

Democratic elections

Electoral lists and voters residing *de facto* abroad

Congress of Local and Regional Authorities
of the Council of Europe

The Congress



Le Congrès

COUNCIL OF EUROPE



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of the Council of Europe

| French edition:

| *Listes électorales et électeurs résidant de facto à l'étranger*

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Foreword

Election observation is now widely recognised as a measure of a country's democratic development and as a means of improving electoral processes. Within the Council of Europe, the observation of territorial elections and the monitoring of the European Charter of Local Self-Government are the institutional responsibility of the Congress of Local and Regional Authorities, entrusted by the Committee of Ministers, as part of assessing the situation of local and regional democracy in Europe.

As part of its observation missions, the Congress addressed the recurring issue of the quality of voters lists and adopted a report in 2015 on "Electoral lists and voters residing *de facto* abroad". Congressional missions on the ground, during local and regional elections, have highlighted potential electoral fraud linked to voters who remain registered on the lists even though they effectively reside abroad. This leads to problems of practical organization and transparency of elections for this category of voters.

The issue of the electoral lists and voters residing *de facto* abroad must be examined in the light of the right to political participation and universal suffrage, and the permissible restrictions of that right, in particular regarding residency requirements. There are also general considerations related to the integrity of electoral processes, the prevention of fraud and the effective management of elections.

In addition, it is essential to take into account the specificities of local elections, in particular the relationship between the criteria of effective residence and the right to vote, taking into account the immediate impact of local policies on voters.

Even if the Congress is aware that it is sometimes difficult for a country, for historical and cultural reasons, to accept that citizens who do not permanently reside in a given commune are removed from the electoral registers, it is convinced that decisions on local issues belong to the electorate which actually resides in the municipality concerned. There must be an effective link between a voter and the municipality in which they vote in local elections.

The Congress report examines the international standards applicable to the question of the voters residing *de facto* abroad and the national legislation applicable to them, on the basis of national studies carried out in 16 Council of Europe member States: Albania, Armenia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Estonia, Finland, Georgia, Iceland, North Macedonia, Republic of Moldova, the Netherlands, the United Kingdom and Sweden.

These studies show that legislation usually provides for conditions of residence in order to have the right to vote in local

elections. The problem of voters registering even though they are *de facto* residing abroad is therefore mainly due to a lack of application of the law in force.

In the resolution and recommendation adopted, the Congress emphasizes the responsibility of local and regional authorities as entities in charge of the practical management of elections, including the quality of the electoral lists. In the context of a “genuine connection” (permanent residence, principal place of life, etc.) between an elector and the country where he or she votes at the territorial level, The Congress urges local and regional authorities to pay particular attention to the problem of registered voters who are *de facto* residing abroad.

In addition, the Congress recalls that the right of citizens to participate, as voters or candidates, in the election of members of the council or assembly of the local community in which they reside must be recognized in law and as a minimum condition. It also stresses that the right of others to participate - in accordance with the applicable constitutional order and international legal obligations - must be implemented with the necessary guarantees, so as to ensure the effective management of the elections, the integrity and transparency of electoral processes as well as the prevention of fraud or manipulation in local and regional elections.

The Congress of Local and Regional Authorities has conducted regular activities to observe local and regional elections in the Council of Europe member states, and sometimes beyond, since 2001. This activity complements the political monitoring of the European Charter of Local Self-Government, a unique international treaty which is the cornerstone of local democracy in Europe.

The “Democratic Elections” series presents reports adopted by the Congress on recurring and transversal issues relating to local and regional elections.

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Electoral lists and voters residing *de facto* abroad

Explanatory memorandum

CG/2015(28)6FINAL

13 mars 2015

Monitoring Committee

**Rapporteur: Jos WIENEN, Netherlands
(L, EPP-CCE)**

Background

Problems with voters remaining on electoral lists, although they resided de facto abroad, have been noted during several election observation missions. This category of voters raises concerns from the perspective of effective electoral management, transparency and the objective to combat electoral fraud. Such considerations may call for comprehensive audits of electoral lists including a possible removal of voters who are de facto living abroad.

A selective country study on the situation of 16 Council of Europe member States reveals that most legislations provide for residence requirements for voters to be eligible to vote in local elections. The problem of voters remaining on electoral lists who reside – de facto – abroad seems to be mainly connected to a lack of implementation of existing laws.

With this report the Congress makes local and regional authorities aware of their responsibility for the practical side of electoral management and in particular the quality of electoral lists. Against the background of a “genuine link” (permanent residence, central point of life interests etc.) between a voter and the country in which a voter casts the ballot at territorial level, the Congress urges local and regional authorities to pay special attention to the problem of voters on electoral lists who de facto live abroad.

BACKGROUND¹

The present study relates to voters on electoral lists although they *de facto* reside abroad. The study arises from observed irregularities concerning this category of voters in the course of election observation activities of the Congress of Local and Regional Authorities (Congress), e.g., in Armenia, Bosnia and Herzegovina and Moldova.²

The problem of electoral lists and voters residing *de facto* abroad is to be considered in the light of the right to political participation/universal suffrage and restrictions that are permissible (especially residence requirements). At the same time, general considerations concerning the integrity of the electoral process, the prevention of fraud and effective electoral management are at stake. In view of the Congress' mandate, this study focuses on the specific context of local (and regional) elections. The particularities of local elections have to be taken into account accordingly. Most importantly, in local elections, the relation between actual residence requirements and suffrage rights is more direct, given the voters' immediate exposure to local politics. This is also reflected in the respective electoral arrangements, with residence requirements gaining comparative importance.

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1. The report was drafted with the contribution of Prof. Christina Binder, University of Vienna.
 2. REC 344 (2013), Armenia, Election of the members of the Avagani (Assembly) of the City of Yerevan; REC 339 (2013), Bosnia and Herzegovina, Local elections in Bosnia and Herzegovina; REC 313 (2011), Moldova, Local elections in Moldova.

Against this background, the aims of this study are two-fold: 1. it examines international standards applicable to the question of voters residing *de facto* abroad; as well as 2. domestic legislation applicable to voters residing *de facto* abroad in selected country studies in 16 Council of Europe (CoE) member States.³

In accordance with Congress Resolution 306 (2010), relevant international standards include, most importantly, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the European Charter of Local Self-Government and the Venice Commission Code of Good Practice in Electoral Matters (VC Code of Good Practice).⁴ Also, relevant case law of international human rights monitoring bodies, especially of the (former) European Commission on Human Rights⁵ and the European Court of Human Rights (ECtHR, European Court) will be considered insofar as applicable.

Electoral lists and voters residing *de facto* abroad: selected problems

Voters who remain on electoral lists although they *de facto* reside abroad and related concerns pose challenges to

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3. *Albania, Armenia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Estonia, Finland, Georgia, Iceland, Former Yugoslav Republic of Macedonia, Moldova, Netherlands, Spain, Sweden, and the United Kingdom.*
 4. *Venice Commission, Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report, Opinion No. 190/2002.*
 5. *The European Commission on Human Rights was abolished with the entry into force of Protocol No 11 in 1998.*

effective electoral management/the integrity of the electoral process and the prevention of fraud. At the same time, a disenfranchisement of this category of voters, especially if lacking adequate procedural safeguards, may be problematic from the perspective of universal suffrage/the right to political participation. The following overview illustrates these challenges with reference to relevant election observation reports.

During the presidential and municipal elections in the Former Yugoslav Republic of Macedonia 2009, general problems with the accuracy of voter lists – which were mainly due to the large number of citizens residing abroad whose names remained on the voter lists – were highlighted.⁶ OSCE/ODIHR recommended a thorough audit and revision of the voter lists to address inter alia “the problem of citizens outside the country whose names are not marked as such on the voter lists.”⁷

Also during the 2011 presidential and municipal elections in Bulgaria, the unusually high number of registered voters in comparison to the voting age population – inter alia caused by voters residing *de facto* abroad – caused concerns. Although Bulgarian legislation provided for the removal of voters who resided abroad for at least six months before the elections, the relevant legal provisions had not been implemented.⁸

6. See OSCE/ODIHR Final Report, *Presidential and Municipal Elections – The Former Yugoslav Republic of Macedonia*, 22 March and 5 April 2009, p. 9.

7. *Ibid.*, p. 26f.

8. See OSCE/ODIHR Limited Election Observation Mission Final Report, *Presidential and Municipal Elections – Republic of Bulgaria*, 23 and 30 October 2011, p. 10.

This was mainly attributed to incomplete data received from the national population register – from which voter lists were extracted. It was recommended accordingly that the process of voter registration be reviewed through a comprehensive audit and the responsibility of relevant institutions dealing with the maintenance and update of voter lists be clarified.⁹

Likewise in the local elections in Moldova in 2011, the inaccuracy of voters' lists was considered problematic. It was mainly attributed to a lack of clarity of the respective residence requirements, i.e. whether temporary or permanent residence should be the prevailing criterion. The Congress invited Moldovan authorities accordingly to "take all necessary steps... to clarify residency provisions in the law..."¹⁰

Similarly in the 2012 Bosnia and Herzegovina local elections a considerable number of voters figuring on electoral lists was observed. The Congress raised concerns as regards the vague scope of the legal provisions concerning voter registration and the "tender-ballot system" for "unconfirmed" or unregistered voters which allowed inter alia out of country voters to vote in a polling station without being registered.¹¹

9. Ibid., p. 24.

10. See *Report on the Local Elections in Moldova, CPL(21)4, 18 October 2011, para 11.b*. See also *Chamber of Local Authorities, Local Election in Moldova, CPL(21)4, 27 September 2011, Explanatory memorandum Moldova, paras 30, 34: "local authorities are obliged by law to compile the voters' lists – without having adequate resources to carry out this work"*.

