

**Experts Meeting on Obligations for the Media in Democratic Elections
Atlanta, GA - September 29, 2008**

Executive Summary

The Carter Center held a one and a half day meeting focusing on the role of media in the electoral process aimed at (1) clarifying international legal obligations regarding the media and electoral processes and (2) developing a method for observation based on those obligations. Major points from the discussion are summarized below.

- Participants agreed that public international law forms a strong basis for the development of assessment criteria as it is objective and self-selected by states. However, the often high-level and vague nature of public international law sources was noted as a shortcoming. Therefore, many agreed that international law related to the media should be understood in conjunction with soft-law sources and electoral best practices.
- Participants spoke about determining what constituted ‘the media’. All agreed that traditional forms of mass media, such as television and radio, were included as well as print media. It was also noted that the internet and blogs have been receiving increased attention as new forms of media. However, given a scarcity of regulations related to new media, experts agreed that a media assessment should generally focus on the most watched, accessible media of a particular country.
- Participants felt it was necessary, when using public international law as assessment criteria, to distinguish between public and private media because international obligations apply to governments not private individuals or corporations. It was generally agreed that, while public media can be regulated to ensure balance and impartiality, private media is not under the same obligations. However, while states are not required to regulate private media, they *may* do so to prevent monopolies in ownership and to ensure obligations of plurality are implemented.
- Standards for regulation also vary depending on whether the outlet is broadcast or print. Stronger obligations exist for broadcast media, given that it is a public resource. In contrast, print media is often subject to less regulation and obligations for broadcast media may not be applicable to print.
- As recognized universal human rights, obligations relating to freedom of expression and opinion must be strictly observed by states and are not open for interpretation or derogation. The right to seek, receive, and impart information extends beyond a protection of the speaker’s rights to protect the right of the listener to receive a diversity of opinions and information. Consequently, freedom of expression requires a plurality of both outlets and opinions in the media environment as a whole. A pluralistic media society is particularly important in the context of the electoral process as states must uphold an obligation to ensure an informed electorate, including through the provision of information on candidates and the voting process. All people must be able to enjoy the right to seek and receive information on an equal basis free from discrimination. Effective remedies should be available in the case of violations by state or non-state

actors.

- Participants established several obligations for the media as found in international law. These include the following. Publicly funded media must be balanced and impartial, candidates and parties should have direct, equitable access to government-controlled media, and states must ensure freedom of expression and accessibility for viewers and readers. In addition, states are obligated to ensure there is no discrimination in the sale of advertising, that equal opportunities, conditions, treatment, and rates apply for all political parties, and that media should not be liable for statements published by others, short of incitement to violence.
- A ‘right of reply’ is seen as only one of many means of ensuring that an effective remedy is granted in the case of a violation of rights.
- Experts agreed that, given the limited resources of observation missions, observers should use criteria such as viewership and coverage to determine the most watched channels and most distributed newspapers to be included in an observed sample of media sources and outlets.
- Participants felt that organizations without the resources to conduct a full-scale media assessment should still focus on the issue in some way. When necessary, organizations could consider the value-added of conducting a short duration assessment of the media, analyzing the legal framework without conducting content analysis, or partnering with domestic monitors to ensure their observations still recognize the importance of media to the electoral process. In such cases, when preparing reports and statements organizations should be fully transparent about the limited scope of their assessments

Session 1: Welcome and Introductions

On September 29-30, 2008, the Carter Center hosted an experts meeting on criteria for assessing the media in democratic elections. Leading experts in the fields of the media participated, including Toby Mendel (Article 19), Sandra Coliver (OSJI), and Giovanna Maiola (Osservatorio di Pavia Pavia Institute), as well practitioners from the global election assistance community.

The principal goals of the meeting were to:

1. Gain greater insight into existing obligations regarding media in public international law;
2. Discuss the relative strengths and weaknesses of public international law as a source for obligations; and
3. Discuss how existing methods for observing media can be better and more consistently integrated into election assessment frameworks.

Session 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 to articulate criteria for observing democratic elections based on public international law. After this introduction, participants were asked to discuss the applicability of public international law obligations to an assessment of the media in elections.

