

# **Report of the Commonwealth Observer Group**

## **KENYA GENERAL ELECTIONS**

4 March 2013



**COMMONWEALTH SECRETARIAT**



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# Chapter 1

## Introduction

Following an invitation from the Chairman of the Independent Electoral and Boundaries Commission of Kenya (IEBC), the Commonwealth Secretary-General, Mr Kamalesh Sharma, constituted an Observer Group for the General Elections of 4 March 2013. Prior to his final decision on whether to constitute a Commonwealth Observer Group, the Secretary-General initially sent an Assessment Mission to Kenya to assess the prevailing situation as well as the pre-electoral environment. The Assessment Mission was in the country in January 2013.

The Commonwealth Observer Group for the 2013 elections in Kenya was led by H.E. Festus Mogae, former President of Botswana, and comprised seventeen eminent persons in total. A full list of members is at Annex 1. The Observer Group was supported by a six-person staff team from the Commonwealth Secretariat.

### Terms of Reference

*"The Group is established by the Commonwealth Secretary-General at the request of the Independent Electoral and Boundaries Commission of Kenya. It is to observe relevant aspects of the organisation and conduct of the General Elections which are scheduled to take place on 4 March 2013, in accordance with the laws of Kenya.*

*The Group is to consider the various factors impinging on the credibility of the electoral process as a whole. It will 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.*

*The Group is to act impartially and independently and shall conduct itself according to the standards expressed in the International Declaration of Principles to which the Commonwealth is a signatory. It has no executive role; its function is not to supervise but to observe the process as a whole and to form a judgment accordingly. In its Final Report, the Group is also free to propose to the authorities concerned recommendations for change on institutional, procedural and other matters as would assist the holding of future elections.*

*The Group is to submit its report to the Commonwealth Secretary-General who will forward it to the Government of Kenya, the Independent Electoral and Boundaries Commission, political and civil society organizations and thereafter to all Commonwealth Governments."*

### Activities

The Observer Group arrived in Kenya on 25 February 2013. During four days of briefings, the Group met with the IEBC, political party representatives, civil society groups, media, Commonwealth High Commissions, and national and international observer missions.

An Arrival Statement was issued on 28 February 2013 (Annex 2). The Observer Group was deployed from 2-6 March 2013. Teams were based in seven different areas across the

country. During deployment teams met with election officials, political party and civil society representatives, security agencies as well as other observers.

On the basis of the Group's initial findings and observations, the Chairperson issued an Interim Statement on 6 March 2013 (Annex 3). The Group's Final Report was completed in Nairobi prior to departure on 10 March 2013 and thereafter transmitted to the Commonwealth Secretary-General.

## Chapter 2

### Political Background

The 4 March 2013 elections were the tenth general elections since Kenya's independence. Elections in Kenya, under universal adult suffrage, began with polls in May 1963 (under British rule) to decide who would lead Kenya into independence. The Kenya African National Union (KANU), led by Jomo Kenyatta, emerged victorious.

Elections were planned for 1968, but 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.

#### **Elections 1992 - 2002**

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. New political parties were legally registered and a total of eight contested the 1992 elections. President Moi was re-elected, receiving 36.8 per cent of the vote cast, and KANU, won a large majority in Parliament.

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 with 40.12 per cent of the vote. KANU also won a narrow majority in the parliamentary election.

The 2002 election pitted political veteran Mwai Kibaki, leader 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, led by Raila Odinga, against Uhuru Kenyatta of KANU. Mr Kibaki won a landslide election victory on 27 December 2002, securing 62.21 per cent 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, to address Kenya's economic challenges, and provide Kenyans with a new Constitution within a hundred days.

A Commonwealth Observer Group, led by Professor Adebayo Adedeji, former United Nations Under-Secretary-General and Executive Secretary of the UN Economic Commission for Africa, 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 on 21 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 Raila Odinga's Liberal Democratic Party 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.

## **The 2007 Elections**

The then Secretary-General, Don McKinnon constituted a Commonwealth Observer Group, headed by Dr Ahmad Tejan Kabbah, former President of Sierra Leone, which was present for the 27 December 2007 elections.

In controversial and hotly disputed Presidential elections held on 27 December 2007, President Mwai Kibaki, then leading the newly created Party of National Unity (PNU) was declared re-elected, with 46% of the vote. Raila Odinga, then leading the Orange Democratic Movement (ODM), obtained 44% and Kalonzo Musyoka of the Orange Democratic Movement-Kenya (ODM-K) 9%. Other candidates obtained 3.4% collectively. In parliamentary elections held on the same date, ODM won 99 seats, PNU obtained 46, ODM-K 16, KANU 14 and other parties, 35; 2 seats were ex-officio and 12 seats were appointed by the President in accordance with party strength in parliament - ODM 6, PNU 3, ODM-K 2, KANU 1. Kenya faced the biggest crisis in its post-independence history. The country experienced unprecedented levels of violence, following the announcement of the presidential election results. In the devastation that ensued, approximately 1,300 people were killed and over 600,000 displaced. There was also massive destruction of property.

The Final Report of the Commonwealth Observer Group for the 2007 General Elections in Kenya stated that the "Electoral Commission of Kenya has not succeeded in establishing the integrity of the tallying process, thereby bringing the validity of the election results into question." This was despite "the many positive aspects of the pre-election and polling day procedures, when Kenyans came out in large numbers to vote."

## **Good Offices Engagement**

As Kenya plunged into chaos following the disputed elections, the Commonwealth Observer Group Chairperson, Ahmad Tejan Kabbah switched from electoral observation to Good

Offices mode, from 31 December 2007. Mr Kabbah was the first to engage all stakeholders, including President Kibaki with his Party of National Unity (PNU) supporters, Raila Odinga with his ODM supporters, and Kalonzo Musyoka of ODM-K, seeking to promote dialogue, reconciliation and healing.

Other individuals and groups later joined the mediation effort, including then AU Chairperson President John Kufuor of Ghana, a delegation of former African leaders under the auspices of the Africa Forum, led by Joachim Chissano, former President of Mozambique, Ketumile Masire, former President of Botswana, Benjamin Mkapa, former President of Tanzania and Kenneth Kaunda, former President of Zambia. Others similarly engaged included UN Secretary General Ban Ki-moon, Archbishop Desmond Tutu, and US Secretary of State Condoleezza Rice and her Assistant Secretary for African Affairs, Ambassador Jendayi Frazer.

The visit of President John Kufuor, the then Chair of the African Union, to Kenya from 8 to 10 January 2008, resulted in the creation of a Panel of Eminent African Personalities, composed of former UN Secretary-General, Mr Kofi Annan (Chair), former President of Tanzania, Mr Benjamin Mkapa and former South African First Lady, Mrs Graca Machel, to assist Kenyans in finding a peaceful solution to the crisis. Mr Annan arrived in Kenya on 22 January 2008, while Kenya was still gripped by horrific acts of inter-ethnic violence, and inaugurated the Kenya National Dialogue and Reconciliation Talks on 29 January 2008.

After weeks of acrimonious negotiations, the parties, led by President Kibaki and Raila Odinga, witnessed by newly-elected AU Chairperson President Jakaya Kikwete and Kofi Annan, publicly signed an Agreement on the Principles of Partnership of the Coalition Government on 28 February 2008. Its key points were:

- There would be a Prime Minister of the Government of Kenya, with authority to coordinate and supervise the execution of the functions and affairs of the Government of Kenya.
- The Prime Minister would be an elected member of the National Assembly and the parliamentary leader of the largest party in the National Assembly, or of a coalition, if the largest party did not command a majority.
- Each member of the coalition would nominate one person from the National Assembly to be appointed a Deputy Prime Minister.
- The Cabinet would consist of the President, the Vice-President, the Prime Minister, the two Deputy Prime Ministers and the other Ministers. The removal of any Minister of the coalition would be subject to consultation and concurrence in writing by the leaders.
- The Prime Minister and Deputy Prime Ministers could only be removed if the National Assembly passed a motion of no confidence with a majority vote.
- The composition of the coalition government would at all times take into account the principle of portfolio balance and will reflect their relative parliamentary strength.
- The coalition would be dissolved if the Tenth Parliament was dissolved; or if the parties agreed in writing; or if one coalition partner withdrew from the coalition.
- The National Accord and Reconciliation Act would be entrenched in the Constitution.

The National Accord and Reconciliation Act was subsequently passed and entrenched in the Constitution. The conclusion of the Kenya National Dialogue and Reconciliation (KNDR) mediation process on 28 February 2008 marked the end of the post-election violence. It also marked the start of reforms to address the immediate and underlying causes of the violence. The goal of the National Accord and Reconciliation Agreement was to secure sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights. In addition to providing a basis for the formation of a coalition government,

the Kenya National Dialogue and Reconciliation agreed on 4 March 2008 to set up the several bodies, including the Independent Review Committee (IREC) and the Commission Inquiry into Post-Election Violence.

### **Independent Review Commission**

IREC, a non-judicial body, established under the Commissions of Inquiry Act, was mandated to investigate all aspects of the 2007 Presidential Election and make findings and recommendations to improve the electoral process. IREC has been. The Chairperson, Judge Johann Christiaan Kriegler was an internationally recognized eminent jurist, and former Head of the South Africa's Independent Electoral Commission which organised the 1994 multi-racial elections. The other two international members of the IREC were Horacio Boneo from Argentina and Professor Marangu M'Marete from Tanzania. The above-mentioned three external members were international experts nominated by the Panel, following consultation with the Government/PNU and the ODM. The PNU and ODM each nominated two members.

The Commission, better known as the Kriegler Commission, found that there were too many electoral malpractices from several regions perpetrated by all the contesting parties to conclusively establish which candidate won the December 2007 Presidential elections. Such malpractices included widespread bribery, vote buying, intimidation and ballot stuffing by both sides; as well as incompetence from the Electoral Commission of Kenya (ECK), which was shortly thereafter disbanded by the new Parliament.

### **Commission of Inquiry into Post-Election Violence**

The KNDR Agreement also established a Commission of Inquiry into Post-Election Violence. This Commission was a non-judicial body mandated to:

- investigate the facts and surrounding circumstances related to acts of violence that followed the 2007 Presidential Election,
- investigate the actions or omissions of State security agencies during the course of the violence, and make recommendation as necessary, and
- recommend measures of a legal, political or administrative nature, as appropriate, including measures with regard to bringing to justice those persons responsible for criminal acts. The Commission of Inquiry aimed to prevent any repetition of similar deeds and, in general, to eradicate impunity and promote national reconciliation in Kenya.

The Chairperson of the Commission was Justice Philip Waki, a Judge of Kenya's Court of Appeal. The other two commission members were Gavin Alistair McFadyen, a former Assistant Commissioner of Police in New Zealand and Pascal K. Kambale, a lawyer from the Democratic Republic of the Congo. The Secretary to the Commission was George Mong'are Kegoro, an advocate of the High Court of Kenya and Kenyan Section Director of the International Commission of Jurists.

The post-election violence report, commonly known as the "Waki Report", was handed over to President Mwai Kibaki and Prime Minister Raila Odinga on 15 October 2008. The Waki Report did not publicly disclose the alleged perpetrators in the report handed to the President. The Waki Commission instead handed the list of alleged perpetrators to Kofi Annan. In July, 2009 Koffi Annan handed the sealed envelope to Luis Moreno-Ocampo, the Prosecutor at the International Criminal Court (ICC). Kofi Annan gave the Kenyan

Government one year, beginning July 2009, to set up a Tribunal to deal with the issue. Failure to do this would see the ICC pick up the matter beginning August 2010.

The Kenyan Government did not secure a majority in Parliament to set up a Tribunal. Six Kenyans, Mohammed Ali, Uhuru Kenyatta, Henry Kosgei, Francis Muthaura, William Ruto and Joshua Sang were indicted for crimes against humanity by the ICC on 8 March 2011. Charges against Mohammed Ali and Henry Kosgei were dismissed on 23 January 2012.

