

Supporting Kenya's Election Processes: Lessons from Past Evaluations

Report Prepared for the Joint Donor Group on Elections

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Executive Summary

1. Donors have supported the Kenyan elections for many years, but more consistently since 2007. The support has been coordinated within the aegis of the Donor Group on Elections (DGE), a sub-group of the Donor Group on Democratic Governance (DGDG). The DGDG is a forum that brings together development partners that have programmatic and strategic interest in democratic governance in Kenya.
2. Following the conclusion of the 2013 elections, the DGE designed this assignment so as to assess the impact of past electoral support with a special focus on the role of donors in Kenyan electoral process to date as a basis for informing decisions and strategy for possible support for 2017 elections. The Assessment has reviewed the UNDP basket support facility since 2007 and its evaluations, reports from programme evaluations of bilateral donor support, domestic observation reports and international observer mission reports and augmented these with limited interviews as a basis for making recommendations for future programme design for supporting 2017 General Elections.
3. In assessing donor support to the elections in Kenya, this report has taken as its baseline the 2007 elections. This year is instrumental in Kenyan electoral history for several reasons. First, those elections marked the first comprehensive effort at donor coordination under the DGE in supporting elections through pooling resources in a joint donor basket. Secondly, 2007 elections were characterised by Post-Election violence whose immediate trigger was the general elections resulting in comprehensive review of the framework for and conduct of elections. The result of that review undertaken by the Independent Review Commission on the 2007 Kenyan Elections (IREC), chaired by a Retired South African Judge, Johann Kriegler, was far reaching administrative, legal and constitutional reforms to the electoral system and process.
4. The culmination of these reforms was the Constitution adopted in a referendum in August, 2010. The key highlights included the establishment of an Independent Electoral and Boundaries Commission (IEBC), the restructuring of the governance arrangement to national and devolved levels, fresh voter registration, increase in the number of electoral seats, enhanced regulation of political parties, changes to the electoral dispute resolution procedures and changes to the electoral system.

5. On donor support to Kenyan elections, the IREC recommended a thorough evaluation of the assistance provided by the international community to the electoral process and based on that review to apply lessons learned and ensure that the assistance provided by the international community is carefully co-ordinated and defined well in advance of the electoral process. This formed part of the rationale for the instant assessment, namely, determining the extent to which donors have adhered to the recommendations from IREC and previous evaluations.
6. In assessing donor support, the report has underscored the imperative of appreciating that elections are a process and not an event. Secondly, that they involve several actors who relate with each other in a chain. Donors should ensure that their support seeks to strengthen the electoral chain. This requires them to analyse the chain so as to identify weak parts of that chain for their support. In undertaking the assessment and making consideration for support, the report recommends that donors pay attention to the following criteria.
 - a. Accord due attention to the political context in deciding who and what to support;
 - b. Identify key areas of weakness in the electoral chain;
 - c. Examine the centrality of the function to be supported vis-à-vis the role of government;
 - d. Assess other sources of support that exist if donor support is withheld or is unavailable;
 - e. Avoid convenient decisions on support; have a futuristic, long term agenda.
7. The report, based on a review of the reports and assessment of several thematic areas, including legal reforms, civic and voter education, electoral administration, political parties, security and peace building, voter registration, participation of marginalised groups, role of civil society, private sector and media and cost of elections concludes that donors still have a role to play in supporting the 2017 elections. However that role has to appreciate the changed nature of the 2017 elections, as a result of the outcome of the ICC trials, limited appetite and enthusiasm about the elections, views on the role of the international community and reality on the actual limit and consequent impact of the contributions of donors to the Kenyan elections.
8. The report makes several recommendations including:
 - a. retain a basket and coordinated approach to supporting the 2017 elections;

- b. Create more than one basket for supporting the 2013 elections and separate the basket supporting the IEBC from that supporting other aspects of the electoral chain and process;
 - c. Prioritise areas for support based on an assessment of the weakest link, areas outside core Government support and those likely to have greatest impact on the 2017 elections;
 - d. adopt and implement an electoral cycle approach to supporting the Kenyan elections;
 - e. Balance between technical assistance and direct financial assistance in supporting the Kenyan elections;
 - f. Create clear rules to govern the management of basket funds including relationship between the basket managers, recipients and donors;
 - g. Develop conditions for the use of resources to support IEBC to avoid blank cheques, procurement of too much equipment and unnecessary foreign travels and training with donor support;
 - h. increase coordination of donor policy and diplomatic engagement around elections;
 - i. avoid direct implementation by basket funds;
 - j. pay attention to the political context of elections and electoral support
 - k. support the reforms to domestic observation;
 - l. separate domestic observation from advocacy support around elections;
 - m. respond to the context of devolution in designing a support facility for 2017 elections;
 - n. create greater linkages with Constitutional and independent offices, like the Auditor General; and
 - o. support greater stakeholder engagement around the 2017 elections.
9. To implement these recommendations, donors should urgently support a stakeholder conference involving all key stakeholders to discuss the electoral cycle for the 2017 elections, identify key elements of that cycle and timelines to ensure consensus and support for implementation. Secondly, the support by donors for the 2017 elections should be rolled out in 2015 and build on the outcome of the stakeholder conference. This should commence with a decision on key areas for donor support for the 2017 elections. Finally donors should then determine which baskets to establish for the 2017 elections, identify those who will manage those baskets and the set the rule for engagement for each of the baskets.

I: Introduction and objectives of Report

Introduction

10. Kenya operates a liberal democratic system of government. In this system, elections should play a critical role in constituting and periodically renewing government. As some scholars have argued, elections are the kernel of political accountability and a means of ensuring reciprocity between leaders and citizens. Indeed, though elections are not synonymous with democracy, they embody democracy's main principle. Consequently, while not every country that conducts elections is democratic, every democracy should hold regular elections. At the heart of the legitimacy of a government is, therefore, the ability of people to actually exercise choice at the ballot.

11. The principle behind the credibility of elections is what Mozaffar and Schedler argue: that the outcome of an electoral process depends on how the process abides by the principle of procedural certainty and substantive uncertainty that is, certainty in the process leading to balloting (level playing field in the electoral cycle) and uncertainty on the eventual winner. In other words, the main aim of an electoral process is that the rules of the game do not predetermine the winner. While the rules must be clear and certain to all, it should make it impossible to know and declare the eventual winner of the elections until the process has been implemented.

12. The principle of procedural certainty and substantive uncertainty is important and must be the basis against which the Kenyan elections are conducted. The goal must be to ensure a fair and transparent electoral process whose outcome reflects the will of Kenyan voters. It is the basis against which donors should support the electoral process and that such support must be gauged, discussed and justified. This report locates the role of donor support to elections to the principle highlighted above. It assesses that support and recommends, based on an understanding of past electoral experiences and using existing donor and related evaluation and observer reports and additional data, a method of aligning donor support with this overarching objective. It is expected that such alignment will pay due attention to the overall electoral cycle as mandated in constitution and ensure the cost deployed in the conduct of elections (both donor and national) are leveraged in a way that facilitates the attainment of the overarching objective above. In short, this report explores the place of donor support in Kenya's democratic governance and national priorities in light of Constitution of Kenya, 2010, Vision 2030 and MTP II.

Objectives

13. The objectives of this assignment have been set as being an assessment of the results of the different interventions made by select partner organizations on electoral processes around the 2013 General Elections through an analysis of their respective evaluation reports. Based on that assessment, recommendations are to be made to aid the DGE in designing and formulating a more responsive, relevant and efficient electoral support programme. These have been further elaborated into the following specific objectives:-

- To review the evaluation reports of the UNDP basket funds for the 2007 general elections, the 2010 constitutional referendum and the 2013 general elections to determine which recommendations specifically made for implementation by development partners were fully, partly or never implemented and the reasons and circumstances informing this.
- To assess the evaluation reports of key state and non-state partners covering major thematic areas in electoral processes.
- To analyse the reports commissioned by bilateral development partners to evaluate their elections programmes.
- To analyse the recommendations of the main Election Observation Missions on the 2013 elections
- To make clear and focused recommendations on possible design approaches for a new programme, primarily targeting the 2017 General Elections.

14. The assignment focuses much more on recommending options for election support programme design for 2017 elections to the DGE. The assignment takes the election reports for the 2013 elections as the starting point but not the exclusive reference material. The consultants, therefore, interpreted the task as being broader than just a review of recommendations that have come out of past election evaluation reports to include a broader analysis of accumulated experience with election support in Kenya, the lessons learned and their implications for future support and delivery mechanisms for such support.

15. To achieve the outlined task a mix of methodologies were employed. First, and forming the main source of data, was a review of existing evaluation reports on donor support for elections in Kenya since 2007, with greater focus on the reports arising from support to the 2013 elections. The reports constitute the cumulated knowledge and experience of previous donor support programmes and the basis upon which a reading of possible areas of improvement going into the 2017 elections is to be built. We therefore critique their programmatic contexts, the support strategies adopted, funding plans and how these were prioritised and implemented, but also their findings about the influence of donor interventions on electoral institutions and outcomes of the electoral process.

The analysis has also helped to isolate the recommendations implemented and those not implemented, distil the lessons learned and those not learned. The reports that are reviewed are listed in Annex 1 to this report.

16. In addition to evaluation reports, domestic and international observers have also produced reports for elections and referenda in the period 2007 to 2013 consistently. While their reports are not principally on donor support, they speak to the entire electoral process and key electoral themes, making recommendations in the process, which are important for designing an electoral support programme. As a result, this review has also appraised those reports and gleaned important lessons for DGE to take into account.
17. The support that donors have provided to the electoral process has worked within a context, involving several actors including the Government, the electoral body, political parties, media, religious organisations and civil society amongst many other players who constitute what we term in this report as the electoral chain. Consequently setting the basis for future programming has to rely on both past evaluation reports, but also insights from key players in the electoral process. Towards this end, the consultants have engaged in limited and targeted discussions with representatives from key stakeholder groups as part of the assessment process including those from the donor group, electoral institutions, political parties, judiciary, civil society, private sector, Academia, Constitutional Commissions, Auditor General and Government. Consultations were undertaken both in Nairobi and additional discussions with stakeholders were also held in Nakuru, Kisumu, Mombasa and Garissa. These helped to obtain additional information on the role of donor support and context for support to Kenyan elections in 2017.
18. Based on the review of previous reports and limited interviews, this report identifies core strengths of donor support to the electoral process in Kenya in order to develop an understanding of the cumulated donor experience and expertise in electoral support; point out gaps and areas of weakness and show if, and how, these could have undermined the effectiveness of donor support programmes for elections. The aim has been to identify both positive and negative lessons from past engagement so as to inform future directions and strategies. In carrying out the assignment, the consultants adopted the position that the review is not being undertaken as an end in itself. It is, instead, part of the process of harnessing information and generating initial ideas to help inform design of future donor engagement in Kenya's electoral process.

