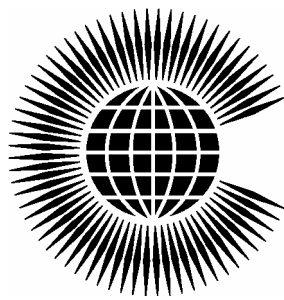


Kenya General Election

27 December 2007

The Report of the
Commonwealth Observer Group



Commonwealth Secretariat

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Note: The Final Report was signed by all Observers. However for technical reasons neither the Letter of Transmittal nor Report Annexes are included in the web-based version of the Report.

Chapter One

INTRODUCTION

Following an invitation from the Minister of Foreign Affairs of Kenya to constitute a Commonwealth Observer Group for the 2007 General Election in Kenya, the Commonwealth Secretary-General, Rt Hon Don McKinnon, sent a three-person Assessment Mission to Kenya in October 2007. (A Copy of the Foreign Minister's Invitation Letter and Secretary-General's response are attached at **Annex 1**).

The purpose of the mission was to determine with the major stakeholders in the Kenyan political environment whether there was broad support for the Commonwealth to observe the elections. The mission was also mandated to ensure that Commonwealth observers would have full access to polling and tallying centres.

The mission briefed all its interlocutors on the *modus operandi* of a Commonwealth Observer Group. It was able to gather valuable information on the political scene in Kenya and factors impinging on the electoral process. It was also able to explore logistical arrangements for the Commonwealth Observer Group. The mission concluded that there was broad support for the presence of Commonwealth Observers and that the Group would be able to fulfil its mandate freely.

Accordingly, an observer group was constituted, which included thirteen Commonwealth eminent persons supported by six Commonwealth Secretariat staff members. The group was led by H E Dr Ahmed Tejan Kabbah, former President of Sierra Leone. The full Composition of the Group is attached at **Annex 2**.

Terms of Reference

The following were the terms of reference of the Group:

- *"To observe relevant aspects of the organisation and conduct of the General Elections which are scheduled to take place on 27 December 2007;*
- *To consider the various factors impinging on the credibility of the electoral process as a whole and determine in its own judgment whether the elections have been conducted according to the standards for democratic elections to which Kenya has committed itself, with reference to national election-related legislation and relevant regional, Commonwealth and other international commitments;*
- *To act impartially and independently and conduct itself according to the standards expressed in the International Declaration of Principles to which the Commonwealth is a signatory. The Group has no executive role; its function is not to supervise but to observe the process as a whole and to form a judgement accordingly;*
- *To write a Final Report, which could include proposals and recommendations to the authorities concerned on institutional, procedural and other matters as would assist the holding of future elections;*
- *To submit its Report to the Commonwealth Secretary-General, who will, in turn, forward it to the Government of Kenya, the Chairperson of the Electoral Commission of Kenya, the leadership of the political parties that took part in the elections and thereafter to all Commonwealth Governments."*

Activities of the Group

The Group arrived in Kenya by 19 December 2007 and issued an Arrival Statement (**Annex 3**). During the days preceding their deployment they were briefed by the Commonwealth Secretariat Staff team which had arrived a few days earlier to make arrangements for the Group's arrival. The briefings continued with various organisations including the Electoral Commission of Kenya (ECK), political parties, civil society groups, the academia, and the media. The Group also met with Commonwealth High Commissioners, representatives of international organisations as well as domestic and international observer groups. A list of organisations consulted by the Group is attached at **Annex 4**.

The Commonwealth Observer Group and three Commonwealth Secretariat support staff was deployed on 23 December in nine teams, including two one-person teams deployed in Eastern and North Eastern Provinces. The teams covered the following regions: Nairobi, Central, Rift Valley, Nyanza, Western, Coast, Eastern and North Eastern. A copy of the deployment schedule is attached at **Annex 5**.

On arrival at their places of deployment, the teams familiarised themselves with their assigned areas. They called upon the local police and the District Electoral Co-ordinators and met political and civil society stakeholders at the local level to assess the final preparations for the elections. They observed the final stages of the campaign and also met with members of the public. On 23 December, the Chairperson travelled to Central Province where he was briefed on 24 December by various local stakeholders including the District Electoral Co-ordinator and a representative of the National Council of Churches of Kenya (NCCCK).

On polling day (27 December), the Group visited 158 polling stations in 14 constituencies across all eight provinces. They were assisted in their work by Observation Notes and Checklists as attached at **Annex 6**.

On 28 December the Chairperson and some members of the Group were able to exchange views with other international and domestic observers. On the same day, the Group reassembled in Nairobi for debriefings. On the basis of the team's observations in the field, the Chairperson issued an Interim Statement on the conduct and findings of these elections on 29 December 2007. A copy of the statement is attached at **Annex 7**.

On 31 December, following the outbreak of violence in reaction to the announcement of results, the Chairperson of the Group issued a Statement urging all political leaders to publicly call for calm and appealed to all Kenyans to maintain the peace for stability in the country (see **Annex 8**). The Group finalised its Report to the Secretary-General prior to its departure from Kenya on 1 January 2008. A copy of the Departure Statement which was issued by the Chairperson on 2 January is attached at **Annex 9**.

Chapter Two

THE POLITICAL ENVIRONMENT

Early Elections

The 27 December poll was the ninth general election since Kenya's independence on 12 December 1963.

Elections in Kenya, under universal adult suffrage, began with pre-independence polls in May 1963 to decide who would lead Kenya into independence. The Kenya African National Union (KANU), led by Jomo Kenyatta, emerged victorious.

Elections due in 1968 were postponed till 1969, and were held on a single-party basis, after the Kenya People's Union, formed in 1966, was banned. Kenya thus became a *de facto* one-party state, and President Kenyatta was re-elected unopposed in 1969 and 1974. He died in office in 1978, and was succeeded by President Daniel arap Moi.

President Moi was elected unopposed in 1979. Kenya was declared a *de jure* one party state by the National Assembly in June 1982. President Moi was re-elected unopposed in 1983 and 1988 general elections.

Return of Multiparty Politics

1992 Elections

Under strong domestic and international pressure, the ruling KANU party held a special conference in December 1991 and agreed to introduce a multiparty political system, and new political parties were legally registered. A total of eight political parties contested the 1992 elections. President Moi was re-elected, although he only received 36.8 per cent of the vote cast, and KANU won a strong majority in Parliament, benefiting from a divided opposition.

1997 Elections

In the run-up to the 1997 election 16 new parties were registered, bringing the total registered parties in Kenya to 27. President Moi won a further term of office in December 1997. He obtained 40.12 per cent of the vote, again profiting from a split opposition. KANU also won a narrow majority in the parliamentary election.

Recent Elections

2002 Elections

In November 2001, President Moi nominated Mr Uhuru Kenyatta, son of the late President Kenyatta, to Parliament and appointed him to the Cabinet, in an effort to rejuvenate the KANU leadership ahead of the 2002 General Election. In March 2002, the ruling KANU party absorbed the smaller National Development Party. President Moi remained Chairman of KANU, while the NDP leader, Mr Raila Odinga, became Secretary-General of the party. Having served two terms after 1992, President Moi was constitutionally barred from any further term in office, and publicly stated that he would stand down from mid-2002.

In July 2002 President Moi announced that Mr Uhuru Kenyatta was his preferred choice as the ruling KANU party candidate for the 2002 Presidential Election. Leading KANU politicians opposed to Mr Kenyatta's nomination as Presidential candidate formed a faction within KANU, known as the Rainbow Alliance. Vice-President Professor George

Saitoti, who had publicly expressed his intention to seek nomination as a presidential candidate for the ruling party, was removed from office by President Moi. Earlier in 2002 leading Opposition politicians had decided to form an alliance ahead of the election. This resulted in the formation of the National Alliance for Change in February 2002, composed of the Democratic Party, Ford-Kenya and the National Party of Kenya. Ten other parties, together with two pressure groups, later joined these three to form the National Alliance (Party) of Kenya. In September 2002 the National Alliance Party of Kenya announced that their presidential candidate would be the prominent opposition politician Mr Mwai Kibaki. Mr Kibaki, a former Vice-President and Cabinet Minister, who resigned from the KANU Government in 1991, had campaigned unsuccessfully as a Presidential candidate both in 1992 and 1997.

Dissent increased within KANU, the ruling party, over President Moi's choice of Mr Kenyatta as the party presidential candidate. On 14 October 2002, the day of Mr Kenyatta's official nomination, influential politicians carried out their threat to leave the ruling party, and took over the then little known fringe party, the Liberal Democratic Party (LDP).