## **New Constitution**

A Constitutional referendum was held on 4 August 2010. The New Constitution was approved by a two-thirds majority (67%) and was promulgated on 27 August 2010.

A three-person Commonwealth Secretariat Team was present at the referendum on 4 August 2010, at the request of the Interim Independent Electoral Commission (IIEC). The team concluded that the IIEC managed the process in a professional, efficient and effective manner, and that, overall, the IIEC was perceived by the public as being independent and impartial.

It was reported to us that there was minimal prosecution locally linked to post-election violence.

## **Political Environment of 2013 Elections**

The 4 March 2013 elections were Kenya's first General Elections under a new Constitution and a raft of new legislative measures. These complex elections signalled multiple transitions: the end of the Grand Coalition Government, the ushering in of a new government to carry forward the implementation of the new Constitution, including the creation of new governance structures, layers and levels of representation and institutions. In addition to voting for the President and an expanded National Assembly, Kenyans were to vote for the new elective positions of Women Members of the Assembly, a Senate, County Governors and County Assemblies.

Kenya operates a first-past-the-post electoral system, characterised by intense competition over access to power and state institutions. The new Constitution provides for additional features, including a President elected with 50% plus one of votes cast, together with a requirement to achieve 25% of votes in at least half of the 47 Counties.

The influence of money in politics in Kenya is a key feature of the Kenyan political environment. Despite the fact that the IEBC has the constitutional mandate under Article 88 to broadly regulate the flow of funds during the campaign period, the Tenth Parliament failed to pass the Election Campaign Bill of 2012, thereby perpetuating weak controls over a crucial element of the political system.

Politics in Kenya retains a strong ethnic dimension, with polarisation and divisions along ethnic, regional and other cleavages. Political coalitions and parties are largely built on this basis, around ethnic political barons, with few ideological differences between them. Party-hopping is common, with politicians not reluctant to move from one party or coalition to another, depending on their personal evaluation of prospects of electoral success, inclusion in the future government, or appearing on the ballot paper at all, especially at the point of nominations. Few political parties appear to be able to survive beyond a single election. For example, the political party under which the outgoing President Mwai Kibaki was elected,

the Party of National Unity (PNU), is no longer a registered party. The weak institutional capacity of the most political parties in Kenya was amply demonstrated in the sometimes chaotic nomination processes witnessed by Kenyans in January 2013.

### **International Criminal Court Factor**

The International Criminal Court indictments against Uhuru Kenyatta and William Ruto were a significant issue in the electoral process. First, there were debates as to whether the indictees were eligible candidates. The Courts ruled in the affirmative. Secondly, the ICC process itself became politicised and ethnicised, with extensive debate on whether the ICC process addressed impunity or challenged Kenya's sovereignty. Lastly, there were extensive debates about the possible consequences of ICC indictees winning the elections.

### **Security Issues**

As Kenya prepared for the March 2013 General Election, there was concern about insecurity in some parts of the country. Pre-election violence, comprising inter-communal and resource-based conflicts, had caused human displacement especially in some parts of coastal and northern Kenya. For example, Tana River County has experienced a spate of serious violence since August 2012, with at least 180 deaths in fighting between the agriculturalist Pokomo and the pastoralist Orma communities. An estimated 34,000 people have been displaced. Some of these conflicts were linked to struggles for political power and, in particular, competition to gain control of the devolved system of government. There were also fears of possible terrorist attacks, as a result of Kenya's pursuit of al-Shabab militia in southern Somalia.

### **Confidence in Institutions**

In contrast to the period after the post-election violence in 2008 when Kenyans reportedly lost confidence in key institutions, transformation of key institutions after the promulgation of the new Constitution appeared to have rekindled public trust. New laws and institutional arrangements that demand transparent recruitment and procurement processes, and the creation of new oversight mechanisms have begun to transform key institutions and are contributing to the gradual renewal of public confidence and trust in a number of institutions.

Significantly, the Judiciary enjoyed increased public confidence. Bold rulings and administrative and technical changes made over the past year have asserted the political and institutional independence of the Judiciary. The Independent Electoral and Boundaries Commission (IEBC) was also highly rated by Kenyans ahead of the elections, with surveys indicating that the vast majority of Kenyans had confidence in the IEBC, and believed that the IEBC was independent enough to conduct the elections. However, there were concerns, ahead of the elections, that the IEBC has been inconsistent with deadlines and the requisite managerial capacity of the IEBC to conduct elections was yet to be properly tested.

Public confidence in the police was relatively lower compared to the Judiciary and the IEBC. The appointment in December 2012 of an Inspector General of Police and the appointment of a National Police Service Commission, alongside promises to undertake further fundamental reforms, including addressing understaffing and poor equipment, were developments that were positively received by Kenyans.

## Chapter 3

### The Electoral Framework and Election Administration

#### Electoral System

The General Elections of 4 March 2013 were held under the new Constitution of 2010 to elect a President, members of the National Assembly, Women representatives for the National Assembly, Senators, County Governors and members of the County Assemblies.

#### *The President*

The President of Kenya is elected for a five-year term and can serve a maximum of two terms in office. A Deputy President, who also serves a five-year term and is also limited to two terms, is elected on the same ballot. The President is elected in a single national constituency on the basis of a majority system.

In order to be elected in the first round a candidate needs to secure more than half of all the votes cast in the election plus at least 25% of the votes cast in each of more than half of the counties (i.e. 24 counties out of the total of 47). If no candidate fulfils both conditions then the two leading candidates contest a run-off election. In the run-off whichever candidate secures the most votes is the winner.

#### *The National Parliament (National Assembly and Senate)*

The Kenyan Parliament consists of the National Assembly and the Senate and both are elected for a five-year term.

The 350-member National Assembly consists of:

- 290 members elected from single-member constituencies on the basis of the first-past-the-post system
- 47 women elected from the counties, with one woman elected from each county on the basis of first-past-the-post.
- 12 members nominated by parliamentary parties, on a proportional basis according to the seats won by the party, to represent special interests – youth, persons with disabilities and workers
- 1 ex-officio member elected by the National Assembly to act as the Speaker

The 68-member Senate consists of:

- 47 members elected from each of the 47 Counties on the basis of the first-past-the-post system
- 16 women members nominated by political parties, with members allocated on a proportional basis according to the proportion of seats won by each party.
- 2 members, one man and one woman, representing youth
- 2 members, one man and one woman, representing persons with disabilities
- 1 ex-officio member elected by the Senate to act as the Speaker

### *County Government (Governor and County Assembly)*

A Governor will be elected in each of the 47 counties on the basis of first-past-the-post.

For the 47 County Assemblies:

- One member is elected from each Ward in a County on the basis of first-past-the-post
- Additional members are nominated by parties in proportion to the seats received by the party in the election in the County to ensure no more than two-thirds of the County Assembly members are of the same gender.
- 8 members are also nominated to represent special interests: four shall be persons with disabilities and four shall be youth.

### **International and Regional Commitments and National Legal Framework**

Kenya has signed or agreed to the major regional and international commitments and instruments relating to human rights and the conduct of elections. These include:

- Port of Spain Affirmation of Commonwealth Values and Principles (2009)
- AU African Charter on Democracy, Elections and Governance (2007)
- International Convention on the Elimination of All Forms of Racial Discrimination (1996)
- African Charter on Human and Peoples' Rights (1981)
- Convention on the Elimination of All Forms of Discrimination Against Women (1979)
- International Covenant on Civil and Political Rights (1966)
- Universal Declaration of Human Rights (1948)

The Kenya Constitution guarantees fundamental rights and freedoms, including freedom of expression, assembly, association and participation in elections.

The key documents providing the legal and regulatory framework for the conduct of the elections are:

- The Constitution (2010)
- Elections Act (2011) and Supplementary Acts
- Political Parties Act (2011)
- IEBC Act (2011)
- Elections (Voter Education) Regulations (2012)
- Electoral Code of Conduct

### **The Independent Electoral and Boundaries Commission (IEBC)**

The 2010 Constitution provides for the establishment of the IEBC, and following the promulgation of the new Constitution and the passing of the 2011 IEBC Act, the current Commissioners were appointed in 2011. The IEBC comprises a Chair (currently Mr Ahmed Issack Hassan) plus eight Commissioners. All are appointed for a six-year term on a full-time basis and are not eligible for re-appointment.

Appointment of Commissioners follows a rigorous open application process, including public broadcasting of the vetting process. In order to qualify as a Commissioner a person must, among other things, be a citizen of Kenya, hold a degree from a recognized university and

have proven relevant experience. Further, Commissioners must not have held office in the Parliament or County Assembly or have stood for election in the previous five years and should not have membership in a political party. In order to assess nominees a Selection Committee is established, which makes a proposal to the National Assembly. The Selection Committee is made up of two people proposed by the President, two by the Prime Minister, one by the Judicial Services Commission, one by the Kenya Anti-Corruption Advisory Board and one by the Association of Professional Societies of East Africa. Nominees must be approved by the National Assembly and then by the President.

There is a Chief Electoral Officer who oversees Departments for Electoral Operations and Support Services. There is also an Office of Registrar of Political Parties which operates under the IEBC.

For the conduct of the elections, the IEBC establishes: a) 17 Regional Offices; b) 47 County Offices; and, c) 290 Constituency Offices. Each of these is run by an IEBC Coordinator. For the purpose of candidate nominations and establishing and communicating election results a Returning Officer is appointed at each level (see Chapter 5).

As provided for by Article 88(4) of the Constitution, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament. Its prescribed duties are quite broad and include:

- continuous registration of citizens as voters and regular revision of the voters' roll
- delimitation of constituencies and wards in accordance with the Constitution
- regulation of the process by which parties nominate candidates for elections
- settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results
- registration of candidates for election
- voter education
- regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election
- development and enforcement of a code of conduct for candidates and parties contesting elections
- investigation and prosecution of electoral offences by candidates, political parties or their agents

### **Voter Eligibility and Voter Registration**

In order to be eligible to vote, a person must be an adult citizen of Kenya and must be registered to vote. Persons are disqualified from voting if they are declared to be of unsound mind or have been convicted of an election offence during the preceding five years.

For the purpose of these elections a new national biometric registration of voters was conducted. Voter registration began on 18 November 2012 and lasted for 30 days (see below). At the point of registration a person had to provide proof of age and citizenship, by using either their national ID Card or Passport. The biometric voter registration captured a series of details for each individual voter, including a fingerprint, photo, the electoral unit ID and each voter's unique electoral number. At the outset of the exercise the IEBC had estimated on the basis of the number of National ID Cards issued that the total number of eligible citizens was around 18 million and set itself this figure as a target. At the completion

of the exercise it was reported that some 14.3 million persons had been provisionally registered.

In addition to the eligible Kenyan citizens inside the country those eligible in the Diaspora could also register to vote. In the event this was limited to East Africa and the total number of registered persons in this category was some 2,000.

The provisional lists were displayed for the public at the local level from 14-28 January 2013 for verification. Following this the IEBC also conducted a cleaning of the lists, including checking for double registrants, correcting some of the recorded data and checking for omissions. The IEBC also had to verify data collected during registration in each individual Biometric Verification Registration kit.

The legal deadline for the final certification of the national voter register was 18 February 2013. The IEBC missed that deadline by a couple of days. The final list contained 14,352,533 voters. In addition there was a list of some 13,000 persons who were identified as double registrants and therefore excluded from voting.

### **Candidate Eligibility and Nomination**

In order to be eligible as a presidential candidate, a person must be a citizen by birth; nominated by a party or stand as an Independent; nominated by 2,000 or more voters from at least 24 counties; and, have a degree from a university recognised in Kenya. A person is not qualified if she/he owes allegiance to a foreign state or if she/he is not otherwise qualified to be an MP.

