The Role of International Organizations during Electoral Crises: The Case of Kenya 2007-08

Paper prepared for presentation at the IPSA/ECPR Joint Conference: *Whatever Happened to North-South?*, University of São Paulo, Brazil, 16-19 February, 2011

Panel:
Internationalization of Elections:
The Role of Regional and International Organizations and Actors

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Abstract

International organizations play many different roles during election processes in new and emerging democracies (and in countries hoping to be seen as democracies). These roles – and the impact they may have – become particularly interesting during situations, where the electoral process develops into "an electoral crisis". An electoral crisis is understood here as some kind of humanitarian or political (or other) crisis, which has developed because of administrative (or other, such as fraudulent behavior) problems occurring in relation to an electoral process. Many such crises have occurred over recent years, but this paper only looks more closely at the Kenyan case of 2007-08. The tragic violence and ethnic cleansing, which was part of this particular crisis, shocked not only Africa, but the entire world during January and February 2008. The instrument established jointly by the Government of Kenya and international organizations to investigate what went so critically wrong in the electoral process, and what should be done to remedy the situation in the electoral field was IREC, the Independent Review Commission. The paper demonstrates how international organizations were involved during the electoral process – and also makes clear that the considerable amount of international assistance before and during the election was of almost no avail, while it was more useful after the election. The paper shows how IREC understood its mandate, describes some of the difficulties it encountered, and presents the key findings. IREC's surprising conclusion was that the main problems in the elections were *not* the finalization of the vote count and the tabulation – or the subsequent presentation of results. One has to look, *i.a.*, to the country's ethnic composition and history, to Kenya's political culture, and to the incompetence of the Electoral Commission of Kenya to understand why the expectations of an exemplary electoral process were turned into such a misery, despite international assistance from the very beginning of the electoral process. The paper moves eventually beyond the Kenyan case by also referring – however briefly – to parallel experiences from a few other countries.

The simultaneous presidential, parliamentary, and civic elections in Kenya on December 27, 2007 were disastrous. They were not only disastrous because many of the politically most established and well-known losers did not accept their electoral fate – as they might have done if the election results had been credible to them – but also because serious election-related violence erupted, in some places even before results were known. However, most of the emotion and most of the violence only occurred after the official announcement of the winner of the presidential contest, i.e. the incumbent president, Hon. Mwai Kibaki of PNU (the Party of National Unity), and the surprisingly low-key swearing-in ceremony immediately thereafter. In most cases, the protesters shared the opinion that Hon. Raila Odinga of ODM (the Orange Democratic Movement) should have been declared the winner as he – at least by his supporters – was expected to have got more votes than Kibaki.

Estimates of the number of deaths due to the violence oscillate between 1,000 and 1,500, the number of rapes and other forms of physical harassment and intimidation is unknown, and the number of internally displaced persons is everybody's guess, but it was probably in the vicinity of 400,000.

This amount of tragic violence was followed by increasing disbelief by the entire world as Kenya by many was considered a reasonably well-functioning country, where democracy was taking root – as demonstrated in the 2002 general elections and the way the constitutional referendum in 2005 had been conducted and the popular dismissal of the proposed amendments subsequently accepted by the losers, i.e. President Kibaki and those allied with him on this issue. Many also saw Kenya as a well-functioning economy, with substantial GNP growth, and as an economic locomotive in the East African region, which meant that developments in Kenya were expected to impact positively on developments in the region, but hopefully also elsewhere in Africa.

The election results were also a blow to the international donor community, as the massive international election support effort – funded by very substantial contributions from most donor countries present in Kenya and which was coordinated by a special unit established under the UNDP-Kenya – turned out to be of almost no avail. The UNDP and the donors had intended to demonstrate to Africa – and in particular to East Africa – what a successful and well conducted election would look like, but in a few hours it became just the opposite: A disaster, which left Kenya in disarray and disrepute, demonstrating to Africa and the world the hollowness of Kenyan democracy and the general instability of the Kenyan state. In this situation, it is not really a consolation that a few observers and analysts had actually pointed to the possibility of this dreadful outcome, as they were not listened to (see on this Leonard *et al.* 2009, 87ff).

 Kenyans themselves were not able to find a way of out this mess – and did also not want to accept the first attempts of international mediation – so only when a small group of eminent African personalities, spear-headed by Mr Kofi Annan, former UN SG, on behalf of the African Union and with the full support of the UN, came into the picture were solutions to the various issues gradually identified and accepted by the parties to the conflict (for an overview of this process, see, e.g., Lindenmayer and Kaye 2009, but also Khadiagala 2008, Juma 2009, and Brown 2009). The key points in the final agreement were only hammered out on the very last days of February, 2008, i.e., two months after election day.

It is important to understand that the ”electoral crisis” in Kenya first and foremost was the combination of a humanitarian catastrophe and a more "ordinary" political crisis because the electoral result for some reason was not acceptable to the runner-up in the presidential contest, Hon. Raila Odinga of the ODM, and his followers. The key purpose of the regional and international organizations was to find ways of ending the violence and human suffering, and here political solutions to the political part crisis were useful.

It is very interesting to note that the key mediators were able to get the two sides to the negotiations in Nairobi to accept that the – for them – burning question of "who won the election?" was put aside, i.e., it was buried in a Commission of Inquiry. IREC was given three to six months to answer the may questions put before it, and in this way the technicalities and possible – but certainly unforeseeable – consequences of the various electoral issues were effectively dismantled – at least for the time being. The negotiators could then go on to more pressing issues, which could actually help stop the violence here and now (Lindenmayer and Kaye, 2009: 12-14).

