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## Kriegler and Waki reports summarised version

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**KRIEGLER AND WAKI REPORTS**

**SUMMARISED VERSION**

**Revised Edition**

**2009**

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## List of Acronyms

<b>AIDS</b>	Acquired Immune Deficiency Syndrome
<b>AP</b>	Administration Police
<b>CIPEV</b>	Commission of Inquiry into Post Election Violence
<b>CREAW</b>	Centre for Rights Education and Awareness
<b>CSOs</b>	Civil Society Organizations
<b>ECK</b>	Electoral Commission of Kenya
<b>FIDA</b>	Federation of Women Lawyers
<b>GBVU</b>	Gender-Based Violence Units
<b>GOK</b>	Government of Kenya
<b>GSU</b>	General Service Unit
<b>GVRC</b>	Gender Violence Recovery Centre
<b>IDPs</b>	Internally Displaced Persons
<b>IREC</b>	Independent Review Committee
<b>KANU</b>	Kenya African National Union
<b>KARI</b>	Kenya Agricultural Research Institute
<b>KEFRI</b>	Kenya Forestry Research Institute
<b>KHRC</b>	Kenya Human Rights Commission
<b>KNCHR</b>	Kenya National Commission on Human Rights
<b>MOU</b>	Memorandum of Understanding
<b>MPs</b>	Members of Parliament
<b>NARC</b>	National Rainbow Coalition
<b>NSAC</b>	National Security Advisory Committee
<b>NCCK</b>	National Council of Churches of Kenya
<b>NGO</b>	Non-Governmental Organization
<b>NSIS</b>	National Security Intelligence Service
<b>OCPD</b>	Officer Commanding Police Division
<b>OCS</b>	Officer Commanding Station
<b>ODM</b>	Orange Democratic Movement
<b>PEV</b>	Post Election Violence
<b>PNU</b>	Party of National Unity
<b>PPO</b>	Provincial Police Officer
<b>SLDF</b>	Sabaot Land Defense Force
<b>UNFPA</b>	United Nations Fund for Population Activities
<b>UNIFEM</b>	United Nations Development Fund for Women
<b>DEC</b>	District Election Coordinators
<b>KEDOF</b>	Kenya Elections Domestic Observation Forum
<b>ACE</b>	Administration on Cost of Elections
<b>KLRC</b>	Kenya Law Reform Commission
<b>MCK</b>	Media Council of Kenya

## Acknowledgments

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We are grateful to the Konrad Adenauer Foundation and particularly the Resident Representative in Nairobi, Anke, Christine Lerch for positively listening to the need for this material and agreeing to support its production. We remain grateful to the endless dedication and cooperation received from the staff of the organization particularly the efforts of Gideon Ochanda, Alice Amayo and Mrs. Roselyne Wekesa who were critically helpful with consultations and advise even amidst real pressure of time as we worked to produce the handbook. Nevertheless, other staff members and partners of the Konrad Adenauer Foundation in the democratization family, and for whom we have been able to make contact are all appreciated in this effort since in one way or the other, their contributions, magnanimity and experiences have inspired this effort.

Finally, we wish to sincerely thank the Board of Trustees of Dialogue Africa Foundation, members of the Secretariat; Jacob Atiang' and Ishmael Osano, our panel of reviewers, consultants and the printers who worked tirelessly in making this handbook a reality. We do, however, take any responsibility for whatever professional errors and inaccuracies that may have escaped our attention and will not hesitate in reviewing them anytime in future. May your reading of this handbook go a long way into shedding light on the critical debate against incessant impunity in this country, and the drive for institutional reforms following the 2007 post election crisis.

Dialogue Africa Foundation, 2009

## Foreword

Kenya has been at a political cross road ever since the close of the 2007 general elections. While there has been relative peace, general calmness and a running government, the situation has remained fairly fragile and uncertain. The brokered settlement or the National Accord process laid out a series of ‘must dos’ through its agenda resolutions and gave time lines if the national healing and reconstruction were to be realized. The ‘must dos’ included the setting up of commissions to investigate, examine and recommend on circumstances that surrounded the post election violence and to further scrutinize the country’s electoral process with a view of initiating and guiding electoral reforms to avoid future electoral chaos.

In line with the Accord, the commissions set up came out with brave and damning revelations. As was expected, the findings have elicited heated debate particularly within the political class to an extent that it is moving the country to an even increased dilemma. The political class is looking at the reports not in terms of their objects and intent but more in terms of political gains and losses. Those that see gains, are on top of things and want the reports implemented yesterday. Those on the receiving end have narrowed the reports to mischief and intent to squeeze out ‘bad’ boys from the 2012 election map.

The raging debate has made us to ask a few questions. Does Kenya belong only to politicians? Must the reports only be looked at politically? Can the other players have a voice and be given space to be heard? What about the consequences of impunity and inaction?

It is some of these questions that prompted us to think that one of the reasons that could be hampering other actors from active participation include access and inhibitive voluminous nature of the reports. We have therefore chosen to do a good number of copies of the abridged version of the reports to facilitate debate by other actors.

*Anke Christine Lerch  
Resident Representative  
Konrad Adenauer Foundation  
Kenya Country Office, 2009*

## Preface

On 30th December 2007, following the announcement of the presidential election results, violence broke out in several places across Kenya amid claims that the electoral commission of Kenya (ECK) had rigged the presidential elections. Sporadic eruptions continued for many weeks, bringing death and destruction to thousands of Kenyans. Political stalemate and inability of the installed Kibaki government to bring order was phenomenal.

The International Community responded to the situation with a clear view that the strategic position held by Kenya both in the region and in the continent could not be allowed to drown. An African Union-sponsored panel of Eminent African personalities led by the former United Nations Secretary General Kofi Annan brokered a settlement which heralded a government of national unity between the main political parties and a common commitment to urgent constitutional reform.

At the fourth session held on 1<sup>st</sup> February, 2008 at the Serena Hotel, Nairobi, the parties to the Kenyan Dialogue and Reconciliation meeting on the resolution of the political crisis and its root causes, under chairmanship of Kofi Annan, namely Government of Kenya/PNU and the ODM agreed on four main agenda for the talks. These were; immediate action to stop violence and restore fundamental rights and liberties, immediate measures to address the humanitarian crisis, promote reconciliation, healing and restoration, how to overcome the current political crisis and finally addressing the long standing issues and solutions including constitutional reform and inequalities in the country. Subsequently, on 4<sup>th</sup> March, 2008, the parties agreed to form two commissions – the Independent Review Committee (IREC) and the Commission of Inquiry on Post Election Violence (CIPEV). The two would be non-judicial bodies mandated to investigate and report on different aspects of the problematic issues in the crises.

The IREC investigated all aspects of the 2007 presidential elections and made findings and recommendations to improve the electoral process. On the other hand, CIPEV would investigate the facts and surrounding circumstances related to the violence that followed the elections and make recommendations to prevent any recurrence of the violence in future. Subsequent to the two commission's work which effectively ended by the end of October 2008, each commission presented elaborate findings and recommendations. However, given the nature of the reports running into hundreds of pages, Dialogue Africa Foundation in partnership with Konrad Adenauer Foundation has chosen to step down the reports to reader friendly sizes. In this handbook, the reports have been summarized, sometimes with verbatim excerpts to facilitate quick reads and to help the public engage meaningfully in the current raging debate about the reports.



**Part I**

**THE INDEPENDENT REVIEW  
COMMITTEE (IREC)**

**The Kriegler Commission**

# The Independent Review Committee (IREC)

## The Kriegler Commission

### Background and Task

IREC was appointed by president Kibaki under the Commissions of Inquiry Act (Cap. 102). Its formation was formally gazetted through a Gazette Notice 1983, Kenya Gazette of 14<sup>th</sup> March 2008. The membership to the commission was arrived at through consensus between the two parties to the negotiations under the PNU and ODM axis. Ten members were agreed on. They were sworn in on the 20<sup>th</sup> March 2008.

The commission was tasked to examine the 2007 elections from a number of angles:

- The constitutional and legal framework with a view of identifying weaknesses and inconsistencies.
- The structure and composition of the ECK in order to assess its independence, capacity and functions (operations).
- The electoral environment and the role of the political parties, civil society, the media and observers.
- The organization and conduct of the 2007 elections, extending from civic and voters education and registration through polling, logistics, security, vote-counting and tabulation to the results-processing and dispute resolutions.
- Vote-tallying and counting to assess the integrity of the results of the entire election with special attention to the presidential contest.
- Assess the functional efficiency of the ECK and its capacity to discharge its mandate.
- Recommend electoral and other reforms to improve future electoral processes.

## Findings & Verdict

### 1. The Constitutional and Legal Framework

The Kenyan laws that are relevant to the elections are about 13 including the constitution, Acts of Parliament, regulations and codes of conduct. The national laws are expected to be in harmony with international conventions and internationally recognized best practices.

When the Commission mirrored the Kenyan elections practice in relation to the legal regimes that exist, the following were isolated as major weaknesses:

- The right to vote and stand for elections is not expressly provided for in the laws. It is only assumed in the constitutional provisions that provides for rights and association, expression, assembly, etc. It is noted that it is erroneously thought to be the same as having an entitlement to register as a voter.
- While the laws are fairly liberal on the participation of persons with disability, it is expressly discriminates and bars anyone who is not able to speak Swahili Language well enough to take an active part in the proceedings – Constitution Section 34.
- The number of pieces of law relating to elections are too many.
- The process of enforcement of the laws is cumbersome and gives space for scapegoats. The elections witnessed:
  - Vote-buying and selling.
  - Unapologetic use of public resources for campaign
  - Participation of public servants in campaign activities of certain camps
  - Ballot-stuffing
  - Organizing, marauding gangs and bully-boys to “zone” regions and electoral areas and intimidate opponents.
  - Using and cheering and uploading hate speech and ethnic sentiments.
  - Demolishing opponents and presidential candidates of opponent camps.
  - Using sexist tactics and violence to keep women out of the race.

Was this happening because there was no legal framework in place to govern such conduct? IREC’s analysis of the laws indicates that there is a legal framework to curb all the above itemized offences. And the true reason of the failure for the 2007 elections was the failure to protect the electoral process from these unacceptable deeds.

Nobody would have dreamt of seriously acting against people in high places. The Attorney-General certainly didn’t lie awake all night worrying about all these crimes being committed with not a finger being lifted to stop them. If the police were concerned about the state of affairs, they were certainly very patient. The ECK, with its powers under the National Assembly and Presidential Elections Act, the Code of Conduct thereto and the Electoral Offences Act which include powers to prosecute never really bit anybody. Public opinion cheered on as long as it seemed to benefit the side they supported.

## Recommendations

1. IREC recommends that the right to vote and to be elected at genuine periodic elections be included in the Bill of rights in the Constitution (chapter V.) and that voting by universal and equal suffrage and by secret ballot should be guaranteed for all without discrimination. To go hand in hand with this is the right to citizenship which is also important and is not included in the constitution.
2. IREC recommends that section 34 (c) of the Constitution be amended so as not to be perceived as discriminatory to any group of persons.
3. IREC recommends that all laws relating to the operational management of elections should be consolidated under one statute.
4. IREC recommends that a separate law be enacted to facilitate the establishment of a special Electoral Dispute Resolution Court to handle appeal matters from the initial stages of dispute resolution by the ECK. These would include matters that cannot be resolved by the ECK, or matters to which the ECK is not a party, and post-election disputes, including election petitions. The law should entrench a statutory limit to ensure that election petitions are finalized in good time – a limit of six months should be adequate. The current rules and regulations on the procedures of the election petitions should be repealed and replaced with new rules that ensure that petitions are heard in a just and timely manner.

## 2. The Organization Structure and Operation of Elections

The overall mandate in operationalizing elections in Kenya is placed on the ECK. The ECK is invested with powers to:

- Divide Kenya into such numbers of constituencies having such boundaries and names as it may prescribe.
- Register voters and maintain and revise the register of votes.
- Direct and supervise the presidential, parliamentary and civic elections
- Promote free and fair elections
- Promote voter education throughout Kenya.
- Determine the proportion of nominated members of parliament and councilors that each party should nominate and to ensure the observance of the principle of gender equality in such nominations
- Power to divide any municipality, country, township or county division into electoral areas having such boundaries and names as may be prescribed by order.
- To supervise party nominations on request.

More recently, Parliament has again used that power to establish the office of Registrar of Political Parties within ECK and to confer upon it wide-ranging powers to regulate establishment, organization, management and funding of political parties. In addition, section 17A of the National Assembly and Presidential Elections Act accords the ECK “overall conduct of elections” and the power to “give general directions and exercise supervision and control thereof and take the necessary measure to ensure that the elections are transparent, free and fair”.

### **a) Institutional design and management**

A review of the legal framework for the ECK reveals a number of institutional structure issues that require legal attention. Examples, drawn from comparative Kenyan semi-autonomous government agencies and EMBs elsewhere, include: incorporation; chief executive (by whatever name called); oath of office; principal office; meetings and procedure; officers and other staff; guiding principles; powers (including quasi-judicial powers); finances; investment of funds; financial year; annual reports; annual estimates; accounts and audit; and holding property. Beyond the Constitution and section 3-3B of the National Assembly and Presidential Elections Act, there is no law governing many of the ECK’s institutional and operational aspects. This is in stark contrast to the situation in some countries in Africa (such as Malawi and Ghana) and elsewhere where this is provided for in a dedicated law to back up constitutional provisions on, for instance, establishment and security of tenure. It is also in contrast to the position of a number of Kenya’s own constitutional bodies, such as Judiciary and Parliamentary Service Commission.

### **b) Security of Tenure**

Although the security of tenure provisions exist to good purpose and should be maintained, they have not been interpreted as to ensure institutional delivery. This applies not only to ECK commissioners but also to other constitutional office holders. It seems that security of tenure has been interpreted to mean non-removal of any ground that does not point to a serious criminal offence, such as corruption or other economic crime. This attitude must change if constitutional office holders are to respect their oath of office and be fully accountable to the public. Suffice it to say that security of tenure does constitute difficulty in removing officers, but its higher goal is to establish justice in the process of removal, rather than make removal almost impossible.

### **c) Institutional independence**

The ECK has sufficient institutional independence to discharge its mandate. However, by its own account, this is limited by its lack of financial independence and the general political behavior of the various actors in Kenyan elections. In our analysis, this paper provisions give ECK the in-

stitutional independence to do its work. What is needed is an appointment process that inspires public confidence in the Commission and selection criteria that ensure commissioners have the integrity, sense of judgment and mettle to referee a political contest without being unduly influenced by political pressure.

#### **d) Composition of ECK and Appointment of Commissioners**

Contrary to what has become customary in many countries with independent electoral commissions, the President does not need to consult with any other institution or persons in appointing ECK members. It is also worth noting that there are no legal criteria to guide the President in making such appointments (where in terms of professional, representation of diverse interests or otherwise). This apparent lacuna in the legal framework has been the subject of such controversy over many years.

Commissioners are appointed for (renewable) five-year terms. Because the first set of commissioners were appointed in the election year (1992), and another of each set of commissioners was appointed in the next election year (1997), this time very shortly before the elections, the end of five-year cycle has currently coincided with an election year, potentially causing significant disruptions in the planning and implementation. Ten commissioners were replaced in January 2007, with elections scheduled for December that year (the chairman's mandate was renewed only in December, after some uncertainty and public debate). Quite apart from the effect of the eventual new appointments, uncertainty as to what the president would decide *vis-à-vis* retaining or replacing the vacating commissioners, as well as the absence of consultation where he did make new appointments, contributed to pre-election tension and undermined the ECK's credibility as an independent body capable of delivering fair elections.

Debates on reforming the ECK led in 1997 to the Inter-Parties Parliamentary Group (IPPG) agreement the parliamentary opposition would supply the president with a list of nominees, from which he would appoint ten commissioners. It could be argued that the increasing number of members in itself makes reaching consensus on an issue more difficult than it otherwise would have been.

Although the IPPG accord was never entrenched in law, with the terms of commissioners appointed under the arrangement approaching expiry in 2002, President Moi renewed their appointments. After 2002, when commissioners died and concluded their terms, President Kibaki replaced them without reference to the IPPG accord. This caused little initial acrimony, but as he continued to replace commissioners in this manner – especially as the 2007 general elections drew closer – discontent surrounding the matter

was rekindled. The President preferred to follow the letter of the Constitution, using his elusive prerogative to appoint new members, while the opposition demanded he observe the spirit of the IPPG agreement. The issue became particularly acute in 2007, in which year the President appointed fifteen members.

As has been mentioned, in the absence of any consultative requirement, the Constitution grants the President total latitude in appointing ECK members. The only criterion stipulated – and even then this applies solely to the chairman and the vice-chairman – is that they “shall be persons who have or are qualified to hold office of judge of the High Court or Judge of appeal”. In practice, this means that a Commission could comprise a majority of members lacking any professional experience or expertise in election management or other skills that could contribute to the judicious and evenhanded management of an electoral process.

As the legislation now stands, Kenya’s electoral commissions does not seem to conform to any clearly defined appointment principles. Inevitably, its credibility suffers, since key stakeholders cannot feel a sense of (part) ownership of the structure, nor can they place much faith in its inherent professional competence.

### **e) The ECK’s operational procedures**

The ECK has made efforts ever since its establishment to improve its procedures for managing and conducting elections. As things now stand, it is a functioning institution with policies and procedures. However, those policies and procedures – at least in the 2007 general elections – have not managed to deliver a satisfactory election.

Structural weaknesses in the relationship between the commissioners and the Secretariat (in terms of the delineation of roles), bureaucratic procedures; and an unwieldy committee structure in some ways hampered smooth preparations for the elections and interfered with staff selection, recruitment, training and deployment.

The manuals for election staff and their training, though improvements on previous versions, still granted some discretionary power to lower-level staff (for instance, whether to give a voter one ballot paper at a time or all three at once, whether to count the presidential or the civic ballot papers first, etc). As a general practice, electoral procedures ought to anticipate the environment in which they will operate and provide as much operational detail as is required to inform decision-making. When matters are left to the good sense or judgment of the field staff, breakdowns in communication (resulting for instance in the reporting of partial results when this had not even been discussed) and non-compliance with laid-down procedure are the likely result.