In order to be eligible as a parliamentary candidate, a person must be a registered voter; have a post-secondary school qualification; and must satisfy moral and ethical requirements prescribed by the Constitution or by Act of Parliament. Further, a person must be nominated by a party or stand as an independent candidate and, in the case of a National Assembly candidate, must be endorsed by at least 1,000 voters registered in the Constituency, and in the case of the Senate, endorsed by at least 2,000 registered voters of the County.

A person is disqualified as a parliamentary candidate if she/he is a state officer or other public officer. Such persons must resign seven months before the date of the election in order to be eligible. Further, a person is disqualified if she/he has held office as a member of the IEBC in the immediate past five years or has not been a citizen of Kenya for at least ten years immediately before the date of the election.

Political parties are required to hold primaries in order to identify their officially eligible candidates. These were conducted in January 2013. In the event, some 12,400 candidates contested for 1,882 elective positions.

### **Complaints, Appeals and Election Petitions**

Every person has the right to petition the High Court if she/he claims to have been denied a right or a fundamental freedom. Election disputes during the pre-election period, for instance relating to nominations and other disputes prior to the declaration of results, can be dealt with by the IEBC or the High Court. The IEBC created a Dispute Resolution Committee to settle disputes related to nominations of candidates, and decisions in this regard are appealable to the High Court.

There is also an Electoral Code of Conduct Committee and Peace Committees, which were set up by the IEBC to receive complaints related to the Code of Conduct. The Peace Committees function more as an informal conflict resolution body and were envisaged to be present in each Constituency.

In addition there is a Political Parties Disputes Tribunal, whose decisions can be appealed to the Court. The Tribunal resolves disputes between members of a party as well as between political parties. However, political parties are required by law to have an internal party dispute resolution mechanism, in order to address internal matters first. This was supposed to be used, for instance, with regard to complaints regarding party nominations prior to those nominations being submitted to the IEBC as final.

Petitions against presidential election results have to be filed with the Supreme Court within seven days of the declaration of results. The Court has 14 days to hear and determine a petition. If the decision is that the election was not conducted properly then there is to be a new election within 60 days. Petitions against results for the Parliamentary and Gubernatorial elections must be filed at the High Court within 28 days of the declaration of the results. The High Court has six months from the date of lodging the petition to hear and determine on the case.

The Elections Act identifies a series of election offences, and stipulates sanctions for these. Convicted persons are ineligible for election for five years following the date of conviction. Such offences include: false or multiple voter registration; multiple voting or destruction of voting materials; use of force or violence; use of public resources; personation; treating; bribery; undue influence; and, offences by IEBC staff.

The Judiciary set up fast track mechanisms in order to prioritise the handling of election-related complaints and petitions to avoid any undue delays in the handling of such complaints.

## **Key Issues**

### **1 Independent Electoral and Boundaries Commission (IEBC)**

As stated earlier, the IEBC was only created in 2011 and many of the laws necessary for the conduct of the 2013 elections were only passed in that year. It was therefore a virtually new body working in a new legal framework which had to prepare for six elections, including for three newly created elective institutions. Further, as well as preparing for and conducting the six elections, the IEBC, in the same period, had to conduct a nationwide constituency boundary delimitation and the national biometric voter registration.

In this context, the task of the IEBC was extremely demanding and it is to its credit that many of the conditions precedent to polling were satisfactorily met in a reasonably timely manner, enabling the elections to be held as scheduled. The IEBC was able to maintain a high level of public confidence in the pre-election period, which was critical in ensuring trust and peaceful participation.

While the IEBC generally managed the preparation of the process well it also faced a number of challenges due to delays in internal decision-making as well as delays and problems related to the voter registration process, late amendments of laws by the outgoing parliament and late passage of laws in some instances (see below for a fuller discussion of these issues). These time pressures may have contributed to the IEBC's relatively late

launching of its voter education campaign (see Chapter 5). Further, the IEBC's handling of the problems over the transmission of results and initial presentation of results at the National Tally Centre (see Chapter 5) highlighted some considerable shortcomings.

## **2 Voter Registration**

The registration of some 14.3 million people in 30 days was a major undertaking and in this context it was a largely successful exercise, which represents a solid platform for future registration exercises to further increase the registration rate.

The voter registration exercise, however, did experience a series of problems. It was conducted later than originally expected, with delays due to the time it took to decide on the type of registration system and delays in the procurement of equipment for the biometric registration. Reportedly, the IEBC was under pressure from the Executive, which favoured biometric registration, whereas the IEBC favoured a somewhat simpler system due to the time constraints for implementation. The IEBC also faced challenges when the procurement of the biometric equipment was cancelled and later taken over by the Government. As a consequence, the time available for registration was shortened to only 30 days which placed extreme pressure on the IEBC and the period for public verification was shortened to just 14 days.

During the registration process itself there were some technical challenges, such as with the failure of some of the biometric kits. However, overall the voter lists proved reliable on election day, especially as reliance on the voter lists was provided for. The IEBC has published registration data on its website and it is apparent that the rate of registration does vary from area to area. This may reflect varying levels of public interest, poor public mobilisation in some areas or greater technical challenges in some cases. But the shortened timeframe was difficult to work with and limited the IEBC's options with regard to following up later in areas of lower registration.

## **3 The Legislative Framework**

The new Constitution and associated legislation provide a new framework for the conduct of elections in Kenya and overall offer the basis for credible, competitive elections.

However, there were a series of late changes and amendments to legislation by the outgoing parliament which impacted on the process. Some of these changes appeared to be to the benefit of parties and potential candidates but had the effect of making administration of the elections a harder task. There were also some cases where expected legislation was not passed, thereby weakening the legislative framework for the polls. For instance, in addition to the changes to the timelines for voter registration, the time for submission of party membership lists was reduced from three months prior to the elections to 45 days and the minimum period for party membership prior to nomination was reduced from a minimum three month period to only being required to be a member of a party on the day of nomination. This later example facilitated the party hopping which was prevalent during the party primaries (see below). Further, the deadline for party nominations was very late in relation to the time the IEBC required to print the ballot papers (see below).

Parliament failed to pass new legislation on campaign financing and expenditure, which weakened transparency and accountability in this regard. Political parties do receive some funds from the Public Fund, which has to be accounted for, but other funds and expenditure do not (see Chapters 2 and 4).

#### **4 Candidate Nomination and Political Party Primaries**

As part of the candidate nomination process political parties were obliged to hold party primaries to select their respective candidates. Each party was also expected to have internal dispute resolution mechanisms, so that the list of candidates submitted to the IEBC was final. The IEBC was then able to use these lists for the purpose of confirming the eligibility and nomination of candidates and printing ballot papers.

However, a number of problems arose. Most political parties held their primaries virtually on the eve of the deadline for nomination, for fear of unsuccessful aspirants switching parties (party hopping). Secondly, the primaries were very poorly organised with widespread reports of fraud and manipulation of results.

Thirdly, it does not appear that parties had adequate internal dispute mechanisms, or did not leave themselves enough time to properly complete all necessary procedures before the nomination deadline. As a consequence, in some cases the lists given to the IEBC were not always correct, with some wrong names appearing. This meant that at the time the IEBC was compelled to be printing the ballot papers some aspirants were in the courts contesting the nomination process. In cases where they were successful it meant that the wrong name appeared on the ballot paper and thus an election petition was likely after the polls.

As well as concerns regarding the conduct of party primaries, which should help to enhance the democratic process and not undermine it, there is a concern regarding the truncated timelines which again impacted negatively on the administration of the election just for narrow political party interest.

#### **5 Women's Participation and Representation**

The level of women's representation in elective institutions under the current dispensation is improved compared to previously, when some 10% of the members of parliament were female. There are 47 seats reserved for women in the National Assembly, 16 seats allocated in the Senate from party lists and women members for County Assemblies, in addition to any women winning for any of the open competitive seats.

Article 27(8) of the Constitution states that the "State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender". However, following the Attorney-General's request for an advisory on the minimum one-third gender requirement in the National Assembly and the Senate, the Supreme Court ruled that the quota was not applicable to the 2013 elections but should be implemented "progressively" by 2015. At the time of writing this decision was being challenged in court by the Gender and Equality Commission.

While women were well represented as voters, the level of participation of women as candidates was fairly low. Indeed, it was reported to the Observer Group that the provision of special seats may have acted against women being selected for the open competitive seats. For these elections, just one of the eight presidential candidates was a woman; and the number of women candidates for other elective positions was: seven out of 237 for Governor (2.95%); 19 out of 244 for the Senate (7.79%); and, 697 out of 9,603 for the County Assemblies (7.26%).

## **6 The Electoral System for the Presidential Election**

Article 138(4) of the Constitution states that: "A candidate shall be declared elected as President if the candidate receives –

- a) More than half of all the votes cast in the election; and
- b) At least twenty-five per cent of the votes cast in each of more than half of the counties."

However, during the tallying and announcement of presidential results there was some confusion as to whether the rejected ballots should be included in the total of votes cast or not. On its public results screens, which were broadcast live on TV and were the basis for media reporting on the tallying of results, the IEBC initially expressed each candidate's percentage of the vote share as a percentage of the *valid* votes cast. This was later identified as a mistake and the IEBC stated that in determining the number of "all votes cast" it would include both valid and rejected votes.

## **Recommendations**

### *1 Electoral Timelines*

It is important that the electoral timelines are established in a manner that facilitates the timely and effective administration of the election. This includes, but is not limited to, providing an adequate period for voter registration which can be completed in good time prior to the polls; ensuring candidate nominations are finalised and confirmed in good time for the ballot printing; and, ensuring that voter education is conducted for a long enough period to ensure it is effective. Both parliament and the election management body have to work together in this regard to ensure the legislative process and election administration are in harmony.

### *2 Voter Registration*

It is envisaged in the law that voter registration will be continuous, enabling the IEBC to build upon the strong platform provided by the new voter register compiled for these polls. It is apparent that some areas have lower registration rates than others, and so there is now an opportunity to rectify this.

Further, if the IEBC intends to continue to utilise the biometric voter identification devices in polling stations then it must ensure that there is sufficient time to adequately test the system, train personnel in their use and ensure that the local resources are suitable for their use; notably with regard to suitable power or battery back-up.

### *3 Legislation on Campaign Financing and Expenditure*

New legislation governing campaign financing and expenditure was not enacted for these polls, but it is required. It is hoped that the new parliament will consider this and pass such legislation, thereby ensuring adequate transparency and accountability in this regard.

### *5 Women's Representation*

It is important that the quota for gender balance in representation in the parliament, as envisaged in the Constitution, is enforced as soon as is feasible. Further, there remains a

broader need to encourage and facilitate women's participation as candidates for future elections.

*6 Electoral System for Presidential Elections*

During these elections, the calculation as to whether or not a particular candidate has secured a majority of all the votes cast has been defined as all of the valid votes cast plus all of the rejected ballots. It is important that this is clearly articulated for future elections to avoid any further uncertainty in this regard.

# Chapter 4

## Campaign and Media

### The Election Campaign

Campaigns during the 2013 elections in Kenya were held in a generally peaceful environment, though there were reports of isolated incidents of violence in some parts of the country. The campaigns were intense and appeared heavily financed, particularly for the two main coalitions, namely, Jubilee Alliance and the Coalition for Reforms and Democracy (CORD).

A main feature of the campaign period was the agreement by political parties and the Independent Electoral and Boundaries Commission on guidelines to ensure responsible practice. There were also guidelines by the National Cohesion and Integration Commission (NCIC), one of the bodies established by the country's new Constitution to facilitate and promote equality of opportunity, good relations, harmony and peaceful coexistence between persons of different ethnic and racial backgrounds in Kenya.

The NCIC, for example, flagged up key words in local languages that it barred from being used in campaign rallies. These were words considered to stir up ethnic hatred and stereotyping—a feature that was prevalent in the lead up to the controversial 2007 elections and during the subsequent violence.

Mobile phones, the primary medium used to spread violent messages during the 2007 elections were subjected to tight guidelines and scrutiny during the 2013 elections. The Communications Commission of Kenya (CCK) issued guidelines to political parties regarding the content of campaign messages using SMS messages. The mobile phone was no longer a free-for-all device for disseminating dubious content. Mobile telephone companies were required to register all SIM cards and to allocate unique internet protocol addresses to all phones on their networks, to make it easier to track down culprits.