The tentative definition of an electoral crisis suggested is thus that it is a conflictual situation where problems related to the conduct of an election function as the trigger for serious problems (crises) of a humanitarian, a (deep) political, or other nature. The electoral problems are only the occasion (or

justification?), and the crisis is basically related to something else, oftentimes root causes of a much more permanent and serious nature (UNDP 2009).

A Framework

When analyzing electoral processes, it has become commonplace to take one's point of departure in the different phases these processes can be seen as consisting of. Either one can use a chronological approach, which means that electoral processes must be studied based on what happened before, during, and after election day, or one must apply a more procedural approach where the electoral process is seen as consisting of a set of different procedures and functions (but obviously also with a basic chronological structure built into it).
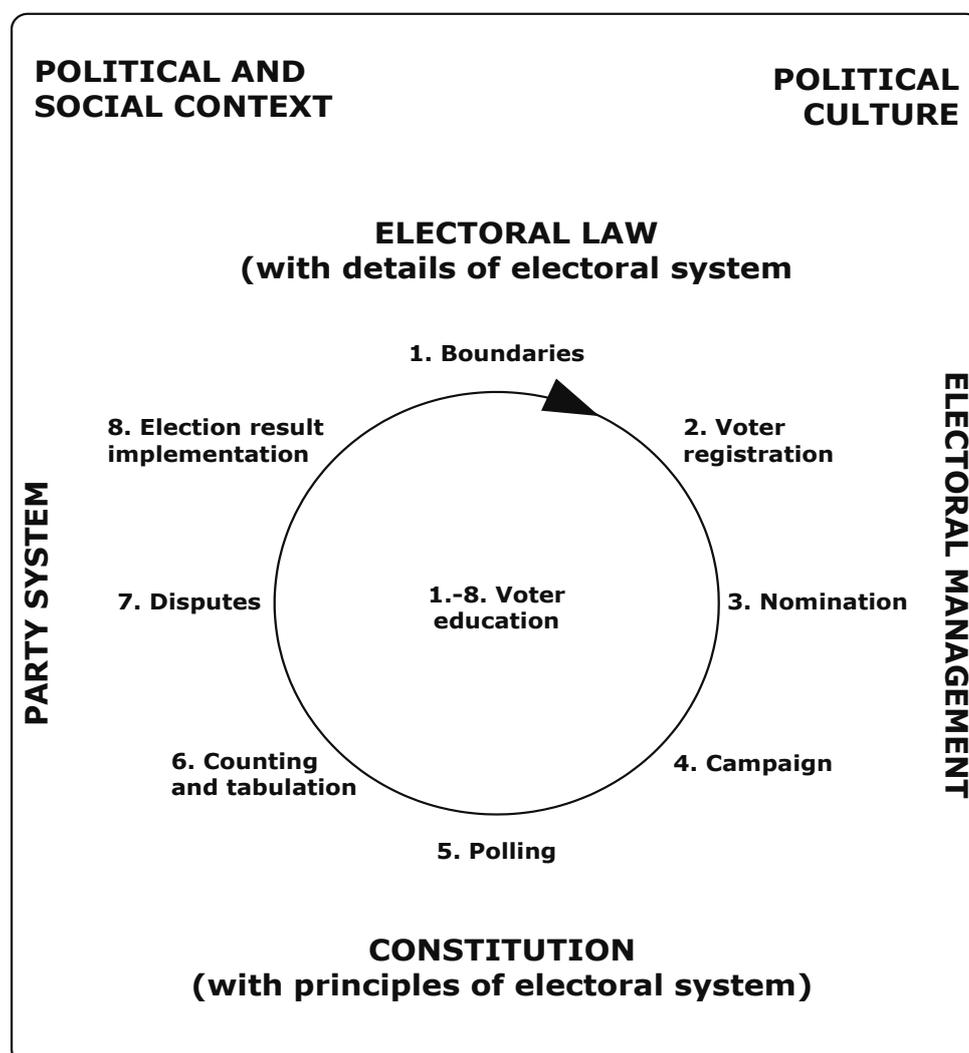
Both approaches have merit. The first, simpler and more strictly chronological, approach is immediately useful as it allows one to clarify how elements of the three main components of international electoral assistance – technical and managerial support, election observation, and post-election assessment and adjudication assistance – occur during the different chronological phases. A first take on this approach is found in the table below. Please note that the table does not even attempt to provide a complete coverage, it only indicates the principle in the chronological approach. The examples given in the table cells relate to the December 27, 2007 elections in Kenya.

	International technical and managerial support to the EMB	Election observation or monitoring	International assistance in dealing with election related complaints
Prior to the election	All kinds of preparatory support aiming at improving the various elements of the electoral process Examples: donors, UNDP (Electoral Assistance Programme, EAP), IFES	Long-term observers Example: EU-EOM	
Election Day(s)	Logistical support	Short-term observers Examples: EU-EOM, donors, Commonwealth Secretariat, NDI, KEDOF	
After the election	Counting, tabulation, and dissemination of results Post-election evaluations and recommendations Examples: UNDP (EAP), donors (individually and jointly), DFID	Reporting Example: EU-EOM	Adjudication processes Example: IREC

The other approach – sometimes called the electoral cycle approach – takes a more detailed view of the entire electoral process. It is seen as iterative, and the various elements cover all the inter-connected procedural elements of the entire electoral process. The thinking behind this approach has often led to a graphic presentation based on the idea of a circle, where the continuous flow of procedural elements automatically continues into the next, similar, cycle in the subsequent election.