Certainly the tallying staff at the national tallying centre either had not received adequate training or, if they had, did not quite do as they had been instructed. One team leader even used briefing instructions that were later repudiated by the ECK in the formal IREC hearings. The result of this uneven performance and the chaos at the national tallying centre was suspicion and the sullyng of the overall integrity of the electoral process.

### **f) The ECK Secretariat**

The ECK has professional staff in many of its departments – all departmental heads at least are professionals. Given the Commission’s committee system, however, they will continue to be nothing more than “senior assistants” to the commissioners if they are not given room to apply their professional minds to the issues. This does not bode well for the ECK; in a body where policy-makers come and go according to the appointing authority’s preferences, the need to professionalize the Secretariat and make it the repository of the institutional memory of the ECK cannot be gainsaid. Indeed, one of the ECK’s weaknesses in the run-up to the 2007 elections that most commissioners had insufficient experience in running an election could have been offset by a professional secretariat of election workers with substantially devolved decision-making authority on the management of the electoral process. The current Secretariat structure lends itself to administrative inefficiency and waste. Standing committee business, for example, seems to take up time that would be better spent on operations (some committees do not even keep minutes).

The committee approach to work also reduces departmental multitasking, which puts unnecessary pressure on the organization every time a major exercise is undertaken. It would be much more efficient for some of these exercises (say the annual voter registration drive) to take place at the same time as other regular business, such as coordination of voter education. Between elections, the effect of this modus operandi is not really felt, save for the wasteful involvement of non-professionals in professional tasks. In an election year, however, when time is of the essence, it can be debilitating.

Consultations in committee are necessary, but they should be a prelude to implementation and not take time away from implementation itself. The role of district staff (DECs and their support staff) is provided for in pre-election (and non election year) activities. However, when it comes to election-day activities, district staffs are conspicuous by their absence. There is no role for them in a formal sense save as logistics personnel. IREC proposes on the ECK’s devolved structure to perform some of the tasks conducted by temporary election officials, although in certain constituencies, depending on geography, they (DECs) might well be confined to the constituency tallying centre. This would not only reduce expenses, but would also lessen the risk associated with introducing temporary election officials in key areas such as tallying.

### **g) ECK Funding**

ECK funding enjoys operational independence but relief on public funds for its operation. Only commissioners' salaries and allowances are a charge on the consolidated fund are determined in accordance with the constitutional offices remuneration act. The situation is similar to other independent institutions i.e. KNCHR, NCGD. It raises fundamental questions as what, then, does financial independence mean in this context? Does the ECK have financial independence? If not, how should it be instituted?

A comparative study shows that Kenya electoral costs are exorbitant. The costs of elections (without the additional costs from other sources) is thus US\$ 20.4 per registered voter (or US\$ 29 per cast ballot). If we do not consider the whole electoral cycle, but limit the calculations to the costs sustained in 2006/7 and 2007/8, in which period the general elections took place, the cost per registered voter is US\$ 13.74. How does this compare with other countries?

Comparison is somewhat difficult, because the data from other countries may not correspond with the items we have considered when estimating Kenyan electoral costs. However, these quotations from the article, "How much do elections cost?" in the ACE Encyclopedia (produced by the Administration and Cost of Elections [ACE] Electoral Knowledge Network) go some way to providing an answer:

*"Low electoral costs, approximately US\$ 1 to US\$ 3 per elector, tend to manifest in countries with longer electoral experience: the United States and most Western European countries; Chile (US\$ 1.2), Costa Rica (US\$ 1.8) and Brazil (US\$ 2.3) in Latin America; Benin (US\$ 1.6), Botswana (US\$ 2.7), Ghana (US\$ 0.7) and Senegal (US\$ 1.2) in Africa; India (US\$ 1) and Pakistan (US\$ 0.5) in Asia; and Australia (US\$ 3.2)."*

*"In most countries that have less multi-party experience, costs tend to be higher, even taking into consideration elections that have taken place as part of peacekeeping operations, where the cost per elector is highest: Mexico (US\$ 5.9), El Salvador (US\$ 4.1) and Paraguay (US\$ 3.7) can be mentioned in Latin America; Lesotho (US\$ 6.9), Liberia (US\$ 6.1) and Uganda (US\$ 3.7) in Africa; and Russia (US\$ 3.7) in Eastern Europe."*

The costs in Kenya are comparable only to very special cases of post-conflict elections like Angola, Afghanistan or Cambodia. They are even higher than those observed in cases like Bosnia-Herzegovina under the Dayton Accords (US\$ 8). The high cost does not speak highly of the ECK's efficiency. The efficiency of the registration process and activities in the non-election

period: Registration of voters constitutes a significant part of the expenses of any EMB. In the case of Kenya, they can be estimated at around 30% of the total electoral cost. As is discussed at length in annex 3.A the ECK has established a system that incorporates the cost of continuous registration while maintaining those of periodic registration. Although the ECK has established a network of 7145 district offices, only some 2% of voters opt to register there. The remaining 98% do so at the annual registration drives.

While it is true that the ECK registered 1,767,000 voters during the two registration drives in 2007, the cost per registered voter was K.Shs 1,233 (around US\$ 18), which is extraordinarily high. Although it is difficult to make precise estimates, the cost per registered voter of the 1,078,000 voters registered in the registration drives or through continuous registration in 2003 through 2006 was much higher, probably by as much as 50%.

As mentioned in annex 3.A, the productivity of the district offices is very low in non-election periods. In the first four months of 2008, the network of district offices conducted only 553 transactions: 129 new registrations, 110 transfers, 23 cases of persons missing in the register, 275 deceased and 16 changes in particulars. There was not much else to do in those offices during that period, so we can conservatively estimate that half of the cost of these offices is related to these 553 transactions. Since the cost of these offices for that period amounted to close to K.Shs 100m (according to the 2007/8 estimates, the annual budget of the district offices is K.Shs 402m), the cost of each of those transactions comes to K.Shs 90,000. While this is an extreme example, given that the period analyzed was immediately after the general elections, the cost is staggering.

#### **h) The ECK's advisory role on legal reforms**

Over the years a number of carefully reasoned and cogently substantiated submissions and recommendations by the ECK urging fundamental reform of virtually every aspect of Kenya's constitutional and legal framework for elections have not been implemented.

It is indeed ironic that the ECK, the composition and legitimacy of which has been so trenchantly criticized since the 2007 elections, itself made proposals for reform which could have prevented the fiasco. However, these proposals were not pursued, or they were frustrated by a political agenda that did not give them the attention they deserved. As things stand now, there is nothing in law to prevent the relevant policy- and law-makers from taking the ECK's advice, discussing all or aspects of it with the ECK, and then incorporating the final result of those deliberations into electoral law reform proposals.

## Recommendations

### **On ECK's legal framework**

IREC recommends that urgent consideration be given to drafting and enacting more detailed provisions on the ECK's institutional aspects, taking into account the relative complexity of the organization and also its responsibilities, which have increased exponentially since the early 1990s. These provisions could be added to the existing National Assembly and Presidential Elections Act (as sections 3-3B have been) or contained in an Electoral Commission of Kenya Bill or in a consolidated electoral law, such as the Electoral Bill currently being drafted by the Kenya Law Reform Commission (KLRC).

### **On Composition of ECK and Appointment of Commissioners**

IREC recommends that the requirement for a broad consultative process prior to the appointment of ordinary members and the chairman of the ECK be given legislative grounding; consultation should include political parties and civil society in its broadest sense. It is not essential to any purpose that the actual appointment be made by the President. Alternative means should be considered, including appointment by Parliament. IREC recommends that the maximum number of commissioners be reduced to such a number as are functionally able to do the work. The currently bloated structure at the top should be trimmed radically.

IREC recommends that expiry of the terms of office of ECK members not coincide with election years. Ideally, a fully composed commission should be in office for two years prior to the conduct of general or presidential elections. IREC recommends that the ECK be made accountable to Parliament, without prejudice to its status as an independent body; this should affect the channels by which it establishes and seeks approval for its budgetary requests.

### **On ECK's operational procedures**

IREC recommends a review of the ECK's administrative procedures, with a view to introducing as much certainty – and as little discretion – as possible in key operational areas so as to ensure uniformity of performance throughout the electoral process, from polling station level up to the various teams at the national tallying centre. These procedures should be codified, well-known to staff and form the basis of training.

IREC recommends that the ECK review its overall training/briefing procedures in order to improve on their utility for adult learners. Training should, as a standard and not good-to-do measure, include simulations with the

tools of work that the election staff are being prepared to use in the forthcoming elections. Commissioners and senior staff should all receive basic training in election management, such as Building Resources in Democracy Governance and Elections (BRIDGE) or Basic Election Administration Training (BEAT), at the earliest possible opportunity after joining the ECK and also receive such refresher training as may be necessary in the course of their service to the ECK. IREC recommends that, in the recruitment of temporary election officers, commissioners should themselves vet only returning officer recruitment; they should establish clear procedures for the recruitment of other staff and ensure these are strictly implemented.

### **On the structure of ECK Secretariat**

IREC recommends an urgent re-examination of the roles of commissioners vis-à-vis those of staff, with a view to establishing a clearer commission-management separation of roles. Once clear lines of authority and responsibility have been established, investment in staff training should be increased with a view to vesting in the Secretariat much of the institutional memory needed to conduct a genuine election. Greater, if not all, implementation responsibility should be delegated to the Secretariat while greater, if not exclusive, policy-making responsibility should remain with the Commission. To ensure accountability, IREC recommends the establishment of clear lines of individual responsibility for service delivery among both commissioners and staff. IREC recommends that the ECK operating structure be rationalised to reduce time devoted to committees.

Some committees can be consolidated or even abolished altogether. Their procedures should also be clarified, clear terms of reference should be drawn up for each committee and minutes should be kept for institutional memory. IREC recommends that the district offices be disbanded. Instead, the ECK should decentralize only down to the provincial level, since eight well-equipped provincial offices would be able to function both at election time and between elections.

The provincial staff should include the right mix of skills, including information and communication technologies (ICT) literacy. IREC recommends that the ECK revise its secretariat structure with a view to introducing performance management across the board. Staff should be on three-to-five-year contracts, renewable on the basis of performance. They should have clear job descriptions and the space to perform their roles on the basis of the responsibilities set out therein. Annual performance appraisals and performance-improvement measures should also be put in place. IREC recommends that the Commission Secretary, among other qualifications, be an experienced election manager, competitively recruited from the open job market and have the status of Permanent Secretary.

**On ECK funding modalities**

IREC recommends that the issue of the ECK's expenses being a charge on the Consolidated Fund be considered carefully in the constitutional review process, which is expected to begin soon. Any measures agreed in that process to deal with the question of the financial independence of constitutional commissions would, of necessity, apply to the ECK.

**On ECK's advisory role**

IREC recommends that in the constitutional review debate, enumeration of the ECK's roles should include advising the government, Parliament and other stakeholders on electoral law reform. Though the ECK's role will be advisory, IREC recommends that its advice henceforth be taken more seriously than has been the case in the past and that the relevant institutions charged with law reform proceed to deliberate such proposals expeditiously with both the ECK and other stakeholders, with a view to incorporating them into the law.

**On ECK's functional efficiency**

IREC recommends that a new or transformed ECK undertake a thorough management systems review as a matter of urgency. Such a review should aim to tailor the institution to implement critical decisions expeditiously and transparently.

**3. Other players in the electoral process and 2007 election fall out****a) Political Parties**

Political parties are an essential component of Kenya's electoral system. The Constitution the national assembly and & a presidential election Act Cap 7 provides that party sponsorship is a prerequisite in presidential, parliamentary and civic elections: independent candidates are not recognized. Political parties represented in parliament nominate candidates to the National Assembly in proportion to the seats won at elections. Political parties, therefore, are the only vehicles for political representation.

Indeed, under section 40 of the Constitution, members who resign from their parties lose their parliamentary seats. An examination of political parties in Kenya (by 30 June 2008) reveals that they are, as currently constituted, incapable of providing democratic space to their membership. They are characterized by lack of transparency in choosing leaders. Elections for office-bearers are cosmetic and therefore undemocratic. As a result, leadership is often arbitrary, autocratic and unaccountable.

Parties are also dogged by flawed and poor party nomination rules and processes. The leadership interferes with party electoral processes, especially in nominating candidates for elective positions. Candidates got certificates because of their “good connections” with the party headquarters, party election boards and/or party leaders. During the electoral period, parties consistently lack respect for laws or regulations and the Electoral Code of Conduct is blatantly violated. Political parties, however, do not have adequate financial, infrastructural and manpower resources to organize primaries. As the funds to sustain parties and manage processes are donated by individuals, the nomination process is an endorsement affair for closest party sponsors.

### **b) The Media**

The 2007 elections were held amid unprecedented media attention. The print and electronic media sought to outdo each other in election coverage from the campaign stage right through to the transmission of election results. The elections came at a time when the media arena had been fully liberalized. The consequence was the entry of exciting new players, mainly in the form of frequency modulated (FM) radio stations. Many of these went straight into interactive vernacular radio broadcasting complete with call-in facilities. Millions of anxious and excited Kenyans who for years had been only passive listeners to one state-owned radio station could now access a wide choice of radio stations including those that broadcast in their respective home languages.

ECK accredited 2,964 local and international journalists to cover the 2007 elections. Accredited journalists were given ECK election kits, including Media Guidelines, and were briefed by the ECK. Training and orientation was carried out by the Media Council of Kenya (MCK), the consultant for the Media and Elections Project managed by UNDP. The Kenya Broadcasting Corporation (KBC), a State corporation established during one party rule, existed as a broadcasting monopoly and was widely viewed as a propaganda arm of the government. It was therefore hardly surprising that KBC came under serious criticism over the way it covered the 2007 general elections. The station was specifically accused of favoring PNU. Aggrieved political parties raised their concerns with ECK but it had neither the power nor the resolve to force KBC to change its editorial line.

Equally controversial was the official announcement of the presidential results via KBC. The swearing-in of the president, also carried live by KBC, was unacceptable to some Kenyans. Much of the criticism of KBC has arisen not just from its former monopoly status but also because of its strategic position as the only broadcaster covering virtually the entire country and its failure to make a clean break with the past. The station has been reluctant to act independently and, since it is a creature of the political estab-

ishment, its management, operations and funding have been at the mercy of the government. The banning of live coverage after the announcement of presidential results, for instance, was perceived as suspicious, wrong and provocatively high-handed.

According to the IREC;

- Even though the leading newspapers, television and radio stations were not very openly biased for or against any of the candidates, there were discernible preferences shown by the tilt they gave in favour of or against the candidates and their campaign issues.
- As election results started trickling in, the stations competed with each other to be the first to announce the results from various constituencies. Some stations relied on unspecified sources to broadcast and announce results ahead of the ECK.
- Most media houses avoided hate speech but several FM stations incited ethnic animosity, particularly during call-in programs.

### **c) Opinion Polls**

The impact of opinion polls on the outcome of the 2007 presidential elections was controversial. While politicians sought to downplay the significance of opinion polls on the outcome of the presidential race, it was obvious that the polls were being taken seriously by political campaign strategists, voters and even the presidential contestants.

Every time the various poll results were released, a storm brewed. Opinion polls conducted within the last three months before the 2007 elections confirmed the prediction that the elections would be a hotly contested affair between Kibaki and Raila.

### **d) Civil Society, Faith Based Organizations**

Civil society organizations (CSOs) have since continued to play an invaluable role in sustaining a growing democratic culture. CSOs, including faith-based organizations (FBOs), contributed immensely in the promotion of voter registration. They also participated in the election observation process. The visibility of civil society in an electoral observation process is critical in ensuring compliance and respect for the rule of law and deterring irregularities.

### **e) Electoral Observation**

A consistent and effective domestic observation programme is one of the key components in measuring electoral performance and enhancement of frameworks, monitoring use of public resources for private benefit, assessing media coverage; checking electoral violence and observing party behaviour and voter attitudes. The ECK accredited 24,063 election observers. These included 15,000 local observers under the Kenya Elections Domestic Ob-

ervation Forum (KEDOF) (which, however, itself cites a figure of 16,595). The international and regional observer groups accredited included the European Union, the Commonwealth International Conference of the Great Lakes Region, the East African Community and the Independent Republican Institute (IRI). The ECK gave all observers accreditation badges and bags containing election materials which included the guidelines on observation.

The observers are expected to be impartial. They are also expected to have the financial and logistical capacity to carry out the observation process. This does not, however, mean that domestic observers are necessarily partial or biased. Still, the lack of open information channels on elections often leads to the publication of inaccurate and alarming documents on the subject. The ECK is largely to blame for these mistakes and misunderstandings. The resultant torrent of vilification to which the 2007 elections was subjected is not entirely undeserved.

## **Recommendations**

### **Concerning Nominations**

1. IREC recommends that a standing liaison committee be set up comprising the ECK and political parties as a first step towards the enactment of nomination rules which must be strictly adhered to.
2. IREC recommends that once Parliament has been dissolved, no more political parties should be registered and no new symbols allocated
3. IREC recommends that campaign period be specifically defined to assist the ECK in ensuring compliance with the Electoral Code of Conduct
4. IREC recommends that the election date should be pre-set, taking into account all the required timelines for efficient conduct of the elections
5. ECK should enforce the provisions of section 17 of the National Assembly and Presidential Elections Act and the Local Governments Act (Cap. 265), which empower it to deny political parties' nominations made contrary to their own constitutions or nomination rules

### **Concerning Media**

1. The MCK should oversee the conduct of media and enforce its Code of Conduct
2. IREC recommends that a media and elections policy should be developed, to include guidelines for verifying data before going on air, vetting of live broadcasts and screening of paid-for advertisements, responsibility to announce accurate results and training of journalists on the Electoral Code of Conduct, and elections reporting and the manner of reporting on opinion polls

3. IREC recommends that disclosure of the real owners of media be made on a regular basis
4. IREC recommends that KBC Act be amended to provide the ECK with the commensurate power to compel KBC to act in accordance with the law
5. IREC recommends that mechanisms be set up to ensure the independence and public accountability of KBC
6. IREC recommends that access to KBC by the Presidential Press Service be reviewed, particularly in an election year
7. IREC recommends that key provisions in the KBC Act pertaining to free access slots for party political broadcasts be clarified and precisely defined as to the rights of the parties and candidates in law
8. IREC recommends that a substantive Act prohibiting hate speech be drafted and enacted

### **Concerning CSOs and EOs**

1. IREC recommends that the ECK and CSOs be encouraged to work together, particularly in voter education in an arrangement whereby the ECK coordinates and CSOs provide delivery
2. IREC recommends that ECK's selection of ECK trainers and facilitators should be done through a transparent process and the criteria for a neutrality test determined in advance and published
3. IREC recommends that bodies (including FBOs) with contractual or financial relationships with either the ECK or political parties, or which are established to have acted in a partisan manner in an immediately preceding election, should be excluded from domestic observation
4. IREC recommends that a permanent domestic observer group should be constituted comprising diverse civil society interests
5. IREC recommends that co-operation and co-ordination of observer groups, local, regional and international, be encouraged.
6. IREC recommends that the Regulations be amended to provide for observation of the tallying process at all levels and provide copies of all authentic statutory forms to observers.