Talks immediately began between the LDP and other opposition groups on forming a "super alliance". The talks resulted in the creation of the National Rainbow Coalition (NARC) – an alliance on a 50-50 basis between the National Alliance Party of Kenya and the Liberal Democratic Party of Kenya. Two days later, 30 KANU MPs led by Secretary-General Mr Raila Odinga publicly crossed the parliamentary floor and took seats on the opposition benches. On 22 October 2002 the fourteen parties and two pressure groups comprising the National Rainbow Coalition announced that Mr Mwai Kibaki would be their joint presidential candidate. A steady stream of defections from the ruling party, including Cabinet Ministers, began. There were a few defections in the reverse direction, and also to other opposition parties, but these were of less significance.

On 25 October 2002 President Moi dissolved Parliament, paving the way for Kenya's eighth General Election since independence. The 2002 election pitted political veteran Mwai Kibaki against Uhuru Kenyatta. Mr Kibaki won a landslide election victory on 27 December 2002, securing 62.21% of the popular vote, while NARC won 132 seats of the 210 elected seats in Parliament. His key campaign promises included a pledge to fight endemic corruption and to address Kenya's economic woes and provide Kenyans with a new Constitution within 100 days.

A Commonwealth Observer Group was present for the 2002 elections, and concluded "we have no hesitation in saying that in our view the electoral process was credible, the conditions existed for a free expression of will by the electors and the results reflected the wishes of the people of Kenya".

2005 Constitutional Referendum

The biggest disagreement within the NARC coalition arose over completion of the constitutional review process started under President Moi. President Kibaki promised a new Constitution in "a hundred days" during his 2002 campaign. A lengthy public consultation process produced a new Draft Constitution (known as the Bomas Draft) in March 2004. But its provisions, notably those reducing the executive powers of the Presidency, proved unacceptable to the Government.

After a protracted legal wrangle, and amid violent protests in Nairobi, the government secured Parliamentary approval for certain key amendments to be made to the Draft Constitution, and a new Constitution Bill was published. This new Draft Constitution was

felt by some to have been illegitimately modified, for example, to preserve wide powers for the President, against the spirit of the Bomas Draft.

The new Draft Constitution was rejected by 58% of voters when it was put to a referendum in November 2005. This result was also widely viewed as a vote of no confidence in President Kibaki's government. This prompted President Kibaki to dismiss his entire government and start with a new team which excluded all those Ministers (mainly from the LDP faction of the NARC Coalition) who campaigned and voted against the Draft Constitution. Some ministerial nominees rejected their appointments. This effectively marked the end of the NARC Coalition.

Major Political Parties

Kenya did not appear to have a tradition of historically strong political party structures. None of the major political parties in the 2007 elections were in existence at the last elections. By December 2007, there were over 300 registered political parties in Kenya, though 117 fielded parliamentary candidates, and 118 took part in civic elections. However, during the 2007 elections, only 3 political parties/coalitions received a significant share of the vote. These were:

Party of National Unity (PNU)

President Mwai Kibaki sought a second term in office as the PNU flag bearer. The PNU was formed in August 2007, initially as an alliance of seven parties, namely the Democratic Party (DP), FORD-KENYA, FORD-PEOPLE, KANU, NARC-KENYA, New Ford Kenya and Shirikisho. These parties were later joined by twenty others, namely Agano, Community Development Party, Ford Asili, Forepa, Kenya Republican Reformation Party, Kenya Union of National Alliance, Mazingira Green Party, National Alliance Party of Kenya, National Renewal People's Party, New Aspirations Party of Kenya, New Generation Party, Republican Liberty Party, Saba Saba Asili, SAFINA, Sheda Party, Sisi Kwa Sisi, United People's Congress, Vijana Progressive and Workers Congress. All these parties supported President Kibaki's presidential bid, while some separately fielded parliamentary and civic candidates.

In terms of policy, the PNU stood for continuity, stability, sustained economic recovery, free secondary education, poverty reduction, job creation, free health and antenatal care, rehabilitation of infrastructure, including roads and railways, affirmative action and a "clean hands" Cabinet.

Orange Democratic Movement (ODM)

President Kibaki's main challenger was Mr Raila Odinga, leader of the Orange Democratic Movement, which broke away from the Orange Democratic Movement – Kenya, the political party that emerged from the successful campaign against the Government's Draft Constitution referendum in 2005.

The key issues in the Orange Democratic Movement manifesto included delivering a new Constitution in six months, a fight against corruption, the eradication of poverty and reducing unemployment. The ODM also promised free secondary education and subsidised tertiary education. In addition, the ODM pledged equitable distribution of resources, improved security, and affirmative action for women in Parliament and government. The ODM also promised to devote additional resources to infrastructural development, ICT, sports, agriculture and tourism.

The ODM party advocated 'majimbo', a quasi-federalist arrangement that would devolve political and financial powers to provincial administrations.

Orange Democratic Movement-Kenya (ODM-K)

Mr Stephen Kalonzo Musyoka was the Presidential candidate for the Orange Democratic Movement – Kenya (ODM-K), the political party that emerged from the successful campaign against the Government's Draft Constitution referendum in 2005. ODM-K espouses the principles of social democracy. The ODM-K manifesto places emphasis on governance issues, promising devolved government, a fight against corruption, and security, and affirmative action for women. The ODM-K also put economic development, poverty eradication and employment at the top of its agenda. On the social front, ODM-K promised free primary and secondary education and free health care for children.

Major Political Issues

The political manifestos of the major political parties appeared to be very similar in content, and did not appear to have been a decisive factor in the campaigns. The two major political parties campaigned on the platform of continuity of economic success and development (PNU) versus “time for a change” (ODM). We formed the view that the major political issues of the day were the following:

Ethnicity

Ethnicity remains the fulcrum for organising politics in Kenya. From colonial times, Kenyan society was ethnicised as part of a “divide and rule” strategy. This contributed to an imbalance in regional development, which persists till today. Political parties and alliances right from independence were largely formed along ethnic lines. No single ethnic group has so far had sufficient numbers to win elections alone. This has resulted in the formation of various political alliances, created on an ethnic basis, with the aim of broadening support and increasing the likelihood of gaining political, and thereby hopefully economic power. Many Kenyans we met expressed the view that ethnicity and the personalities of key candidates remained the key mobiliser of political support, and therefore strongly influenced voting patterns. There appeared to be a strong perception among voters that having a kinsman in State House would substantially increase their access to the national cake.

Political Reform

There was a palpable mood among many Kenyans, particularly the youth, of the need for major reforms in the governance of Kenya. High on the agenda in this regard was addressing pandemic corruption, devolution of political and administrative power, and wider constitutional reform.

Political Violence

Kenya experienced significant levels of political violence during the electoral process, which led to several deaths and injuries. We were particularly concerned about violence against women candidates. The violence manifested itself in several forms, including intimidation of rivals, intra-party clashes during party nominations, inter-party altercations during the campaign, and unrest in the post-polling period.

Gender Issues

The patriarchal nature of Kenyan society to a greatly extent influenced the political party structures in the country. Men hold key leadership positions within the political party structures. As in other countries, being a candidate involves considerable financial expenditure. In this regard, women, generally less financially endowed, are disadvantaged. These dual imbalances manifested themselves in the unfair elimination of female candidates during the nominations exercises of political parties.

The gender concerns are further heightened by the level of gender-based violence that was targeted at female contestants in the form of verbal abuse, emotional threats and blackmail or physical and sexual assaults, which led to serious injuries, and in one case, to death. This trend significantly frustrated the chances of women participating in the democratic process. The issue of gender marginalisation was also evident in areas where women's voting was informed by the choice of their husbands.

Youth Issues

There appeared to be a greater awareness among political parties of youth issues, and we noted that most political parties placed strong emphasis on issues of particular interest to the youth, such as education and employment.

We formed the impression that generational politics played a key role in this election. The youth, who constitute the majority of registered voters appear to have taken a stronger and more active interest in the electoral process, and significant numbers put themselves forward as candidates for elected office. However, we were told that lack of access to campaign funding for this group, in general, meant that young candidates could not compete on the same footing as those with greater assets.

We recommend a full review of the barriers that prevent young people acting as representatives, including their access to funding and support, and the findings acted upon to increase the political representation of young people in the 18 – 40 age group and to ensure that these young people are able to genuinely compete as electoral candidates.

Chapter Three

THE LEGAL FRAMEWORK

In addition to the Constitution, the General Election was governed by the National Assembly and Presidential Elections Act (NAPEA), the Local Government Act, The Election Offences Act, The Kenya Broadcasting Corporation Act, The Public Order and the Preservation of the Public Security Act, The Registration of Persons Act, The Police Act, The Societies Act and the Penal Code.

