

INTERNATIONAL OBLIGATIONS
FOR ELECTORAL DISPUTE RESOLUTION

DISCUSSION PAPER¹

February 24 -25, 2009

Introduction

The Carter Center has been working for some time with partner organizations and experts in the field of election observation and electoral assistance to identify and articulate criteria for assessing democratic elections based on public international law (PIL).² While these efforts have focused on the entire electoral process, electoral dispute resolution was identified as a topic requiring further research and exploration.

Election related disputes are an intrinsic part of the electoral process and the credibility of that process is determined to a large degree by the capacity of the State to effectively resolve these disputes. As noted by authors on the subject, challenges to election results, or the conduct of elections, should not be considered a weakness of the electoral system, but a sign of its resilience.³ In addition, electoral dispute resolution mechanisms vary greatly country-by-country, based largely on historical and political context. As is widely recognized in the international electoral field, it is essential then, for election observers and electoral practitioners to better understand the common foundational principles enshrined in public international law obligations.

In preparation for the one and half day *Experts Meeting on Electoral Dispute Resolution* in February 2009, we have prepared this short discussion paper on Obligations for Electoral Dispute Resolution Mechanisms. In it we first highlight some of the challenges that we have been facing when trying to identify and articulate criteria for the assessment of electoral dispute resolution based on PIL. We then outline our understanding of international

¹ This paper was drafted by Avery Davis-Roberts, Senior Program Associate in the Center's Democracy Program.

² For more information about the larger project and over all approach, please see *Identifying Obligations for Democratic Elections*.

³ Petit (2000), p. 5.

obligations that exist for EDR mechanisms. We hope that this paper will contribute to a fruitful discussion during the meeting.

Challenges to Identifying Obligations for EDR in Public International Law

Identifying obligations for EDR, based on public international law has proven to be a difficult for a number of reasons. Principal among them:

International obligations related to dispute resolution have not necessarily been tied explicitly to the electoral process. Public international law appears to provide only the highest level guidance regarding the resolution of disputes. The International Covenant on Civil and Political Rights (ICCPR)⁴ and regional treaties⁵ stipulate a number of obligations upon States Parties which provide a broad framework for the resolution of disputes. However, these obligations are not explicitly linked to the resolution of electoral disputes. In fact, even at the level of handbooks and practitioner led efforts to document guidelines for EDR, there are very few sources upon which we can rely that address the resolution of electoral disputes directly.⁶ It is therefore necessary to extrapolate obligations for the resolution of electoral disputes from these more general obligations.

In addition, it is necessary to distinguish between obligations (binding legal commitments) related to EDR mechanisms and *best practices*, or agreed upon techniques or practices which are most effective at ensuring that international obligations are met. Because standards for electoral dispute resolution have not, as yet, been clearly articulated in

⁴ International Covenant on Civil and Political Rights (adopted 16 December, 1966, entered into force 23 March 1973) 999 UNTS 171.

⁵ For example, Convention for the Protection of Human Rights and Fundamental Freedoms (**ECHR**), (European Convention on Human Rights) (adopted 4 November, 1950, entered into force 3 September 1953, amended by Protocol No 11, European Treaty Series No. 155, entered into force on 1 November, 1998 which replaced Protocols 2, 3, 4, 5, 8, 9, 10 and repealed articles 25 and 46 of the Convention); American Convention on Human Rights (**AmCHR**), (adopted 22 November, 1969, entered into force 18 July, 1978) OAS TS 36 (Pact of San Jose, Costa Rica); Commonwealth of Independent States Convention on the Human Rights and Fundamental Freedoms (**CISCHRFF**) (adopted 16 May, 1995, entered into force 11 August, 1998); Copenhagen Document (**Copenhagen Document**), – Second Conference on the Human Dimension of the CSCE (Copenhagen, 5 June – 29 July, 1990), Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE ; African Union Declaration on the Principles Governing Democratic Elections in Africa (**AU-DPGDE**) (adopted at the 38th Ordinary Session of the Organization of African Unity, 8 July 2002, Durban, South Africa) AHG/Decl.1 (XXXVIII), 2002; Inter-American Democratic Charter (**IADC**) (adopted 11 September, 2001, Lima Peru).

