

END OF ASSIGNMENT REPORT



DR. ROSELYN AKOMBE

**COMMISSIONER, INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION OF KENYA
18 JANUARY 2017 TO 18 OCTOBER 2017**

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Hillside, NJ 07205

30 October 2017

Mr. W.W. Chebukati
The Chairperson
Independent Electoral and Boundaries Commission
Anniversary Towers
NAIROBI

Dear Chairman,

RE: END OF ASSIGNMENT REPORT

I hereby wish to transmit my “end of assignment” report covering the period of my tenure as a Commissioner with the Independent Electoral and Boundaries Commission.

As you know, it was always my intention to work closely with you and colleagues to build a credible institution charged with the solemn responsibility of being the channel through which Kenyans express their constitutional sovereign will. However, as you indicated in your 19 October 2017 statement, “it is very sad that we could not provide an environment for such minds to find full expression without fear for their lives”. However in furtherance of my desire to be constructive and as a professional obligation to smooth hand-over to my successor, I have prepared this detailed report as part of my contribution to making our institutions better and stronger.

This report is a professional attempt to share my observations, including some existing good practices at the Commission, and suggest some recommendations for your consideration. As a Commissioner, I did not benefit from a detailed debriefing or hand-over note (except the report from the CEO, many weeks after we had joined the Commission) from my predecessors. I hope that my successor will benefit from the thoughts in this report.

The views contained in this report are solely mine and do not represent the official positions of any institutions that I have been affiliated with or will be affiliated with in the next few months.

I wish you the very best as you continue discharging your mandate.

Sincerely,

A handwritten signature in black ink that reads "Roselyn Akombe". The signature is written in a cursive, flowing style.

Roselyn Kwamboka Akombe (PhD)

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LIST OF ACRONYMS

AU	African Union
BVR	Biometric voter registration
CEO	Chief Electoral Officer
CORD	Coalition for Reforms and Democracy
CSOs	Civil society organizations
CS	Cabinet Secretary
DCR	Department of Civil Registration
ELOG	Elections Observation Group
EOM	Election observation mission
EMB	Election Management Body
EU	European Union
IEBC	Independent Electoral and Boundaries Commission
KIEMS	Kenya Integrated Elections Management System
KYSY	Kura Yangu Sauti Yangu
NASA	National Super Alliance
NGO	Non-governmental organization
NRB	National Registration Bureau
ODM	Orange Democratic Movement
UN	United Nations
UNDP	United Nations Development Programme

SUMMARY OF RECOMMENDATIONS

A. NATIONAL DIALOGUE

In order for the country to have credible elections in 2022 and the future, there should be a political dialogue akin to the national conventions held in the 1990s, to facilitate a frank environment to address the issues that befall the nation. This national dialogue must, by necessity, discuss and seek consensus on next steps to:

- i) Lead to the establishment of an independent public inquiry into the conduct of the 2017 elections especially the use of technology, including the role played by Safran/ OT Morpho and other IT consultants. The Commission, to be composed of external experts as was done during the Waki and Kriegler Commissions should be led by a prominent jurist to audit the entire Kenyan electoral processes including the August/October elections, the register of voters, procurement of strategic electoral material including ballot papers and form, use of technology, political influence/interference in the electoral process, among other key issues.
- ii) Review how well/not well the 2010 Constitution has worked and whether amendments are required.
- iii) Determine what political system needs to be put in place to address the history of two communities dominating the presidency¹;
- iv) Establish mechanisms to ensure the full implementation of the recommendations of the Truth, Justice and Reconciliation Commission, Independent Review Commission (Kriegler report), the Commission of Inquiry on Post-Election Violence (Waki Commission) and the Ndungu Land Commission report ;
- v) Discuss ways of ensuring the full implementation of the devolution agenda;
- vi) Tackle the issues of youth unemployment and exclusion of minorities, women and persons with disability;
- vii) Address corruption and misuse of state resources;
- viii) End the state capture of constitutional bodies.

¹ The Nigerian example, although not always easy to implement, is worth noting. Since 1998, the predominant PDP party has an unwritten agreement to rotate the Presidency between the North (predominantly Muslim) and the South (pre-dominantly Christian). Other options include proportional representation, parliamentary system, among others.

B. INSITUTIONAL ISSUES

- i) The political polarization in the country compounded by the fact that the current Commissioners appointed had no expertise in election management to warrant a classification of the Commission being an expert-based model requires a genuine discussion and a shift from this model to a cross-party/ multi-sectoral based model of Commission. This will require broad consultations on the criteria for political parties, civil society, religious groups, persons with disabilities and other minorities to participate in the nomination process. It may be worthwhile to look at the 1997 Inter-Parties Parliamentary Group (IPPG)² example as it relates to the appointment of Commissioners. Consideration should be made to having at least two external Commissioners borrowing from the composition of the Kriegler and Waki Commissions.
- ii) The ethical and moral integrity of persons to be appointed to positions of Commissioners should be above reproach. They must have demonstrated experience in electoral and political processes, in addition to unquestionable relevant academic qualifications. Given the focus on legal issues in the work of the Commission, at least two of the Commissioners (including the Chair) must have legal experience. The other requirements must be expertise in ICT, election operations and logistics.
- iii) The organizational structure of the Commission should be reformed to maintain only one center of power- the Chairman of the Commission with sufficient authority to take decisions probably with a veto vote on certain issues. There should be established an Executive Chairman who should also be the Chief Operating Officer with accountability and responsibility for the use of financial resources and staff. The Commissioners should have responsibility for each of the directorates. This in turn means that the positions of CEO and Deputy CEOs should be abolished. The Commission should have a Chief of Staff that should not have any policy role and will be answerable to the Board. He or she would assist the Chairman in coordinating the work of all the Commissioners and serve as the Secretary of the Board. Returning Officers should report to the Director of Operations on all matters relating to their work.
- iv) To ensure that the Commissioners efficiently perform their functions, they should each have two officers to prepare their briefing material, speeches and talking points and assist in following up directly with the directors on emerging issues

2 Human Rights Watch, "Kenya's Unfinished Democracy: A Human Rights Agenda for the New Government", December 2002.

of concern to the Commission. The officers should have expertise in the areas of support to the Commissioners. For instance, to support the Commissioner in charge of ICT, the officers must be ICT professionals with sufficient knowledge of electoral processes.

- v) To ensure full financial independence, the Commission's budget should be completely divorced from the State and the Cabinet Secretary in charge of the National Treasury.
- vi) The National Assembly and/or Auditor-General should request for an independent audit/ inquiry of all the procurement processes that the Commission undertook between 2012 and 2017 to get to the core of the allegations of malpractice and corruption by Commission officials.
- vii) The Commission should make its Board meetings public (except on exceptional issues) open to the public (as observers) , publish minutes of its meetings and increase transparency in its decision-making;
- viii) The Commission should establish a document classification policy and address issues of its information security in a serious manner;
- ix) The Commission should consider having its own premises given the sensitivity of the data it holds, among other reasons. The campus should include warehouse, secure data center and server rooms, and conference facilities as a matter of efficiency, cost saving and security.
- x) The Commission should reduce its over-dependency on legal advice from external commercial lawyers who are prone to political manipulation and instead build its internal capacity. In addition, the Commission should hold regular meetings with judges and lawyers with expertise in electoral law and related matters to be advised and assisted in navigating legal electoral questions.

C. ELECTION OPERATIONS

- i) There must be a direct link between the registration of persons and registration of voters. The country spends enormous amounts of money on registration of voters. There has to be a way in which, once one has attained the age of 18, they are automatically included in the register of voters, with the opt-out option for those not wishing to vote and opportunities to change polling stations;

- ii) In the same manner, there should be an electronic linkage between the register of voters and the civil registry directorate to flag all the deceased persons from the register of voters. Given that the next General Election will be on the basis of a new register of voters, this is the time to make these legal changes to allow for synchronizing of records;
- iii) It is a fact that there are errors made by the National Registration Bureau (NRB) in the issuance of national identification numbers with thousands of persons in the register of voters being issued the same number. The NRB must rectify this anomaly and ensure that national identification numbers are unique identifiers. Issuance of identification cards should be reviewed to avoid disenfranchising possible voters;
- iv) The law requires amendments to provide for a transparent process for removing deceased voters from the register of voters. The Ghana model is worth consideration;
- v) Legal changes are required to clarify the issues of inspection of the register of voters versus the biometric verification of voters. Inspection of the register is a critical function in finalizing the register of voters and must be done at least 60 days before the election to make the exercise meaningful. This basically requires that by the time of inspection, registration of voters is complete and the purpose would be to identify underage, deceased voters and other errors to allow time for corrections to be made before the register is certified;
- vi) If the Commission retains the mandate to register voters, then the system for registration of voters must be completely overhauled with the responsibility for the register falling squarely under the Elections Operations directorate and not ICT. The over-reliance on Safran/ OT Morpho has to be addressed with full ownership of critical functions on the register being in the hands of Commission staff, not contractors.
- vii) Political parties, civil society and other stakeholders must be actively involved in the voter registration process at all its stages;
- viii) Logistics and operation plans are critical for the success of elections. The Commission must employ persons with specific expertise in logistics (and not rely on one-time consultants) to ensure close coordination with all directorates of the Commission;
- ix) Training ought not to be an exercise conducted a few weeks ahead of the General Election. Training of ROs and DROs must be continuous especially on the non-changing aspects of the Commission's work. It is for this reason too that legal reforms need to be finalized at least one year to the Election to ensure sufficient time for development of training material and training programs;

- x) Communication is crucial during all aspects of the Commission's work. Explaining the processes that the Commission has requires continuous engagement with all stakeholders and the media;
- xi) There should be an independent review to get to the bottom of what actually happened with the election forms during the 8 August General Election. This would be the only viable way of truly understanding if the issue is one of training/capacity gaps or deliberate actions of poll officials;
- xii) Procurement of election material is a highly sensitive issue. The Commission should have open, transparent and genuine engagement with political actors as part of confidence building measures and accountability.

D. ELECTORAL TECHNOLOGY

- i) The National Assembly should institute an independent public inquiry into the conduct of the 2017 elections especially the use of technology, including the role played by Safran/ OT Morpho and other IT consultants.
- ii) The country needs to have a genuine conversation on the role of technology in the electoral process. Technology cannot replace trust, credibility and transparency;
- iii) If the country decides that it needs advanced technology in its elections, then the Commission needs to move away from inventing new technology each and every election year, and use existing technology that has been used continuously by other countries.³ The price, likelihood of corruption, and uncertainty about functionality is too high, and the marginal benefit too low to justify new technology each electoral season;
- iv) Political actors need to assure the public that legislation on technology takes into account sustainability, and does not divert resources from critical development priorities;
- v) The Commission must build its own ICT capacity especially in the areas of cyber security, biometric registration, if technology continues to be central to Kenya's electoral process;

³ India has adapted its technology to its environment and could be considered, among many other countries.

- vi) The Chairperson of the Commission's ICT Committee should be a person with professional experience in ICT and elections.
- vii) International and local Companies involved in provision of strategic electoral material should be properly vetted to ensure value for tax payer's money.

