



**KENYA**

**FINAL REPORT**

**General Elections 27 December 2007**

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**EUROPEAN UNION  
ELECTION OBSERVATION MISSION**

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*This report was produced by the EU Election Observation Mission and presents the EU EOM's findings on the 27 December 2007 General Elections in Kenya. These views have not been adopted or in any way approved by the European Commission and should not be relied upon as a statement of the Commission. The European Commission does not guarantee the accuracy of the data included in this report, nor does it accept responsibility for any use made thereof.*

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## I. EXECUTIVE SUMMARY

### *EU EOM Mission*

Elections for the President of Kenya, 210 Members of the National Assembly and 2,498 members of local authorities took place on 27 December 2007. Following an invitation from the Government of the Republic of Kenya and the Electoral Commission of Kenya (ECK), the European Union (EU) established an Election Observation Mission (EOM) to observe these elections. Its mandate was to conduct a comprehensive assessment of the electoral process in accordance with international standards for democratic elections. The Chief Observer of the EU EOM was Alexander Graf Lambsdorff, Member of the European Parliament. The EU EOM consisted of 11 core team members, 38 long-term observers and 94 short-term observers selected from 26 EU Member States as well as Norway. The EU EOM undertook observation in all eight provinces of Kenya and was joined over the election-day period by a four member delegation from the European Parliament.

### *Overall conclusion*

The 2007 General Elections in Kenya fell short of key international and regional standards for democratic elections.<sup>1</sup> Most significantly, the electoral process suffered from a lack of transparency in the processing and tallying of results, which undermined the confidence in the accuracy of the final result of the presidential election. Some violence before polling, notably during the nomination phase for parliamentary candidates hampered the conduct of the election, whereas widespread violence with numerous victims after election-day was part of a larger political crisis. This overall conclusion is all the more regrettable, since in advance of the tallying process and despite some significant shortcomings in the legal framework, the elections were generally well administered and freedoms of expression, association and assembly were generally respected. Voters turned out in high numbers for the polling and voted largely peacefully. Moreover, and importantly, the outcome of the parliamentary elections appears to command greater confidence by election stakeholders.

### *Legal framework*

The legal framework generally provided a workable basis for the conduct of elections. However, it contains some significant shortcomings and deficiencies, including lack of clarity, under-regulation and inconsistencies. Most significantly, in terms of the problems that arose with the conduct of the elections, basic transparency safeguards relating to the tallying and publication of results are missing. Although regulations issued by the ECK generally helped to accommodate needs expressed by political parties, they were not always in compliance with the law.

### *Election Administration*

Within the resources at its disposal, the ECK was able to prepare adequately for the elections both technically and logistically. It enhanced accessibility to voter registration centres, ensured gender balance in the selection of polling staff and generally provided appropriate training for election officials. The appointment of new ECK Commissioners by the President without consultation with opposition parties, however, undermined the confidence in the electoral authority. This mistrust was further fuelled by the failure of the ECK to meet international standards of transparency. Observers and party agents were denied full access to

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<sup>1</sup> Standards that were breached include Article 25 of the ICCPR relating to secrecy of vote, independence and neutrality of the election administration, transparency and the disposal of petitions.

the tabulation of results at national and partly at constituency level. The ECK announced the final presidential result in the absence of certified constituency results. A full breakdown of presidential results down to polling station level, as commonly and speedily executed in elections following best international practice, has not been published so far.

### ***Voter registration***

The voter registration exercise was generally well organised. Few complaints were reported concerning exclusion or discrimination of particular groups. However, problems with the register remain, including a high number of multiple registrations, a large number of deceased persons' names on the list and a delay in issuing identity cards that are required to register.

### ***Candidate nomination***

The certification of presidential candidates by the ECK took place without any significant problem. However, the nomination processes for the parliamentary and civic elections were seriously marred by irregularities, chaotic administration, interference by party headquarters in various constituencies and violence in protest against the process and outcome by unsuccessful aspirants and their supporters.

### ***Campaign period***

The campaign was conducted in a fairly open and free environment. Candidates and parties campaigned intensively, and were mostly able to move freely throughout the country. However, the campaign atmosphere was also characterised by a strong ethno-political polarisation between main contenders and their alliances, leading to a tense atmosphere in many constituencies. The distribution of money and gifts by candidates and the widespread use of state resources by some incumbents were widely reported by observers, the Kenyan National Commission for Human Rights (KNCHR) and the media. These practices are inconsistent with international standards for campaigning in a democracy.

### ***Media***

While there were high levels of media coverage of the campaign, a number of media outlets monitored by the EU EOM failed to provide equitable coverage for candidates and parties. Most significantly, the Kenya Broadcasting Corporation (KBC) failed to fulfil even its most basic legal obligations as a public service broadcaster, demonstrating a high degree of bias in favour of the Party of National Unity (PNU) coalition. While freedom of speech in the media was generally respected during the campaign period, immediately following the announcement of the final results of the presidential election on 30 December 2007 a Directive from the Internal Security Minister ordered broadcasters to suspend all live broadcasts, seriously infringing the right of the media to report freely and without fear of undue State interference.

### ***Polling and counting***

On election day, voters turned out in high numbers, showing their commitment to genuine elections by largely peaceful, patient and vigilant behaviour. Voting was generally well administered, although several aspects of polling procedures, particularly relating to assisting voters were not implemented with sufficient rigour, which saw some breaches of the secrecy of the vote. Multiple voter lists in polling stations increased the risk of multiple voting. The widespread presence of political party agents and domestic observers contributed to the transparency and confidence in the voting process. The counting of the ballots in polling station was conducted transparently but slowly. In almost a third of counts attended, party

agents were not given a copy of the result sheet, either because it was not available or because they did not ask for it. In more than a third of counts at which EU observers were present, the results were not publicly posted, which fundamentally undermined the transparency of the process.

#### ***Tabulation and publication of results***

The aggregation of results in the constituency tally centres was delayed, inconsistent and lacked transparency in a number of constituencies. Against a background of a lack of clearly defined procedures for tallying, EU observers noted variations in the processing of results. In Central Province, the majority of EU observers experienced difficulties in obtaining polling station results and in several constituencies Returning Officers refused to provide constituency results. No detailed breakdown of polling station results was posted at the constituency level. At the ECK tally centre in Nairobi, due to the limited access granted to observers and party agents, tabulation of results could not be systematically observed by the EU EOM. Constituency results were announced mostly on the basis of telephone calls and faxes rather than original result forms as required by law. Inconsistencies were identified between the presidential election results announced at the constituency level and those announced at the national level. At the ECK headquarters, the EU EOM Chief Observer was shown forms on which the election results for two constituencies had been changed without any written justification for the changes.

#### ***Women in elections***

Prior to the elections, political parties announced ad hoc measures to promote female candidates for the parliamentary elections. However, the combination of an absence of adequate measures to ensure female representation in parliament, the lack of satisfactory internal political party measures and the poor social and economic conditions of women meant that the female representation in parliament remains low. During the nomination and election campaign periods there were violent assaults and incidents of intimidation on women that restricted their right to campaign.

#### ***Domestic observation***

Civil society deployed some 17,000 observers to polling stations on election-day. Domestic observation, although not achieving the same level of participation as in previous elections, was important for the transparency at the polling station level.

#### ***Dispute resolution***

The system for the resolution of electoral disputes does not provide sufficient guarantees for redress and there remains a lack of confidence in the independence of the judiciary to act as an impartial appeal body.

#### ***Recommendations***

It is vital that the leadership of political parties take responsibility to restore trust and confidence in democracy. The EU EOM preliminary report recommended that a comprehensive, independent and transparent investigation into the conduct of the elections should be carried out to draw lessons for the future, and ensure that those responsible for the irregularities are held accountable. The EU EOM welcomes that meanwhile an Election Review Committee has been established.

In advance of future elections, the election framework needs reforms to be fully in line with international standards for democratic elections. As a contribution to this process, a set of detailed recommendations is included at the end of this report. Key recommendations include:

- Kenya needs one Kenya Elections Act that consolidates the various and disparate elements of the current election legislation so as to ensure that all aspects of the process are clearly regulated. Particular attention should be paid to introducing essential transparency requirements.
- The ECK should establish a results process that guarantees full transparency at every stage, including requirements for a breakdown of polling station results to be immediately published at constituency level upon the completion of tallying and detailed polling station results to be swiftly posted on the ECK website.
- The prevention and handling of election disputes should become a priority in the next elections, based on the lessons learned from the 2007 general elections. This includes measures in favour of an independent judiciary ensuring that complaints and appeals are dealt with in a timely, effective and transparent manner. It is recommended that a specialized Kenya Electoral Dispute Adjudication Board be installed. Nomination to that board should follow the same procedure as for the ECK.
- The ECK should ensure that polling procedures are implemented in a consistent manner, especially those relating to assisted voting.
- The selection and appointment of the ECK Commissioners should be changed to ensure confidence in electoral authorities by all election stakeholders. The institution should operate in a fully transparent manner and free from any political pressure. Furthermore the tenure of office for Commissioners should run to six months after the elections.
- A national voter registration database should be developed on the national level and constituency registration offices should be fully computerized.
- A regulatory framework for the audiovisual media should be introduced, together with a system to ensure that the independence and public accountability of KBC is restored.

The EU EOM urges the authorities, political parties and civil society of Kenya to swiftly start to take these and other required steps in order to ensure that the conduct of future elections can be held in accordance with international standards for democratic elections.

## II. INTRODUCTION

Elections for the President of Kenya, 210 Members of the National Assembly<sup>2</sup> and 2,498 members of local authorities took place on 27 December 2007. Following an invitation from the Government of the Republic of Kenya and the Electoral Commission of Kenya, the European Union (EU) decided to establish an Election Observation Mission (EU EOM) to Kenya. Its mandate was to conduct a comprehensive and independent assessment of the electoral process against international and regional standards for democratic elections. The Chief Observer of the EU EOM was Alexander Graf Lambsdorff, Member of the European Parliament. The EU EOM adhered to the Declaration of Principles for International Election Observation, commemorated at the United Nations in October 2005.

The EU EOM was deployed on 14 November 2007. Its headquarters were located in Nairobi and the Mission undertook observation in all eight provinces of Kenya. The EU EOM consisted of 11 core team experts, 38 long-term observers and 94 short-term observers selected from 26 EU Member States as well as Norway. The EU EOM was joined by a four member delegation from the European Parliament, led by Jan Mulder, Member of the European Parliament. The EU EOM issued its statement of preliminary findings and conclusions on 1 January 2008.<sup>3</sup> The EU EOM closed its operations on 12 January 2008.

## III. POLITICAL BACKGROUND

### A. Political Context

Kenya has a presidential system of governance with the President elected to act as Head of State and of Government. He nominates the Attorney General, the judges of the High Court, Provincial and District Commissioners and Election Commissioners. He can also dissolve Parliament at any point in time. The President is the Commander in Chief of the Armed Forces. Since independence in 1963 the country has held a number of general elections under varying political conditions. The 2007 elections were the tenth such elections. The 2002 general elections brought about the first change of government through elections based on universal suffrage in the country's history and set the benchmark for the 2007 contest.

In contrast to many countries in the wider East African and Great Lakes Region, Kenya has been politically relatively stable with only three presidents since independence: Jomo Kenyatta (1963-1978), Daniel arap Moi (1978-2002) and Mwai Kibaki (since 2002). Despite a quickly aborted coup attempt in 1982, strong authoritarian repression in the 1980s and severe ethnic clashes in the 1990s, the country has been able to maintain a fragile and precarious ethno-political balance until the 2007 general elections.

The first national and general multiparty elections were in 1963,<sup>4</sup> while the subsequent five elections between 1969 and 1991 were held under a *de facto* or *de jure* one-party system. The

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<sup>2</sup> A total of 12 additional members of the National Assembly are appointed after the election, proportionate to political parties representation in the National Assembly.

<sup>3</sup> See the EU EOM website ([www.eueomkenya.org](http://www.eueomkenya.org)) and the European Commission's election observation webpage ([http://ec.europa.eu/comm/external\\_relations/human\\_rights/eu\\_election\\_ass\\_observ/index.htm](http://ec.europa.eu/comm/external_relations/human_rights/eu_election_ass_observ/index.htm)).

<sup>4</sup> These elections were held in May 1963, 2 days later, on 1 June 1963, Kenya was granted internal autonomy and on 12 December 1963 gained full independence.

Constitution of 1963, the so called Majimbo-constitution (jimbo is swahili for region), provided for a federal system of government with a parliamentary system. The Majimbo constitution was meant to protect the interests of the smaller ethnic communities, cooperating together in the Kenya African Democratic Union (KADU),<sup>5</sup> against dominance by the larger ethnic groups, making up the Kenya African National Union (KANU).<sup>6</sup> In exchange the outgoing colonial powers and KADU accepted a government ruled by KANU which had won the 1963 elections. Following this elections, Jomo Kenyatta, a Kikuyu from Central Province, became Prime Minister for KANU. However, once in power Kenyatta initiated constitutional changes that established a centralised form of government and the position of President that was filled by Kenyatta himself in 1964. Oginga Odinga of the Luo community from Nyanza Province became Vice President. After internal friction, Odinga lost this position in 1966 and formed his own party, the Kenya People's Union (KPU) that attracted a large number of existing members of parliament. The fractures in the government required 29 by-elections, the so-called mini general elections of 1966, in which the KPU won nine seats. In 1969 Tom Mboya, another prominent Luo leader, was assassinated leading to civil unrest. Kenyatta banned the KPU and several of its leaders were detained including Odinga.

On the death of Kenyatta in 1978 and in accordance with the Constitution the serving Vice President at that time, Daniel arap Moi, took Presidential office. Moi's tenure as President became increasingly repressive after a failed coup attempt in August 1982 that followed a Constitutional amendment creating a one party state in Kenya. Under Moi the ethno-regional power balance shifted away from the Kikuyu community towards Moi's Kalenjin and their region in the Rift Valley. By 1990 most of the main Kikuyu and Luo leaders had either been excluded from KANU or left the party or – as in one case – were killed.<sup>7</sup> It was not until 1991 that multiparty democracy was restored by further Constitutional amendments, including a limit of two presidential terms and the requirement for a winning presidential candidate to garner at least 25 per cent of the votes in at least five of the country's eight provinces, a requirement meant to ensure that the president commands a minimum national following.