⁶ A notable early exception is the 2000 OSCE/ODIHR publication, Resolving Election Disputes in the OSCE Region.

international law, we see a burgeoning body of best practices that are used by international observers and electoral assistance practitioners as guideposts to help countries implement better EDR systems. At times, the two become confused.

As outlined in the project approach paper, *Identifying Obligations for Democratic Elections*, we distinguish between obligations and best practices for the purposes of our work. We assume that greater clarity between the two will help observers and practitioners conduct their work more effectively and professionally. This paper, and the meeting, will therefore focus largely on PIL obligations for EDR in democratic elections.

In the context of Electoral Dispute Resolution, ***International obligations remain high-level*** and do not necessarily address the nuts and bolts issues of EDR that observers and practitioners are most concerned with. However, as outlined in the Overview Paper, when you consider a broader range of legal sources, greater detail about these obligations emerge.

Electoral Dispute Resolution mechanisms have not received the same amount of analysis and attention that other aspects of the electoral process, such as voter registration, have. Although observation of these mechanisms does take place, different observation organizations have very different methodologies that they employ and many are often under-resourced for EDR observation throughout the pre- and post- election period. In addition, few organizations have published on the topic.

However, EDR is a growing area of interest for the election observation and election assistance community and a number of organizations are making notable contributions including:

- A forthcoming handbook on *Electoral Justice Systems* by International IDEA.
- NDI's recent publication, *Promoting Legal Frameworks for Democratic Elections* which includes means of assessing the legal framework for electoral dispute resolution.
- Additional research being conducted by The Carter Center's Conflict Resolution Program, in coordination with the Democracy Program.

Defining Electoral Dispute Resolution⁷

While some scholars and practitioners have focused on a broad array of issues related to election disputes writ large, we are focusing on a narrower set of issues that are determined to a large extent by the obligations that we have identified below – namely issues related to the interaction between the electoral process and judicial system (mediated principally by the right to a fair and impartial hearing) and those that are related to the provision of an effective remedy.

In the context of the former, we are focused on the system of judicial or quasi-judicial mechanisms through which electoral actions can be legally challenged and electoral rights protected.⁸ In the context of the latter, we are focused on any number of remedial actions (which may or may not be judicial in nature) through which the State provides redress for violations of Covenant rights. As Merloe points out “the question of whether a remedy in this circumstance is effective depends upon a number of factors, including the specific right abridged. It also depends upon the nature of the procedures and processes with which the right was violated. For example, the violation of equal suffrage by drawing improper election districts has a different nature and could well require a different dispute resolution process than the issue of whether a person was denied candidacy.”⁹

In addition, distinctions between ‘participatory rights’ (e.g. the rights to vote and be elected or to participate in public affairs) and broader human rights (e.g. the right to freedom of movement) that may be formalized in the domestic law of the country being observed may impact the nature, scope and timelines of the remedy granted in cases of violation.

Obligations for EDR in Democratic Elections

Based on our research, we have identified a number of key obligations found principally in the ICCPR and regional treaties that can provide the cornerstone of our understanding of international legal principles for EDR mechanisms. In addition we have relied heavily on General Comments 31 and 32 of the United Nations Human Rights Committee,¹⁰ the Venice

⁷ For additional terms and definitions, please see Appendix A.

⁸ This definition is based, in part, on the definition used by the ACE Electoral Knowledge Network.

⁹ Merloe and Young (2005) p. 878

¹⁰ United Nations Human Rights Committee (UNHRC), General Comment No. 31, Nature of the General Legal Obligations on States Parties to the Covenant, U.N. Doc

Commission’s Code of Good Practice in Electoral Matters, and other sources which help to add detail and definition to these obligations.¹¹

While these documents do not explicitly address issues related to electoral dispute resolution mechanisms (as mentioned above) and are focused on broader, more general rights such as the right to an effective remedy, the right to a fair and public hearing and others, it can be argued that they provide firm foundational principles for the assessment of EDR mechanisms. It may even be the case that these “every day” rights not only continue to be important during the electoral cycle, but some may take on special characteristics in the context of the election. For example, the State must provide the right to a fair and public hearing at all times. However, in the context of the electoral process “expeditious” may mean that the hearing take place within days or weeks, rather than weeks or months.¹²

The key obligations, both overarching obligations and those that are specifically related to EDR processes, are outlined below. In addition, a matrix of these obligations, including source quotes, is attached to this paper as Appendix C.

