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# ELECTION WATCHDOGS

Transparency, Accountability and Integrity

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## Chapter 5

### Election Audits: Principles and Practices

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*Where elections have integrity, the bedrock democratic principle of political equality is honoured; citizens select their leaders, and hold them accountable. Where elections lack integrity, politicians, officials and institutions are not accountable to the public...In these cases democratic institutions are empty shells, deprived of the ethos and spirit of democracy.*

*The Global Commission on Elections, Democracy and Security  
(International IDEA and The Kofi Annan Foundation 2012.)*

*The legitimacy of this voting process [in Afghanistan] is obviously at stake. There were millions of people that voted in the first round and then again in the second round of elections. They deserve to be counted accurately and to demonstrate that democracy works.*

*U.S. State Department Official, 12 July 2014*

*(Gall and Rosenberg 2012).*

In both developed and developing democracies, elections promise a widely-accepted route to peaceful transfers of power. Elections are, nonetheless, *contests* saddled with many of the difficulties posed by other competitive pursuits: questions about the credibility of the authorities setting the rules or refereeing outcomes; sharp imbalances in knowledge of the rules; players who fail to live up to the spirit of the competition as well as its letter; and unwillingness of the losers to accept the final result without a fight (The Electoral Integrity Project 2016; Drumond 2015; International IDEA 2012).

Many elections do lead to clear outcomes, in which one candidate or party is the resounding winner by a large and acceptable margin, or an acceptable coalition government emerges. Close contests, on the other hand, are more frequently challenged, throwing any concerns about transparency, accountability, and compliance into sharp relief. Credible and widely-accepted outcomes require an unimpeachable foundation: a resilient and clear legal framework, transparent rules and decision-making

procedures, an impartial and authoritative election management body (EMB), a robust complaint adjudication process, and high levels of public trust in governing institutions, among other things.

As the *Global Commission on Elections, Democracy and Security* has noted, elections that lack integrity can lead instead to unaccountable institutions and illegitimate governments. In developed democracies, existing laws and regulations generally trigger predictable procedures that confirm results, adjudicate complaints, and produce respected election outcomes. In developing democracies, on the other hand, legal frameworks are often more ambiguous and susceptible to dispute, and processes and procedures may be less resilient to manipulation. Fraud allegations, poor election administration, and a general climate of insecurity, impunity, and unaccountability only compound these challenges. As a result, close elections in developing democracies are often far more contentious and require the commitment and ethical leadership of electoral authorities to navigate to peaceful and respected outcomes, and patience on the part of the public to allow the authorities to do their jobs.

Enter the large-scale post-election audit. When conducted in response to contentious elections, effective audits have the potential to increase the credibility of the final outcome and to ensure that results are accepted. On the other hand, poorly-administered audits can actually undermine these objectives. As will be described in this chapter, large-scale audits should be used only in limited circumstances and according to well-defined and transparent regulatory frameworks, to ensure that they meet international standards and to avoid compounding existing levels of mistrust. International standards are often presented as a benchmark by which to judge the electoral process, but for these standards to be meaningful, they should also reinforce the principles of transparency, accountability, and compliance discussed throughout this volume.

Recent elections in which such audits were used illustrate the challenges inherent to conducting high-stakes post-election audits in developing countries. Most notably, in Afghanistan in 2014, an audit was conducted to help verify the outcome of the presidential race, applying ad hoc procedures in an effort to respond to significant political tension and insecurity. This audit was conducted amid allegations of widespread fraud and with the credibility of the electoral management bodies in question. Observer missions reported that electoral authorities and the international community were compelled by a political agreement to begin the audit in haste, which made it challenging to properly address key considerations, including the criteria that should be used to invalidate votes and which organization should have ultimate authority over the process. While this kind of response to political turmoil is not uncommon in developing and post-conflict states, it leaves the process vulnerable to ad hoc processes and decision-making (Organization for Security and Cooperation in Europe 2014). These challenges in

turn can fray or sever the accountability linkages detailed in this publication by complicating the efforts of stakeholders to support a legitimate post-election audit and broadly credible electoral process.

The focus of this chapter is on the most important considerations for conducting an audit and building trust in the election's final results, grounded in international best practice and standards for election processes. We also describe three recent examples in Afghanistan, Kosovo, and Haiti that illuminate these considerations. It is worth noting, however, that audit investigations in these countries were each conducted against a complex backdrop of political, economic, and social grievances, conflicts, and imperatives. This context is also essential for understanding the credibility of the audit outcomes.

### **Definitions and Distinctions**

We use the term '*audit*' to refer narrowly to a *post-election investigation conducted to address large-scale allegations of fraud and/or malpractice*. There are many other types of audits that may be conducted around an election in both developing and consolidate democracies, focusing on specific aspects of the electoral process or as required by law (for example, routine audits of the voter registration database or hand counts in a certain percentage of polling stations in elections that use electronic voting equipment, reviews of EMB performance, or audits of political party financial records) (Lindeman et al. 2008).

Many readers will be familiar with *recounts*, during which ballots in an electoral contest are tallied again as a check on the original results (Bircher 2008). Recounts are usually conducted under the same rules and procedures as the original count. A partial recount may include the ballots from specific polling stations or electoral districts; a full recount would normally involve tallying all ballots in all polling stations. Usually, if the non-winning candidate chooses to accept the results, a recount is not undertaken.

The audits considered in this chapter may include a recount of the votes, but they also involve other aspects of an investigation into allegations of wrongdoing. Audit investigators may focus on whether or not certain voters were eligible to cast ballots, for example. Audits may focus on the mechanics of the vote or on broader issues such as the integrity of the voter list (Darnolf 2011). The decision to conduct an audit can also be made after a highly contested election in which the results lack legitimacy. Here, the audit can be a means of moving the process forward and determining a winner or breaking a political deadlock. Given this narrow definition, our examples are drawn from recent elections in less-consolidated democracies.

## **Principles for Large-Scale Post-Election Audits**

As we will propose here, post-election audits should be held to the same standards as other dispute resolution and investigative processes, including clear ownership of the process, predetermination and uniform application of procedures, well-understood evidentiary requirements, and the right of appeal. Processes should also be in place to permit unfettered access of observation groups and political party/candidate agents. All of these elements are needed to safeguard the integrity of elections and their final outcomes.