II: Kenyan Elections in Context

Elections before 2007

19. The story of elections in Kenya goes back to the end of colonialism when in 1957 a qualified franchise was extended to African representation in the Legislative Council. Four main transitions have characterised the history of elections in Kenya since then; each of course, came with its own gains to the democratic project even though the process has never been a linear progression. The first transition involved a universal franchise of May 1963 when elections ushered in *uhuru* in December 1963. The overarching framework for these elections was a nationalist struggle for independence even though those elections were also framed by a colonial project that tribalised politics. The second transition occurred from the end of colonialism through all the subsequent elections leading up to 1988 mlolongo elections. The overarching framework for these elections was a largely authoritarian one-party dispensation in which contest over presidential elections never took place.
20. The third transition involved multi-party elections, themselves the outcome of years of struggles for democracy that led to the repeal of Section 2(a) of the then constitution and the emergence of multi-party politics in 1992. From 1992 to 2007, elections were far more open and transparent than previous ones as they involved a contest between different parties in a multi-party framework. Substantively though, the competitive content of those elections were limited by manipulations of elections by incumbent regimes. Thus, the 1992 and 1997 elections were not free and fair even though election observers judged the 1997 elections as reflecting the will of the people. The frustration emanating from the menu of manipulation of elections to defeat the popular will at the ballot came to head in 2007 and was an immediate trigger for post-election violence, an eventuality that framed a new era in Kenya's electoral politics.

Elections since 2007

21. The post-election violence marked out the 2007 elections as a new and major departure point in Kenya's electoral history. Following the outbreak of violence that saw 1,300 people killed and over half a million others displaced, the need for major reforms in the country, including those touching on elections, was accepted as part of Kofi Annan's Agenda Item 4. This was part of the package brokered with the support of the international community under the framework of the Kenya National Dialogue and Reconciliation (KNDR) process. During this mediation process, the parties agreed to establish an Independent Commission on the Review of the 2007 Election (IREC) and a Commission of Inquiry on Post-Election Violence (CIPEV). IREC was charged with investigating all aspects of the 2007 presidential elections and making findings and recommendations to improve future elections while CIPEV investigated, among

others, facts and circumstances surrounding acts of violence following the 2007 Presidential Election and actions and omissions of state security agencies during the course of the violence and making recommendations as necessary. IREC was chaired by Judge Johann Kriegler from South Africa and CIPEV by Justice Philip Waki and both came up with several conclusions and recommendations that have formed the basis of or informed electoral reforms in Kenya since then.

22. The IREC found that Kenya had a defective legal system for the conduct of elections which were exacerbated by numerous abuses of the electoral process as a result of accumulated history of impunity and blatant disregard of the law. The Commission also found counting and tallying so confused and confusing and concluded that the conduct of those elections was so materially defective that it was impossible to establish the true and reliable result for the presidential and parliamentary elections. The CIPEV mapped out the violence and identified cases where it was pre-planned and others where it was spontaneous. It, however, reserved for greatest condemnation for the state security agencies. Though it noted that there was enough intelligence predicting possible occurrence of violence, the Commission noted little evidence on the part of the police of planning and preparation to prevent or ameliorate the violence. It also accused the police and political actors of impunity and recommended major reforms within the police sector that subsequently formed the basis of reforms under the new constitutional dispensation.
23. Under the terms of the agreement mandating the constitution of CIPEV, the Parties expressed a commitment to identify and prosecute perpetrators of violence. In pursuit of this mandate and cognisant of the history of impunity dominating the Kenyan political scene, the commission developed a list of those considered most responsible for the violence and gave the Kenya government the first chance to investigate further and prosecute them. Failure to do this, the Commission provided a second back-up option of handing over of those names to the ICC prosecutor for further investigation and prosecution.
24. Two things clearly stand out with respect to the 2007 PEV. The first is the generalised findings that core to Kenya's reform challenge and electoral history was the continuation of one-party, personality driven electoral politics. Second was the identification of impunity as a key driver of politics including its negative impact on electoral politics. These influenced IREC in recommending a range of reforms necessary for the conduct of proper elections in 2013. It referred to the need to review and systematise the constitutional and legal framework, the streamlining of the legal framework for the election management body including parts that secure its independence and enabling it to work with CSOs, developing a media policy and securing the independence of the media, movement to a new voter registration system, among others. It also called for

the disbandment of the Electoral Commission of Kenya as the starting point of the recommended electoral reforms.

25. The IREC report emphasized the need for transparency in the conduct of elections and argued for post-election audits and evaluations recommending that such reports should be published on the website to ensure transparency. With specific reference to the international community, the IREC report recommended *a thorough evaluation of the assistance provided by the international community to the electoral process* and based on that review to apply lessons learned and ensure that the assistance provided by the international community is carefully co-ordinated and defined well in advance of the electoral process.
26. The recommendations of the IREC report formed the basis of electoral reforms that included disbandment of ECK and establishment of an Interim Independent Electoral Commission (IIEC), administrative reforms in the manner of conduct of elections, fresh registration of voters, introduction of technology, reforms to the regulatory framework for political parties and legal reforms. It also formed the basis of the provisions on elections in a new Constitution as part of the constitutional review process. Donors supported the work of IREC and engaged with the electoral process thereafter on the basis of implementation of the recommendations emerging from that report.
27. It was with a reconstituted election management body, the IIEC that Kenya went into the 2010 referendum on the draft constitution. This constitution encapsulated many of the provisions emanating from the reforms mandated by the KNDR. Though the campaigns were intense and acrimonious at times, the voting and tallying was smooth and the announcement of the results came quickly. The victors celebrated while the losers conceded defeat. The IIEC had successfully deployed an electronic system for the transmission of the results at the referendum and this success buoyed many into general respect for the Commissioners and the Commission. This was the case even though the referendum needed more rudimentary technology to succeed compared to the forthcoming 2013 elections.
28. Ironically, it is the 2010 constitution that mandated a much more complex, very demanding, electoral process with a range of changes previously not handled by any election management body in Kenya. Among the key changes to the electoral system emerging out of the 2010 constitution was, first, the devolved system of governance to counties. This came with the introduction of new levels of representation leading to a total of six ballots for every voter in the 2013 elections. Second, it amalgamated into the functions of electoral body the added function of boundary delimitation. Thus, the newly constituted IEBC was both an electoral and boundaries commission. Three, though not

constitutionalised, the expectation going into the 2013 elections was that vote tallying and transmission process would be by electronic means. Further, the role of civic education was partly handed to the new commission. Further, the regulation of political parties encapsulated in both the Constitution and Political Parties Act was jointly handled by the Registrar of Political Parties and IEBC and required the two to work together in ways never tried before. This was only partially addressed by the fact that the Registrar of Political Parties continued to be an officer of the IEBC as a result of delays in appointing a substantive holder to the post following the enactment of the new Political Parties Act.

29. Most of the new provisions and mandate was meant to streamline the conduct of elections, and to ensure free and fair and transparent elections. However, they were new, complex and required to be implemented within a short time period of less than three years. Donors supported the electoral process with a view to helping the country and various institutions to ensure that the 2013 elections were conducted freely, fairly and peacefully.

As the next sections shows, a range of actors also came to play a key role in the conduct of elections and formed an electoral chain that is useful to understanding the conduct of elections in Kenya and future donor support to elections. The IREC report had already pointed to the importance of leveraging resource through better co-ordination of donor support. The report therefore recognized the importance of donor support to elections, something that was underscored by previous support to election observation and later direct support to election through a basket fund. As early as 1997, the role of donors in elections had been an issue of disquiet especially when the political opposition felt that donor support to election observers had assisted in legitimising flawed elections. But the 2013 elections saw increased donor interest in elections. This was forced largely by the failure associated with the PEV. In this new dispensation, donor interest and support increased exponentially thereby requiring new thinking on how donors can focus on the overall electoral cycle while leveraging resources but in a way that supports the consolidation of democracy by supporting those aspects of the elections that ensure a free, fair and transparent election.

III: The Electoral Chain in Kenya and Key Actors

30. The conduct of an election is a process that involves a sequence of events and the engagement of several actors. Supporting elections must consequently pay attention to two critical but interrelated concepts, that of electoral cycle and electoral chain. The former relates to the reality that elections are not an event but a continuous cycle where the end of one election marks the beginning of the next. In Kenya, it is the political class who take the concept of electoral cycle too seriously, by starting campaigns for the next elections as soon as the

results of one election are announced. All other actors take a break from one election before starting preparations for the next.

31. In the conduct of an election, there are several actors who play a role and whose conduct impacts on the outcome of an election. Any support to the electoral process, must analyse and understand the electoral chain. By electoral chain, we refer to the interactions of actors in the electoral cycle. This interaction is guided by an electoral process that links actors and defines their relevance within that cycle so that electoral management is steered towards its outcome. For an electoral outcome to be judged legitimate and therefore contribute towards the overarching goal of free, fair and transparent elections, they must obey the principle of procedural certainty and substantive uncertainty. It is the actors within that process that guarantee this principle. While it is possible for there to occur errors in the electoral process, there is a threshold within which those errors are acceptable.
32. The DGE must pay attention to and understand the electoral chain in Kenya if their electoral support is to be effective in 2017. This will help them identify the weak links in the chain that has often undermined the credibility of elections and increased costs. Based on an appreciation of the weak link in the electoral chain, their support can be much more targeted and impactful. As a result, it is hoped, the DGE will be able to better target its interventions and get the best effect of its support to elections.
33. As stated above, support must also appreciate and align to the electoral cycle. The electoral cycle is never-ending, the end of one election normally also marks the beginning of preparations for the next. Although there is always a lull soon after announcement of the outcome, the IREC in fact recommended the need for an audit and evaluation of previous elections so that lessons can be identified and cumulated for the new electoral cycle. In Kenya, the cycle ideally involves the following: voter registration, civic education, boundary delimitation, formal registration of nominated candidates, preparation of balloting material; identification and deployment of electoral officials; balloting, tallying and announcing electoral outcome.
34. The electoral management body (EMB) also oversees the accreditation of election observers, media and adjudicates over conflicts in party nominations. It has quasi-judicial powers to ensure that electoral rules are complied with and can discipline electoral offenders. Some of these functions are however also vested in the judiciary, the Registrar of Political Parties, The Political Parties Dispute Tribunal and the media oversight body.

35. The EMB is therefore a very important actor in the electoral cycle but cannot act alone in any stage of the cycle. It requires the involvement and contribution of several other actors. Actors in the electoral process include the EMB (the central institution in the electoral process), political parties, security agencies, judiciary, media, state institutions with oversight functions over aspects of the elections like parliament, and civil society organisations. Since 2007, external actors like donors have also come to play a crucial role in the electoral process by supporting aspects of the management of the electoral process, observing and conferring credibility to elections. All these actors are important to the success or otherwise of elections, but some are more consequential than others.