According to the CCK guidelines, no political message was to contain offensive, threatening, abusive, insulting obscene or profane language. Political messages were not to contain inciting, threatening or discriminatory language intended to expose an individual or group of individuals to violence, hatred, hostility, discrimination or ridicule on the basis of ethnicity, tribe, race, colour, religion, gender or otherwise.

Politicians wanting to send bulk campaign text messages had to wait for at least 48 hours before dispatch in order for mobile phone service operators and CCK to vet content and reject anything they believed could be inciting.

The need for making political campaigns less ethnically divisive was identified after the 2007 elections. The election campaign then was aggressive, marred by hate speech and focused on personalities rather than political issues.

The call for peace and non-violence was therefore an overriding theme of the messages emanating from civil society, politicians, religious groups and the media. A key development in this regard was several peace rallies that were organised in the course of the campaign

period. One such peace rally, organised one week prior to the elections was attended by six out of the eight presidential candidates who declared their continued commitment to peaceful and responsible conduct.

The election campaign was highly competitive, with political parties and candidates holding rallies and meetings across the country. There was extensive use of advertisement on radio, television and in newspapers. Posters, flags and billboards were in abundance. Candidates also used leaflets, road-shows, music and social media to reach their supporters. SMS messages were used to invite party supporters to rallies. Parties also ran websites on which they advertised their manifestos, news and information.

It appeared that considerable resources—financial and material—were used during the campaigns. In the absence of clear campaign finance legislation, which the country's previous parliament failed to approve, spending during the campaign period was largely unregulated. The Group noted that while existing campaign finance regulations prohibit political parties from obtaining foreign funding, reporting requirements for campaign expenditure were inadequate, except for funds provided by the state. The transparency of the electoral process could be enhanced by an early passage of campaign finance legislation.

The campaigns generally focussed on issues, with the candidates putting across a spirited agenda on, for instance, job creation, infrastructure, and devolution of powers, security, education and health.

Members of the Group observed some of the last rallies in Nairobi and other areas where observers were deployed, and were impressed by the massive turn out and enthusiasm of the party supporters. The rallies were animated, colourful and peaceful.

For the first time in the country's history, two national presidential debates were organised by the media. All the eight candidates participated in the debates which were widely broadcast. The debates gave an opportunity to the candidates to explain their agenda and manifestos, and respond to some critical questions from the moderators and the public. Some of the key issues that dominated the debates included, the land question, ICC issues, corruption and management of the country's resources, as well as security.

## **Media Coverage**

The media in Kenya is vibrant, well developed and has a long tradition of being critical and incisive in its reporting. Newspapers played a key role in the struggle for multiparty politics, highlighting and exposing corruption scandals and calling for the opening up of political and economic space in the country.

The new Constitution provides and guarantees in Articles 33, 34 and 35, freedom of expression and of the press. The articles provide for the freedom to seek, receive or impart information and ideas and independence of the media and the right to access information. The state is prohibited from interference with editorial decisions in both state as well as private media. The state media is required to be impartial and present a diversity of views.

Kenya has over 100 radio stations, 20 TV channels and over two dozen newspapers. Radio is the main source of news and information and played a key role in the 2013 elections. There is also a growing access to and use of the internet, with official statistics putting the figure

at 28 per cent. Mobile phones were also an important tool for relaying election news and information, with over 30 million Kenyans owning a mobile phone.

## **Background and Context**

The media in Kenya planned coverage of the election process for the 2013 polls conscious of the bitter criticism of their performance during the 2007 elections. In 2007, some media houses, notably the vernacular radio stations stirred tensions by taking sides and providing politicians with avenues to disseminate hate speech. As an example, one of the four ICC indictees was a DJ with a vernacular radio station.

As a result, both the Waki and Kriegler reports into the post-election violence of 2007/2008 referred to in earlier chapters, identified hate speech as a key issue and recommended improvements in media regulation. In this regard, the 2008 Kenya Communications (Amendment) Act was passed to address these issues. Also, the National Cohesion and Integration Commission (NCIC) was established in 2008 to deal with cases of hate speech. The National Cohesion and Integration Commission Act stipulates that a person convicted of hate speech shall receive a maximum fine of KShs 1 million (USD\$11,760), three years in jail or both. There were a number of reports in the lead up to the 2013 elections, of cases that were brought to the NCIC, but it was not clear what transpired. The Group was informed that the NCIC does not yet have full capacity to effectively undertake its work.

Furthermore, an enhanced media regulatory body, the Media Council of Kenya (MCK) was established by the 2008 Media Act to amongst other things: mediate or arbitrate in disputes between the government and the media, the public and the media and intra-media; promote and protect freedom and independence of the media; promote high professional standards among journalists; enhance professional collaboration among media practitioners; and promote ethical standards among journalists and in the media.

In preparation for the coverage of the 2013 elections, the MCK, in April 2012, together with media houses, the Independent Electoral and Boundaries Commission, Kenya Union of Journalists, other media stakeholders and the government, developed binding media guidelines for reporting elections. The objective of the guidelines was to promote accurate, comprehensive, impartial, fair and responsible coverage of the elections and to ensure that journalists are sensitive to the risk of conflict. In this regard, the Group commends the media for adhering to the Guidelines to obtain election results exclusively from the IEBC as the official source.

## **Print Media**

Newspapers devoted detailed and substantial space to covering the election process, highlighting political party platforms, analysing party manifestos and activities of the Independent Electoral and Boundaries Commission and other state institutions. The Group was impressed by the special election coverage sections in most of the newspapers in Kenya that offered in-depth analysis and commentaries. The Group also commends the editorials of the major newspapers, such as The Daily Nation, The Standard, The Star and The People which consistently called for peaceful, violence-free behaviour from all stakeholders.

## **Radio**

Radio provided robust coverage of the issues in the lead up to, during and after the elections. There were special programmes dedicated to discussing positions of political

parties and their candidates. Unlike in 2007 when some radio stations were accused of being used by politicians to stir up ethnic hatred, this time coverage was more responsible.

Some radio stations even organised peace road shows, and many others played songs praising the virtues of patriotism and ethnic tolerance. In the lead up to the Election Day, there were special training programmes in ethical and responsible journalism, particularly for journalists working with vernacular broadcasting radio stations to enable them to appreciate the power and impact of their work and the need therefore to act responsibly. On polling day, there was live coverage of the process at locations around the country and phone-in callers and reporters provided live updates about events at the polling stations.

The Group was informed that to a large extent, the reporting guidelines agreed by media houses and the Media Council of Kenya were adhered to, and that there were very few cases of radio stations allowing their platforms to be used to disseminate inflammatory messages. The Media Council of Kenya also conducted a media monitoring service to, where necessary, detect and clamp down on the use of inflammatory and retrogressive language on radio television and in newspapers.

### **The State Broadcaster - KBC**

Kenya Broadcasting Corporation was established in 1998 by the KBC Act with a mandate to “provide independent and impartial broadcasting services of information, education and entertainment.” During elections, the Kenya Broadcasting Corporation Act requires KBC to maintain a fair balance in the allocation of broadcasting hours to different political views; and in consultation with the Electoral Commission, during the campaign period preceding any election, allocate free air time to registered parties participating in the election. The Group was informed that KBC made efforts to live up to this requirement, although complaints were raised by smaller parties that the broadcaster focused attention more on the two main coalitions—Jubilee and CORD.

### **Television**

Television broadcasters invested heavily—both financially and technically—in coverage of the 2013 elections. Most of the major TV stations had correspondents all over the country, providing live coverage on Election Day. In the lead up to the polls, there were several special election programmes that featured candidates, commentators and analysts, breaking down political party manifestos and analysing party programmes and policies. The analysis on television was rich, diverse and informative.

There was a commendable attempt by the TV stations to provide equitable coverage of the major presidential candidates. However, one complaint was that the coverage tended to focus more on the national races, and less on the devolved county campaigns.

An impressive feature of the 2013 election, as earlier alluded to, was the hosting of live television debates for the eight presidential candidates. The debates were relayed simultaneously online and on radio, reaching millions of Kenyans. The initiative to hold the debates was driven by media houses together with the Media Council of Kenya. The Group commends the media for this achievement and notes that it was an important platform for engaging the candidates on their policies and programmes.

## **International Media**

The 2013 Kenya election was covered by an unprecedented high number of international media and journalists. The election featured prominently on the news agenda of most global media houses, not least because of what happened in 2007/2008, but also, because of the issues surrounding the candidates and their programmes. However, there were reports that sections of foreign media filed biased and unfounded reports. Given the trust and credibility the global community places in international media, it is imperative that foreign media, exercise a high level of responsibility in their reporting.

## **Use of Social Media**

There is a growing number of Kenyans using social media platforms such as Facebook, YouTube, Twitter, websites, etc. The IEBC also used social media to keep the public updated on developments before, during and after the elections. These platforms were also used as political campaign tools. The ability to access internet on mobile phones enabled people to follow campaign issues almost in real-time. Candidates made announcements about forthcoming events on these social media platforms and engaged in discussions with supporters online.

The Group noted that websites of radio stations were well updated, and that there was live streaming of videos on websites of television stations and newspapers. TV stations also solicited contributions from the public using mobile technology, a feature that enhanced the quality of the coverage of the election story.

## **Conclusion**

The Commonwealth Observer Group was generally satisfied with the way the domestic media covered the 2013 elections and the role it played in informing the voters about the issues in the election and the contribution media made to the quality of the process. Media is to be commended for calling for patience and calm during the whole election process, particularly during the counting, tallying and announcement of results.

## **Recommendations**

- The National Cohesion and Integration Commission, the Media Council of Kenya and the Communications Commission of Kenya should be adequately financed and equipped to efficiently and effectively fulfil their respective mandates.
- Adherence to guidelines for responsible and ethical coverage of elections should be maintained and strengthened in the period after the elections.
- The Group also recommends training programmes on how media can cover the newly-created elective institutions.

## Chapter 5

### Voting, Counting and Results

#### Background

Polling was scheduled to take place from 06.00 to 17.00 hrs and was organized in 24,573 polling stations which were sub-divided into 32,613 polling streams across the country.

Most polling stations were organized within or outside public facilities such as schools, churches and mosques. Campaigning was prohibited on the day before the election and on election day.

The polling stations were managed by a Presiding Officer and a Deputy Presiding Officer, who were supported by six polling clerks. For the purpose of providing security at polling stations at least two police officers were deployed to each stream. Regular police were supplemented by officers from other services for this duty and were sworn in as temporary police officers for the task.

Each polling station contained six ballot boxes –for the President, County Governor, Senator, Women Representative, Member of the National Assembly and the County Ward Assembly. Additionally, as the IEBC employed Biometric Voter Registration, each polling station was to include a laptop with finger print readers and the Biometric Register. There were between one to four cardboard voting booths in each of the polling stations.

#### Key Procedures for Opening and Voting

The key prescribed procedures for opening and voting are as follows:

##### *Opening*

- Prior to opening, the ballot boxes are to be shown to all present to confirm that they are empty and the boxes are then sealed
- Accredited Party Agents, domestic and international observers, as well as media are allowed to be present.

##### *Voting*

- The queue control polling clerk verifies that the voter has no ink mark indicating they have already voted, and then the voter's identification document (Identity Card or valid Passport) is checked.
- The next polling clerk verifies that the voter is registered at that particular station by consulting the electronic poll book for the biometric identification of the voter. The voter places their finger on the fingerprint reader. If the poll book is not functional, the clerk reverts to the colour printed Registry. Once found in the Registry the voter moves to receive the ballot papers.
- The voter receives all six ballots, the counterfoil and the back of the ballots are stamped with the official stamp of the IEBC and then folded.
- The voter proceeds to the booth and marks the ballots to indicate their choice of candidate

- Once all ballot papers are marked, the voter places each ballot in its respective ballot boxes, which is colour-coded to match the ballot papers.
- Prior to departing the polling station, the voter's left finger is marked with indelible ink.