### **Ownership of the audit process**

Many students of the electoral process note that domestic election commissions should manage post-election audits (Lindeman et al. 2008). If the electoral authority lacks sufficient credibility to stand behind an announced electoral result, however, it may also lack credibility to stand behind the outcome of an audit. Careful consideration of who will conduct an audit is therefore vital. In many cases, it may be necessary for a trusted third party (such as an electoral tribunal) to provide guidance to the audit process, but it is sometimes difficult to identify a neutral actor in nascent democracies. Instead, representatives of the international community may be called upon to assist with or lead a post-election audit, as was the case with elections in Haiti in 2010 and in Afghanistan in 2014.

Regardless of the level and types of support the international community provides for the audit, the election commission should have authority over the process. Daniela Donno explores the potentially transformative effect international actors can have on the post-election environment (see chapter 3), but it is worth underscoring here that international stakeholders should endeavor to reinforce, rather than undermine, the election commission's mandate. In this sense, the upwards accountability of the election management body to the international community should be mirrored by the responsibilities of these external actors to the country's electoral process. Ensuring that the final decision-making authority lies with the election commission or a domestic dispute resolution body will help to mitigate the risk of real or perceived foreign interference in the election and its outcome, and help build confidence in the EMB and the election process as a whole.

Representatives of the candidates may be involved in the audit, but it is important to ensure that they do not control the process. If parties or candidates drive the audit, its course will be determined by partisan interest rather than protecting the public's interest in a legitimate and credible election. This issue was especially salient in Afghanistan in 2014, as illustrated below.

### **Predetermination of standards and procedures**

An electoral system that does not define audit standards and procedures, or that does so in an ad hoc manner, can enable arbitrary implementation of procedures and erode public trust in the process. The rationale is simple: to be fair, effective, and efficient, the rules of the game should be clear for all stakeholders before the game begins.

Just as transparency is essential for all election process rules and procedures (see chapter 6), we argue that audit standards and procedures should be clear and publicized in advance. When an audit is part of a preconceived electoral certification process, standards and procedures are likely to be codified in the legal framework, thus clarifying what constitutes a lawful audit and mitigating a common source of disputes during contentious elections. In contrast, in situations in which an ad hoc audit process is proposed as a means of resolving a legitimacy deficit or an intractable electoral dispute, establishing standards and procedures post-complaint can become an overwhelming challenge. Such an audit process would also be more vulnerable to partisan pressures, as stakeholders may seek to create rules and procedures that would benefit one party or candidate over another. In chapter 6, Garnett similarly argues that an EMB should inform the public of electoral administration issues clearly and in a timely manner.

If the legitimacy of an election's outcome is questioned by unsuccessful candidates or the public, an audit may be needed for reasons beyond what was specified in the electoral framework. In such cases, the audit may be an integral means to restore legitimacy to the electoral process or the credibility of the election management body. One of the major problems with such an audit is that the election commission is starting from a position of weakness. When an unsuccessful candidate or political party succeeds in having the election process audited, it casts doubt on the credibility of the EMB. Even when an electoral authority can show that the election results are credible, skepticism may linger, as it did during the 2014 Afghanistan presidential election.

If a decision is made to undertake an audit, electoral bodies should supplement the legal framework by putting in place well-defined and consistent standards and procedures to govern the process, including for sensitive issues such as similarly marked ballots and results sheets. This framework should be established and publicized *before* the audit is initiated, and applied consistently. This is the same standard that applies to rules and regulations governing the management of elections, as well as those governing the resolution of other electoral disputes. This prior planning takes time, usually a scarce resource in a fraught political environment. However, failing to take these steps leaves the process vulnerable to uneven or arbitrary application of the law and charges of bias, and may increase the risk that other stakeholders will not accept the results.

### **Training and consistent application of standards and procedures**

Effective training dovetails with the requirement for predetermined standards and procedures and is necessary for enabling the accountability and compliance linkages discussed throughout this volume. Even if a regulatory framework is established ahead of an audit, officials and investigators responsible for conducting the audit should be properly trained to reduce the risk of inconsistencies in how the standards are applied. Audit investigators must fully understand their mandate, how to implement audit procedures in a consistent manner, and the importance of doing so impartially. They should also understand the provisions of their code of conduct and what compliance and enforcement mechanisms are in place should they violate their duty of care. Again, effective training can be challenging where capacity may be low, or where an audit is taking place under both time and political pressures. However, this step is key to garnering the trust of political parties, contestants, and the general public in the audit and its results.

The Inter-Parliamentary Union, a global organization of parliaments established in 1889, has agreed that states are obligated to “ensure that those responsible for the various aspects of the election are trained” (Inter-Parliamentary Union 1994; 2015). The necessity of adequate poll worker training and compliance to rules of election management is explored in depth in chapter 8 in this volume; similarly, a lack of adequate training on an audit process can greatly hamper the ability of audit investigators to conduct their duties. The public must have confidence that the standards and procedures put in place for an audit will be applied consistently across polling stations, and for individual ballot boxes, results sheets, and ballots.

Candidates, political parties, audit observers, and other stakeholders (including the general public) also need to be educated about the audit process. It is critical for audit managers to think carefully about the role various groups will play and how they can be enlisted to support the process and outcomes. Deficiencies in training and education leave the system vulnerable, particularly with regard to candidate interaction with an audit process, where it is critical to emphasize the rules around observation to avoid interference. This can make the process even more challenging for EMBs and international stakeholders, as seen in Afghanistan’s 2014 presidential election where disagreements between candidate teams in the audit warehouse were frequent. While political disagreements among even trained candidate agents may be inevitable, emphasizing and enforcing rules and procedures are important mitigating steps to limit these conflicts.