36. As the principal institution of election management, the IEBC carries most weight. The success of its work depends entirely on its internal organisation, the balance between commissioners and secretariat and its ability to secure and defend its autonomy from contenting parties, especially the incumbent. Independence is critical to the IEBC because the legitimacy of the electoral outcome rests on the guarantee of fairness in the process. The security agencies and the judiciary are important because they guarantee the safety of the electoral process. The police provide physical security while the judiciary guarantees that where electoral disputes emerge, they will provide fair and just review and adjudication. Independent oversight over the electoral process is important especially in situations where the EMB is not wedded to a culture of transparency and where electoral competition is a zero-sum game. As such, different CSOs and state institutions charged with such oversight require support to effectively complement the work of IEBC. This should however extend to institutions charged with civic education functions and functions of guaranteeing inclusion of women, youth and marginalised communities in the electoral process. Paying attention to the role of political parties and their regulation also becomes important.

37. According to Chief Justice, Dr. Willy Mutunga, free and fair elections are about the chain, not about a single actor.¹ A weakness in the electoral chain often affects the overall management and outcome of elections. Some institutions in the chain can easily be blamed for weaknesses located elsewhere in the chain. Thus, paying attention to the whole chain is critical for both state and donor interventions in election support. In previous Kenyan elections, there have been several sources of weaknesses in the electoral chain. They include the following:-

- a. inability of some institutions and actors to effectively handle their responsibilities;

¹ Personal Interview with Consultants conducted on 28th October 2014.

- b. interference from actors including the government or opposition or their allies;
 - c. inadequate support of the full electoral cycle leading to skewed focus on electoral campaign;
 - d. the growing complexity of those elections;
 - e. the zero-sum nature of the election that leads to an intense contest among competitors;
 - f. the fear of or actual outbreak of violence;
 - g. lack of proper understanding of the legal framework for elections among political actors and citizens.
38. Therefore, in weighing donor support to elections, the following criteria are important and will be applied in making recommendations for the strategy for 2017 elections:-
- a. Accord due attention to the political context in deciding who and what to support;
 - b. Identify key areas of weakness in the electoral chain;
 - c. Examine the centrality of the function to be supported vis-à-vis the role of government;
 - d. Assess other sources of support that exist if donor support is withheld or is unavailable;
 - e. Avoid convenient decisions on support; have a futuristic, long term agenda.

IV: Key Themes Emerging from Past Election Evaluation and Observation Reports

Legal reforms

39. The drivers for the existing legal regime for elections were the developments that followed the 2007 general elections. These elections were contentious and divisive. The presidential results were hotly disputed and resulted in nationwide violence. International efforts led by Kofi Annan negotiated a power sharing agreement, formalised in the National Accord and Reconciliation Act signed on 28 February 2008 that resulted in the formation of a coalition government, one geared towards national unity. The key mandate of the coalition government was to pursue comprehensive political and social reforms under the auspices of Agenda 4+, namely: examine and address constitutional, legal and institutional reforms, poverty and inequality, youth unemployment and land reforms.
40. The government was required to create institutions that would both address the genesis of the 2007 election violence and suggest legal, institutional and policy reforms that would forestall similar crises and place the country on the trajectory to peaceful and prosperous development. Two major mechanisms that were

established to pursue these goals were the Independent Review Commission on the General Elections held in Kenya on 27 December 2007 (IREC) and the Commission of Inquiry into the Post-Election Violence (The Waki Commission).

41. IREC's mandate included reviewing the organisation and conduct of the 2007 elections, extending from civic and voter education and registration through polling, logistics, security, vote-counting and tabulation to results-processing and dispute resolution, and assessing the structure and composition of the ECK in order to assess its independence, capacity and functioning and to recommend electoral and other reforms to improve future electoral processes.
42. IREC was expected to analyse the constitutional and legal framework for elections and review the work of and capacity of the defunct Electoral Commission of Kenya (ECK) to discharge its mandate as expected. In its report, the IREC concluded that the elections were so flawed that it would be difficult to ascertain who won and, and to forestall a similar crisis, recommended sweeping reforms to the legal and institutional architecture of elections. The Commission found many legal and institutional gaps in the conduct of elections. Just to highlight a few. First, the voters register was materially defective in a way that effectively impaired the integrity of the election results. Second, ECK was incompetent and abdicated its mandate of conducting credible, free and fair elections. Third, the constitutional, institutional and legal framework for Kenya's elections was so weak that it required an overhaul.
43. With regard to resolving elections disputes, the IREC found that the mechanisms for these were not efficient and effective. Courts took inordinately long to determine elections petitions. It recommended enacting a separate law to facilitate the establishment of a special Electoral Dispute Resolution Court to handle appeal matters from the initial stages of dispute resolution by the ECK. The law was to delineate both disputes that the EMB would handle and those that would be the responsibility of other institutions. The law was also expected to entrench a statutory limit to ensure that election petitions are finalized in good time, with a proposed time limit of six months.
44. The IREC recommended a menu of legal and institutional reforms to improve the electoral process. Among these were: consolidating into one statute all laws governing elections; entrenching in the Constitution the right to vote; establishment of efficient and just mechanism for resolving elections disputes; removal of laws discriminating against persons with disability; introduction of a law to ensure election petitions are heard and determined fast, preferably within six months from the date they arose; creation of an electoral management body that is independent in a number of ways including having security of tenure and financial independence; and, separating and clarifying the roles and responsibilities of the Commissioners and secretariat.

45. Kenya introduced a raft of legal changes to fill the gaps and weaknesses found in the laws that informed the 2007 elections. Anecdotal evidence suggests that the country has one of the most progressive constitutions. It guarantees political rights, the right to vote and stipulates principles governing the electoral system such as integrity. The Elections Act, the IEBC Act and the Political Parties Act implement the Constitutional principles and the recommendations that the IREC made.
46. The law provide for different forums for resolving disputes arising amongst different parties and bodies at different points in the electoral process and. Disputes revolving around party nominations were to be lodged, heard, and determined by internal political party dispute resolution mechanisms, established in accordance with their respective party constitutions. Contestants not satisfied with the internal party mechanism had the option to lodge a complaint with the IEBC, whose mandate includes settling electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.+ The IEBC created a dispute resolution committee to settle disputes related to nominations of candidates and party lists. More than 200 disputes relating to nominations and over 2000 relating to party lists were filed in this Committee.
47. The Political Parties Dispute Tribunal (PPDT), provided for in the Political Parties Act, provides a forum for addressing a range of disputes including those between members of a political party and the political party. Some contestants aggrieved with how parties conducted their primaries skipped the internal party dispute mechanism and lodged appeals before the PPDT. So did some of those who were aggrieved by how political parties came up with party lists.
48. The Judiciary established the Judiciary Working Committee on elections Preparations (JWCEP) to advise the Judiciary about handling disputes emanating from elections. The Committee spearheaded the formulation of Elections (Parliamentary and County Elections) Petition Rules 2013 and the Supreme Court (Presidential Election) Petition Rules, both providing procedures for resolving election petitions.
49. Disputes challenging results of parliamentary and senatorial elections must be filed at the High Court within 28 days from declaration of results and the court must decide the case within 6 months from the date of filing the suit. Those challenging presidential elections must be filed at the Supreme Court filed within 7 days of the declaration of results and a determination made within 14 days from the date of filing. The time limit for challenging the presidential election is too short; it may not afford sufficient time to gather evidence, file a complaint and allow the Supreme Court to hear and determine the case

effectively. However, the Supreme Court was of the view that the time was sufficient in view of the exigencies of office involved.

50. Articles 97(1) (c), 98(1) (b) (c) and (d) and Article 177 (1) (b) and (c) of the Constitution provide for election of members of, respectively, the National Assembly, Senate and County Assembly on the basis of proportional representation. Before an election, a political party is expected to nominate candidates under the proportional system and submit the party lists, in order of priority, to the IEBC. After elections, and based on the performance of the party, the Commission will allocate seats to those on the party's list. In a case filed by the National Gender and Equality Commission, the High Court held that the IEBC has responsibility to settle any disputes concerning party lists and also allocate names on the lists so as to ensure representation of marginalized groups.

51. However, the above laws did not, in some respects, work as effectively as was hoped during the 2013 elections. Parliament amended the Elections Act a number of times and very close to elections and jeopardised IEBC's proper planning and conduct of the elections. The Election Campaign Finance Act was passed after the 2013 elections. The principle requiring gender proportionality in elective bodies was not implemented with the Supreme Court ruling that it was a progressive requirement and setting a time limit of 2015 for enactment of the requisite law. Tallying, declaration and announcement of votes remains a contentious issue and is a key contributor to disputes and tensions that arise around elections. There is a conflict of mandate among the IEBC, Political Parties Disputes Tribunal and the Court- in resolving of election disputes and this led to a lot of confusion and forum shopping. The demarcation of the Commissioners' and secretariat powers and responsibilities is not very clear and this causes confusion. This was witnessed during procurement of technology for conduct of elections. Primaries were held so close to the elections, and many disputes arose and, therefore, the IEBC Disputes Resolution Committee and the Courts had very little time to deliberate on the petitions due to their volume as well as the time constraints.

52. While tremendous efforts have been made in improving the legal framework for the conduct of elections, different evaluations have identified several loopholes and contradictions still exist that require to be dealt with as part of preparations for the 2017 elections. First, is streamlining of the disputes resolution mechanism. Second, review of the law to remove weaknesses that prevent it from working as effectively as envisaged. Third, procedures for tallying, declaration and announcement of elections need to be tightened so as to avoid controversies. Others include processes, undoing the last-minute changes by Parliament in the run up to 2013 elections, consider staggering the elections and responding to the dictates of devolution in the management of elections.

Civic and Voter Education

53. The IREC was tasked to inquire into the organization and conduct of the 2007 elections including civic and voters education. It recommended cooperation and coordination between the ECK and CSOs in carrying out voter education with the ECK coordinating and the CSOs offering the services.
54. The overarching goal of voter education in relation to the 2013 elections was to assist people have information about the new constitution and electoral system- which was complex and required voters to cast votes for six different offices- and, promote a peaceful electoral process so as to forestall events similar to those surrounding the 2007 elections. The functions of the IEBC include voter education and the Commission designated a directorate to facilitate voter education and structured partnerships. It strived to undertake voter education although the time was short and funds were limited. Its work was complemented by non-state actors and development partners who pursued this through, among others, a nationwide media campaign.
55. Some constraints were however noted. The process was bereft of institutional coherence and responsibility for coordination kept shifting among departments. Civil Society Organizations (CSOs) and other stakeholders, for instance political parties, felt that it started late.
56. Different evaluations of electoral process have identified aspects of voters and civic education that need streamlining. A coordinated and structured voter education strategy is required for future elections. Special focus should be directed also at persons who may be marginalised due to language or disability. There is need to urgently rollout an elaborate civic education component in the country to address governance issues and to sensitize Kenyans on the devolved government. In addition, IEBC voter education role requires to be rethought and its relations with non-state actors in delivery of civic education be better coordinated and harmonized. The methodology, reach and cost of delivering civic education be reviewed so as to ensure efficiency and effectiveness.

