

## Using International Law to Assess Elections

challenges facing the field—in particular the need for continued improvement of observation methodologies and the articulation of clear, common standards for assessing elections.

Finally, a third group of writings include work on Public



Third, standards based in PIL are prescriptive and point to goals that most states will not fully meet all the time. This helps move the discussion about democratic election standards away from one which characterizes some countries as established functioning democracies and others as somehow inferior towards a more positive perspective which recognizes that all democracies are inherently imperfect, requiring constant efforts to maintain and improve them. In fact, many established democracies are unlikely to meet all of their PIL obligations regarding elections.

Finally, and perhaps most importantly, PIL provides a credible and objective foundation for fostering dialogue on election standards among international election observation organizations, because PIL obligations are in most cases applicable to all nations.

### *What public international Law?*

Public international law, particularly the International Covenant on Civil and Political Rights (ICCPR) and subsequent international and regional treaties, clearly establishes an obligation for states to hold genuine elections. Article 25 of the ICCPR states:

- 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
- a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
  - 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 voters;
  - c) To have access, on general terms of equality, to public service in his country.'

This obligation, along with a handful of other obligations such as freedom of expression, freedom of assembly and association, and freedom of movement, has been used by election observer groups as the basis for their election assessments and observation missions for many years.

However, these obligations, as established in the core international legal instruments, are stated in general terms that do not provide enough detail to allow clear and consistent assessment. While they offer flexibility regarding how elections should be implemented, they pose a challenge for election observers faced with the task of assessing whether electoral processes adequately satisfy the international obligations.

In order to provide greater detail and context about critical obligations and how they should be interpreted in electoral processes, the Carter Center and its partners have compiled a large set of documentary sources that goes beyond the international and regional legal instruments commonly used as a basis of election standards. When this full range of documentary sources of PIL is referenced, it provides substantial additional guidance on how to understand obligations found in high-level instruments.

Relying on a commonly used starting point in identifying and selecting appropriate sources of PIL obligations, we have looked to Article 38 of the Statute of the International Court of Justice, which reads:

'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) International custom, as evidenced by general practice accepted by law;
- c) The general principles of law recognized...by all nations;
- d) Subject to the provisions of Article 59, judicial decisions and the teaching of the most

sources serve to both support the treaty and treaty obligations and provide examples of state practice in the application of international legal obligations

Interpretative Documents The decisions of judicial bodies, such as the European Court of Human Rights, can provide general interpretations of the meaning of treaty obligations. But, given the nature of judicial proceedings, such interpretations are closely linked to the facts of the case in question. In some circumstances, treaty supervisory bodies such as the United Nations Human Rights Committee play a quasi-judicial role and hear individual cases. The Committee's decisions (or 'views') inform the overall interpretation of the ICCPR. In addition, the Committee has adopted a number of 'General Comments,' which lay out its interpretation of particular ICCPR provisions. In the context of elections, the most important of these is General Comment 25.

Taken together, this body of sources provide a comprehensive picture of the range of existing obligations for democratic elections and how they can be met. These include not only the rights and obligations commonly associated with democratic electoral processes (largely collective rights related to the conduct of elections) but also a series of individual human rights that must be fulfilled for elections to be considered democratic.



political principle regarding the overarching macro-level obligation for democratic elections, which depends on the fulfilment of the array of obligations on the right-hand side.

- (1) The will of the people shall form the basis of the authority of government. This obligation was first established in Art. 1 of the Universal Declaration of Human Rights (UDHR) and was subsequently made legally binding in Art. 25 of the ICCPR. It is fulfilled through genuine, periodic elections, by universal and equal suffrage held by secret ballot, but requires that an array of other fundamental rights are fulfilled.
- (2) Genuine elections<sup>14</sup> – While the notion of genuine elections lies at the heart of democratic elections, the treaties provide little guidance about what constitutes a genuine election. It is generally understood to mean elections which offer voters a real choice and where other essential fundamental rights are fulfilled.
- (3) Periodic elections<sup>15</sup> – This obligation was first established in the ICCPR and is generally understood to mean that elections must take place at reasonable intervals. Any postponement of the election must be strictly required by the exigencies of the situation<sup>16</sup>.

Right Box: The obligations on the right relate to a series of processes, focused rights, and individual rights and fundamental freedoms which are essential for a genuinely democratic election that reflects the will of the people.

