/ODIHR standards bluntly hold that “Any limitation or restriction on the right to vote, however, must be scrutinized as to whether it is clearly justified due to exceptional circumstances.”⁴²

In terms of developing standards for absentee voting in this area, the following basic propositions can be advanced:

- States retain wide latitude when determining the various residence requirements that can be imposed on regular expatriate voting rights. Specific limitations can be imposed related to: 1) whether the voter maintains a fixed residence in the home state; 2) the length of time the voter is absent from the state; and 3) intent to return. Nevertheless, these residency and citizenship requirements should be clearly articulated in the constitution or the electoral code.
- Specific standards can be identified in regards to the eligibility criteria relevant to forced-migrants. Forced-migration, by definition, entails the removal of people from their regular place of residence against their will. As a result, requiring these people to demonstrate residency is problematic. Residence requirements that exclude displaced persons from casting their ballot for their home constituency should, in general, be considered a violation of basic voting rights.

V. Systems of Representation

If a country decides to enfranchise external voters, parliamentarians must determine how to translate the will of this electorate into the country's system of representation. Again, election standards initiatives do not address the issue from the perspective of external voting. Rather, the emphasis has been on ensuring that whatever the electoral formula employed, it satisfies the ICCPR criteria for genuine elections. This is interpreted to mean that at least one chamber of the national parliament is directly elected and that electoral constituencies are drawn so as to protect the equality of the vote.

However, adding external voters to an existing system of representation will impact election administration. Three general questions should be addressed:

- Should external voting be limited to specific institutions (president, houses of parliament, sub-national elections and referenda)?
- Should external voters cast their ballots for their constituency of last residence in their home state or for dedicated constituencies established solely for external voters?
- How should external voters be counted when calculating the district delimitation and apportionment process?

1. Which Institutions Should be Contested Externally?

Many states that allow absentee voting do so only for national level elections. The logic

⁴⁰ Human Rights Committee, *General Comment 25* (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996).

⁴¹ Human Rights Committee, *General Comment 25* (14).

⁴² OSCE/ODIHR, “Existing Commitments for Democratic Elections in OSCE Participating States,” (Warsaw: October 2003): 59.

here is that while external voters can generally follow national political news, they probably cannot obtain the information necessary to make an informed vote at the local or municipal level.⁴³ In addition, sub-national elections require many different ballots, which would necessitate a complicated logistical operation to ensure that each external voter received the correct ballot for each contest. Finally, while many economic migrants and expatriates may continue to pay national taxes while abroad, they do not necessarily pay taxes at the municipal or local level.

Countries that allow absentee voting for local elections include the United States, France, Finland, Norway, and Bosnia and Herzegovina. In the United States, elections are managed at the state and county levels, and voters apply directly to the local EMB (often via an embassy) to cast an absentee ballot in their district of origin. In France, voters are eligible to vote by absentee ballot for all national elections but may only vote by proxy for local contests. Finnish expatriates are eligible to vote in both national and regional contests, but eligibility to vote at the local level is contingent upon an absence from the municipality of no more than one year. At the national level, there is no length-of-absence requirement. Norway requires that no more than 10 years have elapsed since the voter left the municipality.

In Bosnia, election organizers were convinced that enfranchising refugees at the local level was critical to reversing the effects of ethnic cleansing, particularly in municipalities such as Srebrenica and Brcko. In 1997, the OSCE organized a highly complex operation to identify all Bosnian refugees and IDPs by municipality of origin and to provide them with appropriate ballots. As a result, ethnic communities who had been displaced from their home municipalities were able to capture political control in some of the post-war municipal assemblies (in Srebrenica, for example) in which they had held pre-war majorities, even though the displaced had not felt safe enough to return.

Even at the national level, however, external voting may not be allowed for all institutions of governance. In the 1992 Angolan elections, presidential candidates were elected based on an absolute majority, with a runoff election if no candidate received more than 50% of the vote. As a result, the election commission rejected proposals for external voting due to the difficulties that would be encountered should a runoff election be necessary. While the elections code did contain (unfulfilled) provisions for external voting for the national assembly, it specifically rejected this option for the presidency because of the costs associated with a run-off ballot.