In 1992 and 1997, the first two multiparty elections since 1963, Moi was returned to office with simple majorities against a divided opposition. Particularly the 1992 elections were characterized by an uneven playing field, intimidation of the opposition and different forms of rigging on election day. Reforms ahead of the 1997 elections made the playing field less unbalanced and the opposition could campaign more freely throughout the country.<sup>8</sup> Again, rigging on election day occurred and was considered instrumental by domestic and international observers in ensuring a parliamentary majority of the ruling party KANU. Both

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<sup>5</sup> These were primarily the Kalenjin (10.5 per cent of the population according to the 1969 National Population Census Report), led by Daniel arap Moi, the Luhya (12.6 per cent), led by Masinde Muliro and the Coastal people, led Ronald Ngala. a Mijikenda (4.8 per cent).

<sup>6</sup> These were basically the Kikuyu (20.1 per cent), led by Jomo Kenyatta, and the Luo (13.9 per cent), led by Oginga Odinga and Tom M'boya.

<sup>7</sup> In February 1990 the Foreign Minister Robert Ouko, a Luo from Nyanza Province, had been found murdered. Senior government figures had been implicated in the killing by various reports and public hearings, but the case remains unresolved until today.

<sup>8</sup> Ahead of the 1997 elections the opposition reorganised and civil society organisations spearheaded a campaign for minimal legal changes to allow for a more level playing field between the government and the opposition. After some resistance to these proposed changes Moi agreed to negotiations with the opposition which led to the so called Inter Party Parliamentary Group (IPPG) agreement. The IPPG agreement included a reorganisation of the Electoral Commission, allowing the opposition to suggest a certain number of Commissioners for appointment by the President.

elections in 1992 and 1997 were marked by strong ethno-political tension between the Kalenjin, parts of the Kamba and the small Maasai, Turkana and Samburu communities on the one hand and the Kikuyu, Luo and Luhya on the other hand, leading to ethnic cleansings in the Rift Valley and – in 1997 – in parts of the Coast. An estimated 2,000 people were killed and around 500,000 internally displaced in the period up to 1995, most of them members of the Kikuyu, Luo, Kisii and Luhya communities. At the same time key leaders of the Moi government from the Kalenjin and Maasai communities suggested the reintroduction of a Majimbo system of government as a means to cater for the interests of the smaller communities in case of a change of government. In the context of the then ongoing ethnic clashes this was understood as a threat to establish a constitutional framework for ethnic evictions.

Prior to the 2002 elections when Moi left office in respect of the maximum two-terms for Presidents, he reached out to representatives of the communities that had been less integrated in his administration, mainly the Luos and the Kikuyus. Raila Odinga of the Luo ethnic group and Uhuru Kenyatta, a Kikuyu and son of the country's first President, took up senior government and party positions alongside representatives from the younger generations of other ethnic communities. When Moi finally selected Kenyatta as his preferred successor, Odinga, together, with several other key KANU ministers including Kalonzo Musyoka, left the government and joined the opposition alliance led by Mwai Kibaki to contest the 2002 elections.

Mwai Kibaki standing as the presidential candidate of the National Rainbow Coalition (NARC) won the 2002 presidential election with 61.7 per cent share of the vote against Uhuru Kenyatta of the KANU party receiving 31.2 per cent. For the first time since the reintroduction of multiparty democracy in 1991 the President was elected with an absolute majority. One of the key pillars of the NARC programme was a Memorandum of Understanding (MoU) signed before the elections by the main leaders, in which they agreed to conclude the constitutional reform process that started in 2001. This included reintroducing the position of Prime Minister with executive powers and limiting presidential powers. Fractures in the coalition started to appear with President Kibaki failing to honour the MoU and instead continuing to resort to the centralised system of government inherited from the previous government.

While a large majority of stakeholders from the political parties and civil society organisations agreed on the reintroduction of the position of Prime Minister and the devolution of powers during the Constitutional Conferences in 2003 and 2004, the Kibaki government dissented and presented a draft constitution for a national referendum in 2005. The government draft excluded key elements of devolution. The position of Prime Minister was foreseen, but he or she would be appointed by the President and would not wield any executive powers. Many of the wide-ranging presidential powers were left in place and to some extent even strengthened as the provision of the current constitution of a vote of no confidence in the cabinet was left out. A broad based opposition against the government draft constitution developed under the umbrella of the Orange Democratic Movement (ODM), led by Raila Odinga, Kalonzo Musyoka and Uhuru Kenyatta. The government lost the referendum with 43 per cent of the vote against 57 per cent leading to Kibaki dismissing his entire cabinet. The referendum was a harbinger for further splintering of the NARC coalition and the growth of an opposition that had previously been part of the NARC government.

## B. Key Political Actors

With the rift between the political groups within NARC deepening further following the referendum ODM transformed itself into a political party. NARC Kenya (NARC-K) was also founded by several government ministers as a platform to solidify support for President Kibaki. With the partners in ODM failing to agree on a nomination process for a joint presidential candidate for the 2007 elections, first Kenyatta and then Musyoka left the new party. Kenyatta realigned with President Kibaki, but insisted on maintaining KANU as an independent party. Musyoka took over ODM Kenya (ODM-K) and Odinga ODM both of which represented the main opposition parties in the 2007 general elections.

118 political parties<sup>9</sup> fielded candidates for the general elections and a number of these parties formed the Party of National Unity (PNU) coalition group lead by Kibaki seeking a second term in office. The majority of these political parties are personality driven and arranged on ethnic lines with political ideologies playing no determining role. The lack of continuity in the political party structures, consolidated party membership and the ephemeral nature of political parties are coupled with strategic and tactical moves to form alliances between parties. As a result of these trends, the majority of political parties contesting the 2007 general elections, including the parties of the major presidential candidates PNU (Mwai Kibaki), ODM (Raila Odinga) and ODM-K (Kalonzo Musyoka), were founded only shortly before the election campaign period or within the election year.

PNU was founded in August 2007 and selected as the party for Kibaki's re-election campaign over NARC-K despite some resistance of cabinet members. PNU consisted of a hybrid of coalition partners, with varying degrees of autonomy after a number of these partners decided to contest the parliamentary elections individually whilst maintaining support for Kibaki's candidature for presidential office. PNU was therefore both an informal coalition and a political party in its own right. Many of the political parties comprising the PNU coalition have strong regional bases<sup>10</sup> and collectively formed a broadly national coalition. Incumbent President Mwai Kibaki, PNU's presidential candidate, is from Nyeri District in Central Province. He stood for a second and constitutionally final term. He has been Member of Parliament since 1963. In the multiparty era he contested the presidency twice unsuccessfully, in 1992, when he finished third, and in 1997 when he was the runner-up. He contested both elections on the ticket of the Democratic Party (DP). Before he joined the opposition in December 1991 he had been a long serving minister in key positions such as Finance, and Home Affairs under both Presidents Kenyatta and Moi. In the Moi era he was also for ten years the Vice President of the country (1978-1988). He is widely viewed as a representative of the Kikuyu business class. While during his presidency several key ministers have been involved in major corruption scandals, Kibaki himself has generally been perceived as relatively "clean". Critics stressed that the key positions in the cabinet and the administration were limited to members of the Mount Kenya communities.<sup>11</sup> At the end of Kibaki's first

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<sup>9</sup> 9 parties registered for presidential, 117 for parliamentary and 118 for civic elections.

<sup>10</sup> FORD-People in the Kisii region of Nyanza Province, led by Cabinet Minister Simeon Nyachae; FORD-Kenya, led by Cabinet Minister Musikari Kombo, in parts of Western Province and the Trans Nzoia District of the Rift Valley; New FORD-Kenya, the breakaway party from FORD-Kenya, rooted in the same regions and led by Cabinet Ministers Mukhisa Kituyi and Soita Shitanda; and KANU under Uhuru Kenyatta in parts of the Rift Valley, North Eastern and Central Provinces, while PNU would primarily focus on the Kikuyu, Embu and Meru regions in Nairobi, Central, Eastern and Rift Valley Provinces.

<sup>11</sup> The Kikuyu, Embu and Meru are closely related to each other and are living around Mount Kenya.

term, the annual growth rate reached 6%; major agricultural cooperatives were successfully revived; building and rehabilitation of the dilapidated infrastructure progressed; the introduction of the Constituency Development Fund (CDF) in 2003 has proved highly popular.<sup>12</sup> On the other hand, the government failed to make tangible progress in the fight against corruption, and allegations about misuse of the Funds from the CDF were widespread in many constituencies. It was felt that the Kikuyu community was benefiting most from economic development and that the impact of the economic recovery was not reaching the vast majority of the poor.

After its success in defeating the government constitutional draft in 2005, ODM eventually transformed itself into a political party. In early September 2007, ODM selected Raila Odinga from the Luo region of Nyanza Province as its presidential candidate. The main opposition party opted for a broad leadership structure, the so-called Pentagon, to accommodate senior members in elevated positions. The Pentagon consisted initially – apart from Odinga – of Musalia Mudavadi representing the Luhya community of Western Province, William Ruto from the Kalenjin groups in the Rift Valley, Najib Balala for the Coast region and Norman Nyagah from the Meru area in Eastern Province to represent the the Kikuyu, Embu and Meru of the Mount Kenya region. In October 2007 the Pentagon was expanded to incorporate the NARC leader Charity Ngilu, Musyoka's long standing competitor for leadership of the Kamba people of Eastern Province. Ngilu and her NARC entered into an alliance with ODM after she broke ranks with Kibaki. Consequently, ODM membership was based on the ethno-regional alliances of strong representatives of all regions except for Central Province. Raila Odinga is the son of the late Oginga Odinga, Kenya's first Vice President. Though his constituency is the cosmopolitan area of Langata in Nairobi, represented by him since 1992, his political base is the Luo region of Nyanza Province. He has been a major opposition activist since the 1980s and was detained by the Moi regime for altogether nine years, among other reasons for his alleged involvement in the 1982 failed coup attempt against President Moi. In 2007 he contested the presidential elections for the second time after 1997, when he finished in third place. After that he joined the Moi government and was appointed as a cabinet minister, only to leave the Moi coalition, together with a number of long standing KANU ministers, when Kenyatta was selected as Moi's preferred successor. Odinga and several other ministers, among them Kalonzo Musyoka, George Saitoti, William ole N'timama, and Moody Awori, (re-)joined the then opposition alliance under Mwai Kibaki to win the 2002 elections. Odinga strongly appealed to the poor, as one of his main election promises was a more equitable distribution of resources benefiting the urban and rural poor.

The third political party, ODM-K, had Kalonzo Musyoka as its presidential candidate. Kalonzo Musyoka had been a long serving minister in the KANU government of President Moi. He comes from the Ukambani region in Eastern Province and has been Member of Parliament since a by-election in 1985. Together with Raila Odinga and other ministers he left the Moi government when Uhuru Kenyatta was selected as the KANU presidential candidate in 2002. He was Minister in the NARC government until the Referendum on the Constitution when he joined sides with Odinga and others to form ODM and opposed the government's constitution draft. With the failure to decide on a nominations process for presidential candidates for ODM, Musyoka formed ODM-K. Despite the attempt to give the party a

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<sup>12</sup> The NARC government introduced the CDF through the CDF Act in The Kenya Gazette Supplement No. 107 (Act No. 11) of 9<sup>th</sup> January 2004, and allocated 2.5% of the national budget to it. 75% of it is distributed equally among the 210 constituencies while the remaining 25% is allocated according to the constituency poverty level.

national outlook, leading personalities only came from the wider Ukambani area, thus limiting national appeal.

In contrast to the 2002 elections with its broad based political and ethnic affiliations between ethnic groups, the three main presidential candidates for the 2007 elections represented different ethnic communities in the country. ODM and the PNU represented the broadest coalitions with strong focal points in most parts of the country, while the ethno-regional ODM-K alliance of Musyoka remained narrower. There were six other presidential candidates, among them one women candidate, Naslin Umar from Nairobi, and Kenneth Matiba, from Central Province, the runner-up of the 1992 elections. However, none of these candidates were able to launch a viable campaign for office.

#### **IV. LEGAL ISSUES**

##### **A. Kenya's Obligations under International and Regional Standards**

Kenya has ratified the most prominent international and regional treaties related to elections, including the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All forms of Racial Discrimination, (CERD) and the African Charter on Human and Peoples' Rights (ACHPR). As a member of the African Union, Kenya has agreed and endorsed the Principles Governing Democratic Elections in Africa encompassed in the 2002 Declaration and the 2007 Charter on Democracy, Elections and Governance. Kenya has ratified the Convention on the Elimination of Discrimination Against Women (CEDAW) and signed the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which, together with the ICCPR, prohibit discrimination against women exercising their rights to vote. The provisions included in these international treaties are binding for Kenya, which therefore has the obligation to strive towards compliance. Kenya has additional commitments to good governance, human rights and the rule of law within the framework of the ACP (African, Pacific and Caribbean States) Partnership agreement with the European Union.

The Universal Declaration of Human Rights contains six universal election standards: elections are to be held periodically, elections must be genuine, there has to be a right to universal suffrage, there is to be a right to equal suffrage, elections must be based on the free will of voters and there has to be the right to a secret ballot. Article 25 of the ICCPR, reiterates and expands them by granting to each citizen the right to vote and the right to stand for election.<sup>13</sup> Article 13 of the African Charter on Human and Peoples' Rights reiterates the same rights. The ACP Partnership Agreement framework, under democracy and political governance initiative, also mentions the specific requirement of transparency.

##### **B. National Legal Framework**

The national laws governing the Kenyan 2007 general elections are *inter alia* the Constitution of Kenya, the National Assembly and Presidential Elections Act, the Local Government Act, the Election Offences Act, the Public Order Act, the Registration of Persons Act, and the Police Act. The Electoral Commission of Kenya (ECK) also issued supplementary regulations

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<sup>13</sup> Article 25 has been complemented by General Comments by the UN Human Rights Committee.

on the registration of electors, election petitions and election procedures. In general, this patchwork of election-related laws provides a workable basis for holding elections. There have been only limited amendments in this framework since the 2002 elections, when legal shortfalls were identified.<sup>14</sup>

The President is elected directly by universal suffrage. The presidential election is held under a qualified majority system where the winning candidate must win a simple majority of votes and at least 25 per cent of valid votes cast in at least five of Kenya's eight provinces as well as have won a seat in parliament. If no candidate meets all these requirements a second round is held between the two candidates with the highest number of valid votes. Candidates for Presidential office must be citizens of Kenya, at least 35 years old and registered in a constituency as a voter for elections to the National Assembly. No person can be elected as President for more than two terms.