Cost and Funding of Elections

57. Determining efficiency of an election requires paying attention to the costs of those elections. Measuring election costs is, however, not an easy task. The difficulty arises from the lack of comparability of contexts for conducting elections, the different budget lines and the fact that the true cost of an election comprises not just funds spent by the EMB but also other agencies, including GoK departments, civil society and international assistance and subsidized

provision of goods and services. In Kenya, however, donors contribute roughly 10 per cent of the elections budget while the GoK takes the remaining 90 per cent. This confirms the fact that elections really are a Kenyan affair with donor support complementing the GoK.

58. Despite this difficulty, there have been international efforts to study and compare the cost of elections worldwide. In 2005, The Centre for Transitional and Post-Conflict Governance and the International Foundation of Election Systems (IFES) with support from the United Nations Development Programme (UNDP) produced a study on the Cost of registration and Elections which provide useful information on comparing costs of elections. It makes the point that in comparing the costs, one should take into account the category of the country, whether it is a stable democracy or a country emerging from post-conflict. This is due to the fact that the latter category of countries will have higher costs as a result of what the report calls integrity costs. These are costs that are over and above the core costs of running the elections, with their focus being on putting in place additional measures to guarantee the process and environment for the conduct of elections. In discussing the issue of cost of the 2013 elections in Kenya, this context needs to be taken into account.

59. Costs of elections have implications on both efficiency and sustainability of elections. By keeping the costs within reasonable limits, the country is able to conduct its elections efficiently, ensure value for money and also move towards being able to support the elections from its domestic resources. The 2013 evaluation of USAID assistance to the 2013 election process estimates donor contributions to the Kenyan elections at around 10% of the total expenses. Thus, the elections were largely funded by domestic resources, a fact that says something about sustainability. But election support is much more than material resources and the sources of funding. It must also include whether the costs can be sustained over the long term without straining other needs. This requires looking at how the costs compare internationally.

60. The Kriegler report, in its assessment of the cost of the 2007 elections concluded that the cost per registered voter was around US\$13.74 or \$20.94 per voter depending on what time period the costs are taken to cover. The report pointed out that this was much higher than even post-conflict countries whose costs were US\$8 per voter. This high costs were against expectations, since in normal circumstances these costs should have been lower for a number of reasons including: the low costs of temporary personnel, the lack of sophistication of the voter registration process and documentation, experience in conducting elections and the joint conduct of all the three elections.

61. Reforms in the electoral process, must consequently address the costs of elections. It is a core element of improving the efficiency of the EMB. It also

helps ensure that donors and the citizens of their home countries get value for money in the sums they contribute to support the Kenyan elections. If calculating the costs of elections in Kenya were difficult in 2007 as documented by the Kriegler report, the same was equally true in 2013. Of all the evaluation reports, the closest attempt to calculate the costs is the DFID EMAS Project Completion Review report, which puts the figure at £15.42 per unit voter but points out that this is just an estimate. What is common in most of the evaluation reports is the high cost of the 2013 elections partly attributed to the unique nature of those elections, procurement of BVR and EVIDS but critically non-adoption of cost-effective measures. Civic and voter education, for example is criticized as not having been cost effective in the manner it was undertaken. When looked at from the perspective that, as reported in the USAID evaluation and UNDP SERP evaluation, civic and voter education was amongst the highest component of the development partners support, the lack of cost-effectiveness has impacts on value for money.

62. It is necessary though to point out that an accurate determination of the cost of elections in Kenya is necessary to help determine the priorities to be set, the methodologies to be applied and the ensuing assessment of the results of those elections. A focus on cost will help improve the efficiency of the electoral process and players and contribute to the quality of the elections hence its credibility

Electoral Administration

63. According to IREC, weaknesses in the ECK partly contributed to the outbreak of violence after the 2007 elections. The delineation of roles between the commissioners and the Secretariat was unclear. The President's unilateral appointment of its Commissioners caused disquiet and contributed to tensions because opposition parties believed they would be partisan when making decisions. Moreover, most were greenhorns in running elections. To address these problems, the IREC reiterated the 1997 IPPG recommendation commissioners be appointed through a consultative process. This proposal was incorporated in the Constitution 2010 and the IEBC Act. They have security of tenure and serve for only a single, non-renewable six-year term.
64. The IEBC gained a measure of public confidence engendered by the successful conduct of the 2010 constitutional referendum and various by-elections by its predecessor, the IIEC. The fact that the Secretariat was the same, two of the Commissioners (one being the Chair) were the same as during IIEC days, meant that the IIEC success could be transferred to IEBC. Further it managed the delimitation of boundaries successfully.

65. Public doubts about the independence and competence of the IEBC were triggered by its decision to consult the executive before announcing the elections date. More doubts were followed the controversy that characterized the acquisition of biometric voter registration (BVR), use for registering voters; it cancelled the procurement process for the BVR kits, announced that it intended to use the Optical Mark Reader- used in the 2010 referendum-and, reverted to BVR after government intervention! The media reported tensions between the Commissioners and the secretariat caused by bias and corruption in the tendering process for BVR.
66. The Constitution and the IEBC Act stipulate that the functions of the Commission include the regulation of the process by which parties nominate candidates for elections. The general view is that the Commission abdicated its responsibility. The parties lacked capacity to conduct successful nominations and where they tried to, they were chaotic and characterized by violence and rigging.
67. In conclusion, the assessment from the various evaluations point to the fact that while several reforms have been instituted in the administration of elections as evidenced by a robust constitutional and legal framework, there were several weaknesses in the manner the electoral body discharged its mandate. The key issues that require attention going into 2017 include the need for clarity of the roles of and relationship between the Commission and Secretariat, weak capacity to plan, procurement and integrity concerns; the administrative structure at both the headquarters and the devolved levels; results transmission, stakeholder engagement and weak public communication. These have had the effect of reduced public confidence in the IEBC, an issue that must to be dealt with as a basis for preparations and conduct of the 2017 elections.

Political Parties

68. The IREC report criticised political parties for lacking internal democracy and promoting electoral malpractices such as voter bribery and ethnic driven politics. Parties primaries were disorganized, shambolic, and subverted the basic tenets of democracy.
69. The 2010 Constitution, the Political Parties Act and the Elections Act introduced a legal and institutional regime geared towards institutionalising democracy and instilling discipline in the management and operation of political parties. A few examples are illustrative. The Political Parties Act creates the Office of the Registrar of Political Parties, an independent office responsible for regulation and supervision of political parties. Parties are supposed to evince national character, for instance, by registering not fewer than one thousand registered voters from more than half of the counties before they can be registered. To

prevent party-hopping, parties were required to submit a register of members six months to elections.

70. Assessment from the various evaluations indicate that the legal regime did not work as effectively as envisaged. Political parties lacked capacity to conduct primaries and these were characterized by rigging, disorganization, fraud and violence. This shortcoming has become a regular and recurring feature of political parties. The law introduces provisions aimed at restricting defection, but this was undermined through late amendments to the law by parliament and ingenious ways to circumvent the law including last minute simultaneous nominations by all the major parties. While the law requires parties to promote gender representation and parties have captured this in their constitutions, in practice, they did not make convincing efforts at increasing the participation of women and minorities as candidates. Obviously, the Registrar of Political parties is a weak link in this chain having failed to enforce core elements of her mandate and procrastinated on cracking the whip on politicians who continue to break the law with impunity. Importantly, the reforms to office of the Registrar of Political Parties through appointment of a substantive Registrar and deputies, full delinking from the IEBC and robust regulation of political parties have somewhat stalled. This is an area.

71. In conclusion, aspects that that requires greater focus if the 2017 elections are to be an improvement on those of 2013 include appointment of a substantive Registrar and deputies, full delinking of the Office from the IEBC and robust regulation of political parties to deal with, among others, gender equity and democracy in political parties.

The Role of Non-State Actors- Civil Society, Private Sector and Media

72. Civil society plays a critical role in Kenya's democratic process and elections and constitutes one of the core moments in this process. Broadly defined, civil society includes all those non-state actors whose role, among many others, includes existing as a countervailing force against the excesses of the state. It includes community-based organisations, the private sector, non-governmental organisations, and faith-based organisations, to name but these few. Its operations also encompass the role of the media. In Kenya, these institutions played a historic role in the democratisation of the country except perhaps for the private business sector which remained aloof until the outbreak of post elections violence (PEV) in 2007. Scared by the effects of the violence on business, they mobilised under the framework of KEPISA and contributed to the mediation process and have remained connected to the political process in some form since then.

73. Precisely because of this historic role, key segments of civil society do not enjoy any sustained cordial relationship with the state. This is often harshly expressed around electioneering and balloting either through state harassment of CSOs or state manipulation of the media. In previous elections, civil society has played two major roles; a civic education role and an observer and oversight role. Indeed, previous donor election support has gone to civil society either as part of the overall regular programme activities for NGOs like KHRC or as targeted election support either independently or in collaboration with multilateral institutions like the UNDP. Such civic education activities as that by CMD on encouraging women candidates or peace building initiatives of the NCK all make for the significant role civil society plays in elections. The other area includes monitoring the electioneering process as part of the civic vigilance of civil society or observing balloting as was done under the framework of ELOG.
74. However, contexts for elections change and must determine the need for and weight of donor support. Precisely because of the PEV, the ICC case against leading candidates and the consistent demand by core segments of civil society for truth and justice, there has been a huge backlash against civil society and the media in Kenya especially from government, forcing the media in 2013 to overplay the peace message at the expense of justice questions and to the labelling of civil society as 'evil' society. Indeed, the vulnerability or weakness of civil society in Kenya is closely tied to a perception that they are agents of foreigner government. This is the reason why the state has repeatedly attempted to asphyxiate it through the Public Benefits Organisations Act. Threats against civil society, if successfully implemented, will sound a major blow not just to electioneering but to the possibility of a free, fair and transparent election. As such, the need for greater but targeted support to civil society in the core programme areas of civic education, monitoring and election observation has never been greater and this issue comes through in several of the evaluation reports. Also, a running theme in those reports is the crises of legitimacy affecting most civil society including the NGOs and the faith-based organisations. There is need therefore to ensure that any future support is staggered across the electoral cycle and should focus on areas of strength of individual or networked civil society organisations. Greater co-ordination of CSO work is highly recommended.
75. A complementary process to strengthening CSO would be ensuring the media is free, fair and objective. This has been a rallying call in previous elections in Kenya and is captured in the evaluation reports especially after the liberalisation of the airwaves around 2002. This desire for objectivity however runs counter to the fact that the large media houses are owned by individuals with political interests and aspirations. The need for an objective oversight organ adjudicating over the media has therefore never been greater. Oversight of the media has always been within the jurisdiction of the GoK through the Media

Council of Kenya and as guided by the Media Act. When the PEV broke out, the GoK through the Ministry of Internal Security invoked the Kenya Information and Communication Act, 1998 to ban live broadcast of politics.