11. See *REC 339 (2013), Bosnia and Herzegovina, para 7*. Cf also *Chamber of Local Authorities, CPL(24)3PROV, 20 February 2013, Explanatory memorandum, paras 15 et seq.*

Voters who appeared on electoral lists, although they *de facto* resided abroad also caused concerns during the election of the members of the Avagani (Assembly of Aldermen) in Armenia (2013), and were raised by the Congress accordingly.¹²

These voters on electoral lists although they *de facto* reside abroad may raise concerns from the perspective of effective electoral management. As observed in various instances (e.g. the 2009 Former Yugoslav Republic of Macedonia presidential and municipal elections, 2010 Georgia Municipal elections), voters who figured on electoral lists although they *de facto* resided abroad opened the possibility for electoral fraud, misuse or manipulation. The problem is compounded in cases of deficient transparency in the handling of electoral registers and in case of irregularities on election day. Voters on electoral lists who *de facto* reside abroad may thus be detrimental to the integrity of the electoral process.

On the other hand, de-registration of voters allegedly residing abroad, especially when lacking adequate procedural safeguards may be problematic from the perspective of individual suffrage rights. Such de-registration was observed in some instances: e.g. by OSCE/ODIHR during the 2007 Moldovan local elections, where citizens living abroad and students being away from their home were removed from

12. See REC 344 (2013), *Armenia*, para. 7; Chamber of Local Authorities, CPL(25)3FINAL, 31 October 2013, *Explanatory memorandum*, para 15. See also Chamber of Local Authorities, CPL(24)2REV, 20 March 2013, *Explanatory memorandum*, para 31.

electoral lists although they had not officially de-registered.¹³ Also during the 2011 presidential and municipal elections in Bulgaria, instances of deletions of citizens from the voter lists were observed,¹⁴ although voters claimed that they had never registered a current address abroad or had returned to Bulgaria many years ago.¹⁵ The removal/deletion of these voters seemed to lack adequate safeguards and is difficult to justify from the perspective of individual suffrage rights.

Finally, the unequal treatment of emigrant voters was raised as a concern by OSCE/ODIHR in the context of the local elections in Albania in 2007. Certain categories of voters, mainly voters residing abroad or citizens without registered addresses, were subjected to more burdensome conditions than other voters. This was found discriminatory and contrary to the commitments of the OSCE 1990 Copenhagen Document.¹⁶

The above-mentioned problems reside partly in the law and are caused, for instance, by problematic or unclear/vague legal provisions. Mostly, however, they are due to inadequate or problematic implementation and caused, for instance, by the deficient handling or insufficient audits of electoral lists.

13. See *OSCE/ODIHR Final Report, Local Elections – Republic of Moldova, 3 and 17 June 2007, p. 9.*

14. *Bulgarian legislation provides for a removal of voters who reside abroad more than 6 months before election from the voter lists.*

15. *OSCE/ODIHR Limited Election Observation Mission Final Report, Presidential and Municipal Elections – Republic of Bulgaria, 23 and 30 October 2011, p. 11.*

16. *OSCE/ODIHR Election Observation Mission Final Report, Local Elections, Republic of Albania, 18 February 2007, p. 6.*

Whatever the reason, voters residing *de facto* abroad whose names remain on electoral lists may raise concerns from the perspective of effective electoral management, transparency and the objective to combat electoral fraud. They risk affecting the integrity of the electoral process as required by relevant international standards, as can be deduced from the references to “genuine” elections or to “universal and equal suffrage” in Article 25 ICCPR.¹⁷ Likewise the VC Code of Good Practice establishes relevant standards/best practices with respect to the integrity of the electoral process, the freedom of voters to express their wishes and action to combat electoral fraud.¹⁸ Voters who figure on electoral lists although they *de facto* reside abroad, may also run counter Section I.1.2 of the VC Code of Good Practice which provides that voter registers should be regularly updated. Considerations of the integrity of the electoral process may thus call for action, such as for effective audits of the voter register. At the same time, especially in the absence of adequate procedural safeguards, these may encroach upon the individual’s right to vote. An according consideration of international standards seems warranted.

17. Article 25 ICCPR: “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: ... (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 expression of the will of the electors; ...”

18. See Code of Good Practice, I.3.2 (Freedom of voters to express their wishes and action to combat electoral fraud).

International standards of relevance for electoral lists and voters residing *de facto* abroad

International (human rights) instruments provide parameters for the handling of electoral lists and voters residing *de facto* abroad. Of most relevance are standards contained in the ICCPR, the European Convention on Human Rights (ECHR) and the VC Code of Good Practice. Likewise of relevance is the case law of international monitoring institutions, most importantly of the European Commission on Human Rights and the European Court of Human Rights.

The problems identified were partly in law (domestic legal framework) but mostly in implementation. In line with this, international standards will be considered in terms of legal reform; the right to vote and possible residence requirements. Also, the problems will be considered as linked to implementation and dealt with from the perspective of audits of voter registers and the handling of electoral lists. Finally, general requirements stemming from due process requirements/the right to appeal and the prohibition of discrimination will be examined.

THE RIGHT TO VOTE, UNIVERSAL SUFFRAGE AND RESIDENCE REQUIREMENTS

Generalities on the legal framework

International standards, best/good practices contain general criteria for the features of the legal framework governing elections. Elements for the provisions on the right to vote, the

conditions for its exercise and possible legal reform may be derived therefrom. First, international good practice, particularly the VC Code of Good Practice, recommends that the legal framework for elections should be clearly written, consistent, and accessible.¹⁹ International standards and best practices also govern possible changes to the electoral law. Given the necessary stability of the legal framework, fundamental changes to the electoral law should not be introduced less than one year before an election.²⁰ Legal provisions and possible legal reform to deal with electoral lists and voters residing *de facto* abroad should conform to these requirements.

The right to political participation (right to vote, universal suffrage) and residence requirements

International human rights instruments establish parameters/criteria for approaches to electoral lists and voters residing *de facto* abroad from the particular perspective of individual suffrage rights. Central to any consideration is the permissibility of residence requirements.

Residence requirements are – generally – a permissible restriction of the right to vote. Respectively, Article 25 ICCPR establishes the right and opportunity of every citizen “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 expression of the will of the electors.” As confirmed in the Human Rights Committee,

19. See Venice Commission, *Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report*, Opinion No. 190/2002, II.2.

20. *Ibid.*

the guarantees of Article 25(b) ICCPR apply also to local elections.²¹ Reasonable residence requirements are permissible restrictions of the right to universal suffrage in accordance with the HRC's General Comment No 25(57).²²

Article 3 of Protocol 1 ECHR²³ is applicable to local and regional elections only insofar as the elected authorities can be considered "legislatures" in the meaning of Article 3, i.e. when they exercise legislative powers.²⁴ While certain elections to regional councils thus fall within the scope of Article

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21. *See HRC's decisions relating to local elections in Debreczeny v. the Netherlands, Communication No. 500/1992, para 28; Antonina Ignatane v. Latvia, Communication No. 884/1999, U.N. Doc. CCPR/C/72/D/884/1999, para 29; see also Mátýus v. Slovakia, Communication No. 923/2000, para 33 (consideration with reference to Art 25 a, c). See M. Nowak, International Covenant on Civil and Political Rights. CCPR Commentary, 2005, Article 25, para. 18, for further reference.*
 22. *HRC General Comment No 25(57), para 11: "States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. ... If residence requirements apply to registration, they must be reasonable ..."*
 23. *Article 3 Protocol 1: "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 the legislature."*
 24. *Whether a body qualifies as "legislature" has to be answered in the light of the constitutional structure of the state in question; the body needs sufficient competences that are typical for a legislative body, in particular the competence to enact laws. For further reference see C. Grabenwarter, European Convention on Human Rights, Commentary, P1-3, para 4 (p. 402).*

3 of Protocol 1, local elections are generally not covered by its guarantees.²⁵ Still, general parameters may be derived from Article 3 of Protocol 1 also for local elections.

For example, the ECtHR has considered the factors which may justify residence requirements in various cases.²⁶ In doing so, the Court generally referred to the following – similar – considerations: It held that non-resident citizens are less directly interested in and have less day-to-day knowledge of a country's – [in the context of this study, it would be a municipality's] – problems. It also referred to the difficulty for candidates to campaign abroad; the need to prevent electoral fraud; the fact that non-resident citizens were less directly affected by the acts of the political bodies so elected; the legitimate concern to limit the influence of citizens living abroad in elections on issues which primarily affect persons in the country; and the necessary link between civic obligations – such as the duty to pay taxes – and the according representation in Parliament. A fortiori, these considerations apply to local and regional elections where the link between residency and local politics is even closer.

25. See *European Commission, X v. United Kingdom*, 28 February 1979; *ECtHR, Molka v. Poland*, 28 June 2005 and 11 April 2006, pp. 14-15.

26. See *ECtHR, Melnychenko v. Ukraine*, 19 October 2004, para. 56; *ECtHR, Hilbe v. Liechtenstein*, 7 September 1999; *ECtHR, Sitaropoulos and Giakoumopoulos v. Greece*, 15 March 2012. See also the case-law of the *European Commission on Human Rights, X v. United Kingdom*, 28 February 1979.

In *Sevinger and Eman v. the Netherlands*,²⁷ the ECtHR had to deal with a complaint of Dutch nationals who were not allowed to vote in the Lower House of the Netherlands on the basis that they were not residents in the Netherlands but in Aruba, one of the four constituent countries of the Kingdom of the Netherlands,²⁸ (and were entitled to vote there). In doing so, the Court focused in particular on the fact that non-resident citizens (Dutch citizens residing in Aruba) were not affected by the acts of the Lower House of the Netherlands' Parliament to the same extent as Dutch nationals residing in the Netherlands and rejected the complaint as manifestly ill founded.