## **4. Organizational Conduct of the 2007 General Elections**

### **a) The one man vote principle**

This principle is explained in many international instruments. The problem in Kenya is that the maximum permitted departure is not fixed and has been seen to allow extreme differences in size: Embakasi is 351% greater than the average while Lamu East is only 18% of the average. As a consequence, the weight of the vote cast by a Lamu East voter is nineteen times greater than that of one in Embakasi.

In no other country in the world is the difference of such magnitude. The reasons for the present situation are related to the introduction of the multi-party system – the skewed size of constituencies was related to the splitting up of small and sparsely populated constituencies in KANU strongholds of Rift Valley, Western, North Eastern and Coast provinces. The lack of a maximum permissible departure has led the High Court to task the ECK with ensuring the representation of rather small ethnic minority groups on the occasion of the next red limitation of boundaries. In Kenya any increase in the number of seats must be approved by Parliament, but the ECK can proceed with red limitation if the number is not changed. In 2006 the ECK made an attempt at delimitation, based mostly on the subdivision of the largest constituencies, but Parliament refused to accept the increase in the number of seats.

The delimitation of boundaries in Kenya as presently established does not respect the basic principle of the equality of the vote. The differences are unacceptable in terms of international standards. The Kenyan legal framework does not establish, as is accepted international practice, the maximum possible departure from the principle of equality of the vote.

#### **b) Registration of voters**

According to section 32 of the Constitution, a person is entitled to vote in a constituency if s/he is registered in such constituency as a voter (with a few standard disqualifications). The qualifications established involve residence (at least five months in the twelve preceding months), conducting business or being employed in the constituency for similar periods, or possessing land or residential buildings there. The qualifications for voting in the civic elections are quite complex, but in practice they are not applied by the ECK. For the first multiparty elections in 1992 the ECK conducted a national registration drive. The data of registrants was entered in the so-called “black books” from which mimeographed lists for use at the polling stations were derived. In 1997 the ECK computerized the registers using optical mark recognition (OMR) forms, although the black books were kept as a back-up. The 2002 elections were based on the 1997 register, updated in registration drives in 2000, 2001 and 2002. The use of black books was forbidden in those elections. (The same approach was to apply in the 2007 elections but shortly before the elections it was decided that black books could be used as back-up.)

In 2007, the ECK conducted a massive registration effort, which took place in 20,655 centers. There were two registration drives in 2007, from 1 to 30 March, reinforced by a second drive from 11 June to 31 July (with 30-day inspection periods following each drive). The unusually long period of registration (67 days) produced good results. The number of registered voters

increased by 1,767,212, resulting in a total number of voters for the 2007 election of 14,296,180. This represented 71% of the 19.8 million persons over 18 years of age who had been issued national ID cards. In 2007 the Government had acquired equipment which enabled it to produce national ID cards in large numbers, which facilitated the access to the ID cards by many young Kenyans. The average productivity of the registration teams was exceptionally low, however, only 1.1 registered voters per day per registration team (and just 0.8 in the first of the two periods).

### **c) Voter Registration**

The introduction of continuous registration, perceived as a forward step in 2002, has in practice created a system that combines the cost of both the periodic and the continuous systems of registration. It has resulted in an extended network of district offices whose main purpose, in non-election years, is registering voluntary applicants. But the ECK still conducts yearly registration drives that in magnitude and cost are similar to those conducted in the case of a periodic register.

The system as it exists today is open to serious criticism:

- Continuous registration has not worked – only (2-3)% of the registration took place at the ECK offices. The ECK alleges that this is because the number of field offices is too small (and aims to have an office in each constituency). This is not correct: a significant proportion of the Kenyan population lives within a reasonable distance of an ECK district office (located in populated areas) yet only a minimal fraction of that part of the population opts to register at ECK field offices.
- The system has very low productivity. During the 2007 registration drives before the elections, the average number of voters registered per registration centre was about one per day. The productivity of the continuous registration is even lower. In the four months after the 2007 elections, the ECK network of offices recorded 553 transactions, of which only 129 were new registrants (the rest being transfers, detected deceased voters, etc.). This means that the ECK offices conducted only one transaction every two weeks per office.
- The voter register has a low and biased coverage. Registered voters represent only 71% of the 19.8 million persons over 18 years of age who were issued national ID cards. Women are significantly under-registered: they represent 51.4% of the population and only 47.1% of the voter register. Worse, the proportion has been declining: in 1997 the proportion of women in the register was 47.9%. Young people are similarly under-registered: the proportion of persons between 18 and 30 years of age is 46.2% of the population and only 32.1% of the registered voters. Furthermore, the deletion of names of deceased voters from the register is ineffective: the Central Bureau of Statistics estimates that 1,733,000 persons have died since 1997 but the ECK has been able

to eliminate the names of only 513,000 deceased persons from the register. Statistically, therefore, the names of some 1.2 million dead persons swell the voter register.

- There is an almost complete lack of controls by the ECK. One of the main reasons for maintaining a voter register is that the verification of entitlement to vote is conducted in advance, as it takes significant time to verify residence, etc. The ECK system operates entirely on trust regarding residence. Form B (application to register as an elector) includes a declaration of residence, but no further proof is required, nor does the ECK conduct any post facto investigation or any other form of verification (except for the notoriously ineffectual period for exhibition of the list of registered voters).
- The system is outrageously expensive. The cost of the field offices, mostly devoted to voter registration in non-election years, was K.Shs 309 million in 2006 and it is expected to reach K.Shs 377.4 million in 2008. The cost of the 2006 registration drive was K.Shs 412.2 million, the two registration drives in 2007 required K.Shs 2,179 million and the allocation for voter registration for 2007/2008 is K.Shs 596.6 million. The present situation is far from adequate.

The continuous registration of voters introduced in 2002 has not worked, as the number of people who register at the ECK district electoral offices is minimal. The available evidence suggests that the solution will not be found in increasing the number of offices, as the ECK suggests, but rather in a change of system. The voter register, as it stands today, has a low and biased coverage, as women and youth are heavily under-represented. The registration system is outrageously expensive and has very low productivity. The permanent solution will involve moving to systems based in other population databases, including the transfer of ECK human and financial resources to support the prompt implementation of such solution.

#### **d) Nomination of Candidates**

As long as party nominations have been conducted in accordance with the constitution or rules of the political party concerned and is certified by a person whose specimen signature has been deposited with the Commission, that nomination is deemed valid.

In 2007 the nomination of presidential candidates went without much incident, save for the fall-out in the Orange Democratic Movement-Kenya (ODM-K) over the party flag bearer, and the eventual departure of Mr. Raila Odinga and his supporters to the Orange Democratic Movement Party of Kenya (ODM).

With respect to the parliamentary and civic elections, ECK's statutory notice required political parties to nominate candidates to contest the elections

by 16 November 2007 and to send certified lists to the ECK headquarters by 19 November 2007. All the parties conducted the primaries themselves using party rank and file officials and other people hired for the purpose. The accounts on the process indicate chaos, logistical challenges; vote buying, favours and waivers in favour of different nominations.

A number of complaints were filed with the ECK, while some candidates actually went to court. While the ECK originally set up a nine member committee to listen to aspirants' complaints, it later decided the complaints were misdirected (since the proper forum for these complaints was the respective dispute resolution bodies established under each party's constitution or rules) and disbanded the committee. As for the court cases, many failed to surmount the popular judicial view that the only option open to aggrieved aspirants is to file an election petition after the election – and were dismissed – while others were overtaken by event as the cases had not been heard by the time their opponents were gazetted as the candidates.

Owing to the proximity of the primaries to the deadline established by the ECK, most parties were late in submitting their certified lists of candidates. The ECK agreed to shift the deadline by a few days and the candidates' nomination papers were formally submitted to the ECK on 23 and 24 November 2007. A total of 117 political parties sponsored some 2,547 candidates in the parliamentary elections alone.

Moreover, the time between the party primaries and the ECK deadlines has been shrunk by the parties over the years so as to pre-empt defections engineered by the opposite side. This has made it almost impossible for the party machinery to respond adequately and timely to all complaints arising from the nomination exercise. Even assuming they had, the time left for judicial review, if any aspirant is still dissatisfied with the decision of the electoral court, is almost non-existent. The legal standard for valid nominations does not seem to take into account the primacy of fair nomination procedures for the fairness of the overall election itself, even as established in the constitution and rules of the political party. This generally breeds impunity in the electoral process.

### **e) Staff recruitment and training**

The ECK recruits and trains a number of temporary electoral officers particularly during key periods like voter registration, polling & counting apart from its headquarters secretariat staff and the permanent field officers. The selected personnel are usually trained by the widely used “cascade” method (training of trainers), given the huge numbers involved. Training takes place reasonably close to the actual activity involved, to minimize loss of personnel and to ensure that the acquired instructions remain fresh in their memories. Observer reports indicate that the selection of staff seemed to have

been conducted transparently, though instances of favoritism (in particular tribalism and nepotism) were alleged in some areas. A more worrisome allegation involves the last-minute replacement of some returning officers, apparently by the Area Commissioner.

Considering the electoral process from the perspective of what became its most controversial aspect – the management of the collation, transmission and tallying of results – what causes most concern is the inadequate definition of the requisite qualifications for some key personnel (returning officers, presiding officers) and the non provision of very basic equipment to facilitate their work. The recruitment of returning officers and their staff did not ensure minimal capacity in handling simple arithmetical operations, as evidenced by the number of errors committed.

Arrangements for the deployment of personnel at the national tallying centre did not seem as if adequate preparation had been made for this part of the operation, especially in terms of definition of clear procedures and training of staff on those procedures. The staff at the tallying centre comprised some fairly senior officers of the ECK, in the role of team leaders, but also included a substantial number of temporary staff, recruited solely for that purpose. Not all staff in the centre had undergone the required training, nor even had all the supervisors. In regard to training, while it is difficult to judge the quality of the training objectively, it is quite apparent that there were cases in which selected personnel did not participate in the entire exercise (including some returning officers).

#### **f) Voter turnout**

A worrisome feature of the 2007 elections was the incidence of abnormally and suspiciously high voter turnout figures reported from many constituencies in certain areas was not effective. On the basis of the Central Bureau of Statistics estimates, it is probable that the names of some 1.2 million deceased voters were still on the register. To this should be added that because of the age of the register, the currency of the data is otherwise far from satisfactory and many persons whose names still appear have probably emigrated or moved to a distant location within the country without the changes being processed by the ECK.

Over and above these notorious facts of electoral administration, there is always a percentage of persons who do not vote because they are sick, otherwise committed or are temporarily far from the polling station. It follows that the statistical prospect of having voter turnouts higher than 85% is extremely small. The turnout was over that figure in a significant number of polling stations (with many showing voters turnouts of 100%), concentrated in certain constituencies. This clearly suggests the existence of “ballot stuffing”, which requires collusion between the polling station staff – a clear

indication of biased recruitment compounded by inadequate training and supervision.

Owing to the extensive – and expensive – efforts of the ECK, the registration of new voters in the months before the 2007 general elections proceeded smoothly. There were, however, a number of identifiable problems related to the wasteful supervision of the printing and packing of ballots, as well as with the design of some of the key forms used in the process. However, the worst problems seem to have occurred in relation to the recruitment and training of temporary personnel. The recruitment did not take into account the requirements of the approved method for the tallying and transmission of results at constituency level, as it did not include the required qualifications in the process. This lack of foresight resulted in the reversal, at the last minute, of the tallying process approved months before.

### **g) Regulation of Political campaigns**

Election campaigns provide candidates and their political parties with the opportunity to hold political meetings, organize meet-the-people tours, produce and distribute posters and other publicity material, produce and air radio and television advertisements and otherwise to sell themselves and the ideas of their parties to the general public. The campaign period in Kenya is a rather fluid concept. While the current provisions of the law (supplemented by the ECK's administrative action) are to the effect that it normally begins immediately after formal nominations and ends twelve hours before polling day, the fact is that political campaigning happens throughout the period between one election and the next.

As was expected, given previous history, there were a number of breaches of electoral law relating to campaigns, particularly the Electoral Code of Conduct. Violence (including violence against women) was witnessed in certain areas, with or without the use of the patently undemocratic practice of “zoning” to keep competitors away from perceived strongholds. Spam messages were used to circulate defamatory propaganda, hate speech and viruses. Hate speech was also disseminated at rallies, through short text messages (SMS) and internet blogs. The campaign period also witnessed bribery, vote- buying and -destruction, and other unfair, if not illegal, activities.

The practice of using state resources in partisan campaigns was again witnessed (as in previous elections, in the Moi and post-Moi era, including the 2005 referendum). This included use of government vehicles and aircraft in the campaigns (some disguised with civilian number plates) and use of high-ranking (and some low-ranking) public servants in the campaigns of the incumbent candidates (and, surprisingly, some opposing candidates).

Current regulations on many aspects of political campaigning are sufficient to run a credible election. What is mainly lacking is adequate enforcement powers by the ECK, hence the impunity with which its orders are treated. Campaign finance also remains an arena that will require some control, given concerns about unclean money being used in elections, possibly in illegal or unfair ways. Misuse of public funds for political purposes is actually an unfair practice and (at least with respect to public human resources) an illegality according to three Kenyan laws at the time of the 2007 general elections. Yet all the claims on use of public resources were either ignored or flatly denied. Impunity may get short-term results but it also breeds public anger that an electoral process can ill afford.

Perhaps in recognition of the intractability of the problem, section 15 of the Political Parties Act now bars public servants (except MPs and councilors) from being founder members or office bearers of political parties, engaging in activities that may compromise or be seen to compromise the neutrality of their offices or publicly indicating support for or opposition to any political party or candidate in an election. Four laws on a single issue should not only be indicative of the existence of the social mischief; it behoves law-enforcement agencies, including the ECK, to implement the law.

With regard to political finance (including campaign finance), the Political Parties Act provides a sufficient enabling framework for regulatory input in an area that threatens the quality of Kenyan elections. It is not lost on IREC that even provisions that would have provided some modicum of a check, such as section 8 of the Election Offences Act (against treating) and sections 18A-18L of the National Assembly and Presidential Elections Act (on capping campaign expenditure) were repealed, ostensibly because they were “difficult to enforce” or the limits “unrealistic”. In order to ensure that both political funds mobilization and expenditure are closely monitored, more detailed provisions will have to be made in the regulations contemplated in section 43 of that Act, and enforced rigorously.

IREC has taken note of the likelihood that, for an election to have experienced problems on the scale witnessed in the 2007 elections, a large number of election offences were committed. These includes vote-buying, impersonation - contrary to section 7 of the Election Offences Act (when dead voters vote), participation in elections by public officers, multiple registration, transportation of voters, assault, trespass (all contrary to various sections of the Penal Code) and so on. However, compliance with the Electoral Code of Conduct will be improved if it contains the values underpinning the participation of political parties in the campaigns and all actionable legal obligations are incorporated into the relevant election law(s). At the same time, the regulation of political finance should take into account the

realities of the Kenyan political landscape and define adequate controls to ensure safeguards against unfair, corrupt and illegal financing.

### **h) Polling day operations**

Certain persistent problems were found: (a) bribery connected to the abuse of assisted voting to ensure the fulfillment of the agreement (b) misuse of the “black books” (c) problems of access for agents of opposing parties in certain party strongholds (d) inadequate handling of ballots. These problems will have to be dealt with in future elections.

## **Recommendations**

### **Concerning Constituency delimitation**

- IREC recommends that the basic principle for the delimitation of constituencies should be the equality of the vote, and the maximum departure from that principle should be clearly defined in the law (equality of voting strength should be aimed at in all cases, although in rare specially justified circumstances a 5 to 20% deviation range could be accepted). Criteria such as density of population, population trends, means of communication, geographical features and community of interest should be retained, but they should interfere minimally with the basic principle of equality of voting strength.
- IREC recommends that the process of delimitation be made accessible to the public through a consultation process and enough time provide for it to discuss and challenge ECK decisions. The process should be as transparent as possible.
- IREC recommends the establishment of an independent commission – the Boundary Review Commission (BRC) – with responsibility for establishing, reviewing and drawing new constituency boundaries. The persons appointed to this commission should be non-partisan (non-political) public officials with some having a background in election administration, geography and statistics and some being retired judges, clergy or other non-partisan citizens. The term of the body should end with establishment of the new constituency boundaries. The establishment of constituency boundaries should be separated from the administration and management of elections, the responsibility of the ECK. Separating the two functions will remove the politics involved in boundary delimitation from the ECK. Parliament should not have the power to override BRC decisions. Parliamentarians should be allowed to provide their views only before the commission makes its decision.
- IREC recommends that the first delimitation exercise take place as soon as possible. Afterwards, delimitation should follow the population census. The delimitation process should be completed at least eighteen months before a general election.