The Constitution

The present Constitution was adopted on 12 December 1963, and has been amended several times, most notably in 1964 when Kenya became a republic. Further amendments include:

- in 1991 when a multiparty system was restored;
- in 1997 when all political parties were granted equal access to the media, detention without trial was prohibited and the opposition allowed to participate in selecting the 12 nominated members of the National Assembly; and
- in 1999 when a further amendment reduced the level of presidential control over the legislative process.

Executive Presidency

The Constitution of Kenya provides for an executive President, directly elected by popular vote. The President has to fulfil three criteria for election¹:

- election as a member of the National Assembly;
- receiving the greatest number of valid votes cast in the Presidential Election of any candidate for President; and
- receiving a minimum of 25 percent of the valid votes cast in at least five of the eight provinces.

Parliament (National Assembly)

There is a provision for a maximum of 210 constituencies², with each constituency represented by one elected member³. An additional 12 members of the National Assembly are nominated by the parliamentary parties according to their proportion in the National Assembly and appointed by the President following a general election⁴. Kenya is also divided into 2,486 local government electoral areas (or civic wards). The 9th Parliament of Kenya was dissolved on 22 October 2007.

¹ The Constitution of Kenya (Revised Edition 2001), Chapter II, Section 5 (3)(f)

² The Constitution of Kenya (Revised Edition 2001), Chapter III, Section 42 (2)

³ The Constitution of Kenya (Revised Edition 2001), Chapter III, Section 32 (1)

⁴ The Constitution of Kenya (Revised Edition 2001), Chapter III, Section 33

Qualification for Election to Parliament

Section 34 of the Constitution of Kenya lays down the qualifications for election as a Member of the National Assembly. Under this provision, a person shall not be qualified unless at the date of his nomination for election:

- he (*sic*) is a citizen of Kenya who has attained the age of twenty-one years; and
- he is registered in some constituency as a voter in elections to the National Assembly; and
- he is able to speak and, unless incapacitated by blindness or other physical cause, to read the Swahili and English languages well enough to take an active part in the proceedings of the National Assembly; and
- he is nominated by a political party in the manner prescribed by or under an Act of Parliament.

Disqualification for Membership of Parliament

Section 35 of the Constitution outlines the circumstances under which a person shall be disqualified from being elected to the National Assembly. Under Section 35, a person shall not be qualified to be elected as an elected member if, at the date of his nomination for election he (*sic*):

- is, by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to a foreign state; or
- is under sentence of death imposed on him by a Court in Kenya, or is under sentence of imprisonment (by whatever name called) exceeding six months imposed on him by such a Court or substituted by competent authority for some other sentence imposed on him by such a Court; or
- is, under any law in force in Kenya, adjudged to be of unsound mind; or
- is an undischarged bankrupt, having been adjudged bankrupt under any law in force in Kenya; or
- subject to such exceptions and limitations as may be prescribed by Parliament, has an interest in a class or description of contract made with the Government of Kenya as may be prescribed by Parliament; or
- holds or is acting in any office in the public service (including the office of judge or member of a court of law or an office to which section 69 applies), in the armed forces of the Republic or in a local government authority.

Constitutional Amendments

An amendment to the Constitution adopted in 1991 permitted the establishment of a multiparty system. In 1997 the National Assembly further amended the Constitution to grant all political parties equal access to the media, to prohibit detention without trial and to allow the opposition to participate in selecting the 12 nominated members of the National Assembly. In 1999 a further amendment reduced the level of presidential control over the legislative process.

The Electoral Commission of Kenya (ECK)

The Constitution provides for an Electoral Commission consisting of a Chairman and a maximum of 21 members appointed by the President⁵. The Constitution defines the Commission's responsibilities as⁶:

- the registration of voters and the maintenance and revision of the register of voters;
- directing and supervising the Presidential, National Assembly and local government elections;
- promoting free and fair elections;
- promoting voter education throughout Kenya; and
- such other functions as may be prescribed by the law.

The Electoral Commission also has the mandate to delimit parliamentary constituencies, with the responsibility to review the number, boundaries and names of the constituencies at intervals of between eight and 10 years, and the power to alter the number, the boundaries or the names if it considers that desirable⁷. There are also additional responsibilities to review local authorities' electoral areas, their boundaries, numbers and names, as well as the determination of the ratio of party nominees and eligibility in respect of nominated Members of Parliament and Councillors.

The Chairperson and Vice-Chair of the ECK must have held or be qualified to hold the office of Judge of the High Court or Judge of Appeal Court. All Commissioners must be Kenyan citizens. There is a Code of Conduct for members of the Electoral Commission provided under the National Assembly and Presidential Elections Act.

Electoral Commissioners are appointed by the President for a term of 5 years and are eligible for reappointment, enjoy security of tenure and can only be removed by the President. For the 2007 elections there were 22 Electoral Commissioners, including the Chair.

The independence of the Electoral Commission is guaranteed by the Constitution; in the exercise of its functions it is not subject to the direction of any other person or authority⁸. We were impressed by the leadership, competence and professionalism of the Electoral Commission in the conduct of the 2007 General Election; this notwithstanding the fact that out of the total 22 Commissioners only five⁹ had conducted a General Election before. We heard very few criticisms of the ECK's competence during the election campaign.

Constituency Demarcation

Parliamentary elections took place in 210 constituencies. On the basis of ECK statistics dated November 2007 the number of registered voters in each constituency varied significantly – from 12,867 voters in constituency 024 (Lamu East) to 249,811 voters in constituency 008 (Embakasi). These differences were highlighted in our report on the

⁵ The Constitution of Kenya (Revised Edition 2001), Chapter III, Section 41

⁶ The Constitution of Kenya (Revised Edition 2001), Chapter III, Section 42A

⁷ Election Manual, Electoral Commission of Kenya, p. 16

⁸ The Constitution of Kenya (Revised Edition 2001), Chapter III, Section 41(9)

⁹ This includes the Chairman, Mr Samuel Kivuitu, Deputy Chair Mr Kihara Muttu, Amb Jack Tumwa, Mrs Anne Wambaa and Mr Jeremiah Matigaro

2002 elections and are unacceptable. In our view, each vote should have a broadly equivalent value which cannot be the case with such a large range.

The ECK prepared a scheme which would have increased the number of constituencies and rebalanced the number of voters in each to provide a more equitable arrangement but Parliament failed to endorse it. The failure to rebalance voter numbers results in an unfair position and must be regretted.

We recommend that this matter be addressed well before the next elections.

Funding

The COG was advised that the ECK budget and extra budgetary requests have been approved¹⁰. The ECK appears to have been appropriately funded to be in a position to conduct the elections on schedule, to improve electoral awareness across the country, to properly train and equip its election officials and to produce the election results in a timely manner.

The National Assembly and Presidential Elections Act (NAPEA)

Under the National Assembly and Presidential Elections Act (NAPEA) the Electoral Commission of Kenya has complete authority to appoint officials for the conduct of elections. The law also puts police on election duties under the direction and instruction of the Electoral Commission. The Electoral Commission and electoral officers are immune from any personal liability for actions done in good faith in the exercise of their functions.

The Local Government Act

This Act provides for the establishment of authorities for local government, defines the functions of local government and sets out the manner in which councillors of local authorities shall be elected. The Act further provides that whenever there is a general election under the NAPEA, there shall simultaneously be held an election of local authority councillors.¹¹ The ECK has similar responsibilities to conduct elections under this Act as under the NAPEA.¹² The Act further requires all candidates seeking election to local authorities to be members of a political party.

Kenya Broadcasting Act

The Kenya Broadcasting Act stipulates that the Kenya Broadcasting Corporation (KBC) has the responsibility to ensure that, in its allocation of broadcasting hours, a fair balance among different political viewpoints is maintained. This also extends to the allocation of free airtime for all registered political parties participating in the election.

The Political Parties Act of 2007

This Act provides for the registration of political parties. It further provides for the provision of state funding to political parties. While the Act does not control election expenditure it does require political parties to disclose the source of any funding they receive. The Act, though assented to on 22 October 2007, is yet to come into effect. We recommend that the Government takes this final step.

¹⁰ ECK briefing, Nairobi, 19-12-2007

¹¹ Section 58(1).

¹² Section 58(2).

Changes in Procedures for Polling Day [see Annex 10]

Following consultations between the Electoral Commission and political parties, in a circular¹³ to all Returning Officers prior to polling day, the Electoral Commission outlined some important changes regarding the functions of presiding officers and their deputies, including changes to polling station procedures and protocols. These included:

Duration of polling

The opening of polls was to occur at 06:00 and close at 17:00, with the proviso that if there were voters in the polling station at 17:00 waiting to cast their votes they were to be allowed to cast their votes, even if this were only possible during the night.