The parliamentary elections are based on a first-past-the-post, single-member constituency system: voters elect one person per constituency by a simple majority. There are 210 electoral constituencies. The President appoints 12 members of parliament who have been nominated by political parties, proportional to the parties' strength, in the new Parliament. To be elected as a member of the National Assembly, a person needs to be nominated by a political party, must be a citizen of Kenya who has attained the age of 21, is registered in a constituency as a voter in elections to the National Assembly, is able to speak and, unless incapacitated by blindness or another physical disability, to read Swahili and English to a proficient level to take an active part in the proceedings of the National Assembly. Whilst these measures are largely reasonable there are some overly restrictive qualification criteria on certain categories of persons. Independent candidates, for example, are not permitted to stand for any election in Kenya, a regulation that is not in compliance with international standards.<sup>15</sup>

Certain other aspects of the elections are either under-regulated or not regulated at all. There is for instance a lack of specific and adequate arrangements to facilitate voting for special categories of voters on duty on election-day. This includes members of the armed forces, police officers and election officials working in a polling station other than where they are registered. The law also does not determine the duration of the electoral campaign period. In addition, there is a lack of regulations ensuring control and transparency in the financing of political parties and the electoral campaign. Financial accountability structures for political parties are part of the 2007 Political Parties Bill adopted and published in October 2007 but yet to come into force.

Furthermore, Kenya's electoral laws fall short on a number of key issues essential for ensuring transparency in the electoral process particularly in the tallying and announcement of results. Most significantly, there is no requirement to release results per polling station in the publication of final results. The National Assembly and Presidential Elections Act contains no provision to post results at constituency tallying centres; and the law makes no mention that

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<sup>14</sup> The 2002 EU EOM final reports mentions shortfalls such as the missing regulations for the campaign period, the complexity of the legal framework for elections due to the variety of applicable laws, the inconsistency between different applicable laws, the missing provisions for election officials to vote in the polling station they are employed, limited voting rights for soldiers on duty.

<sup>15</sup> See International Covenant on Civil and Political Rights, general comment 25 (point 17) on the right to participate in public affairs and voting rights, stating that "the right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties [...]"

copies of result sheets should be provided to observers at polling stations and constituency level. Further, neither the electoral acts nor issued regulations define clearly the procedures and reasons that might lead to an alteration of result certificates. Also, it is not clear who is entitled to modify result certificates. According to information given to the EU EOM, there are no regulations regarding the tallying procedures on constituency or national level. These are all basic transparency requirements that should be implemented during an election process to enhance confidence in the final results.

Inconsistencies are evident in a number of procedural components of the elections. During the weeks prior to the elections, the ECK issued contradictory instructions regarding the right to vote for those who registered twice. By law, voters who registered more than once lose their right to vote and fear prosecution. The ECK issued late instructions allowing voters to vote as long as they had not registered more than twice – an attempt to accommodate requests from several political parties. The ECK also issued contradictory instructions regarding assistance to voters, leaving much to the discretion of Presiding Officers and as a consequence, rules were not consistently applied. Assistance given to voters in polling stations exceeded normal practice, which increased the risk of breaching the secrecy of the vote.

### **C. Political Party Registration**

According to the Constitution (section 1A), the Republic of Kenya is a multiparty democratic state. For the time being, political parties register as societies under the Societies Act. The registration process is efficient and simple. There are only few requirements to qualify for registration: a party constitution, a formal address, a list of ten members, and a fee of 2,000 KES. In total 156 political parties were registered by the Registrar of Societies before the start of the candidates' nomination process, a significant increase compared to the 53 parties that were registered at the time of the 2002 elections. The principle of non-discrimination applies and applications are rejected if and when the proposed political party is not open to all Kenyans on non-discriminatory grounds. Under the Societies Act, registration can be refused where the Registrar "has reasonable cause to believe that the interests of peace, welfare of good order would be likely to suffer prejudice by reason of the registration of the society" (section 11 of the Act). Non-registration is however extremely rare; in the only case in which a group filed a petition against such a decision, its grievance was redressed by the High Court.<sup>16</sup>

The Registrar has the right to inspect the accounts and finances of political parties, but has not yet taken such responsibility. The new 2007 Political Parties Act will bring four crucial changes and improvements in this sensitive matter: it stipulates the creation of an office of the registrar of political parties within the ECK expected to be more independent; it allows for the establishment of a 'political parties disputes tribunal' and new rules to register political parties; and there will be new rules regarding funding and accounts of political parties, including public funding, obligation of declaration, contribution limitations, annual audit and the publication of audit results. However, various sources confirmed that the new Political Parties Act would not enter into force before June 2008.

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<sup>16</sup> High Court ruling of October 26, 2007 in favour of the Chama Cha Mapinduzi group.

#### **D. Constituency Delimitation**

According to the Constitution (section 42, 3), all constituencies should contain nearly equal numbers of inhabitants. However, in practice, the size and the boundaries of the electoral constituencies for the legislative elections continue to remain an important issue. The 210 single seat constituencies vary greatly in population and size with the least populous constituency Lamu East having 12,866 registered voters whilst the most populous, Embakasi has 249,903 registered voters. The High Court ruled in May 2002 that constituency boundaries as determined by the ECK were not in accordance with the principles set forth in the Constitution and asked the ECK to address this issue. The ECK proposed that the number of constituencies should be increased for the 2007 elections, but its proposals were rejected by Parliament. On 3 December 2007, the ECK announced that the realignment of 15 constituency boundaries had been concluded in line with administrative boundaries, but this exercise only concluded some administrative adjustments and cannot be compared in any way to a constituency boundaries review. Consequently, the 2007 elections were conducted using the same constituency boundaries as the 2002 elections violating the constitutional principle as well as the ICCPR standard<sup>17</sup> of equal representation of voters.

#### **E. Dispute Resolution, Complaints and Petitions**

Complaints that can be submitted to the ECK relate to challenges to preliminary results announced by the ECK within 24 hours of the announcement of results, including the request that the ECK conducts a recount or recheck of ballot papers in a specific constituency. The ECK must decide the validity of cases within 48 hours of that request. The High Court has jurisdiction to hear any formal election petition related to Presidential and National Assembly elections. A registered voter, candidate or agent and the Attorney General are entitled to file an election petition seeking to overturn the result of an election. In the case of parliamentary and presidential elections, the petition must be filed with the High Court and served on the respondent within 28 days of the results being published by the ECK in the Kenya Gazette. Upon decision by the High Court on an election petition, an appeal can be lodged with the Court of Appeal. Such an appeal must be filed within 30 days after the initial court decision.

Historically, the court system has suffered from critical flaws in dealing with election related cases, and cases have taken years to conclude, undermining stakeholder confidence in the process. Proceedings before the High Court are cumbersome and hard to access for most potential complainants due to a rule requiring a deposit of 250,000 KES (about 2500 Euro) for every complaint filed. The High Court received 34 petitions after the 2002 elections and three of these cases were not concluded before the 2007 elections.<sup>18</sup> In general, therefore the legal

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<sup>17</sup> ICCPR, General Comment 25 (point 21) on the right to participate in public affairs and voting rights, stating, “although the Covenant does not impose any particular electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries should not distort the distribution of voters and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely”.

<sup>18</sup> Some MPs are widely seen to have used delaying tactics while others use legal loopholes to have cases dismissed. Only one petition has been granted and allowed for the conduct of a by-election in Magarini constituency. This took place on 14 May 2007, almost five years after the petition was filed. Members of Parliament facing election petitions can earn automatic reprieve if Parliament is dissolved before their case is determined. Three pending petitions have been overtaken by the recent general elections. In many instances, justice delayed means justice denied.

framework does not provide for an efficient dispute resolution system and for a prompt response to election complaints and petitions.

The Electoral Code of Conduct binds political parties to refrain from any action involving violence or intimidation, from publishing or repeating false, defamatory or inflammatory allegations about persons or parties connected with the elections. An electoral code of conduct enforcement committee that was part of the ECK was responsible for ensuring compliance with the code and had powers to issue formal warnings, impose fines and prohibit a political party from campaigning and/or from using the state owned media. The committee also had the right to call upon the intervention of a special electoral police force comprising of 17 units of five policemen each to investigate any violation of the code or to enforce the sanctions. However, despite these positive measures the committee had limited competence and its range of corrective measures were not adequate to resolve disputes between parties or prevent violent incidents. Consequently, and despite numerous violent incidents and deaths the code of conduct enforcement committee received a very limited number of complaints. The committee rejected most of these on technical grounds, and many cases were not dealt with in a prompt manner.

However, even when the committee dealt with cases and took decisions, these were not followed by contestants, demonstrating the weakness of the mechanism. Specifically, the committee heard four cases filed by complainants in Ikolomani, Malava, Maragua and Kilgoris constituencies. These cases involved destruction of campaign material, violence, threats and intimidation. In the cases of Ikolomani and Malava constituencies, former Members of Parliament were accused of instigating violence against ODM supporters and destroying campaign material. The former MP from Malava had also failed to inform the police of his intention to stage a rally knowing that his opponent had scheduled a rally in the same area. This led to a clash between ODM and New Ford Kenya supporters and resulted in deaths and the destruction of property. The two former MPs were found guilty of violating the provisions of the electoral code of conduct and fined 100,000 KES (about 1000 EUR) to be paid within 30 days. In the Maragua case the former MP was accused of using abusive language and instigating violence against his opponents. The committee fined him 100,000 KES also to be paid within 30 days. In the fourth complaint heard by the committee a parliamentary candidate in Kilgoris constituency made allegations of an illegal transfer of Returning Officers and the lack of impartiality of Presiding Officers. His claims could not be substantiated. The former MPs involved in these proceedings have publicly stated that they would not pay the fines.

## **V. ELECTION ADMINISTRATION**

### **A. Structure and Composition of the Election Administration**

All elections and referenda in Kenya are organised and administered by the ECK, a permanent body established by the Constitution. According to the Constitution, the ECK is responsible for the registration of voters including maintenance and regular revision of the register; it directs and supervises the Presidential, National Assembly and local government elections; it promotes voter education throughout Kenya and has further functions as prescribed by law necessary to conduct “free and fair“ elections (section 42A).

The independence of the ECK is protected by a set of legal provisions. The Constitution (section 41,9) states that “in the exercise of its functions under this Constitution the Commission shall not be subject to the direction of any other person or authority.” According to the National Assembly and Presidential Elections Act, the Code of Conduct for Members and Staff of the Electoral Commission, requires that “every member of the Commission shall serve impartially and independently and perform the functions of a member in good faith and without fear, favour or prejudice, and without influence from the Government, any public officer, any political party, any candidate participating in an election, or any other person or authority”. Other provisions secure the tenure of the Commissioners and protect them from arbitrary removal from office. However, the rules governing the ECK also contain some limits to its independence, such as those governing the nomination of the Commissioners. It also lacks financial independence as it is funded by the Government. Whilst the ECK is authorised to make regulations they must be submitted to and adopted by the National Assembly.

Currently the ECK has 22 Commissioners, including a Chairman and vice Chairman, who can take decisions by a simple majority.<sup>19</sup> While President Kibaki acted in line with the Constitution when appointing 19 new Commissioners shortly before the 2007 general elections, he acted against the Inter-Party Parliamentary Group (IPPG) agreement by not consulting with the opposition parties. Kibaki himself had helped to negotiate the IPPG agreement with Moi in 1997 in order to guarantee a more balanced ECK. Part of the agreement was for parliamentary parties to choose members for appointment to the electoral commission according to their strength in Parliament.

The President’s single-handed manner in which the appointments in 2007 were made undermined public confidence in the electoral authority. The new Commissioners were perceived as biased in favour of the ruling party. In addition, most of them lacked experience in election administration.<sup>20</sup> Public confidence in the ECK was further eroded by the delay and doubts about the re-appointment of Chairman Samuel Kivuitu. Although the Chairman, according to the law, has no special role or decisive vote, public opinion polls indicated a significant increase in public confidence in the ECK when Kivuitu’s re-appointment was finally announced a few weeks before election-day. Kivuitu was considered as a sort of guarantor for the independence of the ECK until he challenged his own credibility by announcing final presidential results despite serious doubts in their accuracy.

The ECK has a permanent secretariat located in Nairobi. An Administrative Secretary is the head of the ECK secretariat and is assisted by a deputy and seven departmental heads.<sup>21</sup> The secretariat was first established in 1998 as a small unit with 80 staff members, but during the last nine years it has been restructured and now comprises some 530 staff. For the 2007 general elections the ECK appointed 71 district election coordinators (one per district), 210 Returning Officers (one for each constituency) and approximately 245,000 polling staff for the 27,555 polling stations. The ECK district coordinators have a limited role in the

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<sup>19</sup> National Assembly and Presidential Election Act, Chapter 7, Section 3 stipulates that “unless a unanimous decision is reached, a decision on any matter before the Commission shall be by concurrence of a majority of all the members” (art 7). The “quorum for the conduct of business at a meeting of the Commission shall be the majority of all members of the Commission” (art 5).

<sup>20</sup> Only five of the 22 Commissioners had previously conducted a General Election: Samuel Kivuitu, the Chairman, Kihara Muttu, the Deputy Chairman, Anne Wambaa, Jeremiah Matagarro and Ambassador Jack Tumwa.

<sup>21</sup> Finance, Procurement and Supplies, Human Resources, Training, Public Relations, Cartography and Information Technology.

preparation and the conduct of the elections. Except for their involvement in the selection and recruitment of polling station officials, most of their tasks remain largely administrative. The effective responsibility for organising the election process in the constituencies falls under the authority of the Returning Officers and their deputies.

The ECK prepares and presents its draft budgetary requirements for each financial year as it is the case for any government agency. The budget for the financial year running from 1 July 2007 to 30 June 2008, was set at 7.29 billion KES of which 4.5 billion KES was allocated to these elections.

## **B. Administration of the Elections**

Within the resources at its disposal, the ECK was generally able to prepare adequately for the elections both technically and logistically. The distribution and security of sensitive and non-sensitive election materials in preparation for election day was well implemented, although the lack of infrastructure and adverse weather conditions affected performance in some remote areas. Polling and counting were generally well conducted and largely met international standards of transparency.

The recruitment of the Presiding Officers and other polling officials was conducted under the responsibility of committees involving the ECK district coordinators and the Returning Officers. According to EU EOM observers, election officials temporarily employed for the elections were well trained and most of them perceived as impartial; they were well aware of polling procedures. With very few exceptions, the vast majority of Returning Officers and their deputies were not serving in the constituency of their origin or residence, which contributed to the confidence in the performance of the ECK local officials, a feeling that prevailed before and on election-day, but faded during the tallying process. In a few cases, returning officers were replaced several days before the election-day. The motives for these replacements have not been clearly explained.