E. PUBLIC OUTREACH AND COMMUNICATION

- i) The Commission should set up a full-fledged Strategic Communications Directorate with experienced persons to implement its communication strategy. The head of the directorate would participate in all key meetings of the Commission and ensure that communication is integrated to all phases of its work.
- ii) The new communications directorate should ensure that the Chairperson and Commissioners are trained and are fully briefed on all issues before appearance for media engagements. The directorate should institute a weekly briefing programme for the media on an Election year and a monthly one, during the non-election year.
- iii) The Commission should establish a regular structured programme for engaging with political parties, candidates, civil society, business community, and special interest groups such as women and youth and other stakeholders.
- iv) The budget of the Commission should include funding for voter education programs throughout the electoral cycle. This should include adequate staffing at the Constituency level.
- v) In preparation for presidential elections, the Commission must insist on having regular meetings with the Presidential Candidates, not their surrogates.

F. LEGAL REFORMS

- i) Legal reforms must involve all stakeholders with priority being given to those with expertise in electoral processes and making a shift from a legalistic approach to electoral reforms to a pragmatic holistic approach. The Commission should propose legal reforms following extensive lessons learned exercises not more than six months after conducting a General Election and must prioritize a pragmatic holistic approach to electoral reforms over a legalistic approach.

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- ii) Legal reforms, including development of regulations should take place one year before the General Election. Laws amended during the year of the General Election should only be applicable during the next General Election.
- iii) The Commission should be empowered to develop regulations with the oversight role of the Parliamentary Committee being clear and not exercised to veto over every word in the regulations.
- iv) The selection of Commissioners should include at least two persons with expertise in electoral matters and law to be able to constructively engage in the substantive aspects of legal reforms, even at short notice;
- v) The Commission must conduct itself with utmost impartiality and independence to address the mistrust that results in over-regulation and legislation.

I. BACKGROUND AND INTRODUCTION

My service as a Commissioner with the Independent Electoral and Boundaries Commission (IEBC) was a result of the positions becoming vacant following violent mass demonstrations calling for electoral reforms and disbandment of the Commission. The grievances by the opposition and a section of the civil society emanated from the contested results of the 2013 presidential election, in which the Supreme Court had upheld the election of President Uhuru Kenyatta, following a petition by Rt. Hon. Raila Odinga and civil society groups. The Opposition called for dialogue to address several concerns including how the Commission had conducted the General Election in 2013; perceived lack of credibility and trust, complaints of incompetence and impropriety in the procurement of electoral material.

The dialogue did not take off and was rejected by the leadership of the ruling party, Jubilee, leading the Opposition and a section of civil society groups to organize around a draft Bill dubbed the *Okoa Kenya Referendum Draft Bill of 2015* that was presented to the IEBC on 9 November 2015. The Commission rejected the draft bill for not meeting the legal threshold of one million valid signatures of registered voters. The rejection by the Commission was perceived as an imposition by the ruling party leading to further controversy and sustained calls for the immediate disbandment of the IEBC team from office and reconstitution of a new electoral body. In early 2016, the country witnessed public demonstrations and protests led by key opposition leaders and sections of the civil society which in some instances turned violent with lives lost, hundreds of protesters injured and property worth millions destroyed.

To avert more violence, the ruling party and the opposition Coalition for Reforms and Democracy (CORD), with the support of religious and business leaders, held talks that led to the formation of the *Joint Parliamentary Select Committee on the Independent Electoral and Boundaries Commission* co-chaired by then Meru Senator Hon. Kiraitu Murungi and his Siaya counterpart Hon. James Orendo. The Select Committee had 14 members from both the Senate and the National Assembly.⁴

The Committee had 30 days to conduct an inquiry, including receiving views from experts, the public, civil society, religious groups, political parties and county governments on required reforms in the IEBC. It was also mandated to recommend legal mechanisms for the commissioners to leave office in accordance with the Constitution and tasked with providing

⁴ *Report of the Joint Parliamentary Select Committee on matters relating Independent Electoral & Boundaries Commission, Volume I released on 16 August 2016.*

recommendations to both Houses on legal and institutional reforms to improve the IEBC to ensure the 2017 General Election was free, fair and administered in a transparent manner.

In addition to a raft of electoral laws recommended by the Joint Select Committee, focusing mostly on the register of voters and the use of technology in elections, the Committee also recommended the establishment of a Selection Panel comprising of a multi-sectoral membership to oversee the process of appointment of new Commissioners. The IEBC Act was amended to provide for the removal from office of the then IEBC Commissioners through a negotiated settlement and to further provide for a seamless transition in the institution.

Following the approval of the recommendations of the Joint Select Committee, the Chairperson Isaack Hassan, Vice Chairperson Lilian Mahiri-Zaja, Commissioners Thomas Letangule, Muthoni Wangai, Mohamed Alawi Hussun, Yusuf Nzibo, Albert Bwire, Kule Galma Godana and Abdullahi Sharawe submitted their resignation letters to the President with the understanding that they would remain in office until the new Commissioners were appointed and assumed their responsibilities.

On 11 October 2016, President Kenyatta gazzetted a nine-member team to recruit new electoral commissioners. The Selection Panel members consisted of four persons nominated by the Parliamentary Service Commission from names provided by Jubilee and CORD, with Mr. Evans Monari and Ms. Mary Karen Kigen-Sorobit representing Jubilee and Rtd Justice Tom Mbaluto and Ms. Oglia Chepkemai Karani, representing CORD. The remaining five were nominated by religious groups, namely; Ms. Bernadette Musundi (Chairperson), Rev. Peter Karanja, Prof. Abdulghafur El-Busaidy, Bishop (Dr.) David Oginde and Mr. Rajesh Rawal.

Despite my extensive knowledge of matters elections and political processes, I had little expectations of being shortlisted as I was reminded by many that I did not “know anybody” and indeed I had no prior contact with any of the members of the Selection Panel. Neither did I have any prior contact with officials of the Jubilee Party or the CORD opposition coalition. I nevertheless applied with the strong conviction that after fifteen years of working with the African Union and the United Nations, it was time to give back to my country. National service was the call that I responded to in offering myself for service.

On 29 December 2016, President Kenyatta announced⁵ the nomination of Chairman Wafula Chebukati and the following to serve as Commissioners; Ms. Consolata Nkatha Bucha Maina, Mr. Boya Molu, Ambassador (Dr) Paul Kurgat, Ms. Margaret Wanjala Mwachanya, Professor Abdi Guliye and I. The announcement led to questions on the suitability of the nominees from a section of Kenyans forcing the Selection Panel to issue a press statement defending the choice of candidates which in part read, “... there have been various allegations in the media

5 *Daily Nation*, “President Kenyatta nominates Chebukati for IEBC Chair” , 29 December 2016

concerning the suitability or otherwise of Mr. Wafula Chebukati and Ms. Consolata Nkatha Maina for appointment to the positions of chairperson and member of IEBC, respectively.”⁶

The Judicial and Legal Affairs Committee (JLAC) vetted the Chairperson and Commissioners on 10 and 11 January 2017⁷. I appeared before the Committee on 10 and had an engaging discussion with the honorable members. JLAC presented its report to the National Assembly recommended the approval of all the members noting that no public memorandum was submitted regarding any of the candidates contrary to media reports. The National Assembly approved the appointments by majority acclamation on 17 January 2017.⁸

The background above is critical in understanding how the Commission was constituted and the delicate political balance in play throughout my tenure at the Commission. In the end, out of the 800 Kenyans that applied to serve their country, the eight of us appointed were a result of political compromises made with focus being on the least common denominator for the political actors. The appointments were not based on the expertise of the candidates or on putting the interest of the country first.

As required by law, President Kenyatta formally gazetted our appointment on 18 January 2016 and we were sworn in on 20 January 2016 by the Chief Justice. As an international civil servant, I had previously taken an oath of office, but this was the first time I was swearing to uphold the Constitution of Kenya. It gave me great pride, honor and humility to do so. Our work was cut out for us—to organize six elections, in a highly polarized political environment, in less than seven months. This entailed completing a myriad of key tasks including: finalizing regulations for the electoral process; registration, auditing and certifying a credible register of voters; overseeing the political party nomination process and addressing disputes; procurement of the Kenya Integrated Electoral Management System (KIEMS) and other strategic and non-strategic material; recruitment and training of poll officials, among others.

The Commission does its work through eight committees that are answerable to the Plenary. The Plenary is composed of all the Commissioners and led by the Chairman with the CEO serving as the Secretary. Decisions of the Commission are made by consensus or by a vote with the majority carrying the vote. The Chairman does not have a veto power. I was assigned the responsibility of chairing the Election Technical Operations Committee, whose responsibilities included all election operations planning, boundary delimitation and risk,

6 *East African Standard*, “Questions as IEBC Selection Panel Defends Polls Team, 4 January 2017, See: <https://www.standardmedia.co.ke/article/2000228697/questions-as-iebc-selection-panel-defends-polls-team>

7 See Hansard Report, 17 January 2017

8 Ibid

monitoring and compliance.⁹ The Committee was composed of two other Commissioners, Mr. Molu Boya and Prof. Abdi Guliye, with Ms. Immaculate Kassait, Director of Operations serving as its Secretary. I was also a member of the ICT Committee, chaired by Prof. Guliye, the Legal Affairs Committee, chaired by Chairman Chebukati, the Political Parties Liaison Committee, chaired by Ms. Consolata Nkantha Maina and a co-opted member of the Voter Education Committee, chaired by Ms. Margaret Mwachanya. In addition, all Commissioners were members of several dispute resolution mechanisms. The Chairman had also tasked me to represent the Commission in various media engagements and meetings with national and international groups.

This end of assignment report focuses on my responsibilities as outlined herein above. The report is organized around five thematic areas, namely: i) Institutional issues; ii) Election Operations; iii) Election Technology; iv) Public Outreach and Communication; and v) Legal Reforms and Compliance. Each thematic section delves into the context by providing a background to the issue, identifies the challenges encountered, points out some good practices and suggests some specific recommendations. It concludes with a section that focuses on issues outside the remit of the Commission but that have an impact on the conduct of free, fair and credible elections.

⁹ See Minutes of the 165th Special Plenary meeting of the IEBC held at the 6th Floor Commission Boardroom, Anniversary Towers on Monday, 23rd January 2017 at 11:00 am.

II. ISSUES AND RECOMMENDATIONS:

1.0 INSTITUTIONAL ISSUES

1.1 Background and Challenges

As per the IEBC Act of 2011, the Commission is made of the Chairperson, Commissioners, and the Secretariat. Section 11 of the Act intends to clarify the relationship between the Commissioners and the Secretariat by stating:

For the effective performance of the functions of the Commission –

(a) the chairperson and members of the Commission shall perform their functions in accordance with the Constitution and in particular, shall be responsible for the formulation of policy and strategy of the Commission and oversight; and

(b) the secretariat shall perform the day-to-day administrative functions of the Commission and implement the policies and strategies formulated by the Commission.¹⁰

The Chairperson and the Commissioners understood the oversight function to be comprehensive, covering all aspects of the work of the Commission, from election operations, to procurement to sensitive personnel related issues. The CEO understood the oversight role in a minimalistic manner of basically attending Board meetings and approving management papers presented by the Secretariat on all matters. The Commissioners argued that in case of any fall-out from actions taken by the Secretariat, it would be the Commissioners that would be forced to take the political responsibility.