Discussion began with participants noting that, despite some reluctance on the part of election

observers to adopt PIL as the basis for assessment, PIL is already recognized as the strongest source for the determination of obligations in the field of legal advocacy. While the election observation community is still in the process of developing a methodological framework using PIL as its basis, participants uniformly recognized its potential impact on the professionalization of election observation. Discussants agreed that the strength of an approach using PIL as the source of obligations is that it can be applied objectively and states have voluntarily committed to it.

However, some participants expressed concern that, while integral to the development of assessment criteria, PIL would not alone suffice as a source of a methodological framework for observation. Particularly, many high-level PIL sources were not thought to be detailed enough to be practical. For example, Article 19 of the International Covenant on Civil and Political Rights guarantees to all citizens the right to freely seek, receive, and impart information, but does not offer guidance on what steps states should take to ensure the implementation of these rights. Practitioners agreed that PIL should be considered in addition to soft-law sources and electoral best practices, particularly as the media is a relatively new subject in international law and has not received as much attention as some other aspects of the electoral process.

Session 3: The Role of The Media in Democratic Elections

This session focused on determining the roles played by the media in the electoral process and how these roles impact the assessment of elections. Questions for consideration by meeting participants included: How should election observation missions understand the role of the media in the electoral process? Are there specific roles that the media consistently plays during the electoral process that can frame our understanding of international obligations, for example, information provider, information facilitator, or watchdog? Is the media a public resource? Should election observation missions distinguish between public and private media, or focus on the broader 'media environment'? When we talk about the media, to what are we referring – Individual journalists, discrete corporate entities, an 'institution', or all of the above? Should and how can such distinctions be effectively taken into consideration by election observers when referring to international obligations?

It was noted that first determining what was meant by the 'media' and what it's role was in the electoral process, would later help to determine what obligations were relevant to election observers. Therefore, this session opened with a request made to participants to share their perception of what 'the media' encompasses. While all participants agreed that traditional media (broadcast and print) were included in this conception, it was noted that the internet and blogs have been receiving increased attention. While experts agreed that it is possible to assess non-traditional media in the context of the election observation mission (EOM), participants felt it must be justified given the scarcity of regulations upon these 'new' media and the limited resources available to election observers. Generally, participants agreed that in the context of the work of election observers, a media assessment should focus on the most watched, accessible media of a particular country.¹

¹ Participants were careful not to assume that the most accessible media outlets would always be traditional mass media. They urged observers to pay particular attention to the media environment and culture of each observed state to determine the most relevant media outlets in that country.

Discussants felt that the media assumes several roles, including information provider, information facilitator, and watchdog. However, the unique nature of the electoral process led experts to remind participants that the role of watchdog can be particularly sensitive during the electoral period as continually highlighting government failures can have a biasing effect on the public. It was agreed that in the electoral context the media should perhaps play less of an investigative role while increasingly acting as conduit for facts and voter education efforts.

Discussion also highlighted the fact that media may be understood differently based on your assessment tools. For example, when basing a media assessment on public international law it is necessary to distinguish between public and private media sources as PIL obligations are only relevant to government-controlled media. However, media assessments from a different perspective may make this distinction unnecessary.

Generally, given the focus on PIL as a basis for obligations, participants felt that public media, as a state-funded outlet, may be regulated. Private media, in contrast, can only be regulated as a check monopolies and to prevent violence and defamation. Regulatory standards also vary depending on whether the outlet is broadcast or print. Although stronger obligations exist for broadcast media (given that it is a public resource), it can still be difficult to establish rules on private broadcasters. Similarly, print media are often unregulated and many obligations applied to broadcast media are not as concrete for print.² It is more difficult to identify concrete obligations related to new technologies such as the internet than for traditional media as such new technologies are currently unregulated.

Session 4: International Obligations Regarding Media

This session focused on the existing obligations for the media that may be found in public international law. Questions for consideration by meeting participants included: Are there obligations established in international law beyond freedom of expression and access to information which can and should be applied directly to media? Is the obligation for transparency (in public decision-making) applicable to the media?