The ECK, however, failed to meet international standards of transparency in key areas of its mandate. Crucial safeguards against malpractices such as those designed to ensure full confidence in the results were lacking. In more than a third of polling stations visited by EU EOM observers, the results were not posted at the polling station level. Contrary to international best practice, ECK made no provision for results to be posted at the constituency tallying centres. Furthermore, since results are not published down to the level of polling stations, they can not be systematically corroborated by party agents or observers. A month after the announcement of the results, there were still results from constituencies missing on the ECK website. The EU EOM was informed by the ECK election officer Suleiman Chege on 5 January that result certificates of at least 20 constituencies were still missing, indicating the premature announcement of results. ECK Chairman Kivuitu admitted publicly on 2 January 2008 that he acted under pressure when announcing results. The declaration of a presidential winner in the absence of all original result certificates and the external pressure on the ECK to prematurely announce the presidential results are indications of a breach of the Constitution and the electoral law (Constitution, Art 41,9; ECK Regulations, Sec 41,2a).

The ECK failed to issue clear and written regulations on tallying procedures, which, according to EU EOM observers, resulted in inconsistencies in the tallying at constituency level and hampered the transparency in the tabulation of results. In several constituencies

Returning Officers refused to provide constituency results to EU EOM observers and allegedly also to a number of party agents, which is in violation of election regulations. The ECK was apparently not in full control of Returning Officers, given that Chairman Kivuitu mentioned to the media on 29 December 2007 that some of his Returning Officers had disappeared, switched off their mobile phones and “pocketed the results”. The announcement of results was significantly delayed due to missing result certificates, which Returning Officers were due to deliver to Nairobi. When the ECK eventually announced the results, it relied on the assumption that missing result certificates from constituencies would not make a difference as to the winner of the presidential election. Evidence, however, corroborating this assumption has so far not been made public.

Finally, the ECK also undermined the confidence in the good conduct of the elections by limiting the access for observers to its decision-making and in the final tabulation of results. Despite a Memorandum of Understanding granting full access for EU observers, the Mission could neither permanently observe the tallying at national level nor could it attend the plenary sessions of the ECK, which were held *in camera* without public access. A number of important issues have either not been regulated at all or respective regulations have not been communicated to the EU EOM. There is for instance no clarity on reasons or the authority to alter result certificates. The combination of the lack of transparency and missing information on procedures hampered the EU EOM observation and the monitoring by party agents.

In conclusion, the administration of the 2007 general elections in Kenya was largely professional on a technical level up to and including voting and counting in the polling stations. As far as tallying, tabulation, and announcement are concerned, the election administration did not meet key international and regional standards for transparency in the conduct of elections. The same is true with regards to the independence of the election administration as emphasised in the ICCPR (HRC GC 25 paragraph 20) and the African Union Declaration on the Principles Governing Democratic Elections in Africa (AU CPGDEA II (4)).

## VI. VOTER REGISTRATION

### A. The Right to Vote

Under the Constitution Kenyan citizens who have attained the age of 18 years can register if they have been resident in Kenya for a certain period of time. Nobody who has been charged for electoral offences or served a prison term is eligible to vote.<sup>22</sup> A total of 14,296,180 voters registered for the 2007 elections, 7,559,570 (52.9 per cent) men and 6,736,610 (47.1 per cent) women. A large percentage of 68.8 per cent of registered voters are between 18 and 40 years old. According to the ECK, the total number of registered voters represents an estimated 82.1 per cent of the total eligible voter population.

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<sup>22</sup> One must have been a resident in Kenya either (i) for a period of not less than one year immediately preceding registration, (ii) for a period of, or periods amounting to, not less than four years in the eight years immediately preceding registration or (iii) one must have for a period of – in aggregate – not less than five months in the twelve months preceding registration been ordinarily resident in the constituency in which he applies to be registered, or (iv) for such a period have carried on business there or have been lawfully employed or lawfully possessed land or buildings for that period (see for the exact text, section 43 of the Constitution).

## **B. Voter Registration Procedures**

In June 2002, amendments to the Constitution introduced a permanent or rolling voter registration. Although continuous voter registration is carried out throughout the year at district level, the ECK organises a yearly 30-day drive with voter registration taking place in registration centres and registration units where polling stations are located on election-day.

The ECK carried out the 2007 drive in March, followed by a 30-day inspection period in April. The ECK conducted a second voter registration initiative in June/July 2007. These two voter registration drives produced an additional 1.8 million registered voters.

A study published by the Institute for Education in Democracy commended the ECK for the increased number of voter registration centres that enhanced people's access to registration.

However, continuous voter registration, outside the period of voter registration drives, remains a problem as people must travel long distances to the ECK District Election Coordinators' Offices, mainly situated at the District Headquarters. There were few complaints reported concerning exclusion or discrimination of particular groups from the voter register.

The main issue that affected negatively upon the entire exercise was the delay in the issuing of identity cards. The limited resources and extremely bureaucratic organisation of the Registrar of Persons led to serious delays which mostly affected young applicants. In general the average waiting time for a new identity card was reported to be three months. Certain minority groups also experienced difficulties in acquiring identity cards that would have enabled them to register (see human rights section below).

The number of double and multiple registrations remains high at nearly half a million entries. According to election officials the main reasons for double and multiple registrations are related to the lack of voters' awareness: few voters actively verified their entry and when voters moved to another ward they failed to update their records.

In addition, the ECK has not systematically expunged the details of deceased persons from the voter register and the Registrar of Persons does not have a structural method for removing deceased persons from the register and relies solely on the records from the Registrar of Births and Deaths.

## **VII. CANDIDATE NOMINATION**

The certification of presidential candidates by the ECK took place over a two-day period on 14 and 15 November 2007 without major problems. Of 16 aspirants presenting their nomination papers, the ECK accepted the nominations of nine candidates. None of the seven aspirants who were refused petitioned the decision of the ECK.

The primaries for the parliamentary and civic elections were seriously marred by irregularities, chaotic administration and interference by the party headquarters in individual constituencies. There were subsequent outbreaks of violence in protest by unsuccessful aspirants and their supporters against both the process itself and the outcome of the

nominations. There was a high number of MPs from the previous parliament that failed to win the nominations and many of these unsuccessful candidates defected from their parties to accept the nominations of smaller parties. The capacity of political parties conducting primaries was clearly limited due to the lack of permanent party structure and membership. The PNU requested ECK to support or conduct its party primaries in a number of constituencies. ODM contracted retired judges and retired ECK officials to oversee and organise the nomination process.

The confusion regarding the results of the primaries led to a number of complaints being lodged to the ECK. In a move to help to resolve them, the ECK set up a nine member committee to listen to complaints sent by aspirants. On 21 November 2007, the ECK declared that the various complaints lodged to it were misdirected. It stated that the legal and legitimate forum for these were the respective dispute resolution bodies set up under the respective parties' rules.

Initially the ECK requested political parties to submit lists of candidates five days prior to the nomination dates on 23 and 24 November 2007, but rescinded this requirement after consultation with the political parties. Compared to 2002, the number of both political parties and candidates participating in the parliamentary elections dramatically increased. While 34 parties fielded parliamentary candidates in 2002, there were 117 parties contesting parliamentary seats in 2007. With 2,547 aspirants the number of parliamentary candidates more than doubled compared to the 2002 elections. Almost all EU EOM interlocutors from political parties, civil society and faith-based organisations considered the high number of candidates to be a result of the huge increase in the remunerations paid to Members of Parliament. Despite the high numbers of candidates, for the first time since the reintroduction of the multiparty system none of the political parties were able to field candidates in all 210 constituencies. Nevertheless, the nominations were particularly strongly contested in the respective strongholds of the two main presidential candidates.

In total, 13 formal cases were filed to the ECK. Most of the complaints related to the parliamentary elections and concerned the validity of nomination certificates, failure to pass the proficiency language test, late presentation of nomination papers and the presentation of nomination papers by an agent rather than by the aspirant himself. Most of these cases were either dismissed by the court for lack of jurisdiction or were overtaken by events as they had not been heard before the names of the candidates had been duly gazetted.

## **VIII. ELECTION CAMPAIGN AND PRE-ELECTION ENVIRONMENT**

### **A. Overview of the Election Campaign**

Campaigning by the main presidential candidates started several months before the campaign period as defined by the ECK calendar. The campaigns were widely conducted in an open and free environment, in which the freedom of expression, assembly and association was generally respected. Candidates and parties campaigned intensively, and were generally able to move freely throughout the country without restriction or interference. However, the campaign atmosphere was also characterised by a strong ethno-political polarisation between the communities of the two main contenders, leading to a hostile atmosphere in their respective strongholds towards the other side. This resulted in both of them avoiding

campaigning in the strongholds of their opponent, in order to avoid hostile receptions, embarrassingly low rally turnouts and to concentrate their resources in closely contested areas.

Major rallies took place when the three main presidential candidates, Kibaki, Musyoka and Odinga campaigned in an area. The parliamentary and civic candidates running for the same parties in the respective area usually accompanied them. Parliamentary and civic campaigns were mainly conducted through smaller and improvised stopovers at market places, door-to-door-campaigns and at times smaller rallies. In a positive development, co-ordination between the police and political parties helped to ensure that candidates and parties were not campaigning in the same area on the same day, thus reducing the potential for violence. Initial disputes concerning the use of venues by major candidates were consensually resolved by the candidates' campaign teams and the police ahead of the event.<sup>23</sup>

Strong and fierce competition between parliamentary candidates of the same alliance took place particularly in Central, Western and Nyanza Provinces, as here candidates maintained best chances of winning through association with the strongest presidential candidate of the respective area. The constituency based Peace Committees were able to mediate conflicts in some places, but as they did not have any inbuilt mechanism to enforce conflict solutions on the contestants, their impact was limited where candidates and other stakeholders lacked willingness to cooperate. Particularly, in Western and Nyanza Provinces some of these contests turned violent, leading to the deaths of several people.

The distribution of money and goods by candidates was widely reported by EU EOM observers, the media and the Kenya National Commission on Human Rights. This activity appears deeply entrenched in the political culture of the country, despite the fact that it is clearly incompatible with democratic standards. There is a general expectation that candidates on campaign trails will hand out money and/or goods to the public. This practice has its roots in the first two multiparty campaigns in 1992 and 1997 when significant amounts of money were spent in order to bribe voters. Many interlocutors pointed out to the EU EOM that in the 2007 elections even candidates who disapproved of this practice felt pressured to hand out money.

In contrast to the 1992 and 1997 elections, there was some discussion of political issues in the campaigns in 2007, building on elements of the 2002 elections. All three of the main presidential candidates promised to make secondary education free. With this pledge they built on the campaign experience of 2002 when the free primary education promised and realised by NARC proved extremely popular. On the other hand, the fight against corruption,

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<sup>23</sup> The Public Order Act was amended to remove the need for licenses and other permits for public meetings or processions. The Act provides that any person intending to convene a public meeting or a public procession shall notify the regulating officer of such intent at least three days but not more than fourteen days before the proposed date of the public meeting or procession. A notice shall specify the full names and physical address of the organizer of the proposed public meeting or procession. It must detail the proposed date of the meeting or procession and the time thereof, which shall be between 06:00-18:00 hours. It must also specify the proposed site of the public meeting or the proposed route of the public procession. Where it is impossible to hold the proposed public meeting or public procession because another public meeting or procession has already been scheduled for the same date, time and venue the regulating officer shall notify the organizer. These rules were not fully implemented in practice but the EU EOM received very few reports or complaints on any serious dispute related to the implementation of this notification system.

one of the key issues in 2002 campaigns, did not feature as prominently. It only temporarily became a significant issue when Finance Minister Amos Kimunya claimed that according to his meetings during the EU-Africa summit the EU would withhold financial support to Kenya if Raila Odinga became elected President.<sup>24</sup> PNU and ODM then accused each other of having senior leaders in their ranks that had been implicated in major corruption scandals during the NARC and KANU governments. Kalonzo Musyoka, in an attempt to prove that he has a clean bill in terms of his sources of income made his personal income records public and demanded the same from the other candidates, a request to which both did not respond.

One of the major campaign issues was the debate about the preferred system of government. ODM, building on the Bomas Draft constitution, campaigned strongly for devolution, pledging to bring development and decision making closer to the people. In contrast, the PNU favoured the existing centralised system and promised to increase the budget share of the highly popular Constituency Development Fund (CDF) from 2.5 per cent to 5 per cent of the national budget. While the two different policy agendas gave the electorate a choice, an open, enlightened debate about the different concepts was derailed. Both ODM and PNU used the term *Majimbo* (Swahili for region) as a label for a devolved system. Especially since the linkage in the 1990s between the ethnic cleansings in the Rift Valley and along the Coast a *Majimbo*-system has been understood by most Kenyans to provide for ethnic homogenous regions. ODM used the term to solicit support particularly in the Rift Valley, North Eastern and Coastal regions, while PNU prevailed upon their voters in these regions not to vote ODM as this would mean eviction from these areas. Thus both sides openly played in a populist way with the fears and aspirations of the voters. Tensions were further fuelled by inflammatory leaflets of undisclosed origin which were circulated particularly in the Rift Valley, implying imminent evictions of ethnic minorities in case of an ODM victory. Similar texts with hate messages about both camps circulated via mobile phones. These strategies contrast sharply with the 2005 Referendum campaign during which both camps avoided using the term *Majimbo* in favour a more rational debate.

The signing of a Memorandum of Understanding between ODM and the National Muslim Leaders Forum (NAMLEF) at the end of August 2007 proved to be highly contentious. While it contained a pledge of mutual support for development in the Coast and North Eastern regions under an Odinga presidency, circulating fake versions, indicating the introduction of elements of a sharia law in Kenya, nurtured religious-ethnic tensions. A similar agreement between NARC and the Council of Imams and Preachers of Kenya (CIPK) in 2002 did not arouse such public controversy.

## **B. Use of State Resources**

In breach of the Electoral Code of Conduct and in violation of the Public Officers Ethics Act, state resources were widely used during the campaign. The Kenya National Commission on Human Rights reported 141 cases of use of government vehicles and 2 cases of use of government helicopters. Public servants, heads of parastatals and the provincial administration were observed being involved in campaign activities. In addition President Mwai Kibaki used his presidential powers for campaign purposes when he announced the creation of a substantial number of new districts during campaign rallies.