Persons requiring assistance are permitted to bring with them an assistant, who has to take a written oath of secrecy. Alternatively, a voter can request assistance from the presiding officer, but in the presence of party agents serving as witnesses.

### **Assessment of Opening and Voting**

On Election Day, Commonwealth teams reported a largely peaceful process that was generally well managed and transparent, with voters were free to exercise their right to vote. Additionally, polling officials generally worked hard in sometimes difficult and trying circumstances. Party Agents and national observers were largely present throughout the country. The turnout of voters was high, particularly at the outset of the voting, which created some crowd management challenges but overall voters waited patiently in extremely long queues in order to cast their votes.

Some of the key observations of our teams were:

- In a few locations materials were delivered late to the polling station causing some areas to open late.
- In most cases where the polling station opened late Presiding Officers compensated voters by staying open later.
- At the opening of the polls, the queues were quite lengthy as many voters turned up very early to cast their votes. Despite the large numbers, most voters were patient and orderly.
- Polling stations with large numbers of registered voters were split into smaller streams, and voters were grouped alphabetically, based on first names. As a result, some confusion, and challenges with crowd management, emerged. This situation was exacerbated by the absence of a designated official providing information to voters.
- The layout of polling stations varied. Some were well laid out, facilitating the flow of voters, communication between officers and scrutiny of the process. However, in other instances the layout was quite poor with voters and party agents mingling in and around the booth and the table where officials were situated. Poor layout sometimes compromised the secrecy of the vote as the booths were visible to most.
- The absence of adequate space and facilities (electricity, lights, etc.) in some locations proved to be a challenge.
- In many instances, the electronic poll books used to verify the biometric data of registered voters either stopped working (due to a lack of electricity to recharge the batteries) or never functioned. As a result, many polling stations relied on the colour printed register, which most polling staff appeared to be more comfortable with.
- Adequate security was provided and order was maintained at most polling stations.

- Commonwealth teams were impressed with the conduct and professionalism of many of the IEBC polling staff. Most of the officials supporting the electoral process had slept at the polling station the night before elections in order to protect materials and start the process on time. Moreover, many remained late into the early hours of the next morning to complete the count.
- For ease of voting and counting the ballot papers were colour coded with the ballot boxes. Nonetheless, voters still seemed confused by the colour coding, as many found the colouring indistinguishable.
- Although polling officials were generally trying to ensure that voters placed the ballots in the corresponding boxes, some ballots still ended up in the wrong box and these stray ballots were categorized as invalid.
- The law provides for a polling official to assist a voter if required, which is commendable. However, this process included the participation of party agents as witnesses. The inclusion of agents in this compromises the secrecy of the vote and can be intimidating for vulnerable voters. A large number of voters requiring assistance were women.

### **Key Procedures for Counting and Results Tabulation**

The key prescribed procedures for the counting and results processes are as follows:

- The polls are officially scheduled to close at 17:00 hrs. However, voters waiting in line at the close of poll are allowed to vote and voting continues until the last person in line has voted.
- Following the last voter, the Presiding Officer closes the polling station and starts preparing for the count. Agents, national and international observers are permitted to witness this process as well.
- Party Agents are briefed on the counting procedures and consensus is reached on what constitutes an invalid ballot.
- Ballot box apertures are sealed, and the numbers of each seal are reconfirmed by the party agents prior to the organization of the polling station for the count.
- Ballot boxes are then opened and emptied starting with the presidential ballot box.
- The ballot papers are unfolded, to confirm the IEBC stamp on the back of each paper.
- Valid, Rejected, and Disputed ballot papers are identified, with the Presiding Officer clearly showing the ballot to Party Agents and Observers.
- Valid ballot papers are sorted by candidate, audibly announced and subsequently counted.
- Ballot papers are then organized into bundles of fifty each and the vote tally is announced.
- The Results Declaration form is completed and signed by the Presiding Officer and the Party Agents present can also sign.
- The ballot papers are placed in the corresponding ballot box, one Results Declaration form and all associated documents are placed in a tamper proof envelope and sealed.
- Results are then transmitted using the mobile phone encrypted systems.
- This process is then repeated for the five other ballot boxes.
- Upon completion of the process all results are posted outside of the polling station.

## **Assessment of Counting and Results Tabulation**

The vote count at the polling stations was transparent, with party agents and observers able to follow the process closely. This was also the case during the tabulation process. At the polling station level, party agents signed and received a copy of the result and could therefore verify the results later tabulated and announced at the constituency, county and national levels. Results from constituencies were also broadcast extensively on TV, and radio, enabling people to follow on an on-going basis as the results were calculated.

In the lead up to election day, the IEBC experienced problems in the trial run of the electronic transmission systems. On the day of election these problems were again evident, resulting in the abandonment of the electronic transmission system. The IEBC then relied solely on the physical delivery of the official results forms by each Constituency Returning Officer to the National Tally Center in Nairobi.

Some of the key observations of our teams were:

- To reassert their commitment to the transparency of the process, many Presiding Officers took great pains slowly and deliberately communicating every aspect of the counting and tallying process to party agents and observers.
- Due to the late start, long lines and challenges with technology, many stations did not start the count till late in the evening. As a result, in some instances, the count went into the early hours of the morning of the following day.
- The electronic transmission of results from the polling station level was hampered by the failure of the mobile phone encrypted systems, which affected the ability of the IEBC at the national level to communicate official results in a consistent and reliable manner.
- The IEBC initially presented provisional results as a percentage of valid votes cast, rather than all votes casts, resulting in confusion when this decision was reversed.
- Initial broadcasting of results showed an extremely high number of rejected votes, but the IEBC later announced that this was due to a technical fault.
- Due to continued challenges with the electronic transmission, the IEBC abandoned the process and concentrated on the manual transmission, relying solely on the physical delivery of the Results Declaration Forms by Constituency Returning Officers to Nairobi.
- There was tension between some party agents and IEBC officials at the National Tally Center over access to parts of the tallying process.
- Overall the IEBC's management of the results and tabulation process at the national level was marred by inconsistencies.

## **Overview of the Countrywide Observation**

Commonwealth teams were deployed to seven of the eight Provinces of Kenya. Our teams observed the voting, counting and results tabulation. They also met with electoral officials,

observers and other stakeholders at the Constituency level to build up a broader picture on the conduct of the process.

### **Central (Nyeri)**

- Most Presiding Officers reported that the Electronic Voter Identification Devices (EVID) worked well. However, in locations without electricity supply, the batteries (including the three back-ups provided) were exhausted within 3-4 hours of opening.
- There was wide discrepancy in the space provided for the polling streams, including at times within a single polling station. In one stream, for instance, there was not enough space even for party agents to observe the polling.
- Guidelines for giving priority to vulnerable voters such as expectant mothers, elderly people, and women with young children, were generally not being followed.
- There were instances when a voter's record was found in the EVID but not in the printed voter poll book, and vice versa. Voters in both cases were allowed to vote, and in one stream a separate record was being kept of such cases.
- In one case, it was noticed that the polling station was located directly opposite a building functioning as the cultural centre of a particular political party. This could have been avoided.
- In one stream it was observed that, contrary to the guidelines, the Presiding Officer decided, in consensus with the party agents present, that a 'stray ballot' (i.e. a ballot paper not placed in its corresponding ballot box) would be counted as a valid vote.
- At the Nyeri Town Constituency Tally Centre, one of the candidates for the National Assembly member seat challenged the results from two polling streams, claiming that the votes cast in his favour had been misreported (nil against 400 in one and 2 against 700 in the other). The difference between the two candidates was about 7000 votes, so it was apparent that even if these disputed votes were counted, it would not make a difference to the overall result. The candidate was advised to approach the courts if he wished to, and the frontrunner was declared the winner.

### **Coast (Mombasa)**

- Violence was reported to have occurred in Mombasa. Policemen were attacked by unknown assailants and reportedly hacked to death.
- Late opening of some polling stations was attributed to the fear engendered by this perception of violence.
- Assistance to blind or illiterate voters could have led to the secrecy being compromised.

### **Eastern (Kitui)**

- Almost all polling stations visited opened 2-3 hours later than expected due to a delay in delivery of materials.
- Given the large number of voters at each polling station the standard number of polling booths i.e.- generally between 2-3, was not sufficient. At one polling station there was one booth for 626 registered voters.
- Voting time was extended based upon the morning delay e.g.- where a polling station opened 2 hours late it was then kept open for an extra two hours.
- There were a high number of illiterate voters in the area who required assistance in voting. In these circumstances party agents acted as witnesses and often seemed to be quite intrusive.
- At one station a clerk was arrested for issuing more than one ballot to a voter. The incident occurred prior to our visiting the polling station. The Presiding Officer did not mention this to us despite us asking if there had been any incidents or challenges that day.

- Party agents and domestic observers were kept well informed throughout the tally and results process.
- Under the coordination of the presiding officer general consensus was reached on which ballot papers were spoilt, rejected and valid.
- Polling stations which did not have electricity or were prone to power cuts were provided with lamps which came in useful during the tallying process which continued late into the night.
- At almost all polling stations visited there were clear signs towards voting streams and an adequate number of staff available to assist.

### **Eastern (Isiolo)**

- One voter was allowed to vote twice as one of her first ballots was placed in the wrong box.
- One candidate entered a polling station to 'advise' PO his voters know him by another name other than the one stated on the ballot paper. Advice was to mark the ballot accordingly as this was a largely illiterate group of voters who needed assistance.
- Counting proved a challenge in some areas as it was quite dark and the use of only one gas lamp was perhaps not adequate.
- There were very long queues but voters in general were patient and orderly.
- Overall, the IEBC in Isiolo pulled off polling day with ease and great efficiency.

### **Nairobi**

- Voters were enthusiastic and showed quiet determination to vote, notwithstanding the long queues. A defining image of these elections was the queue outside the Moi Avenue Primary School, in Starehe Constituency, where the media extensively covered thousands of voters waiting patiently to cast their votes. A similarly lengthy queue was witnessed at Lavington Primary School in Dagoretti North Constituency.
- Some polling station compounds were dangerously overcrowded at the commencement of the poll. At St Peter Clavers Primary School, for example, thousands of voters, in twelve streams, were crowded into a relatively small courtyard. This represented a safety risk, and made it difficult for voters to identify their correct stream and queue. Access to the polling station itself was difficult in these circumstances.
- Again, at St Peter Clavers Primary School, polling staff struggled to get the BVM equipment to function. In stream 11, for example, staff took 15 minutes to identify the first voter, much to the frustration of voters waiting outside to cast their votes.
- Some polling stations were difficult for disabled voters to access. For example, some polling streams were located in classrooms on the second floor at Nairobi Primary School.
- There was a very long queue at Riverbank Primary School in Starehe Constituency, which had formed hours prior to the opening. At 06.00 it proved difficult for the police to maintain order at the gate to the centre, as the crowds became impatient.
- At Kiambiu Social Hall in Kamakunji Constituency, which was a low income high density area, there was a very large crowd crammed in a small courtyard and with makeshift tents as polling stations. Proper management of the queue was impossible and the management of the voting was extremely challenging under the circumstances.