The permissible length of residence requirements in the context of subnational elections was dealt with in other cases. In *Py v. France*²⁹, the ECtHR considered whether a ten year residence requirement to vote in the elections to the provincial Congress of New Caledonia³⁰ was permissible in the light of Article 3 Protocol 1. While considering the ten years residence requirement as particularly long, the Court found that "local requirements" (New Caledonia had come out of civil war; the election requirements were part of the peace deal) warranted the restrictions imposed on the applicant's right to vote, held

27. ECtHR, *Sevinger and Emans v. Netherlands*, 13 April 2007.

28. *The other countries are the Netherlands, Curacao and Sint Maarten.*

29. ECtHR, *Py v. France*, 6 June 2005.

30. *New Caledonia is a sui generis collectivity to which France has gradually transferred certain powers. It is governed by a 54-member provincial Congress, a legislative body composed of members of three provincial assemblies. The French State is represented in the territory by a High Commissioner.*

that the essence of the right had not been impaired,³¹ and did not find a violation of the provision.

In *Polacco and Garofalo v. Italy*,³² the European Commission on Human Rights considered whether the requirement of continuous residence of four years so as to be eligible to vote in the elections for the Regional Council Trentino Alto-Adige were permissible in the light of Article 3 Protocol 1. While the Commission considered the four-year residence requirement as somehow “lengthy”, it accepted the period as justified in particular in view of the necessary “thorough understanding of the regional context” and the specific aim of minority protection. The complaint was thus manifestly ill-founded.

In sum, the European human rights monitoring institutions (the European Commission and the ECtHR), thus grant states a rather broad margin of appreciation as regards the establishment of length of residence requirements as permissible restrictions to the right to vote. This is generally justified by the specific conditions of the respective state which would require such restrictions of universal suffrage rights.

The VC Code of Good Practice also deals with permissible length of residence. It is comparatively stricter. First, it considers a particular length of residence to be permissible only for local and regional elections.³³ Secondly,

31. *Ibid.*, paras 64f.

32. *European Commission, Polacco and Garofalo v. Italy*, 15 September 1997.

33. *See Venice Commission, Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report, Opinion No. 190/2002, I.1.1.c.iii: “... a length of residence requirement may be imposed*

residence requirement for nationals to participate in local or regional elections is limited to the maximum period of six months; longer periods are only permissible for the purpose of minority protection.

Accordingly, residence requirements are, in principle, a permissible restriction of the right to vote.³⁴ In local/regional elections the length of residence requirements are – a priori – also accepted with the condition that they do not exceed a few months. Especially the European human rights monitoring institutions are relatively “generous” in this respect, and will generally allow restrictions of the right to vote if local conditions so require.

on nationals solely for local or regional elections; iv. the requisite period of residence should not exceed six months; a longer period may be required only to protect national minorities; ...” See, however, ECtHR, Sevinger and Emans v. Netherlands, 13 April 2007: “The Court considers that the obligation to satisfy a length-of residence requirement in order to have or exercise the right to vote is not, in principle, an arbitrary restriction of the right to vote.”

34. Note that the 2002 Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms in the Member States of the Commonwealth of Independent States out-rules residence requirements as reasons for dis-enfranchisement in national – not however in local – elections. (Article 2.1.c. of the CIS Convention: “1. Observance of the principle of universal suffrage means the following: ... (c) each citizen, residing or staying during the period of the national elections outside the territory of his state, has the same electoral rights as the other citizens of his state.”) Armenia, Kyrgyz Republic, Moldova, Russian Federation, and Tajikistan have ratified the 2002 CIS Convention.

As regards the notion and features of these residence requirements, only general parameters may be derived from international standards and best practices. Residence requirements were dealt with at some length in *Melnychenko v. Ukraine*.³⁵ The ECtHR determined that while states generally had a wide margin of appreciation with respect to the establishment of residence criteria, this margin was not unlimited and an arbitrary application of domestic laws was considered in contravention of the ECHR. In *Melnychenko*, the applicant had alleged that the refusal to register him as candidate for the election on the basis of lack of residence was a violation of Article 3 Protocol 1. The ECtHR thus considered the condition of residence in relation to the right to stand for elections. More particularly, the Court held that notwithstanding the fact that the applicant's "habitual residence" had been for some time outside Ukraine, he remained officially registered in the Ukraine. The European Court held that neither relevant legislation on nor practice contained a direct eligibility requirement of habitual or continuous residence in the territory of Ukraine. Also, there was no distinction between "official" and "habitual" residence in the Ukrainian law.³⁶ The only proof of official registration of residence at the material time was in the ordinary citizen's internal passport, which did not always correspond to the person's habitual place of residence.³⁷ Inter alia on this basis, the Court held that the decision of the Central Election Commission to refuse the applicant's candidacy as untruthful although he still had a valid registered place of

35. ECtHR, *Melnychenko v. Ukraine*, 19 October 2004, para 56.

36. *Ibid.*, para 61.

37. *Ibid.*, para 62

official residence in Ukraine was in breach of Article 3 Protocol 1.³⁸ In particular the arbitrary application of the Ukraine's domestic law was considered problematic. One may conclude that if residence requirements are contained in domestic law, they have to be applied/implemented in a non-arbitrary way.

Certain insights for the concept of residence and the required link between a country and a person may also be derived from the *Nottebohm* case, adjudicated by the International Court of Justice (ICJ).³⁹ While the primary issue of the case related to the field of diplomatic protection and the criteria for acquisition of citizenship, useful factors/criteria for the definition of the required link/relationship between a country and a person can be identified. The ICJ ruled that while the determination of the criteria for becoming a citizen falls within the competence of states, the corresponding procedure was subject to control by the Court. In particular, a genuine connection between the applicant and the relevant state had to be proven. When defining the "genuine link", the ICJ referred to the centre of Nottebohm's interests and of his business/economic activities. Likewise, the factors of settled or prolonged residence were taken as relevant criteria; not, however the promise to pay taxes levied at the time of naturalization. In the absence of such "genuine" link, a person may not be considered to have a true relation with a state. *Nottebohm* thus offers useful criteria to determine the existence of a link between a country and voters residing *de facto* abroad.

38. *Ibid.*, para 66.

39. *Nottebohm Case (Liechtenstein v. Guatemala)*, 1955 ICJ 4 (*Judgment*, 6 April).

The Explanatory report to the VC Code of Good Practice specifies the residence requirements of the VC Code of Good Practice insofar as it indicates that residence in this case means “habitual” residence.⁴⁰

In sum, only broad criteria for the concept of residence may be derived from international standards. Still, one may draw upon these e contrario to define when a non-resident voter has lost the relation to its country. If a “genuine link” is lacking, this may be an indication for possible adjustment of voter lists.

Electoral lists and voter registration

Electoral lists and voters residing *de facto* abroad are intrinsically linked to the question of voter registration and the capacity to accurately determine who is eligible to vote. Voter registration can be active or passive. In an “active” voter registration system, voters must take action to register with the relevant authority their intention to participate in elections. In a “passive” voter registration system, voters are not required to take any specific action and are automatically included on voter lists that are compiled on the basis of existing state data. It seems, accordingly, that the problem of voters *de facto* abroad whose names remain on electoral lists occurs mainly in passive systems of voter registration. Paragraph 11 of the 1996 UNHCR General Comment No. 25 requires that states take effective measures to ensure that all persons entitled to vote are able to exercise that right.

40. Venice Commission, *Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report, Opinion No. 190/2002, I.1.1.c.*

Transparency of voter lists and the voter registration process is important to ensure that eligible voters are not disenfranchised and is a safeguard against potential attempts to manipulate voter lists. Section I.2 of the VC Code of Good Practice recommends that voter registers be permanent, updated regularly, and publicly available. Voters must have the opportunity to check their registration and request corrections. Also, when a voter is removed from the electoral list (because he is residing *de facto* abroad) he has to be informed in writing about the decision of removal.

Procedural/fair trial requirements

The ability to contestation of acts concerning the right to vote and electoral lists – in final instances appeals to Court – must also be possible. These guarantees should be relevant especially in case of audits of voter registers to ensure their accuracy (including removals of voters from electoral lists because they are *de facto* residing abroad).

Relevant fair trial standards may be derived from general human rights instruments; most importantly from Articles 6, 13 ECHR as well as from Article 14 ICCPR. Provisions related to the independence, impartiality, and competence of the judiciary are referred to in paragraph 3 of the 1984 UNHRC General Comment No. 13. The VC Code of Good Practice requires the establishment of an effective system of contestation, inter alia on matters concerning the right to vote including electoral registers, with the necessary final appeal to a court.⁴¹

41. Venice Commission, *Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report, Opinion No. 190/2002, II.3.3.*

As provided for in the VC Code of Good Practice, the appeal body must have authority in particular over such matters as the right to vote, including electoral registers.⁴²

Accordingly, in case a voter is removed from the electoral list in the course of audits of the electoral registers, he has to be informed in writing about the decision of removal.⁴³ All decisions concerning removal must be subject to appeal – in final stages judicial appeal – and courts must decide on such appeals expeditiously; within a timeframe specified by the law. Also, the procedure should be simple and devoid of formalism.

Prohibition of discrimination

Any measures taken in relation to voters on electoral lists who are residing *de facto* abroad are furthermore subject to the prohibition of discrimination, as incorporated in several international instruments. Article 25 ICCPR contains an explicit reference to the prohibition of discrimination in Article 2 ICCPR which establishes that the rights in the ICCPR are to be respected and ensured “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other states.”⁴⁴ Article 14 ECHR contains an accessory prohibition of

42. Ibid.

43. OSCE/ODIHR, *Handbook for the Observation of Voter Registration*, 2012, p. 28. *The duty to inform the voter about the removal may also be deduced from the right to appeal which presupposes such information.*

44. *Respectively, see also the prohibition of discrimination in Article 26 ICCPR (“equality”).*

discrimination with respect to the rights in the ECHR. Further standards may be derived from specific instruments which incorporate protection for particularly vulnerable groups, such as the Convention on the Elimination of all Forms of Racial Discrimination (CERD), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW, Article 7) or the Convention on the Rights of Persons with Disabilities (CRPD, Article 29).