Participants focused on existing media obligations in public international law, specifically whether obligations beyond freedom of expression and access to information can be applied directly to the media and how regional obligations and emergent norms may impact an assessment of the media environment.

Role of Best Practice in Assessing Media

Discussion first centered on whether international obligations and best practices were applicable in an electoral context and how they might provide a framework for understanding the media. While it is incumbent upon states to comply with the obligations set forth in public international law, best practices are not absolute and represent only one of several ways a state may uphold its obligation. In other words, international law consists of binding commitments that states *must* meet regardless of existing statutes in domestic law, culture, religion, or regime type, for example, rights of expression and information. Best practices, on the other hand, include statements and recommendations by international or regional bodies on measures states *may*

² For example, public ownership disclosure obligations are not as strong for print outlets and they may opt out of requirements for direct, equitable access.

undertake to achieve an obligation or desired principle, but with which they are not legally required to comply.

Freedom of Expression

Freedom of expression was identified as a fundamental right well established in international law. Participants felt confident in the strength of this obligation as they noted that the language in several international instruments is almost identical, and there is a convergence in the jurisprudence. As a recognized universal human right, obligations relating to freedom of opinion and expression must be strictly observed by states. Participants remarked that the guarantee to seek, receive, and impart information extends beyond a protection of the speaker's rights to protect the right of the listener to receive a diversity of opinions and information. Consequently, freedom of expression is not realized if individuals can only hear one voice, demanding plurality of both outlet and opinion in the media environment as a whole.

On the question of including responsible expression in the framework, some reflected that the sensitive position of the media around elections and the uneven playing field in most countries demand that observers primarily focus on monitoring the government. While there is a need for media responsibility, the media can only fulfill a public watchdog role when able to operate independently. Hence, media responsibility and quality of coverage are not areas for government regulation.

Public and Private Media

Participants discussed the fact that a methodology using only PIL sources would be limited in its ability to assess private media, as international obligations relate to obligations of governments not private individuals or corporations. As experts and practitioners agreed that an assessment of private media is necessary to gain a full understanding of the impact media plays in an electoral process, many felt best practices were an important means of assessing private media regulations that may not have a touchstone in international law.

While private media outlets are not obligated by international law to behave in a particular manner, the obligation of a state to provide for a diverse and pluralistic media may require regulation of private media sources. However, the group concluded that international law does not consistently provide obligations beyond that 'states are *permitted* to place restrictions on private media.' While balance and impartiality are imposed on public and private broadcasters alike in the vast majority of countries, it was noted that observers cannot tell host countries that they *must* impose these principles on all broadcasters. Yet, some practitioners expressed concern about not extrapolating international obligations onto private media, since there are cases where government media plays only a minor role in the electoral process.

Discussion highlighted the point that states may choose to ensure diversity through the distribution of frequencies and licenses and may grant licenses to those conforming to certain standards or behaviors. Participants agreed that states may also promote a diverse environment through a number of other means, including regulating the amount of airtime that can be purchased, regulating spending, and providing airtime to parties and candidates directly.

It was further noted that states may promote plurality through regulations which deter the

concentration of media outlet ownership to avoid a monopoly or oligopoly from developing in media ownership structures. The point was raised, however, that efforts to prevent media oligopoly can open opportunities for government interference. While most participants felt this concern was not significant enough to outweigh the states obligation to provide for diversity, they noted that assessments of the success of domestic regulations to regulate ownership should be considered in proportion to their ability to allow for misfeasance. Ownership of media outlets by candidates also calls for regulation, including requirements for clear ownership disclosure.

The principle of transparent disclosure is found in existing law at the regional level, as well as in a great number of soft law sources (particularly from the inter-American system). Therefore, meeting participants considered disclosure of media ownership to be an emerging obligation. Participants also used this opportunity to discuss how good practice, as it becomes an accepted norm, can evolve into a mature standard, noting that the observer community may choose to play an increasingly significant role in pushing for the creation of new PIL obligations by promoting good practice.