### **Principles for managing evidence**

As the U.N. High Commissioner on Human Rights has affirmed, the “purpose of an investigation should be to secure independent evidence.” (Office of the United Nations High Commissioner for Human

Rights 2004). The collection and corroboration of substantiated facts and evidence goes to the very heart of an elections investigation and any subsequent adjudication process that leads to the invalidation of votes. Audit investigators should make every effort to substantiate facts and evidence without relying on hearsay, assumptions, or suppositions.<sup>2</sup>

An audit of election results based on claims of fraud should be managed according to the same basic evidentiary principles as other fraud investigations. For example, the United Nations General Assembly has declared that investigators have the responsibility to “identify and obtain all relevant information and evidence to establish facts relevant to an allegation, resulting in the facts being confirmed or refuted” (The United Nations Joint Investigation Unit 2012). To do so, investigators should consider multiple types of evidence to corroborate findings, assess the value of the evidence according to a clearly established standard of proof and, as necessary, follow applicable search and seizure policies.

International standards currently offer very little guidance on the specific type of evidence needed to validate electoral results. In their absence, we must look to case law of regional bodies, such as the European Court of Human Rights (ECtHR), and international public law documents. In *El-Masri v. the Former Yugoslav Republic of Macedonia*, for example, the ECtHR defined a thorough investigation on the basis of substantiated evidence. Commenting on the necessity for the “prompt and thorough” investigation of rights violations, the Court explained, “That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions . . . [and] must take all reasonable steps available to them to secure the evidence concerning the incident.”<sup>3</sup>

In *Aliyev v. Azerbaijan*, the ECtHR emphasized that the need for the timely resolution of electoral disputes does not outweigh the responsibility to undertake a thorough review of the evidence: “[R]elevant domestic authorities may be required to examine election-related appeals within comparatively short time limits in order to avoid retarding the electoral process . . . Nevertheless, . . . it must be ensured that a genuine effort is made to address the substance of arguable individual complaints concerning electoral irregularities and that the relevant decisions are sufficiently reasoned.”<sup>4</sup> Meeting this goal requires countries to establish audit guidelines that strike a balance between timely resolution and a thorough investigative process.

In an election investigation, documentary evidence often takes on particular importance. The *Canadian Special Investigators’ Manual* – a unique publication that provides clear, detailed guidance for election investigators – lists the types of official election documents Canadian investigators consider



in an audit process. These include nomination papers filed by candidates, documents related to revisions to the lists of electors, and various polling station returns enclosed in sealed envelopes, such as the packets of cast, rejected, and spoiled ballot papers.<sup>5</sup>

Auditors and other election investigators should take into account the many types of evidence they have at their disposal, from documentary material and physical evidence to witness testimony, such as interviews or written affidavits. This can be challenging in an unstable and developing democracy, and evidence may not be immediately or easily accessible. However, it is critical to the integrity of the investigation process, and investigators should endeavor to secure multiple sources of evidence. More importantly, auditors should not simply accept evidence at face value. Auditors have the responsibility to seriously consider whether the available information is reliable and substantial enough to support or refute the allegation. To aid in this task, states should develop a clearly articulated standard of evidence.

A proper chain of custody is also a crucial component of legitimate audit processes, as the quality of the physical evidence may affect decisions of the court or auditing panel. Investigative bodies, including auditors, have the burden to prove that every step in the process of collecting, using, and preserving evidence comports with international best practices.<sup>6</sup> These best practices include the development of clear standard operating procedures to define the responsibilities of investigators in maintaining the chain of evidence; maintenance of a thorough inventory of physical evidence to ensure that all items are properly secured and preserved for adjudication (Latta and Giles 2012); a secure location to protect evidence from unauthorized access and degrading physical conditions (Nielsen and Kleffner 2013); and periodic inspections of the evidence control area (Latta and Giles 2012).

### **Right of appeal**

International human rights conventions all recognize, implicitly or explicitly, the fundamental value of an appeals mechanism (Vickery 2011). In the elections context, the ECtHR has stressed that “an effective system of electoral appeals is an important safeguard against arbitrariness in the electoral process.”<sup>7</sup> Within the context of an audit – particularly when election results are challenged and the electoral commission is starting from a position of weakness – the right of appeal is integral to building (or re-building) trust in the process and in the election outcome.

In the course of developing standards and procedures for post-election audits, a timely and effective appeals process should be established and clearly articulated. It is important to note here that an election audit can be considered as a fundamental and routine part of an election process (for example, where an audit is required by law regardless of whether the outcome is contested), or it may be an election dispute resolution mechanism, where fraud or malpractice has been alleged, often on a

large scale. In the latter situation, the audit may itself be considered a form of appeal (and potentially also a form of remedy, for example if it results in a confirmation of results). In either case, however, the appeals process should support the fundamental right to judicial review (that is, review of an administrative decision by an independent judicial body), have a clear basis in the law, and be generally known to the public. This last principle is particularly important when an audit changes the outcome of elections because the public must understand why the election result was challenged and accept the remedy that was administered.

The audit review process should be fast and effective, but it also should not contravene due process protections. Appeals should not be used to delay the certification of the results or to harass the opposing party or candidate. Time limits for lodging and deciding appeals should be reasonably short. The European Commission for Democracy through Law (generally known and referred hereafter as the Venice Commission)<sup>8</sup> has set the standard of three to five days for actions at first instance (that is, for decisions by the arbiter who is mandated to hear the case first).

Finally, as previously stated, a transparent right of redress requires that the appellant be informed of the reasons why an appeal was dismissed or denied. Thus, the appellate body should clearly state the legal basis used and factual determination made when it ruled on the particular case. The judge or arbiter should detail which audit findings were considered or relied on in making their decisions, what violation was committed and by whom, and whether the violation influenced or might have influenced the outcome of the elections. The appellate body should also provide the concurring or dissenting opinions of the judges or arbiters. This will provide transparency about the reasoning used by arbiters to reach their conclusion and any personal legal views that entered into the decision. A legal justification for a decision will also facilitate the enforcement of the decision and help to establish the legitimacy of the final electoral results.

### **Mandate for Audit Oversight/Observation**

There is a strong basis for external monitoring of electoral processes in international law and best practice. The Declaration of Principles for International Election Observation recognizes that “Achieving genuine democratic election...has become a matter of concern for international organizations, just as it is the concern of national institutions, political competitors, citizens and their civic organizations” and affirms that “International election observation has become widely accepted around the world and plays an important role in providing accurate and impartial assessments about the nature of electoral processes” (The United Nations 2005). The Inter-Parliamentary Union (IPU) *Declaration on Criteria for Free and Fair Elections* also provides that “states should take all necessary and appropriate measures to ensure the transparency of the entire electoral process including, for example, through

the presence of party agents and duly accredited observers” (Inter-Parliamentary Union 1994). This chapter is focused on upwards accountability to the international community, and will therefore focus mainly on the role and rights of international observer missions in a post-election audit. However, similar arguments can be made for the rights and responsibilities of domestic observers and party agents.