These standards prohibiting discrimination relate to the wording/framing of the legal provisions and their implementation. Most importantly, in case of electoral lists and voters residing *de facto* abroad, they concern the establishment and application of residence requirements. According measures must be non-discriminatory. In this respect, the disproportionate impact of a specific measure on a particular group may be of relevance. For example, a “de-listing”/disenfranchisement of voters for lack of residence may be problematic if it has a disproportionate impact on particularly vulnerable groups, i.e. if comparatively more minorities, persons with disabilities or women are disenfranchised.

Applicable framework for absentee voting

Explicit standards are provided for absentee voting. In particular the VC Code of Good Practice provides for relevant standards concerning postal voting, electronic voting and proxy voting and sets the conditions for their acceptability.⁴⁵ The VC Code of Good Practice establishes that postal voting

45. Venice Commission, *Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report, Opinion No. 190/2002, I.3.2.*

should be safe and reliable, excluding the possibility of fraud and intimidation. Postal voting may be confined to certain groups of electors, such as electors residing abroad. In accordance with the VC Code of Good Practice, also electronic voting must be safe and reliable, voters should be able to obtain a confirmation of their votes and to correct them, if necessary, respecting secret suffrage. Also, the system must be transparent.⁴⁶ According to the VC Code of Good Practice, very strict rules must apply to proxy voting, especially the number of proxies a single voter may hold must be limited.⁴⁷ For those states which allow for absentee voting in local elections, these standards are of relevance, in particular the necessary safety and reliability of mechanisms and their non-discriminatory application.

Conclusion

International standards and best/good practices thus contain relevant parameters for permissible action of how to deal with voters on electoral lists who are *de facto* residing abroad. While the criteria derived therefrom are rather general, they provide useful guidance to determine the permissibility/warrantedness of state action in the ambit of electoral lists and this category of voters. In a nutshell, reasonable residence criteria are permissible restrictions of the right to vote under certain conditions. According state action may even be warranted for the sake of the integrity of the electoral process. Still, relevant residence requirements have to be established

46. *Ibid.*

47. *Ibid.*

and implemented on a non-discriminatory basis. Likewise, due process guarantees (e.g. the notification of the voter of the measure and the possibility of appeal) have to be respected.

EXCURSUS: OUT OF COUNTRY VOTING AND FOREIGNERS' RIGHT TO VOTE IN LOCAL ELECTIONS

The question of voters on electoral lists who *de facto* reside abroad is closely linked to two phenomena which also draw attention to the particularities of local elections. First, it has to be considered in relation to the debate on out of country voting. While there is a general trend towards an increased enfranchisement of citizens residing abroad to vote in national elections, this does not hold true for local elections where the link to local politics seems more marked. Second, the close relation between an individual and the life in local community is also reflected in the “contrary” phenomenon: the increasing enfranchisement of foreigners to vote in local elections.

Out of country voting (OCV)

OCV is a complex phenomenon. It comprises various constellations. As stated in the 2011 VC Report on Out-Of-Country Voting: “In general there are three categories of citizens abroad: firstly, citizens of a State may be abroad on the day of the election for business or personal reasons; secondly, there are citizens, who, for academic or employment purposes, spend a definite and temporary amount of time in another country, where they will reside for a given period; lastly, the third category comprises citizens residing abroad for a much

longer period of time, who may sometimes have double nationality and who settle down in the host country in a more permanent manner.”⁴⁸

The complexity of the phenomenon also reflects in international standards. There are simply no international standards on the (dis)enfranchisement of citizens abroad. The ECtHR established in *Sitaropoulos and Giakoumopoulos v. Greece* (GC, 2012) that a failure by states to provide conditions for citizens to vote in national elections while abroad was not a violation of voting rights. Also in *Shindler v. UK* (2013)⁴⁹ the ECtHR held that the disenfranchisement of a British citizen who resided abroad for more than 15 years⁵⁰ was not a violation of Article 3 Protocol 1. The VC Code of Good practice does not take a position as regards the voting rights of citizens abroad. It establishes with respect to residence requirements: “v. the right to vote and to be elected may be accorded to citizens residing abroad.”⁵¹ There are thus no international standards requiring the enfranchisement of citizens abroad.

However, there is a general trend towards an increased expansion of OCV especially in parliamentary/national

48. *Venice Commission, Report on Out-Of-Country Voting, Study No. 580/2010, 24 June 2011, para 6.*

49. *ECtHR, Shindler v. the United Kingdom, 7 May 2013.*

50. *British citizens residing overseas for less than 15 years are allowed to vote in parliamentary elections in the UK.*

51. *Venice Commission, Code of Good Practice in Electoral Matters – Guidelines and Explanatory Report, Opinion No. 190/2002, I.1.1.c.v. See also Venice Commission, Report on Out-Of-Country Voting, Study No. 580/2010, 24 June 2011.*

elections. First, relevant CoE documents, notably resolutions of the Parliamentary Assembly, point toward a general expansion of OCV. For example, in Recommendation 1714 (2005) on abolition of restrictions on the right to vote, the Parliamentary Assembly called upon the Committee of Ministers to appeal to member and observer states to, inter alia, review existing instruments with a view to assessing the possible need for a CoE convention to improve international co-operation with a view to facilitating the exercise of electoral rights by expatriates. In Resolution 1591 (2007) on distance voting (i.e. the exercise of the right to vote when absent from the country) the Parliamentary Assembly reiterated that the right to vote was an essential freedom in every democratic system and invited member states to introduce distance voting. In Resolution 1696 (2009) on engaging European diasporas, the Assembly encouraged member states, as countries of origin, to adopt policy initiatives, including civil and political incentives to “9.1.2. ease the acquisition or maintenance of voting rights by offering out-of-country voting at national elections”.

The Venice Commission also adopted several documents on OCV and related issues. Most importantly, in June 2011 it adopted a report on Out-Of-Country Voting (Study No. 580/2010) (2011 VC Report on OCV 2011). The report noted that while national practices regarding the right to vote of citizens living abroad and its exercise were far from uniform in Europe, developments in legislation pointed to a favourable trend in out-of-country voting, in national elections at least, as regards citizens who had maintained ties with their country of origin. The Commission suggested, in view of citizens’ European mobility, that states adopt a positive approach to the right to vote of citizens living abroad, since this right fostered the development of national and European citizenship.

Also at the domestic level, most CoE member states allow for OCV of non-residents in national elections in the country of citizenship.⁵² Thus, there is a general trend towards OCV in parliamentary/national elections.

The situation is somewhat different for OCV in local (or regional) elections. As observed in the abovementioned 2011 VC Report on OCV: “94. Distinctions should ... be

52. *According to the Venice Commission’s report on OCV, in 2011 only three states prohibited voting by non-residents or restricted to a very limited category of persons (Armenia, Ireland and Malta). In thirty-five states no restrictions were placed on the period of absence from the country (Albania, Andorra, Austria, Azerbaijan, Belgium, Bulgaria, Cyprus, Czech Republic, Croatia, Estonia, Finland, France, Georgia, Greece, Iceland, Italy, Latvia, Lithuania, Luxembourg, Moldova, Monaco, Norway, Netherlands, Poland, Portugal, Romania, Russia, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey and Ukraine). Nine states allowed non-residents to vote but imposed restrictions. Seven states restricted the right to vote from overseas to those “temporarily” abroad (Bosnia and Herzegovina, Denmark, Hungary, Liechtenstein, Montenegro, Serbia and the Former Yugoslav Republic of Macedonia). In three of these states the term “temporary” is not defined and no particular conditions are imposed on non-residents to demonstrate that their residence abroad is temporary (Bosnia and Herzegovina, Montenegro and Serbia). Two states grant a right to vote to overseas electors abroad for a long-term period but remove the right at the expiry of this period (Germany, which removes the right after twenty-five years, and the United Kingdom). (Venice Commission, Report on Out-Of-Country Voting, Study No. 580/2010, 24 June 2011). Note that in 2011, the Serbian legislation on parliamentary elections was amended to limit the right to vote in parliamentary elections to persons residing in the Republic of Serbia.*

drawn according to the type of elections. National, single constituency elections are easier to open up to citizens resident abroad, while local elections are generally closed to them, particularly on account of their tenuous link with local politics.”⁵³

This is also reflected in respective domestic legislation. According to the 2011 VC Report on OCV, citizens abroad are allowed to vote also in local elections only in a limited number of countries (from the CoE member States, these are Austria, Bosnia and Herzegovina, Denmark, Finland, Iceland, Liechtenstein,⁵⁴ Lithuania, Monaco, Norway, Spain,⁵⁵ Sweden and Switzerland (cantonal elections in some cantons). In Ireland, only diplomats and military personnel can vote in all, i.e. also in local, elections; in Germany, citizens temporarily out of country can vote in all elections.⁵⁶

In sum, notwithstanding the overall trend to OCV in national/parliamentary elections, OCV remains the exception in local

53. *Venice Commission, Report on Out-Of-Country Voting, Study No. 580/2010, 24 June 2011, para. 94.*

54. *NotethatinLiechtensteintheActonPeople’sRights(Volksrechtegesetz; LGBl. 1973 nr. 50) states in Art. 1 §2 that persons abroad will keep their right to vote if they are abroad in order to join an educational institution, to work abroad for a limited period of time, or if they are temporarily abroad in a care institution/sanatorium – as long as all other preconditions to the voting right are fulfilled. Since no other provisions regarding the voting right exist for the local level, i.e. elections in the municipalities, the same provision applies.*

55. *Reform in 2011, makes it necessary to reside in Spain to have right to vote in local elections.*

56. *See generally Venice Commission, Report on Out-Of-Country Voting, Study No. 580/2010, 24 June 2011, pp. 9, 10.*

elections. This seems primarily due to the intimate link between individuals and local politics in the respective communities and is of relevance for citizens who reside *de facto* abroad and according state obligations.