2. Representation and Constituency Delimitation Issues

Except for proportional representation (PR) systems using a single nationwide electoral constituency (e.g., Israel, the Netherlands, and Liberia [1997]), EMBs must delimit and apportion electoral constituencies.⁴⁴ Most states delimit constituencies based on census or voter registration data, giving some consideration to existing administrative boundaries, geographic features, and ethnic and social composition. Election standards initiatives hold that there should be a rough uniformity in the weight that each vote

⁴³ Another argument against external voting for local elections holds that politics at the local level has a direct and highly visible impact on residents in terms of taxation and service provision. Since external voters do not have to live directly with the consequences of their vote in this regard, they may vote less responsibly.

⁴⁴ Electoral formulas for parliamentary elections come in two basic forms. The most common is the PR system, in which parties win parliamentary seats in proportion to the percentage of votes they receive either nationally or in multi-member sub-national districts. The alternative system is the majority-plurality system, which uses single-member districts to elect individual candidates to political office according to who wins the largest number of votes in the district.

carries in the distribution of mandates across different constituencies. But delimitation is complicated by an absentee voting program. How should these populations be tallied when determining either the apportionment or delimiting of their home constituencies?

Countries that allow external voting tend to utilize one of two options for securing representation of external voters. The vast majority employ a system through which the voter participates in their last constituency of residence (referred to as assimilated representation).⁴⁵ In U.S. elections, for example, voters simply apply for an absentee ballot from their last constituency of residence and mail it to that constituency by a particular date, where it is counted along with regular ballots to determine the winner of the seat. The same holds true for countries that employ PR systems, where the external voters are provided the same party-list ballot and those totals are added to the total vote earned by each party.

At least seven⁴⁶ countries, however, employ a system whereby external voters participate in "discrete districts," either directly or indirectly, which only represent those abroad. In Portugal, for example, members of parliament are elected via a PR system based on 20 sub-national districts. Two districts—each with two seats—are reserved for Portuguese abroad, one for those in Europe and one for those elsewhere. Croatia follows a similar model, except that the number of external seats is not fixed. Instead, the overall turnout of external voters is compared to the overall turnout of in-country voters before the number of dedicated external seats is established. Prior to an electoral reform in 2000, however, the system had instead guaranteed 12 seats for external voters. The use of this mechanism provided an advantage to the ruling party, as the Croats abroad were provided with seats disproportionate to their voting weight, and these voters tended to overwhelmingly support the ruling HDZ.⁴⁷ The Council of Europe noted that:

Election results confirmed the preference of Diaspora voters for the ruling party, which obtained 90% of the votes from abroad compared to approximately 45% of the votes from inside the country. The turnout of the voters abroad was much lower than inside the country so that finally citizens from abroad are better represented in parliament than citizens from inside the country.⁴⁸

Discrete districts can also be employed to provide indirect voting for members of a national legislative body. Since 1983, for example, French expatriates have been represented in the Senate by 12 members. However, these Senators are not directly elected. Rather, French expatriates vote for members of the Conseil Supérieur des Français de l'Etranger (CSFE),⁴⁹ a government agency reporting to the Ministry of Foreign Affairs. Expatriates cast ballots for the 150 CSFE members based on a PR

⁴⁵ Peter J. Spiro, "Perfecting Political Diaspora," *New York University Law Review*, Vol. 81 (April 2006): pp. 226-231. Available at <http://ssrn.com/abstract=876955>.

⁴⁶ International IDEA, "A Preview of the Forthcoming International IDEA Handbook on External Voting." Available at http://www.idea.int/elections/upload/External_voting_Preview_withlayout_07june06_final.pdf.

⁴⁷ For an interesting analysis of why diaspora communities tend to vote for more nationalistic parties, see "Diasporas: A World of Exiles," *The Economist*, 2 January 2003.

