

Using Public International Law to Assess Elections:
The Experience in Africa

Nairobi – Kenya, 3 – 4 May 2010

Summary of Proceedings

1. Introduction

In partnership with The Carter Center, EISA co-hosted a two-day workshop on assessment criteria for democratic elections. The workshop's aim was to introduce tools for election observation based on public international law to participating organisations. These tools, which are the output of the Center's multi-year, collaborative Democratic Election Standards project, were presented for review and discussion amongst participants to determine their effectiveness and relevance in the African region.

The Carter Center viewed the Democratic Election Standards project as a collaborative process and saw the workshop as an important opportunity to seek input from regional organisations. The goal of this conference, therefore, was to ensure regional buy-in from African based NGOs and IGOs on the Democratic Election Standards work. In addition, as the harmonisation of election observation between organisations is a key goal of the Center's project, the workshop was seen as a forum which could help establish co-ordination between and amongst organisations and help to build consensus on the criteria for conducting assessments of democratic elections.

The workshop was held in part to fulfil one of the project goals, namely, fostering dialogue in the international election community regarding the need for consistent criteria for assessing elections. The impetus for this project is the recognition of problems arising from the proliferation of observation groups and the lack of common standards for assessment and approaches to election observation. While the major international observation organisations have made great strides in agreeing on general guidelines for professional election observation, most practitioners now agree on the critical importance of establishing clear and objective criteria for assessing democratic elections and to foster broad international consensus on these standards. Utilising and referencing a common set of election standards will help ensure that all organisations are working to the highest professional standards of impartiality, integrity and transparency.

The workshop was held at the Laico Regency Hotel in Nairobi, Kenya on 3-4 May 2010 and was attended by participants (Annexure 2) from organisations working in the area of election observation, human rights and democracy and governance.

This is a summary of the main issues discussed during the workshop. It is worth mentioning that the workshop was never intended to reach agreements but simply give an opportunity to groups to voice their views on issues related to international observation and most importantly as those issues relate to them.

2. Welcome Remarks and official opening

Participants were advised that the meeting focus would grow from discussion of the three main goals of the Democratic Election Standards project, namely:

- Articulating criteria for assessing democratic elections based on public international law (PIL)
- Creating practical tools for observers based on those criteria
- Fostering dialogue in the international election community regarding the need for consistent criteria for assessing elections

3. Presentations and general discussions

3.1 Overview of the Carter Center's work on defining Assessment Criteria based on Public International Law (PIL)

Participants were given an overview of The Carter Center's ongoing research project on the relationship between PIL and elections. The research involved going through over 200 source documents, one result of which was a paper, *Identifying Obligations for Democratic Elections: Narrative of Obligations*, and an index of international sources (UN treaties, as well as other instruments, interpretative documents and additional resources). The instruments covered were not only those relating to elections but also to civil and human rights, protocols against of corruption and discrimination against women etc. They were advised as well that an electronic database of PIL obligations would be available on the Center's website in the summer of 2010.

Reference was made to the fact that Public international law (PIL) provides a sound foundation for such standards for several reasons including the fact that states have voluntarily committed to the identified obligations for democratic elections through the signature and ratification of treaties. Additionally, PIL provides the most credible and objective foundation for fostering dialogue among international election observation organisations on election standards, as they are based on standards that are applicable to all nations. However, it was noted that regional sources may be more persuasive in the context of election observation.

During this session, mention was made to key sources of Public International Law (PIL) that include:

- Binding International and regional treaties and conventions including the 1966 **International Covenant on Civil and Political Rights and the African Charter on Human and People's Rights**
- Customary Law – in most cases not written down but practice of member states, over a period of time where there is a sense of legal obligations. The **1948 United Nations Declaration for Human Rights** which is technically non-binding has been endorsed by all UN member states and has taken on the status of codified customary law.
- Declarations and Political Commitments - E.g. **African Union Declaration on the Principles Governing Democratic Elections in Africa**
- Judicial decisions – such as those of the UN Human Rights Committee, or decisions of international courts of justice such as the European Court of Human Rights.
- The teachings of highly qualified publicists such as expert jurists, or in the case of the Center's project, handbooks or manuals such as PEMMO, SADC PF Norms and

Standards, Declaration of International Principles for Election Observation and the Code of Conduct.