Foreigners' right to vote in local elections

From the other point of view, the increasing enfranchisement of (certain) foreigners to vote in local elections emphasizes the particularly close relation between a person and the community where he resides.⁵⁷ This direct link is also reflected in the respective electoral arrangement; the legislation governing local elections differs generally from national elections. In the context of national elections, citizenship is, in principle, the decisive criterion for the conferral of the right to vote.⁵⁸ In the context of local and regional elections, conversely, in some countries, the focus shifts to actual residency rather than to citizenship to make a person eligible to participate in local elections.

In fact, the enfranchisement of resident non-citizens in elections at local level is mainly explained in that they are particularly affected by local politics. Accordingly, the 1992 CoE Convention on the Participation of Foreigners in Public Life at

57. *As stated in the Explanatory Report to the CoE Convention on the Participation of Foreigners in Public Life at Local Level: "18. ...For those who live in a local community, numerous aspects of their daily life - such as housing, education, local amenities, public transport, cultural and sports facilities - are influenced by decisions taken by the local authority. ..."*

58. *See, e.g., the wording of Article 25 ICCPR: "Every citizen..."*

Local Level⁵⁹ provides for a possible participation of foreign residents in local politics in Chapter C (Right to vote in local authority elections), Article 6. Article 40 of the Charter of Fundamental Rights of the EU contains a similar provision for citizens of EU member states. When these are residents but, however, non-citizens of another EU member state, they are granted the right to vote in local elections accordingly.⁶⁰ Similarly, and although more carefully worded, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families refers to the possible participation of migrant workers in local politics in Article 42(2).⁶¹ Also more generally, the VC Code of Good Practice

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59. *Convention on the Participation of Foreigners in Public Life at Local Level, Strasbourg, 5 February 1992, ETS No 144. As of 12 August 2014, the Convention was ratified by eight states: Albania, Denmark, Finland, Iceland, Italy, Netherlands, Norway and Sweden. Cyprus, Czech Republic, Lithuania, Slovenia and United Kingdom have signed but not ratified the Convention. (<http://www2.ohchr.org/english/bodies/cmw/cmw.htm>). Note that in Slovenia, also citizens of non-EU states have voting right in local elections provided they have permanent residence in Slovenia for five years.*
60. *Article 40 of the Charter of Fundamental Rights: "Right to vote and to stand as a candidate at municipal elections. Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State."*
61. *International Convention on the Protection of the Rights of All Migrant Workers, 2220 UNTS 3 (1990), Article 42: "2. States of employment shall facilitate, in accordance with their national legislation, the consultation or participation of migrant workers and members of their families in decisions concerning the life and administration of local communities."*

views the participation of foreigners in local elections after a certain period of residence as advisable.⁶² Accordingly, relevant international standards and the enfranchisement of foreigners in local/municipal elections reflect the importance of actual residency in the respective community.

At the domestic level, some countries also grant resident foreigners the right to participate in local elections, subject to, partly, certain length of residence requirements. The member states of the European Union generally grant the right to vote to citizens of other EU member states in accordance with Article 40 EU Charter Fundamental Rights.⁶³ What is more, Armenia, Denmark, Ireland, the Netherlands, Norway and Sweden accord to foreign residents the right to vote in local elections on a general basis; Finland and Iceland accord the right to vote to nationals of other members states of the Nordic Council and the United Kingdom confers the right to vote to Commonwealth citizens and those of the Republic of Ireland.⁶⁴ In these cases, residency rather than citizenship is decisive for the conferral of the right to vote in local elections.

62. *Principle I.1.1.a, p. 5. See also the Explanatory report of Venice Commission concerning the participation of foreigners in local elections which draws attention to the emerging tendency “to grant local political rights to long-standing foreign residents” and recommends to grant the right to vote “after a certain period of residence” (para 6).*

63. *See for details K. Groenendijk, Article 40, in: The EU Charter of Fundamental Rights. A Commentary (Peers et al. eds., 2014), p. 1061 (para 40.13).*

64. *See also CoE Explanatory Report to the Convention on the Participation in Political Life at Local Level. As regards length of residence requirements: Sweden - 3 years (citizens other than from EU, Iceland, Norway); Armenia – 6 months; Estonia - 5 years; Iceland – 3 years (only Danish, Finnish, Norwegian and Swedish nationals).*

To conclude, the arrangements related to OCV of citizens residing abroad as well as the enfranchisement of (certain) foreigners in local elections illustrate the comparatively close ties between residency in a community and suffrage rights which are more intimate than in case of national elections.

DOMESTIC LEVEL: COMPARATIVE STUDY – SELECTED COUNTRIES

The following analysis draws on selected country studies in 16 member states of the Council of Europe, namely Albania,⁶⁵ Armenia,⁶⁶ Austria (Vienna),⁶⁷ Belgium,⁶⁸ Bosnia

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65. *Albania (Constitution of Albania, as of 27 November 2003), excerpts derived from http://vota.te.gob.mx/sites/default/files/national/8/el_law_alb_27_11_2003_const_constitution_e_hm_79600.htm; Electoral Code of the Republic of Albania (Law No. 10019, as of 29 December 2008), Electoral Code derived from http://vota.te.gob.mx/sites/default/files/national/8/el_law_alb_29_12_2008_electoralcode_electoralcode__13251.htm.*
 66. *Armenia (Electoral Code of the Republic of Armenia, as of 26 May 2011), Electoral Code derived from http://eudo-citizenship.eu/NationalElectoralLawsDB/docs/Armenia_Electoral_Code_2011.pdf.*
 67. *Austria (Wiener Gemeindewahlordnung 1996), Electoral Code derived from <https://www.wien.gv.at/recht/landesrecht-wien/rechtvorschriften/html/v1000000.htm>; Federal Law on National Council Elections 1992, as amended November 2013, derived from https://www.ris.bka.gv.at/Dokumente/Erv/ERV_1992_471/ERV_1992_471.pdf.*
 68. *Belgium (Election Code, as of 1 April 2007), Electoral Code derived from <http://aceproject.org/ero-en/regions/europe/BE/belgium-election-code-2007/view>.*

and Herzegovina,⁶⁹ Bulgaria,⁷⁰ Estonia,⁷¹ Finland,⁷² Georgia,⁷³ Iceland,⁷⁴ the Former Yugoslav Republic of Macedonia,⁷⁵

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69. *Bosnia and Herzegovina (Election Law of Bosnia and Herzegovina, as of 4 March 2006)*, Electoral Code derived from <http://legislationline.org/documents/action/popup/id/6244>.
 70. *Bulgaria ((Draft) Election Code of Bulgaria 2013, adopted with changes on 4 March 2014)*, Electoral Code derived from [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2013\)059-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2013)059-e).
 71. *Estonia (Local Government Council Election Act, entered into force 8 June 1996)*, Election Act derived from http://vota.te.gob.mx/sites/default/files/national/21/el_law_est_08_06_1996_code_logovcouncilelect_e_ht_13161.htm
 72. *Finland (Constitution of Finland, 11 June 1999)*, excerpts derived from http://vota.te.gob.mx/sites/default/files/national/22/el_law_fin_01_03_2000_const_extract_e_htm_19692.htm; information on the *Municipalities Act* from <http://www.vaalit.fi/en/index/onelections/municipalelections/righttovoteandcompilationofthevotingregister.html>.
 73. *Georgia (Unified Election Code Georgia, as revised 21 March 2008)*, Electoral Code derived from [http://www.venice.coe.int/webforms/documents/?pdf=CDL-EL\(2008\)016-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-EL(2008)016-e).
 74. *Iceland (Local Government Elections Act, No. 5/1998)*, Local Government Elections Act derived from http://vota.te.gob.mx/sites/default/files/national/28/el_law_ice_01_01_1998_loc_logovelec_e_htm_97216.htm.
 75. *Former Yugoslav Republic of Macedonia (Law on Local Elections, OG No. 45/2004)*, Law on Local Elections derived from http://vota.te.gob.mx/sites/default/files/national/54/theformeryugoslavlawonlocalelections_html_23168.html; Law on Voters' List 2002, Law on Voters' List derived from http://vota.te.gob.mx/sites/default/files/national/54/lawonvoterslist_html_11865.html; Electoral Code as amended 2012, derived from [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2013\)013-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2013)013-e).

Moldova,⁷⁶ Netherlands,⁷⁷ Spain,⁷⁸ Sweden,⁷⁹ and the United Kingdom.⁸⁰ The selection criteria were threefold: first, those countries were selected where problems concerning electoral lists and voters residing *de facto* abroad had been observed by the Congress or OSCE/ODIHR. A second selection criterion

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76. *Moldova (Electoral Code of Moldova, as of 17 January 2012), Electoral Code derived from [http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF\(2012\)039-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF(2012)039-e).*
 77. *Netherlands (Netherlands Constitution, adopted 17 February), excerpt derived from http://vota.te.gob.mx/sites/default/files/national/40/el_law_ned_17_02_1983_const_extracts_e_hm_13176.htm; Netherlands Elections Act, 28 September 1989, as amended by Act of 25 September 2008, derived from <http://vota.te.gob.mx/countries/40/>.*
 78. *Spain (Ley Orgánica del Régimen Electoral General 5/1985, as amended 2011), Electoral Code derived from <http://www.juntaelectoralcentral.es/portal/page/portal/JuntaElectoralCentral/Ley%20Org%C3%A1nica%20del%20R%C3%A9gimen%20Electoral%20General>.*
 79. *Sweden (Swedish Constitution, 1 January 1975), excerpts derived from http://vota.te.gob.mx/sites/default/files/national/52/el_law_swe_01_01_1975_const_extracts_e_hm_15997.htm; Mail Voting in Certain Cases Act, 13 March 2003, derived from http://vota.te.gob.mx/sites/default/files/national/52/el_law_swe_01_04_2003_mail_mailvotingincertaincase_10493.htm; Swedish Elections Act (2005:837), Election Act derived from <http://www.government.se/content/1/c6/06/44/45/722c9ee2.pdf>.*
 80. *United Kingdom (Representation of the People Act, 2000), derived from <http://www.legislation.gov.uk/ukpga/2000/2/part/I>; Local Government Elections Act 2000, derived from <http://www.legislation.gov.uk/ukpga/2000/22/contents>.*

was regional spread throughout the CoE's member States. Third, civil and common law countries were chosen.

