

## **Experts Meeting: International Obligations for Political Finance**

**Atlanta, GA – October 1, 2008**

### **Executive Summary**

The Carter Center held a one-day meeting focusing on the role of campaign finance in the electoral process aimed at developing a methodology for observation of finance systems based in obligations determined by public international law. This initiative is part of a Carter Center led collaborative project focused on building consensus on obligations for democratic elections. Major points from the discussion are summarized below.

- Campaign finance is a relatively new subject in public international law. While participants agreed that public international law is a strong foundation for assessment because it is objective and self-selected by states, they noted that there is a relative lack of consensus on what constitutes international obligations for campaign finance. However, participants did suggest that there are a number of emergent norms, observed across regions, which can form the basis of an observation methodology. These include transparent disclosure, the creation of a level playing field, and equity in the allocation of public funds (if a state chooses to provide public funding – see below).
- Regional obligations (such as those developed by the Organization of American States or the Council of Europe) can be used to strengthen assessment criteria which is relatively weak at the international level. Such regional obligations, however, should be understood within the political context of member states and should not be incorrectly applied in other regions.
- Political finance refers to the larger system of funding parties and political institutions both outside and during electoral processes. Campaign finance is more narrowly construed to refer to financing of parties and candidates within a specified campaign period. Given the limitation and mandates of election observers, campaign finance is, generally, what the community of observers will assess.
- States are not obligated to provide public funding for parties and candidates. However, there is a growing global trend towards providing such funding as a means of ensuring a level playing field, thus fulfilling the states obligation to ensure all citizen have a right to be elected. Funding may be financial or non-financial in nature. If such funding is offered, it must be done so equitably. Observation of campaign finance systems that include an aspect of public funding should focus on several key issues including who receives subsidies, the amount of such subsidies, and the system for determining their allocation.
- The observer community should consider requirements for transparent disclosure a best practice to ensure an informed electorate. Disclosure should (1) be timely, with requirements specifying reporting immediately before or after elections, (2) be comprehensive, allowing interested parties to find out donor identities, and (3) prohibit

anonymous donations.

- While independent bodies to monitor and implement reporting and disclosure requirements are not obligatory in public international law, they are widely accepted as the best method to ensure effective implementation of campaign finance regulations.
- Spending limits generally were not seen to impinge on a citizen's freedom of expression. Participants agreed that such limits may be put into place by observed states to counteract corruption and to ensure political equality.
- Experts noted that election observation missions increasingly include a specialist focused specifically on campaign finance. Evaluation of campaign finance systems should include an assessment of domestic legislation against regional and international obligations and determination of whether such laws are implemented. Focus should be placed on the use of state resources, media expenditures and reports, and the implementation of disclosure. Assessment should extend to the performance of election administration bodies, regulators, and enforcement agencies.
- Potentially, the work of international observation missions could be strengthened through partnerships with local civil society organizations and work with domestic political parties. Participants also suggested conducting surveys with campaign donors to get their perspectives on why they contribute money and consulting with journalists as a potential source of information.
- Participants agreed that campaign finance should form an increasingly large part of the focus of the international election observation community and others in the democracy assistance field. Participants suggested bi-lateral partnerships, as well as making campaign finance a focus of the ACE Electoral Knowledge Network for the upcoming year (2009-2010). Additionally, many felt practitioners should partner with academics and theorists in the development of an observation methodology.

### **Session 1: Welcome and Introduction**

On October 1, 2008, The Carter Center hosted a meeting to discuss assessing the role of campaign finance in democratic elections as determined by public international law and electoral good practice. Participants included leading experts in the field of campaign finance, Marcin Walecki (IFES), Bruno Speck (TI), Ingrid van Biezen (University of Birmingham), and Kevin Casas-Zamora (Brookings Institute), as well as representatives of other international observation organizations.

The principal goals of the meeting were three-fold:

- To learn more from leading international experts in the field of campaign and political party finance about existing obligations and commitments for campaign finance in public international law.
- To discuss the relative strengths and weaknesses of public international law as a source of obligations for campaign finance and how state practice and best practice can be used to bolster understanding of these obligations.
- To discuss how existing methods of observing campaign and political party finance can

inform a practical understanding of the international obligations during observation missions, as well as how election observers may better and more consistently integrate these methods into our observation missions.