76. The Waki and Kriegler Commissions discuss the media and the PEV highlighting the themes of autonomy of the media and violence. They zero in on the role of vernacular radio stations, revealing that monitoring of the media broadcast was minimal. The reports document that FM Radio stations incited people through hate speech. This explains why a key component of the Kenyan ICC case involves a media personality. Discussions about the media and election have subsequently been conducted in the context of the tension between media freedom, national cohesion and censorship, three themes that recur in the evaluation reports. In 2008, the Kenya Information and Communication (Amendment) Act was passed to facilitate the development of information and communication sector (including broadcasting, multi-media, telecommunications and postal services) and electronic commerce. The amendments were meant to take care of the challenges identified with PEV but concerns about increased government control over the media have been raised. The specific aspect of hate speech led to the enactment of the National Cohesion and Integration Act, 2008 in which Article 13 seeks to curb hate speech. More recently, the Media Act 2013 came in force. Its hefty penalties contained in Article 48(3) have however provoked wide protests and condemnation.
77. The need for regulation of the media cannot be gainsaid. Indeed, trends within the industry call for regular vigilance especially with the growing diversification of the industry with the entry of mobile telephone, the widespread use social media including Facebook, twitter, and Instagram. Yet, there is a history of government censorship that we must be sensitive to. Even worse is the growing trend of increasing ownership of media houses by politicians as variously document including in the ICG Report, that can easily be a danger to the responsible role of the media. In the 2013 elections, the danger of such censorship reared its head when the MCK issued guidelines to the media to ensure that the media remains sensitive to the risk of conflict but the balance between that and self-censorship was thin leading to a situation in which the media kept its silence in the face of alleged electoral malpractices, an eventuality one media personality has described as keeping the peace while killing the news.
78. The reports from the 2013 elections point to the need for greater regulation of media conduct in elections, improved relationship between IEBC and non-state actors and enhanced role and engagement of the private sector in electoral processes. The combination of these reforms and enhanced donor support to

networking and complementarity between these sectors would bolster the credibility of 2017 election.

Election Observation

79. IREC found that the regulations governing elections observation were adequate and that the ECK had properly accredited domestic and international observers. The IREC underscored the centrality and importance of election observers arguing that they gauge whether elections have been credible, free and fair. In 2007, domestic observation was carried out under the aegis of Kenya Elections Domestic Observation Forum (KEDOF), a network comprising representative of professional, religious, youth, women, disabled and marginalized groups and organisations working in the area of governance, elections and domestic observation. The goal of KEDOF was to observe and determine the credibility, peacefulness, freeness and fairness of the 2007 general elections.
80. Unfortunately, KEDOF did not work as anticipated; it was hobbled by internal differences, weak leadership and delayed implementation. IREC noted that KEDOF had the potential to convert itself into a formal long-term institution with strong structures and the ability to mobilise increased human and financial resources for long-term observation of future elections. But the institution did not do so. Implicitly, IREC was proposing that one of the actors that need a presence in the electoral process is domestic observers. It recommended that to enhance its effectiveness domestic observation needed to be long-term and permanent, a point that we wish to reiterate in this report if domestic observers have to transform into an effective institution in Kenya's electoral process.
81. This was the genesis of the Elections Observation Group (ELOG), a permanent domestic election observation body comprising more than a dozen local civil society and faith-based groups. ELOG observed the 2010 referendum on the constitution and the 2013 general elections. How was ELOG's performance in the 2013 general elections? Generally, its performance was not viewed favourably. As a permanent body, it was hoped that it would observe all activities in the electoral cycle. But it did not. Hence, it never provided a comprehensive view of the whole electoral cycle including, most importantly, observing voters' registration and political parties' nominations. This is despite the fact that it received support to observe these processes. Its reports on some aspects of the cycle were late, lacked rigour and did not help in identifying early corrective action. Some civil society actors even felt that by releasing its report in a lacklustre manner, it contributed to legitimising what they described as a flawed electoral process.

82. Indeed there is still simmering debate on how domestic observation relate with civil society advocacy work. Two viewpoints were canvassed; first, those who see election observation as intimately connected to civil society advocacy work and prefer therefore to keep the two connected and even managed by the same team and, the second are those who prefer to separate election observation from civil society advocacy. Some respondents argued that the reason for the lack of traction of domestic observers was a capacity deficit. However, we recommend separating civil society advocacy work from election observation to avoid the conflict of interest embedded if the two functions remained together. Secondly, election observation has become routine and lack creativity and imagination, an issue that we believe should be addressed. Thirdly, a permanent platform for domestic observation in itself is only sufficient if the platform responds competently to all stages of the electoral cycle and is more nuanced and imaginative in delivering on its mandate. Finally domestic observers have to move towards more nuanced and not standard reporting so as to enhance their contribution to the country's electoral process.

Security and Peace Building

83. Embedded in the preparation for the 2013 elections was a generalised concern about security. This concern stemmed from the fear and uncertainty generated by the 2007 PEV. In reviewing the causes of the violence, the Waki Report pointed directly at historical injustice, normalisation of impunity and illegitimacy of state institutions including most important the security agencies in the eyes of citizens as critical factor explaining the violence. It recommended major reforms including in the police force. Many of these recommendations had been proposed by National Task Force on Police Reforms chaired by Judge Ransley. Eventually, the new constitution consolidated the reforms. It mandated broad ranging re-organisation of the force into a service and entrenched civilian oversight over the police by establishing the National Police Service Commission and IPOA.

84. The preparation for the 2013 elections commenced amidst assumption that those elections needed heavy security. Other initiatives however focused on peace building and donors supported both. The GoK had commenced the National Cohesion and Integration Commission Initiative. Donors also came in strongly with their own initiatives, some of which were channelled through the state security agencies and others through CSOs including NGOs and faith-based organisations like NCKK. This included supporting a conflict prevention and response strategy under the 'Uwiano Platform for Peace+ that brought together the IEBC, the National Steering Committee on Peace Building and Conflict Management (NSC), NCIC, Peacenet and UN Women. These institutions aimed to use this framework as an early warning and response mechanism among different agencies. The other initiative was a partnership

between IEBC and the Kenya Police Service and was supported through United Nations Development Programme (UNDP) Support to Elections Reforms and Processes (SERP). They designed the Enhanced Security Arrangements Project (ESAP) with the aim of undertaking election security coordination and a framework for managing the security aspects of the 2013 elections.

85. However, the reform highlighted above had not percolated into the grassroots as elections neared. The outbreak of terror violence in Garissa, the MRC protests and attacks at the Coast, and the Tana River violence all mirrored an environment of changing security needs. In this changed environment, the reform process within the security agencies encountered challenges, chief among these was how to handle the entrenched attitudes within the police. In particular, the police persisted in treating their responsibilities from a law and order perspective rather than from a service to citizens perspective mandated by the new constitution. So while Usalama Watch report recorded the capacity challenges of the police, Amnesty International documented the challenges to policing emanating from a persisting corrupt and brutal policing culture that made it difficult to have effective forms of policing in which communities were co-participants and not mere recipients of security. The Report noted that there were major attitudinal questions still hanging unattended by the new policing framework. Indeed, when 2013 elections approached, the inability of the police to nip some of the violence depicted the police badly and raised questions about the ability of the security agency to secure the electoral process and enable it to remain free, fair and transparent.

86. The reports, especially the Elections Management and Security Programme (EMAS) Project Completion Report of DFID, noted that the engagement between the police and IEBC was good while that with civil society was limited. This, among other issues, was the basis of suspicion on the role of the security sector in election. The need for security thinking that is inclusive and that is based on consideration of human rights remains. With respect to the police, evaluation reports emphasize a new policing culture that involves citizens. Though some evaluations reports scored the police highly in terms of securing the elections, others note that they did not play a neutral role in the electioneering process. Finally, it is clear that securing the country also requires securing the safety, comfort and wellbeing of the police.

Voter Registration

87. The IREC was tasked to inquire into the whole gamut of the organization and conduct of the 2007 elections including registration of voters. It found that the voters register was materially defective and therefore impaired the integrity of elections. The drivers for this defects included containing names of about 1.2 million deceased persons and under-registration of women and those under the age of 18. Members of certain marginalized communities could not register

because they lacked national identity cards, which are a prerequisite for registration as a voter. IREC also found implausibly high turnout of voters in the strongholds of political parties that they attributed to, among others, organised impersonation of absent voters. Some of the bottlenecks ECK faced were beyond its control. With respect to young people under 18, it is depended on the Registrar of Persons, which has no electoral function, to issue issues national IDs, after which prospective voters would register. It recommended synchronization of the work of the ECK and Registrar of Persons, so that an individual is registered simultaneously when they are issued with the national ID. With regard to continuous voter registration, it found the system cumbersome and expensive and suggested either improving it or resorting to periodic registration. A permanent solution, they suggested, would entail synchronizing voter registration with either issuance of IDs or integrated Population Registration Systems (IPRS).

88. Past evaluation reports recommend that support to voter registration is good value but it needs to start early. Some aspects that donor support has been directed to include purchase of equipment and public campaigns. When the Constitution was put to the referendum, the basket fund supported the introduction of new technologies used in the voter registration process and the transmissions of results from the polling centres to the tallying centres. The central role technology plays in the elections has led to suggestions that purchase of these should be the responsibility of government. This explains why the IEBC had to seek funds from the government to procure the BVR equipment. A recurring theme from the reports is that voter registration is expensive and that this will reduce when mechanism for injecting efficiency are introduced. One suggested mechanism is integrating civil registration and voter registration so that when individuals are issued with an ID Card, they can automatically be registered voters.

Participation of Marginalised Groups

89. How to secure the participation of the marginalized groups in the country's governance system is a recurring subject in electoral processes and, indeed, other aspects of the society. In the course of constitution-making, several suggestions for dealing with it were broached. The Bomas and Wako/Kilifi Constitutional drafts grappled with it. Before the 2007 elections, ECK secured financial support from the government and UNDP basket fund to manage a voter education programme whose goal was to achieve increased participation- more so for women and marginalized groups- in the electoral process. This was achieved via a number of strategies including development of voter education materials and delivery of voter education countrywide. According to the IREC, members of the public found it inadequate.

