

## Using International Law to Assess Elections

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### Abstract

*Building on the work of the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (OSCE-/ODIHR), the Inter-Parliamentary Union (IPU), the European Commission (EC) and many others, The Carter Center and other election observer organizations have been collaborating for several years on an initiative aimed at identifying existing obligations for democratic elections in Public International Law (PIL), and linking these obligations to criteria for assessing electoral processes. This paper provides an overview of the framework that has been developed through these efforts, and argues that it provides an approach for election observation that is more transparent, more objective, and more acceptable to host countries because it is based on states' acknowledged international legal commitments. In addition, the authors argue that this approach provides a solid foundation for building broad consensus on what constitutes 'international standards for democratic elections,' an often-used term for which there still is no single commonly accepted definition.*

Keywords: election observation; public international law; election standards; human rights; democracy.

### Introduction and background<sup>2</sup>

In the last 50 years, and especially since the end of the Cold War, the challenges of democratization and democratic elections have been a central focus of international affairs. On the one hand, there is now broad consensus that genuine democratic elections are essential for establishing the legitimate authority of governments and for allowing citizens to hold their governments accountable. On the other hand, the empirical record reveals an uneven pattern of democratic development around the globe, with many countries making only marginal progress.

At the same time, the practice of international election observation has grown, with a proliferation of observation organizations and the gradual emergence of a professional community of election observers. While these groups generally use compatible approaches—many refer to 'international standards' in their work—there is no single common set of internationally accepted standards for assessing elections.<sup>3</sup>

In recent years, however, there has been important progress in building the basis for common standards, with contributions from a range of separate but related perspectives. First, a large and growing body of literature has evolved regarding the concept of democracy and its key dimensions, and attempts to develop measures of the quality of democracy.<sup>4</sup> These writings provide a wealth of theoretical approaches, all of which include elections as a key element of the broader concept of democracy, but also reflect an unfinished debate about how to establish the definitional boundaries of a concept as complex and multifaceted as democracy.

A second area of research and writing concentrates more narrowly on elections and/or election observation, including critical analyses of election observation as well as several pieces on observation methods and assessment criteria.<sup>5</sup> Collectively, these works offer useful critiques of the work of observers, helping to identify the key

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 International Law (PIL), particularly international human rights law, and its connection to democratic elections. Several scholars in this group have introduced arguments in favour of PIL approaches to election observation.<sup>6</sup> At the same time, publications by a number of major election observer organizations have made critically important advances in this regard, demonstrating a growing focus on utilizing observation methods that reference PIL and/or international human rights.<sup>7</sup>

While the authors of this article draw insights from all of the above, the last group are especially important, in that they include rough outlines for PIL approaches to election observation and provide a foundation for the framework articulated in this paper and in related efforts by The Carter Center and other election observation organizations.

In spite of the accumulation of work in this direction, election observer groups have not developed a comprehensive observation framework based on PIL. Several factors help to explain this: First, since much of the election observation community looks at the electoral process from the perspective of election administration, most election observation experts are not deeply familiar with PIL and are uncertain about its practical use in observation. Second, there remains a critical lack of communication between the democracy and elections community and the broader human rights community, such that the overlap in their agendas is not fully recognized. Third, the task of building a detailed framework of PIL related to the electoral process is challenging, time-consuming, and tedious.

### ***Why develop standards now?***

Recognizing problems arising from the lack of common standards for assessing elections, major international observation organizations have gradually begun to address these key challenges. In October 2005, following several years of consultations, 22 organizations met at the United Nations to endorse the *Declaration of Principles for International Election Observation* and the *Code of Conduct for Election Observers*.<sup>8</sup>

The endorsement of these documents was an important step in the professionalization of election observation, and helped catalyze the emergence of a global community of international election observation practitioners that meets regularly. The *Declaration* and *Code* are now widely recognized by endorsers not only as providing guidelines for professional international observation, but also as foundational documents for a process of collective information-sharing and problem-solving.

Through the participatory development of the *Declaration*, observer groups established a common definition of international election observation. In addition, the *Declaration* provides broad guidelines regarding the parameters of credible election observation missions, such as the size, duration and scope of the missions. It also delineates key conditions required for observation mission to be meaningful, including host country guarantees to provide access to key persons and electoral information, freedom of movement, and for observers to issue public statements on their findings. The accompanying *Code of Conduct* outlines standards of professional conduct for individual observers and includes a pledge that observers must sign before embarking on a mission.

Although the *Declaration of Principles* lays out general standards for professional election observation, it does *not* attempt to establish a common understanding of ‘international standards’ nor to define ‘genuine democratic elections.’ Many of the endorsing organizations, especially those connected to intergovernmental organizations, were uncomfortable with having the *Declaration* address issues regarding ‘election standards’ or assessment criteria since such references raise sensitive questions about the nature of democratic legitimacy and matters of sovereignty. As a result, the *Declaration* endorsers limited their focus to agreeing on general principles for observation

Despite these concerns, the endorsers did agree on the need to harmonize their methodologies. And, in the last several annual meetings of *Declaration* endorsers the issue of observation methods and assessment criteria has been a major agenda item.

### **Identifying obligations for democratic elections**

This paper summarizes an initiative aimed at identifying existing obligations in public international law (PIL) for democratic elections as part of an analytical framework for assessing electoral processes. In addition, it argues that this framework offers a foundation for fostering consensus among international observers on a common set of criteria. The lack of a common set of standards has opened the door to criticisms – generally unfounded – that observer groups have ‘double standards,’ or that their methods lack integrity. Developing common standards based on transparent and objective criteria rooted in PIL would help observer groups maintain high professional standards of impartiality, integrity and transparency, and should strengthen their ability to play key roles in supporting genuine democratization.

The following sections outline the rationale for using PIL as the basis for assessing elections, and then summarize the relevant PIL obligations and link them to the main constituent parts of the electoral process, creating a framework of obligations for democratic elections that can be used for election assessment. This is followed by a section on practical tools that can be used by election observation missions to use this framework for assessment. The final section discusses some key challenges, and suggests next steps in building consensus on election standards.

### ***Why public international law?***

Public international law provides a sound foundation for such standards for several reasons. First, PIL creates a framework for democratic election standards that is based on obligations in international and regional treaties and instruments to which State Parties have already voluntarily committed, as well as on international customary law (as evidenced by state practice). That is, states have obligated themselves to standards of behaviour and respect for human rights through the signature and ratification of treaties and in some cases through membership in the community of states. Because states are committed to upholding these obligations, PIL provides a recognized, objective, and transparent set of standards for assessing elections.

Second, PIL develops over time. As treaties, declarations and other instruments are signed, ratified or endorsed, the pool of obligations grows and evolves. This means that PIL is not static, but is a living body of law that can respond to the changing needs of the international community, and the states themselves.

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, and 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,<sup>9</sup> 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 afford 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 core international and regional legal instruments commonly used as the 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 Art. 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 evidence of a 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 highly-qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.'