⁴⁸ The revised election law of 2000 "... created a special constituency for non-resident citizens to elect between 0 and 14 members of parliament according to the relationship between turn-out for this constituency and average turn-out per elected member throughout Croatia. Six seats were finally allocated to the Croatian diaspora," a move that satisfied the Council of Europe, without disenfranchising Croats abroad. See Committee on the Honouring of Obligations and Commitments of Member States of the Council of Europe (Parliamentary Assembly), "Honouring of obligations and commitments by Croatia," Draft Report AS/Mon (1998), January 1999. Available at <http://assembly.coe.int/Documents/WorkingDocs/doc00/edoc8823.htm>

⁴⁹ Chaired by the foreign minister, the CSFE represents expatriate interests and provides the government with reports and analyses of issues concerning French citizens abroad. See <http://www.senat.fr/etranger/index.html> for more information.

system in which various countries and regions form constituencies; these regions must have in residence at least a minimum number of French citizens. Once elected, CSFE members select 12 senators, who retain full voting rights.

Some countries employ variants that combine elements of both discrete and assimilated systems. In the Russian Federation, external voters are included in specified sub-set of the single-mandate electoral districts for the Duma. According to one observer, "Assignment to a voting district is based on the foreign state in which the voter is residing abroad. Depending on the foreign state...he or she will be assigned automatically to one of several designated electoral districts in the Moscow Region or the St. Petersburg Region."⁵⁰ In practice, the EMB is required to ensure that "[t]he number of additional voters included in a single-mandate electoral district shall not exceed 10 percent of the number of voters registered in the territory of the given single-mandate electoral district."⁵¹ In principle, this means that external voters are factored into the delimitation process, but no constituency can have more than 10 percent of its votes cast from abroad. A similar program operates in Belarus, except that the external ballots are distributed to constituencies that have lower than average turnout.

3. Considerations for the Development of Standards

Genuine elections require that constituencies should be delimited by an impartial delimitation commission according to procedures described by law and in accordance with the principle of the equality of the vote and an equitable distribution of seats among constituencies.⁵² As with residency and eligibility requirements, however, no specific standards cover how best to secure representation for external voters, and the issue of discrete external districts is not even mentioned in the standards initiatives. In terms of future work on this issue, the following general propositions can be advanced:

- In terms of regular expatriate voters, whether to limit external participation to national contests is a matter of national preference. No specific legal obligation or standard applies.
- Expatriate voters can be represented through discrete districts or through assimilated representation. In either case, their voting weight should not exceed the national average. These voters can and may be "under-represented" as there is no specific international obligation incumbent on states to protect the equality of the absentee vote. In fact, the larger the potential absentee electorate, the more likely it may be that limiting external representation will be necessary in order to avoid a situation in which the domestic population feels it is being governed by voters residing abroad.
- Forced-migrants should be provided the right to participate by absentee ballot for all levels of elections in their home communities and countries on an equal basis with non-displaced populations, particularly if the displacement has resulted from attempts at "ethnic cleansing." In addition, they should generally be provided the

⁵⁰ Linda Edgeworth, "Voting Abroad. Laws and Procedures of the Russian Federation," Unpublished draft prepared for International IDEA: External Voting Project. 2001.

⁵¹ Russian Federation, *On the Election of Deputies of the State Duma of the Federal Assembly of the Russian Federation*. (Russian Federation, 2002). Available at <http://www.legislationline.org/legislation.php?tid=57&lid=482&less=false>.

⁵² Human Rights Committee, General Comment 25, Para 21 states: "The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely."

right to vote directly for their previous electoral constituencies through assimilated representation. Their voting weight should never be diminished through the use of “discrete districts.”

VI. Implementation

One of the fundamental concerns regarding absentee voting is whether such programs will be transparent and genuine. Voting in the territory of another state raises questions regarding the jurisdiction of the EMB to implement registration and balloting operations in accordance with the electoral rules and regulations. In addition, the right of citizens and political parties to observe the voting process abroad becomes increasingly problematic as the scope of the program grows. Since the inherent function of election standards is to build public confidence in the voting system, moves that seem to weaken public oversight and accountability would seem to contravene the spirit, if not the letter, of the procedural best practices embedded in the standards.