The electoral cycle approach was first developed for the general analysis of electoral processes and the quality of electoral management, and has (in slightly different forms) become common ground for the study of electoral processes, in particular processes of democratic transition. The framework as applied here (cf. the model below) contains three different kinds of elements, which also allow a more comprehensive understanding of the electoral process's embeddedness in a particular set of institutional and contextual factors:

- *The nine iterative steps of the electoral process in its strictest sense* (i.e., the circle in the middle). Voter education is – at least in principle – linked to all the other eight steps, which is why it is placed within the circle.

- *The four institutional factors located around the electoral process circle*, i.e. the electoral administration system (or EMB, electoral management body), the constitution, the electoral law, and the party system. The EMB-factor also encompasses all sorts of regional, local, or international assistance to the running of the elections, whether fully integrated in the EMB or not.

POLITICAL AND SOCIAL CONTEXT

POLITICAL CULTURE

ELECTORAL LAW (with details of electoral system

1. Boundaries

8. Election result implementation

2. Voter registration

PARTY SYSTEM

ELECTORAL MANAGEMENT

7. Disputes

1.-8. Voter education

3. Nomination

6. Counting and tabulation

4. Campaign

5. Polling

CONSTITUTION (with principles of electoral system)

- *The political, cultural, and social factors placed in the two upper corners of the square.* These elements reflect key characteristics of the society under scrutiny as well as the ongoing development of those factors. No election can be fully understood without a reasonable grasp of these factors. In the context of the approach of this paper to understanding "electoral crises", it is evident that these factors will often be among the root causes of election related conflicts.

Following the electoral cycle approach, the paper will introduce the key international organizations in the order indicated in the figure above, with the main focus, however, on steps 7 and 8, as it was only here that the electoral crisis erupted. The attempt to develop a comprehensive understanding of the 2007-08 Kenyan electoral crisis took place within what was termed The Independent Review Commission (IREC for short),[1] but became popularly known as the Kriegler Commission, after its chairperson, South African retired Judge Johann Kriegler. The commission further consisted of four Kenyans, two from each side of the political divide, a Tanzanian judge, and an experienced electoral advisor from Argentina, who previously had headed the UN Electoral Assistance Division. Secretary to the Commission was the author of this paper.[2]

First, however, the contextual factors, in which the 2007 Kenyan electoral process was embedded, must be introduced.

Background Factors

1. The political and social context of the December 2007 elections has already been referred to in (very) broad terms. The political development since 1991-92 – with the difficult introduction of multi-party democracy – and the country's remarkable ethnic composition with the largest ethnic group consisting of only slightly more than 20 per cent of all Kenyans – and the clear pattern of parties being formed and appealing for support on the basis of ethnicity – creates a situation with a substantial number of challenges for a harmonious development of an electoral, multi-party democracy. However, the claim has been made that ethnicity as such is not the key factor in what happened, but rather that the scrupulous instrumentalization of ethnicity by some politicians should be blamed for the violence in 2007-8 as well as at previous occasions.

2. The political culture as it has developed in Kenya suffers from a number of problems. Among the most important, one counts in a culture of impunity, the "Big Man"-syndrome known from many African countries, and strong elements of neo-patrimonialism.

Institutional Factors

1. The Electoral Management Body was the Electoral Commission of Kenya (ECK) with as many as 22 members, 19 of which had only been appointed shortly before the elections and by the President alone, i.e. without inter-party consultation. Many saw this as a conscious violation of the 1997 IPPG agreement and it contributed to ECK being considered biased in favor of Kibaki. Some of the new commissioners also lacked electoral and other relevant experience, so it is easy to understand why

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[1] This paper is an expansion of an earlier paper on IREC (Elklit 2010).

[2] Obviously, the paper is written in the author's personal capacity. JE

many Kenyans claimed that the 2007 ECK was not a legitimate organizer and arbiter of election related issues. The chairman, Mr Samuel Kivuitu, was, however, considered both experienced and professional, so his eventual reappointment as chair was seen – not least in the donor community and among the international organizations – as a guarantee that professionalism would nevertheless prevail and that the electoral process would be run as competently and unproblematic as the 2002 general elections and the 2005 referendum.

2. The Constitution of Kenya had been debated for a number of years, and seriously so for at least 10 years. One of many issues was that the Constitution (in Section 33) was silent about the way the 12 Nominated Seats were to be filled. The ECK was not able to explain to IREC why these seats were allocated differently after the 2007 parliamentary election compared to 1997 and 2007 – apparently using a formula never used before in electoral history!

3. The electoral law was not in a good shape. Only one (sic!) complete copy existed (in the Parliamentary Library), and it was therefore difficult to provide those interested with a complete and comprehensive legal text. The various manuals produced to the different levels of election administrators were missing in various respects – not least because the law was changed after the printing of the manuals (sic!). The change suddenly allowed voters who had registered more than once to vote (only once, of course), even though previous provisions had made it a serious electoral offence, which should be punished accordingly (a heavy fine and/or imprisonment). This late change to the electoral law was very ill-timed and probably also poorly implemented because of all kinds of communication difficulties. This meant that the preparation and production of election manuals and voter information material – which in various ways was supported by the international donors through the election support office placed under UNDP-Kenya (see below) – was based on a text, which was not sufficiently accurate. The impression was that this material mainly benefitted the printing industry in Kenya, not the electoral process.