## **Sessions 2: Overview of Work to Identify Obligations for Democratic Elections**

*This session focused on familiarizing meeting participants with the collaborative efforts of leading election organizations on articulating criteria for observing democratic elections. This included an introduction to The Carter Center's collaborative efforts to articulate assessment criteria based on public international law. After this introduction, participants were asked to discuss the applicability of public international law obligations to an assessment of campaign finance.*

Participants recognized the relative newness of campaign finance obligations at the international level, and expressed concern that consequently assessment criteria for this aspect of the electoral process will be relatively difficult to determine. While experts urged election observers to be aware of this shortcoming, they likewise expressed a belief that public international law was a strong foundation for assessment, as it has been accepted by states themselves, answering issues of sovereignty and self-selection. The increasing focus of election observers on using such criteria, which potentially represents increased commonality of assessment methodology, was viewed as a positive step for the election-assistance community. Participants discussed their belief that such a methodology must not try to act as an 'electoral scorecard,' but rather as a guiding framework to establish and harmonize criteria among organizations and between states. This point re-articulated a core principle of the work that had been introduced by the Carter Center's presentation, which aims to provide a strong, objective set of criteria, which nonetheless remains adequately flexible to recognize and accommodate the individuality of States. While reflecting on the importance of collaborative efforts to identify such obligations, participants remained cognizant of the fact that campaign finance rules are contingent on the political regime, legal system, political culture, and electoral system, making such obligations difficult to determine.

After discussion about the strengths and weakness of the use of public international law as a whole, participants spent time discussing the role and applicability of regional obligations. Experts saw regional obligations as extremely important to any discussion of assessment methodology for campaign finance. However, they cautioned about the inclusion of regional standards in the development of a methodological framework, wanting to ensure that such standards are directly applicable to an observed state. For example, participants noted that the European region is governed by particular standards set forth by the Council of Europe which, while persuasive as an example of state practice, cannot be applied to Latin American states.

While experts noted that the development of global obligations for campaign finance will be difficult, they agreed that some principles are applicable regardless of region. Experts offered a number of common principles, specifically transparency and timely, accurate disclosure, equity (a level playing field), rule of law, prevention of corruption, spending limits that do not violate freedom of expression; independent monitoring that does not violate other rights, and avoidance of vote and power buying.

### **Session 3: Existing Standards for Campaign Finance**

*This session focused on the identification of obligations upon states, regarding campaign and political finance that can be found in public international law. Key questions for consideration by participants included: What obligations are there regarding campaign finance? Is there an obligation to provide public financing for campaigns/parties or more specifically is public funding essential for the realization of the right to be elected? Is there an obligation to provide funding directly to individual candidates, or can/should funding be directed to candidates through a party? Should public funding be granted on a proportional or equal basis? Are individual rights applicable to 'collective' entities, such as political parties? How have the United Nations Convention Against Corruption and the various regional treaties on corruption changed our understanding of political party financing?*

**Terminology: Political versus Campaign Finance** - In order to ensure that all participants had the same conception of the topics being discussed participants spent some time articulating the differences between political and campaign finance. Campaign finance is bound to a particular electoral cycle and is commonly seen as financing for both political parties and individual candidates during an identified campaign period. In contrast, political finance includes the financing and functioning of parties and political institutions both within and outside of electoral periods. Participants agreed that an assessment of political financing, as a necessarily more comprehensive exercise might be the best way to gain an understanding of a state's financial system. However, experts noted that partnership with domestic monitors and/or work with organizations such as Transparency International would likely be necessary to offer a full understanding of a political finance framework. Given the mandate of election observers, it was suggested that international observers are generally better positioned to focus on more the more narrow conception of 'campaign finance.'

**The Role of Public Funding** - Session three included a discussion of the provision of public funding to parties and candidates. Public funding was seen as potentially important tool for effective campaign finance regulation for several reasons, including creating a level playing field, preventing corruption, and ensuring reasonable choices for voters, allowing all eligible candidates a real chance to be elected. For some, the issue of finance was not only about the state's obligation to ensure the right to be elected, but about whether public finance contributes to or undermines other democratic goals, such as absence of corruption, access to information, freedoms of expression and association, or making parties more representative of and accountable to society. For example, public finance systems are considered as a means of increasing the ability of small parties to challenge an entrenched incumbent who may have significant advantages regarding funding and resources.