Overarching obligations¹³

Rule of Law is recognized as essential to the fulfillment of human rights and representative democracy.¹⁴ It serves as the milieu for our understanding of EDR in democratic elections. In addition, we assume that *States¹⁵ will take necessary steps to ensure the realization of*

CCPR/C/21/Rev.1/Add.13(2004); UNHRC, General Comment No. 32, Right to equality before courts and tribunals and to a fair trial, U.N. Doc CCPR/C/GC/32

¹¹ For more information regarding the sources uses, please see Appendix B.

¹² Venice Commission, Code of Good Practice, para 95; Merloe and Young (2005) p.878.

¹³ For more information about these obligations, please see Identifying Obligations for Democratic Elections, and the Generic Obligation Matrices.

¹⁴ See for example, UN General Assembly Resolution 55/96, Promoting and Consolidating Democracy, UN Doc A/RES/55/96; UN Commission on Human Rights Resolution, Interdependence between democracy and human rights, E/CN.4/RES/2003/36; UN Commission on Human Rights Resolution, Promotion of the Right to Democracy, E/CN.4/RES/1999/57; UN Commission on Human Rights, Resolution Promoting and Consolidating Democracy, UN Doc E/C.4/RES/2000/47; The Inter-American Democratic Charter (Lima, September 11, 2001), arts. 3 and 4; the Copenhagen Document, para 3.

¹⁵ All branches of government (executive, legislative and judicial), and other public governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the state party, UNHRC General Comment 31, para 4.

human rights.¹⁶ This obligation, broadly stated, requires states to take legislative and other measures to ensure that human rights are fulfilled and protected. We also assume that effective EDR mechanisms, through which fundamental rights and freedoms are protected, are essential components to determining whether the election can truly be considered *genuine*,¹⁷ and a *reflection of the will of the people*.¹⁸

Specific Obligations

Right to an Effective Remedy - Everyone is entitled to an effective remedy for acts that violate their Covenant rights,¹⁹ including their article 25 participatory rights.²⁰ When a remedy is granted, it must be enforced.²¹ An effective remedy need not be judicial, however if it is, it must provide adequate redress for the alleged violation.

In order to give effect to an effective remedy, states are obligated to investigate alleged violations of Covenant rights.²² “Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end.”²³

The state is also obligated to regulate human rights violations by third parties and non-state actors,²⁴ and to bring to justice perpetrators of human rights violations (including public

¹⁶ See for example, ICCPR art. 2(3); ICERD, art. 5 (a); ICERD art 2(1); AfCHPR art.1; AmCHR art. 2; ECHR art. 1.

¹⁷ See for example, ICCPR, art 25(b); AmCHR art. 23(b); Protocol 1 ECHR, art. 3; UDHR art.21 (3)

¹⁸ See for example, IICPR art 25 (b); 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, II (1); AmCHR art. 23(1)(b); CISCHRFF art. 29(b); Protocol 1 ECHR art. 3; UDHR art. 21 (3).

¹⁹ ICCPR, art 2(3); ICERD , art 5(a); AfCHRP art. 7(1); AmCHR, art 25(1); ECHR, art 13; UDHR, art 8

²⁰ United Nations Human Rights and Elections, F.114; Council of Europe Committee of Ministers; Declaration on the Code of Good Practice in Electoral Matters; African Charter and Democracy, Elections and Governance, art. 17(2)

²¹ See for example, ICCPR, art 2(3); AmChR, art. 25(2)

²² UNHRC General Comment 31, para. 15; Declaration on Rights and Responsibilities Art. 9(5); UN Economic and Social Council, II.3.b

²³ UNHRC General Comment 31, para. 15

²⁴ UNHRC General Comment 31, para. 8

officials or State agents).²⁵ Sanctions against infringement of the electoral law should be enforced.²⁶

States Parties are required to “make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy... is not discharged.”²⁷ Reparation can include restitution, rehabilitation and measures of satisfaction such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.²⁸ Such reparations may also include election recounts.²⁹

Non- Discrimination and Equality before the law – All are equal before the law³⁰ and are entitled without any discrimination to the equal protection of the law.³¹ All persons are equal before courts and tribunals.³² This guarantee “must also be respected whenever domestic law entrusts a judicial body with a judicial task,”³³ presumably including a judicial body considering electoral disputes. In addition, equality before the courts requires that similar cases be dealt with in similar proceedings.³⁴

The right to equality before courts and tribunals includes equality of arms.³⁵ This means that the same procedural rights are to be provided to all parties unless distinctions are based in law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or unfairness to the defendant.³⁶ In addition, everyone shall have equal

²⁵ UNHRC General Comment 31, para. 8

²⁶ See for example United Nations Human Rights and Elections H.118; Goodwin-Gill, Free and Fair Elections (1994), 3.1.10.