4. The party system is highly relevant for the understanding of any election, which was particularly evident in Kenya, where the weak nature of the political parties contributed to the various problems. The weak support basis of the parties – with no formal party membership (or only a very narrow membership basis) – meant that it was not too difficult for those interested (and wealthy enough) to consider vying for a nomination to stand for parliament to convince those present at nomination gatherings to accept the person's plea – in particular if it was supported by strong arguments (in the form of cash being distributed). The fluidity of the party concept and the relationship between ethnicity and party (Elischer, 2008) – among grass-roots supporters as well as some of the new candidates standing for election – did not make it easier for voters to find a party to vote for based on ideology and policy visions – even though it is has been demonstrated that government performance and issues also influenced the electoral outcome (Gibson & Long, 2009).

The Quiet First Five Steps in the Electoral Process

As already hinted at, most foreign donors in Kenya were keen to support the electoral process, partly because it was seen as important to the political process in Kenya itself – particularly after the 2005 referendum – partly because it was expected that the process would run smoothly, which meant that it could have demonstrative value for other countries in the region – maybe even on the continent.

The donors agreed to provide funding for a joint election support program, coordinated and managed by UNDP-Kenya, called the 2007 Kenya Election Assistance Program. Donors established an Election Support Donor Group, with USAID as the lead donor, and together with ECK and UNDP also an overall steering committee, which was to provide overall leadership and strategic guidance for the entire program. An experienced foreign electoral management specialist was identified and contracted to head the UNDP Program Management Unit, which should manage the Election Assistance Program on behalf of ECK and the donors (e.g., UNDP 2009, pp. 69-78).

The size of the program budget was more than 12,000,000 US$, which comparatively speaking is a very substantial amount of external support for an election expected to be relatively peaceful and not some kind of post-conflict election.

Key support areas – agreed with the ECK – were "the usual suspects", i.e. EMB capacity building, voter education, voter registration, preparation of election material, support for a domestic election observation organization, training of political journalists in election coverage, development of a new water-proof, integrated IT-based system for result transmission from voting stations to national results presentation, etc. The presentation below of the steps in the electoral process will include some comments on the degree of success of these support areas.

1. Boundaries: This is the first step because clear constituency and polling district boundaries must be in place before anything else as these administrative units play a role in subsequent steps. This was by and large the case in Kenya, even though there had been attempts to have a new constituency delimitation conducted, in particular because of huge differences in constituency size. The largest constituency had 20 times as many registered voters as the smallest. This was seen as detracting in legitimacy from the parliamentary body, especially as parliament itself had blocked the ECK attempt to have a least some kind of constituency structure and size revision.

2. Voter registration is the second step in the electoral process. It is also one of the most important elements – at least from a democratic point of view – as it is through the system for voter registration that inhabitants fulfilling the eligibility requirements become voters and full citizens. If the system for voter registration does not include all (or almost all) entitled to registration on the voters' roll, the entire system will lack in democratic legitimacy. Registration in most African countries is problematic as it is not unusual that as many as 30-35 per cent of the voting age population has not been registered to vote.[3] Kenya in 2007 combined a system of continuous registration (through the so-called *Black Books* kept at the constituency registration offices) with registration drives when an election was up-coming. However, the constituency registration offices did not function well as almost no prospective voters were registered in this way. The constituency offices were also ineffective in relation to the purging of the voters' register because of deaths or moving out of the constituency. IREC estimated that 1,000,000 registered voters were actually deceased (IREC, 2008: 279-281), something no one apparently bothered about. This is particularly

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[3] The consequence is that turnout percentages in many African countries are inflated, at least compared to what they should have been, had the basis for the calculation been the voting age population (VAP), which is a more useful calculation basis.

interesting as the two voter registration drives in 2007 led to the registration of far more than 1,000,000 new voters, which the Program Management Unit, ECK and the donors considered a major achievement. But this was obviously only part of what should have been done to have a much better voter register than previously. The under-registration of young people and women is not only seen in Kenya, but also elsewhere in Africa, even though that is a poor excuse for not securing that potential voters are actually on the register on election day (and that dead voters are not). It is interesting that the registration (under the new IIEC) for later by-elections in two constituencies (Bomachoge and Shinyalu) saw the number of registered voters decline considerably compared to what was the case in December 2007. This development continued during the re-registration process before the 2010 referendum.

3. Nomination of candidates for parliamentary and civic election was inundated by problems, mainly due to the political parties' low level of institutionalization. Candidates who could not get nominated by their preferred party, often continued to seek nomination by other parties, not seldom using distribution of cash in their attempts to convince those present of their suitability as candidates. This was possible because of the weak nature of political parties, with shallow organizational structures, few, if any, card-carrying members, and only rarely clear procedures for nomination of candidates. The consequence was that many candidates ran for election, and therefore one also saw a spread of votes on candidates with only minuscule prospects of winning.

4. Election campaigning went reasonably well by many standards and according to most observers, even though it was also characterized by a strong element of hate speech, primarily in vernacular language radio programs.