Voters' register

The Presiding Officer or Deputy Presiding Officer was free to consult the black book and the reference voters' register if s/he failed to find a voter's name in the polling station register:

- where the Presiding Officer or Deputy Presiding Officer did so s/he was to make a note in writing of this fact; and
- any voter whose name did not appear in any of those registers was not to be allowed to vote, even if s/he held a voter's card.

The Circular also outlined changes to the number of voters allowed per polling station, not limiting it to 500 voters in situations where the higher literacy level of voters (mainly in urban areas) allowed for more voters (up to 700), dependent on the complexity of ballot papers caused by the large number of candidates. In terms of the number of candidates' agents allowed in polling stations, Presiding Officers and Deputy Presiding Officers were free to determine how many agents were to be allowed in the polling station at one time. Final major procedural change involved the stipulation that voters who required assistance could in the 2007 General Election seek the assistance of another voter, if the voter to be assisted preferred that voter to assist him/her. Voting was also no longer limited to the placing of a cross to mark ballots; voters were free to write anything, provided the intention of the voter was clear.

¹³ "Instructions to Returning Officers on some important changes regarding the functions of the Presiding Officers and their deputies and Polling Station Procedures and Protocols", Circular from the Chairman of the Electoral Commission of Kenya, Mr Samuel Kivuitu, 12 December 2007

Chapter Four

PREPARATIONS FOR THE ELECTION

Voter registration

For the past nine years, Kenya has adopted the system of continuous registration. Section 43 of the Constitution sets out the qualifications to be registered as a voter. Section 4A of the National Assembly and Presidential Elections Act (NAPEA), Chapter 7, specifies that only those citizens who produce National Identity Cards or Kenyan passports and Voter ID cards shall be allowed to vote at Presidential, Parliamentary and Civic Elections.

The voter registration exercise began on 11 June 2007 and was scheduled to close on 10 July 2007, but was extended to 31 July. At the conclusion of the voter registration exercise, 1,225,156 new voters were registered. According to the ECK, a total of 14,267,764 people were registered to vote in the 2007 General Election. The total voters on the list of electors represented 82.1 per cent of the Kenyan population of 17.3 million aged 18 years and older. It was estimated that 7.5 million of the registered voters comprised women with 68.8% of them aged between 18 years and 40 years.

It was reported that not every qualified elector with a National ID card or Kenyan passport had applied for a Voter ID card. While visiting the offices of District Coordinators during deployment the Group observed queues of eligible voters who were still collecting their Voter ID cards. The ECK officials at the district level reported that their officers had visited the homes of eligible voters in villages in an effort to facilitate accessibility to the registration process. The same methodology was also employed in distributing national ID cards. The ECK officials said that they recognised the inability of some voters to access the registration offices and that officials were requested adopt this approach to ensure maximum success of the processes of voter registration and ID card distribution.

Double and Multiple registered voters

Prior to Election Day the ECK recognised that there were high instances of multiple registrations and took corrective action resulting in a significant reduction of such registrations. However, despite this commendable effort, over 400,000 duplicated names remained on the list. These names were identified and placed on a special list which was to be sent to each polling station.

The problems of multiple registrations were attributed partly to the failure of the registration machinery to cancel the former/original registrations of registrants who were transferred and those who made corrections to their particulars.

In order to address the over 400,000 names that remained on the list the ECK developed the following procedures for polling officials to observe:

- voters who had registered twice (i.e. double registered voters) were to be allowed to vote if the following conditions were met:
 - o the voter was to surrender to the Presiding Officer both elector's cards;
 - o the Presiding Officer or Deputy Presiding Officer was to emboss both cards as if s/he voted with both of them and retain the cards;

- o the Presiding Officer or Deputy Presiding Officer was to interview the voter first, to convincingly establish that the voter had registered twice as a result of the Electoral Commission's failure or default to delete one of his/her registrations;
 - o the voter was to fill a form entitled "Declaration by a doubly registered voter" which the District Election Coordinator was to supply to the Returning Officer, who in turn was to supply it to the Presiding Officers and Deputy Presiding Officers;
 - o the Presiding Officer or Deputy Presiding Officer was to firstly, make a record showing the names and serial numbers of the voters' cards and registration centres they originated from, and secondly, to retain the form "Declaration by a doubly registered voter".
- voters who had registered more than twice were prohibited from voting, and faced possible legal sanctions if they attempted to vote. We did not observe any instances of voters in this category attempting to cast a vote.

Voter Education

The ECK conducted a very comprehensive voter education programme. It contracted civil society groups/organisations countrywide to carry out its voter education campaign over a 40 day period. This involved voter educators in teams of two visiting homes, markets, churches, mosques and religious meetings in villages. The messages conveyed to the voters were focused on the following themes:

- good governance;
- how to vote;
- free and fair elections;
- determining spoilt votes; and
- how to mark the ballots: this was especially designed for illiterate voters.

Apart from funds released through the National Budget, funding was received through UNDP and its basket. While on deployment, members of the Group saw ECK posters and billboards strategically displayed in constituencies. The Group also observed newspaper advertisements, publications, television ads and programmes which sought to provide information and guidance to the voters. These programmes covered several topics and focused also on the themes mentioned before. The ECK also continuously urged voters, party supporters and candidates to desist from violence during and after the elections and to show respect to others while campaigning.

The ECK met political parties and also had regular public meetings to explain the electoral process to Kenyans. The Media also played a significant role in keeping the public informed.

Though an extensive voter education programme was implemented, we observed that many illiterate voters nevertheless requested assistance in polling stations. In some instances, Presiding Officers requested those candidates' agents present to observe the voter casting the ballot in close proximity, potentially violating the privacy of the voter and the confidentiality of the vote. In any election, the secrecy of the ballot is sacrosanct. There is an added risk in that, if a voter casts his/her ballot in full view of a candidates' agent, it can open the door for potential abuse through voters "selling" their vote to the candidates' agents. While it is noted that in some areas up to 95% of voters are illiterate, in our considered judgement, we are of the view that these voters would still in fact have been able to distinguish party symbols and party colours. Many

countries experience the same challenge of the high number of illiterate voters and they have resolved it with symbols, colours and photos of the candidates. We hope that during the next election the ECK will place emphasis on coordination with the parties and the media to discourage this voting practice.

Administrative Framework

In order to assist the ECK achieve its mandate there is a permanent secretariat at the centre. The secretariat is headed by an Administrative Secretary who is the accounting officer. He/she is assisted by a deputy and there are heads of departments including Human Resources, Finance, Information Technology, Cartography, Procurement and Supplies, Public Relations and Training.

In keeping with the authority stipulated by the National Assembly and Presidential Elections Act (NAPEA) and the Local Government Act, the ECK appointed various categories of registration and election officers to assist in managing the registration and electoral processes. In the voter registration process these officers included Registrations Officers, Assistant Registration Officers and Registration Clerks.

For the conduct of elections the ECK appointed several temporary election officials, included among these were Deputy District Coordinators to assist the District Election Coordinators at the district level, Returning Officers responsible for the conduct of the polls in each constituency, Deputy Returning Officers to assist the Returning Officer, Presiding Officers and Deputy Presiding Officers responsible for the conduct of the polls at polling centres and polling stations along with polling and counting clerks to assist with the voting process at each polling station.

The temporary officers were involved in three days intensive training in order to equip them with the requisite skills and knowledge regarding the conduct of elections, including the laws governing the election process.

Training

The ECK, specifically the training officials of the secretariat, was responsible for the recruitment and training of election officials, and a cascade approach to training was adopted. The ECK trained District Officers who in turn trained the Returning Officers, their deputies and polling clerks. The training for the polling staff was held for three day periods in 2007 as against one day periods in 2002. ECK officials explained that this was because the one day training sessions in 2002 had proved to be inadequate.

At the conclusion of their training, polling staff were required to take the Oaths of Office and Secrecy. In some constituencies polling staff refused to take these oaths because they were dissatisfied with the quantum of allowances (meals and travelling) being offered. This situation arose because there were rumours that their colleagues in other constituencies were receiving higher allowances. The ECK was very firm on its offer of allowances and the situation was later resolved.

The ECK also conducted training of security personnel and party agents in order that these two categories of persons could develop an appreciation and understanding of their roles and functions on Election Day.