On this basis, our sources of PIL obligations relevant to democratic elections include the following:

*Treaties* - A treaty is an international agreement, generally concluded between two or more states in writing, and governed by international law. Treaties may also be concluded between states and international organizations, and between international organizations. Treaties may be called Conventions or Covenants or Protocols.<sup>10</sup>

Treaties in force are binding upon the ratifying parties, and must be interpreted and performed by them in good faith. In addition, the provisions of domestic law cannot be used as a justification for failure to meet treaty obligations. While treaties do not directly bind third parties, their provisions may form the basis of customary international law obligations which are binding on third parties. In general, in order to become part of customary international law, treaty provisions must be of a 'fundamentally norm-creating character,' be widely (but not necessarily universally) accepted, and be recognized as binding (*opinio juris*).<sup>11</sup>

*Customary international law* - Article 38 of the Statute of the International Court of Justice also identifies, 'international custom' as a source of law. Whereas treaties, establish rules expressly recognized by states, custom as a source of law takes into account the *practice* of states in their relations with each other and in matters subject to international legal regulation. State practice can thus become the basis of binding customary international law when it is followed consistently over time (the period of time can be relatively short), where it is widely followed (but not necessarily universally), and where there is evidence (which may be a matter of inference), that the practice is considered obligatory as a matter of law.<sup>12</sup> In considering whether a practice has become binding as a matter of general international law (and also whether a treaty-based norm has emerged to become generally binding, even on non-parties), evidence of states' actions is particularly important. In this context, national legislation, national practices and administrative arrangements are relevant, together with judicial decisions.

In addition, non-binding instruments such as declarations and resolutions, particularly when adopted in international forums with broad state participation, can confirm points of agreement between parties and be extremely influential in the creation of customary law, both in impacting state practice and demonstrating the acceptance of a practice as law. Once accepted as customary international law, all states are bound unless they have expressed a valid objection to the norm, irrespective of any formal consent. The Universal Declaration of Human Rights, for example, was drafted and adopted as a non-binding instrument, but many of its provisions are now considered binding as a matter of customary international law.

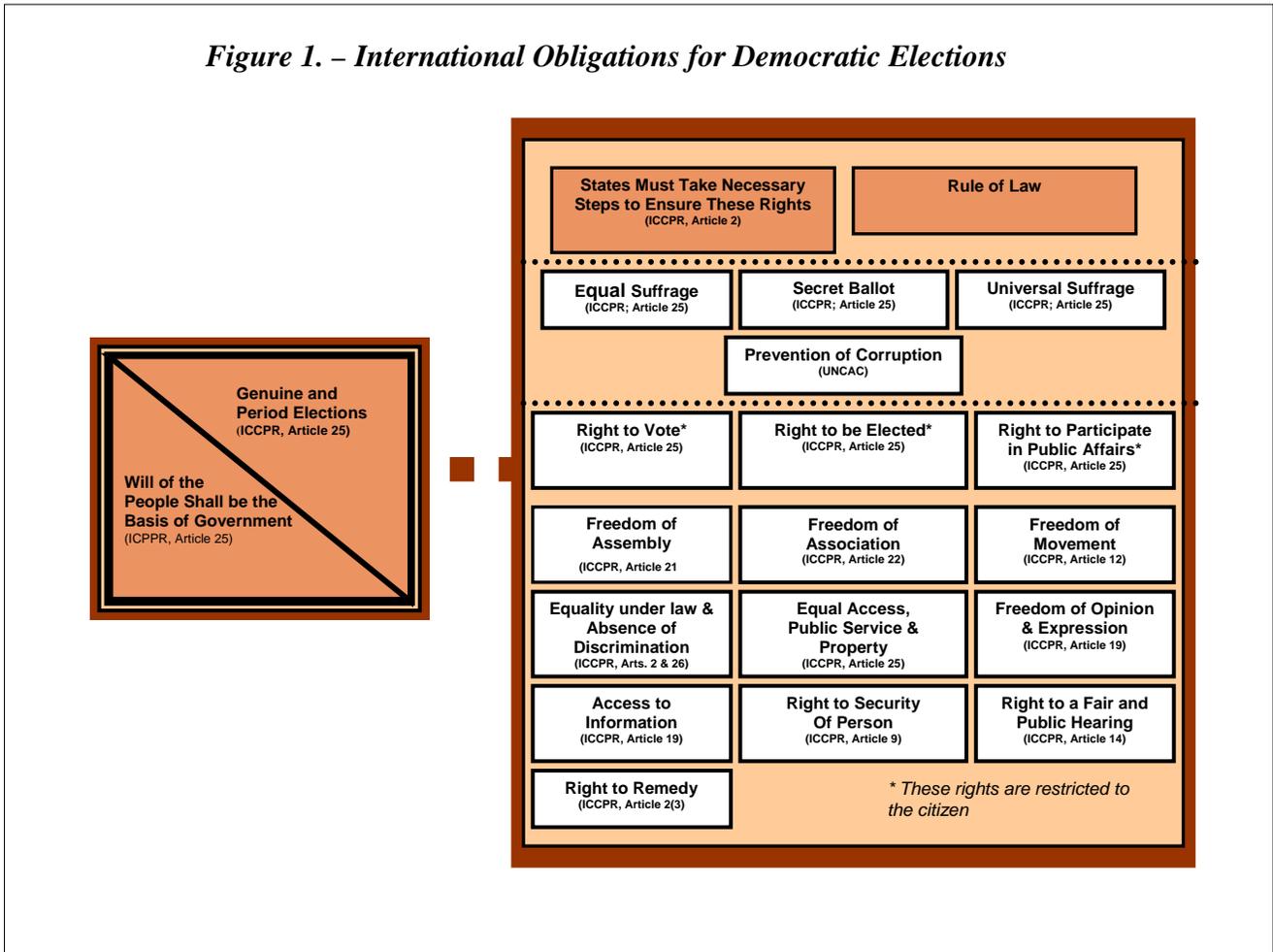
Included in the framework presented here are handbooks and manuals from observation organizations (both non-governmental and intergovernmental). These

sources serve to both support the treaty and non-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 above 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.

**Figure 1. – International Obligations for Democratic Elections**



Based on a careful review of the full range of sources above, we have identified 22 separate obligations in existing international law that relate to the democratic nature of elections. Figure 1 shows these obligations arrayed in two separate boxes. The box on the left, which includes the obligations to hold genuine and periodic democratic elections that express the will of the people, represents the overarching macro-level obligation of states to hold democratic elections. The box on the right includes 19 other obligations that are essential to the fulfilment of the macro-level obligations. At the top are obligations which are instrumental, i.e., relate to essential means of fulfilling international human rights: that the state must take the steps necessary to ensure human rights; and that there be rule of law. Below these are obligations related to the electoral process, or “process focused” rights, most of which come from Article 25 of the ICCPR.<sup>13</sup> Below those are obligations relating to the protection of key individual rights and freedoms. Although many of these are general human rights obligations not specifically tied to the electoral process, they are an essential to ensure genuinely democratic electoral processes. Short summaries of each obligation are presented below:

*Left Box:* The expression of the will of the people through genuine, periodic elections are unique obligations in the ICCPR. They do not articulate rights, but instead outline a