5. Polling went reasonably well according to both domestic and international monitors. However, polling in some constituencies – and in particular in a number of polling stations – had a very impressive turnout of voters. The many dead voters on the register – spread all over the country, i.e. in all provinces and all constituencies – made it most unlikely to have turnout percentages of more than 90. But that was the case in many areas, and turnout percentages of exactly 100.0 per cent were seen in a number of polling districts, also in constituencies outside the control of the incumbent administration and its ethnic basis. Such turnout percentages are extremely unlikely and were seen by the IREC as indicative of inefficiency and poor administrative competence – if not outright bias in favor of the area's preferred candidate – as there was reason to believe that this was a sign of ordinary ballot stuffing.

The Electoral Process Steps Which Led to the Crisis

6. The key claim from ODM, when the result of the presidential election announced by the ECK was challenged – violently by some – was that at least the tabulation process at the national level – at The N*ational Tallying Centre* at the KICC (Kenyatta International Conference Centre) in central Nairobi – was the arena for extensive manipulation by ECK staff and commissioners in some kind of illicit co-operation with prominent PNU activists and leaders.

The brief of the Commission of Inquiry established by the National Accord after the invention by Kofi Annan and his team was that IREC should:

- analyze the constitutional and legal framework for the conduct of the elections and identify all weaknesses and inconsistencies in the electoral legislation,

- examine all aspects of the ECK's preparedness and way of conducting the elections,

- examine the public participation in the electoral process,

- investigate all relevant aspects of the 2007 electoral operations,

- investigate the vote counting and tallying for the entire election with special attention to the presidential elections to "assess the integrity of the results and make recommendation for improvements …",

- "assess the functional capacity of the ECK and its capacity to discharge its mandate", and

- "recommend electoral reform, including constitutional, legislative, operative and institutional aspects, as well as accountability mechanisms for ECK commissioners and staff pertaining to electoral malpractices, in order to improve future electoral processes" (*The Kenya Gazette*, 14th March, 2008, Notice No. 1983).

However, the brief did not ask IREC to establish who had actually won the presidential race, Kibaki or Odinga, even though exactly that question was probably what triggered the violence. The drafters of the brief of IREC understood only too well how difficult – probably even impossible – it would be to answer that question and any attempt to declare who should "rightfully" have won the presidential contest, would in all likelihood only re-ignite the political and ethnic violence, especially if it turned out to be Mr Odinga. But the key point for the drafters of the brief – and for IREC – was that it would not be possible to tell beyond dispute who should have been declared the winner (for reasons to be developed below). The brief – as one can see even in the paraphrased form above – was quite comprehensive, so one must say that (1) all aspects of the electoral process had to be covered and (2) there was no reason to believe that it would not take at least several months, which meant that a report would only appear when political life in the country was back to some kind of normalcy and, the atrocities had been stopped, and the worst problems of the IDPs had been dealt with.

It is extremely interesting here to note that Kofi Annan early on had realized that it was a *sine qua non* to get the endless discussions about "who actually won the presidential election" off the table as these discussions derailed the more important attempts to find the political solutions necessary to get to an end to the continuing atrocities. The negotiation team was brought to accept this by being forced to listen to presentations about all the severe problems connected with finding out "who actually won the election" (which would be next to impossible) (Lindenmayer and Kaye, *ibid.*) – and one supposes that it was this briefing of the negotiation that led to the formulation of the very comprehensive brief.

When it was agreed to park the electoral questions in a Commission of Inquiry it became possible to move on to the higher priority issues, such as the political solutions to the many problems, which were before the political actors.

In the mind of the public – and certainly also in the minds of the politicians, in particular on the ODM side – there was a clear picture of a biased (to say the least) electoral commission and a conspiracy between some electoral commissioners and staff on the one hand and high-level PNU activists and leaders on the other which had worked together in completely unacceptable ways to ensure that Kibaki would win no matter what. Issues related to electoral cycle step 6 (Counting and tabulation) therefore became particularly important to IREC's work. Some of the elements looked at were the following:

a. A key issue in all complaints about this election was the large voter turnout discrepancies between presidential and parliamentary elections in some of the 210 constituencies. In Kirinyaga Central – to take just one example – 80.4 per cent voted in the presidential contest according to official ECK figures, but only 64.5 per cent in the parliamentary election (see the copies of the official results tables on the following page). Many – including leading civil society organizations and the complaining ODM – saw this as evidence that about 11,000 votes had been added – at KICC – to Kibaki's vote, as he had as many as 52,886 votes cast in his favor – of a total of 55,061 valid votes in the presidential race. Such turnout differentials are, however, very unlikely in simultaneous elections. IREC, therefore, conducted a detailed scrutiny of the relevant ECK forms and the surprising – and extremely alarming – result was that the turnout differentials between the two kinds of elections almost disappeared when data entry of all polling station results was done more carefully than what had been the case immediately after the election in the constituency counting and tallying centres.

As regards Kirinyagi Central, the result was that the official ECK figures for the two elections were wrong. The figures for total number of votes cast were too high in the case of the presidential and much too low in the case of the parliamentary election, as it is easy to see if one adds the number of votes cast for each candidate as they appear in the tables on the following page. A detailed scrutiny of constituency forms reporting results from individual polling stations further made it evident that the number of votes was wrong for 17 of the 18 parliamentary candidates and for eight of the nine presidential candidates. Kibaki had actually been allocated *fewer* votes than he should have had (which, of course, makes it unlikely that the results had been tampered with to his advantage!) – and in the parliamentary race, the declared winner only came second (sic!) (IREC 2008, pp. 320-321). At the IREC hearings, the returning officer from Kirinyaga Central stated officially that he accepted the correctness of IREC's findings.