This was the bone of contention in many Board meetings. The IEBC Act is clear that documents using the seal of the Commission needed to be signed by both the Chairman and the CEO. In many cases, the Board, including the Chairman learned of procurement contracts from the media and the Chairman was not a signatory to most of the strategic documents sent out with the seal of the Commission.

There are two centers of power at the Commission, one led by the CEO and the other by the Chairman. In such a situation, political actors have a convenient way of pitting one center of power against the other, to their own benefit. This indeed happened in the Commission on many occasions including towards the end of my tenure with some Commissioners aligning themselves with the Chairman and others with the CEO. This was more apparent on 7 September 2017 when five Commissioners (2 later disassociated themselves) issued a

¹⁰ IEBC Act of 2011

press statement disavowing a memorandum issued by the Chairman to the CEO¹¹. Such open divisions¹² within the Commission placed the rest of the staff, especially those in the field in a difficult position. Being forced to choose sides between the Chairman and his allies and the CEO and his allies was detrimental to the morale of the staff. Although the Commission, including myself, denied the allegations of divisions when asked by the media, this was more of a strategy to mitigate damage or merely save face rather than a genuine reflection of reality. Attempts to mediate these two centers did not succeed in overcoming them: a case in point is for instance the much-publicized Naivasha “peace meeting”¹³ of 11 September 2017 that glossed over the issues and did not address the deep grievances raised at the meeting.

Although the Commissioners preside over the various Committees that correspond to the existing directorates of the Commission within the Secretariat, they have no real power or control over the work of the Directorates. This makes the Committees perfunctory procedures where a Commissioner sits and approves management papers. Attempts to have substantive discussions with the various Heads of Directorate were often rebuffed by some directors and the CEO as interference in the work of the Secretariat. There are however some Directors and Managers that found it useful to discuss issues with the Commissioners beforehand. For instance, the Manager in charge of training worked closely with me on the training manuals recognizing my expertise in certain areas. In the lead-up to the 26 October Election, she picked up my suggestion to have, for the first time, a guide for Returning Officers, which we worked on together and published. The manager in charge of logistics recognized my knowledge in operations and worked with me on the operations plan. However, in many of the cases, the interaction between the secretariat and the Commission was absent, except in the formal boardroom meetings.

The Offices of the Commissioners, including the Chairman are not sufficiently staffed to allow them to conduct their work in a professional manner. There is one Secretary shared by two Commissioners with the Chairman having two Secretaries and one Officer. Recognizing this gap, we attempted to get Officers from an international organization to be seconded to support the Chairman and the Commissioners but these attempts were frustrated by the Secretariat. My experience shows that if you want to render senior officials useless, you ensure that they are not well staffed and you present them with bulky documents to make decisions within short

11 See attached the memo as provided to Commissioners by Chairman Chebukati. Also see references to media coverage of the public play of divisions in the Commission. <https://www.standardmedia.co.ke/article/2001253879/confusion-at-iebc-as-5-commissioners-disown-wafula-chebukati-memo-to-ezra-chiloba>

12 See media coverage in many sources including this: <http://www.nation.co.ke/news/politics/IEBC-fallout-as-Chebukati-memo-disowned-/1064-4087062-119b7ujz/index.html>

13 See media coverage including : <http://www.nation.co.ke/news/Church-leader-brokers-IEBC-peace-deal/1056-4091818-f2ndro/index.html>

notice. This was certainly the case at the Commission. We had no support staff and documents were presented to us at the Boardroom to read and urgently make decisions. Basically, the expectation was that we would rubber stamp Secretariat decisions.

In addition, it made it difficult to focus on broader strategic thinking as one had to then spend quite some time on administrative issues. For instance, I became the *de facto* note taker for the informal meetings we had in the Chairman's office and was the *de facto* speech writer for the Chairman, due to limited capacity—both qualitative and quantitative - in the Commission. Minutes of Board meetings were presented weeks after the meetings when we could barely remember the specifics of the meeting. I recall one evening in August 2017 when we spent many hours into the night approving minutes from previous months. Many, except for a few of us that took copious notes during meetings, could barely recall the specifics of issues discussed including sensitive procurement issues.

To have a truly independent Commission, it is imperative to change the process of appointing the Chairman and the Commissioners, and indeed all staff of the Commission. The patronage in appointments is the greatest disservice to the nation as it takes away the ability to make decisions independently professionally. As recent developments have proven, this patronage and attempts to be professional and independent puts the lives of Commissioners and staff at risk. The final decision on appointments of the Chairperson and Commissioners lies with the Executive making everyone, even well-meaning professionals, captive of the State. There are constant reminders that the jobs you hold are provided to you by Government. Any dissenting view leads to a conclusion that you have been "bought" by the Opposition. This is certainly the position I found myself in on numerous occasions indeed starting from my first day in office. I found the Commission staff to be divided along political and ethnic lines. A majority of the senior staff owe their positions to "godfathers and mothers" that were previously Commissioners or hold political positions in the country.

There are three common models of Election Management Bodies: Independent, Governmental and Mixed. In theory, Kenya has adopted the Independent Model of electoral management which means that the Commission should be institutionally independent and autonomous from the executive branch of government. It should not be accountable to a government ministry or department. An independent commission should also manage its own budget. In most cases, such models have security of tenure of its members who are selected on the basis of their expertise.

These hallmarks of independence were absent from the Commission. In what could be read as a way of exerting control by the government, on many occasions we were reminded on the need to go through the line ministry- the Office of the Attorney General or at times the Ministry of Internal Security and Coordination of National Government. The budget was controlled by the

National Treasury, and policy decisions by default ended up being made by the Cabinet Secretary (CS). An illustrative example was when the United Nations¹⁴ offered to procure ballot papers on behalf of the Commission, in order to ease the political rift between Jubilee and NASA on the choice of Al Ghurair and provide a confidence building measure. Before we could discuss the offer further, we had to seek the approval of the CS who, through his staff, responded in the negative, thus closing the opportunity to explore the offer with the political actors.

Leakage of sensitive information has apparently always afflicted the Commission, primarily because the Commission lacks a formal process for sharing information with the media and the public, and yet its decisions are made in the public interest. In other countries, Election Management Bodies have their board meetings in public, while others make available their minutes and decisions to the media and the public. However, many of the Commissioners perceived independence of the Commission to be synonymous with secrecy. The lack of communication inevitably increases the premium of any information from the Commission, hence the leakages, as media houses invest in having their best staff to sniff around for information. Conversely, clear communication of plenary meetings and decisions would remove the incentive to leak information. Moreover, the Commission has no policy or system on classification of documents. This is critical, because even in a context of transparency, some sensitive issues that have to be handled differently. In the absence of such a policy, the casualness with which documents are handled increases the likelihood of abuse.

Plenary meetings should be safe places for open debate and decision-making. However, during my tenure at the Commission, it often seemed as though the meeting room was “bugged” or senior government officials received blow-by-blow briefings of our meetings, including on positions taken by specific Commissioners. Meetings were often followed by calls from government or party officials, which increased the sense of intimidation. This made some Commissioners remain silent in meetings or avoid meetings on sensitive matters all together. This atmosphere was not conducive for good governance. It was common to hear a Commissioner say that she/he “was reported” and therefore would be non-committal in stating their position or would go along with those he/she perceived to have been the “reporters”. While it is expected that tensions would exist in meetings where difficult decisions are being made, the levels of personal affront, intimidation and threats of physical attack made by colleagues¹⁵ made plenary meetings dreadful and unprofessional. The environment in the boardroom made it extremely difficult to be constructive and professional. One approached the meetings with extreme caution and

14 The United Nations Resident Coordinator, Mr. Siddharth Chatterjee and US Ambassador and several members of the diplomatic community made this offer at a meeting with the Chairman and Commissioners in September 2017.

15 See memo in Annex 1 to the Chairman making reference to these issues.

readiness to protect oneself from either physical or verbal attacks including being cautious of the meals served at the boardroom.

Procurement issues were particularly fraught with a lack of professionalism and high ethical standards. I do not recall a single major procurement issue that proceeded seamlessly...from the procuring of KIEMS to hiring a media company, every decision was filled with intrigue. Election year seemed to be the harvest season for members of the Commission, filled with many stories of vendor wars and how much money staff sitting in the procurement evaluation committees made from the processes. There was a running joke that the only meetings which Commission staff would attend on time were the tender evaluation committee meetings. The trend is the same when it comes to tenders at the Constituency level. There are several accusations bordering on violations of procurement laws that can only be addressed through thorough independent investigations.

The location of the commission may not be optimal. The Commission, from the days of the ECK, has always used Anniversary Towers as its Headquarters. On a positive note, its location in the city center makes it accessible to voters and candidates. The facility, as it is however, does not serve the Commission optimally. The unreliable power supply was a source of nightmares for us especially at the data center, particularly considering that the register of voters was hosted in the building.

1.2 Good practices

Despite some of the limitations indicated in the above section, there are several aspects of the institutional structures that are quite positive. The Commission is one of the most geographically diverse institutions especially because Returning Officers are recruited from each of the 290 constituencies, although in practice they do not serve in their home constituency. The replacement of an RO is done from the constituency of origin of the RO thus maintaining the regional balance. The Headquarter staff are also diverse although some geographic areas dominate key directorates.

The Constitution and the IEBC Act provides the legal framework to allow for the Commission to be truly independent. While some adjustments are required in the Organizational chart, the general aspects of it reflect an institutional framework, which if implemented fully, would serve as a model EMB.

1.3 Recommendations

- i) The political polarization in the country and the fact that the current Commissioners appointed have no expertise in election management to warrant a classification of the Commission being an expert-based model requires a genuine discussion

and a shift from this model to a cross-party/ multi-sectoral based model of Commission. This will require broad consultations on the criteria for political parties, civil society, religious groups, persons with disabilities and other minorities to participate in the nomination process. It may be worthwhile to look at the 1997 Inter-Parties Parliamentary Group (IPPG)¹⁶ example as it relates to the appointment of Commissioners. Consideration should be made to having at least two external Commissioners borrowing from the composition of the Kriegler and Waki Commissions.

- ii) The ethical and moral integrity of persons to be appointed to positions of Commissioners should be beyond reproach. They must have demonstrated experience in electoral and political processes, in addition to unquestionable relevant academic qualifications. Given the focus on legal issues in the work of the Commission, at least two of the Commissioners (including the Chair) must have legal experience. The other requirements must be an expert on ICT and an expert on election operations and logistics.
- iii) The organizational structure of the Commission should be reformed to maintain only one center of power- the Chairman of the Commission with sufficient authority to take decisions probably with a veto vote on certain issues. There should be established an Executive Chairman who should also be the Chief Operating Officer with accountability and responsibility for the use of financial resources and staff. The Commissioners would have responsibility for each of the directorates. There would therefore be no positions of CEO and the two Deputy CEOs. The Commission would have a Chief of Staff that would have no policy role and will be answerable to the Board. He or she would assist the Chairman in coordinating the work of all the Commissioners and serve as the Secretary of the Board. Returning Officers would report to the Director of Operations on all matters relating to their work.
- iv) To ensure that the Commissioners efficiently perform their functions, they should each have two officers to prepare their briefing material, speeches and talking points and assist in following up directly with the directors on emerging issues of concern to the Commission. The officers should have expertise in the areas of support to the Commissioners. For instance, to support the Commissioner in charge of ICT, the officers must be ICT professionals with sufficient knowledge of electoral processes.