In the following, aspects of relevance for the question of electoral lists and voters residing *de facto* abroad are considered, with a focus on the respective country situations.

System of voter registration

Aside from the United Kingdom, which operates through an active voter registration system (through "annual canvass"), all countries observed had a passive system of voter registration.⁸¹ The electoral lists are generally composed on the basis of information provided from the state's/national population register (e.g. Armenia, Bulgaria, Sweden, Spain,⁸² the General Directorate of Civil Status in the Ministry of Interior (Albania),⁸³ relevant ministries (the Former Yugoslav Republic of Macedonia),⁸⁴ other institutions (Ministry of Justice, local self government bodies – Georgia),⁸⁵ national registers (e.g. rural municipality register, city register, central register – Estonia),⁸⁶ the municipality (Netherlands),⁸⁷ Statistics Iceland (Iceland),⁸⁸

81. *In Bosnia and Herzegovina, the system of voter registration was active until 2006. In Bulgaria, it is partly active for EU citizens.*

82. *Art. 7(1) Electoral Code of Armenia; Art. 23(1) (Draft) Election Code of Bulgaria 2013; Chapter 5, Section 1, Election Act of Sweden.*

83. *Art. 46 Electoral Code of Albania.*

84. *Arts. 10, 11 Law on Voters' List of the Former Yugoslav Republic of Macedonia.*

85. *Art. 9 Unified Election Code of Georgia.*

86. *§ 20 Local Government Council Election Act of Estonia.*

87. *Chapter B, Section B4 Elections Act of the Netherlands.*

88. *Art. 4 Local Government Elections Act of Iceland.*

or other available official records and documents (Bosnia and Herzegovina).⁸⁹ In Austria, the electoral rolls (Wählerverzeichnis) are based on the voters' index (Wählerevidenz), which is determined by the register of residents (Melderegister).⁹⁰ Data generally refer to the permanent address where a person is registered. In the studied country examples, the accuracy of the electoral lists thus depends to a large extent on the accuracy of the underlying register/source of information (e.g. on the completeness of the respective databases and the frequency of updates made).

In fact, the problem of voters on electoral lists although they *de facto* reside abroad is frequently caused by inaccurate/incomplete or outdated data in the underlying database. For instance, in Bulgaria, it was observed that many voters remained registered at their permanent address although they had been residing abroad for many years already.⁹¹ Also in Albania, inaccuracies in the voter registers were largely due to deficient information provided by the General Directorate of Civil Status.⁹² Likewise in Georgia, the information

89. Art. 3.3 Election Law of Bosnia and Herzegovina.

90. Wählerevidenzgesetz 1973, BGBl Nr 601/1973, http://www.bmi.gv.at/cms/BMI_wahlen/waehlerevidenz/files/Kunsttext_WEG_1973_Fassung_2013_Anpassung.pdf.

91. See OSCE/ODIHR Limited Election Observation Mission Final Report, Presidential and Municipal Elections – Republic of Bulgaria, 23 and 30 October 2011.

92. See OSCE/ODIHR Election Observation Mission Final Report, Local Elections, Republic of Albania, 18 February 2007, p. 10. See also Venice Commission, Joint Opinion on the Electoral Code of the Republic of Albania, Opinion No. 513/2009, 13 March 2009, paras 78-79.

provided to the Central Election Commission on Georgian voters residing *de facto* abroad had been collected systematically only since 2008.⁹³ A lack of centralized processes (e.g. United Kingdom,⁹⁴ Moldova)⁹⁵ or technological capacities (the Former Yugoslav Republic of Macedonia)⁹⁶ have also been identified as a cause for weakness as regards the accuracy of electoral lists. Voters on electoral lists although they *de facto* reside abroad are thus frequently a problem of implementation rather than of deficient or missing legal provisions.

Residence requirements to be eligible to vote

This is also confirmed by the general incorporation of residence requirements in domestic legal provisions. Laws generally establish residence requirements for citizens to be eligible to vote in local elections (e.g. in Moldova, Bosnia and Herzegovina, Austria, Finland, Belgium, Spain (newly introduced

93. See OSCE/ODIHR Election Observation Mission Final Report, *Municipal Elections, Georgia*, 30 May 2010, p. 9.

94. OSCE/ODIHR Election Assessment Mission Report, *United Kingdom of Great Britain and Northern Ireland*, 6 May 2010, p. 11.

95. OSCE/ODIHR Election Observation Mission Report, *Local Elections Republic of Moldova*, 5 and 19 June 2011, p. 7.

96. OSCE/ODIHR Election Observation Final Mission, *Municipal Elections, The Former Yugoslav Republic of Macedonia*, 24 March and 7 April 2013, p. 8; OSCE/ODIHR Expert Visit, *Assessment of Sharing Personal Information from the Public Registers in the Process of Updating the Voter Register, The Former Yugoslav Republic of Macedonia*, 16-19 September 2013, p. 2.

in 2011),⁹⁷ Albania, Georgia, Netherlands, Estonia, Iceland, United Kingdom). Partly, these residence requirements are linked to a minimum length of residence in the respective municipality/community/local government unit (Bulgaria – 6 months; Sweden – 30 days; Finland – 51 days; UK/Northern Ireland – 3 months). These legal residence requirements would a priori impede the incorporation of voters who reside *de facto* abroad in electoral lists provided that domestic authorities know about their departure abroad.⁹⁸

Place of voting on election day

As regards the actual act of voting, citizens generally vote in the local government entity/municipality/community where they are (permanently) registered; e.g. in Albania, Sweden, Iceland, Bosnia and Herzegovina,⁹⁹ Austria, Finland, Netherlands and the Former Yugoslav Republic of Macedonia.¹⁰⁰

97. Á. Rodríguez, *Access to Electoral Rights – Spain*, <http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=1315-Spain-FRACIT.pdf>.

98. *Critically, de-registration is frequently in the hands of the individual citizens. An obligatory notification of citizens who move abroad might be one step to improve the accuracy of voter register accordingly.*

99. *If, in Bosnia and Herzegovina, on election day a voter is not included in electoral lists he may vote if he presents an ID and confirmation of permanent residence (Art 3.17).*

100. *Note that, in the Former Yugoslav Republic of Macedonia, also persons who are temporarily abroad – either working or staying abroad – remain registered in the voter list according to their last place of residence prior to their departure abroad. These persons are however not allowed to vote in local elections (Art 6 Electoral Code).*

Some states explicitly distinguish between permanent and temporary/actual residence, and provide for a right to vote in the latter. For example, Moldovan legislation establishes that if a voter has both, temporary residence (“residence”) and permanent residence (“domicile”), he votes in the place of temporary residence.¹⁰¹ In Bulgaria, when voters have different permanent and present addresses, they may request to vote at the place of the present address no later than 14 days before election day. Overall, the legislation in the countries examined thus contains relatively clear indications as to the place to vote.

Definition of residence

Of further importance in relation to electoral lists and voters residing *de facto* abroad is the definition of “residence”. Most of the countries examined rely on the concept of “permanent residence” or “residence”. They generally require inclusion in the register of the respective community, local entity or municipality (e.g. Armenia, Moldova, Sweden, Belgium). Bosnia and Herzegovina refers to permanent residence as either the citizen’s residence according to the most recent national census or to the municipality where the citizen is registered as a permanent resident in accordance with the law. In the Netherlands, it is the resident’s actual place of residence in the Netherlands, province or municipality respectively. Georgia

101. *Evidenced by domicile or residence stamps in the passport. See, however, the OSCE/ODIHR Election Observation Mission Report, Local Elections, Republic of Moldova, 5 and 19 June 2011, which points out that some confusion consisted as to whether temporary or permanent residency was decisive.*

distinguishes between permanent residence (place of registration) and actual residence and requires that the voter list shall include both, the place of registration (permanent residence) as well as his actual residence (e.g. in the case of temporary residence for IDPs).

Still, the exact definitions what is understood by “permanent residence” vary considerably. Estonia refers to the place where a voter permanently resides (long term, 1 August of the election year.) In Austria, according to the Austrian Registration Act (Meldegesetz), the place of permanent residence (Hauptwohnsitz) refers to the “central point of life relations” and “predominant relationship”.¹⁰² In the United Kingdom, residence is not defined by law, but has been held by court to entail a “considerable degree of permanence” (although being resident does not “require actual occupation and so the applicant does not need to be physically present at the address on the relevant date”).¹⁰³ Notwithstanding the varying definitions, a degree of stability and genuine link to the place of registration seems required throughout.

Voters residing *de facto* abroad

Of the examined legislations, many states do not include specific regulations of how to deal with citizens who move abroad. Still, the concept of permanent residence and the

102. § 1.7 of the Austrian Registration Act, §1.7. (Translation by the author).