PRESIDENTIAL ELECTION RESULTS PER CONSTITUENCY

CONSTITUENCY: 090   KIRINYAGA CENTRAL

CANDIDATE'S NAME	POLITICAL PARTY	VOTES SCORED	% VOTES SCORED	
KIBAKI MWAI	PARTY OF NATIONAL UNITY	52,866	96.01	%
KUKUBO NIXON JEREMIAH	REPUBLICAN PARTY OF KENYA	8	0.01	%
MATIBA KENNETH STANLEY NJINDO	SABA SABA ASILI	9	0.02	%
MUSYOKA STEPHEN KALONZO	ORANGE DEMOCRATIC MOVEMENT - KENYA	53	0.10	%
MWANGI PIUS MUIRU	KENYA PEOPLE'S PARTY	37	0.07	%
NGACHA JOSEPH KARANI	KENYA PATRIOTIC TRUST PARTY	130	0.24	%
NGETHE DAVID WAWERU	CHAMA CHA UMA PARTY	2	0.00	%
ODINGA RAILA AMOLO	ORANGE DEMOCRATIC MOVEMENT	580	1.05	%
RAJPUT NAZLIN OMAR FAZALDIN	WORKERS CONGRESS PARTY OF KENYA	3	0.01	%

Total Votes Cast:	55,380	Valid Votes:	55,061	Registered Voters: 68,878
Rejected Votes:	319			Percent Voter Turnout: 80.40 %

PARLIAMENTARY ELECTION RESULTS

CANDIDATE'S NAME	POLITICAL PARTY	VOTES SCORED	% VOTES SCORED
CONSTITUENCY: 090	KIRINYAGA CENTRAL		
ABUBAKAR HASIA IRERI	ORANGE DEMOCRATIC MOVEMENT	219	0.50
DICKSON DANIEL KARABA	PARTY OF NATIONAL UNITY	17,151	39.02
GATIMU PAULINE WANJIKU	NEW SISI KWA SISI KENYA	536	1.22
GICHUKI EVAN MUCHINA	FARMERS PARTY	126	0.29
GITURE ERIC KARANI	THE NURU PARTY	474	1.08
KAGONDU ANDREW MURITHI	AGANO PARTY	226	0.51
KAPONDA DESIDERIOUS	KENYA NATIONAL DEMOCRATIC ALLIANCE	372	0.85
KARIMI DISHON KIRIMA	VIPA PROGRESSIVE ALLIANCE	336	0.76
KARIUKI JOHN NGATA	FORUM FOR THE RESTORATION OF DEMOCRACY - ASILI	17,219 (WINNER)	39.17
KERIRI JOHN MATERE	SAFINA PARTY	7,298	16.60
KINYUA EDWIN MURIITHI	KENYA NATIONAL CONGRESS	9,239	21.02
MBUI NICHOLAS KINYUA	DEMOCRATIC PARTY OF KENYA	948	2.16
MWANGI LAWRENCE RURIGE	CHAMA CHA MWANANCHI	199	0.45
MWANIKI HENRY MURIUKI J	MAZINGIRA GREENS PARTY OF KENYA	1,855	4.22
NJERU SAMUEL KAGDIYO	NATIONAL LIBERATION PARTY	257	0.58
NJIRU JAMES NJAGI	KENYA NATIONALIST PEOPLES DEMOCRATIC PARTY	309	0.70
NJOGU RICHARD MUGO	FORUM FOR THE RESTORATION OF DEMOCRACY FOR THE PEOPLE	24	0.05
THOMAS RAYMOND KARINGA	UNITED DEMOCRATIC PARTY OF KENYA	309	0.70

Total Votes Cast	44,446	Valid Votes:	43,957	Registered Voters:	68,878
Rejected Votes:	489			Percent Voter Turnout:	64.53 %

Similar results were found in most of the constituencies scrutinized in this way, so the official ECK elections results are not to be trusted.[4] However, the important finding is that such problems were not only found in those constituencies where Kibaki had massive support, but also in Odinga-land and elsewhere. So the obvious conclusion is that the differentials were not created by Kibaki- or PNU-biased ECK staff or commissioners adding extra votes to Kibaki's votes at KICC, but were due to poor working conditions at constituency tallying centres, insufficient staff training, the late ECK decision not to use the computers (and software) obtained for this purpose, and probably also sloppy work by some returning officers or deputy ROs. IREC could only scrutinize a sample of constituencies in this time-consuming manner, but the conclusion arrived at by IREC was

> "… that conduct of the transfers from polling stations to constituencies, the tallying in constituencies, the transfer of constituency-level presidential election results and the tallying at national level is – generally speaking – of incredibly low quality; it is actually not acceptable.
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> This scrutiny of the handling of results-transfers and tallying has not indicated any particular or discernible party bias in the demonstration of incompetence by constituency tallying centre staff, by national tallying centre contract staff at KICC, or by ECK permanent staff or commissioners" (IREC 2008, pp. 127-129).

b. Other counting and reporting related problems also contributed to the confusion, which was noted by all observers of the process: (1) Reporting was late from some constituencies, and the debate over possible patterns in these delays has been intense, (2) the fact, that some ROs did not abide by the clear instructions never to release *partial* results and only to release total presidential results as *provisional,*[5] obviously contributed to serious misperceptions and confusion, even in the ECK itself, and (3) some partial results even made it to the KICC where some of them were being updated (i.e., changed to final results) on paper forms, which gave some of those present the impression that "corrections" (read: illegal changes) had been entered in the ECK results computer.[6] It became evident during

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[4] The document compiled by Toni Weis (2008) is therefore only of value if one wants to document what the basis was for the misperceptions and misunderstandings about the importance of turnout differentials in civil society, the ODM, and some of the election monitoring organisations.