Rainer Baubock observes that:

... some of the mechanisms commonly used for external voting cannot fully meet all of [the core standards associated with genuine elections]... Some of these can be minimized only in the controlled environment of a polling station... External voting in an uncontrolled environment requires the general trust that voters, political parties, and electoral authorities will refrain from systematically abusing the system and manipulating the vote. Such trust is likely to exist in consolidated democracies ... but may be absent during democratic transitions.⁵³

Other observers adopt a more sanguine outlook. Peter Spiro argues that

...modern electoral management techniques, along with the use of international observers, should reduce the risk of fraud even in large-scale non-resident polling. Indeed, it has been suggested that the risk of fraud may be lower with respect to external voting, especially in cases where democratic practices are better established in the country of residence than in the homeland.⁵⁴

If absentee balloting is to be organized, EMBs must consider how the program will address the following issues:

- Maximizing opportunities to register;
- Providing sufficient and timely information on the requirements and processes of absentee registration and voting;
- Ensuring that only eligible voters are registered;
- Preventing voters from misrepresenting themselves as other individuals and/or gaining access to more than one vote;
- Guaranteeing the secrecy of the ballot;
- Ensuring that external voters are not pressured to vote in particular ways by political parties, interest groups, or representatives of the government where they reside or by embassy officials;

⁵³ Rainer Baubock. “Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting.” Unpublished draft paper. 2006.

⁵⁴ Peter J. Spiro, “Perfecting Political Diaspora,” *New York University Law Review*, Vol. 81 (April 2006): p. 233. Available at <http://ssrn.com/abstract=876955>.

- Ensuring that to the extent possible external voting rules and procedures reflect in-country practices;
- Protecting sensitive voter information;
- Securing the transport of materials; and
- Guaranteeing access to election observers.

Given the wide divergence in state practice in administering external voting, it is difficult to identify specific, universally applicable best practices in regards to each of these goals. Depending on the nature of the program, different techniques can be employed to mitigate potential threats to electoral integrity. This necessitates a review of the two predominant forms of absentee voting: postal and in-person balloting.⁵⁵

1. Postal Voting

Postal voting is an increasingly common form of absentee enfranchisement. Many countries (including Canada, the U.K., and the United States) even allow postal voting for non-absentee populations who simply prefer the convenience. Focus group–research of postal-voting programs has found that while the programs are widely popular and improve voter turnout, concerns regarding voter fraud and transparency are high.⁵⁶

In postal voting programs, participants can register through the mail, at embassies and consulates, or by fax.⁵⁷ In general, voters submit an application form and supporting documentation by mail to either the national or local EMB. The application typically requires a signed (and perhaps notarized) affidavit certifying that the voter is indeed the person he or she claims to be, along with a photocopy of an officially approved identity document. If the voter’s identity is confirmed, he or she is sent a ballot, which must be marked and returned by a specified deadline for tabulation.

The benefits of voting by mail result from economies of scale and a reduction in clerical work at embassies and consulates. Since all external votes are processed at the national or regional EMB operations center, there is no need for separate facilities and staffing in host countries. As a result, the operation is significantly cheaper per vote cast than in-person voting. In addition, by-mail programs can reach potential voters in countries that may not wish to allow election operations on their territory.

The major drawback of voting by mail is that EMBs do not retain full control and supervision over the ballots. Using the postal system to send ballots means there is a period when the ballots are unsupervised by elections staff, which creates several problems. First, one voter’s ballot could be intercepted and returned by another voter, particularly if the intended voter has moved since registering. Second, even if the proper

⁵⁵ Other mechanisms to provide expatriates with voting opportunities include proxy-voting (where citizens designate a representative to cast a ballot at a regular polling station in their home communities), Internet voting, or requiring that expatriates return to their home country to cast a ballot on election day. A variant of this last approach has also been used for some refugee elections, where the international community has coordinated the repatriation of refugees with a schedule linked to the election calendar (as in Cambodia and Namibia). Since these are essentially in-country voting operations, they are not considered in this paper.

⁵⁶ In the United Kingdom, several constituencies used postal balloting as the only voting option during the May 2003 elections. A review by the U.K. Electoral Commission found that the turnout in these constituencies averaged more than 10 percent higher than the overall turnout. See “The Shape of Elections to Come: A Strategic Evaluation of the 2003 Electoral Pilot Schemes,” The Electoral Commission (U.K.), July 2003. Available at http://www.electoralcommission.org.uk/files/dms/The_shape_of_elections_to_come_final_10316-8346_ENSW.pdf.