### **Concerning registration of voters**

- Move to a new registration system: IREC recommends that as soon as possible the issuance of the national ID card be integrated with the registration of voters, so that when a person requests an ID card, s/he will automatically be entered in the voter register and informed of the location of the polling station where s/he should vote (a cheap voter card containing such information can be provided to the voter). The ECK should immediately begin the necessary studies to implement this solution (resorting, if so desired, to external technical support) and a significant part of the human and budgetary resources today devoted to the registration of voters should be transferred to the new system. The availability of additional resources should allow a much faster implementation of the IPRS, which should be the final goal.
- Simplify qualifications for entitlement: IREC recommends that entitlement to vote be based on residency, unless there are strong arguments for maintaining some of the other categories presently included.
- Requirement of voter's card for voting: This is a redundant requirement. IREC recommends that voters be allowed to vote with the simple presentation of the national ID or passport if their name is in the voter register.

### **Concerning nomination of candidates**

- IREC recommends that consideration be given to establishing a special election court to expeditiously receive and deal with disputes arising from party primaries. Such a court will deal with these matters, but only after the aspirants have exhausted the internal dispute resolution machinery in their respective parties and failed to obtain satisfactory relief. Guided by the constitution or rules of the parties in question, the special election court will then make a decision on the matter, and this decision should be final.
- IREC recommends that the ECK establish a clear, non-adjustable, timeframe within which all parties should hold their primaries and certify their nominees. Such a timeframe should be written into the regulations and communicated to all stakeholders in the electoral process together with the notice for elections. It should take into account the time required not only to conduct primaries but also to settle disputes arising from the primaries. It may be necessary to include, as a positive incentive for good behavior, a requirement that candidates will not be gazetted while an election dispute is pending.
- IREC recommends amendments to the electoral law to require political parties to not only conduct elections in accordance with their constitutions or rules but to also conform to established standards of fair practice. The Registrar of Political Parties should, in consultation with political parties, adopt a standard that is then enforced when the constitution and rules are submitted for the party's registration (and with

every amendment later) and which the electoral court can rely on to make a finding that a party's nomination rules are not in keeping with fair practice.

### **Concerning electoral preparations**

- IREC recommends that the job descriptions of all relevant temporary positions be reviewed and updated to take account of additional skills essential to the competent management of a modern, IT-facilitated electoral process.
- IREC recommends that the training of returning officers be enhanced to match the importance of their function in the electoral process, and also that consideration be given to earlier selection and recruitment to allow a longer period of training and engagement in ECK work.
- IREC recommends that personnel at every level be involved in the training of personnel one level below, to permit greater familiarity with the chain of work (for instance, national tallying centre staff should be involved in training returning officers in the tallying and transmission of results).
- IREC recommends outsourcing the selection of key temporary personnel to thirdparty agencies, with a requirement for testing some essential skills (e.g. IT) and a penalty clause in the event that any poor performance by selected personnel is discovered to have been caused by employees not having the stipulated qualifications. Longer lead time for the exercise is necessary so as to allow time to evaluate and if necessary replace recruits.
- IREC recommends that actual participation in electoral activities be made conditional on verified participation in all prescribed training events.
- IREC recommends the review of all training and operational manuals to ensure that they actually conform to the latest operational procedures in force.

### **Concerning voter information and education**

- IREC recommends long-term investments in voter/civic education/information campaigns. Since district officers of the ECK have little to do when there are no elections, they could be used for civic education if provided with complimentary resources, such as mobility.
- IREC recommends that voter/civic education/information campaigns pay attention to local elections too. People must know enough about the choice or how their vote can make a difference in their local government or to their lives.
- IREC suggests that involving young people, particularly students, might help to interest younger voters, and would also strengthen bonds between older and younger elements of communities.

- IREC recommends that for communication to be effective the design of voter education material should factor in the varying needs and interests of target groups.
- IREC recommends introducing simplified teaching of the key principles and values relating to the right to vote in schools from the elementary stage.
- IREC stresses the importance of public forums such as round tables, candidate debates and town-hall meetings at which specific local issues can be raised for discussion (e.g. the problems of people with disabilities and the local community).
- IREC recommends that voter education teach the Electoral Code of Conduct and highlight the deleterious effect of fraudulent practices in elections.
- IREC recommends linking voting to community issues.
- IREC recommends that selected organizations be vetted well in advance in order to have candidates for conducting voter/civic education/information campaigns.
- IREC recommends that monitoring and evaluation be put in place to ensure that CSOs responsible for voter/civic education/information campaigns carry out the programmes properly and in accordance with ECK guidelines.
- Patience, tolerance and long-term commitment are needed to help Kenyan communities overcome the barrier that stands between them and full civic participation and leadership. This is why IREC recommends that particular attention be devoted to demonstrating how free and fair elections can change Kenyans' opportunities and help to resolve difficult problems.

### **Concerning regulation of political campaigns**

- IREC recommends that the ECK immediately promulgate regulations for the Political Parties Act, not only so as to provide a clearer legal framework for the registration of political parties but also so as to achieve the political finance objectives of the Act. Such regulations should have sufficient technical detail to illuminate the ECK's powers of oversight, detection (or investigation) and enforcement (or prosecution and sentence) to ensure compliance with the Act. Should it appear, in the course of drafting regulations, that matters have been omitted that form a statutory bar to the sufficiency of the regulations, the ECK should expeditiously make use of its advisory powers to bring these to the attention of the Kenya Law Reform Commission or Parliament (through a relevant Committee) so that the Act can be amended.
- IREC recommends electoral law reform to give power to the ECK to enforce its orders. This should include barring errant candidates in the event of defiance of the ECK's orders. The ECK should not have to go to the High Court for the sanctions contemplated in rule 9, but should

- be able to apply them itself, subject only to the High Court's power of judicial review. Given that rule 12 states that the judicial review proceedings shall be dealt with in priority and the decision delivered before the date of the election concerned, this would provide additional teeth to the ECK and also safeguards against abuse.
- IREC recommends that the plethora of provisions against the involvement of public servants in politics be consolidated into one provision in the consolidated electoral law barring not only the participation of public servants in political activity, including elections, but also barring (in unambiguous terms) the use of any public financial and material resources.
  - IREC also recommends that the ECK put in place, at every election, adequate monitoring mechanisms to collect information on public servants involved in partisan political activity for use in prosecution and other penalties sanctioned by law.
  - IREC recommends a reintroduction of realistic (given the economic times) and functional (with adequate monitoring and enforcement machinery) expenditure caps on election expenditure generally or specific election expenditure items. This will beef up the other regulatory functions in the Political Parties Act and reduce the undue influence of money in Kenyan elections.
  - IREC recommends that the Attorney-General appoint public prosecutors for the ECK for the purposes of prosecuting election offenders; in the alternative, that amendments be made in the course of the constitutional review process as to how the Attorney-General's prosecutorial powers can be dispersed by Acts of Parliament to lead institutions, such as the ECK, to deal with matters under their remit (in like manner to the exemption of courts-martial under section 26 of the Constitution).
  - IREC further recommends that electoral law be amended to provide the ECK with prosecutorial powers over all election offences, and not merely those in section 34A of the National Assembly and Presidential Elections Act, and that the ECK thereafter proceed to expand its legal department to include public prosecutors for this purpose.

### **Concerning regulation of freedom of expression and equitable access to media**

- IREC recommends that the constitutional guarantee of the right be enhanced by a provision restricting hate speech.
- IREC recommends that media, especially State-owned media such as KBC, should strive to offer balanced coverage to all the players in an election as is required by KBC's establishing statute and enhanced by the IPPG agreement.
- The ECK should ensure that the media receives correct and timely information so as to mitigate the possibility of misinformation such as was witnessed in the 2007 election period.

- IREC recommends that media houses ensure that they recruit professional reporters and editors and, in case of talk-shows and call-in programmes, avoid using staff who are ignorant of conflict reporting or moderation.
- IREC recommends that media houses ensure that they liaise with the ECK before publishing results so as to ensure the reliability and correctness of the information they pass on to their readership/audience.
- IREC recommends that the ECK or its successor, in consultation with suitably qualified advisors, as a matter of urgency devise and implement a sound media relations policy and strategy in order to establish and maintain a proper relationship with the media.

### **Concerning technical assistance received by the ECK**

- The assistance provided by the international community to the electoral process includes highly successful elements as well as components that did not perform very well. IREC recommends that the assistance provided be thoroughly evaluated and the lessons learned applied in the future.
- IREC recommends that the assistance to be provided be carefully coordinated and defined well in advance of the electoral process. External evaluation of the proposed overall assistance programme before commitments is also recommended.

### **Concerning management of polling day operations**

- Given the extent of bribery, IREC recommends that the ECK take steps to eliminate the practice, including stronger sanctions – such as disqualification - for candidates involved in the practice. The complementary practice of allowing assistance on the basis of illiteracy should be discontinued, and voter education programmes adjusted accordingly.
- IREC recommends that the use of black books be discontinued (their destruction should be seriously considered) and that the ECK consider the use of tendered ballots in the case of persons who cannot find their names in the voters' lists.
- IREC recommends that party agents' access to polling stations and tallying centers be assured, and the only restrictions possibly placed on such access be related to the number of people the polling stations or tallying centers can reasonably accommodate. Agents should be adequately identified and, in the case of tallying centers, provided with special tags.
- IREC recommends that all three ballots be handed to the voter at the same time: this should be stressed both in training and in voter education.
- IREC recommends that every effort be made to ensure polling stations are accessible to all voters, especially people with disabilities and the el-

derly. A checklist for electoral officials surveying polling stations should be developed to help them assess whether the polling stations are accessible to all categories of voters.

- IREC points out that the polling station needs to be well designed to allow for easy entry and exit. Further, there must be a safety corridor where only ECK personnel, party agents and those voting are permitted. Clear open space must be left between the polling station door and the security rope.
- Currently the training of party agents is optional. Yet they are vital to the smooth running of a successful election. Most agents do not know their formal role at the polling station since the parties are now left to train their agents according to their own curricula (which might well include how to rig on Election Day and how to prevent your opponents from voting). IREC recommends that party agents undergo ECK-supervised training.
- After training, all poll workers and party agents need to be sworn. IREC recommends that training identify the penalties for perjury, fraud and rigging. No poll worker or party agent should be allowed to work at a polling station without being sworn.
- IREC recommends that one poll worker be trained as a “greeter” for each polling station with the responsibility of ensuring that voters are directed to the correct polling place.
- On Election Day, the ECK should make plans to provide polling station staff with food and water (or provide them with an allowance to that effect). Party agents should not be allowed to provide food to polling station workers.

### **Concerning counting, tallying, and announcement of results**

- Integrate the various descriptions of the entire counting and tallying procedure into one document only, which will then be the principal description and must be adhered to.
- Without delay have developed an integrated and secure tallying and data transmission system.
- Media must have full access to this new system.
- Ample time must be given for verifying provisional results, so that they are only declared final/official, when there is no risk that errors can still be found or non frivolous objections raised.

### **Concerning post-election audits and evaluations**

- Institutionalize the practice of post-election audits and evaluations and improve the quality of the objective data involved.

- Publish all polling station results (form 16A) on the ECK website to ensure transparency.
- Post-election audits should be conducted by external auditors and made public.

### **Concerning post-election dispute resolution**

- Establish an appropriately composed and empowered special electoral dispute resolution court.

### **Concerning swearing-in and assumption of office**

- Introduce a transition period between a successful candidate's election and his swearing-in.

### **Concerning custody of election materials**

- Develop procedures for safe storage of election materials until any post-election analysis is complete.
- Store certain relevant election materials (such as the election results) in electronic format.

### **Concerning allocation of nominated seats**

- If it is decided to retain nominated seats, specify an electoral formula.
- In terms of the use of the nominated seats to support under-represented groups or special interests, rather devote all of them to improve the representation of women in Parliament.
- The Constitution or the law should clearly define what special interests or groups should benefit from reserved seats.
- Use reserved seats with voice but no vote rather than nominated seats for persons with disabilities and ethnic minorities.
- Do not allocate reserved seats to women, youth, trade unions, geographically marginalized communities or other minorities.
- Consider leaving the President a margin for appointing ministers who are not MPs.
- The ECK should fill nominated council seats from a list presented by the political parties.

### **Concerning analysis of post-election procedures**

- Amend the Constitution to eliminate all doubt as to the expiry of the President's term of office.

- Consider amending the Constitution to provide for fixed terms of office for the President and Parliament together with concomitant provisions for an electoral timetable.

## **5. Vote Counting and Tallying**

In Kenya, neither the electoral regulations nor the various checklists and training materials are as clear and unambiguous as one would have hoped. The regulations are not precise about the order in which the three counts (presidential, parliamentary and civic) should be carried out, and they do not indicate how to deal with situations where 100% or more of the registered voters have voted (in itself a rather fluid concept, given the acceptance late in the day by the ECK of voting by double-registered voters and the use of “the black book”).

In 2007, counting and tallying was a straightforward process, at least in principle. At the constituency tallying centre, the returning officer received the material from the polling stations, checked that all the material was there, and then assumed control – almost took ownership – of it. The returning officer then announced the results from each of the polling stations, as the presiding officers submitted them, and these results were then entered in the relevant cells in the huge form.

Once this was done for all polling stations in the constituency (typically between 100 and 200), the results were added up (column-wise), and the resulting figures for presidential candidates entered on form 16, for parliamentary candidates on the last page of form 17A and for civic candidates on the last page of form 9. When this had been done, the results were announced orally, and Certificates of Results were issued for parliamentary winners (form 17) and civic election winners (form 18C).

The complexity of the process is evident, and it can be no surprise that many errors were detected. The process of delivering results, to KICC by returning officers on phone immediately after constituency tallying and then following results thereafter when the provisional tallies had been announced was the main source of confusion at the national tallying centre. Numerous complaints in relation to counting and tallying were made by political parties, individual voters, civil society organizations (CSOs), domestic and international observers, the media and even ECK commissioners and staff.

## **Points & Issues**

### **a) Emerging issues / complaints**

Polling station complaints can all be connected to problems caused by ethnic (and therefore party-political) dominance in a particular area.

- “Zoning”, that is, a conscious policy of keeping political opponents away from one’s territory. Where zoning is practiced, free and fair elections cannot take place.
- Agents of rival political parties were expelled from polling stations, in some cases at the time of counting. This complaint was made by interlocutors from all major political parties and IREC heard it so often and so vigorously that there is no reason to doubt its correctness. Such behaviour – whether initiated by presiding officers, supporters of the dominant party or others – is unacceptable: it is a denial of the access to information and transparency which are preconditions for free and fair elections.
- Results from polling stations in areas dominated by one political party were not always reliable. The reason given to IREC is that ECK polling personnel and party agents from the dominant party in the area would obviously agree on the desirability of a good result for that party. And agents for other parties – if present at all – might not necessarily be reliable witnesses of what went on as they might have been bought or threatened.
- Agents of rival parties were not allowed to accompany ballot boxes to the constituency tally centre.
- In some polling stations, supporters of the main party were allowed to enter without being properly identified as party agents.

### **Constituency Level**

- It was claimed in some cases that returning officers did not include all the 16A forms when the constituency tallying form (17A) was being completed. This element of the entire electoral process should have been conducted transparently, but IREC has found cases where a few forms 16A are missing and/or a few rows in form 17A have not been completed.
- Proper scrutiny of polling station results (forms 16A) at the constituency tallying centre might not always be relied on in areas where one party is dominant, e.g. questions should have been asked or investigations carried out in cases where polling stations had 100% turnout.
- Under no circumstances were returning officers allowed to announce partial results from the constituency tallying processes since that could slow tallying down and create confusion and misunderstanding. For various reasons, including calls from the national tallying centre requesting results, some returning officers nevertheless did announce partial results, which unavoidably – because this was not anticipated – caused considerable, and tragic, confusion and misunderstanding.

- Some returning officers did transfer constituency results (presidential as well as parliamentary) to the national tallying centre before they were entirely certain that they had established their correct results.

### **National Level**

- The verification exercise by the ten teams at KICC was conducted badly, if at all. The ECK chairman admitted in his evidence to IREC that the presidential results in the computer database for no fewer than 32 constituencies currently differ from what is recorded on those constituencies' forms 16. This is 32 out of 210, i.e. 15%!
- Furthermore, the IT department did not provide an adequate checking procedure for the accuracy of the sum of valid votes; it is also not difficult to spot errors in the summation of presidential and/or parliamentary candidates' votes. This has contributed to the use of incorrect results by political parties, CSOs and observer missions in their attempts at analyzing the election, leading to a number of erroneous conclusions. The ECK IT manager must take considerable responsibility for providing at least some of these incorrect figures to users of the ECK's official information.
- It was alleged that figures in forms 16A and 16 were being changed/corrected at KICC, which was in itself seen by some as proof of results-tampering. However, IREC has not been provided with any instance where this appears to be the case.
- Access to the national tallying centre by presidential agents and by observers washandled extremely unprofessionally. It therefore became an awkward issue, causing allsorts of suspicion and justified accusations of lack of transparency. But it appears primarily to have been a sign of unprofessional process-management and inept public relations, not circumstantial evidence of fraudulent ECK misconduct.
- The strange circumstances surrounding the final announcement of the result of the presidential election, the handing over of form 18 and the low-key swearing-in ceremony at State House all contributed to the rumours of ECK malfunction before, during and after Election Day. This contributed significantly to the eruption of post-election violence.

The overnight "audit" exercise carried out by some party stalwarts and a couple of national observers was not conducted in such a way that it put the issues to rest. In the final argument, ODM persisted in contending that, inasmuch as there has been no adequate refutation of such a plot, given the alterations and inconsistencies in the results and the documentation, a finding of fraud is indicated. PNU and the ECK submit that there has been no evidence that any of the alterations and inconsistencies were intended fraudulently to benefit any candidate or in fact had such result. Therefore they contend for a finding that the explanation must be human error.

**b) Analysis of the 2007 counting and tallying process**

The main result of this analysis is that the transfer of data from forms 16A to form 17A – especially when one considers the simplicity of the exercise – in many cases suffers from a very low level of precision and reliability. The tallying in forms 17A is also erroneous in many instances (“many” here meaning in relation to what one would expect, once again considering the simplicity of the arithmetic involved).