16 Human Rights Watch, "Kenya's Unfinished Democracy: A Human Rights Agenda for the New Government", December 2002.

- v) To ensure full financial independence, the Commission's budget should be completely divorced from the State and the Cabinet Secretary in charge of the National Treasury.
- vi) The National Assembly and/or Auditor-General should request for an independent audit/ inquiry of all the procurement processes that the Commission undertook between 2012 and 2017 to get to the core of the allegations of malpractice and corruption by Commission officials.
- vii) The Commission should make its Board meetings public (except on exceptional issues) open to the public (as observers), publish minutes of its meetings and increase transparency in its decision-making;
- viii) The Commission should establish a document classification policy and address issues of its information security in a serious manner;
- ix) The Commission should consider having its own premises given the sensitivity of the data it holds, among other reasons. The campus should include warehouse, secure data center and server rooms, and conference facilities as a matter of efficiency, cost saving and security.
- x) The Commission should reduce its over-dependency on legal advice from external commercial lawyers who are prone to political manipulation and instead build its internal capacity. In addition, the Commission should hold regular meetings with judges and lawyers with expertise in electoral law and related matters to be advised and assisted in navigating legal electoral questions.

2.0 ELECTION OPERATIONS

2.1 Background and Challenges

I assumed my functions of Chair of ETOC amidst tight legislative timelines that we had to meet on a wide range of operations. Based on my reading of the reports of the lessons learned from the 2013 General Election¹⁷, I prioritized three areas: i) the register of voters; ii) operational and logistics planning and; iii) training of staff.

17 The reports include the Commission's own internal review of the conduct of the 2013 General Election as well as very useful recommendations from the European Union Election Observation Mission, the African Union observers as well as the Commonwealth.

i) Registration of voters

My greatest concern as the Chair of ETOC was to be involved in a critical electoral process when the registration of voters was almost complete and yet be expected to ensure that the register was complete and accurate. I was deeply aware of the central role of a register of voters in an electoral process having observed the contentions on this in many parts of the world. I felt a huge weight of responsibility especially with the constant memory of the words in the report of the Independent Review Commission (Krieger report) noting “without a credible, clean and verified Register of Voters, the people of Kenya are denied their right to exercise their sovereign power”¹⁸ Yet, I understood that there was nothing much we could do to have a fully credible and credible register as we had joined the Commission at the tail end of the process.

The first task we took up on the first weekend on the job as Commissioners was to visit various registration centers in Nairobi. Dr. Paul Kurgat and I later visited parts of the former Rift Valley, Western and Nyanza provinces and saw first-hand the voter registration process and familiarized ourselves with our staff in the field. It was one of the best decisions we made in the first week in office. I was immediately struck by the commitment of most of the field staff but concerned at the mistrust between the field and HQ staff. I was rather disappointed at the low voter registration rates in the places we visited, with young men stopping our cars and asking for money before they could register, thinking that we were politicians. The mobilization of voters by politicians helped increase the number of voters but the Commission could have done better in its plans.

The *Elections Laws (Amendment) Act 2016*, required the Commission to have a reputable firm to audit the *Register of Voters* six months before the election. When we assumed office, there was an ongoing court case questioning the award of the tender to KPMG to audit the register. The Court eventually ruled in favor of the Commission. Having been aware of similar register audits in other countries such as Zambia, Nigeria, Ghana, DRC and Cambodia, I was keen to ensure that the audit processes was transparent in order to build the credibility, trust and the legitimacy of the process, despite prevailing limitations.

The terms of reference for KPMG had been long negotiated before we joined the Commission. Nevertheless, in all the meetings with KPMG, I made it clear that the credibility of the process and building confidence in the register was our paramount goal. I was struck by the over KES150 million we were spending on an exercise where in other countries, it had required hiring three or four experienced consultants to finalize the process with just a fraction of what KPMG charged the Commission. Certainly, experienced Kenyans have been hired to work on the registers in sister countries such as Zambia with far more significant results than our own¹⁹.

18 “Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007”, 17 September 2008.

19 A former director at the IEBC was the lead consultant.

In addition, auditing an incomplete register (as voter registration and biometric verification of voters were ongoing) was an exercise in futility especially using unreliable data from the civil registry. Not only were the records of deaths representative of less than 40% of the actual deaths in the country²⁰, but the National Registration Bureau did to provide records of births that could then be used to compare if those in the register were actually persons that were of legal age. This made it difficult to debunk the rumors that in certain parts of the country, underage persons were issued with national identification card and passports thus inflating the actual numbers in those regions. These rumors can only be debunked with an in-depth analysis of the register of voters based on accurate records from the National Registration Bureau.

Even if the Commission had the complete details of deaths, it does not have a procedure for removal of persons from the register of voters. This essentially meant that according to the KPMG audit report, there were potentially over a million deceased persons in the register of voters. Given that there were other means of identifying voters beyond biometrics (alpha-numeric search) there is a high likelihood of “deceased” persons voting in the 2017 election. This would be the case especially in places with exceptionally high voter turn-out.

The *Elections Laws (Amendment) Act 2016* required the Commission to present the register of voters to the public for voters to verify their biometric data for a period of 30 days. The Commission commenced the verification exercise on May 10, 2017 and ended on June 9, 2017. The turn-out was about 35%, a poor performance for such a crucial exercise. In most jurisdictions, this is the most critical exercise where political parties scrutinize the register and remove deceased and under-age persons from the roll. The law was not exactly drafted to achieve this objective as it seemed to be a mix of inspection of the register and the biometric verification process in Nigeria which happens a day to the election. What the drafters of the law did not put into perspective is that the biometric verification in Nigeria is mandatory, meaning that if not verified one would not vote on the next day. But having non-mandatory biometric verification 90 days before the election does not serve the same purpose.

Within the Commission, the management of the register of voters was deeply disturbing. The law is very clear that Registration Officers (Returning Officers) are the primary “owners” of the register, yet this was perceived as an ICT function. ICT facilitates processes not controls them. The Directorate in charge of voter registration at the Commission does not have access to the register of voters and solely relies on the Director of ICT to run all operations related to the register. On many occasions I had to intervene to get the two directorates to cooperate. I recall spending days and nights with Returning Officers overseeing cleaning up of the register and experienced the frustration of field staff who had submitted their records only to find them missing. Then there were the cases in Kisii and Mandera Counties where hundreds of voters,

20 KPMG Kenya, “Independent Audit of the Register of Voters”, 31 May 2017

including candidates were illegally moved from their polling stations thus disenfranchising them. There are several issues regarding the register of voters that would need to be addressed before one can have the confidence that we have a credible register of voters. While I spent numerous amounts of my time on the register of voters, I was not confident that the final register reflected the real picture of voters in the country. This is in addition to serious issues with how national identification cards are issued privileging certain communities, disenfranchising many eligible voters and distorting elections.

ii) Election Operations and Logistics

Elections are complex operations that require a lot of planning and logistical preparedness. During the ETOC meetings, one of the issues we focused on was to ensure that we had a clear logistics and security plan. The managers in charge of both of these areas were highly competent and worked very closely with me with technical support from IFES and UNDP. The IFES official working with us was competent and valued national ownership and therefore was able to provide badly needed support while ensuring that Commission staff did not perceive this as their work being interfered with by external actors²¹. IFES helped us develop the logistics plan using their expertise in these areas but deferring to Commission staff on the local aspects of the plan.

Ensuring election materials were procured and delivered on time was one of our biggest tasks. I established an inter-departmental operations team that met on a weekly basis and as we got closer to the election, we met even more frequently. The team established action points and reported regularly on the status of their implementation. This included on the status of procurement of material, mapping of polling stations, training, voter education and other operational issues. It was the only inter-departmental forum for troubleshooting that was eventually adopted by the Chairman for his operational updates during the last two weeks to the 8 August Election.

The procurement of ballot papers and the KIEMS technology were the two most controversial processes at the Commission. We spent over 65% of our plenary meetings in heated discussions on these two procurement processes and to a large extent, it is on these issues that the trend of voting and “coalitions” begun at the Plenary. Regarding the ballot papers, the Chairman made several attempts at “quiet diplomacy” with the National Super Alliance (NASA), but these and a joint Jubilee/NASA last minute attempt at an out of Court settlement failed. NASA proceeded with their legal challenge in the High Court against our award of the tender to print electoral material for the Presidential race to the Dubai-based Al Ghurair Printing and Publishing firm. The High Court ruled in favor of NASA, thus invalidating the contractual agreement with Al

21 Mr. Deryck Fritz, Senior Election Management Specialist, IFES is highly talented and able to work seamlessly with even the most difficult people and in the most difficult conditions!

Ghurair regarding the ballot paper printing for the Presidential race but continued with the printing for the remaining five elective positions. The Court of Appeal thereafter over-turned the decision of the High Court, allowing the Commission to proceed with the printing of the election material.

Throughout the “Ballot paper saga”, I was baffled by the lack of understanding among several actors of the complexity of the whole process of ballot proofing, packaging correctly, shipping and dispatching accurately election material. I recall being in a meeting with a prominent political leader who when I was pleading that we did not have enough time to start a completely new procurement process he reminded me that in the 1990s, it took a night to print the papers. And we know how that went. The Ballot paper saga is one in which, we as Commissioners were held captive by the Secretariat. There was a long period between the first Court case decision in February for the Secretariat to have started a new procurement process, but nothing was done until it was too close to the election leaving direct procurement to the company of their choice as the only viable option for us. This was the trend on many critical high cost issues. Time was used as a way of tying your hands to take the decision that the CEO had wanted from the very beginning.

Nevertheless, as the Chair of ETOC, the difficult task I had was not only to keep track of the status of procurement of electoral material but to gain the confidence of the stakeholders that despite the choice of the controversial printing company, the process of preparing material for the 8 August General Election would be above board. Picking from lessons learnt from Zambia where the opposition party had made similar allegations against the printing company, as Chair of ETOC I presented a paper to the Plenary on several measures that we could take to enhance transparency and accountability²². The Plenary adopted the recommendations.

One of the key recommendations was to dispatch a stakeholder due diligence team throughout the process of printing and packaging of election material. Dr. Kurgat and I had the tough responsibility of leading the team during the printing of the presidential ballot papers. The process could have fallen apart were it not for the tact and diplomacy that Dr. Kurgat and I deployed. For instance, when we had just arrived in Dubai, Thirdway Alliance issued a statement on 28 July casting aspersions on the diligence of the process, prompting Dr. Kurgat and I to convene an emergency meeting of all delegates to discuss the matter in the open and agree on how to move forward. We had a checklist of all the concerns from the parties and we operated in full transparency. There are things we could fix and we did so and for the others we could not (like putting seals on all pallets). We candidly informed the stakeholders that we could

22 Mr. Brown, former ICT Director at the Zambian Electoral Commission and Deryck Fritz, helped in the development of the paper.

not. By the end of the process, the stakeholders were satisfied, summing their experience in such words on the due diligence team's WhatsApp group "...it was a pleasure working with you all...we are satisfied that the concerns we had were addressed by the Commissioners on site."

Despite the above detailed process, the issue of the forms printed and dispatched by Al Ghurair became a central point of contention during the August Presidential Petition at the Supreme Court. Clearly, there were lapses in the process that can only be unearthed through an independent investigation. But the fact that election material, once they left the factory to the point of dispatch to polling stations gives room for manipulation.