The nomination process

Political Parties

At the time of election there were over 100 registered political parties. However the three major political parties were:

- Orange Democratic Movement - Kenya (ODM-Kenya)
- Orange Democratic Movement (ODM)
- Party of National Unity (PNU)

The other major parties were:

- Chama Cha Uma (CCU)
- KADDU
- Kenya African National Union (KANU)
- NARC
- Safina

Presidential Candidates

Nine candidates nominated for the Presidential Election:

- Mr Joseph Karani (Kenya Patriotic Trust Party/ KPTP)
- Mr Mwai Kibaki (Party of National Unity/ PNU)
- Mr Nixon Kukubo (Republican Party of Kenya/ RPK)
- Mr Kenneth Matiba (Saba Saba Asili)
- Mr Pius Muiru (Kenya People's Party/ KPP)
- Mr Kalonzo Musyoka (Orange Democratic Movement – Kenya/ ODM-K)
- Mr Raila Odinga (Orange Democratic Movement/ ODM)
- Ms Nazlin Omar (Workers Congress Party of Kenya)
- Mr David Waweru Ngethe (Chama Cha Uma/ CCU)

Nomination of Parliamentary Candidates

Section 32 of the Constitution stipulates that Kenya shall be divided into constituencies and that each constituency shall elect one member to the National Assembly. The NAPEA further elaborates on the manner of nominations. Notably, the ECK specifies the days for the nomination of candidates by political parties, which shall not be less than twenty-one days before the formal parliamentary nomination date. The nomination paper shall have a proposer and a seconder, and not less than seven or not more than 18 supporters. The proposer, seconder and supporters must be members of the same political party as the candidate and must also be registered as voters in the constituency for which the candidate proposes to vie or run. No subscriber can validly support more than one candidate for the same election.

In the General Election, a total of 117 parties fielded parliamentary candidates. For the first time in the history of general elections held in Kenya, no party fielded a candidate in every constituency. A total number of 2,548 candidates vied for parliamentary seats, compared to 1,033 candidates at the previous parliamentary elections in 2002. This is despite the fact that the number of constituencies (210) has remained the same. Out of the total figure of 2,548 parliamentary candidates, 269 candidates were female.

Local Government (Civic Elections)

The Local Government Act (LGA) governs the establishment and functions of local government in Kenya. The Government has unlimited powers to establish, alter, amalgamate or divide local governments, in consultation with the Electoral Commission

(Sections 5 and 9 of the LGA). Whenever there is a general election, the law states that “there shall simultaneously be held an election of all councillors” and for that purpose it mandates the Minister to dissolve all local authorities upon the dissolution of Parliament (Section 58 of the LGA).

Councillors are elected every five years under the LGA. A total number of 118 parties endorsed 15,332 candidates are standing for the civic elections, out of which 1,478 are women.

Supply of materials

As at 28 November 2007 the ECK reported most of the election materials had already been received. The receipt of ballot papers was however still in progress. By 17 December all materials for the election were received by the ECK and Returning Officers. All materials for the polling stations were issued to presiding officers by 26 December. The ECK provided transportation to convey presiding officers, their staff and electoral supplies to their polling stations.

Election Observers

The Presidential and Parliamentary Elections (Amendment) Regulations 2002 provide that the Electoral Commission may, at any election, accredit any individual, association, organisation or institution who or which is manifestly non-partisan to act as election observers¹⁴. The ECK accredited local and international observers from 62 organisations¹⁵, including some 17,000 domestic observers from the Kenya Election Domestic Observer Forum (KEDOF) as well as other international observer missions, several of whom the Group met during its briefings. Those accredited include the European Union (EU), International Republican Institute (IRI), the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA) and the Pan African Parliament¹⁶.

¹⁴ Regulation 45 (1), Presidential and Parliamentary Elections (Amendment) Regulations 2002 (Guidelines for Election Observers)

¹⁵ “Over 10,000 to monitor high stakes election”, Daily Nation, p. 6, Thursday 27 December 2007

¹⁶ Other international observer groups accredited by the ECK included: USAid, International Resident Observer Group, Comesa, Pan African Movement, International Foundation for Electoral Systems (IFES), Institute for Democracy and Electoral Assistance, International Conference on the Great Lakes Regions, Municipality of Elverum (Norway), Institute of Global Dialogue and Africa Vision 525 Initiative.

Chapter Five

THE CAMPAIGN

According to the schedule set out by the ECK, campaigns for the Presidential Election were to officially begin on 16 November 2007, the day after the conclusion of presidential nominations. The campaigns for parliamentary and civic elections were to begin once the political parties had completed the nomination of their parliamentary and civic candidates for both elections on 16 November 2007. All campaigns were to officially conclude 12 hours before polling day, though in reality we observed that all the presidential candidates formally concluded their campaigns on 24 December, prior to Christmas Day.

The ECK required all candidates and their political parties during campaigns to¹⁷:

- promote voter education;
- condemn, avoid and take steps to prevent violence;
- avoid using abusive language; and
- desist from offering bribes to voters.

Regulations made it an election offence to carry out campaign propaganda at the polling station, or on polling day itself. It was also an election offence to cause violence during campaigns. The nature of campaigns in Kenya has been such that, effectively, many party leaders (particularly among the opposition), began their campaigns in an unofficial sense after the 2005 Referendum. The campaign platform of “a time for change” emerged after the 2005 Referendum gave birth to a new political party, the Orange Democratic Movement – Kenya (ODM-K). The proliferation of political parties for the 2007 General Election added momentum to this process.

The election campaigns were mainly dominated by the Party of National Unity (PNU) and Orange Democratic Movement (ODM) and the Orange Democratic Movement-Kenya (ODM-K).

Though our Group arrived in Kenya during the concluding phase of the campaigns, we were able to observe the final campaigns of three presidential candidates i.e. President Kibaki (PNU), Mr Raila Odinga (ODM) and Mr Kalonzo Musyoka (ODM-K) in Nairobi prior to our deployment. The campaigns were by and large peaceful, with large crowds of supporters turning out in full party regalia to various lively campaign rallies around the country. As in the 2002 election, incumbents focused on re-election while opposition leaders focused their campaign messages on the need for change e.g. in terms of the two leading presidential candidates, President Kibaki campaigned on the platform of continuity, economic growth and stability while Mr Odinga’s campaign message focused on a “time for change”.

Other campaign methods included mobile loudspeakers, door to door canvassing, posters and billboards, motorcades T-shirts and caps in party colours, as well as advertisements in all media, and “Harambees” (community fundraising events). The campaign methods were largely the same as employed in previous elections, though this time there was a palpable shift in character due to the enhanced competitive spirit of the elections, aided by the large number of political parties and candidates vying for attention from voters.

¹⁷ “A Handbook for the Voter”, Electoral Commission of Kenya (ECK), p. 13

Various stakeholders also observed the conduct of campaigns by the major political parties and concluded that it appeared that the campaigns were largely personality driven, with little interest among supporters in the party manifestos.

Key campaign messages on voter education by the media and the ECK played a significant role in the elections. The campaign message of female candidates was the need for gender equity in the electoral process. Support was sought from political parties to achieve this outcome.

Ethnic violence was one of the negative aspects of the campaign. At certain times there were clashes between party supporters and increased tension between the parties. Both print and electronic media reported extensively on the violence in various campaigns around the country. The campaign environment varied from province to province where there were isolated incidents of violence which resulted in some deaths. We were especially concerned at reports on abuse levelled at female candidates, especially on the campaign trail.

We were concerned by numerous reports on the abuse of state resources for party political purposes, such as the use of official vehicles during campaigns. Though it is recognised that there are some advantages to incumbency, undue advantage was taken in some instances. We reiterate the call made by the Commonwealth Observer Group in 2002, for all parties to negotiate an agreement regarding relevant regulations concerning the use of state resources at future elections. There were some reports of vote buying but the Group could not verify those claims. If the allegations proved to be true, they would clearly have been in violation of the ECK's Electoral Code of Conduct.

Campaign Funding

At present there is no restriction on the amount of campaign expenditure. This campaign saw, by previous standards, exceptionally high campaign expenditure. To ensure a more level playing field between contesting parties, we recommend that some consideration is given to placing restrictions on the amount that can be spent during an election campaign.

Presently there is no requirement for political parties to disclose the source of campaign funding. We see this as a major omission and hold the view that the voting public of Kenya are entitled to know from what sources political parties obtain their campaign funds.

Briefcase Parties

The group noted the considerable number of political parties campaigning in this election. Some of those parties were very small and were referred to as "briefcase parties". The Political Parties Act, which contains a requirement to have a minimum number of members, will see a reduction in the number of very small parties and thus will go some way towards addressing this issue. We noted that local government candidates are required to be members of a political party. We saw this as unnecessary and as an added encouragement to the creation of more political parties.

