

FORGET 'INTERNATIONAL STANDARDS'

WHY ELECTION OBSERVERS SHOULD TALK ABOUT 'INTERNATIONAL OBLIGATIONS AND COMMITMENTS' WHEN EVALUATING AN ELECTION

BY NILS MEYER-OHLENDORF



In the past, when international election observers commented on an election, they mostly referred to it as being 'free and fair' or not, as the case may be. This terminology has been largely abandoned for two reasons. First, the phrase 'free and fair' is not clearly defined, nor has it been agreed by States as a benchmark for elections. Second, the media started describing elections as 'free and fair' or not, which effectively rendered the findings of election observers somewhat banal. Tasked with having to summarise very complex processes, election observers try to avoid drawing any black and white conclusions, and instead prefer to maintain a sense of nuance in their reports.

Rather than 'free and fair', international observers then began talking about whether an election met 'international standards' or not. In recent years 'international standards' has become the buzz word of election observation, as can be seen in a 2008 analysis of the most frequently used words in numerous observer statements (see the 'wordle' on the left side).¹ 'Elections have (or have not) been conducted in line with international standards' is the catch phrase many observers use in their reports. However, there is growing recognition that the term 'standards' is misleading. It projects the wrong image and obscures the fact that elections are evaluated against obligations and commitments that States have freely accepted.

¹ Susan D. Hyde (2008), *Global Trends in National Elections, Multi-Party Competition, and International Election Observation*.

1. WHAT ARE INTERNATIONAL STANDARDS?

The International Standards Organization (ISO) – the world’s largest developer and publisher of international standards – defines the word ‘standard’ as a ‘*document that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order*’.² ISO standards not only cover purely technical matters, such as acoustics or tools, but they also include procedural issues, for example fraud countermeasures or environmental management systems. Although they address a wide range of issues, ISO standards have one thing in common. Standards aim to produce congruency and conformity. According to the ISO, standards create congruency in order to:

- Make products and services more efficient, safer and cleaner
- Facilitate international trade and make it fairer
- Provide governments with a technical base for health, safety and environmental legislation, and the dissemination of innovation³

Importantly, ISO standards are voluntary agreements. There is no obligation to use a certain standard unless it is made mandatory by law. In other words, a standard is compulsory only by virtue of law, but not by its status as a standard. In consequence, there is no legal obligation to write letters in Europe on an ISO 216 standard sheet, although this is the standard paper size in Europe. However, it would be unwise to use another paper size in Europe: only ISO 216 pages fit into envelopes; some printers take only ISO 216 size paper; and Europeans find it odd to use, for example, US standard paper.

2. INTERNATIONAL STANDARDS FOR ELECTIONS?

When observers talk about international standards, they make reference to international human rights treaties, such as the International Covenant for Civil and Political Rights (ICCPR). With 166 State Parties, the ICCPR is nearly a universal instrument. The Covenant contains a number of provisions that are relevant for elections and democratic governance. These are legally binding obligations and leave State Parties no choice but to comply with these obligations. The UN Human Rights Committee concretizes these obligations by issuing General Comments on specific articles, publishing concluding observations on regular

State reports or deciding on individual communications. All of these sources are regarded as ‘authoritative interpretations’ of the Covenant and help observers to apply the relevant provisions of the ICCPR.⁴

Next to international treaties, observers also refer to political commitments. To give an example from the OSCE area, the Copenhagen Document contains a number of detailed election-related commitments. Participating States have agreed on rules regarding vote counting, publication of election results, access to media, campaigning and election observation. In addition, participating States have accepted a number of human rights commitments relevant to democratic elections, such as freedom of assembly, freedom of expression or thought and right of effective remedy (No. 9 or 11 of the Copenhagen Document). Unlike international treaties, these agreements are not legally binding, but introduce political commitments to which States agree to adhere.

In light of this, it is misleading when observers use the term ‘international standard for elections’ – a voluntary agreement aimed at producing congruency – if they actually mean obligations or commitments, which are either legally or politically binding, and which have no intention to create conformity in detail. In short, when observers apply legal obligations or political commitments, they refer to agreements that demand compliance and restrict State action.

The phrase ‘international standard for elections’ is also confusing because it suggests that observers apply one coherent benchmark in their assessments. This is not the case. Despite a number of common core features, there are also important differences between the international agreements that observers apply: the ICCPR is fleshed out by detailed General Comments, but other human rights agreements are not; the Copenhagen documents are unique, as they contain a ‘set of far-reaching democracy and human rights norms that surpassed, in many ways, any existing human rights treaties and, in effect, revolutionized international relations’.⁵

The term ‘international standard’ for elections is further confusing because it implies that there is one standardized way of holding elections – like a screw is standardized for widest possible use. This is not true for elections. Elections come in various forms. Election administration varies greatly across the globe; voting and counting procedures differ significantly. And yet, these different forms of elections can or cannot all meet international obligations, depending on the actual implementation of the election process.