The decision to sub-contract the Kenya Postal Services to handle transport of all election material at the national level was wise as it minimized the vendor wars on transportation at the national level. However, the oversight from the Commission was lacking in key aspects. For instance, there was no tracking mechanism by the Commission of strategic material such as ballot papers as they were transported from Nairobi to the various Constituencies. The Commission did not have mechanisms in place to ensure that the ballot papers that left Nairobi were the ones delivered and not changed before delivery. There were also delays in delivery of material and even mix-ups in certain places. On Election Day, I received calls from many Returning Officers especially in Turkana County where the helicopter pilots were causing delays and I had to intervene. Then there were the issues of insufficient / missing rubber stamps that called into question the inventory procedures. There were other challenges best documented in internal documents prepared by staff pointing to the need for a more holistic approach to logistics bringing together all Directorates of the Commission.

iii) Training of poll officials

I took specific interest in training of staff as all the observation reports from the 2013 General Election indicated a major weakness in this area. The Commission has the best in-house trainers who understand both the content and the pedagogical aspects of training (a large proportion of Commission staff are former teachers). It has developed a good team of Master Trainers who prepare the curriculum based on feedback from staff. In what I often called the *Ann Nderitu doctrine*²³, any Master Trainer who had errors in their work as a returning officer or official, was dropped from the list of Trainers. Excellence was maintained through this and by also making the title of Master Trainer coveted. I attended almost all the meetings of the Master Trainers and Training of Trainers. My participation was critical in providing policy clarifications as the staff developed the training material and being the link with the plenary on key decisions that needed to be made before the training material was done. The training plans and programs benefited

23 Ms. Ann Nderitu is the IEBC Manager in charge of training.

immensely from the technical and financial support from UNDP²⁴ and IFES. The UN Chief Technical Adviser²⁵ and IFES worked closely with our team in preparing for these trainings. So committed was the team, we often forgot that they were not Commission staff members. They provided excellent feedback on the training and worked with us in refining the training material.

The Supreme Court case of August 2017 brought to the fore the issues of forms and questioned if the training had been sufficient. There is certainly more we could have done for the 8 August Election but it is hard to believe that some of the “errors” in the forms were due to lack of training rather than deliberate attempts from some poll official either during the election or after dispatch to Nairobi. The famous leaked memo from the Chairman raised some of these pertinent issues that were never conclusively responded to, especially those related to changing and deletion of forms on the SFTP (File Zilla) using the Chairman’s password. I met with several Returning Officers who showed me the signed forms, accurately completed and signed that they transmitted and yet they are not the same ones presented to the Supreme Court.²⁶ Why was the discrepancy? I stress these points to say that it is easier to blame training for all the issues regarding the forms and find a solution to the wrong problem.

Despite my apprehension towards the main cause of the discrepancy between the forms from the Returning Officers and those submitted to the Supreme Court, in preparation for the repeat presidential election of 26 October 2017, I focused on training. I also focused on ensuring that all instructions and guidelines to poll Officials were in one document and not several different documents as was the case during the August General Election. The one aspect of my work as ETOC Chair that gave me great satisfaction was to develop, for the first time, the Returning Officer’s Guide. The Guide provides step-by-step guidance for ROs on all their expected activities. We also refined the Presiding Officers Guide. We changed the training for Returning Officers and their Deputies from the regional cluster focus to one venue at Nairobi to ensure that all read from the same script. These trainings, that I attended full time, presented me with an opportunity to meet with all the Returning Officers and County Managers. I was touched by their deep knowledge and commitment to service.

24 Ms. Amanda Serumaga, UNDP Country Director and Ms. Kristina Wilfore, Chief of Party- Kenya KEAP were exceptionally professional and understood the complexity of our operations. They showed maximum flexibility in the use of the resources to support our work within the limits of the rules and procedures of their respective organizations.

25 Mr. Joram Rukambe, the United Nation’s Chief Electoral Technical Adviser was highly professional, easy to work with and had immense practical experience from previous similar assignments from across the globe.

26 Some Commissioners claim to have overheard Commission Officers calling Returning Officers and asking them to change the forms with one saying “*haki huyo ameongeza nyingi sana*”.

The 8 August election had approximately 360,000 election officials, including the County Returning Officers, Constituency Returning Officers, Presiding Officers, Deputy Presiding Officers, Clerks and Security personnel. We employed the cascaded methodology at the National level, County Level and the Constituency level for the training that covered; election laws and regulations, voter education, electoral technology, election logistics operations, election results management among other election procedures. We maintained the same focus for the 26 October Election but added simulations on how to print, scan and copy. We also added a section dealing with the 1 September Supreme Court ruling and its implications for the process.

My interaction with the field staff confirmed my conviction that a majority of the staff worked hard and wanted to do the right thing. This motivated me, despite what I was aware of at a strategic level, to put my efforts in giving a voice to their commitment by informing the public and stakeholders of their work. I genuinely hoped that there were some technical aspects of our work that we could do to build the confidence of the voters and stakeholders in the process. When requested to speak to the media about our work, especially while at training events, I was willing to go into the technical details to showcase our work. I especially did this in honor of our field staff and they appreciated these efforts. Whenever I returned home from a media engagement I received several messages from the staff thanking me for explaining eloquently their work. I saw this as a key part of transparency and making us accountable to the public.

In the lead up to the 26 October repeat presidential election, I travelled to various parts of the country to monitor the training. In some parts of the Country, staff were risking their lives due to calls from the Opposition to boycott elections and ongoing protests against the Commission calling for the resignation of several Commission officials including the CEO. I witnessed these protests first hand and noted how training programmes were being disrupted in Kisumu, Siaya and Homabay Counties and parts of Nairobi County. The annexed report shows more details of these visits and the recommendations that I had put forward²⁷.

2.2 Good practices

The Commission has a tradition of holding lesson's learned conferences/meetings after the elections and incorporates those lessons in the training. This practice ought to be continued and encouraged. As already mentioned the Commission has excellent trainers and develops good training material. The *Ann Nderitu doctrine* needs to be continued to the ToT level to ensure excellence at all levels of training. The Commission has a fairly elaborate operation plan now from the 2017 elections that need to be further refined.

27 See Annex 2

2.3 Recommendations

- i) There must be a direct link between the registration of persons and registration of voters. The country spends enormous amounts of money on registration of voters. There has to be a way in which, once one has attained the age of 18, they are automatically included in the register of voters, with the option of removing your name, in case you do not wish to vote or changing your polling station;
- ii) In the same manner, there should be an electronic linkage between the register of voters and the civil registry directorate to flag all the deceased persons from the register of voters. Given that the next General Election will be on the basis of a new register of voters, this is the time to make these legal changes to allow for synchronizing of records;
- iii) It is a fact that there are errors made by the National Registration Bureau (NRB) in the issuance of national identification numbers with thousands of persons in the register of voters being issued the same number. The NRB must rectify this anomaly and ensure that national identification numbers are unique identifiers. Issuance of identification cards should be reviewed to avoid disenfranchising possible voters;
- iv) The law requires amendments to provide for a transparent process for removing deceased voters from the register of voters. The Ghana model is worth consideration;
- v) Legal changes are required to clarify the issues of inspection of the register of voters versus the biometric verification of voters. Inspection of the register is a critical function in finalizing the register of voters and must be done at least 60 days before the election to make the exercise meaningful. This basically requires that by the time of inspection, registration of voters is complete and the purpose would be to identify underage, deceased voters and other errors to allow time for corrections to be made before the register is certified;
- vi) If the Commission retains the mandate to register voters, then the system for registration of voters must be completely overhauled with the responsibility for the register falling squarely under the Elections Operations directorate and not ICT. The over-reliance on Safran/ OT Morpho has to be addressed with full ownership of critical functions on the register being in the hands of Commission staff, not contractors.
- vii) Political parties, civil society and other stakeholders must be actively involved in the voter registration process at all its stages;
- viii) Logistics and operation plans are critical for the success of elections. The Commission must employ persons with specific expertise in logistics (and not rely on one-time consultants) to ensure close coordination with all directorates of the Commission;

- ix) Training ought not to be an exercise conducted a few weeks ahead of the General Election. Training of ROs and DROs must be continuous especially on the non-changing aspects of the Commission's work. It is for this reason too that legal reforms need to be finalized at least one year to the Election to ensure sufficient time for development of training material and training programs;
- x) Communication is crucial during all aspects of the Commission's work. Explaining the processes that the Commission has requires continuous engagement with all stakeholders and the media;
- xi) There should be an independent review to get to the bottom of what actually happened with the election forms during the 8 August General Election. This would be the only viable way of truly understanding if the issue is one of training/capacity gaps or deliberate actions of poll officials;
- xii) Procurement of election material is a highly sensitive issue. The Commission should have open, transparent and genuine engagement with political actors as part of confidence building measures and accountability.

3.0 ELECTION TECHNOLOGY

3.1 Background and Challenges

The legal requirement to use electronic technology for the 2017 electoral period has its advantages and disadvantages. The use of technology is aimed at improving the electoral process and to ensure efficiency and transparency in the process of registering voters, identifying them on polling day and transmission of results. This is why the 2016 elections laws amendments required the Commission to put in place an integrated electronic electoral management system to be used in the electoral process. The downside was that Kenyans assumed that technology replaces trust and credibility in the conduct of the elections. Political actors gave inordinate weight to the ability of technology to avert the election from being "stolen". Yet experiences all over have shown that technology can be used to manipulate results just in the same manner as a manual system. Instead of focusing on all electoral processes and improving accountability and transparency, the hope of a nation was placed on technology.

This obviously increased the pressure on the Commission and the staff. We had a responsibility to ensure that the failure in technology, whether deliberate or technical, was not witnessed. My years at the United Nations had made me a skeptic on election technology for the reasons mentioned above, but also due to issues of sustainability. Developing countries, in the name

of confidence building, are diverting millions of dollars from development activities to buy this technology from countries that do not even use them in their own countries. The French Company, Safran/ OT Morpho sells its technology to mostly developing countries, with France using a paper-based system for their election. This is the dilemma I faced in my public engagement. The corporate message and one that majority of Kenyans wanted to hear, was that technology will solve all the problems. No deceased voters, no rigging of elections and results projected CNN-style in real-time, yet as a professional I was keenly aware of the limits of the use of technology in elections and its vulnerabilities.

It is therefore no wonder that technology issues along with the procurement of ballot papers dominated our Plenary meetings more than any other issue. Although I was a member of the ICT Committee chaired by Prof. Guliye, we had only a handful of meetings as most issues by-passed the committee and were hurriedly presented to the plenary. It seemed like a deliberate strategy of *fait accompli*. It was done repeatedly and it worked as we were accorded very minimal time to reflect on the issues with the “guilt trip” that any delay in decision-making would have an impact on legal timelines that could be blamed on the Commissioners. The challenges faced in the use of technology appeared to me to be almost similar to those witnessed in the 2013 General Election: lack of proper project management for the technology; late arrival of technology; inadequate training on technology of election officials; inadequate user support on Election Day; issues of servers and data management; unreliable printers and scanners, among other challenges.