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. 21 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 process-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 to 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 decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.’<sup>19</sup>
- (6) *Universal suffrage* – The obligation for universal suffrage appears in the ICCPR and other instruments,<sup>20</sup> and requires that the state ensure that the broadest pool of voters be allowed to cast ballots. It is a collective right exercised by individuals through the intrinsically linked rights to vote and to be elected. Like the right to vote (below), universal suffrage may only be restricted on the basis of reasonable and objective criteria.
  - (7) *Equal suffrage* – Similar to universal suffrage, equal suffrage is a collective right that requires that every voter be granted a vote of equal value to that of other voters. When interpreted with lower level sources, we understand that equal suffrage and the ‘one person, one vote’ rule requires that duplicate voting be prohibited and that safeguards be put in place to diminish the potential for multiple voting and fraud.<sup>21</sup>
  - (8) *Secret ballot*<sup>22</sup> – Voting must be by secret ballot so that ballots cannot be linked with voters who cast them. The secrecy of the ballot must be maintained throughout the entire electoral process.
  - (9) *Prevention of corruption* – Recent anti-corruption instruments include important provisions that promote transparency in public processes by obligating states to regulate the behaviour of public officials and to take steps to ensure that public officials meet the highest standards of professionalism and do not participate in corrupt activities, and that there is transparency in recruitment and procurement practices. Transparency is identified as a critical tool for preventing and combating corruption. States are encouraged to promote campaign and political finance regulation and to promote public participation in decision making.<sup>23</sup>
  - (10) *Every citizen has the right to participate in public affairs* – This obligation protects the ability of citizens to participate in the public affairs of their country,<sup>24</sup> for example by joining or supporting civil society organizations and/or serving as a domestic observer.
  - (11) *Every citizen has the right to vote* – While universal suffrage establishes a collective right, every citizen has the individual right to vote. Unlike most other rights in the ICCPR and other documents, this right is restricted to citizens, but is not absolute and may be limited based on objective and reasonable criteria, for example, minimum age, mental incapacity, or residency. Examples of unreasonable limitations include those based on physical disability, literacy, education, political party membership, and excessive limitations on convicted criminals.<sup>25</sup>
  - (12) *Every citizen has the right to be elected* – The right to be elected may only be restricted based on objective and reasonable criteria, which include residency, age, mental incapacity, criminal conviction, conflicts of interest, minimum amount of support from potential voters, or a reasonable monetary fee.<sup>26</sup>
  - (13) *Freedom of assembly* - Similar to freedom of association, freedom of assembly is recognized as essential to democratic elections, especially as it relates to the ability of candidates and political parties to compete during the campaign period. The freedom of assembly may only be restricted under circumstances prescribed by law and necessary in a democratic society (e.g., if the restrictions

- are in the interest of national security, public safety or for the protection of the rights of others.)<sup>27</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 the 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 law allows) to their country to participate in elections. Any restriction of the right to freedom of movement must be proportionate to the interests that the restriction is intended to protect.<sup>29</sup>
- (16) *Equality before the law and absence of discrimination* – Many treaties establish the right to equality before the law,<sup>30</sup> while separately calling for absence of discrimination in the exercise of human rights and fundamental freedoms.<sup>31</sup> The latter obligation is explicitly tied to the rights enshrined in Art. 25 of the ICCPR, but is also applicable to all the obligations in the covenant.

Not only are states obligated not to discriminate on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, they are separately obligated to ensure equality for everyone before the law. This has been interpreted to mean that states cannot discriminate in the performance of public functions.<sup>32</sup> In addition, some treaties require states to take special temporary measures to ensure the de facto equality of men and women;<sup>33</sup> to advance certain racial or ethnic groups; and in some cases to promote equality for groups that have been victims of previous discrimination.<sup>34</sup> Political parties, as instruments for the expression of the individual rights to vote and be elected, should also embrace the principles of equality, particularly equality between the sexes.<sup>35</sup>

- (17) *Equal access to public service* – Equal access to public service has two principal definitions in public international law. First, it is interpreted to mean that all citizens should have equal access to public service positions. The second definition, found most explicitly in ICERD, relates not only access to public service positions, but also access to public services and places ‘intended for use by the general public.’<sup>36</sup>
- (18) *Freedom of opinion and expression* – Everyone has the right to freedom of expression.<sup>37</sup> Free communication of information and ideas between voters and candidates is essential during the electoral process, and extends to the right to make monetary contributions to political candidates or parties.

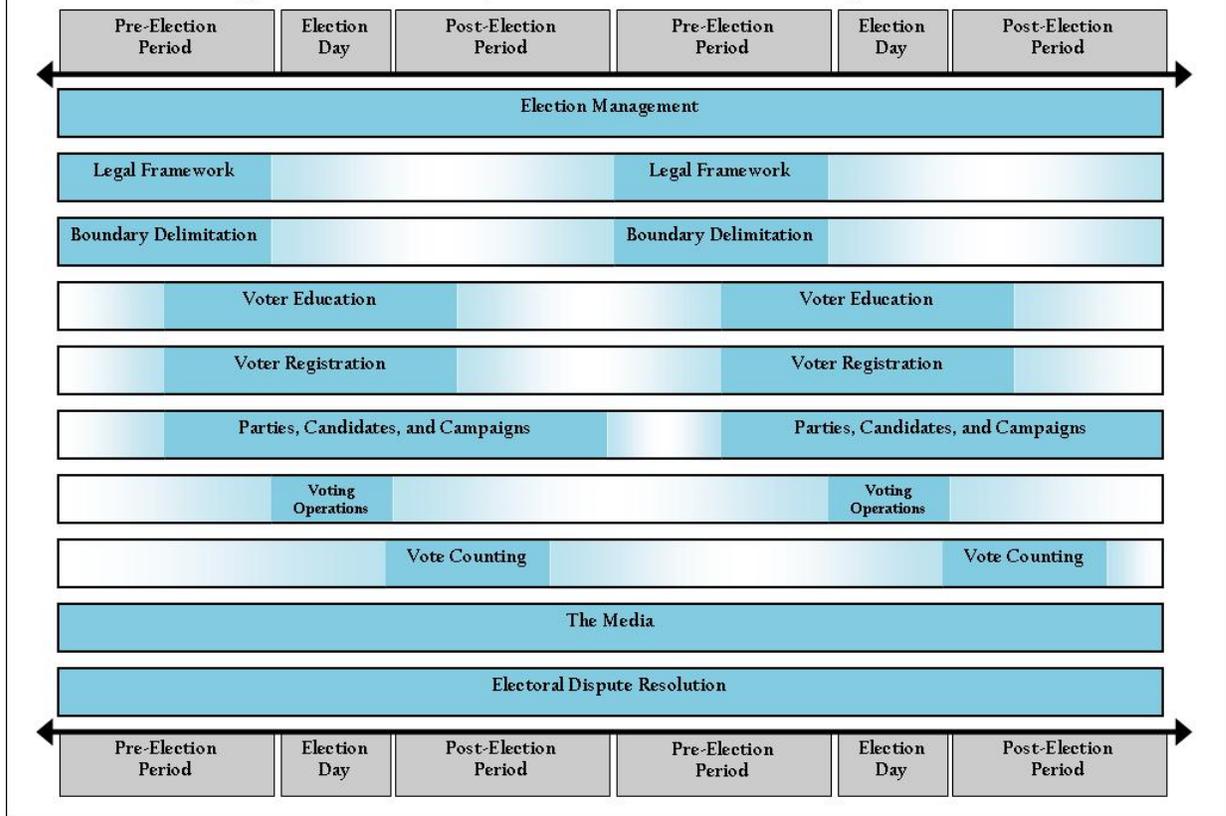
While the right to freedom of expression is not absolute, it may only be restricted under circumstances prescribed by law, and necessary in a democratic society, e.g., in the interests of national security, territorial integrity, public safety or for the protection of the rights and reputations of others<sup>38</sup> (although those in the public eye are not guaranteed the same level of protection).<sup>39</sup> Freedom of