In some instances it was also discovered that results announced in the constituencies, which were more or less identical with the results of IREC’s exercise, had not been accepted for announcement at the national tallying centre at KICC, while the less accurate aggregated result had been. The analysis of the results in selected 18 constituencies clearly indicates the poor quality of the tallying process conducted by the ECK, and the magnitude of the errors in the translation of results from polling stations to form 17A, and additionally, in transcribing the results calculated on the forms 17A to the statutory forms 16.

**c) Statistical evaluation of results**

For two reasons it is not advisable to conduct any form of statistical evaluation of results from the December 2007 elections in Kenya or to draw any conclusions on that basis, nor to conduct some kind of more advanced psychological analysis. The first reason is that the IREC analysis of tallying etc. in nineteen sample constituencies demonstrates convincingly that there are so many more or less erroneous constituency results (refer annex 6.A as well as section 6.5 above) that one cannot rely on any figures from the ECK.

There has been irrefutable conclusion that the ECK was not able to manage the counting, tallying and results announcement processes in such a way that it secured the integrity of the electoral process at either the presidential or the parliamentary level. IREC has only sporadically concerned itself with the civic elections, but we believe that the situation is not much different at that level. If one – be it a voter, a candidate, a media representative, a party leader, an election observer – cannot trust the accuracy of the election results published by an EMB, then nothing is left and the political system loses credibility as well as legitimacy.

In a related analysis, IREC established that a parliamentary candidate did not obtain the seat in the National Assembly that he had won by securing more votes than any other candidate in his constituency. If that can happen – and if the ECK can also get away with allocating a Nominated Seat to a party without using a recognized and documentable seat allocation method – then the conclusion can only be that the election management system as it functioned in the 2007 elections is unacceptable. It did not live up to the basic international standards of transparent, free and fair elections

## Recommendations

- IREC recommends that the ECK integrate the various descriptions of the entire counting and tallying procedure into one document – and one document only – which will then be the principal description and must be adhered to. The need for such descriptive regulations does not depend on possible changes in the counting and tallying system.
- IREC recommends that without delay ECK start having developed an integrated and secure tallying and data transmission system, which will allow computerised data entry and tallying at constituencies, secure simultaneous transmission (of individual polling station level data too) to the national tallying centre, and the integration of this results-handling system in a progressive election result announcement system.
- IREC recommends that the media must have full access to this new system, which will not be a problem if it is properly constructed. This will assist the media in obtaining fully reliable results at high speed from all over the country and will also place the ECK in the driver's in relation to providing the media with fast and reliable data.
- IREC recommends that ample time be allowed for verifying provisional results, so that they are declared final/official only once there is no risk that errors may still be found or non frivolous objections raised. Most countries allow one to two weeks for this – there must be sufficient time to check the provisional results, which are given status as final results only when all objections have been considered, all checks and rechecks conducted and the final verdict issued by the proper authorities. Given a clear explanation of what a provisional result is, there is no problem in making voters understand that election results are so important that they can be declared final only once they have been properly scrutinized and checked.

## 6. Post Election Procedures

Disputes arise in every election. An effective electoral dispute resolution (EDR) mechanism is required if an electoral system is to function properly. The election management body (EMB) needs to have in place certain principles and procedures to enable it to deal with disputes as they occur. The procedures should be known, rule-based and predictable. They should be designed and maintained to anticipate, manage and resolve election disputes.

### **a) Post-election dispute settlement**

During the 2007 general election period in Kenya, a material contributor to the tension at KICC, broadcast live to the country, was the absence of an effective electoral dispute resolution (EDR) mechanism to resolve the

mounting challenges to the integrity of the results from Kibaki strongholds. The response by the ECK and some of the government ministers directing challengers to the courts, merely served to exacerbate matters. ODM representatives, responding to the appointment of five new judges a few days earlier, made plain their distrust of the judiciary and insisted on their challenges being resolved there and then, if necessary delaying the announcement of the final result.

There is indeed no satisfactory mechanism to deal with such disputes. Sections 10 and 44 of the Constitution, read with sections 19 to 23 and 28 to 30 of the National Assembly and Presidential Elections Act, dealing with challenges to presidential and parliamentary results, make provision for determination of challenges only after the result has been announced. Although there is provision (in the practice rules contemplated by section 23 of the Act) for expediting the judicial process in the case of election petitions, resolution of a dispute may eventuate only months or even years later, especially if there is an appeal. Challenges to civic election results are also possible only after the event (see section 16 of the Local Government Act).

**Flexibility and expedition:** It is unwise in principle to oblige disgruntled candidates and their supporters, convinced as they are that they have been wronged, to wait until after the prize has been awarded to their opponents and only then to start litigation – which could drag on indefinitely. If a quick and appropriate remedy is unattainable it predisposes to the kind of political crisis that occurred here. The blanket referral of such disputes to litigation makes it impossible to find and implement quick, sensible and fair solutions.

Thus, for instance, if the mistake in Kirinyaga Central had been discovered on, say, 30 December 2007, after the form 16 had been delivered at the national tally centre and the result had become technically final, the matter could have been resolved there and then instead of taking its course through the courts. For this to be possible, there has to be a tribunal qualified and legally empowered to resolve such disputes quickly, fairly and practically, rather than on the basis of strict legality.

**Competence:** Many Commonwealth countries, such as Kenya, adhere to the quaint fiction that judges are generalists who can grasp and deal with any matter, however esoteric, provided it is competently argued. In the case of electoral disputes this attitude needs to be re-examined. The principles and practice of electoral administration have developed exponentially over the last two decades and a substantial body of international learning has been produced. All of this bears on dispute resolution and ideally requires specialized judicial attention. Because electoral disputes usually demand rapid resolution and do not allow time for extensive legal research by the

adjudicating tribunal, familiarity with electoral law and practice is therefore a highly desirable attribute of such a tribunal.

**A special electoral dispute resolution court:** EMBs are a unique feature of modern democracies. They function, uniquely, at the interface between politics and law. The essence of an election is political, not legal. It is a political process driven by political forces for a political purpose: the allocation of political power within a given polity. Therefore, although an election must always be governed by law, the law should never be allowed to entangle an election in the inevitable niceties and rules, the procedures and precedents, the predilection for detailed analysis, for thorough debate and mature reflection that are the proud hallmarks of the judicial process. Electoral dispute adjudication requires flexibility and pragmatism, an eye to the political exigencies, sometimes even at the cost of strict legalism. Furthermore, and most importantly, in a highly politicised society such as Kenya, where judicial impartiality has already been doubted, the judiciary should not be unnecessarily exposed to the risk of being politicised, or being seen to be politicised, by its involvement in political disputes.

**The type of electoral dispute resolution court:** There is no universally accepted mechanism. Some states, especially older democracies in Europe, have left the task in the hands of administrative agencies within the government. Others, including Kenya, have consigned electoral adjudication in general to the ordinary judiciary, sometimes under adapted procedural rules. Countries such as Mexico, where there has been radical electoral reform comparatively recently, have established a special electoral tribunal with extensive power and exclusive jurisdiction in relation to elections.

This may be costly but has the great benefit of speed and special expertise. Then again, South Africa opted for a special electoral court with exclusive and final jurisdiction consisting of three senior members of the judiciary who ordinarily continue with their routine work but are on standby to deal with electoral matters on an urgent and prioritised basis. Expedition has thus been ensured with the prospect of some degree of specialist knowledge.

**The lowest level of competence rule:** It is often not easy to decide who is to perform a particular adjudicatory task in terms of an EDR system, nor is there necessarily a one solution- fits-all answer. An adaptation of a well-known principle of good management dictates that electoral disputes should be determined at the lowest appropriate point in then chain of authority, there, then and finally.

**Adequate enforcement remedies:** A crucially important feature of effective EDR is to ensure that every dispute is resolved in a manner that affords ad-

equate redress and/or imposes appropriate penalties. Obviously a dispute is to be resolved in time for a remedy to be of value. One of the reasons for opting for extra-judicial EDR is because it is in the very nature of an election that, in order for relief to be effective, a decision often has to be given there and then. One of the most problematic aspects of current Kenyan EDR (which may have contributed to the eruption of violence) is that issues that could and should be addressed and possibly resolved by the ECK are consigned to the judiciary for determination in the fullness of time.

The remedy must not only be timely, it must be fitting in other respects. The ordinary remedies at the disposal of the judiciary are limited. An EDR tribunal should have many more – and more varied – remedial powers than a court ordinarily has. It should also be armed with a much wider and more severe array of penalties than those contained in paragraph 8 of the Electoral Code of Conduct (Fourth Schedule to the National Assembly and Presidential Elections Act).

Consequences of failed remedies: Failure on the part of an EMB to afford an individual effective relief not only does an injustice to the individual, it also devalues the EDR system as a whole, eroding confidence in the EMB itself. Loss of legitimacy by any adjudicator is extremely serious, striking at the viability of the very adjudication process. In the case of an EMB, such loss of confidence in its EDR system is particularly grave. It functions in an arena where power is at stake, state power and control over national resources. Its loss of credibility has implications ranging much wider than the particular dispute or disputes the resolution of which (or, worse, the non-resolution of which) initiated the conflict.

### **b) Swearing-in and assumption of office**

It is standard practice to lay down in electoral legislation a period of some length between elections and winners' assumption of office. In the well known case of the United States, the presidential election takes place on the Tuesday following the first Monday in November and the new president is inaugurated on 20 January the following year. Mexico has an even longer period: the 2006 elections took place on the first Sunday in July and President Calderón sworn on only on 1 December. There are two reasons for this practice:

1. The first, which has been extensively discussed in the previous chapters, is to allow sufficient time for the solution of all pending electoral disputes and for the verification of election results. The period was used for such purpose in both countries mentioned above.

2. The second reason is that there should be a peaceful and orderly transition of power. For instance, a new president may have to select a cabinet, and the new members of the cabinet should be adequately briefed by their predecessors.

### **c) Allocation of nomination seats ( MPs and Councillors)**

Nominated MPs: Nominated seats have existed in Kenya since before Independence in 1963. According to section 33 of the Constitution, the National Assembly includes twelve members “nominated by the parliamentary parties according to the proportion of every parliamentary party in the National Assembly” (section 33(3)). Section 33(4) stipulates that the proportions “shall be determined by the Electoral Commission after every general election”. Furthermore, section 33(1) indicates that these nominated members are “to represent special interests” and following section 33(5) the Electoral Commission ensures “observance of the principle of gender equality in the nominations”.

The constitutional disposition should have been complemented with a regulatory framework at a lower level. However, the Act on Presidential and Parliamentary elections is silent on the subject, and the ECK has never issued any regulation or statement concerning the process for the allocation of the nominated seats. The ambiguity is two-fold. First, it is not clear whether the “nominated” seats are the equivalent of what is usually known as “reserved” seats which some legislatures establish to ensure representation of minority groups. Second, the formula for allocating the seats is not indicated either in the Constitution or in subsidiary legislation. Even in the absence of specific regulations, the ECK has proceeded to allocate the seats.

The ECK should specify the formula to be used in advance of the elections, after consultation with all relevant stakeholders, to distribute nomination seats. Although the Constitution does not define “special interests” as contemplated by section 33(1), the High Court has advised that they include those interests which have not been taken care of by the election process and which are vital to the effectiveness of the democratic elections in terms of adequate representation for all in a democracy. According to the court, the ECK is constitutionally empowered to vet party nominations to ensure compliance with the special interest criterion and gender equality before transmitting names for appointment to the President.

Nomination of councillors: Section 26 of the Local Government Act (Cap. 265) provides that a municipal council shall include councillors elected for each electoral area by the electorate thereof, councillors nominated by the Minister to represent the Government or any special interests as the Minister may by order determine, and in certain circumstances a councilor appointed by a contiguous county council. There is a further provision that

generally the number of non-elected councillors shall not exceed one-third of the number of elected councillors. Section 29(7) provides that the Minister may, in respect of any county or town council, nominate the chairman from among the members of the council or persons qualified to be members of the council. Section 39 provides for the number of councillors for a county or town council and section 46 for an urban council.

The Act states that “the criteria and principles for the appointment of nominated members of the National Assembly under section 33 of the Constitution shall mutatis mutandis apply to the nomination of councillors” (section 26(2)). Section 33 of the Constitution specifies that those to be appointed shall be persons qualified to be elected as members of the National Assembly [section 33(2)] and shall be “nominated by the parliamentary parties according to the proportion of every party in the National Assembly, taking into account the principle of gender equality” {section 33(3)}.

Following every general election the proportion is determined by the ECK which then informs the political parties concerned of the numbers they are entitled to nominate: in response each party supplies the ECK with its list of nominees and the relevant information on each. The ECK then checks:

- the proportionate number of councillor(s) for nomination whether the person proposed qualifies to be elected as a councillor (e.g. is a registered voter of that local authority)
- observance of gender balance and special interest
- that the nominee is able to read and write

If the ECK is satisfied with the information provided, it forwards the names to the Minister for Local Government for gazetting. Sections 27(2), 40(1) and 47(3) provide that the term of office of a councillor shall be five years. The sections give the Minister the power to terminate the nomination of a councillor by notice in writing delivered to the councillor.

The role of the Minister in the nomination of councillors is limited to publishing the names of those proposed by the political parties. The Minister has no power under the Act to substitute others for party nominees or to nominate councillors of his own choice. Because the law empowers the Minister to terminate the nomination of a councillor, it seems that he may do this but has to revert to the ECK and eventually to the parties for the nomination of replacement councillors.

Following the 2007 election, the ECK obtained names for nomination from the political parties of the relevant local authorities and forwarded them to the former Minister for Local Government. He substituted his own nominees for some of the names he had received. Under section 29(7), the Minister is allowed to nominate the chairman of a county or town council from

among the members of the council or persons qualified to be members of the council. This has been misinterpreted to mean that he may nominate another set of councillors whom he can then make chairmen of county or town council.

The Local Government Act vests the power of nomination or appointment in the Minister for Local Government but subject to the provisions of the Constitution. These provisions are confusing. The law allows the Minister to appoint persons to represent the Government in the local government and also empowers the local authorities to nominate some members. These, however, have to come from the list presented by political parties with representation in the relevant local authority. How one can select appointees of the parties to represent the Government is hard to know. Neither is it clear how the local authority itself, e.g. a county council, would appoint members to the municipal council.

The other grey area is the number of appointees and the interests they have to represent. The one third of local government councillors who are nominated ought to represent special interests and also promote gender equality. As in the case of nominated members of Parliament, the ECK has not been very strict on this aspect. The political parties have continued to defy the law and the Constitution with impunity and the ECK has not made efforts to enforce these provisions.

## **Recommendations**

- IREC recommends that the ECK institutionalize the practice of post-election audits and evaluations, not only by continuing to hold them but also by improving the quality of objective data and other information (as well as actors) that feed into the evaluation exercise. This will enable the ECK to be a continuously learning EMB, whose processes are objectively reviewed and improved upon after every major electoral exercise, and at other instances as the EMB deems fit.
- IREC records a recommendation by a member that post-election audits be conducted by an independent auditor and made public.
- In order to facilitate the conduct of such audits, IREC recommends that the ECK publish on its website the results for all polling stations (forms 16A).

### **Recommendation on post-election dispute settlement:**

- IREC recommends that in the course of the constitutional reform debate and in reviewing the legal framework for elections, provision should be made for the establishment of an appropriately composed and empowered special electoral dispute resolution court.

**Recommendations on swearing-in and assumption of office:**

- IREC recommends a transition period between a successful candidate's election and his swearing-in.
- IREC recommends that the period provide sufficient time to resolve most electoral disputes and to verify election results.

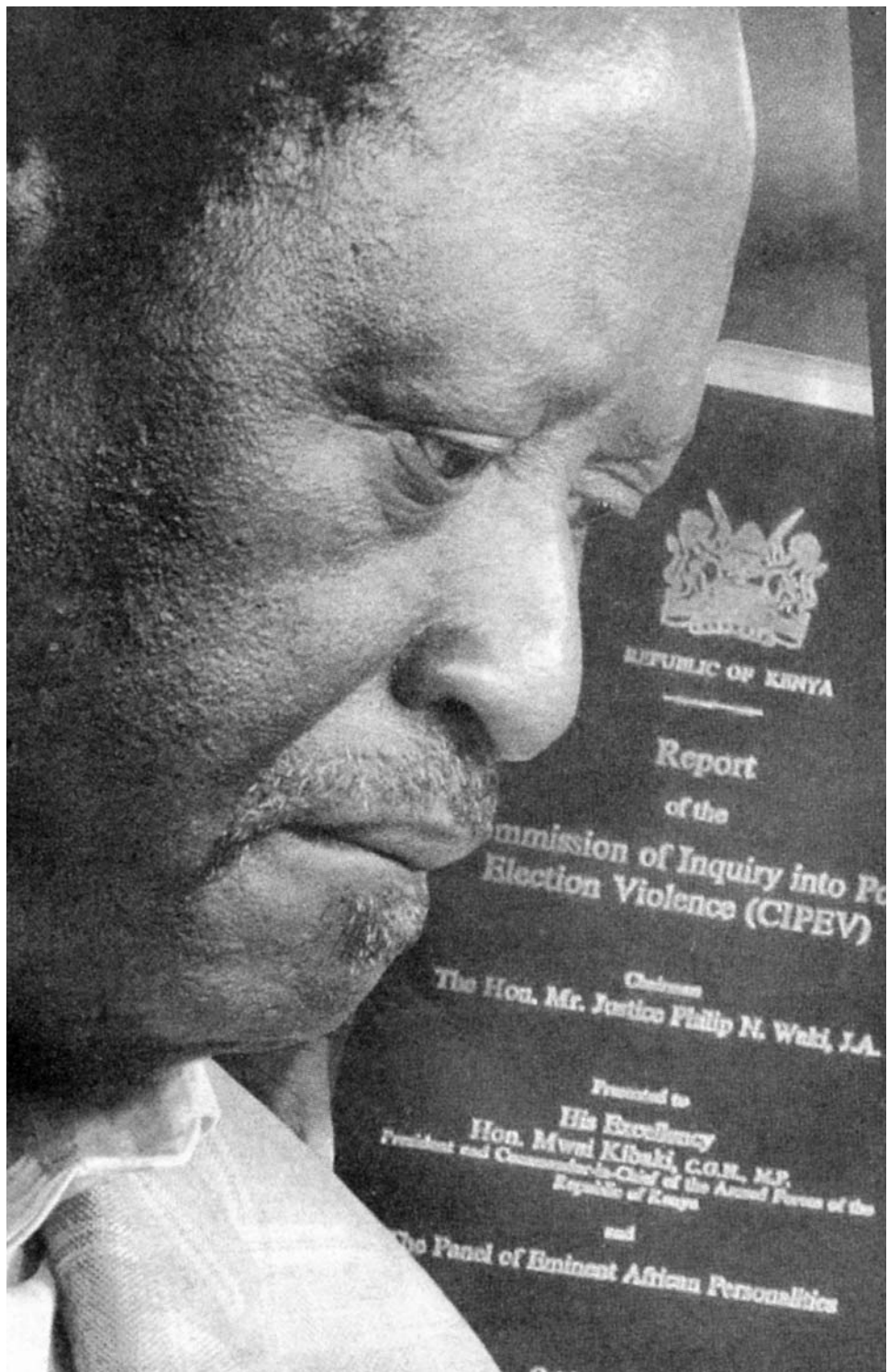
**Recommendations on custody of election materials:**

- IREC recommends that the ECK develop procedures for safe storage of election materials until any post-election analysis has been completed.
- IREC recommends that the ECK store certain relevant election materials (such as the election results) in electronic format.