## **Nairobi (Team 2)**

- There was a remarkable enthusiasm and patience of voters. Polling staff were well organized and knew their roles and tasks. Party Agents were present in large numbers and the process was transparent overall.
- Queues were arranged in alphabetical order based on first name and this caused some confusion and division of family groups. Biometric equipment failed in a number of polling stations due to a lack of electricity.
- The secrecy of the ballot was compromised in the case of assisted voters as Party Agents were involved in the process. The booths did not ensure secrecy but this did not seem to be an issue for the voters
- The electronic transfer of results did not succeed after the count.
- In one case the count was conducted with the assistance of an observer's torch due to the lack of electricity

## **Nyanza**

- All polling stations visited had materials delivered in good time to enable the commencement of voting at the stipulated time, but several lacked electricity and in one instance had to use the torch light from cell phones to enable the voters to see the ballots clearly as voting began before the sun had come up.
- We also witnessed an incident in which one polling agent raised very strong allegations of multiple voting against another polling agent operating in the same polling stream. We witnessed the polling agent that had been accused of multiple voting casting his ballot and we observed that his hand had been marked with ink indicating that he had assisted another voter to vote. The matter was resolved by the accusing polling agent withdrawing her accusation after a small caucus between the Presiding Officer and the security personnel at that particular polling stream.
- All polling stations seemed to have been overwhelmed by the large turnout of voters. Some stations were better able to handle the large numbers than others. In one instance, as a result of the unfamiliar alphabetical system that relied on first names rather than surnames, there was difficulty in controlling the queues for polling streams, prompting an IEBC official to reprimand the Presiding Officer in our presence and threatening to change the leadership at the polling stream so that order could be restored and maintained.

## **Rift Valley (Nakuru)**

- Many of the polling stations visited opened between 15-30 minutes late. Reasons given for the delays primarily related to internal logistical arrangements (putting up signs, organizing the polling station, signing in party agents etc.)
- There was some confusion over the streams to which voters were allocated resulting in even longer waits for those who were not in the line-up for the correct stream from the beginning. While some streams were clearly marked, others were not and queuing clerks were most often posted at the entrance to the stream rather than assisting voters joining the line to find their proper stream.
- The failure of the BVR system, together with the failure of the poll books (due to battery failure, a lack of electricity or general problems with the system) resulted in the manual register being widely used to identify voters.
- In some instances, voters' names were not in the poll book nor recorded in the manual register. In such cases it appears as though the IEBC ROs approved the creation of a supplementary list provided that a voter provided adequate proof of registration.

- The team was told by voters and all party agents that they were satisfied with the arrangements for voting and that they were pleased with the process.
- The counting process at the polling stream visited was transparent. The process began at 18.00 on 4 March and concluded at 07.00 on 5 March.
- During the tally of the votes, allegations by a candidate and the subsequent rumours that spread through the tally station (to party agents, observers etc.) were not addressed nor clarified by IEBC staff leading to tensions rising. The riot police were brought in to calm the situation.

### **Rift Valley (Eldoret)**

- Voting generally started on time with most stations starting within 30 minutes of the expected start time. The late start was attributed to various issues such as poor lighting and irregular formatting of the register.
- Problems encountered with EVIDS but generally both party agents and voters were comfortable voting without the electronic verification. In fact voting appeared to move faster in those streams where the device was not being used. At least one station reported having received an EVID kit with the wrong voter list loaded on.
- Long queues were seen in some polling stations in the urban area but some attempts were made at queue management with clerks sitting outside the polling stations directing voters to specific streams where their names appeared.
- Tallying rules were explained by the PO and agreed with the party agents before the start of the count.
- Constituency tallying centres were well organized but the process was quite long given the numbers of polling stations that each Returning officer had to process.
- By 10am of 6th March, four out of six Constituency Returning officers had reported to the County Returning Officer.

### **Western (Kakamega)**

- At most of the primary school polling stations that we visited in the new constituency of Mumias East, biometric ID devices were not present.
- Where paper Registers were used it was noticeable that queues were moving much faster than areas where biometric ID devices were sometime causing delays.
- Observers noticed that ROs were from different regions thereby catering for rotation, e.g. the RO in Kakamega High School Tallying Centre was from Nairobi.
- Observers noticed that an element of rotation was also present at the level of the police that were securing the various Tallying Centres. For example, the police at the Chivakari High School were not from the Western Region but from the Rift Valley. This also contributed to the confidence.
- Observers encountered members of the prison service who had been deployed and sworn in as police to boost the number of police securing the election. We were impressed with their clear understanding of their role on voting day having been adequately briefed on their powers as police on voting day.

## The Results - *Presidential Elections*

<b>Candidates (Ballot Order)</b>	<b>Votes</b>	<b>% (of All Votes Cast)</b>
James Kiyapi	40,998	0.33%
Martha Karua	43,881	0.36%
Mohamed Dida	52,848	0.43%
Musalia Mudavadi	483,981	3.93%
Paul Muite	12,580	0.10%
Peter Kenneth	72,786	0.59%
Raila Odinga	5,340,546	43.31%
Uhuru Kenyatta	6,173,433	50.07%
<b>Total Valid Votes Cast</b>	12,221,053	
<b>Total Rejected Votes</b>	108,975	0.88%
<b>Total Votes Cast</b>	12,330,028	
<b>Total Registered Voters</b>	14, 352,533	
<b>% Turnout</b>	86%	

## Recommendations

- It is commendable that provisions are made for persons requiring assistance to vote. However it is not appropriate that party agents should be part of this process. The assistance should be limited to a person of their choice or an electoral official.
- In the event that Kenya has multiple elections on the same day, and thereby necessitating multiple ballots and ballot boxes, then it is important that the ballots and their respective boxes are more distinctly coloured to ensure easier differentiation by voters. Further voter education can also help in this regard.

- It is essential that if an electronic results transmission system is to be used again then the system must be adequately tested to ensure that it is reliable.
- At present the number of voters per polling centre requires that polling stations are sub-divided into streams. But the system of managing queues and directing people to their respective queue needs to be improved to ensure better management of crowds and less confusion for voters. Further, the streaming alphabetically by first name means that family members can be separated. It might be considered if this is a reasonable and helpful practice or not.
- Electoral activities across the country must be adequately resourced to ensure inadequacies do not affect the process.

## Chapter 6

### Conclusions and Recommendations

#### Conclusions

The 4 March 2013 elections were Kenya's first General Elections under the new Constitution and a series of new laws governing the elections, and represent an integral step in the reform and devolution process. Citizens have voted for the President, National Assembly, Women Members of the Assembly, Senate, County Governors and County Assemblies; three of which are brand new elective representative institutions. These elections were also the first General Elections since the tragic events following the 2007 polls, and so a major test for the country and its institutions.

The elections were regulated by an entirely new legal framework, including the 2010 Constitution and the 2011 Elections Act, IEBC Act and Political Parties Act and overall the new legal framework provides the basis for credible, inclusive and competitive elections. However, the outgoing parliament, which passed the new electoral legislation, did so in some cases quite late resulting in a contracting of the electoral calendar or with various amendments which were not helpful to the effective administration and management of the process

The elections were competitive, with freedom of association and participation rights provided for. However, the political party primaries were reportedly not well managed by the parties and were delayed virtually up to the deadline for nominations in order to minimize party hopping. This created unnecessary pressure on the IEBC and created challenges with regard to the ballot printing.

The provision of special seats for women in the National Assembly and reserved seats for women (as well as youth and persons with disabilities) in the Senate and County Assemblies, means the level of women's representation is improved compared to the previous parliament. However, it is regretted that the gender quota provided for in the new constitution is yet to be enforced.

There is a higher level of confidence and trust in the independence of the Judiciary following reforms and new appointments among judges at various levels. This is very positive in the context of the elections and more broadly.

The election campaign was largely peaceful. Given the background to these polls, the high level of competition between political contestants and the fact that politics in Kenya retains a strong ethnic dimension, the peaceful campaign was both highly welcomed and commended. This environment was facilitated in no small measure by the large peace rally in Nairobi attended by leading candidates, the positive and constructive tone of the presidential debates, the numerous calls for peace from senior figures and a more responsible coverage by domestic media. Campaign rights were provided for and candidates enjoyed freedom of movement and assembly, though it is unfortunate that adequate legislation on campaign funding and expenditure was not in place for these polls in order to provide for a higher level of transparency and accountability in this regard.

The IEBC faced a challenging task in organizing the elections, not least because in a short period of time it was tasked with conducting nationwide boundary delimitation, a brand new biometric voter registration and preparing for six polls on a single day for multiple institutions some of which are just being created; all in the context of a brand new legal framework. Throughout the preparation for the polls public confidence in the IEBC was reported to be high, which, given the loss of confidence in the previous electoral management body following the 2007 polls, is commendable, and overall the IEBC managed the pre-election preparations in a transparent and effective manner.

In such an environment and faced with late changes to the legislation the IEBC did struggle to contend with some shortcomings and truncated electoral deadlines. For instance, the IEBC's voter education campaign, which is critical given the new system and complexity of the voting process, was initiated relatively late in the process. Problems and delays with the procurement of materials for the biometric voter registration and the reduced period for voter registration both impacted on the process. But overall, while the inclusion rate on the list can probably be further improved for the future, the new register represents a major effort and generally provides for universal suffrage.

On the day of the election Commonwealth observers reported positively on the voting and counting processes in the majority of places visited. There was a very large turnout of 86% and this created some crowd management challenges, but overall people waited peacefully for their turn to vote. There were, however, some violent incidents in the Mombasa area, which most unfortunately led to the tragic loss of several lives. We did observe problems in some instances with the electronic voter identification machines, but this was alleviated by the use of the printed copy of the register as provided for in the regulations.

The count at polling stations was conducted transparently, poll officials worked diligently and party agents were present to witness the outcome. These elections were for 1,882 elective positions and the results tabulation was reasonably well conducted but a number of problems occurred in the tallying of results for the presidential elections:

- Firstly, the electronic transmission process failed and the IEBC had to resort to waiting for the physical delivery of official results by Returning Officers to Nairobi.
- Secondly, there was confusion over the presentation of the respective vote totals for each candidate and whether or not to include rejected ballots in the calculation of the total votes cast.
- Thirdly, there was a system error during the initial reporting of rejected ballots and the totals reported were being multiplied by eight; and it took the IEBC quite some time to identify and rectify the error, and
- Fourthly, there was some tension between the IEBC and party agents at the National Tally Centre regarding access to the process.

The IEBC worked hard to tally the final presidential results, and the process was transparent with parties given a copy of result sheets and able to verify the results. However, the problems identified resulted in some confusion and tension among some stakeholders and represented an untidy end to a critical part of the process.

At the time of writing a final result for the presidential election had been announced and a winner declared. However, the second placed candidate had indicated his intention to avail himself of his constitutional right to contest the results with a petition to the Supreme Court.

Despite these concerns, and the various shortcomings identified, our overall conclusion is that the process for the 2013 General Elections in Kenya was credible and met many of the benchmarks for democratic elections to which Kenya is committed.

## **Recommendations**

### **The Electoral Framework and Election Administration**

- It is important that the electoral timelines are established in a manner that facilitates the timely and effective administration of the election. This includes, but is not limited to, providing an adequate period for voter registration which can be completed in good time prior to the polls; ensuring candidate nominations are finalised and confirmed in good time for the ballot printing; and, ensuring that voter education is conducted for a long enough period to ensure it is effective. Both parliament and the election management body have to work together in this regard to ensure the legislative process and election administration are in harmony.
- It is envisaged in the law that voter registration will be continuous, enabling the IEBC to build upon the strong platform provided by the new voter register compiled for these polls. It is apparent that some areas have lower registration rates than others, and so there is now an opportunity to rectify this.
- Further, if the IEBC intends to continue to utilise the biometric voter identification devices in polling stations then it must ensure that there is sufficient time to adequately test the system, train personnel in their use and ensure that the local resources are suitable for their use; notably with regard to suitable power or battery back-up.
- New legislation governing campaign financing and expenditure was not enacted for these polls, but it is required. It is hoped that the new parliament will consider this and pass such legislation, thereby ensuring adequate transparency and accountability in this regard.
- It is important that the quota for gender balance in representation in the parliament, as envisaged in the Constitution, is enforced as soon as is feasible. Further, there remains a broader need to encourage and facilitate women's participation as candidates for future elections.
- During these elections, the calculation as to whether or not a particular candidate has secured a majority of all the votes cast has been defined as all of the valid votes cast plus all of the rejected ballots. It is important that this is clearly articulated for future elections to pre-empt any further uncertainty in this regard.