- 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 and receive public information.<sup>41</sup> While an important right itself, it is also a critical means of ensuring transparency and accountability throughout the electoral process. Taken together with the state's obligation to take necessary steps to ensure rights and with the transparency related elements of the obligation to prevent corruption, access to information can form the basis of a strong obligation for transparency in the electoral process.
- (20) *Right to security of the person* – The right to security of the person includes not only protection from arbitrary arrest, detention and exile,<sup>42</sup> but in the context of the electoral process, includes the protection of voters, candidates and their agents, poll workers, and domestic and international observers from interference, coercion or intimidation.<sup>43</sup> In this sense, security of the person includes not only the protection of the physical person, but also protection of their mental state.
- (21) *Right to an effective remedy* – International law requires that an effective and timely remedy by a competent administrative, legislative or judicial authority be available for all violations of human rights included in the instruments.<sup>44</sup> This includes investigation of alleged violations, cessation of those violations if they are on-going, and that the state taking steps to prevent their recurrence.<sup>45</sup> Like 'absence of discrimination,' any consideration of rights for democratic elections should also include consideration of the degree to which citizens are granted the right to an effective remedy for the violation of those rights. One such remedy may be a fair and public hearing (below).
- (22) *Right to a fair and public hearing* – Everyone has the right to a fair and public hearing in the determination of their rights in a suite at law.<sup>46</sup> This right includes the ability to have your case heard publicly and expeditiously<sup>47</sup> by an impartial tribunal,<sup>48</sup> to have equal access to the judicial proceedings and equality of arms.<sup>49</sup>

### ***Understanding the electoral process***

In order to systematically assess the degree to which an electoral process as a whole meets these obligations in international law, we divide the electoral process into its main constituent parts. Our approach, which follows that of Guy Goodwin-Gill, the ACE network and other practitioners and academics,<sup>50</sup> views the electoral process from the perspective of election observation missions, and recognizes that electoral processes are most usefully viewed in terms of a cycle of processes that unfold over a long period from one election to the next. This representation of the electoral process suggests that observation missions must focus not just on election day, but rather on the entire process, including pre- and post-election periods. To this end, observer groups deploy long-term observers months in advance of election day.

*Figure 2 — Parts of the election used in this framework*



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 political contestants to equitably access the media, and receive fair media coverage.
- (5) *Parties, Candidates and Campaigns* – This wide-ranging constituent part includes campaign finance, the registration of candidates and political parties, and other aspects of the electoral process traditionally associated with campaigns and/or candidates and political parties.
- (6) *Voter Education* – This includes voter education and voter information efforts provided by the state, political parties or civil society.

- (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 more detail about the obligations. In effect, the obligations serve as the basis for election standards against which to assess the processes.

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

	Legal Framework	Electoral System and Boundary Delimitation	Election Management	Voter Education	Voter Registration	Parties, Candidates and Campaigns	Voting Operations	Vote Counting	The Media	Electoral Dispute Resolution
Expression of the Will of the Electors	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Genuine Elections	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Periodic Elections	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Universal Suffrage	✓	✓		✓	✓		✓	✓	✓	
Equal Suffrage	✓	✓		✓	✓		✓	✓		
Secret Ballot	✓			✓			✓	✓		
Rule of Law	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
State must take necessary steps	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Right to Vote	✓			✓	✓		✓	✓		
Right to be Elected	✓					✓	✓	✓		
Right to Participate in Public Affairs	✓		✓	✓	✓	✓	✓	✓	✓	✓
Equality/Absence of Discrimination	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Freedom of Opinion and Expression	✓			✓		✓			✓	
Access to Information	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Prevention of Corruption	✓	✓	✓		✓	✓	✓	✓		✓
Freedom of Assembly	✓			✓		✓	✓			
Freedom of Association	✓					✓				
Equal Access to Public Service	✓		✓			✓	✓			
Freedom of Movement	✓			✓	✓	✓	✓	✓	✓	
Right to an Effective Remedy	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Right to a fair and public hearing			✓							✓
Right to Security of the Person	✓		✓	✓	✓	✓	✓	✓	✓	

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

**Figure 4 - Universal Suffrage in the Context of Voting Operations**

<b>Universal Suffrage</b>	
<b>Obligation: Elections must be held by Universal Suffrage.</b>	
ICCPR, 25(b)	"To vote and 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 voter."
ICERD, 5(c)	"In compliance with the fundamental obligations laid out in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone... political rights, in particular the right to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service."
AmCHR, 23(b)	"Every citizen shall enjoy the following rights:... to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters."
CISCHRFF, art 29(b)	"Everyone shall have the right and opportunity and in the state of which he is a citizen:... to vote and to be elected at elections held on the basis of universal and equal suffrage by secret ballot, that guarantees the free expression of the will of the voters."
UDHR, art 21(3)	"The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."
ACDEG, Art. 4(2)	"State Parties shall recognize popular participation through universal suffrage as the inalienable right of the people."
Copenhagen Document, para. 7.3	"To ensure that the will of the people serves as the basis of the authority of government, the participating States will: (7.3) guarantee universal and equal suffrage to adult citizens."
Inter-American Democratic Charter, Article 3	"Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government."
<b>Universal suffrage requires that the broadest reasonable pool of voters is guaranteed participatory rights.</b>	
Norwegian Helsinki Committee Election Observation, A.1.	"People meeting the requirements on age and who have lived in the country as de facto citizens for a substantial number of years, should be given the opportunity to obtain citizenship [and, thus, be given voting rights]."
United Nations Human Rights and Elections, para 64	"Universal suffrage requires that the broadest reasonable pool of voters be guaranteed participatory rights."
<b>The right to vote is not absolute and can be restricted based on objective and reasonable criteria.</b>	
UNCHR General Comment 25, para 4	"Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria."
UNCHR General Comment 25, para 10	"The right to vote at elections must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote."
GS Goodwin-Gill Free and Fair Elections: International Law and Practice (Inter-Parliamentary Union Geneva 1994), 42	"The right to vote is not absolute...and may be subject to reasonable restrictions which 'are not arbitrary and do not interfere with the free expression of the people's opinion.'"
Venice Commission, Code of Good Practice, 15, II.1.b	Limits "must have a basis in law, be in the public interest and comply with the principle of proportionality,"
Venice Commission, Code of Good Practice, 8, 1.1.d	"The proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them."
<b>Any restrictions on the right to vote are to be established in advance of election day.</b>	
Goodwin Gill - Free and Fair, 43	"The rule of law requires that the classes of those disqualified from voting, if any, be known in advance, and that challenge be available in appropriate cases."

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 rights. However, the sources make clear that this right is not absolute; it can be restricted on the basis of reasonable and objective criteria that are established in advance of election day (e.g., a minimum age, residency, nationality, mental incapacity, and criminal conviction). The additional sources (regarding good state practice) go further, suggesting ways in which the state could facilitate universal suffrage, e.g., by providing early voting, postal voting, voting from abroad, establishing polling places in hospitals and prisons, and making special provisions for military personnel.

The obligations regarding ‘absence of discrimination’ and the ‘right to an effective remedy’ should be understood in conjunction with other obligations, in that these two serve as means to ensure the effective fulfilment of other obligations. Thus, for universal suffrage in the context of voting operations, PIL requires there be no discrimination in the fulfilment of universal suffrage, and there is an effective remedy for any violation of universal suffrage.