Meeting participants discussed whether a system for allocation of public funding should be treated as an international obligation or a best practice. Participants agreed that while a strong international obligation for public funding may not exist; there is evidence that states increasingly recognize public support as an integral aspect of a campaign finance system. As a pertinent example, the group considered whether a regional obligation for public funding exists in Europe. Despite identifying a trend toward increased public funding among Council of Europe states, the experts remarked that regional instruments use soft language, such as "states may" or "...is the most desirable way to conduct democratic elections." Considering this and

other regions, participants agreed it is an emergent good practice amongst states in all regions of the world to try to mitigate an uneven playing field in electoral contests. They further noted that, if a State does provide public funding, there are obligations in many regions that such funding be available to all electoral contestants.

Despite agreement that public funding systems are an emergent best practice, participants warned against viewing the allocation of public funding as a blanket solution to inequalities in electoral systems, stressing that public funding should not be considered a requirement for a democratic system. Further, experts reminded the group that public support may not necessarily be financial in nature. Such support can take a number of forms, including the allocation of free airtime on government media outlets or the use of public facilities.

***Allocation of Funding*** - Participants moved on to discuss questions for assessing fairness in public funding and the related issue of what type of allocation system best achieves this goal. Discussants considered essential components of a fair public funding system, including who receives subsidies, and the system and amount for allocation.

In discussion, it was noted that rules governing the allocation of subsidies are typically dependent upon election results.<sup>1</sup> Some systems, however, implement some form of affirmative action, as in Mexico. While different allocation models exist, it is crucial that the threshold for fund allocation not be higher than the threshold for political representation, usually seats in parliament. It was reiterated that electoral systems and rules governing public finance are often inextricably linked. For example, if allocation subsidies operate according to electoral results, with subsidy allocation tied to votes or seats, bias in the electoral system can result in inherent inequalities in subsidy distribution.

Participants also noted that the timing of distribution of funds, either before or after elections, determines the impact and importance of allocation systems. When funds are distributed pre-election, experts observed that the state should be under greater obligation to ensure equity. Post-election distribution lessens this burden, and the distributed funds have less direct impact on the electoral candidates and their opportunity to compete fairly.

Participants generally felt that the amount of subsidies available to eligible contestants is best determined by states themselves, with no clear guidelines available that could be considered relevant at a regional or global level. However, participants suggested that evaluation of this aspect of public funding could be based on the impact of such allocations, assessing compliance with the accepted principle that “electoral law should prohibit abuse of state resources,” (including resources available to the ruling candidate/party), and ensuring the implementation of a timely and transparent system of allocation disclosure.<sup>2</sup> Note was also taken of evidence that suggests that although public funding systems can be very effective in promoting electoral competition, they can be ineffective in combating corruption. Hence, experts felt an evaluation of public funding systems is better when focused on whether the funding rules are effective in

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<sup>1</sup> Different systems of allocation generally determine amounts either based upon the results of the directly previous electoral cycle, or distribute money after an election based on the final results.

<sup>2</sup> This is particularly relevant in semi-authoritarian regimes where, despite laws providing that money should be allocated to opposition parties, governments often claim not to have enough or any money.

promoting effective competition.

***Right to be Elected, Funding of Political Parties and Individual Candidates*** –Starting with the right to be elected in Article 25 of the International Covenant on Civil and Political Rights, discussants explored the application of the obligation to campaign and political finance systems, focusing specifically on whether a contradiction exists between party-focused finance rules and the right of the individual to be elected.

As political finance systems can be tied to electoral results, candidates may be automatically disadvantaged. In fact, some participants remarked that it is legitimate for a political system to regulate access to power to avoid stimulating the proliferation of political actors.<sup>3</sup> Further, they felt that the reason for public finance and state regulation is to ensure a competitive campaign system and that a reasonable number of political choices are available to voters, not to guarantee the rights to run for office or be elected.

However, others felt that the exclusion or disadvantage of individual candidates within an electoral system, and consequently within the political and campaign finance structure, inherently limits the right to be elected. Participants cited as an example the OSCE region, in which the Copenhagen Document (Article 7.5) specifically extends the right to contest an election to individual candidates, as evidence that at least at the regional level, political and campaign finance systems should not be designed to disadvantage or limit individual candidates.