- (4) The state must take necessary steps to ensure realization of rights. PIL requires states to take steps to ensure the effective realizations of the rights contained in the instruments<sup>17</sup>. This obligation includes ensuring that the legal framework incorporates the international obligations in treaties and agreed by states; that states regulate violations of human rights not only by states, but also by non-state actors and private individuals; that states educate the population and public officials on human rights; and that states remove barriers to the electoral process for those with specific difficulties (e.g. illiteracy, language barriers, disability, etc.) All branches of the government and subsidiary state organs are responsible for protecting the rights of those within the state's jurisdiction. This obligation is essential to ensuring a political environment and legal framework where fundamental rights and freedoms are fulfilled and protected.
- (5) The rule of law – Implicit in the international human rights treaties and instruments is the obligation of the state to abide by the rule of law. While not explicitly articulated as an obligation in the ICCPR, the rule of law is recognized as an essential condition for the fulfilment of human rights and representative democracy<sup>18</sup>.

As UN Secretary General, Kofi Annan defined rule of law as 'a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards'. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of



powers, participation in decisionmaking, legal certainty, avoidance of

- are in the interest of national security, public safety or for the protection of the rights of others.<sup>37</sup>
- (14) Freedom of association<sup>28</sup> – Freedom of association is critical in the context of political parties and campaign activities and includes the ability to freely establish political parties. As with freedom of assembly, the only legitimate restrictions on freedom of association are those that are prescribed by law and necessary in a democratic society.
- (15) Freedom of movement – Freedom of movement is essential during the electoral process, in particular for political parties and voters, but also for poll workers, and election observers. Freedom of movement includes the ability to move around freely, as well as the ability for citizens who are abroad at the time of voter registration and voting, to return (where the la

expression also protects the right to communicate freely with international bodies regarding human rights issues.<sup>40</sup>

- (19) Access to information Closely related to the right to freedom of opinion and expression, is the right of access to information. Everyone has the right to seek

While others divide the electoral process into fewer or more parts, our framework (outlined in figure 2) includes the following ten:

- (1) **Legal Framework**– The legal framework includes the rules that regulate how and when the election will take place, and who will participate as voters, public officials or observers. The legal framework must ensure that all aspects of the electoral process are consistent with the state’s human rights obligations.
- (2) **The Electoral System and Boundary Delimitation**– The electoral system and boundary delimitation focus on how votes are converted into mandates and how constituencies are drawn. Like the legal framework, they must be in line with a state’s human rights obligations.
- (3) **Election Management**– Election management include issues largely related to the professional and impartial conduct of election activities by the election management body, as well as the structure and mandate of that body.
- (4) **The Media**– This constituent part includes not only issues related to the rights of journalists, but the ability of

(7) **Voter Registration**- This constituent part includes all aspects of the electoral process related to the voter registration, which is generally used to ensure that eligible voters are able to participate.

(8) **Voting Operations**- Voting operations refer to all election day operations and events, including aspects that facilitate voting operations such as the procurement of ballots or technology, establishing alternative means of voting, etc.