The full compendium of obligations should serve as an important reference tool for observers, and is being constructed as an open source and “living” document that will be available for use by any interested organization, and will be regularly updated to reflect the new developments and sources in PIL. Perhaps even more important, unlike prior work on elections and PIL, the compendium pulls together the full range of existing international obligations for democratic elections and provides concrete shape and definition to the obligations.

### ***Are there issues that PIL doesn't cover?: The role of best practice***

While PIL provides a great deal of guidance about state's obligations and the rights and responsibilities of those within its jurisdiction, some parts of the electoral process have very few relevant obligations, e.g., campaign finance. In such areas, election observers have only a few broad obligations from which to assess, and then must turn to best practice for recommendations.

Best practice in elections refers to techniques and practices recognized as the most effective means of implementing electoral processes that meet international commitments. Although best practices do not constitute state obligations, they are good examples of how states may meet those obligations. While there may be an array of best practices that allow a state to meet its obligations, observers can recommend one best practice over another as the most effective means.

An example of best practice concerns the issue of public display of polling-station level election results. The public display of results is widely recognized as a good practice means of ensuring a transparent vote counting and tabulation processes. While PIL does not specifically address this issue, there are relevant high level sources regarding states obligations to take steps to promote the right to be elected, to provide access to information, and to prevent corruption. Combined, these obligations give observers a strong basis for recommending that the state follow the best practice of posting results at each polling station. In some instances, failure to publicly post results could make it difficult for a state to fulfil its obligations of access to information etc., in

which case observers could recommend that the state fulfil these obligations in the future by following established best practice.

### Creating practical tools for assessment

The analytical framework and compendium of obligations, above, also can be used to improve existing observation methods and checklist templates so that they more directly facilitate assessments against international obligations.

Figure 5, again using the example of universal suffrage in the context of voting operations, shows the standard/obligation, as well as several dimensions or measures for the obligation, plus various indicator questions and the possible sources for data collection.

*Figure 5 - Universal Suffrage in the Context of Voting Operations*

Standard (based on PIL obligations)	Measure	Indicator/Checklist Question	Data Source
1. Universal suffrage requires that the broadest reasonable pool of voters be guaranteed participatory rights	1a. Broad participation in election day processes	<ul style="list-style-type: none"> <li>• How many people voted?</li> <li>• What percentage of eligible voters voted?</li> <li>• What percentage of registered voters?</li> </ul>	Short-term observers: <ul style="list-style-type: none"> <li>• Polling station protocols</li> <li>• Information from electoral authority</li> </ul>
	1b. State steps to promote participation	<ul style="list-style-type: none"> <li>• Were any limitations placed on people trying to vote?</li> <li>• Did the state take steps to prevent third parties from inhibiting voting?</li> <li>• On what basis was voting limited?</li> <li>• Were particular groups or supporters of a particular party prevented from voting?                             <ul style="list-style-type: none"> <li>○ Is so, who and why?</li> </ul> </li> </ul>	Long and Short-term observers: <ul style="list-style-type: none"> <li>• Interviews with parties, voters, election authority</li> <li>• Direct observation</li> </ul>
2. Eligible voters should not be inhibited from participating in the electoral process	2. Eligible voters participate freely in the electoral process	<ul style="list-style-type: none"> <li>• Were there procedures that inhibited voters from participating, such as:                             <ul style="list-style-type: none"> <li>○ Limited voting hours?</li> <li>○ Inconveniently placed polling stations?</li> <li>○ Literacy exams?</li> <li>○ Burdensome documentation requirements?</li> <li>○ Fees?</li> </ul> </li> <li>• Was the opportunity to vote extended to those in hospitals/prisons?</li> </ul>	Long and short-term observers: <ul style="list-style-type: none"> <li>• Legal analysis</li> <li>• Direct observation</li> </ul>

A good obvious starting point for compiling these measures and indicators is to refer to the many handbooks and manuals used by The 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 into 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.<sup>51</sup>

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 all 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 regards, 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 critical international standards?’<sup>52</sup>

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 own work is that the quality of election observation should improve. It will encourage collective 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 building more broadly. This framework is presented as a step in that process.

## References

- ACE Project. The Ace Encyclopaedia. <http://aceproject.org/ace-en>.
- African Union. African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* October 21, 1986. <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>.
- African Union. African Union Declaration on the Principles Governing Democratic Elections in Africa (adopted at the 38th Ordinary Session of the Organization of African Unity, 8 July 2002, Durban, South Africa) AHG/Decl.1 (XXXVIII), 2002. <http://www.africa-union.org/root/au/Documents/Decisions/decisions.htm>.
- African Union. Charter on Democratic Elections and Governance, Adopted by the 8th Ordinary Session of the African Union (AU) Assembly, January 30, 2007, Addis Ababa, Ethiopia. <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>.
- African Union. Convention on Preventing and Combatting Corruption. Signed in Maputo, Mozambique, July 11, 2003, *entered into force* August 5, 2008. <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>.
- African Union. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (September 13, 2000). [http://www.achpr.org/english/info/women\\_en.html](http://www.achpr.org/english/info/women_en.html).
- Annan, Kofi. 'Report of the Secretary General on The Rule of Law and Transitional Justice in conflict and Post-Conflict Societies,' August 23, 2004. UNDoc. S/2004/616. <http://daccessdds.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>.
- Article 19. *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*. London: Article 19, 2000.
- Beetham, David. 'Freedom as the Foundation.' *Journal of Democracy*, 15:4 (2004): 61 – 74.
- Beetham, David. 'Towards a Universal Framework for Democracy Assessment.' *Democratization*, 11:2 (2004): 1 – 17.
- Bjornlund, Eric. *Beyond Free and Fair: Monitoring Elections and Building Democracy*. Washington D.C.: Woodrow Wilson Center Press, 2004.
- Black's Law Dictionary, Abridged 7<sup>th</sup> Ed., s.v. 'Obligation'.
- Black's Law Dictionary, Abridged 7<sup>th</sup> Ed., s.v. 'Standard'.
- Boda, Michael D. 'Judging Elections by Public International Law: A Tentative Framework.' In *Revisiting Free and Fair*, ed. Michael D. Boda. Geneva: Inter-parliamentary Union, 2005.
- Burnell, Peter, ed. *Democracy Assistance: International Cooperation for Democratization*. London: Frank Cass, 2000.
- Carothers, Thomas. 'The Observers Observed.' *Journal of Democracy*, 8:3(1997): 17-31.