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<sup>24</sup> The EC delegation in Nairobi made clear that the EU would work with the government that becomes elected.

## C. Voter Education

The ECK contracted 42 civil society organisations to provide voter education countrywide. Voter education teams visited churches, mosques, markets, homes and village meetings and distributed brochures, manuals and handbooks. The ECK also employed the media to broadcast a range of tailor made programmes to enhance voters' understanding of their rights. The exercise was financed by the Kenyan Government and various donors. A UNDP Programme Management Unit administered the funds. The voter education programme covered several topics, including how to vote, good governance, free and fair elections and combating vote buying. Furthermore, the ECK continuously appealed to voters, party supporters and candidates to allow for free campaigning and to refrain from the use of violence both during and after the elections.

## IX. MEDIA AND THE ELECTIONS

### A. Media Environment

With an increasing number of radio and television broadcasters there are today over 140 radio stations licensed throughout the country and over 40 of these are operating and produce programming in official and vernacular languages. Five private television channels as well as a number of daily newspapers provide a degree of diversity in a sector that has a strong financial base. There is also a level of cross ownership of these media and four major private companies own large sections of the media industry. Nation Media Group (NMG): Nation TV, Easy FM and *the Daily Nation*; Royal Media Services (RMS): Citizen Television and Citizen Radio, *Citizen Weekly* as well as a clutch of nine vernacular radio stations; Standard Group: KTN Television and the *Standard*; and Radio Africa: Kiss FM, Classic and the *Nairobi Star*. The state owned broadcaster, the Kenya Broadcasting Corporation (KBC), operates a number of radio and television services including two television channels and radio stations broadcasting in English and Kiswahili as well as a range of regional services in vernacular languages. The majority of these groups have close political ties either via their ownership structures or senior appointments.

### B. Legal Framework for the Media and Elections

Section 79 (1) of the Constitution provides for freedom of speech and the freedom to publish. This fundamental right is however, restricted by Section 79 (2) that permits the Government to censor the media in the interests *inter alia* of security, public order and public morality. During the campaign period freedom of speech was generally respected.<sup>25</sup> However, on the announcement of the final results for the Presidential election on 30 December 2007 at the Kenyatta International Conference Center (KICC), journalists were ejected from the building. Immediately following the announcement, a Directive from the Internal Security Minister

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<sup>25</sup> ICCPR, Article 19. There was one exception during the campaign period when journalists had their footage and photographs confiscated by the security services after an incident at State House involving the First Lady. A complaint was lodged by NMG over the incident to the Media Council, though no further action was taken on this matter.

ordered broadcasters to suspend all live broadcasts, seriously infringing the right of the media to report freely without fear of undue state interference.<sup>26</sup>

There is a lack of a comprehensive legal framework for the media and a number of statutory provisions governing the media are absent even considering the modernisation of the framework for the regulation of this sector with the introduction of a Media Act in October 2007. In this respect, the legal provisions that do pertain to the media are included in a diverse range of laws that lack consistency and clarity.<sup>27</sup> There are also a number of laws that fail to meet with international standards in this field and contain overly restrictive measures as well as un-proportional and excessive penalties for breaches of their provisions including prison terms that are also contained in the recently introduced Media Act.

There is, however, a relatively detailed Act establishing the state owned broadcaster KBC. The Kenya Broadcasting Corporation Act establishes KBC with a mandate to: “provide independent and impartial broadcasting services of information, education and entertainment, in English and Kiswahili and in such other languages as the Corporation may decide” Part 3, Section 8 (1a). In terms of election coverage KBC is also obliged by this law to treat political parties equally during election campaign periods. KBC is required to provide fair balance in its coverage of the parties both in terms of time and tone and not to discriminate between political viewpoints. In consultation with the ECK, KBC should also allocate free airtime to registered political parties standing for election pursuant to Part 3, Section 8 (1k) of the Kenya Broadcasting Corporation Act.

A self regulatory Media Council was established in 2002 as a professional body for the media to receive complaints from members of the public about media coverage and develop standards in the media industry. After a protracted period of disagreement between the media and government over the Media Act, it was passed by Parliament in October 2007 and transformed the self regulatory Media Council into a statutory body. The Media Act also introduced statutory provisions for the regulation of standards in the media sector in the form of a legally binding code of conduct.<sup>28</sup> The statutory code of conduct sets out standard principles for reporting: these include accuracy, impartiality, balance and fairness in reporting as well as a right to correction in the case of errors. Further benchmarks in this code are that journalists should refrain from discrimination, subterfuge, paying money for information as well as respecting privacy. There are therefore two general codes of conduct: a statutory code of conduct of the Media Council and a self regulatory code of the Media Industry Steering Committee that latter of which contains similar provisions to the statutory code. The self regulatory Media Council also published a code before its dissolution specifically for the election campaign period that stipulates a whole range of standards for journalists in their coverage of elections ranging from accuracy, balance and impartiality; refraining from any forms of hate speech and publishing any material reinforcing prejudices against minority

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<sup>26</sup> The United Nations Human Rights Committee recognises a three pronged test for such restrictions which should: 1) be provided by law 2) be for the purpose of safeguarding one of the legitimate interests listed; and 3) be necessary to achieve this goal. The ban on live broadcasts was un-proportional and cannot be understood as safeguarding a legitimate interest.

<sup>27</sup> Domestic laws that have some provisions relating to the media include: 2007 Media Act, 1985 Penal Code, 1970 Official Secrets Act, 1972 Defamation Act and the 1987 Preservation of Public Security Act.

<sup>28</sup> The main tasks of the newly formed Media Council include *inter alia* receiving complaints from the public, mediating disputes between the Government and the media, support high standards in media coverage and promote and protect the freedom and independence of the media (Article 4 (a-i) Media Act 2007).

groups to promoting democratic values. The ECK issued a set of guidelines containing similar provisions prior to the election campaign period.

The Media Council lacked adequate administrative structures as well as a complaints commission to enable it to fulfil its mandate established in the Media Act.<sup>29</sup> As the dissolution of the self-regulatory Media Council on 11 December 2007 coincided with the election campaign period this created a regulatory vacuum and as a result no satisfactory regulatory infrastructure was in place during the deployment of the mission. The ECK was also supposed to receive media related complaints and monitor the coverage of KBC throughout the campaign period, but there was little evidence that this was undertaken in a rigorous manner. The high degree of imbalance in the coverage of KBC also suggests the ECK was not actively prepared to engage with this aspect of the elections and no formal action was taken to attempt to provide corrective measures to the bias in access that characterised KBC's coverage.

Apart from a provision in the code of conduct of the Media Council relating to advertising standards set out in Article 24, there is a lack of regulatory provisions relating to paid political advertising and this led to inconsistency in the application of standards in this area. Television and radio stations as well as newspapers of NMG, the Standard Group, KBC and RMG refused, or edited to ensure they met legal requirements, a number of political advertisements in line with Article 23 of the code of conduct.<sup>30</sup> There was, however, inconsistency in the application of these standards. On the one hand, the PNU placed advertisements criticising the ODM in the *Daily Nation* (NMG) after editing by the newspaper's editorial staff following the introduction of the guidelines.<sup>31</sup> The Standard Group's television channel KTN, who was not party to the guidelines, also continued to air advertisements produced by the PNU and ODM criticising one another. On the other hand, three advertisements which were part of a series that criticised the policy record of the Government produced by ODM were rejected by the majority of media houses on grounds that their content fell short of taste and decency and legal standards. In order to set consistent standards for political advertising, and in the absence of clear regulations, the NMG introduced guidelines that the RMG also subscribed to. The inconsistency in the application of the rules, however, continued and led to different standards being applied by editors of the different media outlets.

### C. Monitoring of Media Coverage of the Elections

There were high levels of media coverage of the election preparations and candidates and parties standing for election throughout the monitoring period that was neutral or positive in tone. Despite this wide range of coverage of the elections a number of legal provisions were not met by the media. The absence of a satisfactory degree of equitable coverage on a number of radio and television stations, and in terms of the ODM and PNU parties a lack of equal coverage, breached the agreement to provide balanced coverage in the Media Council's code of conduct for election coverage. Further breaches to the Media Council's statutory code of conduct include the lack of access to political parties participating in the elections (Article 1a) and failure to serve the public interest established in Part V, 35 (1) of the Media Act by

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<sup>29</sup> One further complaint was submitted to the Media Council by the Information Permanent Secretary against KTN TV after this channel aired a story about allegations of plans to employ the security services to influence the election results. During deployment this complaint had also not been concluded.

<sup>30</sup> Article 24 of the Media Council's Code of Conduct provides for advertising standards and Article 23 editorial responsibility for ensuring these standards are maintained.

<sup>31</sup> *Daily Nation*, p.41, November 30 2007.

granting proportional coverage of the parties and candidates. Article b of the ECK's Guidelines was also breached by a number of broadcasters due to the lack of a reasonable degree of balance in their news coverage. KBC's coverage demonstrated a marked failure to fulfil even its minimal obligations as a public service broadcaster set out in the Kenya Broadcasting Corporation Act. The allocation of free airtime to registered political parties standing for election pursuant to Part 3, Section 8 (1k) of the Kenya Broadcasting Corporation Act on KBC was not implemented by the KBC and the ECK. Both institutions clearly failed to fulfil this key legal provision.

KBC Radio's English and Swahili language services demonstrated a high level of bias and granted a combined total of 76 per cent of coverage to the PNU coalition partners.<sup>32</sup> ODM received 13 per cent and ODM-K 5 per cent with the remaining 6 per cent allocated to a range of parties. KBC-TV's coverage demonstrated a similarly excessively high amount of coverage of the PNU coalition: PNU received 71 per cent share of coverage of political actors with ODM receiving 11 per cent and ODM-K 5 per cent, with a number of other parties receiving small amounts of coverage representing the final 13 per cent. A lack of strategic planning, pressures from the incumbent administration coupled with a lack of independence for the management and editorial staff of KBC compounded these problems. This led to a high degree of imbalance in coverage of the parties and candidates. Furthermore, pressures from the Presidential Press Service that continued to place content on KBC throughout the campaign period against international recommendations further distorted KBC's coverage.<sup>33</sup> These combined factors led to KBC failing to meet the provisions in the Kenya Broadcasting Corporation Act, the Inter Parties Parliamentary Group Agreement 1997 and regional and international standards for public and state owned broadcasters.<sup>34</sup>

The commercial radio stations provided some degree of diversity between the main political parties though the PNU coalition partners enjoyed the majority of coverage. Excluding paid for political advertising; Citizen FM granted 45 per cent of its coverage of political actors to the parties of the PNU coalition. ODM received 29 per cent and ODM-K 12 per cent with the remaining 14 per cent of coverage allocated to a range of political parties. Similar imbalance also characterised Easy FM's coverage and the PNU coalition partners received 52 per cent share of coverage and ODM 34 per cent share. ODM-K also received 12 per cent share of coverage on this station. Kiss FM provided a greater degree of balance in their coverage of political parties. The PNU coalition and ODM received almost equal coverage: 44 and 43 per cent respectively on this station. The commercial television channels, KTN and NTV's coverage of the PNU coalition demonstrated similar trends. The PNU coalition received 46 and 50 per cent share of coverage on the respective channels. However, there were differences

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<sup>32</sup> All data excludes paid for political advertisements. Data charts are accessible on the EU EOM website: [www.eueomkenya.org](http://www.eueomkenya.org)

<sup>33</sup> See the Joint Declaration: International Mechanisms for Promoting Freedom of Expression by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe and the Organization of American States Special Rapporteur on Freedom of Expression, 2003 that states "Media outlets should not be required by law to carry messages from specified political figures, such as the president."

<sup>34</sup> See *inter alia* Chapter 7, Article 17 (3) African Charter on Democracy, Elections and Governance stipulates that "State Parties shall (...) ensure fair and equitable access by contesting parties and candidates to state controlled media during elections." See also Article VI, Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17-23 October, 2002: Banjul, The Gambia. The Commission for Africa, Our Common Interest: A Report of the Commission for Africa, 11 March 2005, recommendation paragraph 58, section 4.3.3, p.143.

between the channels in the amounts of coverage granted to ODM and this party received 39 per cent share of coverage on KTN and 28 per cent share on NTV. ODM-K was afforded 12 per cent share of coverage on KTN and 17 per cent on NTV. Citizen TV granted the PNU coalition partners 56 per cent share of coverage and ODM 29 per cent with ODM-K receiving 11 per cent share.

The vernacular radio stations' coverage demonstrated a tendency to grant greater access to the parties and candidates with close links to the tribal and political affiliations of their listeners with few of these stations providing adequate balance in their coverage. Egessa FM's coverage granted the PNU coalition partners 48 per cent share with ODM receiving 36 per cent share of coverage and ODM-K 10 per cent. Mulembe FM afforded the PNU coalition partners 45 per cent share of coverage with ODM receiving 32 per cent and ODM-K 13 per cent share. The coverage of Inooro FM and Kameme FM were both dominated by the PNU coalition who received 71 per cent share of coverage on both these stations. In contrast, ODM received 16 per cent share of coverage and ODM-K 7 per cent on Inooro FM and ODM 17 per cent and ODM-K 6 per cent share of coverage on Kameme FM. Musyi FM also granted the largest share of its coverage to the PNU coalition partners who received a total of 49 per cent share of coverage followed by ODM-K with 28 per cent and ODM 16 per cent share. Reversing this trend Kass FM afforded ODM the largest share of coverage and this party received a 52 per cent share of coverage on this station with the PNU coalition receiving 28 per cent, UDM 8 per cent and ODM-K 4 per cent with the remaining 8 per cent shared between a range of parties. In a similar manner Ramogi FM also granted ODM the largest amount of coverage as it received a 55 per cent share with the PNU coalition being afforded 27 per cent, ODM-K 8 per cent and NARC 7 per cent.

Newspaper coverage demonstrated a constant trend across all of the titles monitored. In the *Daily Nation* the PNU coalition received 54 per cent share of coverage compared with 53 per cent in the *Kenya Times*, 55 per cent in the *Standard* and 56 per cent in the *People*. ODM received 29 per cent in the *Daily Nation*, 33 per cent in the *Kenya Times*, 30 per cent in the *Standard* and 28 per cent in the *People*. ODM-K received a 12 per cent share of coverage in the *Daily Nation*, 8 per cent in the *Kenya Times*, 10 per cent in the *Standard* and 5 per cent in the *People*.