⁵⁷ Facsimile transmission of applications for voter registration was used by the International Organization for Migration when it administered by-mail external voting for Bosnia and Herzegovina and for Kosovo.

voter receives the ballot, he or she might be subject to pressures that compromise freedom of choice.⁵⁸ For example, refugee communities often live in concentrated areas in which they can be subject to pressure from political groups that attempt to influence the vote. Normal balloting procedures prohibit third parties from entering the voting booth (unless invited by the voter due to specific disabilities) and demarcate a space around a polling station where electioneering (handing out political platforms or posters urging a particular selection) is prohibited. It is impossible to implement these rules when using the postal system.

A related problem is ensuring that the ballots are truly secret. Postal voting systems for the Bosnian and Kosovo elections required voters to return the ballot inside a sealed “secrecy envelope” together with their registration receipt inside a larger second envelope. While these programs were conducted under strict conditions and supervision, voters complained that the system could potentially allow election officials to match voters’ names with the marked ballots, compromising voter secrecy.⁵⁹

In terms of developing standards for absentee voting in this area, the following basic propositions can be advanced:

- Postal registration and voting facilities should be open to full observation by political parties, civil society organizations, and international observer missions. This right should be guaranteed in the election law, and the EMB has an obligation to facilitate accreditation for observers. Observation should be allowed at all stages of the electoral cycle until the final counting and reporting of results.
- Postal voting programs should be accompanied by information campaigns that stress the secrecy of the ballot and encourage individual voters to report attempts to manipulate or coerce their votes. The EMB has an obligation to investigate any reports of voter intimidation or vote-buying schemes received.
- Postal voting programs should always use a “secrecy envelope” that separates the actual returned ballot(s) from any identifying information, such as a registration slip, signed affidavit, or photocopied identity document.
- All registration information and data should be protected. In general, individual voter information should only be accessible to the EMB and only used for election-related purposes. This is especially true in the context of post-conflict elections.
- If postal voting is to be used, electoral timelines and calendars should be designed to account for the increased time necessary to mail out ballots, have the voter mark them, and return them by the post in time for counting. Deadlines should be widely publicized.

⁵⁸ Even consolidated democracies are not free from attempts to manipulate postal balloting. A report on postal voting by the U.K. Electoral Commission found that “We have received reports of party workers seeking to influence how votes are cast by exerting pressure (or even, in a handful of reported cases, completing the ballot on behalf of the voter). Practices such as these clearly raise concerns” See “Absentee Voting in Great Britain: Report and Recommendations,” The Electoral Commission (U.K.), 2003: 27. Available at <http://www.electoralcommission.org.uk>.

⁵⁹ “Case Studies on the Participation of Conflict Forced Migrants in Elections.” IOM Participatory Elections Project (May 2003). Available at <http://www.geneseo.edu/%7Eiompres/Archive/Outputs/PEP%20Case%20Studies%202003.pdf>.

- Postal voting should only be used when the integrity and quality of national postal systems is well established.

2. In-person External Voting

Embassy voting requires that electors present themselves at embassies or consulates in order to register and vote. Consular staff (and sometimes EMB personnel) help voters confirm their registration and cast their ballots. The main advantages of this system are that EMBs retain full supervision of the process, voting procedures can mimic those of in-country polling stations, and observers can be provided access to the program. This system also helps address the problems of intimidation and ballot secrecy that can occur during postal voting and ensures that election materials remain under the control of the EMB or other government officials.

The main problem with embassy voting is limited geographical coverage; any external voters who do not reside in the capital district or cities with a consular office will have to assume the costs of traveling to a facility. In some cases, additional election facilities have been established in host states to augment voting at embassies.⁶⁰ Examples include the recent absentee voting programs for the Philippine and Mexican elections and in many internationally organized voting programs for refugees, including during the 2005 Iraq elections. Even so, the cost and logistical complication of providing these services to every area where expatriates may be resident places an undue burden on the EMB and home-state taxpayers.