- CEDAW Committee. General Recommendation 23 on Political and Public Life. 1997.  
<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>
- Commonwealth of Independent States. Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, adopted May 26, 1995, *entered into force* August 11, 1998. <http://merlin.obs.coe.int/iris/1995/6/article100.en.html>
- Council of Europe. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 *respectively*.  
<http://conventions.coe.int/treaty/EN/Treaties/html/005.htm>.
- Council of Europe. Framework Convention for the Protection of National Minorities. Strasbourg, 1.II.1995. <http://conventions.coe.int/Treaty/EN/Treaties/Html/157.htm>.
- Economic Community of West African States. Protocol on Democracy and Good Governance, adopted December 21, 2001, Dakar Senegal.  
[www.comm.ecowas.int/.../protocoles/Protocol%20on%20good-governance-and-democracy-rev-5EN.pdf](http://www.comm.ecowas.int/.../protocoles/Protocol%20on%20good-governance-and-democracy-rev-5EN.pdf).
- Electoral Institute of Southern Africa. Principles for Election Management, Monitoring and Observation in the SADC Region, adopted on November 6, 2003 in Benoni, Johannesburg, South Africa. <http://www.eisa.org.za/EISA/publications/pemmo.htm>.
- Elklit, Jørgen and Andrew Reynolds. 'A framework for the systematic study of election quality.' *Democratization*, 12:2 (2005): 147-162.
- Elklit, Jørgen and Palle Svensson. 'What Makes Elections Free and Fair?' *Journal of Democracy*, 8:3 (1997): 32-46.
- Encyclopaedia Britannica Online, s.vv. 'International Law',  
<http://www.britanica.com/eb/article-9106320>.
- European Commission. *Compendium of Standards for Elections*. London: NEEDS, 2008
- European Commission. *Handbook for Europe Union Election Observation, 2<sup>nd</sup> Edition*. London: NEEDS, 2008.
- European Commission. *Handbook for European Union Election Observation Missions*. Stockholm: SIDA, 2002.
- European Court of Human Rights. *Hentrich v France*, ECHR, Application No. 13616/88
- Fox, Gregory H. 'Election Monitoring: The International Legal Setting.' *Wisconsin International Law Journal*, 19:3, 2000-2001: 295 – 320.
- Fox, Gregory H. 'The Right to Political Participation in International Law.' *Yale Journal of International Law*, 17:2, 1992: 539 – 607.
- Frank, Thomas M. 'The Emerging Right to Democratic Governance.' *The American Journal of International Law*, 86:1 (1992): 46-91.
- Freedom House. 'Freedom in the World'. Freedom House.  
<http://www.freedomhouse.org/template.cfm?page=15>.

- Garber, Larry. *Guidelines for International Election Observing*. Washington D.C.: International Human Rights Law Group, 1984.
- Goodwin-Gill, Guy. *Free and Fair Elections: New Expanded Edition*. Geneva: Inter-Parliamentary Union, 2006.
- Hartlyn, Jonathan and Jennifer McCoy. 'Observer Paradoxes: How to Assess Electoral Manipulation.' In *Electoral Authoritarianism: The Dynamics of Unfree Competition*, ed. Andreas Schedler. Boulder, Colorado: Lynne Rienner Publishers, 2006.
- Hinz, Veronika and Marku Suksi. *Election Elements: On International Standards of Electoral Participation*. Åbo, Finland: Institute for Human Rights, 2003.
- Hyde, Susan D. 'How International Observers Detect and Deter Fraud.' In *Election Fraud: Detecting and Deterring Electoral Manipulation*, eds. R. Michael Alvarez, Thad E. Hall and Susan D. Hyde. Washington, D.C.: Brooking Institution Press, 2008.
- Hyde, Susan D. 'The Observer Effect in International Politics: Evidence from a Natural Experiment.' *World Politics* 60, 2007: 37-63.
- International Court of Justice. *North Sea Continental Shelf (Federal Republic of Germany/Netherlands and Federal Republic of Germany/Denmark)* 1969 ICJ (February 20, 1969)
- Inter-Parliamentary Union. Declaratin on Criteria for Free and Fair Elections. Unanimously adopted by the Inter-Parliamentary Council in Paris, March 26, 1994.  
<http://www.ipu.org/cnl-e/154-free.htm>.
- Klein, Richard L. and Patrick Merloe. *Building Confidence in the Voter Registration Process*. Washington, D.C.: NDI, 2001.
- Koelble, Thomas A and Edward Lipuma. 'Democratizing Democracy: A Postcolonial Critique of Conventional Approaches to the "Measurement of Democracy"'. *Democratization*, 15:1 (2008): 1 – 28.
- Merloe, Patrick. 'Human rights – the Basis for Inclusiveness, Transparency, Accountability and Public Confidence in Elections'. In *International Principles for Democratic Elections*, ed. John Hardin Young, Washington D.C.: American Bar Association, 2009.
- Merloe, Patrick. *Promoting Legal Frameworks for Democratic Elections*. Washington D.C.: NDI, 2008.
- Morlino, Leonardo. 'What is a Good Democracy?' *Democratization*, 11:5 (2004): 10 -32.
- Munck, Gerardo. *Measuring Democracy: A Bridge Between Scholarship and Politics*. Baltimore: Johns Hopkins Press, 2009.
- Norris, Robert and Patrick Merloe. *Media Monitoring to Promote Democratic Elections*. Washington, D.C.: NDI, 2002.
- Organization for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights. *Existing Commitments for Democratic Elections in OSCE Participating States*. Warsaw: OSCE/ODIHR, 2003.

- Organization for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights. *Election Observation Handbook, 5<sup>th</sup> Edition*. Warsaw: OSCE/ODIHR, 2005.
- Organization for Security and Cooperation in Europe. Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Second Conference on the Human Dimension of the CSCE (Copenhagen, 5 June – 29 July, 1990).  
[www.osce.org/item/13992.html](http://www.osce.org/item/13992.html).
- Organization of American States. American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978.  
<http://www.oas.org/juridico/English/treaties/b-32.html>.
- Organization of American States. *Methods for Election Observation: A Manual for OAS Electoral Observation Missions*. Washington, D.C.: OAS, 2007.
- Organization of American States. Inter-American Democratic Charter, Adopted by the General Assembly of the Organization of American States, Lima Peru (September 11, 2001). [http://www.oas.org/charter/docs/resolution1\\_en\\_p4.htm](http://www.oas.org/charter/docs/resolution1_en_p4.htm).
- Pastor, Robert. 'Mediating Elections.' *Journal of Democracy*, 9:1 (1998): 154-163
- Polity IV. 'Polity IV Project: Political Regime Characteristics and Transitions, 1800-2008'. Polity IV. <http://www.systemicpeace.org/polity/polity4.htm>.
- Pran, Vladimir and Patrick Merloe. *Monitoring Electronic Technologies in Electoral Processes*. Washington, D.C.: NDI, 2007.
- Rich, Roland. 'Bringing Democracy into International Law.' *Journal of Democracy*, 12.:3, (2001): 20-34
- Storm, Lise. An Elemental Definition of Democracy and its Advantages for Comparing Political Regime Types. *Democratization*, 15:2 (2008): 215 – 229.
- United Nations General Assembly. 'Declaration on the Right and Responsibility of Individuals, Groups and Organisations of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms.' UN Doc. GA Res 53/144. March 8, 1999.
- United Nations General Assembly. 'Resolution on the Rule of Law at the National and International Levels,' Adopted December 4, 2006. UN Doc. A/RES/61/39.
- United Nations General Assembly. 'Resolution on the Rule of Law at the National and International Levels,' adopted December 6, 2007. UN Doc. A/RES/62/70.
- United Nations General Assembly. 'United Nations Millennium Declaration,' Adopted by a Plenary Session of the Assembly, September 8, 2000. UN Doc. A/RES/55/2.  
<http://www.un.org/millennium/declaration/ares552e.pdf>.
- United Nations Human Rights Committee. 'General Comment 18 Non-Discrimination.' UNDoc. HRI/GEN/1/Rev.1 at 26 (1994).  
<http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