The Kenya Integrated Electoral Management System (KIEMS) was a noble idea, only if there was sufficient time to develop it fully, especially the results transmission component. Although the Commission acquired the technology 60 days before the election, there were still several adjustments that had to be made before deployment. However, unlike 2013, the staff had the opportunity to interact with the technology before Election Day. The other positive aspect was that the kits were deployed for the biometric verification exercise in May-June allowing exposure to staff before its use on Election Day in August. The verification exercise although limited to only 11,000 kits showed a high performance of the kits during identification and that was replicated on Election Day.

The Candidate Registration and Management System (CRMS), a part of the KIEMS, was a positive innovation that enabled political parties and Commission staff to manage candidates for the August 2017 General Election. The CRMS performed very well during the nomination and was able to process 87% of the candidates. It was however prone to abuse by political parties who changed the names of the candidates and conveniently blamed the Commission. The same system was used for the political party’s lists reducing the burden on Commission staff.

The two issues that concerned me most on technology were: i) the results transmission system (RTS) component of the KIEMS and; ii) the security and redundancy of our systems. In all

my media engagement I was confident that the identification of voters would be successfully conducted through the KIEMS as we had tested this in May and June 2017 during the biometric identification of voters with a success rate of over 90%. Despite the successful tests conducted on transmission of results, I was always reticent as it was the aspect of the technology most vulnerable to external attacks. In addition, unlike biometric identification of voters, RTS was dependent on availability of reliable 3G network. We spent numerous hours discussing mitigating measures but our confidence in the RTS was always cautiously optimistic especially after the shocking and unresolved brutal torture and murder of the RTS Project Manager, Chris Msando²⁸ barely nine days to the General Election.

The second issue that concerned me on technology was the security of the hardware, database and network levels to ensure high availability and integrity of the systems. While we were often ensured of the inbuilt system redundancy for the deployed systems that would ensure business continuity in case of any breaches or disasters on Election Day, these assurances were not convincing especially given that the Commission did not have back-up data centers and relied on one at Anniversary towers that was on the verge of collapsing. We took a decision to acquire new servers for the primary and secondary datacenter but delays in procurement made it impossible for them to be fully functional for the General Election and even the repeat presidential election. In the end, the Commission resorted to the use of the infamous cloud-based platform, which dominated the Supreme Court case of August 2017.

As a member of the ICT committee, I always had a sense that many of the issues related to technology were shrouded in secrecy and handled by the CEO and the Director of ICT, Mr. James Muhati, with minimal accountability to the Committee and the Plenary. While there is a certain level of confidentiality required on issues of technology, there was no sufficient information provided for me to make informed decisions, nor did any of the Commissioners, including myself have expertise in ICT. The dominance of Safran/ OT Morpho in all aspects of the Commission's work is an aspect worth in-depth investigation including their role in the 2017 Election.

I will also always remember 8 August 2017 at about 8:30 pm when the display of results stopped and neither our staff nor Safran could explain to us what had happened. The display resumed about 3 hours later with the margin of difference between the leading candidates almost constant for the rest of the results transmission process. It is such situations that will forever leave questions in my mind of what actually happened on 8 August. In the absence of an audit done by the Commission (although the Plenary had approved it), it becomes difficult

28 Christopher Msando was an extremely intelligent, hardworking and eloquent professional. He was among the few staff that understood all the technology based processes. He worked closely with the Chairman and appeared with me on several television and outreach programmes. Sadly, his brutal murder achieved the fear and intimidation it was meant to convey.

to debunk myths of serious anomalies in management of the electronic transmission of results during the 2017 elections. Chairman Chebukati raised his own concerns on ICT issues in the memo annexed herewith²⁹.

3.2 Recommendations

- i) The National Assembly should institute an independent public inquiry into the conduct of the 2017 elections especially the use of technology, including the role played by Safran/ OT Morpho and other IT consultants.
- ii) The country needs to have a genuine conversation on the role of technology in the electoral process. Technology cannot replace trust, credibility and transparency;
- iii) If the country decides that it needs advanced technology in its elections, then the Commission needs to move away from inventing new technology every election year and use existing technology that has been used by other countries³⁰ for many years rather than reinventing the wheel every electoral year;
- iv) Political actors need to ensure that legislation on technology takes into account sustainability to avert diverting resources from development;
- v) The Commission needs to build its own ICT capacity especially in the areas of cyber-security, biometric registration, in case technology continue to be central to Kenya's electoral process;
- vi) The Chairperson of the Commission's ICT Committee should be a person with professional experience in ICT and elections.
- vii) International and local Companies involved in provision of strategic electoral material should be properly vetted to ensure value for tax payer's money.

4.0 PUBLIC OUTREACH AND COMMUNICATION

4.1 Background and Challenges

In my previous international assignments, we always emphasized to EMBs the importance of engaging genuinely and transparently with the public, political parties, civil society and other stakeholders. These points were emphasized to us during our orientation programme

²⁹ See Memo in Annex 5

³⁰ India has adapted its technology to its environment and could be considered, among many other countries.

as Commissioners with practical experiences shared with us by the Chairs of EMBs in Ghana, South Africa, and Namibia. With the support of UNDP, we also went through a media and etiquette training programme. The expectation was that after these programs, we would increase our outreach to the public and the media. Sadly, this was not the case. Although we recognized stakeholder engagement and communication as one of the challenges to our work, we did not make the requisite efforts to improve.

The Commission had an open-door policy on engagement with stakeholders and all Commissioners were available to meet with various parties. These engagements were however not structured and consistent and they were driven more by persons requesting to meet the Commission rather than deliberate efforts of the Commission. On several occasions we discussed the need to have weekly meetings with stakeholders but this often fell through. The political tensions did not make the situation easier. Even in situations when the Commission organized meetings with political parties, they did not engage in good faith. For instance, attempts by the Chairman to convene meetings with Presidential candidates proved challenging with the Jubilee candidate skipping all the meetings including the National Conference on Election Preparedness organized in June 2017. In cases in which the NASA candidate attended the meetings, the goal of diffusing political tensions was lost as the meetings ended with more issues than solutions.

The culture of genuine engagement with stakeholders does not exist in the Commission. Commissioners assume that independence means making decisions and informing the stakeholders rather than engaging with them genuinely, hearing their alternative approaches and then making decisions with the knowledge gained and as part of carrying the stakeholders along. The handling of the NASA irreducible minimums was a case in point where we took a “take it or leave it” approach³¹. Many of the concerns they raised were beyond the capacity of the Commission to handle, but on others, one wonders whether the Commission did all within its powers to address the issues in good faith. The atmosphere of mistrust made it difficult to hold genuine discussions. In other countries like Guinea where the Commission became highly mistrusted and a party to the crisis, a third actor intervened to mediate successfully. In our case, we let the Commission, which was at the heart of the controversy especially after the annulled presidential result play judge and juror, with inevitable failure.

Public outreach was not seen as an integral part of all the work of the Commission but rather the work of the communications manager. The simplistic solution for this was to request for UNDP to provide us with a communication specialist, who in the end was severely under-utilized. There was also lack of confidence among Commissioners in their ability to engage with the media and the public. Therefore, rather than expose the lack of knowledge in the issues being handled, it was better to shun the engagement all together. In retrospect, I think that the

31 See annex 4, the document from NASA.

reason the Chairman and Commissioners avoided public engagement and the media was self-preservation. To avoid shouldering the personal responsibility in case things did not work out, it was better to take a low profile. I recall on many occasions when colleagues said that once issues such as KIEMs and Ballot papers were sorted out, they would take up media engagements. This approach did not acknowledge that during a crisis, you need to communicate more and better.

Although I had spent my professional life preparing press material, talking points and speeches for my bosses, I had limited exposure to media appearances before I joined the Commission. I was however great at drafting press statements, which became a *de facto* role assigned to me by my colleagues from our very first week in office. One may wonder why we ended up drafting our press statements. Our first experience was that the CEO set up a press conference but the Chairman did not have his speech until a few minutes to the press briefing and the quality was wanting. We huddled together and redrafted the statement, with me being the penholder. That was the beginning of my *de facto* speech/press statement drafter role. Once the Communication specialist from UNDP joined us, my role was to review the drafts and rewrite them before they were submitted to the rest of the Commissioners and the Chairman. In certain situations, the Communication specialist was not privy to discussions held among Commissioners and the Chairman and we felt that it would be easier for us to draft them and quickly review without the danger of leakages or dilution of facts by the Secretariat. A vivid example was our press statement of 1 September in response to the Supreme Court decision, the Chairman asked me to draft with very useful contributions, including on the need to take disciplinary action on staff, from the rest of the Commissioners.

My first encounter as a guest in a television station was on 24 March 2017 *KTN News- Friday Briefing* with Betty Kyalo. Earlier in the day, we had held a press conference to update the nation on election preparedness and in particular the decision to award a direct tender to Safran / OT Morpho for KIEMS. The CEO informed me of a media appearance request from *KTN* and emphasized that it was important to provide more details to the public on election preparedness. He had discussed it with the Chairman and they had both agreed that I would be the best person to represent the Commission, as the Chair of ETOC. He explained that the interview would be on broad issues of election preparedness but that I would need to be prepared on questions related to the Safran contract.

This was short notice especially for a novice— practically a two-hour notice. I felt unprepared but like a “good soldier”, after talking to the Chairman, I agreed to attend the interview. The CEO sent me a text message with key messages reminding me to “always pivot to base”- integrity of electoral process. I was obviously nervous during this first live interview and could not wait to leave immediately after answering the last question, ignorant of the protocols that require one to sit until the cameras shift before exiting the set! Nevertheless, it was not a disastrous interview as the Chairman, fellow Commissioners, the CEO and others who watched the interview sent me

congratulatory messages. Thus, began my *de facto* role of explainer-in-chief of the Commission leading to several television and radio appearances during a span of eight months³².

Beyond media engagements, I held various public engagements on election preparedness. They were mostly through civil society forums such as *Mkenya Daima*, *Kura Yangu Sauti Yangu*, ELOG, local and international election observers, diplomatic community events and meetings with political parties and presidential candidates. I should have done much more in reaching out directly to voters beyond radio and television interviews.

Within the Commission, the Committee on Voter Education and Partnership chaired by Commissioner Margaret Mwachanya had the responsibility for voter education and media engagement. Commissioner Mwachanya, a good educator, helped us simplify material quick to grasp lines easily understood by voters and spent her time on television and radio educating voters on the electoral process, especially in Swahili which she delivered eloquently. I am grateful to Commissioner Mwachanya for coopting me as a member of the Voter Education and Partnership Committee where we worked together on media commercials focused on strengthening the trust and participation of key citizens and stakeholders with the electoral process. Commissioner Mwachanya was supported by a fantastic team from the Secretariat that was always available to join Commissioners on television programs to simulate Election Day activities. The passion with which they handled their work was infectious even during our darkest moments. I recall them persuading me to join them in a briefing to observers in October, when I outlined *the Ten Things the Commission will do Differently* during the 26 October Election³³, despite the fact that by then I understood that it was too late to salvage the credibility of the repeat presidential election.

Voter education had its challenges too that are not much different from those related to communications. While the law provides for continuous voter education, funding is only provided for on an Election Year. This means that rather than voter education taking place during the period in between a General Election, it only takes place during an Election Year. In addition, voter education is not integrated into all work processes making staff proceed in silos with returning officers not recognizing voter education as their direct responsibility. Given that for almost four years in-between a General Election the responsibilities at the constituency level are light, this time should be used to increase voter education and registration of voters. Even on election year, we witnessed cases in which the voter education material arrived long

32 See Nation Media Group Article of 19 August 2017, *How the Commission Found a Fresh Face in Dr. Akombe* <https://www.nation.co.ke/lifestyle/weekend/How-elections-team-found-a-fresh-face-in-Dr-Akombe/1220-4063172-fy8lo5/index.html>

33 See the document in Annex 6 that was later developed into a visual and published by the Commission.

after the intended activity. For instance, during the mass voter registration exercise in January and February 2017, material arrived long after registration of voters was finalized.