103. For example, students, those with two homes and those who work away from home, in general, all satisfy the residence requirement. See L. Khadar, *Access to Electoral Rights – United Kingdom*, http://cadmus.eui.eu/bitstream/handle/1814/29827/ER_2013_10-UK-FRACIT.pdf?sequence=1.

general requirement of registration for a person to be eligible to vote in the respective local elections imply certain automatic limitations. As stated, the voters' register is in general based on the national population/civil status registries (or similar databases) and a deregistration of persons who move abroad from these databases should therewith imply their non-inclusion in/omission from the voters' registers.¹⁰⁴ Changes in the status of permanent residence (e.g. deregistration because a person moves abroad) have according consequences for his or her right to vote in the respective local elections. For example, in Viennese local elections, Austrians residing permanently abroad receive a marking in the voters' index and are only permitted to vote in federal elections. In Finland, the voters' list is compiled on the basis of information available in the population information system 51 days before election-day and therefore excludes citizens who have previously deregistered for moving abroad. Also in states where problems with electoral lists were observed, these are generally caused by inaccuracies in the population register (or similar databases) (Albania, Armenia and Moldova)¹⁰⁵ since the latter are the basis for the compilation of electoral lists.

Other states incorporate specific provisions to deal with voters who reside abroad. For example, Bulgaria establishes that voters who are abroad at least six months before elections shall be removed from electoral lists for municipal councilors

104. *See above (D.1) for details.*

105. *See also OSCE/ODIHR Election Observation Mission Report, Local Elections Republic of Moldova, 5 and 19 June 2011, p. 7 for further reference.*

and mayors.¹⁰⁶ In Georgia, persons who temporarily or permanently reside abroad on the day when elections are called may not take part in the local self government elections. Conversely, Swedish citizens who are no longer registered as residents in Sweden shall be included in the electoral roll for ten years after the population register ceased. Likewise Bosnia and Herzegovina provides that those who are temporarily residing abroad may vote as long as they remain a permanent resident in that municipality in which they wish to vote.¹⁰⁷

Overall, legislation in most states thus provides – explicitly or implicitly – for omission or possible removal of voters from electoral lists because they (permanently) reside abroad. Problems with this category of voters on electoral lists, as observed in the above mentioned election observation missions, seem thus mainly due to deficient implementation of the applicable legislation (e.g. because of inaccurate data in the underlying register¹⁰⁸ or due to the imprecise scope of the legal provisions).

106. *As regards the procedure for removal: In Bulgaria, a list of persons who are removed shall be published 10 days in advance of election day on the internet site of relevant municipality. Persons who are on the roll may also ask to be removed by written application to mayor (Art 39) upon provision of evidence. (There is a possibility of appeal to an administrative court within 24 hours).*

107. *Article 1.5. Election Law of Bosnia and Herzegovina, as of 2006.*

108. *Problems may be due to the fact that de-registration most often falls within the purview of the concerned citizen. If he does not deregister when moving abroad, he will remain registered accordingly.*

Transparency requirements and control of electoral lists

Transparency requirements, the publication of electoral lists and the correction of errors are essential for the accuracy of data incorporated therein. They may thus be of relevance for the question of voters residing *de facto* abroad.

Generally, domestic legislation of the examined states provides for the necessary publication of lists and also allows for (certain) corrections. For example, in Armenia, the register of electors is published on the internet and everyone has the right to submit applications to eliminate inaccuracies in the the list of electors until five days before the elections.¹⁰⁹ In Moldova, voter lists are posted in polling stations for correction and voters are notified until 20 days before elections where they can vote. They have the right to submit a complaint against omission or exclusion from the list as well as errors in personal data until one day before the election. In Austria, the electoral roll must be displayed for a period of ten days in an official place opened to the public and every citizens may then make written or oral objections to the list. People who on the basis of such an objection might be deprived of their vote must be informed within 24 hours and have the right to appeal against the objection. In Bulgaria, electoral lists shall be displayed in polling stations; citizens who have been omitted shall be added. Removal – inter alia for being abroad for six months in advance of the date of elections – is foreseen. Also in the Former Yugoslav Republic

109. *Procedures for removal of electors are foreseen, however generally in the context of placing these persons on other lists.*

of Macedonia, Albania, Georgia, Sweden, Estonia and Iceland according public inspection of voter lists is provided for, with possible requests for corrections.¹¹⁰

These general transparency requirements, the publication and possible correction of certain errors, provides for a minimum degree of accuracy. Still, in particular in the case of voters on electoral lists who reside *de facto* abroad it is doubtful whether these safeguards are sufficient. First, in some countries corrections of the voter register are only possible in case of omissions or of incorrect data; applications for removal are not foreseen. Second, even if the application for removal is possible (e.g. in Austria, Estonia, the Former Yugoslav Republic of Macedonia, Armenia), it is doubtful that there is knowledge and/or interest among the electorate to inform about voters *de facto* residing abroad. Thus, the publication of voter lists and according corrections are only of limited help as regards the problem related to this category of voters. The primary responsibility to ensure the accuracy of electoral lists remains with state authorities, i.e. is to be taken *ex officio*.

Conclusion

The 16 CoE States examined generally provide for according residence requirements to be eligible to vote in the respective community. The problem of voters on electoral lists although they *de facto* reside abroad seems rather a problem of

110. Note that, in line with international standards, domestic legislation in the examined states generally provides also for the possibility to appeal to an independent court, e.g. in Armenia, Bulgaria, Moldova or Austria.

implementation (i.e. inaccurate data of underlying registry, lack of de-registration) than one of lacking legal provisions.

Concluding appreciation

Problems with voters on electoral lists although they *de facto* resided abroad were noted in several election observation missions. This category of voters raises concerns from the perspective of effective electoral management, transparency and the objective to combat electoral fraud. These considerations may call for audits of the respective electoral lists, including a possible removal of voters who are *de facto* residing abroad. There is thus a possible tension between the integrity of the electoral process and universal suffrage rights/the right to political participation.

International standards and best practices provide for – relatively broad – parameters for permissible action concerning voters on electoral lists who *de facto* reside abroad. Residence requirements, including a minimum length of residence, are generally permissible restrictions of the right to vote. Due process requirements – i.e. the notification of the voter of the measure and the possibility of appeal – as well as the principle on non-discrimination provide further guidance of how to deal with electoral lists and voters residing *de facto* abroad (e.g. in case of electoral audits).

At domestic level, among the 16 CoE member States examined, most legislations provide for residence requirements for voters to be eligible to vote in local elections. The problem of voters on electoral lists who *de facto* reside abroad seems thus mainly a problem of deficient implementation (e.g. due to inaccurate data concerning this category of voters).

Comprehensive audits of electoral lists accordingly seem most important to ensure the accuracy of electoral lists in relation to voters residing *de facto* abroad.

Resolution 378 (2015)

**Electoral lists and voters residing
de facto abroad**

Debated and adopted on 25 March 2015

1. The right of citizens to free elections by secret ballot is an internationally recognised human right enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms.¹¹¹ Universal suffrage is a pillar of international law in this respect, contained in relevant international standards.¹¹²

2. The citizens' right to exercise their democratic choice in a universal, equal, free, secret and direct suffrage is the most important foundation of political participation at local and regional level and this is enshrined in the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority.¹¹³ The Human Rights Committee of the United Nations confirmed

111. *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 9), Article 3*, <http://conventions.coe.int/treaty/EN/treaties/html/009.htm>

112. *Including: the Universal Declaration of Human Rights, Article 21*, <http://www.un.org/en/documents/udhr/>; *the International Covenant on Civil and Political Rights (ICCPR), Article 25(b)*, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> ; *the OSCE Copenhagen Document, Paragraph 7.3.*, <http://www.osce.org/odihr/elections/14304?download=true> ; *the Code of Good Practice in Electoral Matters of the European Commission on Democracy through Law of the Council of Europe ("Venice Commission")*, [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2002\)023-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2002)023-e)

113. *Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority (CETS No. 207), entered into force in June 2012*, <http://conventions.coe.int/Treaty/en/Treaties/html/207.htm>

the guarantees of Article 25(b) of the ICCPR¹¹⁴ also with regard to local elections.¹¹⁵

3. Notwithstanding that universal suffrage and non-discrimination are ruling principles of free elections established by international treaties and standards, the right to vote may be subject to a number of conditions which should be reasonable and provided by law. The most usual exceptions are age and nationality. The right to vote may also be subject to residence requirements. With regard to local and regional elections, the residence requirements are not incompatible – a priori – with the principle of universal suffrage.¹¹⁶ Reasonable and limited residence requirements are permissible restrictions to the right to universal suffrage also in accordance with the UN Human Rights Committee¹¹⁷ and pertinent judgments of the European Court of Human Rights.

4. Voters who remain on electoral lists although they do *de facto* reside abroad were identified as problematic with regard to effective electoral management, the integrity and transparency of electoral processes and the prevention of fraud or manipulation during Congress' missions carried out, in particular, to Armenia, Bosnia and Herzegovina and

114. *International Covenant on Civil and Political Rights*.

115. *See different decisions of the UN-HRC with regard to local elections*, <http://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx>

116. *Code of Good Practice in Electoral Matters, explanatory report*, page 19: "... the residence period specified does not exceed a few months, any other period is acceptable only to protect national minorities."

117. *UN-HRC General Comment No. 25(57), para 11*, <http://www1.umn.edu/humanrts/gencomm/hrcom25.htm>

Moldova.¹¹⁸ Similar problems were raised also by observers with respect to elections at national level.

5. Without prejudice to existing regulations in different countries with regard to this category of voters, there is agreement among international actors in the field of election observation that voters on electoral lists who *de facto* reside abroad have become increasingly relevant in a wide range of states. There is also common knowledge about the underlying issue – the quality of electoral lists.

6. The right to vote is linked closely with the capacity of the state authorities to accurately determine who is eligible to vote and to establish accurate voters' lists. Voter registration can be "active" (legislation requires the voter to indicate to the authorities interest to take part in elections) or "passive" (voters' lists are compiled on the basis of existing state data, e.g. national population registries) and it seems that the problem of voters residing *de facto* abroad whose names remain on electoral lists occurs mainly in countries with passive registration systems. Regardless of the system of voter registration, voters may also have personal interest in not declaring that they no longer reside in their country of origin and thus

118. REC 313 (2011), *Local Elections in Moldova* <https://wcd.coe.int/ViewDoc.jsp?id=1855277&Site=Congress> ; REC 339(2013), *Local Elections in Bosnia and Herzegovina* <https://wcd.coe.int/ViewDoc.jsp?id=2048201&Site=CM> ; REC 344(2013), *Election of the members of the Avagani (Assembly) of the City of Yerevan (Armenia)*, <https://wcd.coe.int/ViewBlob.jsp?id=2123917&SourceFile=0&BlobId=2499511&DocId=2072026&Index=no>

staying on the electoral list. (The entitlement to social security benefits may be among such interests).