In-person voting is especially warranted in the case of refugees voting in post-conflict elections undertaken in territorially contiguous states. In the 1996–1998 Bosnian elections, for example, Bosnian refugees in Croatia and Serbia and Montenegro were provided opportunities to register and vote at facilities established by the IOM and OSCE. The logic here is that conflicts often involve a regional dimension, and neighboring state governments or political actors may have strategic interests in the election results and therefore manipulate a postal-voting program. As a result, in-person voting operated by neutral intergovernmental organizations and supervised by political parties and other international observers ensured the transparency of the program and prevented attempts to manipulate the vote on the part of government agencies in the host states.

In terms of developing standards for absentee voting in this area, the following basic propositions can be advanced:

- Any in-person voting operation conducted in the territory of foreign states should be open to observation. This may necessitate close cooperation between the EMB and the Foreign Ministry, as well as reaching agreements with host states to facilitate visa issuance and the entry and exit of observers.
- Embassy and consular staff involved in voting operations should receive clear training on both the relevant processes and the broader principles of neutrality and secrecy involved in genuine elections.

⁶⁰ These types of programs may require substantial support from intergovernmental organizations in order to promote transparency.

- Embassy and consular staff should monitor and report on the general political environment in the host state, paying particular attention to reports of vote manipulation.
- For regular expatriate voters, there is no clear legal obligation to extend in-person voting opportunities beyond embassies and consular offices, or even to all countries where expatriates may reside. However, if absentee balloting is to be conducted, general principles of equity would seem to call for the establishment of as many facilities as possible to minimize the travel burden placed on individual voters.
- In the case of refugee voting in post-conflict elections, a much stronger case can be made that EMBs need to expend the maximum available resources to provide a wide geographic dispersal of registration and voting facilities.

VII. Election Standards and Absentee Voting

The literature on absentee voting has until recently been extremely limited. Theoretical work tends to focus on transnational political bonds in a broad sense, particularly the relationship between expatriates and diasporas and their homeland.⁶¹ The democratization literature has been largely silent on the issue. Some EMBs (notably in the U.K. and Australia) have conducted careful evaluations of postal voting programs, and the IOM has sought to develop standards for refugee and IDP voting programs.⁶² Another important (and as of November 2006, still forthcoming) initiative is a global survey of external voting practices carried out by the International Institute for Democracy and Electoral Assistance, which will also include thematic chapters on many of the issues addressed in this paper.⁶³

Nohlen and Grotz note that "...external voting is a rather heterogeneous phenomenon ... In most cases the moment and reasons for the introduction of external voting were highly dependant on national peculiarities."⁶⁴ The existence of "national peculiarities" highlights the difficulties in advancing a claim that the human rights regime obligates governments to extend the right of political participation to all nationals residing abroad or even that basic standards of genuine elections, such as equality of the vote, must be applied in all cases. Each situation must account for the political implications of external voting. In some cases (as in Hungary), the external vote might increase regional instability. In other cases (as in Kosovo), voting on the part of the entire Kosovar diaspora would produce a situation in which the Kosovo political system was dominated by non-resident voters.

Nevertheless, there is an emerging consensus that forced-migrants should be guaranteed full political rights in post-conflict elections. With respect to IDPs, the right to vote is firmly grounded in the nondiscrimination principles of global and regional

⁶¹ This literature, which can be found primarily in the field of migration studies, is largely concerned with how expatriate and diaspora communities maintain their cultural connections and why they tend to adopt more nationalistic political outlooks than citizens who live in the home state (such as in Croatia and Armenia, for example). See Rainer Baubock, "Towards a Political Theory of Migrant Transnationalism," IWE Working Paper Series (October 2002). Available at <http://www.iwe.oeaw.ac.at/workingpapers/WP34.pdf>; see also the now defunct Transnational Communities Program, a joint collaboration between Oxford University and the U.K. Economic and Social Research Council, available at <http://www.transcomm.ox.ac.uk/>; and Terrence Lyons, "Globalization, Diasporas, and Conflict," Institute for Conflict Analysis and Resolution (January 2004).

⁶² See www.geneseo.edu/~iompress.