4.2 Good practices

The Commission has some of the most committed staff working in the Directorate of Voter Education and Partnerships. They often have very good outreach programs that require effective implementation. The mapping of stakeholders is available which should make it possible to have structured public outreach programs.

4.3 Recommendations

- i) The Commission should set up a full-fledged Strategic Communications Directorate with experienced persons to implement its communication strategy. The head of the directorate would participate in all key meetings of the Commission and ensure that communication is integrated to all phases of its work.
- ii) The new communications directorate should ensure that the Chairperson and Commissioners are trained and are fully briefed on all issues before appearance for media engagements. The directorate should institute a weekly briefing programme for the media on an Election year and a monthly one, during the non-election year.
- iii) The Commission should establish a regular structured programme for engaging with political parties, candidates, civil society, business community, special interest groups such as women and youth and other stakeholders.
- iv) The budget of the Commission should include funding for voter education programs throughout the electoral cycle. This should include adequate staffing at the Constituency level.
- v) In preparation for presidential elections, the Commission must insist on having regular meetings with the Presidential Candidates, not their surrogates.

5.0 LEGAL REFORMS

5.1 Background and Challenges

Kenya has one of the most regulated electoral systems. As is the case with technology, stakeholders believe that mistrust and lack of impartiality of the election management body would be fixed by regulating every aspect of its work. Many of the legal reforms initiated in

2016 and 2017 aimed at enhancing the transparency and credibility of the electoral process while many others were a result of mere political posturing. As many world-renowned electoral experts have said before, making legal changes too close to an election almost guarantees a failure in their implementation. Electoral laws continued to be amended even up to days before the 26 October repeat presidential elections calling into question the practicality of their implementation let alone their efficacy.

As indicated in the introductory part of this report, by the time we were appointed as Commissioners, the National Assembly and the Senate had made substantive changes to the laws. They included the enactment of: i) the *Election Laws (Amendment) Act, 2016*; and ii) the *Election Laws (Amendment) Act, 2017*. These two laws amended provisions of the *Elections Act, 2011*, the *Independent Electoral and Boundaries Commission Act, 2011*, the *Political Parties Act, 2011*, the *Supreme Court Act 2011* and the *Registration of Persons Act, Cap 106* Laws of Kenya. Then there was the dramatic recall of the National Assembly from the Christmas recess on 22 December 2016 to make further amendments to the laws. This unilateral action by one political party, later repeated a few days before the 26 October repeat presidential election only increased the political polarization in the Country.

Development of legislation is not just a political process in the hands of politicians but rather one that requires involvement of stakeholders including those with electoral expertise. The legal amendments made in 2016 over-prescribed processes in the law thus literally tying the hands of the election management body. Legislating on such mundane details as timelines for procurement of electoral material only added pressure to the Commission and increased chances for impropriety and therefore did not necessary lead to the desired goal of the legislation.

For the laws amended in 2016, we had the responsibility of preparing regulations. While the direct involvement of Commissioners in preparations of the regulations was a welcome move, it was a challenge to develop regulations for amended laws that we had not been involved in developing nor had enough time to comprehend their implications. We relied heavily on the Secretariat on most issues making it challenging to have at par discussions with the legislators.

The task assigned to us was to finalize discussions with members of the Parliamentary Committee on Delegated Legislation chaired by Hon. William Cheptumo. We held several meetings with members of the Committee between 13 February and 22 March 2017. Prof. Guliye and I were assigned by colleagues to finalize the discussions and we worked with the Legal Affairs Directorate to finalize the documents on time for approval and gazette³⁴.

34 Thanks to Ms. Salome Oyugi, Ms. Ruth Kamuthu, Ms. Fiona Otieno and Mr. Wafula Wakoko for the excellent work throughout the process of preparing the regulations and throughout other legal processes at the Commission. In the sessions, Hon. William Cheptumo, Hon. TJ Kajwang and Hon. Agostinho Neto stood out for their exceptional knowledge of the law, parliamentary processes and

The following were the regulations finally gazetted.

- a) Election (Voter Registration) (Amendment) Regulations, 2017
- b) Election (General Regulations) (Amendment) Regulations, 2017
- c) Election (Voter Education) Regulations, 2017
- d) Election (Party Primaries and Party Lists) Regulations, 2017
- e) Election (Technology) Regulations, 2017

Following the annulment of the presidential results by the Supreme Court, the ruling party blamed the electronic transmission of results for the decision by the Judges and vowed to change the laws related to the same. The Jubilee Members of Parliament initiated legislative changes despite appeals against the same from Religious Leaders, Civil Society, Opposition Political Parties and the Diplomatic Community. They formed a Joint Parliamentary Committee on electoral laws with members of the Senate and the National Assembly- all from Jubilee that rushed through parliamentary processes to ensure that the laws were amended before the 26 October presidential election.

The amendments included provisions to designate the Commission's Vice Chair as the Deputy Returning Officer unlike the existing law that provided for the Chairman as the sole Returning Officer of the presidential election. This was clearly a politically motivated legislative amendment given that the Chairman had expressed his frustrations with impasse in the Commission that was making it difficult for critical personnel and process changes to be made to ensure a fairly credible electoral process. Earlier iterations of the amendments had also sought to reduce the quorum required for decision making to three Commissioners and remove the requirement of a legal background for the Chairman of the Commission. Pundits claimed that these two provisions would have allowed for easy and quick replacement of Chairman Chebukati with the Vice Chair with only three Commissioners voting. Other changes included explicitly providing for manual transmission of results and hefty punishment for poll officials guilty of certain election offenses. In my view, none of the legislative changes sought were in good faith.

When asked about the legislative changes, the Chairman noted that the Commission had not been consulted and did not see the value of the changes very late in the day. I echoed the Chairman's sentiments during media appearances earning the wrath of some Jubilee legislators. For instance, during a press appearance on Citizen TV on 26 September 2017, I rebutted Senator Murkomen's accusation of being sympathetic to the opposition by cautioning against the operational constraints if legal changes touch on key aspects of our work at the time we were finalizing our training material.³⁵

their intellectual leadership.

35 The television show entitled *The Big Question* on *Citizen TV* with Hussein Mohamed had two other panelists; Hon. Murkomen (Jubilee) and Hon. Otiende Amollo (NASA).

The Commission was finally requested to present its submissions to the Joint Parliamentary Committee; I had hoped that as “experts” we would have the courage to advise against legal changes being made 21 days to the repeat presidential election but the divisions and the partisanship amongst us could not allow us to reach this level of consensus. We had an inconclusive discussion in Plenary on 4 October and agreed to have the Chairman finalize the documents in consultation with the Legal directorate. As was the practice, the Chairman circulated the draft submissions of the Commission and requested for colleagues to join him at the legislature on 5 October. Some of us believed that the Chairman of the Commission was sufficient to represent us at the meeting and instead proceeded to represent the Commission in other functions.³⁶ However, the Chairman was turned back by the legislators and asked to bring us along. We appeared before the Committee in the same day until after midnight with each of us reading sections of the submission³⁷, in one of the most humiliating professional situation I have ever found myself in. Some of us were reading a script that we had barely digested with the only objective being to rubberstamp a highly partisan and controversial process.

5.2 Good practices: The direct engagement of Commissioners, including the Chairman, with the legislators in discussing the regulations was an excellent initiative. It provided an opportunity for us to understand the political dynamics behind the provisions in the amended laws given that we were not in office when the amendments were made. The working relationship that the legal directorate has established with the staffers of parliament is worth maintaining.

5.3 Recommendations

- i) Legal reforms must involve all stakeholders with priority being given to those with expertise in electoral processes and making a shift from a legalistic approach to electoral reforms to a pragmatic holistic approach. The Commission should propose legal reforms following extensive lessons learned exercises not more than six months after conducting a General Election.
- ii) Legal reforms, including development of regulations should take place one year before the General Election. Laws amended during the year of the General Election should only be applicable during the next General Election.
- iii) The Commission should be empowered to develop regulations with the oversight role of the Parliamentary Committee being clear and not exercised as a veto over every word in the regulations.

³⁶ The Chairman had requested me to represent the Commission at the Nairobi ASK Show and then later at a blogger’s event at the Intercontinental Hotel.

³⁷ *The Hansard*, 5 October 2017.

- iv) The selection of Commissioners should include persons with expertise in electoral matters and law to be able to constructively engage in the substantive aspects of legal reforms, even at short notice;
- v) The Commission must conduct itself with utmost impartiality and independence to address the mistrust that results in over-regulation and legislation.

III. CONCLUSION

The previous sections of this report focused on the technical aspects of the electoral process and sought to provide the context during the 2017 elections and make suggestions on the way forward. Elections however take place in a socio-political context. Elections do not take place in a political vacuum and technical as the process may be, its success or failure depends on the management of the politics.

Regardless of one's political beliefs, it would be difficult not to admit that Kenya faces indomitable political and socio-economic challenges. All these socio-political challenges have been well documented in numerous reports emanating from public-solicited views and analysis including the Kriegler and Waki Commissions. However, instead of addressing these challenges through well-known and time-tested mechanisms, we resort to elections and Court cases as a panacea to all our problems.

As I mentioned in several meetings and press engagements³⁸, what Kenya faces is a purely political (and socio-economic) situation that cannot be fixed by merely replacing the current Commissioners at the IEBC with another set or making some cosmetic changes in the Commission or even replacing those at the helm of the Supreme Court. Political problems cannot be fixed by seeking annulment or affirmation of election results by the Supreme Court. While these efforts are certainly useful and welcome, they are like placing a Band-Aid on a festering wound rather than treating it.

The process of treating the symptoms of our perpetual electoral crisis genuinely began after the 2007/8 crisis with the establishment of the National Dialogue process. The National Dialogue and Reconciliation Agreement signed on 1 February, 2008 sought to provide a peaceful solution to the political impasse and violence that had engulfed the Country. While it was partially successful in developing a framework for addressing three out of the four agenda items: i) Immediate action to stop violence and restore fundamental rights and liberties; ii) Immediate measures to address the humanitarian crisis, promote reconciliation, healing and restoration; iii) overcoming the then political crisis. The long-term issues identified as Agenda number four, continue to plague the country including; constitutional, institutional and legal reforms (despite the adoption of the 2010 Constitution); land reform; poverty and inequity; unemployment particularly among the youth; consolidating national cohesion and unity; transparency and accountability and addressing impunity.

38 See especially the media interviews held in September and October 2017

Many perceive it as a process in which the political elite sat around the table to share the loot. It was also a process that was time bound to limit the loss of life and property that was ongoing. The Government that was established thereafter failed to push hard for the implementation of the recommendations from all the Commissions. This meant that a majority of the recommendations that address the real problem in Kenya, beyond the power grab, were left untouched. We then quickly celebrated having the most progressive Constitution in Kenya in 2010, forgetting that even with the best Constitution; political actors have a tendency to mutilate it when it does not serve their interests, as we have seen in the past five years. The lack of serious commitment to the 2010 Constitution by the political class has led to assault on independent constitutional bodies, flagrant abuse of human rights, use of intimidation, threats and other underhand measure to silence the civil society and human rights defenders.