²⁷ UNHRC General Comment 31, para. 16

²⁸ UNHRC General Comment 31, para. 16

²⁹ For example Venice Commission, Code of Good Practice, para 101; UN Human Rights and Elections para 112, OSCE Legal Frameworks, p 36

³⁰ See for example ICCPR, art 26; CEDAW, art. 15; AfCHPR, art. 19; AmCHR, art 24; ECHR, art 6.

³¹ ICCPR, art 26

³² See for example ICCPR, art 14(1); UNHRC, General Comment 32, para. 7

³³ UNHRC General Comment 32, para. 7

³⁴ UNHRC General Comment 32, para. 14

³⁵ UNHRC General Comment 32, para 13

³⁶ UNHRC General Comment 32, para. 13; Council of Europe, Committee of Ministers Recommendation (2004)20 b.4.b.

access to the courts³⁷ free from unreasonable restrictions or discrimination.³⁸ Any restriction placed on access to courts or tribunals must be based in law, and justified on reasonable and objective grounds.³⁹ Systematic de jure or de facto frustration of attempts to access courts run counter to the right to a fair hearing.⁴⁰ For example, fees that would prevent access to the courts may violate this obligation.⁴¹ The right of equal access to a court concerns only first instance procedures.⁴²

The Right to a Fair and Public Hearing - Everyone has the right to a fair and public hearing in the determination of his/her rights in a suit at law.⁴³ “The concept of the “suit at law” ...is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights.”⁴⁴

In the determination of rights in a suit at law, everyone should be guaranteed access to a competent, impartial and independent tribunal at least at one stage of the proceedings.⁴⁵ An administrative review will not suffice.

The tribunal - A “tribunal” is a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature.⁴⁶ The right to competence, impartiality and independence of the tribunal is absolute.⁴⁷

³⁷ See for example United Nations General Comment 32, para. 8; UNHRC General Comment 32, para. 9.

³⁸ UNHRC General Comment 32, para 9

³⁹ UNHRC General Comment 32, para 9

⁴⁰ UNHRC General Comment 32, para 9

⁴¹ See for example, UNHRC General Comment 32, para 9; Council of Europe, Committee of Ministers Recommendation (2004)20 b.1.d; Council of Europe, Committee of Ministers Recommendation (81)7, Appendix D11-12.

⁴² UNHRC General Comment 32, para 12

⁴³ ICCPR, art 14(1); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, signed 18 December 1990, entered into force 1 July 2003, UN Doc. A/RES/45/158 (MWC), 18(1); AfCHR, art. 7; AmCHR, art 8; ECHR, art. 6(1)

⁴⁴ UNHRC General Comment 32, para 16

⁴⁵ UNHRC General Comment 32, para. 18

⁴⁶ UNHRC General Comment 32, para 18

⁴⁷ UNHRC General Comment 32, para 19; ACDEG, art 32 (3)

Competence - The tribunal must be competent and the powers and responsibilities of various bodies involved in resolution of disputes (including electoral disputes) should be clearly laid out in law.⁴⁸ Failure to establish a competent tribunal or to prevent access to the tribunal can amount to a violation of international obligations if the failure is not based on domestic legislation and is not necessary to pursue legitimate aims such as proper administration of justice.⁴⁹ Competence is particularly important in the context of elections, when a timely resolution of disputes is of particular import.⁵⁰

Independence - A tribunal must be independent of the executive and legislative branches of the government or enjoy judicial independence in deciding legal matters that are judicial in nature.⁵¹ States should take specific measures to guarantee the independence of tribunal judges by establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of members of the judiciary.⁵²