[5] Because the ECK was responsible for the final result and therefore only commissioners could declare final presidential results (for constituencies or for the entire country).

[6] Juja Constituency is a good example of this: The final result of the presidential elections in the constituency – in particular the 100,390 votes cast for Kibaki – was challenged by many, because another result – with 48,293 votes for Kibaki – had also been reported. However, the latter was only a partial result, based on 111 polling stations (see documentation in the ODM submission), while the constituency has 232 polling stations. Results for all other presidential candidates also more or less doubled between the partial and the final results; this adds to the credibility of this explanation of the differences, which were noted by many Kenyans and also by, e.g., the EU observers.

the IREC hearings that there was an obvious and surprising lack of understanding of the need to be able to officially and transparently correct constituency results (both for the presidential and the parliamentary elections), which for some understandable reason had been forwarded and published by mistake.

c. European Union Election Observation Monitors (EU EOM) did not fully understand and identify the various problems related to counting, tallying, and reporting results, which regrettably contributed to setting a rather negative tone in both the preliminary statement and the final EU EOM report. There was – during the lifetime of IREC – absolutely no help to be obtained from the EU EOM desk in Brussels, which was rather disappointing as that might have helped IREC in verifying what had actually happened at specific constituency counting centres. The approach of the EU and EU EOM towards IREC could only substantiate the feeling that it would have been very interesting to have been given access to the internal material we politely asked for.

d. KEDOF (Kenyan Election Domestic Observation Forum) was the umbrella organization for the domestic monitoring organizations, created with the support of the UNDP based election assistance program. It was a very costly exercise and extremely little came out of it, not even a timely report.[7] The many reasons for the almost complete failure of the domestic observation program need not be reported here. What is important in this context is that differences of opinion, competence, integrity, and experience between the various interested parties and stakeholders were not resolved and therefore contributed to spending – as part of the international support program – more than US$ 2 mill. with nothing coming out of it.

7. Disputes. The time frame allowed for preparing election related complaints, and the brief time frame for personally serving the winners contributed to a lot of anger and frustration, in particular because the courts took a very legalistic approach to issues before them even when one suspected that there might have been a problem. The low level of trust in Kenyan courts was thus substantiated. It was also telling – but also surprising for observers – that Mr Odinga did not want to present his complaints to the courts as allowed for in the electoral law.

8. Result implementation was fast, in particular as Hon. Kibaki was sworn in soon after the ECK had declared him the winner with a few percentage points over Hon. Odinga.

9. Voter education was conducted to a considerable degree and at considerable costs. It was a little unclear why extensive voter education was necessary after several rounds of competitive elections (1992, 1997, 2002), a considerable number of by-elections in constituencies across the country, and the 2005 referendum.

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[7] Apart from a brief preliminary statement of little value, nothing was published until September-October 2008 (sic!) when a useless, partly misunderstood report was published.

The course of election related events in Kenya in late 2007 and early 2008 have triggered a considerable amount of writings on the topic, some of which are listed among the references. At least three academic journals (*Journal of Eastern African Studies, Journal of African Elections*, and *Journal of Contemporary Africa Studies*) have even published special issues dealing with various aspects of the political and electoral developments, and there is no doubt that the December 2007 general elections in Kenya will for years continue to be a contentious issue among Kenyans as well as among africanists, election advisors and experts from Africa and elsewhere, and many others. Leonard *et al.* (2009) has a particularly comprehensive list of references and relevant material.

One issue in dealing with the Kenyan crisis is how to separate what happened during the electoral process as such from more general political and social developments in the country. Among those who argue that one has to have a comprehensive approach of what happened at all levels one finds Branch and Cheeseman (2008). They see the elections as the immediate trigger of the crisis, but also argue convincingly that the deeper and more important roots of the crisis are to be found within three broad historical trends, which they term elite fragmentation, political liberalization, and state informalization.

Branch and Cheeseman (op.cit.; see also Smith, 2009, and Leonard *et al.* 2009) provide a useful account of relevant elements in the social and political development in Kenya and they also try to put the ethnic factor into proper perspective by drawing on their insight in elite fragmentation over recent decades, demonstrating convincingly that it is too simplistic to refer only to Kenya's ethnic composition (and the relationships between politicians, political parties, and ethnic groups) as the primary cause of the crisis. Behind the use of the ethnic factor, one finds elite fragmentation as it has developed, and which caused some elite fractions to behave differently in 2006 and 2007 from what they might otherwise have done (for a useful survey of the relationship between ethnic groups and parties, see Elischer, 2008; see also Leonard *et al.*, 2009, 79ff). Others have also argued that ethnicity might have been used more instrumentally than one sometimes think.

Later Developments

One of IREC's many suggestions was the complete dismantling of ECK, which had demonstrated such levels of incompetence and integrity – and was seen by very many Kenyan voters – as the main wrongdoers. The ECK was eventually replaced by a nine-member Interim Independent Electoral Commission. The body was made interim because of the constitutional reform process, as one could not know what the precise stipulations in the new constitution in this particular field would be. After the approval of the constitution, legislation on the EMB is being prepared, and the body will eventually be the Independent Electoral and Boundary commission.