Government decision making during the campaign

It was a matter of concern to the Group that the decision making power of the incumbent government provided a considerable advantage during the election campaign. We noted that during the campaign the government granted land tenure to a number of Kenyans, made adjustments to the salaries of public servants. The President, on a number of occasions, created new districts in several provinces. We are of the view that there should be a moratorium on substantial government decision making for a defined period before the election.

Chapter Six

THE MEDIA AND ELECTION COVERAGE

The media plays a very important role during an election process by enabling full public participation in elections, not only by reporting on the performance of the government and the policies of the contesting parties, but also through educating the voters on how to exercise their democratic rights, reporting on the development of the election campaign and providing a platform for the political parties to communicate their message to the electorate. However, for the media to play this critical role, they have to conduct themselves in a responsible and professional manner by adhering to their ethical codes of conduct as well as media guidelines for responsible election reporting.

During the 2007 elections in Kenya, various media outlets - print, radio and electronic - generally played a positive role in disseminating information on the electoral process to the voting population of Kenya. They carried candidate debates, panel interviews and discussions which were essential in providing voter education, keeping voters informed about the issues and the candidates. They also imparted basic information about how to vote and the importance of voting.

We were able to follow media coverage of the electoral process, especially newspapers, television news bulletins and continuous updates from the radio stations, only during the last part of the campaign, and as such our observations are limited to that period. Our overall impression was that the majority of the media did an excellent job in informing the voting public on the political issues relevant to the election. It was difficult to discern any overt bias, which had been a concern expressed by a number of commentators.

However, we noted that the public owned media, Kenya Broadcasting Corporation (KBC) which is required by law to provide equal and balanced coverage to all political parties participating in the elections was biased in favour of the Party for National Unity (PNU), as the party in government. This observation was confirmed by media monitoring that was carried out during the electoral period. This is regrettable.

The Kenya Broadcasting Corporation Act (the Act) was amended in 1997 to regulate KBC's coverage of political activities during elections. The Act provides for equal coverage of campaign activities for all political parties and their presidential candidates. It was quite clear that KBC failed to comply with this legislative requirement.

The Act also required that KBC, in consultation with the ECK, allocate free broadcasting to registered political parties participating in the election, but this was not done. The Chairman of the ECK publicly complained that KBC had refused to comply. It appeared there was little effective action the ECK could take. We are of the view that there is a need to implement better methods of obtaining compliance with these two legislative requirements during the election campaign. Considerable media coverage was given to decisions taken by the Government right up to the eve of the election. This can give an unfair advantage to an incumbent government. Elsewhere in this report we suggest a moratorium on major decision making in the lead up to an election.

The media, particularly the print media paid particular attention to the role of the Electoral Commission of Kenya, and the whole electoral regime. Most aspects of the electoral process were extensively covered and reported on. There were also some very

insightful analyses and commentaries authored and published in the major newspapers, namely, The Nation and The Standard. Furthermore, most television stations ran special election related programmes to inform voters about their rights and well as providing a platform for the major candidates to espouse their programmes and manifestos.

In the lead up to the elections, the Media Council of Kenya, ECK and media practitioners developed guidelines aimed at ensuring responsible media coverage, upholding journalistic professional standards, impartiality, and independence. These were often flouted. It is not clear how they were enforced and how errant media were sanctioned. Observers were told that the media in Kenya have political leanings that are influenced by ownership, ethnic considerations, and business interests. We were however not able to independently verify these accusations. The media gave full coverage of incidences of election related violence, and in some cases carried articles condemning the violence and calling for peaceful and fair elections.

Sectarian ethnic campaigning by some politicians was denounced in media editorials. However, there were some stories which reported on allegations where it was clear that there was no evidence to substantiate the reports. Such stories, which put unjustified doubt in the voters' minds, are to be deplored. In some cases, the stories led to outbreaks of violence. There is a need to impose better discipline on media that undertake such reporting. Journalists and the media must conduct their duties responsibly by seeking and reporting facts. They should desist from reporting rumour and inflammatory statements that lack authenticity.

There were also instances of anonymous advertisements being published that encouraged voters to support certain political parties. There appeared to be no restriction on the amount of money that could be spent on political advertising, furthermore there appeared to be no consistency with regard to the standards required for election advertising, particularly with regard to the ability of the media to decline advertising on the grounds of taste and decency. We recommend that consideration is given to require all advertisements to carry some form of identification as well as clearer guidelines with regard to disallowing advertising. Elsewhere in this report we comment further on the issue of campaign funding.

The Media Council of Kenya has an important role to play in establishing election reporting guidelines that are accepted by all media outlets. The training of journalists is also an important task so that the standard of election reporting is enhanced. However, overall, we are of the view that there was balanced coverage of the contestants and their issues, leaving aside some occasional partisan reporting and influence by commercial interests.

Chapter Seven

THE POLL AND THE COUNT

A record 117 registered political parties fielded candidates for parliament. Nine candidates contested the Presidency with 2,548 candidates for the 210 parliamentary seats and 15,332 candidates for the 2,500 local authority seats.

Our teams began the day by observing the opening of polling stations. We had, as far as possible, co-ordinated with other international observers to cover as many stations as possible. Throughout the whole process of Election Day, even where polling station officials were under pressure, we were met with courtesy and helpfulness and an open approach to our presence.

THE POLLING

The opening of the polls

We observed Presiding Officers carrying out the opening procedures with thoroughness, ensuring that agents were able to see the empty ballot boxes and affix their seals. Sometimes the late arrival of agents delayed the start as they wished to re-open sealed boxes to check for themselves.

Many stations were opened at 6:00 or soon afterwards but some were delayed in opening. In the larger polling centres, where there were five or more polling stations, insufficient thought appeared to have been given to layout and signage. This caused considerable overcrowding and confusion. We recommend that consideration is given to splitting such centres up, particularly in those locations where we noted that there were unused school premises close by.

The number and adequacy of polling stations

The very high turnout and consequent overcrowded polling stations (we noted several polling stations that were too small to accommodate the party agents inside) and their locations need to be revisited by the ECK. The addition of large numbers of temporarily erected polling stations already in use should be encouraged, as should be the establishment of polling stations in remote locations from where electors had to travel significant distances, often on foot due to the lack of public transport facilities, to exercise their franchise. We felt, however, that the current arrangement of each station being staffed by six/seven ECK officials was adequate to ensure a smoothly running poll and to provide adequate staffing for the count.

Queues

In many locations we observed extensive queues of voters which began forming as early as 4:00 am. These were for the most part orderly and good humoured but in some locations voters climbed fences and walls in their enthusiasm to be amongst the first to vote. The allocation of voters to streams did not appear to have been done in advance and appeared to be based on a lack of understanding of the composition of the voters list. For example, in many cases where most people registered at a polling centre had common surnames, we noted long queues at one or a few stations while other stations had few or no voters because the streams were based on the first letter of their surname. This led to a significant imbalance in workloads.

We recommend that Returning Officers or the ECK is tasked with determining equal splits of voter numbers between streams and ensuring that clear separation and signage directs voters to their correct polling station. We commend the decision of the ECK to extend the hours of polling in those stations that opened some hours late. This decision had the effect of extending the franchise to voters who may otherwise, through no fault of their own, have missed the opportunity to cast their vote.

Voter Lists

The group observed that there were special desks set up and attended by Presiding Officers or their Deputies at some polling centres to deal with eligible voters whose names were not found on the voters lists. We were advised by some Presiding Officers that most elector names were subsequently found in the “black book” but we unable to assess the extent of eligible voters omitted from the voter lists for ourselves.

Stamping and issuing of Ballots

We noted the different practices regarding the issuing of ballots. In some polling stations the ECK staff validated quantities of ballots with the ECK stamp in advance of issue, in contravention of the mandated practice of only validating one ballot at a time, immediately prior to issuing it to the voter. This practice could potentially result in more than one validated paper being issued to an individual.

We also noted that some papers were disqualified from the count because they were not validated, and our judgement is that this was likely in most cases to be a result of the validation stamp being missed on otherwise properly-issued ballots. We noted one instance of non-validated papers being excluded from the count in a polling station where earlier in the day we had observed quantities of ballots being stamped in advance of issue. Some stations allocated ballots to voters one at a time – first for the presidential ballot then, after the voter had completed the ballot and placed it in the ballot box, the ballot for the parliamentary election was issued.

After the voter placed the parliamentary ballot in the ballot box, they were issued with the civic election ballot paper. In other stations, all three ballots were issued at once to the voter. We noted that in stations where all three ballots were issued at once, the voter flows were improved in comparison to those stations where ballots were allocated to the voter one at a time. There did not appear to be any difference in the number of spoilt ballots between the two issuing methods.