**Recommendations on allocation of nominated seats:**

- If it is decided to maintain the nominated seats, IREC recommends that an electoral formula (with two alternative options) be specified. In terms of the use of the nominated seats to support underrepresented groups or special interests, it would be preferable to devote all of them to improve the representation of women in Parliament. The number of nominated seats might be the same as at present, or Parliament might decide on an increase. Kenya might also explore alternative approaches (such as those adopted in Uganda and Rwanda) to increase the representation of women in Parliament.
- In the case of persons with disabilities and ethnic minorities, IREC recommends the introduction of reserved seats. Rather than preparing special rolls it might be better to ask organizations representing those groups to submit candidacies, with the final selection to be conducted by Parliament. Reserved seats should have a voice but no vote in the deliberations of Parliament.
- IREC recommends that, since there is no necessity for allocating reserved seats to women (who would be better covered by nominated seats and selection by political parties), to young people (some MPs are reasonably young), to other minorities (the concept might be somewhat difficult to operationalise), to trade unions (certainly not a marginalized group) or to geographically marginalized communities (another concept difficult to operationalise), this not be done
- IREC recommends that consideration be given to leaving the President a margin for appointing ministers who are not MPs. This would eliminate pressures on the use of nominated seats. Ministers who are not MPs might participate in Parliament with voice but without vote.

- IREC recommends the proper regulation of the matter of nominated councilors. It should be left to the ECK, applying a predetermined formula, to make the nominations from a list presented by the political parties. A minister who is a politician (and will always belong on a particular side of the political divide) is not expected always to act fairly/equitably in the allocation/nominations, as was demonstrated after the 2007 elections.
- IREC recommends that the Constitution or legislation clearly define what special interests or groups should benefit from nominations.
- Recommendation on post-election procedures
- IREC recommends an amendment to sections 7 and 9 of the Constitution to eliminate all doubt as to the expiry of the President's term of office.
- IREC recommends that consideration be given to amending the Constitution to provide for fixed terms of office for the President and Parliament together with concomitant provisions for an electoral timetable.



**Part 2**

**THE APPOINTMENT OF THE COMMISSION  
OF INQUIRY INTO THE POST ELECTION  
VIOLENCE (CIPEV)**

**The Waki Commission**

## **The Appointment of the Commission of Inquiry into the Post Election Violence (CIPEV)**

The Commission of Inquiry into the Post Election Violence began its work on 23<sup>rd</sup> May 2008 with an announcement published in the Kenya Gazette Notice No.4473 vol. cx-no.4. The members of the Commission as appointed were its Chair, Mr. Justice Philip Waki, a judge of Kenya's Court of Appeal and two Commissioners, Mr. Gavin McFadyen and Mr. Pascal Kambale respectively nationals of New Zealand and the Democratic Republic of Congo respectively. Mr. David Majanja and Mr. George Kegoro (all Kenyans) served as the Counsel Assisting the Commission and Commission Secretary. The Commission was appointed under the Commissions of Inquiry Act (Cap 102) Laws of Kenya but consequent to the National Dialogue and Reconciliation agreement.

Funding for the work of the commission was provided by the Government of Kenya (GOK) and the multi donor Trust Fund for National Dialogue and Reconciliation, managed by the United Nations Development Programme (UNDP).

The basic terms of reference of the commission was to investigate the facts relating to the post-election violence; the actions or omissions of State security agencies during the course of the violence; and give recommendations of a legal, political or administrative nature, as appropriate, including measures with regard to bringing to justice those responsible for criminal acts, eradicate impunity and promote national reconciliation. It was also to make such suggestions to the Truth, Justice, and Reconciliation Commission as it would deem necessary.

### **The Public Hearings**

The findings of Commission of Inquiry into Post Election Violence (CIPEV) relates to the testimony from 156 witnesses and 144 other witnesses who submitted depositions and recorded statements when the commission moved around the country from July 2008 to September 2008 to gather evidence and other information on the post election violence. The hearings were conducted in Nairobi, Naivasha , Nakuru, Eldoret , Kisumu, Borabu and Mombasa. The Commission had only a limited period to carry out these investigations and as such their findings may not have been exhaustive.

In some places, witnesses hardly turned up: The result is that when the Commission went to certain places such as Kisumu, there were no wit-

nesses, other than the officials of professional groups and the civil service who turned up to testify on matters relating to violence in the Province. The Commission, however, made efforts to visit most of the areas afflicted by the post election violence, toured several towns and rural areas to witness first hand accounts of properties that had been destroyed and damaged during the PEV. It also visited Police Stations and IDP camps in the process of collecting the analyzed data. In writing the report, the Commission has noted that it relied on the testimony of the witnesses, its observations and submissions made on behalf of many groups that presented views to the commission. Secondary evidence was also used.

## **Countdown to Hell: A Background of the Post Election Crisis in Kenya**

In the chapter “The Personalization of Presidential Power and the Deliberate Weakening of Public Institutions” the CIPEV has delved into the possible issues behind the problem of ethnic hate and hostilities in Kenya, and specifically in the count down to the 2007 violence.

According to the Commission, political power in Kenya has been personalized around the presidency and this has been increased by changes in the Constitution under the subsequent Presidents since independence. This is the main cause of the country’s political restlessness. Laws were passed to increase executive authority, and other laws seen as being in the way of an executive presidency are often changed or even ignored. By 1991, the Constitution had been amended about 32 times. Hence, the checks and balances normally associated with democracies are deliberately weak in Kenya.

Individuals in various parts of Government whether in the civil service, the judiciary, and even in Parliament, understand that, irrespective of the laws, the executive arm of government determines what happens. Hence, the State is not seen as neutral but as the preserve of those in power. As such, Government institutions and officials lack in integrity and autonomy. One result of this in the 2007 election was the perception by sections of the public that Government institutions, and officials, including the judiciary, were not independent of the presidency, were partisan and lacked integrity. Hence, were perceived as not able to conduct the election fairly. This led to some officials not following the law themselves, and sections of the provincial administration and security forces even themselves engaging in acts of violence. This has built a culture of impunity, which the CIPEV has advised as a pertinent issue to the recurrence of election related violence and should be dealt with once and for all.

Given the power of the President and the political class, the perception on the part of the public is that everything flows not from laws but from the President's power and personal decisions. This also has led the public to believe a person from their own tribe must be in power, both to secure for them benefits and as a defensive strategy to keep other ethnic groups, should these take over power, from taking jobs, land and entitlements. All of this has led to acquisition of presidential power being seen both by politicians and the public as a zero sum game, in which losing is seen as hugely costly and is not acceptable. Hence, there is tendency on the part of a variety of political actors to do anything, including engaging in violence to obtain or retain political power. This has created a climate of fear and suspicions which politicians easily exploit and use to mobilize violence. Fears over rigging of the 2007 presidential results were a culmination of these tensions.

An attempt to reduce the personal power that had been accumulated by former President Moi initially was made by the combined opposition forces under NARC that sought to introduce the post of Prime Minister with the exit of KANU from power. This culminated in an informal Memorandum of Understanding (MoU) before the 2002 election between the then opposition coalition chiefs but once elected, however, President Kibaki reneged on the MoU. Discussions continued concerning constitutional change and the devolution of power.

The Kibaki Government then came up with a draft Constitution put forward by Attorney General, Amos Wako which was put to the public at a referendum in 2005, where voters rejected it. That the MoU was scuttled was a big campaign issue for the group led by Raila Odinga that later left the NARC coalition Government. President Kibaki's Government was perceived as unwilling to abide by its pre-election agreement with its partners and as retreating into an ethnic enclave. This was criticized by the public and was seen as an attempt by the so-called "Mount Kenya Mafia" to keep power to itself rather than share it. Even though the MoU was not a legal agreement, the Kibaki's Government turning away from it and removing from government the group of Ministers associated to Odinga had the effect of increasing the polarization of politics along ethnic lines. Even though the 2005 referendum was peaceful and the results were accepted rather than contested, the parameters were nevertheless drawn for battle. With the ethnic political fault lines clearly marked after 2005, and the need to win the presidency seen as paramount, tensions began to mount.

The post election violence therefore is, in part, a consequence of the failure of President Kibaki's Government to exert political control over the country or to maintain sufficient legitimacy as would have allowed a civilized contest with him at the polls to be possible. Kibaki's regime failed to unite the country, and allowed feelings of marginalization to foster into what became the

post election violence. According to CIPEV, president Kibaki and his then Government were complacent in the support they considered they would receive in any election from the majority Kikuyu community and failed to heed the views of the legitimate leaders of other communities.

## **Other issues were;**

### **Land Disputes**

Kenya consists of 42 ethnic groups who live in eight provinces. Many areas outside the major cities and towns are relatively homogeneous ethnically. Problems of inequality and marginalization thus are often viewed in ethno geographic terms even though the inequalities between individuals of the same ethnic group are sometimes more pronounced than those between different ethnic groups and geographic areas. Studies done elsewhere have not found that the presence of a large number of ethnic groups or inequality per se explains large scale violence even though most of the violence in the Rift Valley has occurred mainly in ethnically mixed settlement schemes. Apart from this, citizens are often concerned that resources, including land, and services are distributed equitably and are quick to point out inequities.

Constitutionally, individuals may own land in any place in Kenya and in law no part of the country belongs to an ethnic group. Nevertheless, this phenomenon is de facto a characteristic of many areas, particularly as many of the newly created districts since the nineteen nineties have been ethno-specific, leading to the creation of ethnically homogenous effective “native reserves”. This in turn has created the notion of “insiders”, who are native to a place and “outsiders”, who have migrated there, a notion that has been tapped by aspiring politicians.

Still, gross corruption in the acquisition, registration, and administration of land matters has been a major problem in Kenya. The Ndungu Report noted that throughout the 1980s and 1990s public land was illegally and irregularly allocated “in total disregard of the public interest and in circumstances that fly in the face of the law”. “Land grabbing” and the allocation of public land as political patronage were part of the gross corruption of this period. Those involved in this allocation were senior public servants, but also local land boards, the courts, and a range of officials including members of the provincial administration, politicians, and others.

Land allocations were therefore used to reward “politically correct individuals”, and became heavily politicized. Given that the recommendations of the Ndungu report were never implemented, this has increased the sense of frustration in attempting to deal with land tenure disputes. Furthermore, as land is an emotive issue, politicians have capitalized on issues surrounding it, including encouraging violence during elections.

## **Push for Political Power**

In analyzing the causes of the post-election violence, the Commission documented that many Kalenjins argued that it was a product of long-standing anger over land distribution following independence. They argued that the community land was alienated by the colonial government and then unfairly parceled out to Kikuyus and other groups whom they view as outsiders. Many Kalenjins believe that issues relating to land were the reason for both the pre-electoral violence in the 1990s and the post election violence after the December 2007 elections.

Other authorities such as the Akiwumi Report dismiss this explanation pointing out that individuals from different groups lived side by side for many years until the advent of multi party democracy when violence was used to kill and displace opposition party voters to keep them from voting. Hence, the Report further argues that even though the promise of getting land from those who were displaced was used to entice youth into violence, the desire for political power and not land hunger was among the causal factors.

## **Poverty**

Also, some communities have done better than others which are poorer, less well developed, and more marginalized from the mainstream. This in turn has generated feelings of resentment and powerlessness, sentiments that can and have been mobilized violently. Furthermore, there is a large and growing under-class of urban poor who are not landowners and are unlikely ever to be landowners. This number of Kenyans, especially living in urban slums, and afflicted by poverty, engaged in the violence more easily.

## **Unemployed Youth**

Although Kenya's population growth rate has been reduced and is now reportedly down to 3%, it still has an estimated two million youth who are unemployed. Furthermore, between 1992 and 1996, the number of street children increased 300% in just four years. Many of these initially rootless children who are now adults are the product of displacement by ethnic violence. They have grown up on the streets and are inured to violence, something that is clearly very dangerous. In addition, although many youth speak English, something that has raised their expectations, they have no hope of formal sector employment. The combination of being rootless, having survived amidst violence, plus their need for an identity and a livelihood makes them ready recruits for violent gangs, which exist all over Kenya and are tapped by politicians, particularly but not exclusively during elections.

Additionally, there is also a growing problem of unemployment among youth who are university educated, estimated to be around 40,000 a year,

given that only 150,000 formal sector jobs have been created since 2003, raising the spectre of whether these individuals will also be ready to engage in violence as well if they are unable to find work. Violent gangs, consisting mainly of unemployed youth have been mobilized into gangs along ethnic lines.

### **Negative Ethnicity**

Ethnic polarization and the mobilization of ethnic sentiments by political leaders during campaigns are partly to blame for the violence. Furthermore, the fact that both the police and military are perceived historically to have been recruited along ethnic lines to protect the particular government of the day has increased the likelihood of their breaking down along ethnic lines in a crisis and being either unable or unwilling to maintain law and order impartially. This meant that post election violence proliferated and intensified for a number of months, and that politicians and businessmen allegedly chose to hire gangs of youth to fight their attackers rather than call in forces whose loyalties could not necessarily be counted on, the problem of ethnic distrust in the poll violence was clearly a factor.

## **Conclusion**

All of the above factors dovetailed to make violence the method of choice to resolve a range of political differences and to obtain political power. Furthermore, because the violence surrounding elections was ethnically directed, this increased distrust among different groups and vastly eroded any sense of national identity. Hence, ethnicity has now taken on a dangerous and negative connotation. The country should now deal with these issues. Currently, violence is endemic, is used routinely to resolve political differences, and therefore threatens the future of the nation.

In conclusion the CIPEV observed that the country must also make decisions to change the way politics is conducted, as well as to its intersection with other issues related to land, marginalization and inequality, and youth. Short of that, violence including that related to elections will continue to appear and will be ignited ever more readily.

## CIPEV Findings on Post Election Violence

The report has accounts of people and communities affected by the post election violence. It has analyzed the information gathered during the duration of the hearings and made its report which is briefly reproduced in this booklet;

- A total of 1,133 people died as a consequence of the post-election violence. The geographical distribution of the deaths was unequal, with most of the post-election violence related deaths concentrated in the provinces of Rift Valley (744), Nyanza (134) and Nairobi (125). The districts of Uasin Gishu (230), Nakuru (213) and Trans Nzoia (104) in the Rift Valley Province registered the highest number of deaths related to post-election violence.
- A total of 3,561 people suffered injuries inflicted by or resulting from sharp pointed objects - 1229, blunt objects -604, Soft tissue injury - 360, Gunshot - 557, Arrow shots - 267, Burns -164, Assault - 196, etc.
- A total of 117,216 private properties (including residential houses, commercial premises, vehicles, farm produce) were destroyed, while 491 Government owned properties (offices, vehicles, health centres, schools and trees) were destroyed.
- Gunshots accounted for 962 casualties out of whom 405 died. This represented 35.7% of the total deaths, making gunshot the single most frequent cause of deaths during post-election violence. It was followed by deaths caused through injuries sustained as a result of sharp pointed objects at 28.2%.
- The post election violence was attributed to historical and long term tensions in the conflict red spots that seem to have endured since independence, and intermittently boiled over to active violence (investigated in part by the Akiwumi Commission in 1997) as well as immediate trigger of perceived rigging of the 2007 December presidential polls.

## On Causes and Patterns of the Post- Election Violence

According to the Commission of Inquiry into Post Election Violence, the causes of the post election violence are multi-fold. They can be analyzed as below;

1. In contrast to the pre-election violence, which was mainly between candidates and their supporters, the post-election violence had a distinct ethnic dimension.
2. Initial violence witnessed in the Rift Valley was spontaneous and was in part a reaction to the perceived rigging of elections. In areas like the Rift Valley and the Coast, it targeted members of the Kikuyu and Kisii

- communities perceived to be associated with the PNU and with President Kibaki who were seen as the beneficiaries of the “rigged” election, while in Nyanza and Western, the spontaneous violence was mostly directed towards government facilities and gradually took the form of looting and destruction, and while it also targeted Kikuyus and Kisii, the intention appeared to be not to kill them but rather to expel them and destroy their property.
3. Subsequently the pattern of violence showed planning and organization by politicians, businessmen and others who enlisted criminal gangs to execute the violence. That was the case particularly in Rift Valley and Nairobi. In places like Naivasha, Nakuru and the slum areas of Nairobi, Kikuyu gangs were mobilised and used to unleash violence against Luos, Luhya and Kalenjins and to expel them from their rented residences and, similarly, organized Kalenjin youth particularly in the North Rift attacked and drove out Kikuyus living there.
  4. Some of the pointers to the organization include the fact that: In instances, warnings were issued to the victims before the attacks; The violence involved large numbers of attackers, often mobilized from areas outside the location of the violence; Petrol and weapons were used in various places to carry out the attacks and destruction, which required arrangements as regards acquisition, concealment and transport; and sometimes the attacks specifically targeted only members of given ethnic groups to the exclusion of others.
  5. Some responsibility for the violence remains with the country’s politicians who precipitated the violence by among other actions and omissions:
    - Conducting the election campaigns in a strident and confrontational manner, thereby creating an atmosphere of tension;
    - For party political ends, casting the majimbo debate in ethnically divisive terms; and
    - Failing to create confidence among voters around the electoral processes and institutions.
  6. The administrative authorities, including the police, the security forces and the provincial administration take responsibility for various omissions and commissions in regard to the violence arising from:
    - Failure to act on intelligence regarding the possibility of violence following the elections;
    - Failure to respond appropriately and adequately to the violence and its effects, thereby aggravating the suffering of the victims;
    - In the case of the security agents and the police, resorting to an unjustified use of force and causing death and injury unnecessarily; and
    - Failure to act with discipline and impartiality and at times descending into acts of serious crime against civilians.