Inviting international observers to observe an electoral audit is a best practice in emerging democracies. The Declaration of Principles highlights a number of specific principles that will enable observation to serve as a vehicle for transparency and accountability, including that: (1) observers must be granted access to key locations where electoral events take place, including electoral adjudication and complaint mechanisms; (2) representatives of election observation missions must be allowed to move around freely and access relevant documents and information related to their mandate; and (3) observers should receive formal accreditation from the relevant authority (The United Nations 2005).

There are a number of possible barriers to the integrity and transparency of audit processes, discussed throughout this chapter, that also impede the effective participation of international observers. These include insufficient procedural clarity, poorly enforced or non-existent training requirements, and logistical and other impediments to ensuring the chain of custody of sensitive materials. A slow accreditation process can also be an obstacle for getting external stakeholders involved in the audit. The procedure for accreditation should therefore take into consideration any time and material limitations and the start-up timeline for the audit.

For the sake of promoting accountability and to avoid confusion regarding reporting and evaluation of the process, all stakeholders should have a clear and comprehensive understanding of how the audit will be administered. Observers cannot do their work effectively if there is no point of reference for assessment. Adjudication decisions and changes to the process should be clearly communicated to all stakeholders to reduce confusion and consequent setbacks.

Transparency during the movement of sensitive election material is also imperative to an audit’s credibility (ACE Project. 2016). External stakeholders should be permitted access to every step of the audit process, including transit and storage of evidence. Depending on the scope of the audit, an EMB may have the audit officials travel to multiple locations or have all the ballot boxes transported to a central location. Audit managers should consider the stakeholders that should be present and their ability to access the locations where audits are to be performed. At a minimum, each site will need to have sufficient space for auditors, observers, and the ballot boxes; adequate security; and a relatively clean, comfortable environment.

It is worth noting here that the effectiveness of observation as a tool for providing oversight of the audit process is predicated on many of the same assumptions as for effective observation before and on Election Day. Neutrality and adherence to internationally accepted principles for election observation (as illustrated by the Declaration of Global Principles) are essential conditions for effective observation and fulfilling the public reporting function. Craig Arceneaux and Anika Leithner explore this concern further in chapter 2 of this volume.

### **Practical Applications of Audit Standards: Afghanistan, Kosovo, and Haiti**

Recent large-scale post-election audits illustrate the importance of the six principles discussed herein: domestic ownership of the audit process; predetermined and clear standards and procedures; training and consistent application of audit processes; clear and widely-understood principles for managing evidence; a reasonable right to appeal the audit outcome; and a mandate for external observation.

#### **Afghanistan (2014)**

The 2014 Afghanistan presidential election is generally considered historic: it marked the first time in Afghanistan's history that a transfer of executive power was achieved through the democratic process (Loyn 2014). At the end of the first round of voting on April 5, Abdullah Abdullah held the lead with 45% of the votes, while Ashraf Ghani followed with 31.6% (Stancati 2014). No candidate garnered a majority of votes, triggering a runoff election. After initial tallying of votes for the runoff election held on June 14, the Independent Election Commission (IEC) released preliminary results indicating that Ashraf Ghani had garnered 56.44% of the vote. Abdullah Abdullah and his supporters alleged widespread fraud, vote rigging, and manipulation of the electoral process by the IEC, ultimately boycotting the formal complaints adjudication process and threatening to establish a parallel government. Increasing tensions between both camps and deteriorating trust in the electoral management bodies led to political deadlock and fears of instability.

On July 12, U.S. Secretary of State John Kerry hosted a negotiation during which both candidates agreed to a nationwide audit that would review each of the 8.1 million ballots cast in the election (Jeong 2014). The July 12 agreement gave a large role in the audit process directly to international entities, including multiple United Nations agencies and offices (Fischer 2015). This approach presented enormous challenges for international stakeholders, as Afghan law did not include explicit provisions for an audit process or international involvement, although Article 58 of the Electoral Law provides authority to the Independent Election Commission (IEC) to quarantine and investigate ballot boxes. Through the high-level political agreement, the international community ultimately was vested with significant responsibility for the audit process, but formal legal authority remained with the IEC (Democracy International 2015).

As the IEC did not anticipate the possibility of a comprehensive, nationwide audit, no contingency plans were available to conduct such an exercise. The audit process was suspended multiple times amid allegations by Abdullah Abdullah that the agreed-upon audit criteria were not being followed (Stancati and Khan Totalkhil 2014). However, the E.U.'s final report on the election places part of the blame for the vagueness of the audit procedures on the contestants themselves, as the candidate teams played "a central role in the design of the audit procedures" (European Union Election Assessment Team 2014) and their continued discussions after coming to their initial agreement "diminished the constancy and clarity of the exercise" (European Union Election Assessment Team 2014). Without predetermined audit standards, the candidates could continue to argue (sometimes violently) for more favorable standards, ultimately slowing and undermining the process further.

The July 12 agreement mandated a rapid start to the massive audit undertaking. As a result, rules were not agreed or publicized ahead of the audit. Instead, they were developed incrementally by an Audit Committee and the IEC throughout the process, which led to confusion for the auditing staff and observers, and left the process vulnerable to criticism (European Union Election Assessment Team 2014). Procedures were ultimately driven in large part by the candidate teams. While consultation is important, it is equally critical that political actors do not dictate regulations and procedures (which should be developed by electoral bodies that have a legislative mandate to do so). July 30, thirteen days after the audit began, marked a turning point, as the candidates endorsed detailed audit procedures and an IEC decision defined the "criteria leading to recounts and to partial and total invalidations" (European Union Election Assessment Team 2014). Still, although criteria were changed midway through the audit and daily clarifications were issued by the Audit Committee, prior audit decisions were not revisited in light of this new information. Accordingly, not all evidence was treated the same.