⁶³ International IDEA, "A Preview of the Forthcoming International IDEA Handbook on External Voting."

⁶⁴ Nohlen and Grotz, p. 1116.

human rights instruments and has been forcefully restated in the Guiding Principles on Internal Displacement. These same principles should, to the extent possible, be extended to refugee populations, who have not left their home states of their own free will and thus should not be denied equal rights with citizens who remain at home. Unfortunately, countries do not always meet this obligation (for example, Liberia and Angola). The reasons are complex, but often revolve around political opposition from those who perceive the refugee/IDP vote as an obstacle to their victory, as well as the costs and technical difficulties associated with absentee balloting.

Clearly articulated standards combined with better monitoring would prevent forced-migrant disenfranchisement and improve the overall integrity of electoral processes in post-conflict environments. IOM has initiated a project to develop standards along these lines, and the issue has received substantial attention from the UN's Representative of the Secretary General on the Human Rights of Internally Displaced Persons. Continued international attention and commitment on the issue are needed and clarification of fundamental human rights norms should be a priority. Possible avenues include:

- A General Comment from the Human Rights Committee further clarifying issues of forced-migrant political rights in the context of Article 25 of the ICCPR.
- Initiatives within the United Nations Electoral Assistance Division and other election technical and observation agencies such as the OSCE/ODIHR to mainstream forced-migrant voting rights into their technical support, monitoring, and other post-conflict election activities. While the UNEAD and OSCE have often played a lead role in ensuring CFM voting rights (c.f. Bosnia and Herzegovina, Afghanistan, East Timor), in some cases these organizations have been either insufficiently resourced to address the issue or have questioned whether the costs and complications of absentee voting programs warrant the implementation of a program.
- Work in the regional IGOs and regional human rights mechanisms (such as the European Court of Human Rights, the American Court of Human Rights, etc.) to promote, apply, and uphold baseline standards.
- Training for election observation groups on the core commitments related to forced-migrant political rights and how to evaluate electoral codes and election processes to identify shortcomings.

For regular expatriates and economic migrants, further research on state practice is needed. In general, aside from states party to the Migrant Rights Convention, there is no international legal obligation on democracies to extend franchise to their citizens who reside abroad. In addition, should states decide to extend absentee voting services, basic issues associated with residency requirements, intent to return, and other limitations can be placed on these voters. More importantly, issues such as the equality of the vote, limitations on which contests external voters can participate in, and the extent to which states must ensure that all external voters everywhere in the world are provided an opportunity to participate often differ from state to state.

Nevertheless, some basic principles should guide parliamentarians and EMBs in the design and execution of external voting programs. First, the decision to enable expatriate voting should reflect a broad national consensus in favor of such a move, rather than partisan calculations. The process of constitutional or electoral framework reform should be transparent and deliberate. In both Mexico and the Philippines, these

programs followed years of public debate, deliberation and even court challenges. Conversely, the Croatian program (prior to 2000) was implemented through a simple parliamentary act passed by the ruling nationalist party in a fashion that gave all appearances of naked partisanship.

Second, regardless of whether a postal or in-person system is employed, external voting operations should be subject to full observation by domestic and international observers. If in-person programs will be conducted, observers should question whether the program is available in all countries hosting significant numbers of expatriates or only in those where the external vote is perceived to reflect a particular political or ideological outlook. Second, observers should note the extent to which basic protections such as the secrecy of the ballot and the right to vote in free from intimidation are guaranteed.

Finally, donors and technical assistance organizations should pay more consistent attention to external voting in transitional democracies, where resources are short and capacity may be weak. Given the potential for badly managed external voting programs to undermine public confidence in election results, the lack of attention to the issue is surprising. As a start, establishing a network of experts drawn from national EMBs with long experience in external and absentee voting would help identify a pool of expertise that could be called upon to distill lessons learned, identify best practices, and provide concrete guidance to electoral authorities in new and transitional democracies. Such a network could also begin the process of building a knowledge bank of best practices that could ultimately lead to clear and concise standards for external and absentee voting.

Further Readings and Select Bibliography

In addition to the documents referenced in the above footnotes, the following works were consulted:

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