A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.⁵³

Impartiality – Impartiality requires that the judgments of tribunal judges are not influenced by personal bias or prejudice, and that judges do not harbor preconceptions about the particular case before them nor act in ways that improperly promote the interests of one of the parties to the detriment of the other.⁵⁴ Importantly, the tribunal must also appear to the reasonable observer to be impartial.⁵⁵

⁴⁸ UNHRC General Comment 32, para 19; Venice Commission, Code of Good Practice, Para 97

⁴⁹ UNHRC General Comment 32, para 18

⁵⁰ Venice Commission, Code of Good, para 95

⁵¹ UNHRC General Comment 32, para 18; Office of the High Commission on Human Rights (OHCHR), Basic Principles on the Independence of the Judiciary, principle 2.

⁵² UNHRC General Comment 32, para 19; OHCHR, Basic Principles on the Independence of the Judiciary, principle 10-13; Council of Europe, *Handbook on the Right to a Fair Trial*, p 30-31

⁵³ UNHRC General Comment 32, para 19

⁵⁴ UNHRC General Comment 32, para 21

⁵⁵ UNHRC General Comment 32, para 21; Council of Europe, *Handbook on the Right to a Fair Trial*, p 33.

A fair hearing is expeditious,⁵⁶ free from influence,⁵⁷ and open to the public. The publicity of hearings ensures transparency and safeguards the public interest.⁵⁸ Courts should make essential information, such as the time and venue for oral hearings, available to the public and should provide facilities that can accommodate public access to the proceedings.⁵⁹

The public may only be restricted from a hearing on the basis of public order, morals, national security in a democratic society, when the interest of the private lives of the parties so requires or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.⁶⁰ At all other times, the hearing must be open to the general public, and the media.⁶¹

The right to a public hearing does not necessarily apply to appellate proceedings for determining rights and obligations in a suit at law.⁶² In addition, the right to an appeal is not guaranteed in the determination of rights in a suit at law.⁶³

Access to Information – Everyone has the right to seek and receive information.⁶⁴ This includes information about how to file complaints, as well as information about the essential findings, evidence presented and the legal reasoning of a tribunal, even if the hearing is not open to the public.⁶⁵

Key Actors and Institutions

A number of key actors and institutions may participate in the resolution of electoral disputes. Some of these roles are more formal than others and we outline them here to merely draw attention to those that are most often the focus of observation missions and

⁵⁶ UNHRC General Comment 32, para 27, Venice Commission, Code of Good Practice, para 95

⁵⁷ UNHRC General Comment 32, para 25; Council of Europe, Committee of Ministers Recommendation (94)12, I.d

⁵⁸ UNHRC General Comment 32, para 28

⁵⁹ UNHRC General Comment 32, para 28

⁶⁰ ICCPR, art 14(1); ECHR, art 6(1); UNHRC General Comment 32, para 29; Council of Europe, Committee of Ministers, Recommendation (2004)20, b.4.f

⁶¹ UNHRC General Comment 32, para. 29

⁶² UNHRC General Comment 32, para 28

⁶³ UNHRC General Comment 32, paras 46 and 12; Council of Europe Committee of Ministers Recommendation (2004)20, b.4.i; Council of Europe Committee of Ministers Recommendation (84)5, Appendix 1.1

⁶⁴ See for example ICCPR, art 19; AmCHR, art 13; CISCHRFF, art 11; Protocol 1 ECHR, art. 10; UDHR, art. 9

⁶⁵ UNHRC General Comment 32, para 2.

electoral assistance programs, as well as some pertinent issues we have identified in the context of EDR.

- ***Voters, Candidates, Parties and NGOs*** are always the most important participants in the electoral process. With regard to the resolution of electoral disputes, a critical issue for these groups is that of *locus standi*, or who has the ability to bring an action to court. Finn points out that there is little consensus on who should have standing and in what circumstances.⁶⁶ Some argue that standing should be given to every voter, for example. Others argue that it is necessary to strike a balance between the fulfillment of rights and the practical application of judicial remedies in a timely fashion. This issue is not addressed by PIL and the variety of practice among states does not make an emerging norm readily apparent.