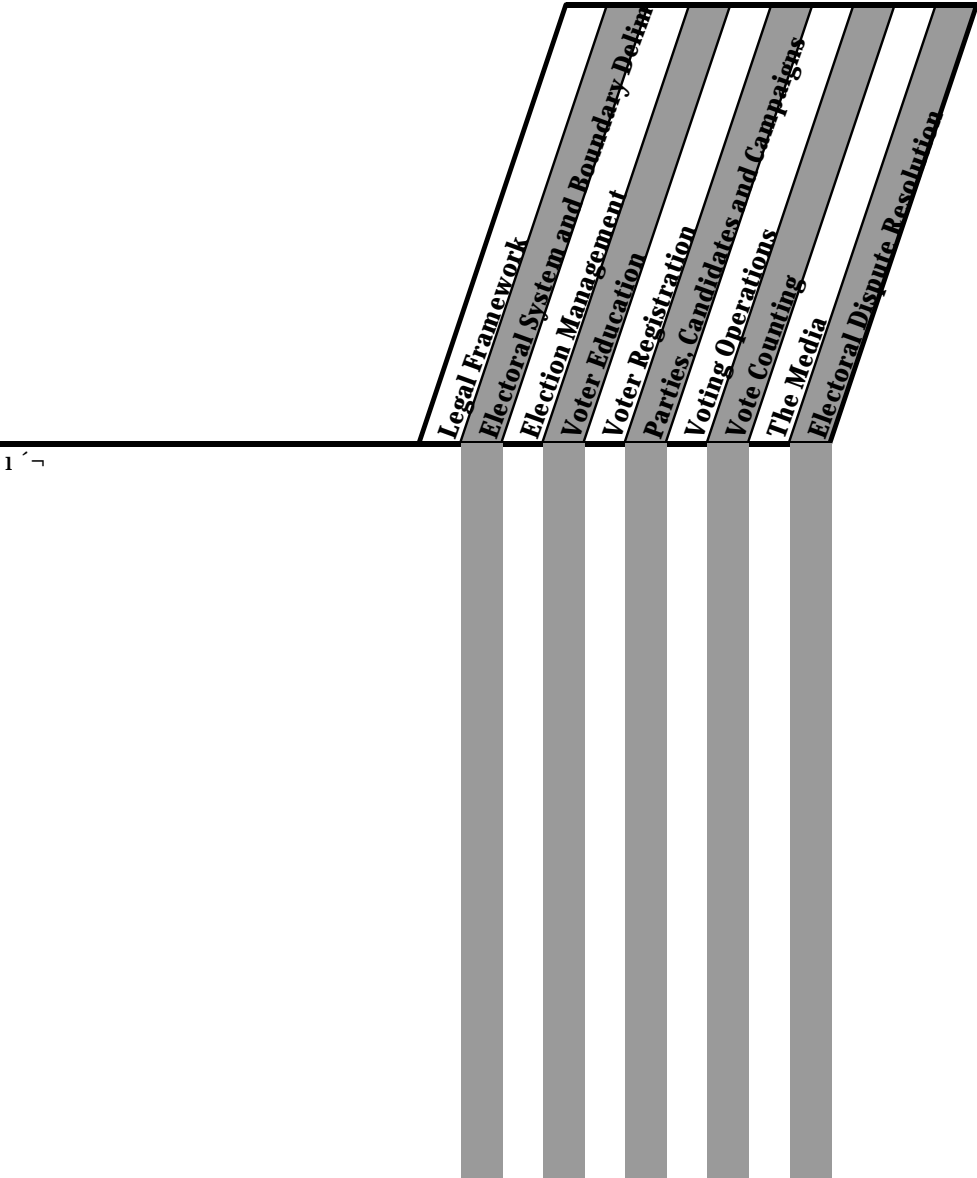
(9) **Vote Counting**- This includes the vote counting process at the end of election day, and all aggregation and tabulation processes through to the final announcement of results.

(10) **Electoral Dispute Resolution**- Electoral dispute resolution is relevant throughout the electoral cycle and includes any dispute resolution mechanism established to hear and adjudicate election related disputes.

### ***Linking the obligations to the parts of the election***

With both the broad range of electoral obligations and the parts of the electoral process defined as above, we now create a two-dimensional framework which shows the two together and helps establish which international obligations are relevant to the various constituent parts (see Figure 3). Using this framework, election observers would determine which international obligations are involved in each part of the electoral process (indicated by check marks in Figure 4), and could use the corresponding PIL instruments as evidentiary sources to provide detail about the obligations. In effect, the obligations serve as the basis for the standards against which to assess the processes.

*Figure 3 - Constituent Parts and their Relevant International Obligations*



## Compendium of Obligations As indicated above, each check mark in Figure 4

represents a part of the electoral process where an international obligation is relevant, and hence where PIL sources are available to help elucidate a more precise meaning of the obligation. In order to facilitate this work, The Carter Center and its partners have created a series of matrices to serve as a comprehensive reference guide on the obligations relevant to each constituent part of the electoral process (see, e.g., Figure 4.) The matrices include summary statements of obligations and state practice, followed by the full source quotes from the relevant PIL instruments, which add detail to the definition to the obligation and/or provide guidance on how that obligation might be interpreted or applied. The sources are colour-coded on the right hand side based on the relative strength of the source according to the hierarchy outlined by Article 38 and described above.

For example, the matrix in Figure 4 shows the summary statements and source quotes for the cell corresponding to the obligation for universal suffrage in the voting operations part of the electoral process. The matrix indicates that the obligation of universal suffrage (a collective right to vote) requires that the broadest pool of voters be guaranteed their participatory ri



which case observers could recommend that the

A good obvious starting point for compiling these measures and indicators is to refer to the many handbooks and manuals used by Carter Center and other election observer organizations. While some measures may involve numerical grading, the full set of measures is not intended to be aggregated into an overall score for the electoral process as a whole. Rather, the measures will include a range of both qualitative and quantitative measures that can be compiled in a more comprehensive set of data and evidence against which to assess the standards established for each constituent part.