7. Concerning the concept of “residence”, provisions vary considerably between different states and only general parameters may be derived from international standards and best practices. Concerning the latter, the International Court of Justice (ICJ) found in the *Nottebohm case*¹¹⁹, that a “genuine connection” has to be proven for the link between a country and a person. When defining the “genuine” link, the ICJ referred to the centre of the applicant’s interests and of his business/economic activities. At domestic level, many countries rely on the concept of “permanent residence”¹²⁰ which generally requires inclusion in the registry of the respective locality in respect of the definition of “residence”. Despite varying definitions of “permanent residence”, a “genuine link” through predominant relations between a person and a country seems to be the common denominator of domestic regulations.

8. With regard to an adjacent issue, the right of foreigners to cast their ballot in local elections, there is a tendency perceivable, based on international standards, to increase enfranchisement of (certain) foreigners, notably in the light

119. *ICJ, Nottebohm case (Liechtenstein v. Guatemala), judgement of 6 April 1955.*

120. *The Code of Good Practice in Electoral Matters refers to the notion of „habitual residence“, explanatory report, page 19.*

of the voting rights at local level for EU citizens.¹²¹ The 1992 Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level¹²² provides member States may undertake to grant to every foreign resident the right to vote in local elections.¹²³ The enfranchisement of non-citizens resident in a given community in local elections is explained by the better integration of foreigners into the life of the community and by the fact that they are also – as is the case for citizens – particularly affected by local politics.¹²⁴

9. The Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority¹²⁵ guarantees “the right of nationals to participate, as voters or candidates, in the election of members of the council or assembly of the local authority in which

121. *EU Charter of Fundamental Rights, Article 40: „Every citizen of the Union has the right to vote and to stand as candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.“*

122. *Ratified by 8 member States.*

123. *Articles 6/7, provide franchise “...after five years of lawful and habitual residence in the host country..”, <http://conventions.coe.int/Treaty/en/Treaties/html/144.htm>*

124. *Paragraph 18 of the Explanatory Report to the European Convention on the Participation of Foreigners in Public Life at Local level states that “...for those who live in a local community, numerous aspects of their daily life – such as housing, education, local amenities, public transport, cultural and sports facilities – are influenced by decisions taken by the local authority...”, <http://conventions.coe.int/treaty/en/Reports/Html/144.htm>*

125. *Ratified by 12 member States.*

they reside.”¹²⁶ Pursuant to paragraph 5.1. of the Additional Protocol, member States may confer the right to vote only to persons who have the citizenship of the respective country. The Explanatory Report to the Additional Protocol makes clear that the provisions do not oppose the granting of electoral rights to other persons, such as nationals not resident in the local authority or non-nationals,¹²⁷ which is reflected by the different approaches of member states as regards voters who move abroad.

10. In light of the above and based on practical experiences acquired during missions to observe local and regional elections, the Congress underlines the importance of accuracy of electoral lists to ensure fair and genuinely democratic elections.

11. Therefore, it invites local and regional authorities in Council of Europe member States, taking into account their responsibility for the practical side of electoral management including the quality of electoral lists, to pay special attention to the problem of voters on electoral lists who *de facto* reside abroad with regard to effective electoral management, transparency and integrity of the process and the objective to prevent electoral fraud,

126. *Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority, Article 1, Paragraph 4.1.*, <http://conventions.coe.int/Treaty/en/Treaties/html/207.htm>

127. *Explanatory Report to the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority*, <http://conventions.coe.int/Treaty/EN/Reports/Html/207.htm>

in particular to:

- a. efficiently implement existing legislation on residence requirements for voters eligible to vote at local level;
- b. on the basis of existing legislation, in countries where removal from electoral lists is foreseen, implement the necessary corrections;
- c. notwithstanding the primary responsibility of state authorities – in most member states – for the accuracy of electoral lists, assume their role for the promotion and conduct of sustainable electoral audits.

12. The Congress invites its own bodies and members, its partner organisations and national associations as well as the local and regional authorities in Council of Europe member states to raise awareness of the importance of a “genuine link”, through predominant relations (permanent residence, central point of life interests etc.), between a voter and the country in which he/she casts the ballot at local level.

13. It calls on its own bodies to foster the dissemination of information about regulations and best practices concerning this category of voters through targeted action, in the interest of ensuring the integrity of electoral processes at the grassroots’ level and increasing public confidence in elections as such.

14. The Congress instructs its Monitoring Committee to keep the question of voters residing *de facto* abroad under review and to suggest further activities, if appropriate. It calls on its election observation delegations to regularly address this issue and to make reference in their reports to specific

provisions dealing with this category of voters with due attention paid also to problems in implementation, in coherence with the opinions of the European Commission for Democracy through Law (Venice Commission) and its Council for Democratic Elections.

15. It encourages local and regional authorities in Council of Europe member States, notably in light of the consultations between territorial bodies and the government, as stipulated by the European Charter of Local Self-Government, to appeal to the authorities to amend, if required, regulations concerning voters on electoral lists who *de facto* reside abroad, on the basis of international standards and best practices for permissible action concerning this category of voters.

Recommendation 369 (2015)

**Electoral lists and voters residing
de facto abroad**

Debated and adopted on 25 March 2015

1. The right of citizens to free elections by secret ballot is an internationally recognised human right enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms. Universal suffrage is a pillar of international law in this respect, and contained in relevant international standards.

2. Notwithstanding that universal suffrage is a ruling principle of free and fair elections established by international treaties and standards, the right to vote may be subject to a number of conditions which should be reasonable and provided by law. The most usual exceptions are age and nationality. The right to vote may also be subject to residence requirements. With regard to local and regional elections, the residence requirements are not incompatible – *a priori* – with the principle of universal suffrage.

3. Without prejudice to existing regulations in different countries with regard to voters who move abroad, there is agreement among international actors in the field of election observation that voters on electoral lists who *de facto* reside abroad have become increasingly relevant in a wide range of states. There is also understanding that the quality of electoral lists is the underlying issue and that accurate and up-dated voters' lists are essential to ensure fair and genuinely democratic elections.

4. Voters who remain on electoral lists although they do *de facto* reside abroad were identified as problematic with regard to the effective electoral management, the integrity and transparency of electoral processes and the prevention of fraud or manipulation during Congress' missions.

5. The Congress therefore, bearing in mind:

a. the Universal Declaration of Human Rights and the United Nations International Covenant on Civil and Political Rights;

b. the Convention for the Protection of Human Rights and Fundamental Freedoms, also referred to as the European Convention on Human rights (ETS No. 5);

c. the European Charter of Local Self-Government (ETS No. 122) and its Additional Protocol on the right to participate in the affairs of a local authority;

d. the Statutory Resolution CM/Res(2011)2 relating to the Congress of Local and Regional Authorities of the Council of Europe and the revised Charter appended thereto, adopted by the Council of Europe Committee of Ministers, defining observation of local and/or regional elections and presenting reports to the Committee of Ministers as one of the priorities of Congress action;

e. the Code of Good Practice in Electoral Matters (2002) of the European Commission for Democracy through Law of the Council of Europe (Venice Commission), and its Declaration of Principles for International Election Observation (2004);

f. its Recommendation 124 (2003) on the Code of Good Practice in electoral matters;

g. its Resolution 233 (2007) on the observation of elections – co-operation between the Congress and national associations of local and regional authorities;

h. its Resolution 274 (2008) on Congress policy in observing local and regional elections;

i. its Resolution 306(2010)REV on Observation of local and regional elections – strategy and rules of the Congress,

6. The Congress underlines that the state and conditions of electoral processes at the local and regional level are assessed by local and regional elected political representatives of the 47 Council of Europe member States on a peer-to-peer basis, in order to contribute to the legitimacy and credibility of electoral processes at local and regional level.

7. The Congress recommends that the Committee of Ministers invite the governments of member states to ensure that:

a. the right of nationals to participate, as voters or candidates, in the election of members of the council or assembly of the local authority in which they reside¹²⁸ is recognised by law and as a minimum requirement;

b. the right of other persons to so participate,¹²⁹ in accordance with the respective constitutional order and international legal obligations, is implemented with the necessary safeguards, so that effective electoral management, the integrity and transparency of electoral processes and the prevention of fraud or manipulation during local and regional elections are guaranteed.

8. In addition, the Congress recommends further ratifications of the Additional Protocol to the European Charter of Local

128. Paragraph 4.1. (Article 1), *Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority* (CETS No. 207).

129. Paragraph 4.2. (Article 1), *idem*.

Self-Government on the right to participate in the affairs of a local authority¹³⁰ and the Convention on the Participation of Foreigners in Public Life at Local Level¹³¹ be taken into consideration by member States.

130. *Ratified by 12 member States.*

131. *Ratified by 8 member States.*

The issue of the electoral lists and voters residing de facto abroad must be examined in the light of the right to political participation and universal suffrage, and the permissible restrictions of that right, in particular regarding residency requirements.

The aim of this study by the Congress of Local and Regional Authorities of the Council of Europe is to examine international standards and domestic legislation applicable to voters residing de facto abroad in selected country studies in sixteen Council of Europe member States: Albania, Armenia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Estonia, Finland, Georgia, Iceland, North Macedonia, Moldova, Netherlands, Spain, Sweden and the United Kingdom.

The “Democratic Elections” series presents reports adopted by the Congress on recurring and transversal issues relating to local and regional elections.