3.2 An Introduction to Public International Law's Role in Elections

The second session focused on the following points:

- Why PIL is an appropriate basis for electoral assessments;
- The strengths and weaknesses of using PIL as the basis of assessment and whether other assessment criteria existed other than PIL; and
- The impact of the use of PIL might have on the current work of election observers.

This session provided participants with the opportunity to interrogate the usefulness of PIL as a basis for conducting objective electoral assessments. Participants discussed the above questions and came to the conclusion that PIL is an appropriate basis for electoral assessments, particularly since many regional election instruments, guidelines and norms and standards are derived from PIL. Participants were agreed that one way or another, their organisations were already using PIL to assess democratic elections, although they had not overtly tied their observations to PIL.

There arose some differences of opinion regarding the question of whether PIL can and should always be used to assess elections in all States, regardless of the unique cultural or political factors. Some participants suggested that that post conflict countries' electoral process should not be measured in the same way as that of more stable democracies, while others argued for one common set of standards for all countries, particularly when considering elections as a human right.

Participants agreed that PIL should be used as the basis of assessments irrespective of the context and in the reporting of the electoral processes and that any irregularities or deficiencies in the process should be brought to the attention of the relevant authority. For example, when there is not equal access or allocation of airtime by state media to all parties contesting elections, these deficiencies should be highlighted in the report and recommendations be made as to how this can be addressed.

3.3 Review of Continental and Regional Obligations Relevant to Political Processes

This session examined PIL in relation to continental and regional instruments. The session moderator discussed the role played by continental and regional instruments in the development and application of PIL standards as well as the different continental and regional standards.

After discussion and identification of these regional instruments, participants were divided into discussion groups and looked at how these regional treaties and the obligations they spell out compare with those at international level. The groups also discussed the usefulness and

drawbacks of using regional instruments, as well as their best use in conjunction with international treaties in order to come up with useful recommendations for observer reports.

In discussing the above, participants had varied responses ranging from a comparative analysis of regional instruments which in some cases illustrated that some regional instruments had omitted one of the 21 principal obligations for democratic elections, namely, the secrecy of the ballot, to some groups being of the opinion that regional standards are more obligatory because of regional ownership and that these tend to have more impact. At the same time the drawback could be that they are inward looking and failed to improve a flawed election as those using them do not look outside the box and may not be aware of what other regions or bodies use. The participants also concluded that when used with international treaties, regional standards allow for consistency in making recommendations given that most regional standards are derived from international treaties.

3.4 Domestic versus International Observation using the Methodology

The last session of the day explored whether a methodology based on PIL was equally applicable to both international and domestic observation groups. During this session participants unpacked the differences and commonalities between domestic and international observation groups. One of the differences highlighted was the fact that given the opportunity and sufficient funding, domestic observer groups are better able than international observers to observe the electoral process for the complete electoral cycle. The other divergences highlighted referred to the use of checklists, internal local knowledge which domestic observer groups have and the professionalisation of the international EOMs. There was agreement by all that the use of PIL can offer a common basis for assessment of electoral processes while at the same time allowing for synergies between domestic and international observers.

4. Application of the Methodological Framework to Assess Elections

The second day of the workshop offered participants a chance to consider the practical utility of a PIL methodology in the conduct of election observation. It was agreed that PIL can and should serve as the basis of assessment for international and domestic observers. It was also agreed that international and domestic observers are essentially looking at the same aspects of the electoral process (e.g. voter registration, voting operations, dispute resolution etc).

Participants broke up into groups to complete an exercise applying PIL obligations to different aspects of the electoral process. Participants were asked to summarise and share their findings in a 45 minutes plenary discussion at the end of the session. (Annexure 2, practical exercise)

5. Next Steps and Conclusions: Building Consensus on the use of PIL Obligations

In the final session of the day, participants reflected on the main lessons learned during the workshops as well as potential ways to progress forward. Participants also asked to consider the opportunities for observer organisations to increase co-operation and harmonize assessment methodologies. The applicability of the PIL assessment criteria in this harmonisation was also discussed.