Assisted Voting

We were troubled during our observations by the lack of secrecy provided by the range of methods used to permit assisted voters to exercise their franchise. Where they were not already accompanied, Presiding Officers (POs) would do any one of the following:

- personally assist the voters to mark their ballots;
- call upon two candidates’ agents to accompany the PO;
- ask the voter to choose a party agent themselves; or
- ask the voter to choose someone from the queue to do so.

We recommend that the problem be addressed through voter education whereby illiterate voters are taught to look for the party symbol and that candidates’ photographs be added to the ballots.

Security

We noted that each polling station had armed police officers assigned to it who, with rare exceptions, remained outside. However, given the extremely high turnout and consequent long queues, there is some doubt that in the event of any major disturbance that security would have been adequate to provide the necessary controls.

Furthermore there were large numbers of those who had already voted who remained close to the polling stations to await the results, some of whom were intoxicated and therefore became an increasing potential liability as the day progressed.

Efficiency of the Election Officials

In general we were impressed by the professionalism and training of the ECK's election officials and their determination to scrupulously demonstrate the transparency of their procedures. The slowness of the procedures in some cases, however, led to late openings and lengthy queues, often compounded by poor lighting. To illustrate, at one station the procedures were so thorough that it took three hours to count the first ballot box.

We were concerned to note that in some polling stations we visited, little or no attempt was made to call out the name of each individual voter as they were marked off the register. This prevented interested parties from clearly being able to identify each individual voter and guard against impersonation attempts.

It was not always easy to identify election officials on entering the polling station. Whilst each wore a badge, this was not necessarily enough to clearly distinguish them from voters or party agents. We understand that it had been intended to issue identifying t-shirts and hats to each polling official, however problems with the colour, which closely resembled the campaign colours of one of the contesting parties and therefore it was decided not to use them. We recommend that an appropriate, identifying uniform is provided in the future to avoid confusion.

Role of Candidates' Agents

Several issues arose around the role and conduct of candidates' agents. There had been concerns that, given the ECK's decision to allow two agents per party in each polling station, that there would be serious overcrowding given the number of participating political parties. This was indeed observed to have been a particular problem in stations with very little space, however, by and large it was mainly the dominant parties that ultimately fielded agents.

Agents were expected to carry clearly visible identification. This was honoured more in the breach, making it difficult for us and, presumably, the electors to be certain of the status of those agents. Presiding Officers, however, were found to have kept an accurate register of their presence and letters of appointment.

Role of Domestic Observers

We were encouraged by the presence of domestic observers in a large number of polling stations, but we also observed that most appeared to be very unclear about their role. We note that the ECK issued guidance material, and we were briefed on the logistical difficulties of training such a large and disparate group of people.

We recommend that in future there is a definite need for more effective and consistent training for this important group.

Ballot Boxes

The ballot boxes were made with a strong, black plastic, each with either a red, yellow or blue stripe along one side, which corresponded with the colour of the Presidential, Parliamentary and Civic ballot papers respectively. Due to the coloured stripe only being on one side of the box, it was often less than obvious to the elector, who often needed to be guided to the right box.

Some Presiding Officers assigned their Deputies to make sure the correct boxes were used; the party agents were also quite vocally helpful in this task since any ballot placed in the wrong coloured box would be automatically rejected at the count, an occurrence we observed often enough to recommend the need for more clearly marked boxes – at least ones where the stripe extends around all four sides of the box.

Reports throughout the election indicated a strong concern with the potential for unauthorised ballot papers to be added to individual boxes, or “ballot stuffing”. We recommend that the ECK consider solutions to this issue, one of which might be to provide transparent, rather than opaque, plastic boxes at future elections.

Essential Services Workers

We noted with some concern that unless an election worker, which included police, drivers and domestic observers, was allocated to a centre where he/she was registered, he/she was unable to exercise his/her democratic right to vote. We also understood that members of the armed forces were not able to vote if they were away from their registered polling station on Election Day. This potentially amounted to the disenfranchisement of thousands of voters. We urge the ECK to consider providing a system that ensures such workers, who are tasked with essential election or security related tasks, are able to exercise their right to vote, which could be by providing early voting facilities or by providing special facilities for them on election day.

The Closure, Count and Tabulation of Results

After the polling our teams were present at polling stations for the close of the poll and the counting of votes. We then followed boxes to the Tally Centres to observe tabulation of the results.

The Closure

Where stations had opened on time and there were no electors waiting to vote, Presiding Officers closed their stations at the specified time of 17:00. However, in a number of locations the last voter was not able to cast his/her vote until very much later. We observed the sealing of the ballot box apertures and the application of both ECK and party agent seals, with their numbers being properly noted and recorded. We also noted Presiding Officers being at pains to reconcile and announce the number of issued and unused ballot papers for each election together with the number of spoilt ballots for which replacements had been issued.

The Polling Station Count

The boxes were opened one at a time. The ballot papers were sorted according to candidate and potential rejected ballots were put aside and each pile was counted. At the end of the count, which was conducted in full view of agents and observers, the figures were reconciled with the number of ballots issued and announced by the Presiding Officer, entered onto a Statement of Poll form and signed. Each agent was given a copy and the Presiding Officer kept a master copy. Ballot papers and other documents were placed in the ballot box and both ECK and agent seals were affixed. This process was then repeated for the other two elections.

The progress of the count was hindered in some, especially rural, locations by a lack of adequate lighting. Whilst agents were present, it was not always possible to see the voter's mark and thereby validate the Presiding Officer's decision. We also observed some inconsistencies in the adjudication of rejected ballots. In some cases, the technical requirement on the elector to mark only one box took precedence over protecting the franchise in some cases where the voter's intention was clear. For example, where a voter had smudged the paper and then made a clear mark, or where the voter had ticked one box and then crossed all others, we observed that the papers were adjudged invalid. Under the poor lighting conditions and the late hour, it is possible that agents could not always see to challenge.

It was also evident that a small number of ballots did not have the ECK authenticating stamp on the reverse. In some polling centres, the need for the Presiding Officer to be present at the count for each station under their control, led to significant delays with the progress of the count. We recommend that procedures to address this issue are developed for future elections. Despite this, the process was very thorough and open. Those present at the count appeared to be completely satisfied and we did not witness any complaints by agents. Generally the process concluded with the affixing of the results of each count to the polling station door and the transportation of boxes and election materials under security to the Tally Centre.

Constituency Tabulation

The Returning Officer had a number of tasks to undertake in checking the returns for each box and adjudicating the rejected ballots. We observed this process to be generally confusing and not clearly organised. Some Returning Officers did not as practices announce what they were doing so that agents and observers could follow. It was often difficult to observe exactly what was happening and for this reason it was not possible to evidence the consistency of the process. The final stage of the process was to announce the results in the constituency and forward details to the ECK in Nairobi. A clear announcement by the Returning Officer of the order of events and each constituency return would enhance the transparency of the process.

Conclusion of the Election and Announcement of the Results

Returning Officers were required to tabulate the results from the Polling Stations in the constituency, and having announced the results in public, transmit the results for Parliamentary and Presidential elections to ECK in Nairobi immediately using the prescribed forms. They generally did this in three ways, by telephone, fax and by internet. This should have ensured a speedy and verifiable set of results at the conclusion of tabulation.

Two Days after the election the chairman of the ECK announced that he was unable to trace Returning Officers in 21 constituencies; one set of the results had been voided as it showed a turnout of over 100% and one constituency was to rerun the election due to disruption of the tabulation and damage to ballot boxes and their contents.

Both PNU and ODM held press conferences where they announced their own final figures for the Presidential race, each showing that their candidate had won. Whilst all parties generally called for calm, these actions appear to have led to significant uncertainty and consequent unrest on the streets in many parts of the country with property damage, looting and loss of life.

After 48 hours from the close of the poll and following disruption at the ECK results centre, the ECK undertook to audit all its results overnight in the presence of party

agents and domestic observers. 72 hours after the polls closed, the ECK arrived to declare the final results. After declaration of the Molo result, the proceedings were disrupted. The centre was cleared and the ECK declared the final Presidential result. It declared Mwai Kibaki the winner by 4,584,721 votes to 4,352,992 votes for Raila Odinga. The ECK statement noted what its powers were and highlighted the legal avenue for challenge.

We consider that the delay in declaring results resulted in Kenyans experiencing significant concerns about the validity of the results. It cannot be acceptable that ECK processes do not ensure accurate and speedy transmission of results to the centre and that they appointed a number of Returning Officers who failed in their duties. Even if the results declared are entirely correct, the process commencing with the tallying of votes must be considered flawed. We are of the opinion that the ECK has not succeeded in establishing the integrity of the tallying process, bringing the validity of the election result into question.