² http://www.iso.org/iso/iec_guide_2_2004.pdf. Similarly, the Merriam-Webster dictionary defines the term ‘standard’ as ‘something established by authority, custom, or general consent as a model or example’ or ‘something set up and established by authority as a rule for the measure of quantity, weight, extent, value, or quality’.

³ *Ibid.*

⁴ In case a country has accepted no obligations relevant for elections, observers could evaluate an election in light of the Universal Declaration of Human Rights (UDHR), which in large part constitutes international customary law. The 2008 Election Observation Mission to Pakistan, for example, applied the UDHR because Pakistan had not ratified the ICCPR at the time of observation.

⁵ ODIHR Director Ambassador Janez Lenarcic, “The Copenhagen Document at 20: Keeping the Promises”, http://www.osce.org/documents/odhr/2010/06/44572_en.pdf.

3. IS IT A PROBLEM?

All this would be a relatively small problem if the matter were only about terminology – semantics. The lack of precise wording might only be interesting for academics, linguists or lawyers. But the problem runs deeper. The term ‘standard’ blurs the binding nature of international obligations and commitments for elections. The ICCPR is an international treaty that is legally binding. The same is true for various regional human rights treaties, such as the African Charter on Human and Peoples’ Rights or the American Convention on Human Rights. These treaties contain important election-related obligations for State Parties. According to Article 25 of the ICCPR, for example, State Parties have no choice but to hold ‘genuine periodic elections’. In short, the phrase ‘international standard for elections’ weakens election observation because it disguises the binding nature of election-related obligations that countries voluntarily have accepted.

4. IF ‘STANDARD’ DOESN’T WORK, WHAT’S THE ALTERNATIVE?

Despite its flaws, it would be reasonable to keep the term ‘standard’ if there were no viable alternative. The term ‘standard’ seems to summarize well the fact that observers not only apply legal obligations and political commitments, but also principles, such as transparency or honesty, or good practice examples. Furthermore, the term ‘standard’ appears stronger than ‘free and fair’, the routine catch word of many observer reports from the 1990s. However, these arguments make no convincing case to keep using the word ‘standard’:

- Because there are fundamental differences between them, summarizing legal obligations, political commitments, principles and good practice is like comparing apples and oranges. Unlike obligations or commitments, principles such as transparency and honesty are not binding as such. They neither constitute mutually accepted rules nor ‘general principles of law’, another source of international law (Article 38 of ICJ Statute).⁶ In parts, these principles may be enshrined in international human rights treaties or may be part of international customary law.⁷ If so, their binding nature derives from the treaty or customary law (as opposed to the principles *per se*) and they would constitute an obligation for States.

Good practice mainly serves to substantiate an assessment. It constitutes no binding benchmark as such because it has not been accepted as a binding agreement by the country being observed.

- While the term ‘standard’ is indeed more robust than the notion ‘free and fair’ – a fuzzy and vague term – ‘obligation’ or ‘commitment’ is yet more precise than ‘standard’, thus constituting a critical improvement in the discourse.

There is, then, a viable alternative for ‘standard’ and it is ‘international obligations’ or ‘commitments for elections or democratic governance’. This terminology clearly indicates what is meant: An obligation or commitment that – unlike a standard – leaves States no choice but to comply with it.⁸

5. CONCLUSIONS

It is a problem that it has become standard for observers to use the term ‘standard’. Election observers and other democracy advocates should avoid the term altogether. There is a viable alternative – ‘obligations and commitments’ – for elections and democratic governance. This is not only the right term, but also the one that carries with it a much more powerful connotation. If observers refer to good practice, they should make clear that this does not constitute their benchmark as such, but is only used to substantiate their findings.

And after all: Who would want the International Standards Organization, a body of technical experts who are simply mandated to issue non-binding descriptions of technical and procedural details, to develop standards for elections? Rule-making for elections is rightly left to States, which have the authority to adopt binding rules, either through legal obligations or political commitments.

⁶ There is a long academic debate about how to interpret this and there is little agreement on the details. There is agreement, however, that ‘general principles of law’ mostly derive from civil law. Examples are concepts like equity, *estoppel* or good faith. It is generally agreed that principles of administrative law, such as transparency or honesty, are not general principles in the sense of Article 38.

⁷ In short, customary international law derives from the consistent and widespread conduct of States (State practice) and the belief that the law requires States to act in a certain way (*opinio juris*). In light of these requirements, it is yet to be established whether electoral issues, such as transparency or honest, count as part of international customary law. See Nasiru Adamu Aliyu, “Concept of Democratic Elections Under International Law”: http://www.eurojournals.com/rjjs_10_02.pdf or Avery Davis-Roberts and David J. Carroll, “Using International Law to Assess Elections”: http://www.cartercenter.org/resources/pdfs/news/peace_publications/democracy/InternationalLaw-AssessElections.pdf.

⁸ General Comment 25, paragraph 20.

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info@democracy-reporting.org