The key document guiding the auditors was a 16-point checklist determined in the July 12 agreement. However, additional regulations, procedures and training were needed to guide auditors in completing the checklist, in order to reduce subjectivity and ensure uniformity. For example, question 12 of the IEC checklist asked: "Are there identical or significant patterns of the same markings on ballots? If yes, how many?" (Clark and Suroush 2014). Further guidance and training was important for individual auditors to uniformly identify similarly marked ballot (SMB) papers, as well as to understand what constituted a pattern. The training that was provided to audit investigators, however, was extremely limited and rudimentary. In addition, while an audit is by definition meant to address wider issues of fraud and intimidation, the audit investigation in Afghanistan was narrowly focused on the invalidation of ballot boxes. An 'investigations committee' established by the IECC to address these wider issues was itself fraught with procedural issues and came well after the election and audit, when the opportunity to address fraud and rebuild public trust had passed.

Due to an urgent focus on operational issues and the transfer of ballots to Kabul (which were logistically significant), the IEC also did not issue at the outset detailed guidelines about the proper chain of custody of evidence and how to deal with fundamental fraud risks such as similarly marked ballots and similarly signed results sheets. Such clear and tangible directions would have helped to prepare auditors to perform fundamental aspects of their audit duties in a standardized manner, and reduce challenges for the IEC down the road. Beginning the audit process under political pressure (with notice of 24 hours according to the political agreement) left little time to develop such guidelines.

A key challenge faced by the main actors in the Afghanistan election related to the transport of ballot boxes to the centralized audit location. The IEC, the International Security Assistance Force and the UN did a remarkable job of securing transportation of ballot boxes from the provincial warehouses scattered across Afghanistan to a centralized location. Procedures to ensure the presence of observers and party agents were quickly issued, facilitating sufficient transparency of this important component. For an audit process of this scale and level of controversy, the importance of transparency measures is hard to overstate. The presence of candidates and observers over many weeks was admirable. However, the complex operating environment, the pressure for rapid decisions, and the lack of pre-determined standards led to challenges in preserving the evidentiary chain of custody.

In accordance with the international standard requiring the right of appeal, audit decisions by the IEC could be appealed to the Independent Electoral Complaints Commission (IECC). However, appeal procedures were not determined before the audit began, and challenges with the consistent application of IECC procedures meant there was also a loss of trust in this body by candidate agents and the public – despite the fact that cooperation between the IEC and IECC during the audit was generally good. As such, this appeal process faced challenges in ensuring the legitimacy of the process and the acceptance of results.

As discussed earlier, inviting international observers to observe an electoral audit is a best practice in emerging democracies, and permitting international observers contributed significantly to the transparency of Afghanistan's audit process. However, the IEC required that one international observer be present at each audit station before IEC officials could begin auditing ballot boxes, based on a political requirement from one candidate team as a precondition for participation in the audit. While the motivation to ensure transparency of the process was important, this requirement significantly influenced the structure of the international observation missions, albeit not their findings. Specifically, this requirement forced observer missions to deploy many more observers than was substantively necessary to observe such a process and increased the logistical and management burden considerably.

Candidate accreditation was also a serious issue in Afghanistan. To ensure transparency, the IEC initially set no limit on how many candidate agents could be accredited or present at the audit site at one time, but the flood of agents from both candidates engendered a frenzied rumor mill that escalated minor doubts to serious accusations of fraud or misconduct. Security concerns after a few violent confrontations led the IEC and its advisers to reduce the number of agents permitted at the audit site.

A final note is in order on the characterization of the 2014 transfer of power in Afghanistan: as the audit unfolded, some stakeholders complained that the process was subject to the whim of the candidates. Allegations of fraud by both sides brought the electoral process and audit to a standstill. Pressure to find a solution – even one that might be outside the legal framework for the elections – was increased by concerns that failing to find a mutually acceptable solution would lead to serious instability. The IEC ultimately agreed not to release the final results of the audit as part of the negotiations that led to the National Unity Government that leads Afghanistan today.

Only one of the six principles described above – external monitoring by professional observers – can be said to have been met during the Afghanistan audit in 2014 (albeit with significant challenges to their work). The other five standards were largely not met: although legal mandate for the audit remained with the IEC, the July 12 agreement gave a large role in the audit process directly to international entities; standards and procedures for dealing with sensitive issues such as similarly marked ballots and results sheets were neither established in advance nor understood by all stakeholders; the audit process was marred by insufficient training and inconsistent application of procedures (especially as clarifications were made but not applied retroactively); limited review of multiple evidence types and challenges with maintaining a clear chain of custody of evidence beset the process; and, the right of appeal to the IECC, available under the law, was stymied by the lack of appeal procedures and the decision not to release the final results of the audit.

### **Haiti (2010)**

Prior to the November 2010 presidential election in Haiti, the country suffered a devastating earthquake (European Commission on Humanitarian Aid 2016). Haiti's infrastructure was considered "among the world's worst even in the best of times" (CNN 2010) and critical components of the electoral process, including voter lists, ID cards, and polling stations were lost or destroyed in the earthquake and needed to be re-created in an extremely short time amidst extreme devastation (Tracy 2010). A cholera outbreak in October traced to UN peacekeeping troops from Nepal (Frerichs et al. 2012) cast further doubt on the efficacy and motives of foreign assistance agencies in Haiti (Boumba 2015; Sherwell 2010). Against this backdrop, the head of the Organization of American States (OAS)

insisted that it was “extremely important that [the election] take place” to hasten Haiti’s recovery and show to the world that it still had a “civic pulse” (Padgett and Desvarieux 2010).

A controversial first round of presidential elections excluded dozens of parties from eligibility and left 2,217 tally sheets (representing around 23% of votes) either uncounted or with irregular vote totals (Johnston and Weisbrot 2011). The primary observation report from the election, issued by the OAS Joint Electoral Observation Mission, noted that Haiti’s laws did not clearly articulate the roles and responsibilities of the Departmental Electoral Bureaus (BED) and the Communal Electoral Bureaus (BEC). The Mission also said responsibilities of the dispute resolution bureaus, both of which fall under the structure of the Provisional Electoral Council (CEP) and are tasked with addressing electoral disputes at both the departmental (BCED) and national (BCEN) levels, were not clearly defined (Organization of American States 2011).