***Transparency and Disclosure*** - Discussants considered the basis of transparency principles. Although few international obligations can be identified in the realm of campaign finance, the issue of transparency is addressed in several regional treaties and a case can be made for strong disclosure as a best practice. Participants agreed that election observers could consider it an electoral good practice, and that disclosure should (1) be timely, with requirements specifying reporting immediately before or after elections, (2) be comprehensive, allowing interested parties to find out donor identities, and (3) prohibit anonymous donors.<sup>4</sup> It was also noted that, as formulated in most public international legal texts, transparency principles are underpinned by other essential obligations or institutions; for example, freedom of the press. Therefore, effective transparency policies must assume the pre-existence of some other institutions and rights.

Participants felt that it was critical to address the question of *why* transparency is desirable; what ultimately matters is whether transparency enhances the quality of the democratic process. While participants generally agreed that transparency in relation to campaign finance is good practice, there was disagreement amongst participants related to transparency's potential benefits. For example, some discussants argued that transparency helps to ensure parties and candidates abide by the law, whereas others perceived transparency as desirable as a way of providing access to information that could potentially act to undermine other fundamental rights. Despite this divergence, participants universally agreed that the growing trend has been to include transparency requirements in electoral law as a way of ensuring the right of the electorate

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<sup>3</sup> The issue that borders on unfairness is whether regulation is aimed at specific, individual candidates to prevent them from running, and such systems, according to several experts, should not automatically be considered unfair.

<sup>4</sup> Anonymous donations may be allowed up to a certain value, beneath which they are unlikely to have much purchasing power.

to make an informed choice. However, while not negating the positive contributions of systems requiring transparent disclosure, one expert urged participants to remember that such disclosure may increase perceptions of corruption and consequently foster political instability.

***Implementation and Monitoring*** - Some participants noted that without the development of an independent body to receive and monitor campaign finance disclosure, even systems with strong transparency requirements will be ineffective. Some experts argued that, in the absence of such a regulatory body, the press can fulfill an investigative role.

Others remained divided as to whether public international law necessitated that such a body be fully independent from the government. While conceding that there is not a clearly defined obligation in public international law to require the body's independence, those in support of such a system pointed out that disclosure can easily be abused, particularly when the bodies are controlled by a ruling party that receives the information to harass others.<sup>5</sup> Consequently, it was agreed that investing the power to collect and act upon financial reports with an independent body was a best practice and the most effective way to ensure compliance. Discussants suggested that evaluation by election observers should also include consideration of what monitoring and enforcement bodies are in existence and their degree of efficacy.

***Spending/Contribution Limits and Freedom of Expression*** - Discussion on campaign spending and contribution limits first addressed the topic of whether restrictions on spending or contributions curtail freedom of expression. Regional perspectives on the interrelationship between campaign contributions and freedom of expression differ. In the United States, spending on campaigns is generally equated directly with the exercise of free expression. However, the widespread perception in Europe is that spending limits do not impinge on freedom of expression. Most experts and participants agreed with the European conception of spending limits, noting that while the right to give money to a candidate is a right of expression, the state is entitled to limit that right on certain grounds for the public good, such as combating corruption.<sup>6</sup>

While acting as a counterbalance for corruption is a viable argument, the group found the higher goal of political equality a more compelling justification for limiting contributions. Consensus emerged that limits can be presented as a means of ensuring that the influence of voters and donors is relatively equal and that economic disparities do not translate into political disparities. It can therefore be acceptable to curtail contributions as an aspect of expression, just as the rich cannot have more than one vote.

Participants also agreed on what constitutes acceptable types of limits within a campaign finance system. Generally, in the view of participants and experts, states should be required to limit contributions from foreign governments,<sup>7</sup> public companies, or anonymous donors, as these can

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<sup>5</sup> Zimbabwe was used as a case in point – the opposition donors would be severely harassed.

<sup>6</sup> The Council of Europe has connected contributions with corruption, asserting that high-level corruption threatens national security. Thus, states can use security as a justification for limiting donations and freedom of expression.