### **The Election Campaign and Media**

- The National Cohesion and Integration Commission, the Media Council of Kenya and the Communications Commission of Kenya should be adequately financed and equipped to efficiently and effectively fulfil their respective mandates.

- Adherence to guidelines for responsible and ethical coverage of elections should be maintained and strengthened in the period after the elections.
- The Group also recommends training programmes on how media can cover the newly-created elective institutions.

### **Voting, Counting and Results**

- It is commendable that provisions are made for persons requiring assistance to vote. However it is not appropriate that party agents should be part of this process. The assistance should be limited to a person of their choice or an electoral official.
- In the event that Kenya has multiple elections on the same day, and thereby necessitating multiple ballots and ballot boxes, then it is important that the ballots and their respective boxes are more distinctly coloured to ensure easier differentiation by voters. Further voter education can also help in this regard.
- It is essential that if an electronic results transmission system is to be used again then the system must be adequately tested to ensure that it is reliable.
- At present the number of voters per polling centre requires that polling stations are sub-divided into streams. But the system of managing queues and directing people to their respective queue needs to be improved to ensure better management of crowds and less confusion for voters. Further, the streaming alphabetically by first name means that family members can be separated. It might be considered if this is a reasonable and helpful practice or not.
- Electoral activities across the country must be adequately resourced to ensure inadequacies do not affect the process.

# Annex 1

## Composition of the Team

### **His Excellency Mr Festus Mogae (Chair) Botswana**

President Mogae trained as an Economist at the Universities of Oxford and Sussex in the United Kingdom. He served his country in a number of capacities including as Permanent Secretary, Ministry of Finance and Development Planning from 1975 to 1976. He became Alternate Governor for Botswana at the International Monetary Fund, African Development Bank, and the International Bank for Reconstruction and Development from 1971 to 1976.

He was Governor of the Bank of Botswana from 1980 to 1981. From 1982 to 1989 he was Permanent Secretary to the President, Secretary to the Cabinet and Supervisor of Elections. He was appointed Minister of Finance and Development Planning in 1989 and became Vice President in 1992, until 31 March 1998 when he became the Third President of the Republic of Botswana. President Mogae has served on the boards of various parastatals as well as corporate organisations. He has been involved in a number of community oriented initiatives and is Chairman of the National AIDS Council (launched 30 March 2000). Among a significant number of national and international honours and awards, President Mogae won the Mo Ibrahim Prize for African leadership for ensuring "stability and prosperity" in 2008.

### **Shana Kaiser (Canada)**

Shana Kaiser has worked with the Electoral Processes Programme at International IDEA since early 2008 and has worked with many aspects of electoral processes during this time including direct democracy mechanisms, electoral justice, social media and electoral processes and capacity development for electoral management bodies. Prior to her work with the COG, she has observed elections in Côte d'Ivoire and the Ukraine.

### **Thomas Kwesi Quartey (Ghana)**

Kwesi Quartey has just retired as Ambassador of Ghana to Ethiopia, the African Union and the United Nations Economic Commission for Africa, after a career spanning more than 30 years in the Ghana Foreign Service.

### **Hon Justice Carl Singh, OR, CCH (Guyana)**

Since 1995, Justice Carl Singh has been a member of the Judiciary of Guyana. He presently holds the position of Acting Chancellor and Head of the Judiciary. Justice Singh is the President of the Court of Appeal of Guyana and by virtue of his position as the Acting Chancellor he is also the head of the constitutionally-established Judicial Service Commission which body is responsible inter-alia, for the appointment of Judges and magistrates.

### **Dr SY Quraishi (India)**

Dr Quraishi is a former Election Commissioner and Chief Election Commissioner of India (2006-2012). In this role he introduced a number of innovative electoral reforms, established an Expenditure Control Division and a Voter Education Division in the Commission. He also founded the India International Institute of Democracy and Election Management to professionalize election management and share it with the emerging democracies of the world. Dr Quraishi has delivered lectures on democracy and elections at numerous fora worldwide including a number of universities like Harvard, Yale, Pennsylvania, California, North Carolina in the US and Cambridge and London in UK. He has been recently appointed on the Board of Advisors of International IDEA and he was also a

Member of the Advisory Committee to assist and advise the Global Commission on Elections, Democracy and Security, headed by Mr Kofi Annan (2010-12). Previously he observed elections in Russia and South Africa.

**Fabian Brown (Jamaica)**

Brown is one of the founding directors of the Citizens Actions for Free and Fair Elections, Jamaica's local election observer group. He is involved in the on-going youth, social and community transformation of various rural and urban communities. He is the founder and CEO of Value Added Services Limited and the Value Added Services Foundation. and the immediate past president of the Young Entrepreneurs Association of Jamaica. His major areas of focus includes: strategic management, music and entertainment, social development, change management, resource mobilization, programme facilitation, communication and organizational management; and continues to add productive value within the public, private and the social services sectors of Jamaica and the Caribbean.

**Nancy Tembo (Malawi)**

Nancy Tembo is a Commissioner on the Malawi Electoral Commission. Previously she was a Member of Parliament, where she also served on the Public Accounts Committee and the Parliamentary Committee on Health. She has served as the Chairperson of the African Parliamentarians Network Against Corruption – Malawi Chapter and has been an active participant in the fight for gender equality in Malawi. Nancy Tembo has also previously worked in the private sector and for the Reserve Bank of Malawi.

**Ilham Mohamed (Maldives)**

Miss Mohamed is Head of Transparency International in the Maldives, building on a strong background working on financial management and transparency initiatives. From 1997-2007 she worked at the Ministry of Finance and Treasury holding several positions including Assistance Undersecretary for Economic Affairs and Policy Planning and Director overseeing and fund raising from overseas development assistance groups and commercial lenders. She advised the Minister and Deputy Minister on the external debt environment of the country by preparing and forecasting future borrowing and projects to be assigned foreign funding. Miss Mohamed holds a Masters in Gender Studies from the University of London and a Bachelor of Arts from the University of Toronto.

**Tahura Titi Gabi (Papua New Guinea)**

Tahura Gabi is a senior journalist from Papua New Guinea. She has worked in television, including anchoring a daily news programme and hosting a talk show. She attained a Bachelor's Degree in Journalism from the University of Papua New Guinea. In the last two years, Tahura has worked as a freelance journalist. She is also a Media Monitor in the South Pacific region, having been trained by the International Federation of Journalists (IFJ) in Apia, Samoa and Honiara, Solomon Islands. Ms Gabi also chairs a media monitor on-line group called the Pacific Freedom Forum and is responsible for the creation of the new PNG Media Workers Association. She has covered three National Elections as a reporter in Papua New Guinea whilst with television and radio.

**Hon Jacqueline Muhongayire (Rwanda)**

Jacqueline Muhongayire is currently a Member of Parliament representing Rwanda in the East African Legislative Assembly (EALA) - East African community (EAC) and Member of the Committee on Regional Affairs and Conflicts Resolutions. She is a Former Deputy Speaker of the National Assembly of Rwanda and one of the founding Members of the Rwandese Women Parliamentarians Forum (RWPF). She has observed the Southern Sudan Referendum in 2011 and different elections in the EAC Region.

### **Miatta French (Sierra Leone)**

Miatta French is one of the five members of the National Electoral Commission of Sierra Leone. She has previously served the Commission as head of its Outreach and External Relations Unit and as Director of Operations. She has observed elections with the African Union and the Mano River Union. Before joining the Commission, she worked with a range of local and international organizations and donor partners in research, advocacy, public information and administrative positions. She is an accredited BRIDGE (Building Resources in Democracy, Governance and Elections) facilitator and a Chevening Fellow.

### **Raenette Taljaard (South Africa)**

Raenette Taljaard is a part-time commissioner of the Electoral Commission of South Africa and senior lecturer, Public Policy University of Cape Town. She holds a BA (Hons) in Law; MA in International Relations, University of Johannesburg; MSc in Public Policy and Public Administration, London School of Economics. From 1999-2004, she was Member of South African Parliament including: 2002-04 as Shadow Minister of Finance. Ms Taljaard is a Yale World Fellow; Fellow Emerging Leaders Program, Duke University and UCT; African Leadership Initiative Fellow, Aspen Institute. She lectures and writes on private military and private security companies and political accountability questions. She is a Young Global Leader of the World Economic Forum and serves on the World Economic Forum Global Agenda Council for Africa.

### **Hon Dr Didas John Massaburi (Tanzania)**

Hon Dr Didas John Massaburi is the Mayor of Dar es Salaam. Hon Dr Massaburi also a Board Member of the Commonwealth Local Government Forum and President of the Association of Local Authorities of Tanzania.

### **Joshua Wamala (Uganda)**

Joshua Wamala is currently the Head of Election Management at the Uganda Electoral Commission. He has over twenty years of experience in the field of election management, mainly focusing on voter registration, nomination processes, election planning and logistics, boundary delimitation and management of election results. He has previously been an election observer in a number of countries, including the United States of America, India, Namibia, Tanzania, Rwanda, Burundi and Kenya. He previously worked as a research officer with the Uganda Constitutional Commission, a body which spearheaded the drafting of a new constitution for Uganda. He holds a Master of Statistics degree from Makerere University and qualifications in Management.

### **Kaye Oliver, CMG, OBE (United Kingdom)**

Miss Oliver was a diplomat until 2002. She spent 16 years in Africa including as Ambassador to Rwanda and Burundi and as High Commissioner to Lesotho. Miss Oliver was part of the Commonwealth Observer Groups to Kenya, Nigeria, Swaziland, Rwanda, Burundi and Zambia. She is a Director of Electoral Reform International Services (ERIS) in the UK.

### **Samira Sawlani (United Kingdom)**

Samira Sawlani is a freelance journalist and Humanitarian Aid Worker. She has written for a number of publications in Africa and the Middle East and has previously worked for the Commonwealth Secretariat, Red Cross Uganda, UNHCR and the Royal Commonwealth Society. A holder of an MA in International Studies and Diplomacy, Samira's areas of focus are politics and society in African countries, International Conflict and Refugee Care.

**Elias Chipimo (Zambia)**

Elias Chipimo is an Opposition leader in Zambia and heads the National Restoration Party. As a lawyer and founding Partner of Corpus Legal Practitioners, Zambia's largest legal firm, he co-established in 1993, one of the nation's longest standing local human rights NGO's, Zambia Civic Education Association. He is a Rhodes scholar and a graduate of the University of Zambia and Oxford University. He retired from private practice in 2009. In 2010 he published "Unequal to the Task?". In general elections in Zambia in 2011, he stood as the country's youngest presidential contender in a field of 10 candidates and emerged fifth.

## Annex 2

### COG Deployment Plan

<b>Team</b>	<b>PROVINCE</b>	<b>LOCATION</b>	<b>NAMES</b>
1	Nairobi & Environs	Nairobi	H.E. Pres Mogae (Botswana) Mark Stevens and Julius Mucunguzi
2	Nairobi & Environs	Nairobi	Martin Kasirye Zippy Ojago
3	Nairobi City	Nairobi	Kaye Oliver (UK) Dr SY Quraishi (India)
4	Western	Kakamega	Raenette Taljaard (South Africa) Fabian Brown (Jamaica)
5	Nyanza	Kisumu	Elias Chipimo (Zambia) Clara Cole
6	Rift Valley	Eldoret	Miatta French (Sierra Leone) Joshua Wamala (Uganda)
7	Rift Valley	Nakuru	Shana Kaiser (Canada) Justice Carl Singh (Guyana)
8	Central	Nyeri	Nancy Tembo (Malawi) Priyanka Chauhan
9	Coast	Mombasa	Kwesi Quartey (Ghana) Ilham Mohamed (Maldives)
10	Eastern	Isiolo	Tahura Gabi (PNG) Hon Didas Massaburi (Tanzania)
11	Eastern	Kitui	Jacqueline Muhongayire (Rwanda) Samira Sawlani (UK)

## **Annex 3**

### **Arrival Statement**



## **Commonwealth Observer Group**

### **Kenya General Elections 2013**

#### **NEWS RELEASE**

#### **Arrival Statement by H.E. Festus Mogae**

#### **Chairperson of the Commonwealth Observer Group**

Following an invitation from the Independent Electoral and Boundaries Commission (IEBC) of Kenya, the Commonwealth Secretary-General, Mr. Kamalesh Sharma, has constituted an Observer Group for the 2013 General Elections. It is my honour and privilege to have been asked to lead the Group, and to be here in the country for these important elections.