Existing, Emerging, and Desirable Obligations

Meeting participants sought to distinguish between items that constitute international obligations and those that are best practices, identify gaps between obligations and best practices, and discuss how the election observer community may bridge the difference. The group agreed that the following represent existing obligations identified in public international law.³

- Publicly funded media must be balanced and impartial.
- Candidates and parties should have direct, equitable access to government-controlled media.⁴
- It is incumbent upon states to ensure freedom of expression and accessibility for viewers and readers.⁵
- Regulators should be independent and fair.
- There should be a timely system for complaints and the application of rules.
- States are obligated to ensure there is non-discrimination in the sale of advertising and that equal opportunities, conditions, treatment, and rates apply for political parties.⁶
- State authorities must not exert financial pressures or intimidation to unduly influence media content and conduct.
- States must ensure freedom of movement for journalists and protect journalists from attacks aimed at limiting freedom of expression.
- Media should also not be liable for statements published by others, short of incitement to violence.⁷

³ While most participants saw a PIL basis for all obligations listed, some noted that the principles requiring a diversity of content and a plurality of sources seem less entrenched in law than other obligations. Some felt these principles were still best described as ‘emergent standards.’ Media liable laws were also thought to vary more significantly between states than other obligations.

⁴ If one has direct access, then all must have it, without discrimination. This is an obligation *if* government-controlled media is the only way candidate information can be adequately distributed. There is no obligation for private media, only a best practice. Print media can opt out of the provision if it violates their manifesto.

⁵ This relates to diversity, right to receive information, and an obligation to strive for universality. Public broadcasters must seek to provide information, particularly voter education, in all languages and broadcast areas.

⁶ Newspapers owned by political parties may be exempt. Paid advertising should be labeled as such.

⁷ There are limits to media protection, specifically clear, direct incitement to violence.

In addition to these obligations several best or good practices were considered, including requirements for plurality in ownership and anti-trust restrictions preventing ownership concentration, (which can be expanded from the obligation for pluralism), laws requiring balanced, impartial coverage by individual broadcasters, clear separation between editorial opinion and news coverage,⁸ and limits to paid advertising. Participants also noted private broadcasters carrying direct access slots for candidates and parties was a good practice, and urged an evaluation of the geographical distribution of media sources to ensure non-discrimination in the provision of information. The adoption of editorial guidelines regarding a commitment to balance and codes of conduct for journalists were highlighted as good practices, however, it was recognized that such practices should be developed by the media outlets themselves rather than the state.

Right to Remedy

Participants felt that, given international obligations to provide effective redress for the violation of rights, a system of complaints regarding the media must be in place that allows for timely remedies. This obligation of timeliness is paramount during an electoral process as efficacy is bound by the electoral calendar. For example, if regulatory bodies find discrepancies in the advertising rates awarded to particular candidates during the campaign period, such violations should be remedied prior to election day to ensure the remedy is effective.

Discussion also focused on whether there was a requirement that individuals impacted by media infractions be allowed a right of reply. A ‘right of reply’ generally refers to the award of a media slot (of similar time and size and location) to the victim of a violation in order to allow for a presentation of their alternate views or opinions. While participants affirmed that a right to remedy is an obligation in public international law, some argued that a right of reply, though widely accepted, is a best practice, not an obligation. In fact, most participants felt the right to reply is only one of several ways an effective remedy could be granted.

Session 5: Methods of Observing the Media and International Obligations

This session focused on methods for observing the media and how these methods may inform and be informed by international obligations for democratic elections. Questions for consideration by meeting participants included whether current media monitoring methods allow observers to collect all necessary data, how such methods can inform the discussion of international legal obligations regarding the media, and what scope and duration of mission is ideal to best assess the media.