Preliminary election results from the CEP indicating that a popular anti-establishment candidate, Michel Martelly, would not be part of the run-off were greeted with three days of violent protests. Shortly after this announcement, the United States Embassy in Port-Au-Prince raised concerns about irregularities in the election process and the differences between the CEP results announcement and the findings of the National Observation Council (CNO), a domestic observer group that had monitored the process across the country (Sontag 2010). Rapid negotiations between the OAS and Haitian government resulted in an OAS team of experts being sent to Haiti to verify the results (Taft-Morales 2011). This Expert Verification Mission faced a difficult task, lacking a prior legal mandate and predetermined audit processes and procedures. The Mission did not issue a code of conduct, and while it created standards for the inclusion or exclusion of tally sheets from the final count that were based on the electoral law of Haiti (specifically Articles 171, 161.1, and 173.2) and relevant international standards, they were not specifically provided for in preexisting election law (Organization of American States 2011). Ultimately, the mission investigated only a subset of the polling stations based on a statistical model and focused on elements of fraud only, as opposed to both fraud and malpractice. The major triggers for an audit of a polling station were also adjusted during the audit, causing further challenges with respect to uniformity (the trigger for closer scrutiny of a polling station results form was initially 225 ballots cast in favor of one candidate, but this trigger was subsequently changed to 150 ballots) (Organization of American States 2011).

Tally sheets selected for review were analyzed on the basis of several criteria: 1) whether the tally sheet had the required signatures of polling officials, 2) whether a list of registered voters was included, and 3) whether voter national identity numbers of those who voted at a particular voting station were present and accurate. To these, the Mission also added an additional criterion to assess



whether the results on the tally sheet had obviously been altered (Organization of American States 2011).

Preliminary results announced by the CEP had indicated that Mirlande Manigat earned first place with 31.4% of the vote, Jude Celestin was in second with 22.5%, and Michel Martelly stood in third with 21.8%. The top two candidates would move on to a runoff election. The new vote count reached by the OAS following the tally sheet review put Martelly in second place and Celestin in third, though the new participants in the runoff were still separated by less than one percent of the vote, making the process extremely contentious (Taft-Morales 2011).

Critics have argued that the investigation by the OAS was politically biased and arrived at arbitrary conclusions that altered the results of the election (Johnston and Weisbrot 2011; Morrell 2011). Although the OAS expert verification mission notes that it took care to establish a thorough process to ensure consistency and quality control (Organization of American States 2011), no additional outside observers or candidate agents were present during the audit process to confirm. Outgoing Haitian President René Prével was reportedly not satisfied with the OAS mission's methodology and the lack of control granted to the CEP in the investigation (Taft-Morales 2011). In reaching its results, the Mission reviewed only a small subset of the total number of tally sheets (919 out of 11,181 tally sheets, with 234 excluded on the basis of the criteria noted above). Because only a small subset of tally sheets were subject to the mission's legal analysis, other actors have alleged that "the Mission does not even have a limited legal basis for its result." (Johnston and Weisbrot 2011). Additionally, approximately 12 percent of tally sheets (representing 156,000 votes) were missing or quarantined by the CEP. As the distribution of votes in the areas represented by these tally sheets apparently varied markedly from the rest of the country, it is entirely possible that their inclusion could have altered the ranking of the candidates as determined by OAS (Johnston and Weisbrot 2011).

Although there were a number of concerns raised about the procedures used to trigger tally sheet investigation and the criteria established for this review, the final OAS report noted that the Mission took some steps to ensure standards were consistently applied in the review process. Two-member teams were rotated after one day to allow reviewers to compare their approach to assessing tally sheets. Additionally, data was checked by a third person not involved in the data entry process after it was submitted by reviewers. Tally sheets were then labeled and reviewers' names were included on the packages, with spot checkers visually evaluating packages at random (Organization of American States 2011).

The Mission reviewed only a limited set of evidence sources, including packets of tally sheets and the Election Day incident logs from the UN peacekeeping mission and the CEP Emergency Call Center. The

team also interviewed electoral stakeholders, including candidates (though not Manigat) and several civil society organizations (Organization of American States 2011). According to the Mission's report, the audit teams also employed several measures to ensure the appropriate management of evidence throughout the investigation, including keeping signed chain of custody and spot check records, and storage of sensitive materials using tamper-evident seals in the locked tabulation center when the investigation was not in progress (Organization of American States 2011).

As a final note, the audit process did not include a clear right of appeal. The Haitian government was under significant pressure from the United States and other major donors to accept the OAS recommendations. Ultimately, the CEP announced that it would adhere to the OAS analysis and Manigat and Martelly would advance to the second round of elections.

As in Afghanistan, the 2010 Haitian post-election audit largely did not meet the principles detailed in this chapter, and the methodology and neutrality of the process and its outcomes are clearly in doubt. Although the OAS Mission's operations were not open for observation by external actors, it appears that generally measures were taken to ensure appropriate control and management of evidence, as per our fourth standard (although the array of evidence reviewed was limited to a sub-set of tally sheets, Election Day incident logs, and stakeholder interviews). The audit was, however, led by an international actor lacking both a prior legal mandate and predetermined audit processes and procedures; used a statistically—flawed methodology and suffered from a lack of uniformity as the triggers for an audit of a polling station were adjusted mid-stream; and did not include a clear right of appeal of the results, given the politically-charged nature of the final outcome.

### **Kosovo (2010)**

The 2010 snap election in Kosovo – triggered by the unanticipated resignation of the President (Kuebler 2010; Bolsover 2010), the collapse of the governing coalition, and a vote of no-confidence in parliament – offers a useful foil for Afghanistan and Haiti (BBC News 2010; Friend 2010). These assembly elections were of particular importance as the first national elections held without substantial management by the Organization for Security and Cooperation in Europe (OSCE). Unlike in Afghanistan and Haiti, ownership of the audit process also remained with the domestic authorities. Although the election was troubled by widespread allegations of fraud and malpractice, investigations were conducted on the basis of specific, pre-determined mechanisms in the domestic law – both administrative and criminal – and not as a result of a political agreement. The audit in this context included recounts, review of official tally sheets and results forms, complaints investigation and adjudication, and criminal prosecution.