- United Nations Human Rights Committee. 'General Comment 25 The Right to Participate in Public Affairs, Voting Rights and Right to Equal Access to Public Service.' UN Doc. CCPR/C/21/rev.1, Addendum 7. August 27, 1996.  
<http://www2.ohchr.org/english/bodies/hrc/comments.htm>.
- United Nations Human Rights Committee. General Comment 28 Equality of Rights Between Men and Women (Article 3). UNDoc. CCPR/C/21/Rev. 1/Add.10. March 29, 2000.  
<http://www2.ohchr.org/english/bodies/hrc/comments.htm>.
- United Nations Human Rights Committee. General Comment 31 The Nature of General Legal Obligations on States Parties to the Covenant. UN Doc. CCPR/C/21/Rev.1/Add.13. March 29, 2004. <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.
- United Nations Human Rights Committee. General Comment 32 Right to equality before courts and tribunals and to a fair trial. UN Doc. CCPR/C/GC/32. August 23, 2007.  
<http://www2.ohchr.org/english/bodies/hrc/comments.htm>.
- United Nations Secretariat. *Declaration of Principles for International Election Observation*. New York, 2005. (Joint Publication of the United Nations Secretariat, the National Democratic Institute for International Affairs and The Carter Center).  
[http://www.cartercenter.org/peace/democracy/des\\_declaration.html](http://www.cartercenter.org/peace/democracy/des_declaration.html)
- United Nations. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 UNGAOR Supp. (No. 14) at 47, UN Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* January 4, 1969.  
<http://www2.ohchr.org/english/law/cerd.htm>.
- United Nations. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), UN Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* March 23, 1976.  
<http://www2.ohchr.org/english/law/ccpr.htm>.
- United Nations. Statute of the International Court of Justice, annexed to the Charter of the United Nations. <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.
- United Nations. United Nations Convention Against Corruption, UNDoc. A/58/422, adopted October 31, 2003 and *entered into force* December 14, 2005.  
<http://www.unodc.org/unodc/en/treaties/CAC/index.html>.
- United Nations. *United Nations Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections*. New York: United Nations Centre for Human Rights, 1994.
- United Nations. Universal Declaration of Human Rights, adopted December 10, 1948.  
<http://www.un.org/en/documents/udhr/>.
- United Nations. Vienna Convention on the Law of Treaties, 1155 UNTS 331, 8 I.L.M. 679, *entered into force* January 27, 1980.  
[http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).
- United Nations. Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, UN Doc. A/34/46, *entered into force* Sept. 3, 1981.  
<http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>.

Venice Commission (European Commission for Democracy through Law). *Code of Good Practice in Electoral Matters*, adopted by the Venice Commission at its 51st and 52nd sessions, Venice 5-6 July and 18-19 October 2002, Opinion no. 190/2002.  
[www.venice.coe.int/docs/2002/CDL-AD\(2002\)023-e.pdf](http://www.venice.coe.int/docs/2002/CDL-AD(2002)023-e.pdf).

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<sup>3</sup> A note on the definition of terms used in this paper: Public international law (also known as the law of nations) can be defined as "the body of legal rules, norms, and standards that apply between sovereign states and other entities that are legally recognized as international actors." International Law, Encyclopaedia Britannica. Standing in international law for individuals and international organizations is created by specific international treaties. By 'standard' we mean 'a criterion for measuring acceptability, quality or accuracy.' (Black's Law Dictionary); Unless otherwise noted, by 'observers' we mean election observers, generally, rather than short-term, or long-term observers specifically. By 'obligation' we mean 'a legal... duty to do or not do something.' (Black's Law Dictionary). In the case of public international law, the obligations are those to which States Parties have committed by acceding to a convention.

<sup>4</sup> Recent work in this regard includes: Beetham, 'Towards a Universal Framework' and 'Freedom'; Munck, *Measuring Democracy*; Morlino, 'What Makes a Good Democracy?'; Storm, 'Elemental Definition'; and Koelble and Lipuma, 'Democratizing Democracy' among others.

<sup>5</sup> See for example, Carothers, 'The Observers Observed'; Bjornlund, *Beyond Free and Fair*; Hartlyn and McCoy, 'Observer Paradoxes'; Elklit and Svensson, 'What Makes Elections Free and Fair'; Elklit and Reynolds, 'Framework for Systematic Study of Election Quality'; and Hyde, How International Observers Detect Fraud.

<sup>6</sup> On Public International Law and elections see, for example, Goodwin-Gill, *Free and Fair*; Boda, 'Judging Elections'; Hinz and Suksi, *Election Elements*; Garber, *Guidelines for International Election Observing*; Merloe, 'Human Rights'; Fox, 'Right to Political Participation'; Frank, 'Emerging Right to Democratic Governance'; Pastor, 'Mediating Elections'; and Rich, 'Bringing Democracy in International Law.'

<sup>7</sup> The participating states of the Organization for Security and Cooperation in Europe (OSCE) have made a series of non-binding documents and declarations ('Commitments') to hold democratic elections. The OSCE Commitments are the foundation for Office for Democratic Institutions and Human Rights (ODIHR) election observation missions, as described in a series of handbooks; In 2008 the European Union released the second edition of the *Compendium of International Standards for Elections*, and the *European Commission Handbook for Election Observation*. Together, these volumes provide criteria and a methodology for assessing democratic elections which is applied by EU election observation missions; In 2003, the Electoral Institute of Southern Africa (EISA) and the Southern African Development Community-Electoral Commissions Forum (SADC-ECF) adopted the 'Principles for Electoral Management, Monitoring and Organization (PEMMO),' which outline 'best practice' for electoral processes consistent with values expressed in SADC instruments; In 1994, the Inter-Parliamentary Council of the Inter-Parliamentary Union (IPU) adopted the Declaration on Criteria for Free and Fair Elections, and subsequently released Goodwin-Gill's *Free and Fair Elections* (updated in 2006) which outlines evolving international obligations for genuine electoral processes; The Organization of American States (OAS) recently released a manual outlining their election observation methodology which is linked to the obligations enshrined in the Inter-American human rights instruments; The National Democratic Institute (NDI) has published a series of handbooks on observation methods, including for media monitoring, voter registration, electronic technologies in elections, and assessments of legal frameworks for election.

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<sup>8</sup> The *Declaration of Principles* has now been endorsed by 35 international organizations (as of August 2009).

<sup>9</sup> See for example the Universal Declaration (UDHR); European Convention (ECHR); American Convention (ACHR); CIS Convention (CIS); Copenhagen document; the African Union Declaration on Democratic Elections and the Inter-American Democratic Charter (IADC).

<sup>10</sup> The law relating to treaties, including procedures for ratification, entry into force, and interpretation, has been codified in the 1969 Vienna Convention.

<sup>11</sup> International Court of Justice (ICJ), *North Sea Continental Shelf (Federal Republic of Germany/Netherlands and Federal Republic of Germany/Denmark)*, (1969)

<sup>12</sup> For ICJ interpretation of the creation of custom from state practice, see *North Sea Continental Shelf* (1969)

<sup>13</sup> This distinction was identified by Michael D. Boda during a series of working meetings held at The Carter Center from 2005 – 2009.

<sup>14</sup> See for example, UDHR, art 21(3); ICCPR, art 25 (b); ACHR, art 23 (1) (b); and Copenhagen, para 6. While the term ‘genuine elections’ was first used in the UDHR, the summary report of the deliberations over the declaration do not provide a definition of what was meant by ‘genuine.’ Subsequent work by academics and practitioners have gone some way in defining this obligation, for example, UN, *Human Rights and Elections*, para 77; Hinz and Suksi, *Election Elements*

<sup>15</sup> For example, ICCPR, art 25(b); Protocol No 1 – ECHR, art. 3; ACHR, art 23 (1) (b); African Charter on Democratic Elections and Governance (ACDEG) arts. 3(4), 32 (7); ECOWAS Protocol on Democracy, (ECOWAS – PDGG), art 2(2); and Copenhagen, paras 6 and 7.1.