In opening the discussion on media observation, Giovanna Maiola gave a brief presentation on the monitoring methodology used by the Pavia Institute during an EOM. This method is two-pronged, first assessing the national legislation and legal framework for the media to determine its alignment with international legal principles. After legal analysis, the Institute also assesses the overall media environment, the conditions of journalists and media outlets, such as repression and intimidation by state authorities. Core activities include document and content analysis to assess the production and performance of media, the degree of media pluralism, and compliance

⁸ Although some felt this is a journalistic best practice, others noted an argument can be made that government broadcasters must do this, while others asserted it is an obligation.

with national legislation and international obligations. The methodology incorporates both quantitative and qualitative components. The quantitative element looks at time allocation, content, and the timing of broadcasts, in addition to political advertising. Monitoring of the campaign includes kind of program, time/placement, direct speech or interview, subject of communication, and tone of coverage. In addition to the quantitative elements, the qualitative component assesses voter education, media bias, opinion and exit polls, respect for blackouts, and hate speech.

At the conclusion of this presentation, participants considered how practitioners currently assess media and how this might be improved upon. Discussions included the duration of the observation, sampling methods, data collection technology, timing, and potential partnership with domestic actors. Regarding the amount of time to monitor, it was noted that the length of an observation exercise is often contingent upon the observed state, type of election, and number of candidates. It was agreed that long-term issues in a campaign dictate an assessment that ideally covers at least the entire campaign, if now longer.

Discussion also highlighted the issue of sample size and whether clear conclusions can be drawn from what is often a very small sample due to inevitable resource constraints of observation missions. Experts agreed that one means of combating this problem is the use of criteria such as viewership and coverage to determine the most watched channels and most distributed newspapers to be included in the observation sample. While still requiring practitioners to be cognizant that they are assessing only a portion of an overall environment, this method allows observers to draw the most relevant sample possible with available resources.

On the topic of working with domestic actors, practitioners were asked whether individuals from the host country are frequently used to conduct the analysis and if there is an effort to help build domestic capacity. Although consolidation and professionalization of domestic media monitoring has received increased attention, participants noted that in practice, election observation missions do not always have the time or capacity to train domestic monitors. Some practitioners noted their organizations often try to recruit domestic monitors from a local organization already engaged in media monitoring field, thus combining both resources and skill sets. When asked whether international organizations can rightly rely on domestic organizations due to potential biases, practitioners felt that engagement with domestic civil society is often extremely useful, however, efforts should be taken to assess the impartiality and credibility of such domestic partners.

Participants discussed how election observation missions should best address their own limited ability to monitor the media in statements and reports. Most participants felt election observers would be remiss to not say anything about the media as it plays such a large role in electoral processes. Some suggested that it may be possible to scale back existing methods in terms of timeframe, etc. by developing a truncated version of media monitoring (that might be very helpful to more resource-poor organizations).⁹ Practitioners and experts agreed that in this context, organizations might also consider conducting a legal analysis of media laws even if they are unable to monitor content and usage. While such limited assessments may make it possible

⁹ For example, if radio is the most widely accessed source and the campaign period is only four weeks, then one can monitor those stations for four weeks.

only to draw out some key general points, participants felt this would still have a significant value-added during an election observation. It was also suggested that election observation missions look for domestic partners to help increase their capacity to monitor the media. In any case, participants felt some focus on the media was necessary but that observers should be careful to acknowledge the limitations of their work in any public statement or report.

Session 6: Next Steps and Closing Remarks

In the last session, participants reflected on the remaining issue of needing to separate what is a concrete legal obligation from assessment criteria that, while persuasive, are not obligatory upon states. As participants recognized that media obligations have a significant grey zone of emergent norms, they felt greater attention should be paid to principles that, through advocacy and continued usage might become obligations. Experts noted that international forums are generally receptive and advocacy can be important to establishing obligations. However, while recognizing that advocacy may be the only path to achieving movement on these norms and persuading interlocutors to comply with obligations, some practitioners cautioned against blurring the lines between impartial observation and advocacy.

Participants also suggested that connections be strengthened with freedom of expression practitioners in Africa. Experts noted that African courts may be particularly receptive to this work due to the prioritization of elections, and African cases are often strong examples of good practice. It was also suggested that this work can feed into that of the Special Rapporteurs by Article 19. Finally, given the potential to build a legacy by working with domestic actors and consolidating positive work conducted on the ground, discussants noted the possibility of seeking extra funding for domestic capacity building, particularly from the European Commission.