In general, the complaints and appeals mechanism for adjudicating electoral disputes was streamlined significantly in advance of the 2010 elections in Kosovo through amendments to the 2008 Law on General Elections and other reform efforts (Republic of Kosovo Central Election Commission. 2010). The Central Election Commission (CEC), the Election Complaints and Appeals Panel (ECAP), and the Administrative Division of the Kosovo Supreme Court are all involved in resolving election disputes (European Union Election Expert Mission 2011). The CEC is responsible for administering elections and reviewing and auditing election data (through its Count and Results Center), and can order recounts of ballots in problematic polling stations (Organization for Security and Co-Operation in Europe 2012). The amended law gave ECAP the authority to adjudicate voting and counting complaints. These decisions were binding on the CEC but could be appealed to the Administrative Division of the Kosovo Supreme Court within 24 hours (European Union Election Expert Mission 2011).

In Kosovo, all the reconciliation and results forms (and corresponding candidate results sheets) that are compiled by polling stations are processed, verified, and audited at a centralized Count and Results Center (CRC) based on procedures developed by the CEC. In advance of the 2010 election, and in order to detect errors in results compilation, the CEC adopted procedures to cross-reference the candidate results form with the results and reconciliation form (party totals) using an audit feature incorporated into the counting and tabulation software. The tabulation system then would automatically detect whether results were compiled incorrectly at the polling station level; because each voter could choose only one political party and five candidates from that party, the ratio of party votes to candidates should have been approximately 1:5. When the 2010 election results forms were processed at the CRC, significant deviations from this ratio triggered a review of investigation reports compiled and submitted by the CRC's audit and investigations team. Based on that review, the CEC ordered a recount and investigation of the ballots in 760 polling stations (approximately 40%) (European Union Election Expert Mission 2011). The high number of irregularities combined with pressure to produce results in a reasonable time frame limited the amount of training that could be provided to auditors and created an enabling environment for mistakes. Although established before the election, the uniform application of audit and recount procedures was challenging without comprehensive training; in many cases, materials were incorrectly counted or recorded in the initial recounts, requiring a repeat of audit procedures.<sup>9</sup>

In its own investigation, ECAP also invalidated results in 49 polling stations in five municipalities based on breaches of the secrecy of vote, persons voting on someone's else behalf, and falsification of signatures on the voter lists, and ruled that re-voting should be organized in those individual polling sites. Based on this ECAP decision and CRC reports, the CEC organized re-voting on January 9, 2011 in several polling stations in five municipalities. On January 6, the Supreme Court overturned ECAP's rejection

of an additional complaint, prompting the CEC to organize another repeat election for a sixth municipality on January 23 (European Network of Election Monitoring Organizations 2011).

It is important to highlight here that although the ECAP ordered these repeat elections for irregularities during the December elections, it only ordered recounts for similar complaints lodged following the partial repeat election. As the EU noted, “While this is likely to have happened because the Panel was reluctant to order repeats of repeat elections, it only indicates that addressing irregularities by partial repeat elections does not provide a sustainable remedy.” (European Union Election Expert Mission 2011).

The next step of the investigatory process – missing in Afghanistan and Haiti, where the audit processes effectively ended with a political agreement – was the criminal investigation of individuals alleged to have contributed to the irregularities found during the CEC and ECAP reviews. In prior elections in Kosovo, observers had noted serious concerns about “the failure of prosecution authorities to promptly and vigorously investigate and prosecute fraudulent activities” (Organization for Security and Co-Operation in Europe 2012). Accordingly, “in an attempt to curtail the culture of impunity, the President of the Supreme Court and the State Prosecutor committed to fast-track criminal cases” emerging from the 2010 election (European Union Election Expert Mission 2011). As per the criminal procedure law, municipal prosecutors were tasked with investigating and prosecuting election offenses. A comprehensive analysis conducted by the OSCE of a sampling of these cases revealed troubling lapses in the handling of these investigations according to international standards, with some notable exceptions. A full analysis of these shortcomings is outside the scope of this chapter, but many of the cases reviewed suffered from insufficient evidence and poor legal reasoning for indictments and the failure of the judiciary to “thoroughly and fairly examine these cases during the main trial in compliance with applicable law and defendants’ fair-trial rights” (Organization for Security and Co-Operation in Europe 2012).

Determining how far the 2010 post-election “audit” in Kosovo met the six principles outlined in this chapter is somewhat more complex than in either Afghanistan or Haiti, where the investigations and evidence sources were more limited. As noted above, ownership of the Kosovo audit process remained with the election management body and complaints panel (and the relevant prosecutorial authorities for criminal investigation) as per the law (although as some observers have noted, the law may give excessive authority to the CEC to order re-votes without a judicial decision) (European Union Election Expert Mission 2011). Clearly articulated procedures were in place to determine the type of irregularities that would trigger an audit by the CEC, and for the investigation of complaints by the ECAP. In the former case, however, the scale of the review and the limited timeframe put a huge burden on audit staff who lacked comprehensive training. The EU Mission final report notes tellingly

that “in the course of meetings with the EU EEM, the number of polling stations where the results were to be annulled or recounted, or where voting was to be repeated often changed without clear reasons. This seriously undermined the transparency and credibility of the election process” (European Union Election Expert Mission 2011). As briefly noted, the criminal investigation process aimed to increase accountability and compliance by electoral actors, but did not meet best practices for ensuring the right to due process and the collection and consideration of evidence. Observation by domestic and international groups was generally effectively enabled, but the right to appeal available under the law – and by extension the right to an effective remedy – was not fully met, given the discrepancies between remedies applied to similar cases.

### **Conclusions**

This chapter has highlighted six foundational principles for conducting credible audit investigations in response to large-scale allegations of election fraud and malpractice: domestic ownership of the audit process; pre-determination of standards and procedures; appropriate training of audit actors and consistent application of the rules; clear and widely-understood rules for gathering and maintaining evidence; a reasonable and balanced right of appeal; and external observation of all audit processes. These standards provide a clear structure for a potentially complex and politically-fraught process. They can also reinforce the principles of transparency, accountability, and compliance discussed throughout this volume.