- ***Election Management Bodies*** (EMB) are responsible of the administration of the election but may also have an additional role as arbiter of election disputes. This is a widely accepted practice in many regions, and does have its strengths given that EMBs may be more familiar with the electoral code and the ins and outs of election administration than a judicial body.⁶⁷

However, it can be argued that an EMB is rarely going to be qualified to make binding decisions regarding the determination of rights, because it may not satisfy the criteria for a tribunal laid out in General Comment 32 and outlined above. EMB members who may adjudicate complaints are not always subject to the hiring processes articulated as necessary to ensure independence.⁶⁸ In addition, it is unclear whether an EMB would be considered independent given that they administer the elections (thereby fulfilling an executive function) and these roles may not be distinguishable.⁶⁹ Finally, an EMB that administers an election and then adjudicates disputes related to the administration of that election may not appear impartial to a reasonable observer.⁷⁰

⁶⁶ Finn, unpublished, p 30. Venice Commission, Code of Good Practice, para 93.

⁶⁷ Venice Commission, Code of Good Practice, para 93.

⁶⁸ UNHRC General Comment 32, para 19; OHCHR, Basic Principles on the Independence of the Judiciary, principle 10-13; Council of Europe, *Handbook on the Right to a Fair Trial*, p 30-31

⁶⁹ UNHRC General Comment 32, para 19

⁷⁰ UNHRC General Comment 32, para 21; Council of Europe, *Handbook on the Right to a Fair Trial*, p 33.

Although there may be instances in which an EMB is able to meet all of these criteria, in the majority of cases it seems unlikely that they would do so. If they do meet the criteria to qualify as a “competent, independent and impartial tribunal” under article 14 of the ICCPR, then obligations related to a right fair and impartial hearing would apply to them. If, on the other hand, the EMB does not meet those criteria, a complainant must have recourse to a tribunal that does meet such criteria at least at one point during the proceedings.⁷¹

It is also important to highlight here that the competence of the EMB to consider disputes will be determined by the nature of the dispute itself, and a distinction must be made between what are essentially administrative issues, and issues that impact fundamental rights. For the former, review by an EMB or other administrative body may be sufficient. However, if rights are violated or their status in question, then the state is obligated to investigate and, if a violation determined, provide a remedy. This remedy may include the right to a fair and public hearing. “The issue of whether an electoral contestant appears on the ballot, for example can illustrate this. Being denied access to a ballot is a fundamental [rights] issue, but if you are on the ballot, where you appear in the sequence of the ballot probably is not. That is likely an administrative issue.”⁷² Access to the ballot is an issue that would require judicial review, while administrative review might be adequate for the ballot sequence issue. *For observers this will mean that criteria used to assess EDR mechanisms may differ based on the facts of the case in question.*

- ***The Judiciary*** clearly play an important role in the adjudication of electoral disputes. It is particularly important to understand the degree to which the judiciary is able to be independent and impartial based on the guidance laid out in General Comment 32 and other documents.⁷³

⁷¹ UNHRC General Comment 32, para 15; Venice Commission, Code of Good Practice, para 93

⁷² Merloe and Young (2005), p880

⁷³ For example, the Office of the High Commissioner of Human Rights Basic Principles for the Independence of the Judiciary.

- ***Alternative Dispute Resolution (ADR) Mechanisms*** can provide a valuable means for a State Party to relieve burdens on the legal system and ensure that disputes are heard in a timely fashion. In some cases an ADR mechanism may meet the criteria outlined above to be considered a tribunal. However, it seems that in most cases an ADR mechanism, like an EMB, is unlikely to meet the requirements for independence and impartiality that would allow it to be considered an Article 14 tribunal.⁷⁴ It therefore seems unlikely that in the majority of cases, a State can satisfy international obligations for a fair and public hearing through the provision of an ADR system *alone*. As with the EMB, in most cases it would be necessary for a complainant to have recourse to a tribunal at least at one point during the proceedings.

- ***Specialized Tribunals*** may be established for the resolution of electoral disputes, and offer many benefits, including the possibility of more timely resolution of said disputes, and adjudicators with strong experience and familiarity with the issues and law. While such tribunals are not required for the adjudication of electoral disputes where such tribunals exist they are subject to the obligations outlined above.