90. The Constitution 2010 seeks to promote the interests of women and other marginalized groups. In law making and formulation and implementation of public policy, state officers and agencies must be guided by principles that include public participation and non-discrimination and protection of the marginalized. These lay the foundation for the government to institute affirmative action mechanisms and other policies to address disadvantages that women and other marginalized groups have suffered over the years.
91. Past experience has shown that voters elect very few women into various positions. Article 38(1) of the Constitution provides for the freedom to make political choices including the right to form and participate in forming a political party. Article 91 sets out the basic requirements of a political party including respect the right of all persons to participate in the political process, including minorities and marginalised groups. Before registration, parties must demonstrate that their membership reflects the regional and ethnic diversity, gender balance and representation of minorities and marginalized groups. However, political parties did not formulate policies to enhance women's participation and prospects of succeeding in the party primaries were further limited by the shambolic party primaries. All parties nominated fewer women compared to men to contest the different elective positions and very few of the women won the elections. Indeed, as a percentage, the CIDA-CMD Evaluation report for the Project titled *Deepening Democracy – Strengthening the Participation of Kenya Women in Elective and appointive Positions Under the new Constitutional Dispensation* shows that the number of women elected MP in 2013 as a percentage was lower than in 2007.
92. To ensure women representation, the Constitution provides for their right to be represented in elective and appointive office in the state sectors. In county assemblies, women have special seats; the constitution provides that no gender should have more than two-thirds representation. In the National Assembly, 47 seats are for women elected from counties and others may be nominated under proportional representation to represent special interest including the youth, persons with disabilities and workers. In the Senate, political parties have to nominate 16 women according to their strength in the Senate. One woman representing the youth and another one representing persons with disabilities must also be nominated to the Senate.
93. All elective bodies are to be guided by the principle that not more than two-thirds of the members shall be of the same gender. This principle is meant to guide the composition of the Senate, the National Assembly and the county assembly. While it is clear how this is to be implemented in the county assemblies, the same is not the case for Parliament. Before the 2013 general elections, an issue arose about whether the principle is to be implemented progressively or immediately. The Supreme Court advised that it requires

progressive implementation and gave until August 2015 for it to be implemented through legislation. The Constitution does not provide for an enforcement mechanism to ensure that the principle of no more than two-thirds guides the composition of the National Assembly and the Senate and, therefore, government is expected to institute measures for implementing the principle.

94. Before the 2013 elections, stakeholders in the electoral process explored ways of implementing the two thirds gender principle in relation to the Senate and the National Assembly. No acceptable and workable formula was conceived. Indeed, the CIDA-CMD report referred to above does not offer any conclusions on the issue but raises the specific point about the electoral environment in 2013, especially the party structure, not being conducive to women candidates. Going forward, the Supreme Court advisory that August 2015 should be the benchmark for realising the no more than two-thirds gender rule should constitute the core focus of work, including donor work, on elections.

V: Locating, Weighing and allocating Donor Support

95. We propose the following criteria for weighing and allocating donor support to elections:-

- a. **Accord due attention to the political context.** The context of electioneering and balloting differ and the issues that commanded attention in previous elections might not be as urgent in the forthcoming elections. However, since elections are apart of a political process, the political context must be a constant reference point. A significant aspect of this changing context can be read from previous elections. Previous elections in Kenya that have pitted an incumbent versus a challenger have tended to be intense and conflict prone. Those that have not had an incumbent have however tended to be less violent. The 1992, 1997, and 2007 elections had an incumbent and were violent to a greater or lesser extent. The 2002 and 2013 elections did not have an incumbent and were not as violent. Since the likelihood of the 2017 election having an incumbent is high, donors must place greater weight to this election and infuse a peace building agenda in the nature of support they offer. Indeed, this also suggests that donor support programmes that leave the state secure in its opaque designs around elections might not be effective.
- b. **Identify key areas of weakness in the electoral chain.** Proper knowledge and understanding of the electoral chain and the weak links will be necessary in designing effective support interventions. An inadequate understanding of the chain and its weak links has undermined donor support in previous elections including the perception in 1997 that donors pressured elections observers to

legitimate President Moi's return to power with knowledge that the elections were flawed. Institutions in the chain that weakened previous elections have included political parties, registrar of political parties and the EMB itself. The chain continues to have institutions that are susceptible either to internal weaknesses or external ones including abuse in the interest of biasing the electoral process. Any weak link, be it intentional or incidental, has ratcheting effect on the rest of the chain and its ability to deliver free, fair and transparent poll results. In our recommendations, we urge donors to understand and balance the strengths and weaknesses in the chain in order to determine feasible and effective interventions.

- c. **Examine the centrality of the function to be supported vis-à-vis the role of government.** We are guided in making this recommendation by the fact that donor support amounts to 10 per cent of the total electoral costs. Given the amounts, donors cannot afford to spread their support too thin, otherwise, donor intervention will not be effective. For support to be effective, it must focus on the centrality of the function of the actor being supported to the overall effectiveness of the elections and electoral chain and to the overarching goal identified earlier. It must be noted that some functions are central to the overall chain but when supported by donors, that action undermines the possibility of developing independent capacities of local actors. Thus, support must weigh carefully between the need and the areas where it is the duty of government to provide that support. This will require understanding if and where government funding is compulsorily required. Donor support should not seek to replace government responsibility unless there is sufficient and convincing reason for it.

- d. **Assess other sources of support that exist if donor support is withheld or is unavailable.** Elections are primarily a GoK affair. Indeed, the GoK is the primary source of funding for elections and is therefore expected to fund elections. But occasionally, and for legitimate or illegitimate reasons, the GoK is unable or unwilling to fund elections or it procrastinates to provide the necessary funds. In past elections, the incumbent holders of state power have used the advantage of holding the money to bias the electoral field. It would be useful for donor support to consider and be aware of alternative sources of support if they withheld their support or if funds were simply unavailable. Further, where donors notice that government funds are being used to distort the electoral playing field, as it has happened previously, they might consider strategically deploying donor support to correct such distortions

- e. **Avoid convenient decisions on support; have a futuristic, long term agenda.** Donors should avoid convenient decisions on electoral support. Convenient decisions tend to be short-term and fail to consider the overall context of electoral support while deliberate decisions tend to have longer term implications. . It is important to always support the process based on objectivity and not some temporary perceptions on an institution or individuals in charge of that institution.

VI: Proposed Strategy for support in 2017

- 96. The 2017 elections will be the second following the adoption of the current Kenyan Constitution in 2010. In the run up to 2013 elections several reasons were advanced for donor support for the electoral process. The Evaluation Report of the Donor supported UNDP Electoral Reforms and Constitutional Referendum Project captured the main justifications as being: complexity of the 2013 elections due to new changes in the elections; despite success of IIEC with the 2010 referendum and by-elections, the different nature of the 2013 elections from the IIEC experience; and the politicized environment and context for the elections.
- 97. In determining donor support for the 2017 elections, it is also necessary at the outset to respond to a similar question as the one answered relating 2013 elections. Is there a need for donors to support 2017 elections? Secondly is there an appetite for donor support? Part of the answer to that question requires determining what lessons arise from donor support in the last elections. As this report has demonstrated, in 2013 there was collective impetus for support to the elections and clear rationale as demonstrated above. Reviews of the previous election demonstrate that while those elections were largely free, fair and credible several underlying challenges, lapses and controversies accompanied several stages of the electoral process ranging from boundary delimitation, voter registration, procurement, adoption and utilisation of technology, Political Party nominations, dispute resolution, late amendments of laws, stakeholder engagement, voter education, results transmission and domestic observation.
- 98. Donors support elections for various reasons. These range from their commitment to contributing to democratic governance in a country, challenging contexts either due to recent changes as happened in 2010, post-conflict societies, and gaps in Government financing. It is assumed that after a few elections, Government support will increase, the institutions and processes will be clear to those managing them and the citizenry and the need for donor support will reduce, and even finally cease. In the context of the 2017 elections, all the observation reports have identified many lessons that require to be carried forward in 2017. In addition Kenya's recent electoral history

demonstrates that the country has undergone cycles of peaceful and violent elections interspersed with each other. While the 2013 elections were assessed as largely free and fair, the election left many unresolved issues. Two years later, most players in the electoral process are more preoccupied with assessing the last elections than discussing preparations for 2017 elections. In addition, the last electoral cycle was too short to learn comprehensive lessons for the new electoral process in Kenya. Additionally, there are also many shortcomings that will require to be addressed so as to ensure the country builds on the experiences from 2013. Donors have been instrumental in Kenya's election reform journey since the 2007 elections and even before. The 2017 elections will be an important milestone in consolidating a new electoral culture in Kenya. The challenges from the last election are an opportunity to learn lessons in designing and delivering electoral support much more than abandoning support to the process altogether.

99. Our proposal for support derives from the lessons from the 2007 elections, 2010 referendum and the 2013 elections. In both of those elections donor support was largely delivered through a basket fund approach. The 2007 basket was managed by UNDP and supported the Electoral Commission of Kenya (ECK) and civil society in voter education and domestic observation. Both the 2010 referendum and 2013 elections retained the UNDP basket, but removed the civil society component from the UNDP basket. Evaluations on this approach have been useful in determining what to recommend for 2017.
100. First, the decision to separate civil society and observation component of the support from support to the electoral institution had a logic that requires to be maintained. A basket approach for supporting elections is the most logical way for donors to engage in electoral support in Kenya. By their very nature election are a highly politicised event, with emotions often running high and time extremely constrained. To be helpful to the process, donors should add value and not introduce additional complications. Coordinating their interventions enables value-addition and minimising risks that come from their support, an aspect best addressed through pooling resources.
101. Secondly basket funds also allows the Kenyan side to have a comprehensive picture of the overall support making it easier to quickly identify any funding gaps and determine jointly with its partners how these gaps can be plugged. The Donor Group on Elections should retain the basket approach and pool their resources for 2017. The basket should, just like in 2010 and 2013, be separate for IEBC support and for the other aspects of the electoral support.
102. Taking into account the importance of coordination, it is necessary that the lessons from past elections relating to basket funding be implemented not just for the IEBC component of the support but also for all the other key

components, domestic observation, dispute resolution, party regulation and voter education. In 2013, the extent of pooling resources and basket funding was not as coordinated and effective as the IEBC component managed by UNDP. For 2017 it is important that the basket funding for the elections be the norm to most aspects. It also means that there should be more than one basket for donor support.

103. The next step will definitely be which baskets and who manages them. Answering this question requires defining the areas of support. The rule of thumb must always be that donors should support aspects that the Kenyan Government will either not support, or even if they were to support, gaps will still remain. This was the rationale for the focus on supporting IEBC in the run up to the 2013 elections. Quoting from international practice and also relying on Kenya's budgetary allocations, the IEBC capacity building was an area that required donors input.

104. Analysing the Second MTP for the implementation of Kenya's development blueprint, Vision 2030, elections are captured as a critical component of issue-based politics. The Plan commits to implementation of the Elections Act, The Political Parties Act and the Campaign Finance legislation. However, neither the flagship programmes in this area nor the indicative budgets capture elections. Consequently, whereas it is normal that Government will allocate money for elections, it is safe to assume that there will be several deficits. A basket addressing IEBC as the main election management body is consequently important. In designing that basket it will be necessary for donors to critically identify areas of support and avoid a blanket basket approach to IEBC without clear rules on what can and cannot be funded under it. This is to ensure that resources from donors are used for catalytic purposes. Due to experiences in 2013, more robust discussions will have to take place on procurement issues and also on trainings out of the country. These two while important are examples of problematic areas that unless properly managed can result in lack of optimal results from donor support.