We have focused on post-election audits with extensive international participation or oversight. This linkage between election management bodies and the international community is especially relevant for audits in fragile and transitioning environments. Challenging circumstances – such as the allegations of fraud and malpractice that can trigger full-scale post-election audits – can test the very foundations on which nascent democracies rest. This chapter has outlined numerous considerations in the preparation for, and conduct of, large-scale election audits that contribute to – rather than detract from – efforts to ensure transparency of election processes and accountability of electoral and political actors.

These principles provide an objective and clear framework for supporting post-election audits to meet the widely-accepted criteria for credible electoral and investigative processes. Although there is no “perfect” election, if they are followed they will provide the strongest possible foundation for a credible transfer of power. None of the three post-election audits that we have considered met all of these criteria; in the case of Afghanistan, only one of the six principles – external monitoring by professional observers – was met, and there were still significant challenges to the work of international observers that likely reduced their efficacy. By the metric outlined in this chapter, it would be impossible to call

the Afghanistan audit a success: as noted above, the audit results were never released to the public and a brokered agreement by the international community ultimately secured the transfer of power. In addition, and despite the enormity of the audit investigation – including the deployment of 487 international observers, diplomatic staff, and audit personnel, the collection of more than 22,000 ballot boxes and the review of approximately 8 million votes (United Nations Assistance Mission 2014) – the audit investigation only focused on a narrow set of concerns related to the count, tabulation, and movement of ballots and other sensitive materials. It did not investigate other major allegations of fraud and intimidation that had serious implications for the election results (Fischer 2015).

- Insert Figure 5.1 about here -

The final outcome of the 2014 Afghanistan presidential election reflected a delicate political arrangement, resting precariously on a complex electoral framework. The brokered agreement departed from most standards for a credible election process, and official results were never released. Ultimately, concerns about the stability of the immensely fragile country prevailed, despite the resulting attenuation of the electoral process. Similar challenges beset the 2010 Haiti audit, whose process and outcome have been questioned in multiple corners as politically-motivated and methodologically-flawed. The enormous humanitarian emergency created by the 2010 earthquake and its aftermath magnified the infrastructure and resource limitations already facing the electoral process, and further complicated the country's relationship with international actors. Although political agreements may have been the clearest way to deal with the contentious elections and fragile political and security contexts in these two countries, long-term democratic resilience would be better supported by credible elections and widespread acceptance of genuine results.

The 2010 Kosovo audit, unlike the Haiti and Afghanistan cases, was managed by the domestic EMB and met several of the standards outlined in this chapter. Relatively clear standards and procedures could be found in the legal framework to guide the implementation of investigation processes. Criminal investigations and prosecutions, however, were challenged by the poor quality of evidence marshalled and could not be said to meet international standards or best practice. However, the very fact that a considerable number of investigations were undertaken to hold individuals accountable for breaches of the electoral process is significant. As noted above, the Afghanistan audit investigation was essentially a negotiation tool that enabled powerful actors to ensure their places in the government, without any real proof for their allegations or legal accountability for perpetrators of fraud. This was reflected in the lopsided scale of the investigation: extremely broad as measured by the number of ballots considered, but quite superficial in the methods used to investigate allegations of wrongdoing.

Ideally, large-scale post-election audits would be unnecessary. Robust regulations and procedures for counting and reviewing ballots, appropriate training and performance management of polling center officials, and unfettered monitoring by professional observer organizations could eliminate the need for onerous, inflammatory, and time-consuming investigations after Election Day. When audits are determined necessary, however, they should be based on a predictable set of procedures and guided by best practices, and should enable the state to hold perpetrators of fraud accountable for their actions. This chapter has attempted to provide this guidance so that any post-election audit conducted is predictable and transparent, and – along with appropriate accountability and compliance mechanisms – promotes the integrity of the democratic process.

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Figure 5.1: Summary of Application of Audit Principles

	Afghanistan (2014)	Haiti (2010)	Kosovo (2010)
Full domestic ownership of the audit process	X	X	✓
Predetermined standards and procedures	X	X	✓
Training and consistent application of standards and procedures	X	X	X
Clear and widely-understood principles for managing evidence	X	✓	X
Reasonable and balanced right to appeal	X	X	X
External monitoring enabled	✓	X	✓

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<sup>1</sup> This chapter was written in collaboration with Staffan Darnolf, Katherine Ellena, Emily Lippolis, Dan Murphy, Jed Ober, and Naomi Rasmussen. It draws upon a 2015 white paper jointly prepared by the International Foundation for Electoral Systems (IFES) and Democracy International (DI). For more information, see <http://www.ifes.org> and <http://democracyinternational.com>.

<sup>2</sup> Material in this section has been drawn from a forthcoming IFES publication on investigative standards in election disputes, supported by the United States Agency for International Development (USAID).

<sup>3</sup> *El-Masri v. Former Yugoslav Republic of Macedonia*, App. No. 39630/09, 2012-VI Eur. Ct. H.R. 263. The ECtHR has reaffirmed the importance of substantiated evidence in several recent election-related cases. In *Akatishi v. Azerbaijan*, the ECtHR ruled in favor of the applicant, finding that “the applicant’s disqualification [from candidacy to the National Assembly] was based on irrelevant, insufficient and inadequately examined evidence.”

<sup>4</sup> *Namat Aliyev v. Azerbaijan*, App. No. 18705/06, 2010 Eur. Ct. H.R. at ¶ 90.

<sup>5</sup> See ‘Access to Records, Books and Documents’ in *Commissioner of Canada Elections* (2000); see also Evidence Act, R.S.C. 1985, c. C-5, §§ 24-31(Can.)

<sup>6</sup> See chapter 9 ‘Collection, Use, and Preservation of Evidence’ in *Commissioner of Canada Elections* (2004).

<sup>7</sup> *Petrov v. Bulgaria*, Eur.Ct. H.R., App. nos. 77568/01, 178/02 and 505/02, Judgment of 11 June 2009, ¶ 63.

<sup>8</sup> The Venice Commission is the Council of Europe's advisory body on constitutional issues, and provides legal advice to the 60 member states (including the 27 Council of Europe states and 13 other countries from around the globe) (Council of Europe 2014).

<sup>9</sup> See IFES (2011).