Linking obligations to observer methods

In addition to discussing the obligations outlined above in more detail, we hope that, over the course of the Experts Meeting, participants will also address their own organizational methods for observing EDR mechanisms. In particular, we hope that we will collectively reflect on critical issues such as:

- Have we, as observers, been looking at the right things when considering EDR mechanisms? For example, what does the number of minor complaints filed tell us about the extent to which the obligations outlined above have been fulfilled?
- How effectively do current observation methods answer the questions posed by public international law? Should current methods be altered to better reflect these legal obligations?
- What are some challenges to the development of observation methods based in public international law? Are such methods plausible considering the institutional framework and resources of observer organizations?

⁷⁴ ICCPR, art. 14 (1); UNHRC General Comment 32, paras 18-21.

Based on these discussions we hope that participants will consider ways in which we can better harmonize approaches and methods regarding the observation of EDR mechanisms.

Conclusions

Electoral dispute resolution is a critical part of the electoral process that requires greater research both from election observation and electoral assistance practitioners, but also from the international legal community. While there remain few international legal documents that shed light on EDR specifically, the general obligations related to the right to an effective remedy, and the right to a fair and public hearing (among others) provide a strong basis from which to work as observers and from which to move forward on this topic.

APPENDIX A - ELECTORAL DISPUTE RESOLUTION: GLOSSARY

- **Alternative Dispute Resolution** – “A procedure for settling a dispute by means other than litigation, such as arbitration or mediation.”⁷⁵
- **Appeal** – “To seek review (from a lower court’s decision) by a higher court.”⁷⁶
- **Best Practice** – Agreed upon techniques or methods of application of international obligations that are most effective at ensuring that the obligations are met.
- **Complaint** – The initial pleading that starts a civil action and states the basis for the court’s jurisdiction, the basis for the plaintiff’s claim, and the demand for relief.⁷⁷
- **Customary International Law** – “International law that derives from the practice of states and is accepted by them as legally binding.”⁷⁸
- **Domestic Obligations** – A legal duty to do or not do something that is based on domestic law.
- **Domestic Rights** – Rights that are established and protected by domestic law.
- **International Law** – “The legal system governing the relationships between nations; more modernly, the law of international relations, embracing not only nations but also such participants as international organizations and individuals (such as those who invoke their human rights or commit war crimes).”⁷⁹
- **International Obligations** – “A legal... duty to do or not do something.” In the case of international law, the obligations are those to which State Parties have committed by acceding to a convention.
- **International Rights** – Rights that are established and protected by international law.
- **Investigation** – “1. To inquire into (a matter) systematically; 2. To make an official inquiry.”
- **Locus Standi** – “The right to bring an action or to be heard in a given forum.”⁸⁰
- **Norm** – “1. A model or standard accepted (voluntarily or involuntarily) by society or other large group, against which society judges someone or something. 2. An actual or set standards determined by the typical or most frequent behavior of a group.”⁸¹

⁷⁵ Black’s Law Dictionary (8th ed.)

⁷⁶ Black’s Law Dictionary (8th ed.)

⁷⁷ Black’s Law Dictionary (8th ed.)

⁷⁸ Black’s Law Dictionary (8th ed.)

⁷⁹ Black’s Law Dictionary (8th ed.)

⁸⁰ Black’s Law Dictionary (8th ed.)

⁸¹ Black’s Law Dictionary (8th ed.)

- **Quasi-judicial** – “Of, relating to, or involving an executive or administrative official’s adjudicative acts.”⁸²
- **Remedy** – “1. The means of enforcing a right or preventing or redressing a wrong; legal or equitable relief”⁸³
- **Standard** – A criterion for measuring acceptability, quality or accuracy based in public international law.⁸⁴
- **State Practice** – The practice of states that reflects a common sense of the correct interpretation of a treaty obligation and can serve as evidence of international customary law.
- **Suit at Law** – “A suit conducted according to the common law or equity, as distinguished from statutory provisions.”⁸⁵
- **Tribunal** – “a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature”⁸⁶

⁸² Black’s Law Dictionary (8th ed.)

⁸³ Black’s Law Dictionary (8th ed.)

⁸⁴ Based in part upon definition in Black’s Law Dictionary (8th ed.)

⁸⁵ Black’s Law Dictionary (8th ed.)

⁸⁶ UNHRC General Comment 32, para 18

APPENDIX B – ELECTORAL DISPUTE RESOLUTION : REFERENCES AND SOURCES

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