## **On Sexual Violence**

7. GBV: Because of the context in which it took place, the sexual violence experienced took the form of gang and individual rapes, many of which were ethnically driven, as well as horrendous female and male genital mutilation.

Women and children's labia and vaginas were cut using sharp objects and bottles were stuffed into them. Men and boys, in turn, had their penises cut off and were traumatically circumcised, in some cases using cut glass. Furthermore, entire families, including children often were forced to watch their parents, brothers and sisters being sexually violated.

8. Aside from the above life shattering events, many victims of sexual violence experienced other injuries, lost family members, their houses, property, those who had no place to go or to turn for help, and have ended up alone or in IDP camps without a means of earning a living.

## **On Perpetrators**

9. The Commission found that perpetrators of sexual violence were not just ordinary citizens, neighbours, and gang members, but also significant numbers of security forces. These included members of the General Service Unit (GSU) as well as regular and administration police. Many victims let members of the security forces into their houses assuming they would help them. Instead, they found themselves being attacked by those they thought would help them. This entailed a gross betrayal of trust.
10. Members of the security forces also participated in gang rapes. In addition, they colluded with each other, including having some of their own standing guard outside victims' houses while they raped and mutilated inside victims' dwellings.
11. Even when victims told perpetrators (whether members of the security forces, gangs or individuals) that they were HIV positive, perpetrators chose to rape. This is likely to result in an increase in HIV Aids infection in Kenya.
12. Perpetrators often told victims the sexual violence inflicted upon them was punishment for belonging to a specific ethnic group or purportedly having supported a particular political party.

### **On Victims**

- 13 For a variety of reasons, many victims were not able to access timely medical care, including obtaining the drug PEP, which if taken within 72 hours, prevents HIV Aids and sexually transmitted infections. The reasons for not obtaining medical care included the following: a breakdown in security and the fear of leaving home, lack of transport, ignorance about PEP and not knowing they would not have to pay and could receive free medical care, fear of being stigmatized if it were known they had been raped, and an overriding concern to protect, feed, and shelter their children and family members at their own expense.

### **On Response by Authorities**

14. Authorities in general were totally unprepared to respond to sexual violence. Although the police took many victims of sexual violence to hospitals, the Commission also received evidence that in other instances they were unprepared either to record or investigate criminal complaints of sexual violence. This was exemplified by the Commissioner of Police, Hussein Ali's testimony to the Commission, where he stated "We will determine whether those crimes are fit and whether the people have been arrested and charged".
15. The void created by the lack of official response to sexual violence was partly filled by private hospitals, including the Nairobi Women's Hospital, some government facilities, and a number of NGOs, including the Kenya Red Cross.

### **On Effects**

16. Other than the extraordinary physical and psychological trauma stemming from being a victim of sexual violence, victims also suffered acute injuries, permanent disabilities, contracting incurable diseases like HIV Aids and hepatitis B, ostracism, abandonment by their husbands and parents, loss of abode and income, as well as extreme feelings of humiliation.
17. The Commission learned from its own psychologist that many female victims still are alone, unable to cope with the above traumas and in need of help which is not available to them. A number of victims who had not received medical attention by the time they came before the Commission only managed to do so as a result of the Commission's intervention.

### **On Internally Displaced Persons**

18. As a result of the PEV approximately 350,000 persons were displaced from their normal abodes of residence and or business. IDPs were con-

centrated in Western, Nyanza, Rift Valley, Central, Nairobi and Coast Province. About 1,916 Kenyans sought refuge in Uganda.

19. People were displaced as a result of violence and threats of violence. They moved from their places of residence and business to places considered safe like police stations, administrative posts, churches and trading centres.
20. Thereafter they moved to formal camps or were integrated with their relatives and friends in urban centres or their ancestral homes.
21. Conditions in the IDP camps were less than satisfactory. We found that security was wanting as IDPs were always subjected to threats by criminal gangs. We also found complaints about the inadequacy of food, shelter and sanitation. Most of the inhabitants of IDP camps were women and children.
22. Government and administrative response to the problems of IDPs was initially slow and ad-hoc. The Kenya Red Cross Society, local and international NGOs and CSOs, faith based groups and individual volunteers played an important role in alleviating the suffering of IDPs by offering refuge, food, shelter, security, education, medicine, counselling and other needs.
23. The Government initiated “Operation Rudi Nyumbani” in April 2008 aimed at removing IDPs from camps and where possible resettling them back to their homes. Due to constraints of time and resources, the Commission could not fully make an assessment of the efficacy of this programme but found the following inadequacies;
  - The sum of Kshs. 10,000.00 was considered inadequate by the IDPs to meet their need once they left the camps.
  - The so called “integrated” IDPs (i.e. returnees who went to live within the community) felt neglected as the program concentrated mostly on those who were settled in camps.
24. The IDP problem is likely to persist until the Government and people of Kenya address the political problems that led to eviction of men, women and children from their homes and businesses.

## **How Post Election Violence affected Kenyans: Regional Accounts of PEV**

In general, the clashes would start and end suddenly, but leave a trail of destruction suffering and disruption of life. The police were obviously overwhelmed by criminal gangs and demonstrators who proceeded in large numbers and took control of events at the time. Roadblocks were manned and security forces and health care providers, among other road users, denied free movement. This hampered efforts to rescue distressed victims of the attacks. In other cases, the police themselves were overwhelmed, attacked, and even killed. Nevertheless, the response of the provincial administration in most episodes of the violence was accompanied by excessive force and poor coordination.

However, it would be important to note that the Commission heard that the government did not anticipate that violence could be on the scale on which it happened and took not enough action to avert it although there were indications from various sources that violence could follow the 2007 December elections. The Commission was given evidence that the police were very slow to respond and some simply refused to enforce the law. In many cases police officers were deliberately refusing to intervene and their enforcement of the law was unbalanced and ethnically biased.

### **Rift Valley**

#### **Communities & Areas affected**

Communities especially affected by the violence: Kalenjin, Kikuyu, Luo, Kisii and Luhya

Areas that witnessed the Violence: Uasin Gishu, Kesses Location, Meteite, Eldoret, Tinderet, Nandi District, Kiambaa, Rurigi, Rukuini, Kiamumbi, Moiben Division, Matunda in Soi Division

Turbo; Trans Nzoia West - Gituamba, Timbora Location in Saboti Division and Waumini near Kitale town; Trans Nzoia East, Geta Farm Salama, Kalaa area, and Makutano; Central Rift -Narok, Molo, Koibatek, Nakuru, Rongai and Naivasha districts; Nakuru, Molo and Naivasha Districts; South Rift and Kisii Region - Kipkelion, Kericho, Bomet, Sotik/Borabu Border.

## Reasons for Violence

The causes of the post election clashes in this region covered by CIPEV included conflict over land, cattle rustling, political differences and ecological reasons among others. However, other reasons would include;

- Desire by resident Kalenjins in the province to recover what they think they lost when the Europeans forcibly acquired their ancestral land (also see Akiwumi report on 1997 clashes).
- The desire to remove “foreigners”, derogatorily referred to as “madoa-doa” or “spots” from their midst. The reference was mainly towards the Kikuyu, Kisii, Luo and other communities who had found permanent residence in the Rift Valley.
- Political and ethnic loyalty to the dominant political parties and political leaders
- Negligence of the provincial administration and security officers to punish perpetrators of earlier political violence (1992 & 1997)

## Other Motives

- Perceived arrogance, stereotypes and hostilities of certain ethnic groups
- Incitements, especially from political leaders and other propaganda sources
- Some of those who hold the view that the violence was spontaneous
- Some witnesses testified before the Commission and said that the violence was not spontaneous but planned, coordinated
- A history of ethnic conflict e.g. Molo
- Attempted ethnic cleaning (Koibatek) and Majimboism
- Poor handling of criminal activities by the police contributed to reinforcing the atmosphere of lawlessness

## Nature & Impact of Violence

- Attacks with arrows and bows, pangas (machetes), rungas (clubs)
- Setting houses/property on fire
- Entire village and houses (including church) were burnt
- Traumatic (or forced) circumcision, a particularly barbaric form of violence, was inflicted on mainly male victims who were Luo in areas like Naivasha
- Deaths, injuries (gunshot wounds, sharp or pointed objects, blunt objects, burns,)
- Gender based violence-rape/defilement

- Restriction of movement in places like Nakuru severely affected businesses within the town leading to huge losses

According to official sources, 205 people died in the post-election violence in the Uasin Gishu district alone. Out of the 127 bodies received from outside the Moi Teaching and Referral Hospital, Langas had the highest number of deaths followed by Kiambaa. The causes of death according to the post mortems carried out showed that majority of the deaths were due to sharp/pointed objects (33%), followed by burns (22%), blunt objects (14%), gun shots (14%), arrow wounds 6% and broken bones, 3% and others in that order.

A lot of property was destroyed during the attacks. According to police records, 52,611 houses were burnt; 58 motor vehicles belonging to civilians and 2 government vehicles were also burnt. A total of 21,749 people were displaced from their homes, other places of residence and businesses and they were accommodated in IDP Camps.

## **Western Province**

According to the Commission, the violence experienced in Western Province was generally more distinct from that experienced in other parts of the country in the sense that it was a direct consequence of political differences. These differences led to riots which were quelled by the law enforcement agencies thus resulting in a high number of deaths. The province witnessed a wave of violence that apart from Lugari, was spontaneous and directly flowed from disaffection with the final tally of the presidential results. However, a reasonable level of planning was the case of Lugari.

Communities and areas affected: There were various parties to this conflict in Western Kenya. In Mt. Elgon region, the Sabaot were pitted against other ethnic communities – Bukusu, Ndorobo, etc. However as the post election violence engulfed the province, other communities including the Teso, Kikuyu and the Luo got involved/affected in the conflicts. The province is dominated by the Luhya tribe and its sub dialects.

### **Patterns of Post-Election Violence in Western Province**

Although the land disputes that had pitted security forces of the Government of Kenya against a proscribed militia group, the Sabaot Land Defense Force (SLDF) was part of the reason for continued violence in the region, the contested election results fueled it and was responsible for the political character of the violence.

Post election violence in Western province was characterized by burning, looting and vandalizing of property belonging to the Kikuyu community and by those perceived to be sympathetic to PNU. The most affected towns were Kakamega, Mumias, Bungoma, Mbale, Lugari, Busia and Vihiga. Other affected areas were Budalangi in Busia district.

The road infrastructure in the province was affected as protesters burnt tyres on the roads and mounted illegal roadblocks. The major roads affected were Kisumu-Kakamega; Kakamega-Mumias; Kakamega-Eldoret. The road destined to Uganda was also greatly affected. The areas located near the Lugari/Uasin Gishu border were greatly and directly affected by the violence as well including the Kakamega - Turbo highway got paralyzed around Lugari. Further violence rocked Busia and Bungoma districts.

### **Impact of the Violence**

The records show that 98 died as a result of PEV in the Province as follows; Kakamega 31 deaths; Webuye, 21; Vihiga, 18; Mumias, 12; Busia, 9; Bungoma 7. Post-mortems carried out on the 98 bodies revealed that 74 of them died of gunshots. Thus gunshot comprised 73% of all fatalities in the province.

## **Nyanza Province**

Communities and areas affected: The resident Luo community, Kisii, Kamaba and Kikuyu

Kisumu town-Kondele, Nyalenda, Otongolo; within the slum estates of Nyalenda, Manyatta, Nyamasaria, Kondele, Mamboleo, Otongolo, Bandani, obunga and Kanyakuar.

Rachuonyo, Migori, Siaya, and Nyando districts. Most of the violence was particularly urban based and also concentrated along the highways in the Province.

### **Manner of Violence**

Along the Kisii/Rongo border, some youth torched several sugarcane plantations belonging to both Kisii and Luo farmers; A mob stormed the provincial works offices and burnt the main office block and nine Government of Kenya Vehicles. Another stormed the KBC office and burnt five motor vehicles. Rioters invaded the water company's offices where they looted, set ablaze the main office and burnt 17 motor vehicles and one motor cycle.

For Nyanza province, the political home turf of ODM presidential candidate, Raila Odinga, the perceived delay to release the presidential results

was interpreted as a pointer towards rigging and the community thus acted to pre-empt rigging but the police and the state machinery moved with force in disregard to peoples' lives in suppressing demonstrations. CIPEV heard that the demonstrations in Nyanza were peaceful but the police disrupted them with full force leading to unnecessary violence. The Kisumu OCPD told the Commission that the situation was so chaotic and the circumstances could not allow for the containment of the violence without live ammunition.

Subsequently, all government offices were closed, communication channels were not functioning, roads were blocked, telephone lines, land lines were dismantled. According to the PC, it became difficult for Government officials to discharge their duty: In the course of 30 December, a GSU platoon, 50 regular police and 50 officers from the Rapid Deployment Unit (RDU) of the Administration Police were jointly deployed. 300 security personnel supported by ten vehicles were used to quell the riots.

### **Impact of the Violence**

- Altogether, the commission heard that by 11<sup>th</sup> February 2008, 102 people were reported dead - most of the people who lost their lives did so through gun shots and 685 people injured in the province while 40,000 non-Luos had exited the province. 9 government offices, 73 business premises and 415 residential houses were looted or burnt across the Province. 50 government vehicles were destroyed, 16 public service vehicles damaged mainly on the roads or where they had been parked and another 16 vehicles were damaged. Indeed, about 90% of the deaths in New Nyanza General Hospital were from gun shots and bullet wounds. Three security personnel were killed in the course of suppressing the violence.
- 2,886 people sought refuge as IDPs within the town. The Commission heard that the province received 126,821 returnees from outside Nyanza because they had been ejected from other provinces or they feared continuing to stay in those places most of who were taken in by friends and relatives.
- Loss of property and businesses; one large enterprise, the Ukwala supermarket was burnt down from the explosion of an inflammable material thrown inside it during police clashes with the rioters.

## Nairobi Province

Communities and areas affected by the violence: Suspicion and acrimony among Kikuyu landlords on the one hand and Luo and Luhya tenants on the other was in Kibera, Kawangware, Dandora and Pipeline Estate in Embakasi easily boiled into violent expressions in the trigger of post election violence. Other areas - Dandora and Mathare North, Lucky Summer Quarry, Gituamba, Gitare Marigo and Dandora Dumpsite, Babadogo, Glue Collar, Kariadudu, Mugure and Kasabuni areas.

Kibera - Kianda, Raila village, Gatwikira and Kisumu Ndogo areas; Makina is mainly populated by Nubians while Laini Saba and Soweto are dominated by Kikuyus. Luhyas dominate in Mashimoni and Lindi areas.

### Manner and Impact of Violence

Violence started in Kibera, Mathare, Dandora, Kariobangi and Kawangware upon announcement of the Presidential results and the subsequent swearing in of President Kibaki on 30th December 2007. Police were deployed to cordon off Uhuru Park to prevent the ODM and its leaders from holding its meeting there. Later, the killing of the late Embakasi MP-Hon Melitus Mugabe Were on 29<sup>th</sup> January 2008 in Nairobi's Woodley Estate accelerated the violence. A common thread in the post election violence was the wanton destruction of property and the severe effect arson has had on people's lives and property. Forced circumcision reportedly on Luo victims and attributed to members of the Mungiki Sect was also reported.

Impacts of the violence included looting, destruction of property and arson e.g. Toi Market in Makina area which prior to elections had housed over 3,000 traders, was burnt down and the railway line that passes through the slum was pulled over, disrupting essential transport in the area.

The Nairobi City Mortuary provided information showing that between 30<sup>th</sup> December 2007 and 30<sup>th</sup> January 2008, a total of 111 bodies were booked in by police who categorised them as "Post Election Violence Bodies."

Businesses lost, tribal gangs attacked property; residents and travelers out of the city were killed by rival gangs on an ethnic basis

## Central Province

Violence in Central Province was mainly targeted against persons perceived to be unsympathetic to the PNU presidential candidate, Mwai Kibaki, and therefore responsible for the evictions of non-Kikuyu from conflict-stricken parts of the country. There were incidents of violence reported after Kikuyu IDPs begun arriving from other areas. These led counter attacks on members of those communities, mainly Luos, Luhyas, Kalenjins and Kisiis to vacate their houses and camp in the various police stations. On 3<sup>rd</sup> January 2008, rioting mobs blockaded the Nairobi-Nakuru Highway in areas like Limuru and Thogoto.

In some cases, the centres holding like Togoni which had IDPs from other communities were threatened with burning by members of the Kikuyu community who demanded that the camps should be broken up and those in the camps should leave and go to their homeland. On 5<sup>th</sup> January 2008, fracas started in Limuru town outside Bata Shoe Company gate and outside Kirathimo Red Cross Centre which was accommodating the IDPs, with demands to evict non-Kikuyu IDPs from the area.

There were instances when non-Kikuyu employees working in various companies were targeted for attacks and eviction so as to create employment opportunities for themselves in those companies. Such companies included Universal Corporation Limited (UCL) and Steel Rolling Mills, both in Kikuyu; KARI and KEFRI and other research institutions also situate in Kikuyu; Tea Estates and Bata Shoe Company in Limuru; BIDCO and other industries in Thika; flower farms in Ol Kalou. Within Nyandarua South District, a group of persons set on fire 104 houses, 1 tractor, 1 harrow, 10 sheep and 6 cows belonging to persons from the Kalenjin community.