There was a high volume of paid advertisements on radio and television stations. PNU invested heavily in this area and its political advertising represented 74 per cent of political advertising on television and radio compared with ODM's advertising that represented a 20 per cent share on the audiovisual media. The large number of political advertising of PNU further increased this coalition's presence in the media. During the period following the announcement of the results of the elections by the ECK, despite the live broadcasting ban, the commercial media's coverage continued to provide a wide range of impartial and balanced coverage of events throughout the country in a responsible manner.

## **X. HUMAN RIGHTS IN THE ELECTORAL PROCESS**

The Kenyan Constitution guarantees, together with additional statutory instruments, a range of fundamental rights including the rights of freedom of assembly, speech and expression. However, there are limits placed on these freedoms and the state retains the right to curb these in the interests of defence, public safety, public order and public morality as well as when

reasonably required for the purpose of protecting the rights or freedoms of other persons. Political and civil rights are also protected within the legal framework. The right of all citizens to vote is established in the Constitution, but not granted by law to certain categories of people. There are also specific provisions in the legislation that address special measures for voting for disabled persons.<sup>35</sup> Freedom of opinion and expression, freedom of peaceful assembly and freedom of association were generally respected during the campaign period despite some cases of obstructions including instances where the police cancelled rallies without adequate grounds.<sup>36</sup> In Eldoret, during the last days of the elections, ODM reported several cancellations of a rally because of announced PNU meetings that never materialised.

In line with a resolution of the United Nations General Assembly, an Act of Parliament was passed in October 2002 establishing the Kenya National Commission on Human Rights (KNCHR), which was formed on 12 March 2003.<sup>37</sup> The KNCHR has proven to be very proactive in fulfilling its mandate, and together with a vibrant civil society these groups played an important role in monitoring human rights and raising public awareness of violations during the election period.

A high number of election related incidents of violence were documented by EU observers in all provinces of the country.<sup>38</sup> Generally, victims of violence complained of not receiving an appropriate response from the police or the judiciary. The police were perceived by the population as inactive in some areas such as Eldoret, Trans Nzoia and West Pokot, Kitale, Butere and Mumias. In meetings with EU EOM observers, police denied that they had received complaints when victims of offences claimed they had reported incidents. Police report only a few incidents pre-results. A majority of cases that were reported have not been investigated thoroughly by the authorities or the judiciary.

#### **A. Women**

While there has been some progress in improving opportunities for women, inequalities remain throughout the social, economic and political structures of the country and are most pertinent in rural areas. A lack of economic opportunities and a political culture that limits the role of women in public life compound the problems faced by women in Kenyan elections. This combined with internal party politics is a serious impediment to the participation of women in politics and public affairs.

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<sup>35</sup> The Disabled Act, Articles 29 and 30. Article 29(1) states that “All persons with disabilities shall be entitled at their request, to be assisted by persons of their choice in voting in presidential, parliamentary and civic elections” and 30 “Polling stations shall be made accessible to persons with disabilities during elections, and such persons shall in addition be provided with the necessary devices and assistive devices and services to facilitate the exercise of this right under this section.”

<sup>36</sup> Kenya law guarantees the right to conduct political rallies, provided that notification was given to the authorities 48 hours in advance. Only public order reasons shall be grounds for cancellation by the authorities.

<sup>37</sup> An autonomous and independent governmental body, the KNCHR’s core mandate is to further the protection and promotion of human rights in Kenya. Its functions are wide-ranging and include informing and educating the public about their human rights to the investigation and conciliation of complaints. The Commission also acts as a consultative and advisory body to the Government regarding Kenya’s obligations in terms of human rights.

<sup>38</sup> One hundred and ninety cases were observed or reported, from intimidation to murder, most of them having occurred in the provinces of Rift Valley, Nyanza and Western.

Women are heavily underrepresented, taking up only eight per cent of the seats in the previous Parliament<sup>39</sup> and about ten per cent in the new Parliament. Prior to the 2007 elections, political parties announced *ad hoc* measures to promote female candidates for the parliamentary elections,<sup>40</sup> yet there was little evidence that these initiatives had the desired impact. These measures were not an adequate substitute for affirmative action needed to ensure an adequate representation of women within the pool of candidates and in parliament.<sup>41</sup>

9.6 per cent of civic candidates, 10.2 per cent of parliamentary candidates and one of nine presidential candidates were women in the 2007 general elections.<sup>42</sup> This is an improvement compared to previous elections, but remains low when compared to international standards for women representation.<sup>43</sup> There are discrepancies in the number of female candidates between provinces. The constituencies with the best ratio of female candidates were located in Nairobi.<sup>44</sup> The majority of women candidates were affiliated with smaller political parties after failing to secure nomination in the larger political parties.<sup>45</sup>

During the nomination and election campaign periods there were a significant number of violent assaults on women, which limited their campaigning activities.<sup>46</sup> Although the political parties made campaign promises to integrate and mainstream women in politics in reaction to violence against female candidates, in reality very few of these pledges were given real substance. Generally, women's rights and issues of the role of women in politics and public life were discussed in campaigns to some extent by civil society organisations and by female candidates, but were largely disregarded by male candidates.

Women, however, were well represented in the voting population and in the electoral administration as well as civil society groups involved in domestic observation and civic

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<sup>39</sup> This level of this female participation placed Kenya 112<sup>th</sup> in rankings of female participation in parliaments on a global scale, and below that of its neighbouring countries. Tanzania reaches the threshold of 30 per cent of women in its parliament with 30.5 per cent of women, while Uganda's parliament is currently composed of 29.8 per cent women. Kenya's female representation is also below Ethiopia and Sudan whose parliaments comprise 21.9 per cent and 18.1 per cent women. Inter Parliamentary Union available at <http://www.ipu.org/wmn-e/classif.htm>

<sup>40</sup> ODM stated in September 2007 that it intended to support women parliamentary candidates by campaigning alongside them across Kenya.

<sup>41</sup> The legal framework for elections, including the Political Party Bill, does not require political parties to ensure a minimum quota of women among their candidates. In August 2007, the parliament rejected a bill that would have guaranteed 50 seats for women in the legislature for the election. A Parliamentary Bill allocating 50 parliamentary seats for women was rejected on 15 August 2007 by the Ninth Parliament.

<sup>42</sup> Women represented a total of 1,478 of 15,332 candidates that stood for the civic elections and 269 out of 2,548 for parliamentary seats.

<sup>43</sup> A 30 per cent quota target for women in politics has been established by the UN Security Council Resolution 1325 in 2005.

<sup>44</sup> Nairobi Province had an average of 23.95 per cent of female candidates for the Parliamentary election. In Stahere and Westland, respectively 35.29 per cent and 33 per cent of legislative candidates were women. Other constituencies with more than 30 per cent of female candidates were located in Eastern (4 constituencies), Nyanza (Ndihwa constituency with 3 female out of 4 candidates), Rift Valley (Eldoret East with 41.67 per cent), Central (Juja with 38.4 per cent). North Eastern (average of 10 per cent of women), Coast, (11.05 per cent) and Western with (11.26 per cent) were the three provinces with the lowest rates of female candidates.

<sup>45</sup> 58 women out of the 269 parliamentary candidates ran with a ticket from the main parties.

<sup>46</sup> 33 cases were reported by EU EOM observers, women's groups and human rights organisations, including intimidation, physical assaults, threats, and the murder of one ODM aspirant on 1 December 2007. The most affected Provinces were Eastern, followed by Nairobi and Central. Although armed escorts were provided, when requested, for some women candidates during the last weeks of the campaign, a general climate of fear and intimidation restricted the political activities of women.

education. They were however not adequately represented in the Peace Committees as most groups taking part in the Peace Committees are male dominated.

The combined factors of an absence of adequate measures to ensure female representation in parliament, the lack of satisfactory internal political party initiatives to encourage female candidates and the poor social and economic conditions of women meant that there are no notable changes to the ratios of female representation in the new parliament.

## **B. Minorities**

Kenya acceded to the Convention on the Elimination of All forms of Racial Discrimination (CERD) on 13 September 2001, although it has not signed the Optional Protocol to the Convention. Kenyan law guarantees non-discrimination on any grounds in line with international legal standards although improvements in legislation protecting against discrimination by political parties have not yet been implemented.<sup>47</sup> However, ethnic and religious minorities have traditionally been underrepresented in public affairs, although there has been some improvement in recognising the rights of religious groups since 2002.

Members of the Muslim and Hindu minority groups experienced difficulties getting national identity cards or a passport that prevented some of them from registering as voters for the 2007 polls.<sup>48</sup> Such cases were observed in Busia, Kisii and Wajir districts.

## **C. Internally Displaced Persons**

According to the Kenyan Red Cross, the conflicts in the Mount Elgon region and Kuresoi area have led to around 200 deaths and the displacement of an estimated 46,000 people (IDPs). The late establishment of temporary polling stations immediately prior to election-day by the ECK in IDP settlements allowed some of them to vote. However, the general security situation in these areas was not conducive to ensure key elements of the election process such as campaigning. Furthermore, due to the logistical difficulties posed by the displacement of so many people there were reports that some of the IDPs did not manage to get to the polling stations on election day.

## **XI. PARTICIPATION OF CIVIL SOCIETY**

Kenya has a developed and diverse civil society that has played a key role in the country's democratisation process since the early 1990s. Civil Society organisations participated in the constitutional reform process and remain important actors for democratic development. Since the 2002 elections, the sector has undergone a transformation process as a considerable number of its leading and technical staff took up positions in the new government. This

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<sup>47</sup> In addition to international conventions against discrimination, Article 82 of the Constitution guarantees non-discrimination by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex. The Electoral Code of Conduct (Article 6f), states that political parties should "avoid discrimination". The Political Party Bill 2007, which has yet to come into force, provides for non registration and cancellation of registration of political parties on the basis of discrimination (Articles 6, 16 and 18).

<sup>48</sup> The vetting mechanism used to ensure that nationality requirements were respected led to even longer delays. Hindu and Muslim groups also claim they were asked to pay higher bribes in order to be issued national identification documents.

however has not impeded its watchdog role or its constructive engagement with government institutions indicating a high level of institutional capacity. In the 2007 election campaign a number of organisations played an essential role in the electoral process scrutinising key aspects of the process such as the use of state resources, candidate and party finances and drawing public attention to violence and the displacement of people in parts of the country.

With regard to election observation, Kenya has a longstanding history of effective observation since 1992. In 2007, 13 civil society and faith based organisations constituted the Kenyan Election Domestic Observation Forum (KEDOF).<sup>49</sup> It was funded with 2 million US dollars through the UNDP Donor Basket Fund, an amount around 0.5 million US dollars short of the funding provided in 2002. KEDOF trained and deployed 13 regional coordinators to the eight provinces of the country in October 2007 and 454 constituency observers to cover the 210 constituencies in December 2007.

On Election Day some 17,000 poll watchers observed polling and counting. With 27,555 polling stations in the country the domestic observer group was, for the first time since 1997, not able to deploy one poll watcher to almost every single polling station. Equally worrying were the long standing internal disputes amongst the 13 organisations which hampered the establishment of the KEDOF secretariat and the working structure of the organisation, thereby endangering the success of the entire programme. However, initial fears about a split of the organisation did not materialize and KEDOF issued their Preliminary Press Statement on the 31 December 2007, in which they focused on the election day, the counting and tallying exclusively. They commended the polling, but criticised the counting for not allowing agents to countersign the result forms in most constituencies in Central, Nyanza and parts of Eastern Provinces as well as sending party agents away in some polling stations in these provinces. The tallying according to KEDOF was marred by ‘inordinate delays in transmission of results from the polling stations’ and by ‘significant cases of unsigned statutory forms.’ They comment in particular that the discrepancies in results announced by Returning Officers and by the ECK in Nairobi as well as ‘illegal replacement’ of forms 16a and 17a by photocopies leads to the conclusion that the ‘electoral process lost credibility towards the end with regard to the tallying and announcement of presidential results’.

## **XII. ELECTION DAY**

### **A. Voting**

The EU EOM observed a total of 752 polling stations on election-day in all eight provinces of Kenya. Apart from a few isolated incidents reported by media, which were not confirmed by EU EOM observers, voting and counting were conducted in a peaceful atmosphere.

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<sup>49</sup> The organisations constituting KEDOF are: The Consortium for the Empowerment and Development of Marginalised Communities (CEDMAC); Constitution and Reform Education Consortium (CRECO); Disability Consortium for Empowerment and Development (DICED); Ecumenical Centre for Justice & Peace (ECJP); Hindu Council of Kenya (HCK); Institute for Education in Democracy (IED); Kenya Episcopal Conference (KEC)/Catholic Justice & Peace Commission (CJPC); National Council of Churches of Kenya (NCCK); National Council of Women in Kenya (NCWK); ScoreCard Partnership/Community Aid International (CAI); Supreme Council of Kenya Muslims (SUPKEM); Education Centre for Women in Democracy (ECWD); and Youth Agenda/Youth Empowerment Consortium.

The ECK increased the number of polling stations from 18,366 to 27,555 compared to the 2002 elections, a consequence of the significant rise in the number of registered voters and the reduced number of voters per polling station from 1,000 to maximum 700.<sup>50</sup>

In spite of the sometimes difficult field conditions and the increase in the number of polling stations since 2002, all materials required for the conduct of the poll were available at polling stations visited by EU observers.

The full complement of ECK polling station staff was generally present at the opening of polling stations visited. EU observers reported very few cases of missing polling staff during the day and the ECK were reported to have replaced those who were absent efficiently. It also made a commitment to recruit a high number of female staff to work in polling stations and almost achieved gender parity in its staffing. Women were found to be presiding or serving as deputy presiding officers in 48 per cent of polling stations visited.

The length of the opening procedure, especially the additional sealing of the ballot boxes by candidate agents, and in some cases the late delivery of materials and errors in the voter registers, led to late openings in 30 per cent of polling stations visited. Most Presiding Officers extended the opening hours in polling centres that opened late. In Nairobi, specifically, these delays in opening created tension amongst voters who nevertheless waited patiently and peacefully for many hours.