The analysis of the various measures and indicators will necessarily involve some subjective judgments, and observers will be able to apply the assessment criteria taking into account the specific political context.

**Analysis of Data and Overall Assessments** - To reach overall findings regarding an observed electoral process requires an assessment of the degree to which each constituent part has met the relevant obligations/standards based on the evidence collected by the observer mission. While there is little doubt that journalists will press hard for black/white conclusions that neatly sum up the electoral process in 'bimodal terms' such as 'free and fair,' the analytical framework and the practical tools outlined here should help observers avoid the pitfalls of oversimplified sound-byte conclusions.

With this approach, preliminary post-election statements of election observation missions can root the assessment criteria, related standards, as well as the overall findings in international legal obligations, and can include recommendations about how the state might better achieve their obligations in the future. In addition, final observer mission reports could be submitted to the international accountability-promoting mechanisms like the United Nations Human Rights Committee when states are reporting.

### Conclusions and next steps

Over the course of this project, we have found that election observers have generally been asking the right questions along. However, observers have not been consistently and thoroughly linking their assessment criteria directly to states' obligations for democratic elections in PIL. Doing so will allow observers to report systematically on the degree to which the existing body of international obligations are being fulfilled, using assessment criteria that are objective, transparent, consistent, and applicable to all countries. It is with these goals in mind that we have created the framework, outlined here, that ties international obligations to the work of the observer during the electoral period.

However, work remains to be done. Initial drafts of the tools are being tested by Carter Center election observation missions, a process which will continue through early 2010 and will be reflected in the preliminary assessments and final reports of Carter Center missions. Through these tests we hope not only to evaluate the tools themselves, but also to evaluate the framework as a means of assessing the intricacies of electoral processes. One of the most difficult challenges concerns the methods used to compile observation data and reports into an overall assessment of the electoral process. In this regard, we need to consider whether and how to weight the various constituent parts to arrive at an overall assessment, and also whether there are certain rights or obligations that are so fundamental to the electoral process that, if absent or undermined, render an election as failing to meet international standards?

Overall, we believe that the use of PIL is likely the best basis for building consensus on a common set of criteria for assessing democratic elections among international observation groups. Observation organizations appear increasingly prepared to discuss the need for and parameters of these criteria, particularly when based on the existing commitments of states as enshrined in international law. The process of consensus building will necessarily be a long one, but has begun with the incremental steps starting from the Declaration of Principles.

Building consensus on observation criteria is essential to ensure the continued relevance of international election observation. In the end, the benefit of election observation groups coming together to build on their work is that the quality of election observation should improve. It will encourage reflective reflection on the nature and role of election observation, and will strengthen the credibility and integrity of election observation missions. This in turn should help election observers have a more positive and sustainable impact on democracy and build more broadly. This framework is presented as a step in that process.

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<sup>8</sup> The Declaration of Principles has now been endorsed by 35 international organizations (as of August

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<sup>27</sup> On freedom of assembly generally, please see ICCPR, art. 21; ICERD, art. 5(d.ix); ACHPR, art. 11; ACHR, art. 15; CIS, art. 12(1); ECHR, art. 11. On reasonable restrictions on freedom of assembly see for example, ICCPR, art. 21; ACHR, art. 15; ACHPR, art. 11; CIS, art. 12; and ECHR, Art 11(2).

<sup>28</sup> On freedom of association generally, see ICCPR, art. 22(1); ACHPR, art. 10(1); ACHR, art. 16(1); ECHR, art. 11; and CIS, art. 12(1). On right to establish parties, see for example, UNHRC, General Comment 25, para 26; ACDEG, Art 3(11); and Venice Commission Code, 15. On reasonable restrictions, see ICCPR, art. 22(2); ACHPR, art. 10; ACHR, art. 16(2); CIS, art. 12(2); and ECHR, art. 11(2).

<sup>29</sup> On freedom of movement and reasonable restrictions on this freedom, please see UDHR, art. 13; ICCPR, art. 12; ICERD, art. 5(d.i); ACHR, art. 22(1); CIS, art. 22; and UNHRC, General Comment 27, paras 11, 14 and 20-21.

<sup>30</sup> On equality before the law, see for example ICCPR,