105. The MTP and the on-going discussions in the country are geared towards not just greater regulation for the civil society but also greater control of their role in the election process. Both the Public Benefits Organisation Act and the MTP II caution against CSO involvement in party politics. However the practice will have implications on donor support for civic and voter education and CSO electoral activities. In designing a support mechanism for the CSO sector, these issues require comprehensive attention. A separate basket for CSO support will, in our view, be necessary, so as to separate it from IEBC support, better manage risk and ensure better focus on the work of CSOs around elections.

106. The final question relates to who should manage these baskets. The decision should be made by the donor group on elections based on candid and objective appraisal of past engagements, results from those engagements and the current operating environment. In the end the decision will either be to retain the approaches used in the past or explore new avenues. If new, they will either have to single source or have competitive bidding. Our only guide will be that elections are by their nature political events. In the current political climate, there are legitimate questions about the objectivity of international actors. Unlike the past where international actors were seen as the most objective, it is currently argued that even international actors have their agenda.

107. Secondly, engagement with IEBC in the run up to 2017 will be unlike 2013. In 2013 there was unanimous goodwill for the institution and its capabilities in conducting credible and objective elections. In the current environment, there are contestations. It is not important whether those contestations are legitimate or not. What is relevant is that the environment is different. Support to IEBC must, therefore be undertaken with that background in mind and build in risk management. The leverage that UNDP has built in engaging with and supporting IEBC gives the international community the best option for supporting the institution. In doing so, though it will be necessary to make certain changes to the operations of the basket fund, including decision-making, areas of focus, financial controls and the role of donors.

VII: Summary, Conclusions and Recommendations

Conclusion

108. Donors have played an important role in Kenya's elections since the re-introduction of multi-party politics. Several lessons emerge from supporting Kenyan elections that require to be taken into account in designing future support. This report sought to generate recommendations to help the DGE group to formulate a more responsive, relevant and efficient electoral support programme. From the review the following conclusions can be reached which inform recommendations to the DGE group for future electoral support.

109. The need for involvement of international donors in supporting future elections still exists both from the Kenyan and donor side. In an environment of limited resources like Kenya's, external support is always an important additional help. Secondly, the evaluations from 2013 clearly document areas where further work is required to make the 2017 elections credible by building on the experiences of 2013 elections. The independent evaluation of the SERP project recommends continued engagement by the international community in

supporting Kenya's democratic consolidation, of which elections are an important component. This is similar to the conclusions from the review of USAID's electoral assistance project and DFID's election management and security programme. In designing future electoral support, it is important that the DGE take into account the following issues:

Recommendations

- 110. Recommendation One: Target Support based on Resource Envelope and Priority Areas:** First, the amount of resources available to support elections will determine the extent of support and areas of focus. In 2013 two events coincided to ensure high investment in electoral support. The 2007-2008 post-election violence meant that the last elections in Kenya were categorised as a post-conflict election, which internationally results in increased financial availability. Secondly, Kenya adopted a new Constitution and new electoral legislation meaning that the last elections were fundamentally new and changed from previous elections. 2013 required heavy investments to ensure that these new systems and unique contexts were dealt with in delivering free and fair elections. The same will not be true for 2017. While there are still many new things, the state is fragile and there may be even possibilities of violence accompanying those elections, the resources available for elections may not be in the scale of 2013 both from national resources and internationally. This should have implications on the design of a future support programme.
- 111. Recommendation Two: Maintain and Expand Basket Funding for Kenyan Elections:** Since 2007 donors have mainly used the basket approach to funding the Kenyan elections. This has mainly been on support to the electoral management body. That support has helped improve coordination amongst donors engaged in election support. It has partly contributed to the continued active engagement amongst the Donor Group on Elections. From the electoral management body perspective a basket approach also enhances management efficiency since it reduces reporting and engagement burdens that would exist were they to engage donors separately. It is important that in designing future electoral support, the basket approach be maintained and expanded. Although the basket has been the sole mechanism for supporting the electoral management institutions, it has not been uniformly applied in other support areas, except in the limited instances of voter education and domestic observation. The result has been continued individual approaches in several areas of electoral support. Our recommendation would be to apply the basket approach not just to IEBC but to several other areas of electoral support, including voter education, Judiciary, political party support and domestic observation. This will ensure that donors see the entire electoral chain as a complete process, coordinate their engagements and support across the entire

chain and not just in a few areas. Bilateral support, while still necessary should be in few areas. Even for these areas where bilateral support is undertaken, the DGE should provide a forum for sharing information and coordination over and above the joint pooling of resources through basket arrangements.

112. Recommendation Three: Support should balance Financial with Technical Support.

Supporting elections should balance between financial support and technical assistance. While the design of support to the last elections took this into consideration, the balance was largely in favour of financial assistance. Part of the reason for this approach was the limited timelines within which the assistance was delivered and election conducted. It is important for donors to realise that their support as a percentage of the overall budget for elections is largely small, indeed less than 10%. Consequently taken in totality the amount of money alone is not sufficient to provide a basis for influence. This reality calls for a change in approach. We recommend that there be much more focus on capacity building, stakeholder relationships and targeted support. Easily, there is need for capacity building for domestic observation and technical support for the Judiciary to better inform their rulings. In addition sufficient resources should be allocated to technical assistance and not just financial assistance. Rather than the regular workshops by the IEBC to deal with mundane decisions, technical support should be built in donor support so the officials take training trips abroad that are only outmost value. This will deliver more results, ensure higher chances of knowledge transfer and sustainability of the support granted by donors. It will also make designing a support programme be based on greater analysis and prioritisation.

113. Recommendation Four: Adopt and Implement an Electoral Cycle Approach to Supporting Kenyan Elections.

The last elections were undertaken under a very compressed election timeline. International best practice requires an electoral cycle approach, where elections are viewed as a process and not an event and are built seamlessly into the political to avoid their appearin as a distorting aspect of the political process. Donor support requires too to be aligned to an electoral cycle approach. Both the DFID and USAID evaluation reports stressed the need for an election cycle approach to funding Kenyan elections. This point should be adopted and implemented by the DGE. This will involve a shift from the current arrangement where funds for election support reduce drastically after an election and only pick up one to two years to the next elections. Instead, election support should be much more linked to democratic consolidation and governance engagement in the country. Secondly DGE should change to supporting the entire electoral cycle so that support is spread throughout the process, with the only difference being scale of available resources for the various parts of the cycle. This should be implemented immediately from 2015.

114. Recommendation Five: Diversify Electoral Support: While IEBC is the main agency responsible for the delivery of free, fair and peaceful elections, it is not always the weakest link in the electoral chain. The credibility of an election is contributed to by the performance of several other actors. Donors should ensure that as part of their support they focus both on IEBC and other actors. To support the 2017 elections, donors will have to work on both the demand and supply side. IEBC is at the center of both sides. It is important that the engagement and support of the electoral management body build on the work that has been done since 2007. In the support arrangement by donors, identifying other critical leverage points and weak parts of the electoral chain to support is also necessary. Thus support should be undertaken based on an objective assessment the needs for 2017. Donors should eschew support driven by perceptions of the ability of an institution or the individuals running it and instead rely on objective needs and necessary intervention areas. Support should target processes.

115. Recommendation Six: Increase Coordination of Policy and Diplomatic Engagement around Elections. While political diplomacy is an important aspect of donor support, there is need for greater coordination of that diplomacy role with the technical support role. Additionally donors should be aware that the new Kenya is critical and sceptical of the neutrality and independence of donors. Donors role can be viewed as interference and support to individuals and political sides and not objective support of the electoral process. Donors supporting the electoral process can minimise these perceptions by being alive to the underlying context of their support, undertaking regular political economy analysis, appreciating that despite its utility political diplomacy around has limits and unless properly coordinated can be misconstrued with possible implications for diplomatic relationships with Kenya. It can also adversely affect the electoral process and outcome. Consequently donors should ensure that their technical and diplomatic engagements are coordinated, engagement at ambassadorial level based on clear background analysis and as much as possible avoiding lone-ranger public comments on the election process.

116. Recommendation Seven: Support Kenyan Stakeholder Engagement and Partnerships in the Electoral Process. In 2013, while donors had a healthy engagement with IEBC, this had the unintended result of IEBC being more open and accountable to the donor community than to Kenyan stakeholders. Although close relationship with IEBC is necessary to enable honest exchange of views and discussions of even sensitive issues around elections, it should not result in Kenyans and Kenyan institutions either being or feeling ignored or taken for granted. Donors should, promote Kenyan ownership and support for the elections. They should avoid replacing Kenyans in the process through their electoral support. IEBC and other critical stakeholders must meet and consult more frequently than they do with development partners. In addition regular

updates and information dissemination to the public is necessary to eliminate mistrust and enhance public confidence in and support for both the electoral management body and the election process as a whole. Donor support must prioritise networking and stakeholder relationships on both the demand and supply-side. IEBC should also consider establishing a permanent platform for regular dialogue with key stakeholders(media, Civil Social and Private Sector) in addition to the Political Parties Liaison Committee for political parties.

117. Recommendation Eight: Pay Greater Attention to Politics and the Role of Political Parties in Elections.

International development assistance assumes that neutrality is achieved by avoiding domestic politics. As the experience of the 2013 elections clearly demonstrated, it is very easy for the donor community to find themselves sucked into the politics of the electioneering process. This has the potential of reducing donors to domestic actors which would not only offend rules of diplomatic engagement, but also result in soured relations with the political class and disapproval by the Kenyan public. These events can occur despite the best efforts from the donor community. This is because elections are both a technical and political process. Donors require to continuously analyse the political environment and adjust their engagement to respond to that environment. This should be done without necessarily engaging in politics and supporting political sides to the contest. There is debate as to whether supporting the institution of political parties runs the risk of entering into political support around elections. The reality is that without reforms and institutionalisation of political parties, Kenyan elections will continue to fall short of providing the democratic dividends and credible standards encapsulated in the Country's Constitution. It is, therefore important that donors consider investing in political party regulation and strengthening as part of supporting the electoral cycle.

118. Recommendation Nine: Build on the Strengths of UNDP as a Basket Fund while addressing its Limitations:

Previous election evaluations, including the SERP evaluation has commented on the role of UNDP as a basket for supporting Kenyan elections. This debate is not just restricted to Kenya. Like any other institution, UNDP has both its strengths and weaknesses. On the positive side, UNDP as part of the UN system is a multilateral agency whose membership is state parties. It, consequently works closely with governments. This also gives it convening power while removing it from the bilateral relationships between Kenya and individual donor governments. It also has international track record coordinating donor support around elections not just in Kenya but also internationally. However, based on past experience, the close working relationships not just with Governments but also with the electoral management body also limits its ability to be critical of the electoral body and Government preparations and processes for conducting elections. In the run up to 2013 elections, this became a sore point in the management of the basket

fund. To avoid recurrences of such scenarios in future, it is necessary that a decision be taken that builds on UNDP positive role, while building in processes to respond to its institutional limits. In our recommendation this requires retaining the UNDP basket to support capacity building for IEBC, reforming the manner in which that basket is managed and implementing previous recommendations to separate issues and other support areas not related to IEBC support from this basket.