Polling was generally conducted in an orderly manner. Polling staff proved to be committed and generally well trained. However, several aspects of the polling procedures such as checking of voters' hands for ink and reading out clearly the voters' name were not implemented with sufficient rigour. Some of the procedures were ignored, such as the regulations pertaining to assisted voters: Cases were observed in 21 per cent of polling stations visited where the Presiding Officers, Deputy Presiding Officers and candidate agents actively and systematically assisted voters in casting their ballot, intentionally or unintentionally breaching the secrecy of the vote. Observers reported that up to 90 per cent of voters were assisted in some rural polling stations. The absence of adequate layout in many polling stations visited, combined with the lack of enforcement of the official ECK regulations on assistance, led to breaches of the secrecy of the vote in 16 per cent of polling stations visited, group voting in 8 per cent and proxy voting<sup>51</sup> in 5 per cent of polling stations visited.

New instructions issued by the ECK, which diverged from the original regulations, allowed double registered voters to cast their ballot. Consequently, polling stations had up to four different voter lists: lists organised in alphabetical order, lists organised by identity card numbers, lists with double registered voters and the original black book handwritten lists. Any voter whose name was not found in the list that was organised in alphabetical order, but was included in any of the other three lists could vote if not registered more than twice. The existence of multiple voting lists increased the risk of multiple voting.

Voter turnout higher than 90 per cent was observed in a number of polling stations, mainly in Central, Rift Valley and Nyanza Provinces: In Othaya 16 polling stations (PS) with turnout of

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<sup>50</sup> In bigger urban areas, the maximum of voters per polling station was set at 500.

<sup>51</sup> Polling staff or party agents filled in the ballot for the voter in these cases.

above 95 per cent, one with a 100 per cent; in Gatundu South 1 PS with a 100 per cent; in Kiharu 3 PS between 95.5 per cent and 98.2 per cent; in Ugenya 8 PS with turnouts between 95.8 per cent and 98.7 per cent; in Baringo Central 13 PS with turnout above 96 per cent, 5 of them with 100 per cent; in Kericho 3 PS with 96.5 per cent and 97.5 per cent; in Keiyo South 4 PS with turnout between 94.3 per cent and 98.5 per cent. In Maragwa, it was the ECK district coordinator who informed EU EOM observers of a doubtful high turnout.

In a positive development, candidate agents were present in nearly all polling stations visited, often in high numbers. However, EU observers reported a tendency of over-representation by PNU or ODM agents in the strongholds of these two parties. In Central Province, observers reported up to 12 PNU agents per polling station, having an intimidating effect on other party agents. Domestic observers from various groups were present in 61 per cent of polling stations visited, achieving good coverage of polling stations nationwide but with significant variations from one constituency to another.

Voting took place from 06:00 to 17:00 hours and voters that joined the queue to vote before the scheduled time for closing were largely allowed to vote at polling stations. However, in 6 per cent of polling stations where EU observers were present voters queuing at 17.00 hours could not vote.

## **B. Counting**

As a consequence of polling hours being extended, counting continued well into the night and in the case of several polling stations in Nairobi until the morning of 28 December 2007.

In general the procedures for counting were properly followed in the majority of polling stations where EU observers were present and EU observers assessed the closing and counting process as good or very good in almost two thirds of polling stations.

However, there was a critical absence of consistency in the transparency in the counting process. In almost a third of polling stations where counts were witnessed by EU observers, party agents were not given a copy of the result sheets, either because the form was not available or they did not request a copy. Furthermore, in more than a third of polling stations visited by EU observers, the results were not posted at the polling station level thereby fundamentally undermining transparency rules.

## **C. Tallying**

The aggregation of results in the tally centres was delayed and also lacked transparency in most observed constituencies. EU observers noted variations in the procedures in some of these centres, depending largely on time and logistical constraints.<sup>52</sup> The lack of transparency and written tallying procedures made it difficult for observers and party agents to check the tallying process against national and international standards.

In Central Province, the majority of EU EOM observer teams experienced difficulties in obtaining the results of individual polling station from Returning Officers during the tallying

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<sup>52</sup> Results announced per polling stations or not, PO documents checked or not before tallying, tally sometimes computerized or sometimes not; variations were also observed during the night such as access to the figures restricted, systematic announcement of individual results stopped.

process. In several constituencies including Mathioya (Central Province), Kaloleni, Mvita, Kisauni, Changamwe, Likoni (all Coast Province) and Central and North Imenti (both Eastern Province), the Returning Officers refused to provide constituency results to EU EOM observers before these results were confirmed in Nairobi. The constituency results form in Kangema (Central Province) showed to EU EOM observers was only signed by a party agent of PNU. ODM claimed that party agents reported that they were refused copies of result forms in many constituencies of mostly Central Province. Furthermore, according to the ECK Chairman, some Returning Officers were reported to have disappeared after completion of the tallying process in their constituencies and therefore failed to deliver the original result certificates to the national tallying centre.

The outcome of the tallying on constituency level was not publicly posted and broken down to polling station level. Consequently, it was difficult to compare result copies of polling station with the results of the tallying. ECK has not published any polling station results so far, which is a breach of basic transparency guarantees. The EU EOM in its preliminary statement of 1 January 2008 had suggested to swiftly publish results of all polling stations in newspapers and on the internet to “enable doubts over the accuracy of the presidential results to be clarified”.<sup>53</sup>

### **XIII. RESULTS**

#### **A. Tabulation and Announcement of Results**

EU EOM observers were initially not permitted to enter the national tallying centre at KICC, which is a breach of the Memorandum of Understanding between the ECK and the EU EOM and against international principles of election observation. Party agents as well as domestic and international observers could access the national tallying centre only after an intervention of ECK Chairman Kivuitu against the original practice to restrict monitoring and observation during tabulation. Even after that, admission for observers was intermittent, creating a serious lack of transparency.

The staff at the ECK Tally Centre received constituency results mainly by telephone and some by fax. Results were entered into the ECK database for the national tallying as soon as they arrived, and then subsequently should have been cross-checked with the result forms submitted by Returning Officers. Results, however, were announced without a complete set of these certificates, including documentation that justifies altered results. According to information provided by PNU, documents for 67 constituencies were not in order the night before the announcement of final results.<sup>54</sup> According to information provided by ODM, there were 48 constituencies without supporting mandatory form 16A and 47 constituencies with serious anomalies.<sup>55</sup> By 5 January 2008, six days after the official announcement of the results, the EU EOM was informed by ECK officials that the ECK had still not received the original result forms and supporting documentation from more than 20 constituencies.

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<sup>53</sup> [http://www.eueomkenya.org/Main/English/PDF/Kenya\\_2007\\_Final\\_Preliminary\\_Statement.pdf](http://www.eueomkenya.org/Main/English/PDF/Kenya_2007_Final_Preliminary_Statement.pdf)

<sup>54</sup> Conclusion of the verification conducted by PNU and ODM representatives in the ECK tallying centre on 29 December 2007 as outlined in “Table 1: The findings of the verification Exercise” in report “The future of Kenya is in the rule of law: a clarification of issues arising out of the 2007 general elections”, January 2008.

<sup>55</sup> ODM document “Death of Democracy in Kenya through the theft of the 2007 Presidential Elections”, p. 8 and 10.

Serious inconsistencies and anomalies were identified in various constituency results as announced by the ECK. For example, in Molo (Rift Valley Province) and Kieni (Central Province), there were significant differences between presidential election results reported by EU EOM observers at the constituency level and the results announced by the ECK. In the case of Molo the difference between the results announced by the Returning Officer as completed on the 28 December and those announced at KICC on the 30 December record 20,000 more votes in favour of Kibaki while in Kieni, the number of votes gained by the president was 17,000 more than was announced at constituency level. In the constituency of Kisumu Town West, the result announced by the Returning Officer at the local level and recorded by the EU EOM observers was 57,631 while the fax sent to the ECK gave 64,708 to the same candidate. Moreover, at ECK headquarters, the EU EOM Chief Observer was shown forms of the constituencies Lari and Kandara, both in Central Province, which had been changed. It was unclear, by whom, where, and when these changes were made. It was therefore not possible to verify whether the signature of the party agents was included before or after the changes.

In Limuru constituency, the Returning Officer had publicly announced 40,788 votes cast for the PNU presidential candidate. However, when the originals were delivered to the ECK on 29 December 2007, a recheck carried out at the ECK tally centre found that the results were added up incorrectly and the result was 48,384 votes cast for the same candidate. Similarly, in Lari constituency (Central Province) the Returning Officer publicly announced on 28 December 2007 that 41,213 votes had been cast for the PNU presidential candidate, while at the ECK in Nairobi this figure was increased to 49,276, without any other justification than a written explanation by the Returning Officer.

According to EU EOM reports, the constituency of Subukia (Rift Valley Province) announced final results on the basis of phone/fax information, not on the basis of the original forms delivered by the Returning Officer. The Returning Officer announced to the ECK by phone and fax 64,995 votes cast for the PNU presidential candidate, while the recheck conducted at the ECK (with changes made twice) established a figure of 59,802 votes cast for the PNU presidential candidate as per the forms 16A and 16. However, despite this, the final ECK results for the PNU presidential candidate were based on the originally announced 64,995 votes cast for the PNU presidential candidate. In the constituency of Masinga, the Returning Officer announced publicly at 09:00 hours on 29 December 2007 that 21,225 votes had been cast for the ODM-K presidential candidate. When the Returning Officer delivered form 16A on 30 December 2007 to the ECK, the correct figure of votes cast for the ODM-K presidential candidate was established to be 33,726 votes. However, the final ECK presidential results for the ODM-K presidential candidate were announced on the basis of the 21,225 votes as announced by the Returning Officer and not the 33,726 votes cast as per the original form and supporting documentation. According to ODM accounts, 47 result copies handed out to their agents do not show the same presidential results as those released by the ECK.<sup>56</sup>

Furthermore, the instances of constituencies where the difference between the turnouts for the presidential and parliamentary elections exceeded 10 per cent raises concerns of irregularities, most striking examples being Embakasi, Msambweni, Kaloleni, Taveta, Central Imeni,

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<sup>56</sup> ODM report as quoted above, Table 2.

Masinga, Machakos Town, Kirinyaga Central and Kajiado North.<sup>57</sup> The official results for the constituency of Changamwe appear also highly implausible as no invalid votes are recorded.

Following pressure from both PNU and ODM to scrutinise the tallying of presidential ballots in each of the 210 constituencies, the Chairman of the ECK agreed that two agents for every presidential candidate and five representatives from domestic observer organisations could verify the results overnight on 29 December. No international observers, including the EU EOM were permitted to participate in this scrutiny exercise. Reports from participants show that there were missing documents, documents not signed by Returning Officers, not countersigned by agents, cases of photocopies rather than the legally required original documents and substantial numbers of forms not having the required ECK stamp that validate them. In merely about half of the constituencies PNU and ODM agreed without reservation on the results and supporting documentation during the verification exercise.<sup>58</sup> According to domestic observer reports, Commissioners permitted Returning Officers whose returns exceeded 100 per cent turnout to correct them and then subsequently accepted and included such results for tallying. Furthermore, some Returning Officers arrived without the proper documentation and were permitted to prepare and complete their documentation at ECK headquarters.<sup>59</sup>

The following day, on 30 December 2007, the announcement of results was suspended. The KICC Media Election Results Centre had to be cleared with the help of the police and the ECK Chairman was escorted out of the centre by the police. At around 17:30 hours the ECK Chairman announced, behind closed doors with only a KBC team present, the final presidential results and declared the PNU candidate Mwai Kibaki elected President. Less than half an hour later at around 18:00 hours the newly elected president was sworn in at State House in a swearing-in ceremony conducted by Chief Justice Evan Gicheru. By a special issue, the Kenya Gazette dated 30 December 2007 published Gazette Notice No. 12612 announcing Mwai Kibaki elected president according to the provision of section 5 of the Constitution and gazetted the 207 elected members of the National Assembly. The ECK nullified results from Kamukunji and Kilgoris constituencies due to violence that disrupted the counting process, in Wajir North due to a tie between the two main candidates.

It is questionable whether final presidential results were announced in compliance with the law. According to ECK regulations, section 41 (1) the Returning Officer shall, as soon as practicable, forward to the ECK form 16 showing the total number of votes cast for each candidate in the presidential election, form 17 for the results in the parliamentary election, form 16A containing the presidential and parliamentary results announced at polling stations, and form 17A containing the presidential and parliamentary election results at the constituency level. The ECK, according to the same regulations, section 41 (2) shall upon receipt of form 16, hold the certificate of presidential results until results of all constituencies have been received; thereafter the ECK shall publish a notice in the Gazette declaring the person who has received the highest number of votes, as per the provision of section 5 of the Constitution, to have been elected President. Under the same ECK regulation however, the ECK may declare a candidate elected, before all constituencies have delivered their results, if

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<sup>57</sup> Data based on PNU report as quoted above, Table 3 “voting patterns & variance through-out Kenya”.

<sup>58</sup> PNU report as quoted above, see minutes of the ECK on the meeting held at KICC ECK Tallying centre on 29<sup>th</sup> December 2007.

<sup>59</sup> KPTJ report on verification exercise: “Kenyan Elections Observers Log: December 29-30, 2007”.

in the opinion of the ECK the results that have not been delivered will not make a difference as to the winner on the basis of section 5 of the Constitution.

Following the ECK announcement of the presidential election results, on 31 December 2007 four ECK Commissioners (Jack Tumwa, D.A. Ndamburi, Samuel arap Ngeny, and Jeremiah Matagoro) called for an independent inquiry into whether any of their colleagues tampered with the presidential election results before they were announced. The Commissioners cited the case of Molo constituency saying that information received from Returning Officers, after results had been announced, cast doubt on the figures presented to the public. On 2 January 2008 the ECK Chairman Samuel Kivuitu admitted to KTN that he had announced the results under pressure from main political 'protagonists' further saying there were problems in the tallying of the presidential votes, quoting the Juja and Kieni constituencies whose results were tampered with and that the Returning Officers had not countersigned them as was the normal practice.

## **B. Complaints relating to Election Results**

A very limited number of complaints were received by the EU EOM during its deployment: seven complaints in six constituencies (North Imenti, Makadara, Starehe, Bomachoge, Changamwe, Kisauni) for the parliamentary elections and only one complaint regarding civic elections (in Nyaribari Chache about the wrong party symbol of a KENDA civic candidate). These complaints were also directed to the ECK though the ECK stated to the EU EOM it had officially not received any complaints during the Mission's deployment. The candidates involved have indicated in writing that they contest the results of the elections. In most of the cases they alleged that the elections were not free and fair and that they were rigged in favour of those who won. Others alleged vote bribery, inducement and also the use of violence, threats and intimidation.