I am also pleased to lead a team of sixteen eminent persons drawn from across the Commonwealth, including politicians, members of election management bodies, judiciary, former diplomats, civil society, youth and the media.

The Commonwealth has a long tradition of support for elections in Kenya, including observing the 2007 polls. We are pleased to be in the country as the people of Kenya take this next step in the consolidation of the democratic process in Kenya following the adoption of the new Constitution and the creation of a series of new representative institutions.

For Kenya, the 2013 elections represent a critical moment. It is a moment when the eyes of Africa, the Commonwealth and the world are upon you. As everybody is aware, and nobody more than the people of Kenya, the 2007 elections led to a tragic crisis, resulting in large-scale loss of life, displacement of people, destruction of property and a loss of confidence in the democratic process and institutions.

It is to Kenya's credit that in the subsequent years some of this confidence, notably with regard to the management of the electoral process, has been re-gained by the way a series of by-elections and the 2010 referendum were conducted. These elections are the next step

and it is imperative that first and foremost political contestants engage in all phases of the process in a responsible manner, abiding by the Code of Conduct they have signed and ensuring a peaceful election that Kenya can be proud of. Media also has a responsibility to ensure that its coverage is balanced and measured and does not incite unrest. We also very much hope the IEBC, given the complexity of the task it faces on this occasion, can manage the process in a credible and transparent manner, thereby ensuring that Kenyan voters have the opportunity to express their will and electoral stakeholders maintain confidence in the process.

Our task as the Commonwealth Observer Group is to consider all the factors impinging on the credibility of the electoral process as a whole, and assess whether the elections have been conducted according to the standards for democratic elections to which Kenya has committed itself, with reference to its own election-related legislation as well as relevant regional, Commonwealth and other international commitments.

In conducting our duties and undertaking our assessment, we will be impartial, objective and independent. We are here in our individual capacities as eminent Commonwealth citizens. The assessment by the Group will be its own, and not that of any member government.

In the pre-election period we will meet a wide range of stakeholders, including the IEBC, representatives of political parties, civil society and media, as well as High Commissions and representatives of other international and national observer groups.

Prior to polling day, Commonwealth teams will deploy to a variety of locations around the country to observe the voting, counting and results processes. Our teams will coordinate with other observers in the field in order to maximise our overview of the process. We will issue an Interim Statement after the election and a final report at a later stage.

I wish the people of Kenya well and I also wish to pledge the unwavering solidarity of the Commonwealth as you go into these elections.

**Nairobi, Thursday 28 February 2013**

## **Annex 4**

### **Interim Statement**



## **Commonwealth Observer Group Kenya General Elections 2013**

### **INTERIM STATEMENT**

**H.E. Festus Mogae**  
**Chairperson of the Commonwealth Observer Group**

The Commonwealth Observer Group has been present in Kenya since 25 February 2013. During this period we have met with the Independent Electoral and Boundaries Commission (IEBC), representatives of political parties, civil society, media, Commonwealth High Commissions as well as other international and national observers. Commonwealth teams were based in seven of the Provinces. Our teams observed the voting, counting and results aggregation and also met with electoral officials, observers and other stakeholders at the County level to build up a larger picture on the conduct of the process.

This is the interim statement of the Commonwealth Observer Group, and it is issued with the process yet to be completed as the critical tabulation and results processes are ongoing. We will issue a Final Report at a later stage, containing our conclusions on the entire process.

#### **Key Findings**

- The 4 March 2013 elections were Kenya's first General Elections under the new Constitution and a series of new laws governing the elections, and represent an integral step in the reform and devolution process. Citizens have voted for the President, National Assembly, Women Members of the Assembly, Senate, County Governors and County Assemblies; three of which are brand new elective representative institutions. These elections were also the first General Elections since the tragic events following the 2007 polls, and so a major test for the country and its institutions.
- On the day of the election Commonwealth observers reported positively on the voting and counting processes in the majority of places visited. There was a large turnout, particularly at the outset of the voting and this created some crowd management challenges, but overall people waited peacefully for their turn to vote. There were however reports of incidents in the Mombasa area prior to the opening

of polling and these are regrettable. In cases where there were delays voting was extended to enable those persons still waiting to cast their votes. We did observe problems in some instances with the electronic voter identification machines, but this was alleviated by the use of the printed copy of the register as provided for in the regulations.

- The count at polling stations was conducted transparently, poll officials worked diligently and party agents were present to witness the outcome. The results tabulation is on-going and this is a critical part of the process. We noted the electronic transmission of unofficial results for the presidential elections experienced problems in some areas and later the Chair of the IEBC announced there had been a broader failure of the electronic transmission process and they would instead await the physical delivery of official results. We remain hopeful that the full results will be available within a reasonable period. Further, late on 5 March the IEBC clarified that rejected votes should be included in the total number of votes cast when calculating whether a candidate had received a majority, which was not how provisional results had initially been presented.
- The 2013 elections were regulated by an entirely new legal framework, including the 2010 Constitution and the 2011 Elections Act, IEBC Act and Political Parties Act. While the finalisation of the legislation so close to the election creates some challenges and some aspects do raise concern, overall the new legal framework provides the basis for credible, inclusive and competitive elections.
- The elections were competitive, with freedom of association and participation rights provided for. However, the political party primaries were reportedly not well managed by the parties and were delayed virtually up to the deadline for nominations in order to minimize party hopping. This created unnecessary pressure on the IEBC and created challenges with regard to the ballot printing.
- The provision of special seats for women in the National Assembly and reserved seats for women, among other groups, in the Senate and County Assemblies, means the level of women's representation is improved compared to the previous parliament. However, it is regretted that the gender quota provided for in the new constitution is yet to be enforced.
- The election campaign was largely peaceful. Given the background to these polls, the high level of competition between political contestants and the fact that politics in Kenya retains a strong ethnic dimension, the peaceful campaign was both highly welcomed and commended. This environment was facilitated in no small measure by the large peace rally in Nairobi attended by leading candidates, the positive and constructive tone of the presidential debates, the numerous calls for peace from senior figures and a more responsible coverage by media. Campaign rights were provided for and candidates enjoyed freedom of movement and assembly, though it is unfortunate that adequate legislation on campaign funding and expenditure was not in place for these polls in order to provide for a higher level of transparency and accountability in this regard.
- The IEBC faced a challenging task in organizing the elections, not least because in a short period of time it was tasked with conducting nationwide boundary delimitation, a brand new biometric voter registration and preparing for six polls on a single day for multiple institutions some of which are just being created; all in the context of a

brand new legal framework. Throughout the preparation for the polls public confidence in the IEBC was reported to be high, which, given the loss of confidence in the previous electoral management body following the 2007 polls, is commendable, and overall the IEBC managed the preparations in a transparent and effective manner.

- In such an environment and faced with late changes to the legislation the IEBC did struggle to contend with some truncated electoral deadlines and shortcomings. For instance, the IEBC's voter education campaign, which is critical given the new system and complexity of the voting process, was initiated relatively late in the process. Problems and delays with the procurement of materials for the biometric voter registration and the reduced period for voter registration both impacted on the process. But overall, while the inclusion rate on the list can probably be further improved for the future, the new register represents a major effort and generally provides for universal suffrage.
- It is important to note that the results process is yet to be completed and should there be any legal disputes they will have to be resolved using the prescribed channels. Based on the process up to this point the 2013 polls represent a major effort on behalf of the IEBC and other institutions to conduct genuine elections. We urge the IEBC to ensure clarity and to complete the process in a transparent and timely manner. We also urge all parties and their supporters to be patient and calm and continue to play their part as they have done so far and ensure that Kenya's reputation is enhanced as a result of these elections.

### **The Electoral Framework and Election Administration**

The outgoing parliament passed the new electoral legislation, but they did so in some cases quite late resulting in a contracting of the electoral calendar or with various amendments which were not always helpful to the effective administration and management of the process. For instance, the voter registration period was reduced from 90 days before elections to 60 days; and, the requirement for a minimum period a candidate had to have been a member of a party in order to qualify for nomination was reduced from three months until the day of nominations, thereby facilitating party hopping up to the last moment.

The IEBC set a figure of 18 million as the potential eligible electorate. During the 30 day registration period which was eventually provided for, the IEBC registered some 14.3 million persons. While the registering of 14.3 million persons in just 30 days is an impressive figure, such a truncated period of registration for such crucial elections is unfortunate. The start of registration had been delayed following delays in the decision regarding the system of registration to be used and problems with the procurement process. There were also some delays in the finalisation and certification of the lists due to the time required for the cleaning and correcting of data. Final figures indicate that some 13,000 people were double registered and therefore excluded from voting.

There is a higher level of confidence and trust in the independence of the judiciary following reforms and new appointments among judges at various levels. This is very positive in the context of the elections and more broadly. It was also positive that Courts sought to fast track electoral matters and that informal mechanisms existed, such as the Political Party Liaison Committees, to resolve conflicts between parties.

## **The Election Campaign and Political Participation**

The election campaign was reportedly generally peaceful. There were some local incidents and also tensions in some areas where there had been pre-existing problems, such as in the Tana River. But overall candidates and parties held numerous rallies and meetings throughout the country and were able to freely assemble and express their views. The numerous calls for peace by leading figures helped foster this conducive climate, as did the high profile peace rallies, such as the large one in Nairobi the week before the election. The presidential debates also helped focus attention on the issues and candidates engaged in them in a constructive manner. Further, the absence of hate speech in media and a more balanced coverage by media generally also contributed to the positive assessment of the election campaign.

The level of women's representation in elective institutions under the current dispensation is improved compared to previously when just 10% of the members of parliament were female. Now there are 47 special seats for women in the National Assembly, 16 seats allocated in the Senate from party lists and women members for County Assemblies. However, Article 27(8) of the Constitution states that the "State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender". But following a decision of the Supreme Court, the implementation of this provision was postponed. It is hoped that for future elections the positive provision in the Constitution for more balanced gender representation is implemented.

## **Voting and Counting Procedures**

The turnout of voters was high, with long queues at many polling places prior to the opening of polls at 06.00. In some voting centres there were thousands of registered voters which meant that there was a wait of several hours. Security was present and was on the whole effective in helping IEBC officers to manage crowds. Polling staff worked hard and diligently and while some places experienced problems with the biometric voter identification devices the provision of printed registers as a back-up meant that people were not disenfranchised. The holding of six elections at the same time meant that voting was sometimes slow. Further, the different colours used for the ballots were not sufficiently distinctive and many voters had a problem identifying the correct ballot box for the respective ballots.

The vote count in polling stations was transparent, with officials conducting the process in a deliberate and careful manner and party agents were present and able to scrutinize the process, ensuring transparency and accountability at that level. It is noted that the number of invalid votes is quite high. This is unfortunate but not unforeseeable given the complexity of the voting process and the relatively late effort of the IEBC's voter education campaign. The tabulation process is on-going and the IEBC must retain its transparency in completing this and that any complaints are dealt with effectively to ensure accountability.

**Nairobi, 6 March 2013**

### **Declaration of Principles for International Election Observation**

The Commonwealth Secretariat is a signatory to both the Declaration of Principles for International Election Observation and the associated Code of Conduct for International Election Observation Missions, which were commemorated on 27 October 2005 at the United Nations in New York.

Commonwealth Observer Groups are organised and conducted in accordance with the Declaration and Commonwealth Observers undertake their duties in accordance with the Code of Conduct.