<sup>7</sup> Banning funding from foreign governments, especially hostile ones, was salient after WWII. In the post-Cold War era, the issue decreased in importance and countries have relaxed restrictions, particularly from diaspora groups. It was also noted that arguments on foreign donations as a limit on freedom of expression overlook that the right to contribute is an extension of one's civic rights and only those with civic rights should be able to contribute.

undermine transparency.

#### **Session 4: Improving the Observation of Campaign Finance**

*The fourth session of the day focused on current methods for observing campaign finance issues and how these methods may inform and be informed by international obligations for democratic elections. Participants were asked to discuss how election observers might better assess campaign finance, and how current methods for observing campaign finance issues inform the discussions of international legal obligations regarding campaign finance.*

Discussion focused on how campaign finance assessment by international observers can be improved. Consensus emerged that long-term observation is the best means to assess political and campaign finance. Experts also recommended that each mission include a campaign finance specialist, commending the Organization for Security and Cooperation in Europe – Office for Democracy and Human Rights (OSCE-ODIHR) for inclusion, in recent missions, of a staff member particularly to focus on this and other specific issues. Participants agreed that evaluation should include an assessment of domestic legislation and regional/international obligations and whether such laws are implemented. A particular focus should be placed on the use of state resources, media expenditures and reports, and the implementation of disclosure, which would allow observers to assess campaign finance even in the absence of stringent transparency obligations.

Participants also stressed that assessment should not be limited to parties and candidates, but should extend to the performance of election administration bodies, regulators, and enforcement agencies. Assessment of these bodies could include asking police and/or enforcement bodies for information on cases under investigation (where the cases are going, how many were prosecuted, and how many were found guilty) and by seeing financial reports filed by parties and candidates – all of which help draw a picture of how seriously laws are enforced. Having a strong understanding of domestic campaign finance laws and conducting an in depth legal analysis was also seen as crucial to successful campaign finance monitoring. The law will offer observers guidance on potentially tricky issues, problems, and violations to look for, as well as indicate the potential for the system as a whole to undermine democratic goals.

Given the lack of analysis of campaign finance issues in current election assessments, discussants explored the question of how missions can be amended so that meaningful conclusions can be drawn from a six-month observation period, essentially asking whether a truncated, yet adequate model of finance observation can be created. Using the Group of States Against Corruption (GRECO) as an example some reflected that meaningful reports can be produced from information collected by those outside of the country in only four days.<sup>8</sup> In conjunction, the recommendation was made to develop a strong questionnaire for observers that would reduce the time needed to collect information. In this context, experts urged practitioners to remain cognizant of the fact that, given different electoral systems and types of elections, it may be impossible to develop one universally methodology or set of checklists. It was suggested that perhaps there should be a set of different manuals and guidelines developed, depending on

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<sup>8</sup> This type of data collection requires full government cooperation and access to information, which international observers others do not always enjoy.

the type of elections observed.<sup>9</sup>

Partnerships with local civil society organizations and work with political parties were highlighted as a potential means of engaging with local actors, to increase the capacity of campaign finance observation. Political parties seemed a particularly natural fit for partnership given the natural incentive to scrutinize what political rivals are spending and the degree of ease with which party agents can be involved in activities to monitor the misuse of state resources.<sup>10</sup> Additional suggestions included conducting surveys with campaign donors to get their perspectives on why they contribute money<sup>11</sup> as well as consulting journalists, who serve as a useful source of information on issues inside the country.

### **Session Five: Next Steps and Closing Remarks**

Participants identified several areas for future work and collaboration. IFES, working with the Open Society Initiative, has developed a handbook for NGOs that helps them to evaluate campaign finance and offered to collaborate with The Carter Center in creating a standard questionnaire that can be used by international observers. In addition, it was suggested that all ACE partners should focus on political finance and that it could become an organizational theme for the upcoming year (2009-2010). In doing so, everyone could come together to establish observation guidelines. Agreeing with this idea, others also suggested including international and domestic organizations, as well as academics, in the process of developing a methodology.

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<sup>9</sup> For example, observers will see different patterns in presidential and local elections, and the scope of monitoring political finance depends on the context of the country.

<sup>10</sup> The drawback is that reporting from party agents is likely to be very one-sided.

<sup>11</sup> Government pressure on donors to contribute constitutes indirect abuse of state resources.