119. Recommendation Ten: Reform the Management of basket Funds. A point of tension in the running of basket funds is always the role of the basket fund manager, the donors supporting the basket and the beneficiaries. This played itself out in the UNDP basket fund for 2013 elections, but was also seen in the previous Uraia basket fund support to CSOs before Uraia converted to a Trust. The tension arises from lack of clarity on the roles of the different partners to the fund, with each interpreting their mandate wider than they should. It is important that at the commencement of the next basket fund for any aspect of the electoral process, there must be candid and robust assessment of the working arrangements by all the parties, lessons learned from those conversations and taken into account in designing rules of engagement in the running of the fund. Those rules should capture the fact that for the success of the basket, the rights of each party should be respected, information sharing enhanced, good faith cultivated and the relationship be seen in a broader context beyond just financial assistance and receipt.

120. Recommendation Eleven: Support Reduction in Cost of Elections: Conversations about the cost of the Kenyan elections have been on-going for some time now. The high costs of the 2013 elections have been explained on the basis of the many elective positions introduced by the Constitution and the changed election rules. Still, these costs may also be attributed to other reasons including duplication of efforts and impropriety. Coordination by donors is a useful step in contributing to eliminate wastage around elections and enhancing reduction in the cost of elections. More broadly, though donor support should also target a deep focus on discussions on and identification of avenues for reducing the cost of Kenyan elections.

121. Recommendation Twelve: Exploring Enhanced Engagement with the Auditor General Around Elections. The Constitutional role of the Auditor General is one that requires to be utilised and institutionalised around elections. Following the 2013 elections and the Supreme Court of Kenya Ruling, the National Assembly Commissioned a special Audit of the procurement of BVR by the IEBC noted several shortcomings in the IEBC procurement procedures and planning processes. Greater interface between IEBC and government agencies involved in auditing and procurement would help to reduce the risks of procurement related complaints after every elections. There is need for donors

to consider supporting this interface, including relying on the office for auditing their contribution to the elections through IEBC.

122. Recommendation Thirteen: Identify Realistic Priority Support Areas for 2017 Elections: There are many areas that require support in the run up to the 2017 elections. This report has already explored some of the themes. It is important that donors discuss and prioritise the areas where their support is mostly required. Prioritisation should be done based on previous track record working on those issues, Government of Kenya commitments and prioritise those that will have greater impact to the election process. In prioritising they should also do so against the reality that their financial contributions are only a small fraction of the election budget. Support should consequently rely on technical assistance much more than the impact of money. They should hence reduce instances of allocating resources without accompanying technical aspects and value addition to the electoral process. While deeper analysis is necessary, addressing reputation of and confidence levels in IEBC, stakeholder discussions and consensus on timelines and key deliverables in the electoral cycle and planning by IEBC are key elements.

123. Recommendation Fourteen: Develop a Support programme that responds to Devolution. 2017 elections will be the first election under a devolved system of Government. The dynamics of those elections will be markedly different from all previous elections. Responding to devolution and its dynamics has to be a key factor in the design of the electoral support process. IEBC structure should be reoriented to much more align to and respond to the devolved system and not just the current regional structure. Secondly the devolved dynamics around security, candidature, campaigns and voter engagements must be a key area for donor support and contribution for the 2017 elections.

124. Recommendation Fifteen: Support Restructured Domestic Observation. Domestic observation is important for the credibility of an election. Support to domestic observation must realize that the current domestic observation is in a flux, still has weak capacity and is driven largely by advocacy organizations. Advocacy organisations take a position over specific electoral matters and seek to effect change in the electoral process on the basis of that position. Observation demands neutrality in assessing the electoral process. To avoid the tension between advocacy driven by a position and observations based on neutrality, it is important to separate the two and support both separately. Also, the private sector, trade unions and faith based organisations are anchored within the communities that vote and already have networks across the country that would facilitate civic education and election observation at limited costs. We should encourage and support the voices of private sector, trade unions and faith based organizations in order to ensure wider coverage of the country,

but also to mobilise them to monitor for a transparent and credible election. Further, ensuring a balance between domestic and international observation will be important. Domestic observers can easily cover an electoral cycle since they are on ground while international observers only focus on the specific electioneering part. There will be greater effect if a division of labour is agreed between domestic and international observers to ensure greater effectiveness of their work.

Appendix One: List of Reports Reviewed

	Organisation	Title of Report	Year
1	Government of Kenya	The Report on the Independent Review of Elections Commission	2008
2	Government of Kenya	Commission of Inquiry into the Post-Election Violence	2008
3	African Union Commission	Report of African Union elections observation mission to the 4 march 2013 general elections in Kenya	2013
4	Centre for Multiparty Democracy-Kenya	Strengthening the Participation of Kenya Women in Elective and appointive Positions Under the new Constitutional Dispensation	2013
5	Commonwealth Secretariat	Report of the Commonwealth Observe Group	2013
6	Department for International Development	Evaluation of DFID's Electoral Support through UNDP	2012
7	Department for International Development	Project Completion Review	2013
8	Elections Observation Group (ELOG)	The People's Final Verdict: Report of the Elections Observation Group on the Referendum on the Proposed Constitution of Kenya	2010

		2010	
9	Elections Observation Group (ELOG)	2013 General Elections Report	2013
10	European Union	European Election Observation mission to Kenya:2013 General Elections	2013
11	Institute for Education Democracy	Report on the quality of the principal register of voters used on 4th march 2013 general elections in Kenya	2014
12	International Crisis Group	Kenya's 2013 General Elections	2013
13	Kenya Human Rights Commission	The Democratic Paradox: A Report on 2013 Kenya's General Elections	2014
14	Office of the Auditor General, Kenya	special audit on procurement of electronic voting devices for the 2013 general election by the independent electoral and boundaries commission	2014
15	The Carter Centre	Observing Kenya's March 2013 National Elections	2013
16	Transparency International	Kriegler Commission Report: An Audit of its Implementation	
17	National Democratic Institute and Federation of Women Lawyers-Kenya	Key Gains and Challenges: A Gender Audit of Kenya's 2013 Elections Process	2013
18	United Nations Development Programme	The Joint Elections Assistance Programme	2008
19	United Nations Development Programme	Evaluation of support to Electoral Reforms and Constitutional Referendum project in Kenya	2011

20	United Nations Development Programme	Evaluation of the Support to Electoral Reform and Processes in Kenya (SERP) Project	2013
21	United Nations Development Programme	The Evaluation Report for the Enhanced Security Arrangements Project (ESAP)	2014
22.	Uraia	Uraia Media Strategy Review	2013
23	Uraia	End Term review of The Uchaguzi Bora Programme	2013

Appendix: Matrix of Status of Recommendations

Theme	Recommendation	Source of Recommendation	Year of Recommendation	Status of Implementation
Legal reforms	Consolidate all laws governing elections into one law	IREC report	2008	The Elections Act exists but several gaps and inconsistencies
	Establish an efficient and just dispute resolution mechanism to handle elections disputes	IREC Report The Commonwealth	2008 2013	Mechanism established. However, not working effectively.
	Regulation of party and campaign finance	UNDP EAP, African Union Observation mission Commonwealth Observation Mission The Carter Centre The ELOG Elections Report ELOG Referendum	2008	The Election Campaign Financing Act 2013 enacted
			2013 2013 2010	
Mechanism to implement 2/3 gender rule and promote equity	European Union Observation Mission UNDP 2011 Report	2013	Outstanding	

	Audit of elections laws to identify gaps and weaknesses	ELOG Elections Report	2013	Outstanding
	Inability of the election management body to deal with hate speech and elections violence	UNDP EAP	2008	Code of conduct National Cohesion and integration Commission
Civic and Voter Education	Strengthen voter education	Report of the African Union Observation mission, Caritas Kenya, Carter Centre, Commonwealth , ELOG, European Union, KHRC		Progress realized need to enhance civic and voter engagement
	Structured, timely and adequate voter education	UNDP EAP ELOG elections report ELOG Referendum Report European Union KHRC UNDP Report	2008 2013 2010 2013 2013 2011	
	Integrate voter education to ongoing civic education	UNDP EAP	2008	Outstanding
Cost and Funding of Elections	Effective and reduced costs for elections	IREC DFID UNDP	2008 2013 2014	Still requires work
Institutional arrangements	Clear demarcation of roles between the commission and secretariat staff	UNDP UNDP	2011 2014	Still problematic

	Reliable and Safeguards in using biometric voter registration and ICT; Integration of ICT with the IEBC's other critical processes such as political party liaison, public information, logistics, and security.	African Union Observation mission European Union observation mission Carter Centre	2013 2013 2013	Outstanding
	Transparency in management of elections	ELOG Elections Report ELOG Referendum Report	2013 2010	Outstanding
	Capacity and planning of IEBC to address steps in electoral cycle	European Union	2013	Outstanding
	Streamline procurement	UNDP 2011 Auditor General Special Report	2011 2014	Problematic
Political Parties	Gender equity in elective posts	African Union Observation mission Carter Centre The Commonwealth EOG Elections Report KHRC	2013 2013 2013 2013 2013	Outstanding
	Regulation and proper conduct of political parties' primaries	UNDP EAP KHRC	2008 2013	Outstanding

	Autonomy for the Office of the registrar of political parties	UNDP 2011	2011	Not fully Implemented
Role of non-state actors- media, civil society and private sector	Comprehensive law for regulation of the media	African Union Observation mission, The Commonwealth, European Union	2013	Some work done. Still outstanding areas
	Impartiality and Ethical coverage of elections	KHRC	2013	
	Law on licensing of media coverage	European Union	2011	
	Reduce costs of media coverage	UNDP	2014	
	Role of civil society and relationship with IEBC	ELOG Elections Report	2013	
Election Observation	Streamline accreditation of observers	ELOG Elections Report	2013	ELOG established but need to reassess its performance and structure
	Establish permanent domestic observation	IREC	2008	
Security and Peace Building	Enhance capacity of police	Carter Centre	2013	Ongoing
Role of Government	Improve coordination among government agencies and independent commissions	KHRC	2013	Outstanding
	Government financing of technology	UNDP	2011	Substantially achieved
Voter Registration	Registration of voters in Diaspora	Report of the African Union Observation mission	2013	Outstanding
	Adequate time for voter registration	UNDP EAP Report Carter Centre Commonwealth	2008 2013 2013	The Elections Act provides for continuous voter registration. However, not clear how helpful how this

				has been.
	Improvement of voters registration mechanism	UNDP	2008	Outstanding
		ELOG Elections Report	2013	
		KHRC	2014	
Marginalised Groups Participation	Adequate representation of minorities	European Union	2013	Work in progress