At the close of the EU EOM on 12 January 2008, no election petition had been filed with the High Court relating to the presidential election, but the period for the filing of election petitions was still open. Many political contenders and civil society activists expressed their lack of confidence in the independence and responsiveness of the judiciary. The most controversial matter remains the presidential results that have been disputed by ODM. Raila Odinga has publicly ruled out the possibility of lodging a petition, stating that the courts are controlled by the president and cannot therefore be impartial. In a statement the Law Society of Kenya<sup>60</sup> condemned the misbehaviour of the ECK, asked for it to be disbanded, criticised what it argued was a faulty tallying exercise for the presidential election, and declared null and void both the ECK certificate of results of the presidential election and the swearing in of the new President. However, it decided not to file any petition, due to the long time it takes, and it called for a political solution.

## **C. Political Overview of the Election Results**

No single party gained an absolute majority of the 210 parliamentary seats. With 99 Members of Parliament ODM is the largest parliamentary group, followed by PNU with 43. Together with the three seats of NARC and the United Democratic Movement MPs the ODM bloc

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<sup>60</sup> The Law Society of Kenya is a legal body established by an Act. One of the objects of the Society is to assist the Government and the courts in all matters affecting legislation and the administration and practice of the law in Kenya.

holds 103 parliamentary seats. PNU together with its member and affiliate parties hold 77 seats and, as ODM-K has formally entered into a coalition with PNU, the 16 ODM-K seats mean the PNU bloc has 93 seats in parliament. There are another nine parties who are not formally aligned to either of the two blocs and have 11 seats between them. In addition parties have the right to nominate altogether 12 additional MPs according to their proportional strength in parliament.<sup>61</sup> Furthermore, three parliamentary seats have remained vacant due to nullified results, two more have become vacant after two ODM MPs were killed in January 2008,<sup>62</sup> and the election of two ODM MPs to the position of Speaker and Deputy Speaker of the National Assembly have created two further empty seats.<sup>63</sup> Altogether seven by-elections have to be conducted to fill seats of parliament. Altogether 122 new MPs were elected (58 per cent), while only 71 MPs were re-elected (33.8 per cent) and 14 MPs were elected (6.6 per cent) after one or more legislative periods outside parliament. More than 20 Ministers of the Kibaki cabinet were not re-elected. The results indicate a significant level of dissatisfaction with the performance of the outgoing government and the Members of the Ninth Parliament.

According to the ECK results as announced by Chairman Samuel Kivuitu on 30 December 2007, Mwai Kibaki of PNU won the presidential elections with 4,584 Million votes (46.4 per cent) against Raila Odinga of ODM with 4,352 Million votes (44.1 per cent) and Kalonzo Musyoka of ODM-Kenya with 879,899 votes (8.9 per cent). The other nine candidates accounted for 59,172 votes (0.6 per cent). According to these highly disputed results Kibaki won a majority of votes in four provinces (Central: 96.4 per cent; Eastern: 49.8 per cent; North Eastern: 50.9 per cent and Nairobi 47.3 per cent), while Odinga received most votes in the other four provinces (Nyanza: 82 per cent; Western: 66.5 per cent, Rift Valley 64.1 per cent and Coast 58.8 per cent), while Musyoka came a close second in Eastern with 726,782 votes (43.1 per cent).

ODM refused to accept the results of the presidential elections as did many people in different regions of the country. Serious doubts were also raised not only by various civil society organisations, but also by government organisations such as the Kenya National Commission for Human Rights. The presidential elections leave a legacy of uncertainty as to who was actually elected as President by the Kenyan people. This has created an unprecedented situation in the country characterised by deep ethnic rifts and civil unrest as well as a political stand-off.

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<sup>61</sup> ODM is entitled to six additional seats, PNU to three, ODM-Kenya to two and KANU to one. Internal conflicts arose in all parties from the question who should be nominated. The ECK received different lists from ODM and ODM-K. By February 10 the ECK has forwarded all lists to President Kibaki for approval (see Constitution of the Republic of Kenya: Chapter 3, Part 1, Paragraph 32).

<sup>62</sup> These were Melitus Were for Embakasi (Nairobi) and David Kimutai Too for Ainamoi (Rift Valley Province). The background of the killing of Melitus Were remain unclear, David Kimutai Too was according to the police killed by a traffic police officer because of domestic, not politically related reasons. ODM has stated that they see the killing of the two MPs as a strategy to weaken ODM's parliamentary strength.

<sup>63</sup> Kenneth Marende from Vihiga constituency (Western Province) was elected as Speaker and Farah Maalim from Lagdera Constituency (North Eastern Province). According to the Constitution (Chapter 3, Part 1, Paragraph 37) the Speaker and Deputy Speaker have to vacate their seats.

#### XIV. RECOMMENDATIONS

*The following recommendations are offered for consideration and action by the Kenyan authorities, political parties, civil society and the international community in view of improving the framework and management of future elections:*

##### **Legal provisions should be reviewed to ensure a consistent and comprehensive framework for elections**

1. A complete review and consolidation of the legal provisions relating to elections into a single act should be undertaken to bring them fully in line with international standards for democratic elections. Particular attention should be paid to introducing essential transparency requirements to ensure public accountability of all components of the election administration. This process should include:
  - a. Introduction of legal provisions that guarantee full transparency of all components of the election process. All elements of the elections should be open to public scrutiny and the administration should be required to maximise the transparency of its activities by law.
  - b. Stipulation that the work and all meetings of the ECK are public and accessible to accredited observers, media and party or candidate representatives.
  - c. Removal of section 5 of the Constitution that requires each party to nominate a presidential candidate to qualify to put forward candidates for election.
  - d. Introduction of provisions to enable independent candidates to stand for election.
  - e. Inclusion of detailed provisions for the conduct of a second round of a presidential election.
  - f. Incorporated of legal provisions to promote women's participation in the electoral process, especially as candidates.
  - g. Procedures to nominate the 12 appointed members of Parliament should be drafted in detail on the basis of the 1997 Inter-Parties Parliamentary Group (IPPG) agreement.
  - h. Introduction of more control and more transparency in the financing of political parties and of electoral campaigns. In this context, the 2007 Political Parties Act should be put into force and implemented as soon as possible.
  - i. Inclusion of clear and detailed provision defining the exact duration of the electoral campaign period.
  - j. Provision of detailed regulations regarding the printing of ballot papers, design, format, security and destruction of the ballot paper matrix to avoid possibilities of misuse and illegal printing of ballot papers.
  - k. Establishment of a framework to enable the electoral code of conduct to be enforced in an impartial manner.
  - l. Revision of the dispute resolution system in order to provide for a prompt response to any complaint submitted during the course of the electoral process. Installing a specialized Kenya Electoral Dispute Adjudication Board.
  - m. Establishment of a specialised electoral tribunal to rule on complaints and petitions within the limited period of time frame of elections.

**The ECK should undergo a review of its activities during the 2007 elections with a particular view to rebuilding confidence in its activities**

2. The term of office of ECK Commissioners should run through until six months after the next general elections to enhance their independence and prevent the issue of re-appointment playing a role before the elections. The appointment of Commissioners should be subject to approval by a two-thirds-majority of Parliament.
3. The ECK should review the structure of its organization in order to strengthen and develop the capacity of its middle management and its secretariat.
4. The ECK should issue detailed regulations for the conduct of the entire election at every level of the process (i.e. polling station, constituency level and national level) and provide for full transparency of ECK work at each level.
5. The ECK should (i) develop a clearer system of result forms to be completed at each level of the election process, (ii) stipulate that copies of these forms should be made available to persons legally present at the election related venue, (iii) stipulate that these forms should be publicly displayed at every level of the election administration, and (iv) ensure that results are published by polling station at the constituency level and on the ECK website.
6. The Electoral Code should enable the ECK to issue regulations, guidelines or instructions, without the approval of the National Assembly, which should be legally binding to all election stakeholders. In all cases the ECK should issue such regulations in adequate time to enable election officers, political parties and voters to be fully aware of their contents. The ECK should also avoid issuing last minute instructions.
7. A comprehensive review of constituency delimitation to ensure compliance with the constitutional and international principle of equal representation of the voters should be undertaken.
8. Special arrangements should be made to facilitate the vote of special categories of voters on duty on election day such as electoral staff, armed forces and police and to organize special voting for patients in hospitals and sanatoria (as well as prisoners).
9. Greater investment in voter education should be considered to ensure voters are fully aware of their rights and informed about all components of the election process.

**Continued effort should be made by the ECK to improve the voter register**

10. Voters should be registered to vote at the place of their residence. Voters should also be required to vote at the polling centre where they have registered and vote by showing an identity card, and not allowed to vote anywhere else apart from in exceptional circumstances such as polling officers working outside their constituency.
11. Cooperation between the ECK and the Registrar of the persons should be improved and civil registration should take place at the constituency level in order to allow the

ECK to produce voters' lists, which are extracts from the national voter register for a particular polling station.

12. The voter registration database should be developed on the national level and new registrations should be effected at least on constituency level, outside of the registration drives, with constituency registration offices fully computerized so that new entries can immediately be checked whether on the voter register or not in order to improve the process and avoid double and multiple registration.
13. Clear and detailed provisions should be drafted to define the maximum number of registered voters per polling station.

#### **Polling day procedures should be improve to ensure consistency**

14. The ECK should pay particular attention to improving the secrecy of vote, especially ensuring that regulations for assisted voting are properly and consistently implemented. Assistance to vote should be provided to disabled voters only and not to illiterate voters, since the ballot paper is clear enough to be used easily by illiterate voters.
15. The voter lists for the polling stations should contain a place for the voter to sign or put down a thumb mark as a safeguard against ballot paper stuffing. ECK regulations should stipulate counting the voters' signatures on the voter lists and reconciling this resulting total with the number of ballot papers in the ballot boxes.
16. When a general election takes place, as a rule, the three ballot papers should be issued to the voter at the same time.
17. Clear provisions should define the validity or invalidity of a ballot paper found in the wrong ballot box.

#### **Tallying and the announcement of results processes should be overhauled to ensure transparency and greater security measures**

18. Tamper proof packets, with security seals, should be introduced for packing and delivery of election results at every level, and clear and detailed instructions issued by the ECK for each stage of the election process. The forms used on election day by polling officers should be simplified and tamper evident.
19. The ECK should develop a clearer system of result forms to be completed at each level of the election process and stipulate the availability of copies for persons legally present at the election related venue, as well as making the results forms public at every level by posting the results at the door of the polling station and the constituency office, and ensure the publication of the election results polling station by polling station on the ECK web-site in line with best international practise.
20. The ECK should develop a time-frame for the announcement of results in order to avoid increasing tension due to delays and uncertainties in announcing results.

### **Political party structures need to be developed to ensure greater continuity**

21. Political parties should develop their internal capacity and structures to build a permanent presence in Kenyan political life.
22. There should be internal party rules developed for regulating the primaries for the selection of their candidates to ensure transparency and consistency in the selection process.

### **The regulatory framework for the media sector should be reviewed so that it meets international standards**

23. The powers of the Media Council should be more clearly defined and set out in law. Further provisions relating to media coverage of elections should also be refined and their status clarified. Provisions in the Media Act prescribing penal sentences should be removed as these are un-proportional and incompatible with international standards in this field.
24. The composition of the Media Council should be broadened to include a more representative selection of groups in society through a transparent and public process of selection. The Council's functions and mandate should be clarified and an adequately funded secretariat be established to undertake the management of this institution. A complaints commission should be established using transparent and independent appointment procedures.
25. Provisions in the law such as those on seditious libel should be decriminalised and replaced with suitable and proportion measures. Libel and defamation remedies should also be proportional and not excessively punitive.
26. An adequate regulatory structure should be established to ensure that the provisions in the Kenya Broadcasting Corporation Act are respected by KBC. Key provisions such as those pertaining to free access slots for party political broadcasts should be clarified and precisely defined as to the rights of the parties and candidates in law. Mechanisms should be set up to ensure the independence and public accountability of KBC and a clear monitoring mechanism established to guarantee this organisation's impartiality and balance is maintained.
27. The work of the Presidential Press Service should either be suspended during campaign periods or its activities limited to the official duties attached directly to the presidential office. The access the Presidential Press Service gains to KBC should be re-negotiated on commercial grounds. Its programmes should be clearly labelled as advertisements.
28. The Government should ensure greater access for the media to government records in order for journalists to report on policy making decisions and provide greater transparency and accountability in government by introducing a Public Information Act.

29. A framework and clear guidelines should be developed for the media to be able to screen paid for political advertising to ensure consistency in applying taste and decency as well as other legal standards. A committee composed of members of the media community should be established prior to any future elections to guarantee consistency across all media in the application of these standards. All political advertising during the election campaign period should be required to carry some form of identification.

### **The Human Rights situation in the country needs urgent attention**

30. The deterioration of the humanitarian situation in parts of the country following the elections requires continued attention. Key events should be investigated in an impartial, transparent and effective manner. The root causes of the civil unrest should be addressed and responses by the authorities scrutinised.
31. Enhanced measures should be introduced to sensitize the population and political parties as to the adverse effects of both acts of violence and divisive campaigning. A necessary framework should be introduced to ensure the provisions in the electoral code of conduct and other legislative provisions receive prompt and effective responses from the authorities. In order that these provisions are respected penalties for breaches to its provisions should be proportional, but effective remedies.
32. Greater resources should be allocated to civic education programmes directed at the female population particularly in rural areas in order to increase their awareness of their political and civil rights. This project should include grassroots organisations and educational institutions to ensure the inclusion of all age groups.
33. Increased representation of women in public and political life should be reviewed to ensure their full participation in the decision making process and political party structures. The 30 per cent target quota for female participation in parliament should be addressed and quotas for female parliamentarians reconsidered. Furthermore, greater respect and understanding of the political parties concerning the positive role of women in the political and civil spheres is essential and should be a priority initiative for the new parliament and the parties.
34. The use of vetting procedures for certain parts of the population should, if maintained, be applied without unnecessary delays. Delays in issuing identity cards should be reduced, particularly prior to elections. The practice of bribery to speed up applications should cease, as it constitutes discrimination against the poor.
35. The ECK should introduce a permanent set of measures to ensure that all sections of the population that are displaced for reasons of insecurity, natural disasters or any other reason beyond their control can vote. Prior to election periods a full assessment of the needs of these areas should be undertaken to allow adequate planning and logistic preparations. Temporary parallel polling stations should be reviewed to ensure consistency and security in the places where people vote. All necessary facilities and documentation needed by voters in these areas should be in place prior to the elections.