Many of the recommendations made by IREC will only come into effect in a new electoral law, which is also being considered now. One major improvement, which has been implemented, is a computerized, new voter register, which was in place for the 2010 constitutional referendum, which in itself was a major achievement of the IIEC.

The now approved Constitution of Kenya does not include IREC's recommendation to establish a special Electoral Dispute Resolution Court. One also notes that the provisions for the future electoral system build on the so-called Bomas draft, i.e. has only an minuscule (and therefore unimportant) element of

proportional representation, at the same time as 47 special women constituencies are established (the new counties), on top of the ordinary single-member constituencies.

A provision aiming at securing that at least one third of all MPs are women is commendable, but not well thought out, as it might lead to unforeseen and very unpleasant consequences. There is no indication of how one already in the next general election will get rid of a sufficient number of male MPs elected in the ordinary single-member constituencies as numbers make it very clear that 58 of the 290 single-member constituencies *must* return a woman!

The regulation of political parties is quite detailed – and probably more than is warranted – but it builds on – and provides the constitutional basis for the Political Parties Act, which came into force in mid-2008.

Conclusion

IREC was able to fulfill its mandate within the time set aside as it could pronounce on the electoral process in Kenya in its report, which was published on 18 September 2009 and then presented to Hon. President Kibaki and Hon. Prime Minister Odinga – and then to Kofi Annan at a separate occasion.

Much to the annoyance of some, IREC was not able to establish that the outcome of the presidential contest was caused by fraudulent behavior at the KICC or elsewhere. It was, however, very clear that the ECK had not been able to ensure the integrity of the electoral process, which then contributed to the tragic outburst of violence which followed the declaration of the result of the presidential elections.

However, it is probably more important to realize that Kofi Annan's plan had worked: The difficult election related questions raised during the negotiations in January and February 2008 had for several months been parked outside the main political playing field, which allowed the key political actors time and space to start getting on with other issues, which also contributed to creating an atmosphere where the atrocities could be stopped and the issue of the many IDPs could be addressed – at least to some degree.

The African Union was behind Kofi Annan from start to end, even though he as team leader of the Panel of Eminent African Personalities was given an absolutely free hand to deal with the Kenyan issue as he found best. The same approach was taken by the UN, which mainly gave the former SG its moral and practical support. Mr Annan has also later recognized that it was very useful to be able to act free of the formal requirements of the UN system.

This paper's understanding of what an electoral crisis is – i.e. a humanitarian and/or political crisis caused by a more or less failed electoral process, the results of which are not being accepted by political heavy-weights and their followers – appears to be useful because it allows us to separate occasions (the more or less failed election) from on the one hand (1) more important immediate causes (such as misperceptions of one's own voter support, failed political dreams, or unreliable alliance partners) or (2) deeper social, ethnic, religious tensions, maybe of a historical nature (so-called root causes, e.g. in UNDP 2009), and then on the other hand (3) the various immediate consequences (such as all the various kinds of popular outbursts of anger or the political actors starting to playing delaying games).

This simple analytical tool might also be applied to other "electoral crises", of which the following comes immediately to mind (at least to the present author):

Lesotho 1998: The BNP (and other opposition parties) did not do as well as they had hoped, so they claimed that incumbent party was cheating and incited their supporters to take to the streets. The consequence was that the supporters did so and started to burn down parts of Maseru, the capital. SADC and Commonwealth intervened and analyzed the situation: There was no particular cheating and the elections were pretty OK. Again we see a situation, where the election was the occasion, but nothing more, while a long list of both immediate and more distant causes can be established.

Lesotho 2007-10: See on this – and on the SADC and UNDP interventions – e.g. Matlosa (2010) and UNDP (2009, 79-82).

Afghanistan 2010: The development in Afghanistan since the September 2010 parliamentary elections has not in itself deteriorated into post-election violence. However, the fraudulent and violent nature of the electoral process (as evidenced, i.a., by the decisions of the Electoral Complaints Commission, established in cooperation with the UN system) reflects the same combination of immediate causes and root causes as many other serious electoral conflicts – and one gets the impression that the elections have only been the available trigger for the pursuit of motives, which required the use of means, which elsewhere would be considered unacceptable.

Zimbabwe, Ivory Coast, Angola – the list could be made longer and longer, but that is not the point.

Sometimes elections in new or unstable democracies have been characterized by certainty of the outcome (which is not how it should be), but uncertainty about procedures and processes. This is of course deplorable, since acceptable elections should be characterized by uncertainty about outcome and certainty of procedures and processes. The general elections in Kenya in December 2007provides a new variant as there were uncertainty about not only the outcome of the presidential election (and some parliamentary elections as well), but also about procedures and processes.

The situation developed into the most regrettable atrocities and unacceptable behavior towards fellow citizens, which shattered the world. The post-election intervention by the international community – represented in particular by the AU and its panel – was successful because it was able to get the electoral issue off the negotiation table and "put away" in a Commission of Inquiry. This provided the time and space for finding political solutions to political problems, and even though that process is definitely not yet completed at the time of writing (late January 2011), the question of who won the presidential contest has been effectively dismantled (even though it is still possible to air one's concern about aspects of IREC's report (Leonard *et al.*, 2009, 84-85) – and that was the purpose!

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