### Causes

- Direct incitement by politicians and other leaders, with claims of prior planning of the violence in some parts of Central Province
- The resurgence of Mungiki ostensibly to defend the Kikuyu community against aggression by non-Kikuyus.
- Hate Speech; there were reports of the circulation of malicious cell-phone text messages that propagated hate speech and alarming rumours.

### Impact of the Violence

IDPs: In some areas the incoming Kikuyu IDPs would be absorbed into the society by the local residents and other humanitarian agencies;

Non-Kikuyu IDPs left and concentrated in police stations: Nyeri Police station hosted 900 IDPs; Tigoni Police Station, 5,390; Ruiru Police Station, 620; Juja Police Station, 600; Thika Police Station 552; Maragua Police Station 68; Kinangop Police Station, 66; Karatina Police Station, 193; and Kikuyu Police Station, 500. The cumulative total was 8,889 IDPs.

The provincial administration was ill prepared to satisfactorily handle the overwhelming influx of IDPs leading to pain and suffering among the needy IDP groups that had little to depend on for their daily needs.

## **Coast Province**

The Coast Province was generally peaceful in the run up to the elections. However, threats of eviction of upcountry people especially Kikuyu, Luo and Kamba residing within Kipini Settlement Scheme in Malindi district were always feared. In Taita and Taveta districts, youths angered by the presidential poll result went on rampage in Taveta, Mwatate and Voi towns. In Malindi, Mvita and Kisauni, protests followed.

### **The Violence, Causes and Effects**

- The majimbo debate
- The Election Results Trigger and fears that the elections had been rigged

### **Nature and Extent of Violence**

- Attackers with crude weapons engaged the police in running battles including stoning police in Mishomoroni and Changamwe's Bangladesh area, Likoni
- Blockade the main highway to Nairobi - Mikindani
- Riots in Chaani, Bokole, Magongo Mwisho and Miritini.
- Shops broken into and houses burnt in Changamwe
- Protests in Mlaleo, Mtopanga and in Bamburi Mwish, Mshomoroni, Kadogo, Mtopanga, Bombolulu, Mwandoni, Kiembeni, Bamburi, Mtongwe, Shikaadabu, Miritini, Bomu and Migadini areas

### **Impact of the Violence**

- Massive destruction of property especially those belonging to members of the Kikuyu community; furniture shops, supermarkets and bars; Changamwe, Likoni and Kisauni - massive destruction of property, looting and burning of houses and kiosks

## **Specific Highlights on Sexual Violence, Situation of IDPs and the Media**

### **Sexual Violence**

One of the well known and regrettable tragedies of the post election conflicts was the sexual violence. The Waki Report devotes a full chapter on this theme.

The reports included heart wrenching tales of rape, gang rape, sexual mutilation, loss of body parts, and hideous deaths. In addition, various forms of genital violence against innocent victims were heard including tales of family members being forced to stand by and witness their mothers, fathers, sisters, brothers, and little children being raped, killed, and maimed: innocent victims contracting HIV/Aids after being sexually assaulted because the breakdown of law and order and the deteriorating security situation kept them from accessing medical care soon enough to prevent it: husbands abandoning their wives who had been defiled, and the inevitable psychological burden of powerlessness and hopelessness that left individuals who had experienced sexual violence feeling alone, isolated, and unable to cope, not just for one moment in time, but possibly forever.

The commission heard evidence from women, men, girls and boys who were raped, sodomized, and had their genitals mutilated. It is noted that women and girls were the majority of those affected. Many were victims of other aspects of post election violence including being forced to flee from their homes, having their property destroyed, losing their family members, and suffering from other types of violence. In Naivasha, many were forced into male circumcisions.

The perpetrators of the post election sexual violence included the following: state security agents (e.g. administrative police, regular police, and members of the General Service Unit (GSU), members of organized gangs (e.g. Mungiki, Kalenjin warriors, and others), neighbours, relatives, supposed friends, and individuals working in IDP camps.

### **Impact of Victims' Health and Socio-Economic Conditions**

Victims of the post election sexual violence experienced a number of unintended consequences in the aftermath of being attacked which the Commission heard about from witnesses who testified and from those who did not but nevertheless gave statements to its investigators. These consequences included infection with HIV/Aids, physical injury and psychological trauma,

desertion by their spouses, unwanted pregnancy, and loss of trust that they might have had previously in state security agencies. Some victims of sexual violence already had HIV/Aids and others contracted it as a result of being raped and being unable to access medical services in time to reduce the chances of or prevent infection.

Several local NGOs and international agencies such as UNFPA and UNIFEM, CREAM, CARE Kenya, FIDA Kenya, the Kenya Women Empowerment Link, and the Catholic Diocese of Nakuru made efforts to help the victims of sexual violence during this period.

## **Internally Displaced Persons (IDPs)**

IDPs are the human face of the problem caused by PEV. The Commission was made aware of the fact that internal displacement has been a permanent feature of Kenya history from colonial times onwards. Starting with the eviction of natives from their ancestral land to make way for settlers in colonial Kenya to recent violent evictions accompanying the 1992, 1997 and 2002 election, IDPs have been a constant feature of the country's political landscape. Even before the 2007 General Elections there was already a problem of population displacement as a result of the following factors amongst others:

- a) Pre-election violence in Molo district - 246
- b) Border and land disputes in places like the Sondu which is the confluence of three districts; Nyamira, Nyando and Kericho occupied by the Kisii, Luo and Kipsigis respectively - 247
- c) Cattle rustling and banditry in the Pokot/Transnzoia, Trans Nzoia/ Marakwet District border.
- d) Natural disasters such as drought in large parts of Northern Kenya that often lead to conflicts over natural resources like water leading to displacement.

According to the government there were 350,000 persons displaced as a result of PEV after the 2007 elections. As such, the commission gave a separate focus on the issue of IDPs in its report.

The settlement conditions in IDP Camps- in churches, trading centres, chief's camps, administration police camps and police stations - were reportedly bad. They were the subject of attack or threats of attack by criminal gangs and marauding youth. This phenomenon was particularly evident in the North Rift and in Nakuru. They were also ethnically divided reflecting the ethnic divisions at the time.

Most IDPs had to leave their home with nothing except the clothes on their back. The situation was aggravated during the height of the violence when basic services were not available and the supply lines were blocked. The IDPs depended mainly on relief food and basically had no way of earning a living. They lacked access to basic facilities such as medical/health services, education, social and economic services.

## **The Media and the Post Election Violence**

Diverse views are held about whether and how the spread of information through the print and broadcast media had contributed to the 2007 post election violence. The CIPEV listened to the Permanent Secretary from the Ministry of Information and Communications, the Attorney General, and media representatives who gave views on this issue.

Many recalled that some of the vernacular FM stations contributed to a climate of hate, negative ethnicity and may have incited violence. These included the vernacular music and negative ethnicity allegedly coming from Kikuyu FM stations including Kameme, Inooro, Coro, The Kalenjins' Kass FM and others in different parts of the country. The Commission heard that while KANU was in power, and since the 1930s until the mid-1990s the media had been controlled formally by the state. The media was subject to harassment, torture, imprisonment, and fines for expressing their views. Censorship and self censorship also ensued, stemming from fear of reprisals by the state.

However, after the 2002 election, the Government engaged in a process of liberalization. This included licensing many new stations. These changes took place in the absence of a new regulatory and legislative framework, leading to something of an uncontrolled free for all. As such, certain media took advantage of this lacuna and began to "operate freely and sometimes recklessly and irresponsibly". Some witnesses thought that some media houses were partisan in the elections.

In the 2007 elections, live broadcast of vote tallying of the 2007 election results at the KICC was cut off (and later banned) when visible acrimony of political leaders at the tallying hall became too obvious. This inflamed tensions, bringing "the country to the brink". It was the Ministry of Internal Security which told the Ministry of Information it wanted to invoke Section 88 of the Kenyan Communications Act, to which the latter complied. However the ban was unconstitutional, illegal and improper, the Commission heard.

The Commission heard many allegations of what was said in the FM vernacular stations, but it did not obtain the actual transcripts of who said

exactly what during this very critical period to make a judgement on the allegations. Also some individuals circulated e-mail messages that threatened law and order as well as peaceful co-existence between ethnic communities.

Nevertheless, the CIPEV concluded that it believes that speech in the media, including in vernacular FM radio stations, aiming to foment ethnic hatred and/or incite, organize, or plan for violence should be investigated thoroughly in a timely fashion when it occurs. Submissions to the Commission called for legislative framework governing the Media to clamp down on media misconduct and against hate speech.

## **Recommendations of the CIPEV**

CIPEV made a number of recommendations to the government. These findings have also been presented to the appointing authority, Dr. Koffi Annan, formerly the Secretary-General of the United Nations who led the National Dialogue and Reconciliation Process that arbitrated the parties in the country's post election violence. The recommendations are as follows;

### **“The Secret Envelop”**

In carrying out its TOR, the Commission had to make a crucial decision on whether or not to name names of those persons alleged by various witnesses to have perpetrated violence at some level. In the end, the commission recommended for the thorough investigation, and eventual prosecution of people alleged to have masterminded the violence in parts of the country. This was done in the spirit of natural justice in the adjudication of disputes— that everyone is innocent until proven guilty - and two, because the evidence the Commission gathered in its own assessment, was not sufficient to meet the threshold of proof required for criminal matters, that it be “beyond reasonable doubt”.

These names have been placed in a sealed envelope, together with its supporting evidence. Both will be kept in the custody of the Panel of African Eminent Personalities pending the establishment of a special tribunal (see below) to be set up in accordance with the recommendations. However, in default of setting up the Tribunal, consideration will be given by the Panel to forward the names of alleged perpetrators to the special prosecutor of the International Criminal Court (ICC) in The Hague to conduct further investigations in accordance with the ICC statutes.

## **The Special Tribunal**

CIPEV asked the government to establish a Special Tribunal to adjudicate over the criminal cases brought against persons bearing greatest responsibility for serious crimes, particularly crimes against humanity, related to the 2007 post election violence.

In order to fully give effect to the establishment of the Special Tribunal, an agreement for its establishment shall be signed by representatives of the parties to the Agreement on National Accord and Reconciliation within 60 days of the presentation of the Report of the Commission of Inquiry into the Post-Election Violence to the Panel of Eminent African Personalities, or the Panel's representative. A statute (to be known as "the Statute for the Special Tribunal") is required to be enacted into law and come into force within a further 45 days after the signing of the agreement. The date of commencement of the functioning of the Special Tribunal is to be determined by the President, in consultation with the Prime Minister, the Chief Justice, the Minister for Justice, National Cohesion and Constitutional Affairs and the Attorney-General, within 30 days after the giving of presidential Assent to the Bill enacting the Statute.

If either an agreement for the establishment of the Special Tribunal is not signed, or the Statute for the Special Tribunal fails to be enacted, or the Special Tribunal fails to commence functioning as contemplated above, or having commenced operating its purposes are subverted, a list containing names of and relevant information on those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal shall be forwarded to the Special Prosecutor of the International Criminal Court. The Special Prosecutor shall be requested to analyze the seriousness of the information received with a view to proceeding with an investigation and prosecuting such suspected persons. The Bill establishing the Special Tribunal shall ensure that the Special Tribunal is insulated against objections on constitutionality and to that end; it shall be anchored in the Constitution of Kenya.

The Bill establishing the Special Tribunal shall provide that the Special Tribunal shall consist of four organs: the Chambers (including an Appeals Chamber) and the Prosecutor, which shall be independent of each other, the Registry, and the Defence Office. The Bill Tribunal shall provide that Chambers shall be composed of 6 independent judges, three in the Trial Chamber, and three in the Appeals Chamber. The Presiding Judge of each Chamber shall be a Kenyan while the other two judges in each chamber shall be non-Kenyan and drawn from member states of the Commonwealth.

The Special Tribunal shall provide for a procedure for the appointment of the judges for each chamber and the Prosecutor of the Special Tribunal:

- i) The President shall appoint the Chair of the Trial Chamber in consultation with the Prime Minister, both acting on the advice of the Chief Justice, from among persons qualified to be appointed judge of the High Court of Kenya.
- ii) The Panel of Eminent African Personalities shall identify the other two members who will be appointed by the President, in consultation with the Prime Minister, from among persons qualified to serve as judge of a superior court of record in any part of the Commonwealth.
- iii) The same procedure shall be applied for the appointment of the Chair and members of the Appeals Chamber.
- iv) The Prosecutor of the Tribunal shall be appointed by the President in consultation with the Prime Minister from among persons qualified to serve as judge in a superior court of record in any part of the Commonwealth, from a list provided by the Panel of Eminent African Personalities.

The jurisdiction of the Tribunal shall include the jurisdiction to adjudicate over the criminal cases brought against persons bearing greatest responsibility for serious crimes, particularly crimes against humanity, related to the 2007 post election violence. The Tribunal shall have sufficient authority and independence to conduct investigations.

### **Legislative and policy recommendations**

- Establish an Independent Complaints Directorate
- Fast track the International Crimes Bill 2008 for enactment by Parliament to facilitate investigation and prosecution of crimes against humanity.
- Fully utilize the Witness Protection Act 2008 in the protection of all witnesses who will need such protection in the course of investigation, prosecution and adjudication of PEV cases.
- Enact the Freedom of Information Bill forthwith to enable state and non-state actors to have full access to information which may lead to arrest, detention and prosecution of persons responsible for gross violations.
- All persons holding public office and public servants charged with criminal offences related to post-election violence be suspended from duty until the matter is fully adjudicated upon.
- Upon conviction of any person charged with post-election violence offences of any nature, such persons shall be barred from holding any public office or contesting any electoral position.

- Finalize as a matter of urgency the development and application of the National Security Policy, as articulated in the Kenya National Dialogue and Reconciliation Agenda Item 4 and the First Medium Term Plan (2008-2012).
- Develop and implement the Conflict and Disaster Early Warning and Response systems, articulated in the First Medium Term Plan (2008-2012) as a matter of priority.
- The State Security Agencies develop, under the oversight of a National Security Advisory Committee (NSAC), joint operational preparedness arrangements (to be conducted at least once every two years) including desk top scenarios and full operational exercises to assist in their readiness for dealing with high level security and emergency situations, This should comprise all key participants including, in the case of elections, the ECK, the Ministry of Health, and the Ministry of State for Special Programmes (Disaster Management)
- The NSAC should take a greater leadership role in determining security priorities, focusing on preventive strategies and actions, and providing clear direction to state security Agencies
- The NSAC develop and implement security review arrangements to ensure that agencies' performance in security events such as the PEV are assessed, lessons learned and appropriate improvements and modifications to standard operating procedures are completed
- The NSIS shall be required to report annually to parliament and the annual report to be made public.

### **Specific Recommendations for the Police**

- A comprehensive reform of the Kenya Police Service and Administration Police be undertaken. This reform shall be initiated immediately and shall involve a complete audit of the current police management, structures, policies, practices and procedures; include extensive consultation with a wide variety of national and international stakeholders; undertake extensive and comprehensive public consultations; include an examination and consideration of applicable international law and best practices thorough examination, review and revision of all tactics, weapons and 'Use of Force' employed by the Kenya Police.
- Explore international capacity building possibilities for policing in general with a specific focus on criminal investigations; community based policing and information collection analysis and dissemination.
- Create a modern Code of Conduct -include a complete revision of the Police Act; incorporate a review of issues relating to the ethnic and tribal balance and deployment within the Kenya Police Service; include an examination of the structures of the police including the Senior Executive; include the establishment of a Police Services Commission for the Kenya Police; investigate and make recommendations relating to

any other areas of policing and law enforcement that are, in the opinion of the Police Reform Group (PRG), relevant to the improvement of policing services in Kenya

- Establish an ‘Independent Police Conduct Authority’ to investigate police conduct and provide civilian oversight. The establishment will be undertaken in the following way: Enactment of an Independent Police Conduct Authority Act; involve a complete review of the current police complaints and disciplinary processes within the Kenya Police Service; include an examination and consideration of applicable international law and best practices; report directly to parliament through the Minister responsible; work under the authority of its own Act and have sufficient powers to properly investigate all police conduct issues. Legislation will require that some, more serious policing actions ‘must’ be reported to the authority i.e. allegations of corruption, deaths in custody, serious injury and police related shootings.
- The authority will have far reaching powers including the legislative power to make recommendations for change to policing policy, practices and procedures; have retrospective powers to deal with historical serious misconduct; integrate the Administration Police into the Kenya Police Service creating a single police entity. The integration shall: Commence with the command, responsibility and accountability for every aspect of the Administration Police transferring to the Commissioner of Police with immediate effect, effectively uncouple policing from the Provincial Administration structure, enable combined police organ to function in an unencumbered fashion exercising constabulary independence in performing its functions, ensure that all police services adopt an operational role independent of executive influence and ensure that a new and contemporary police entity is led by professional police officers

All the reforms relating to the Police shall be undertaken and completed by a panel of policing experts (Policing Reform Group -PRG) working completely independent of but alongside the Kenya Police Service and Administration Police.

## **Recommendations on IDPs**

The CIPEV made the following recommendations on the IDP problem:

- The Government of Kenya to enact and implement a clear policy on refugees and internally displaced persons in respect of promotion and protection of the rights of vulnerable groups including internally displaced persons and refugees

- Provide a benchmark for the needs of those displaced by PEV and make certain that the issue be submitted to the Justice and Reconciliation Commission for follow up.
- Also, the successful return of IDPs based on three outcomes of the safety of returnees, restitution and return of property to the displaced and the creation of an economic, social and political environment that sustains them was recommended

### **Recommendations on GBV**

- Citizens should be informed about gender based violence in awareness campaigns
- Training the police on how to handle cases of sexual violence and in first aid
- Encourage Non-Governmental Organizations (NGOs) working in the health sector to partner with medical institutions and share information to ensure a swifter and improved response to sexual violence
- The establishment, under Kenyan law, of the office of rapporteur on sexual violence.