<sup>16</sup> ICCPR, art 4(1); Copenhagen para. 25; UN *Human Rights and Elections*, para 73.

<sup>17</sup> For example, ICCPR, Art 2(2); Convention on Elimination of Discrimination Against Women (CEDAW), art. 2; ICERD, art. 2(1); African Charter on Human and Peoples’ Rights (ACHPR), art. 1; ACHR, art. 2; CIS, art. 1; ECHR, art. 1. See also UNHRC General Comment 31, paras 3-4, 7- 8, 13 for additional interpretation of this obligation, as well as the UN Declaration on Right and Responsibility and UNHRC, General Comment 25, para. 12.

<sup>18</sup> UN General Assembly, Millennium Declaration; UN General Assembly Resolutions on the rule of law; IADC, arts. 3 and 4; and Copenhagen, para 3.

<sup>19</sup> Annan, Report on Rule of Law.

<sup>20</sup> For example, ICCPR, art. 25(b); ACHR, art 23(b); CIS, art. 29(b); ACDEG, Art. 4(2); IADC, art. 3; and Copenhagen, para 7.3.

<sup>21</sup> On equal suffrage generally, please see ICCPR, art 25 (b); ACHR, art. 23 (1)(b); CIS, art. 29(b); and Copenhagen para 7.3. On safeguards to diminish multiple voting, please see for example EISA, PEMMO, 25; or OSCE/ODIHR, Handbook, 43.

<sup>22</sup> ‘By secret ballot or equivalent free voting procedure,’ per UDHR, art. 21(3); “by secret ballot” per ICCPR, art. 25(b); ACHR, art. 23 (b); Protocol 1 – ECHR, art. 3; CIS, art. 29(b); IADC, art. 3; and Copenhagen, Para 7.4;

<sup>23</sup> On prevention of corruption more broadly, please see UN Convention Against Corruption (UNCAC); Inter-American Convention Against Corruption (IACAC); A.U. Convention on Corruption (AU-CPCC); and SADC Protocol Against Corruption. On political finance, see UNCAC, art. 7(3); on public decision making see, UNCAC, art. 13(a). On recruitment of staff, see UNCAC, art. 7 (a); AU-CPCC, art. 7(4) or IACAC, art. III (4). On procurement, see UNCAC, art. 9; AU-CPCC, art. 7(4) and IACAC, art. III(4).

<sup>24</sup> For example, ICCPR, art. 25 (a); ACHPR, art. 13 (1); ACHR, art. 23 (1); and CIS, art. 29 (a).

<sup>25</sup> On the right to vote see UDHR, art. 21(1); ICCPR, art. 25 (b); ACHR, art. 23(1)(b); ACHPR, art. 13(1); CIS, art. 29(b); and the Convention on the Political Rights of Women (CRPW), art. 1. On reasonable and objective restrictions on the right to vote see, for example, UNHRC, General Comment 25, para 10; UN *Human Rights and Elections* para 65 and 67, or Venice Commission, *Code*, 21.

<sup>26</sup> On the right to be elected generally, see for example, UDHR, art. 21(1); ICCPR, art. 25(b); ICERD, art. 5(c); CRPW, art 2; ACHPR, art 13(1); ACHR, art. 23 (1)(a); CIS, art. 29(b); and Copenhagen para. 7.5. On reasonable restrictions on the right to be elected, see for example, UNHRC, General Comment 25, paras 4, 15, 16 and 17; Venice Commission, *Code*, 8 and 9; or UN, *Human Rights and Elections*, paras 83 and 85.

- <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 the 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, art. 26; ACHPR, arts. 13 and 19; ACHR, art. 24; CIS, arts. 6 and 20(1); and ECHR, art. 6(1).
- <sup>31</sup> Non discrimination articles include ICCPR, art. 2(1); ACHPR, art. 2; ACHR, art. 1; ECHR, art. 14; and CIS, art. 20.
- <sup>32</sup> UNHRC, General Comment 18, para. 12.
- <sup>33</sup> On special measures for women, see CEDAW, art. 4(1); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol to ACHPR), art. 2(d); CEDAW Committee, General Recommendation 23 paras. 15 and 42; UNHRC, General Comment 28, para 29.
- <sup>34</sup> On special measures for minorities, see for example, please see ICERD, art. 1(4); ICERD, art. 2(2); Council of Europe Framework Convention art. 4(2); UNHRC, General Comment 18, para. 10. These measures should be discontinued once their objectives are met.
- <sup>35</sup> CEDAW Committee, General Recommendation 23, para 22.
- <sup>36</sup> Equal access to public service, ICCPR, art. 25(c); ICERD, art. 5(f); and ACHPR, art. 13(2). Equal access to public places, see ICERD, art. 5(f)
- <sup>37</sup> UDHR, art. 19; ICCPR, art. 19 (2); ICERD, art. 5(d); ECHR, art. 10; ACHR, art. 13; CIS, art. 11.
- <sup>38</sup> ICCPR, art. 19(3); ECHR, art. 10(2); ACHR, art. 13(2); CIS, art. 11(2)
- <sup>39</sup> Article 19, Defining Defamation, Principle 8.
- <sup>40</sup> See Declaration on Rights and Responsibility, art. 4; ACDEG, Art. 27 (8); Copenhagen, para 10.3
- <sup>41</sup> UDHR, art. 19; ICCPR, art. 19 (2); ICERD, art. 5(d); ACHR, art. 13.
- <sup>42</sup> UDHR, arts. 3 and 9; ICCPR, art. 9; ICERD, art. 5; ACHPR, art. 6; ACHR, arts. 7(1) and 7(3); CIS, art. 5(1); ECHR, art. 5;
- <sup>43</sup> UNHRC, General Comment 25, para 11
- <sup>44</sup> UDHR, art. 8; ICCPR, art. 2(3); ICERD, arts 5(a) and 6; ACHPR, art 7(1); and ACHR, art. 8(1)
- <sup>45</sup> UNHRC, General Comment 31, paras 15 - 17.
- <sup>46</sup> UDHR, art. 10; ICCPR, art. 14; ACHPR, art. 7; ACHR, art. 8; CIS, art. 6(1); and ECHR, art. 6(1)
- <sup>47</sup> On expeditiously, please see UNHRC, General Comment 32, para 27.
- <sup>48</sup> UNHRC, General Comment 32, paras 19 and 21.
- <sup>49</sup> Please see UNHRC, General Comment 32, paras 8, 9, 13 and 14. The principle of 'Equality of Arms,' considered essential to a fair hearing requires 'that each party must be afforded a reasonable opportunity to present his case – including his evidence—under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.' (*Hentrich v France*).
- <sup>50</sup> Elklit and Reynolds, 'Framework for Systematic Study'; Goodwin-Gill, *Free and Fair Elections*; ACE Project Encyclopaedia website.
- <sup>51</sup> Elklit and Reynolds 'Framework for Systematic Study,' 149.
- <sup>52</sup> Elklit and Reynolds pose essentially the same question as 'If this element fails, will that cause the catastrophic breakdown of the election process ('Framework for Systematic Study,' 154)