We commend the ECK's actions in urging Kenyans to respect the rule of law and due process for lodging petitions through the courts.

We urge that the ECK address as a matter of priority a review of the processes for the transmission and announcement of results. This will serve to inspire confidence in the transparency, accountability and integrity of the electoral process.

Judicial Resolution of Electoral Disputes

The National Assembly and Presidential Elections Act provides for election petitions¹⁸ to resolve presidential and parliamentary election disputes, whilst civic election disputes are dealt with by the Local Government Act. Both elements of legislation provide for electoral processes which need to be followed precisely to enable them to be heard. However, there is no timetable prescribed which ensures that any case brought is heard and determined within a relatively short period after the polls had closed.

We noted that in the run-up to this election, cases that had been lodged some years earlier were still making their way through the courts. Such delays act as a major disincentive to using the judicial process to finalise issues arising from a disputed election. We recommend that consideration is given to firstly reducing the time scale allowed for submitting an election petition and requiring cases to be heard and determined within a set period of the petition being lodged with the Court.

¹⁸ National Assembly and Presidential Elections Act, Part VI, Sections 19 - 31

Chapter Eight

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

The December 27 elections were the ninth general elections in independent Kenya and the fourth after the restoration of multi-party democracy in 1992. They were the most competitive in the country's history with a record number of contestants - 9 presidential candidates, 2,548 parliamentary candidates and 15,332 civic (council) nominees sponsored by an equally record number of 117 political parties. The 2002 general elections attracted 5 presidential, 1,033 parliamentary and 7,009 civic candidates.

The election was also significant considering the scale of logistical and operational challenges that the Electoral Commission of Kenya (ECK) had to put in place for the polls. We had in our Interim Statement commended the professionalism and commitment of the ECK. As stated in our Interim Statement, we formed the view that up until the conclusion of Election Day, we considered the process credible.

However, since polling day it has become obvious that there is a need to have in place much improved measures to ensure the timely release of election results and the need to considerably improve the system of communication between the ECK headquarters and the field.

The events that unfolded since polling day have eroded the confidence of the people of Kenya. The manner in which the results were announced has raised suspicion and caused widespread mistrust. It is therefore our view that the election process following the closing of the polls fell short of acceptable international standards.

We applaud the people of Kenya for their enthusiasm, determination and resolve to perform their civic responsibility by turning out in large numbers to exercise their constitutional rights. Indeed, we note that this election registered the highest turn out of voters in the country's history with an increase from 57 percent voter turnout in 2002 to some 65 per cent in the 2007 elections.

We regret the disturbing incidence of political violence in some parts of the country which resulted in several deaths, and the destruction of property including burning of vehicles. We were saddened to note that, in some cases, the violence was directed at women. We also note that, for the first time in the country's history, more than 100 women candidates contested parliamentary seats. We would encourage the Government and political parties to initiate measures aimed at increasing women's participation in the political process, in order to strengthen their representation at all levels.

We were informed that these elections would, to a large extent, be overshadowed by ethnic considerations. Our analysis of election results has corroborated that assertion. We believe that this is a dangerous trend that must be addressed to ensure national cohesion.

RECOMMENDATIONS

Recommendations Arising from Observations of the 2007 General Election

We have, in line with our Terms of Reference, compared our observations of the 2007 Kenyan General Elections, and would like to make the following recommendations directed towards further strengthening the democratic culture of the country, and which support an electoral process that would enable the conduct of elections that meet acceptable international standards.

Electoral Commission of Kenya

- In order to strengthen the independence of the ECK and further insulate the institution from possible political interference, it is recommended that the process for appointing ECK Commissioners be subject to screening and confirmation by Parliament.
- The ECK should as a matter of priority review the processes for the transmission and announcement of results.
- Polling day procedures and operational arrangements should incorporate the following:
 - o Introduction of transparent ballot boxes.
 - o Clearly marked ballot boxes with distinguishing colours.
 - o Requirement for polling staff to issue all three ballot papers at once to a voter.
 - o Strengthen the capacity to manage polling stations.
 - o Ensure that all polling staff are aware that Deputy Presiding Officers are empowered to conduct the count.
 - o Task Returning Officers or the ECK to determine equal splits of voter numbers between streams in multiple polling stations.
 - o Ensure that there are better layout and clearer directions in polling centres for voters to access the correct polling stations.
 - o Ensure greater care with the authentication of ballot papers so that this procedure is carried out one ballot at a time and not authenticated in bulk beforehand.
 - o Ensure strict adherence to the procedure for the calling out of voters' names as they are marked off the register.
 - o Provision of conspicuous identification of all ECK officials at polling stations.
 - o Encourage the establishment of polling stations in remote locations to allow all voters to exercise their franchise.
 - o Provision of adequate lighting for all polling centres.
 - o Issuance of letters of appointment to all Presiding Officers and polling staff well in advance, setting out clearly the terms & conditions of service.
 - o Provision of clearer guidelines to presiding officers to determine a valid vote when the intention of the voter is clear.
- Voter Registration
 - o Implementation of a better system for updating the register of voters.
 - o Implementation of a better for the provision of voters' identification cards.

Political Parties Act of 2007

- o Bring to immediate effect this Act, which was assented to in October 2007.

The Media

- Place a limit on the amount of expenditure that can be incurred during the campaign.
- Require all advertisements to carry some form of identification.
- Provide clear guidelines with regard to disallowing advertising with inappropriate content.
- Provide increased training for all media on political reporting.

Training of Domestic Observers

- A need for more effective and consistent training for all domestic observers.

Post Election Disputes

- To amend the law to require rulings on election petitions within a specified time period.
- To reduce the period for lodging legal challenges.
- That it be a requirement for nomination to political office that candidates pledge to abide by the Electoral Code of Conduct¹⁹.

Inauguration Process

- Consider a requirement that any legal challenge to the election result must be concluded against a set deadline before the inauguration of newly-elected officials.
- Introduce a legal process that would ensure that election disputes are concluded before inauguration of newly-elected officials.

Women

- Separate funding to be made available to female candidates, considering their low social and economic status.
- Enforce laws to protect candidates, particularly women, from violent attacks.
- Government and political parties to foster an environment that is conducive to women's active participation in politics.

Youth

- Provide adequate funding to ensure that young people are able to genuinely compete when nominating for election.

Follow-up on Recommendations from the 2002 Election COG Observer Report

Elections remain the corner stone of a democratic process and as such, they must continue to undergo improvements in the light of experience. Thus, in its report on the 2002 General Election, the Commonwealth Observer Group made a number of recommendations to the Government of Kenya. We are pleased to note that some of the recommendations have been implemented. For instance, it has:

- increased ECK budget and approving extra – budgetary requests;
- introduced regulations on party funding in the 2007 Political Parties Act;
- discontinued the practice of charging international and domestic observers accreditation fees;
- amended the procedures for Assisted Voters; and
- Promoted the use of local peace committees.

¹⁹ Electoral Code of Conduct, Paragraph 6 – "Obligations".

However, there are some key recommendations which are yet to be implemented and which we are re-presenting for the active consideration of the appropriate authorities as follows:

- Ensure that the KBC complies with the broadcasting act by providing fair and balanced reporting as well as free airtime for political parties;
- Avoid calling General Elections close to major religious festivals.
- Revision of constituency demarcation to remove discrepancies in constituency sizes.
- Encourage all parties to negotiate an agreement regarding relevant regulations concerning the use of state resources at future elections.
- The ECK to consider providing a system that ensures essential services workers (e.g. polling staff, police etc.) are able to exercise their right to vote through the provision of early voting facilities or special facilities on Election Day.
- Formulate regulations governing the financing of campaigns, in particular the identification of sources of funding political parties use for campaigns.
- Address the potential for the violation of secrecy of ballots cast by illiterate voters, that those voters are taught through voter education to look for the party symbols and that candidates' photographs be added to the ballots.

Acknowledgements

We extend our appreciation to the Commonwealth Secretary-General, Rt Hon Don McKinnon, for having entrusted this important task to us. We hope that our work here will make a positive contribution to the further strengthening of democracy in Kenya.

We are grateful to all those who assisted our work during our presence in Kenya. We are indebted to the Chairman of the Electoral Commission of Kenya, Mr Samuel Kivuitu, the Electoral Commissioners, District Elections Co-ordinators and colleagues both at the ECK headquarters in Nairobi and in their regional centres for their invaluable advice and support.

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