We cannot end the perpetual electoral crisis without addressing the issues of political exclusion where if we continue with the current political system only two ethnic groups will run the country in perpetuity in the foreseeable future³⁹. The problem is that the current political system that gives room for the political elite from these communities to, in their own words “eat the meat” while the others “salivate”, is not sustainable. Youth unemployment, with thousands of graduates without meaningful employment while they see some of their counterparts who probably did not even complete their studies amass wealth through corruption and state capture only breeds resentment. Exclusionist policies that leave large swathes of the Country feeling left out in the social and political national governance contract could be triggers for violent conflicts. The unresolved land issues in the Country and historical injustices form a fertile ground for conflict to thrive. Discrimination of women, minorities, persons with disabilities and other groups only ensures under-utilization of the potential among these groups. Uneven distribution of resources in this age of oil exploration and the assault on devolution of power and resources to County Governments would only make worse an already delicate situation.

Addressing these issues requires genuine inclusive political dialogue akin to the national conventions held in the 1990s to have a frank environment to address the issues that befall us as a nation. This national dialogue must by necessity:

- i) Lead to the establishment of an independent public inquiry into the conduct of the 2017 elections especially the use of technology, including the role played by Safran/ OT Morpho and other IT consultants. The Commission, to be composed of external experts as was done during the Waki and Kriegler Commissions should be led by a prominent jurist to audit the entire Kenyan electoral processes including

³⁹ President Jomo Kenyatta (1964-78), President Mwai Kibaki (2002-13) and President Uhuru Kenyatta (2013-) are from the Kikuyu ethnic group, while President Daniel arap Moi (1978-2002) is from the Kalenjin ethnic group.

the August/October elections, the register of voters, procurement of strategic electoral material including ballot papers and form, use of technology, political influence/interference in the electoral process, among other key issues.

- ii) Review how well/not well the 2010 Constitution has worked and whether amendments are required.
- iii) Determine what political system needs to be put in place to address the history of two communities dominating the presidency⁴⁰;
- iv) Establish mechanisms to ensure the full implementation of the recommendations of the Truth, Justice and Reconciliation Commission, Independent Review Commission (Kriegler report), the Commission of Inquiry on Post-Election Violence (Waki Commission) and the Ndungu Land Commission report;
- v) Discuss ways of ensuring the full implementation of the devolution agenda;
- vi) Tackle the issues of youth unemployment and exclusion of minorities, women and persons with disability;
- vii) Address corruption and misuse of state resources;
- viii) Discuss how to end the state capture of constitutional bodies.

There is an opportunity to address these issues well ahead of the next General Election in 2022. Even if the world's best Commissioners are recruited to manage the 2022 elections, the process will not address the deep grievances that I heard as I travelled across the Country whether in the so called Jubilee or NASA strongholds. The urgency for the inclusive dialogue becomes even more critical given the boundary demarcation process set to begin soon, under the leadership of the Commission. The potential for gerrymandering and the sensitivities around certain boundaries requires cross-party convergence of views before the process begins. The demarcation of boundaries will be followed by the establishment of a fresh register of voters where the country has a chance to get it right this time round, without the pressure of time. But this also requires urgent legal reforms regarding registration of person (births and deceased) and provision of national identification cards. Delivery of free, fair and credible elections in 2022 requires more than electoral reforms and electoral justice. It requires a rebirth of Kenya.

40 The Nigerian example, although not always easy to implement, is worth noting. Since 1998, the predominant PDP party has an unwritten agreement to rotate the Presidency between the North (predominantly Muslim) and the South (pre-dominantly Christian). Other options include proportional representation, parliamentary system, among others.

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION**INTERNAL MEMO FROM COMMISSIONER AKOMBE TO CHAIRMAN CHEBUKATI**

TO: Chairperson of the Commission

FROM: Commissioner Akombe

REF: IEBC/RA/01/2017

DATE: 9 October 2017

RE: PLANNING FOR THE FRESH PRESIDENTIAL ELECTION

I wish to commend you for the leadership you have shown in steering the country during this difficult time as we prepare for the fresh presidential election planned for 26 October 2017.

I am however concerned that the window of opportunity to create a conducive environment for free, fair and credible elections continues to shrink. Contributing factors to this unhealthy environment are both internal to the Commission while others are external. I wish to raise several concerns that I have with the hope that as leaders that care deeply about our country, we may find solutions;

1. The terms of reference for the ETOC committee that I chair are very clear, inter-alia to address issues related to election operations, boundaries and logistics. Before the 8 August General Election, issues related to operations and logistics were handled within the Committee before consideration by the Plenary. However, since September, the CEO and the Secretary of the Committee have chosen to bring those issues directly to the plenary. These issues include operational timelines, specification of ballot papers, ballot boxes and other strategic material, training material for the election, policy issues regarding the identification of voters, among many others. It appears that the Secretariat has deliberately decided to render the Committee dysfunctional and therefore making my oversight role and that of the two Commissioners who are members of the Committee obsolete. Is this an orchestrated move to ensure that all decisions are controlled by the Secretariat and the majority vote in the plenary? Are there instructions to isolate some of us and make us irrelevant in the operations of the Commission? Are there issues that are being safely kept away from some of us?

2. I acknowledge that decisions of the plenary are either unanimous or through majority votes. I have hoped all along that on key policy issues we could find a consensus decision. I am disturbed for example that having taken the decision during the 8 August election not to cross the register of voters, that we brought this practice back potentially opening the door for rampant misuse of the supervisor's mode in the KIEMS kit, especially in the so called "strongholds". I would have thought that given that section 44 gives us cover to electronically/biometrically identify voters, we could have adopted part of the legal opinion presented to us that would have made it superfluous for us to implement regulation 69 on crossing the register. It is unfortunate that knowing the possibility of high numbers of deceased voters in the register (see the KPMG Audit report), we could still open a potential avenue for irregularities and fraud. Is it an attempt to be overcautious about the law or a deliberate attempt to allow for misuse of the Supervisors mode? There are many more of these critical decisions that are often voted down or in favor of by the same set of Commissioners. In essence, this Commission is governed by four Commissioners while the rest of us are onlookers yet we will be equally held responsible for their decisions. It is time that, like other Election Management Bodies, we increased transparency and accountability for our decisions by making our plenary meetings open to observers or made public minutes of our meetings. We cannot purport to be acting on behalf of the Kenyan people and in accordance with the Constitution when our decisions are shrouded in secrecy.
3. The past few weeks have seen elevated verbal attacks by politicians on staff and Commissioners. We still have the unexplained murder of our colleague Chris Msando 9 days before the 8 August election. I explained to you in my memo dated 25 September 2017 of threats to my life and that of my family members and yet a senior official of a political party had the audacity on 5 October 2017 to trivialize these threats on national television. There is pressure from some politicians to have some of us resign in an attempt to have a team that is responsive to their needs. In an environment such as this, could one really say that we have a conducive environment for free, fair and credible election? In an environment of politically instigated cyber-bullying, well organized spreading of propaganda and fake news, could one say that one is performing his/her functions without intimidation? When this intimidation continues to the boardroom, with even one Commissioner threatening to go physical against me (18 September Plenary Meeting), could one still talk of a conducive environment for free, fair and credible elections? With well-orchestrated verbal attacks and accusations in virtually every plenary meeting, could one say that there is even free speech and tolerance for difference in views in our own boardroom? With intimidating calls from officials after major plenary decisions or discussions, could one really say that we have the right environment to make decisions? It appears that there is a deliberate and calculated plan to silence some of us from airing our views. In whose service is this?

4. In our statement issued on 1 September, we promised to make changes to our processes and personnel. I pay tribute to the HR Committee for the laudable steps it has taken regarding the ROs, DROs and Presiding Officers. I still find it unacceptable that we still have not asked the tough questions and taken action on the HQ staff. As I have said on many occasions, we lost the Supreme Court case because of non-compliance to the court orders regarding scrutiny of forms and opening of servers. Who was responsible for ensuring compliance to the Court orders? If we can take action against ROs and DROs why can we not do the same for the Nairobi-based staff that have led to billions lost in a voided election and billions more as political uncertainty turns away investors?
5. I commend you for setting up a Project Team to manage the fresh presidential election. It is my understanding that your objective was to have a team that enjoyed your confidence and that of the Commission as part of our efforts to improve the environment for free, fair and credible elections. Yet nothing seems to have changed. All key issues related to this election ranging from technology to training are still being managed by the same headquarters staff whose confidence you have questioned and others who have ensured that ETOC is made irrelevant. Is the Project Team under siege? Is the Project Team able to project leadership and build confidence in our preparations?
6. Our role as election managers is to ensure that we are impartial players and perceived to be so. This includes engaging in good faith with all political actors. Have we done our utmost as Commissioners? When did the rain begin beating us when it comes to engaging with political parties in preparation for the fresh presidential election? You may recall that on 4 September 2017 you requested me to reach out to both Jubilee and NASA to organize separate meetings, at the highest leadership levels, at their respective party headquarters. Those meetings were confirmed. However, the majority commissioners decided against the meetings and though humiliating, I had to call to cancel them. A month later, we are still struggling to have a meeting with one of our presidential candidates when we had thrown the opportunity away. On October, you and the Vice Chair had a meeting with Rt. Hon. Raila Odinga and his running meeting. One of the issues on the table was staff changes where as per the document circulated to NASA we committed to ask staff who had been mentioned by both sides, except for the Commissioners, to take their annual leave. What happened? How can we build confidence in political actors when we cannot keep to our commitments? Frankly, what is so difficult in asking a few staff to step aside even on annual leave as part of confidence building measures to establish a conducive environment for elections?
7. On 3 October, at the meeting with the NASA Coalition there was a resolution to establish a technical team led by Senator Orengo and Mr. Magaya from NASA and Commissioner Ambassador (Dr.) Paul Kurgat and myself from the Commission.

The objective of the team was to narrow down on the pending issues outlined in the “irreducible minimum” document. We convened along with members of the Project Team and discussed issues such as pre-printing of form 34 B in order to avoid the use of excel sheets, interpretation of the Maina Kiai ruling regarding displaying of results at the national tallying center and ICT. The project team advised us that since we had two candidates, for the sake of the country, we could pre-print the forms. However, at the plenary presentation on 5 October, they changed that position. Why? What happened in the few hours between our meeting and the plenary meeting? Is there no way that we could make even the most basic concessions to ensure that NASA does not boycott the election? In our conscience, do we feel that we have done all that is humanly possible to ensure that they participate in the election?

8. I appreciate the efforts you have made in ensuring compliance by the Secretariat to decisions made by the plenary and their immediate implementation. I however remain concerned that weeks after we approved the audit of the ICT system used for the August 2017 election and the quality assurance of the system to be used in the 26 October 2017 election, these processes have not commenced. We are all aware of the need for these two processes as part of our confidence building measures and there is a legal requirement for the later. Are these deliberate delays? Stalling like what happened between 28 and 29 August on implementation of Court orders on access to the servers? What would be the reason behind such delays? There are obviously many other decisions which we have lost track of as minutes get to us many days/weeks after the meetings.

I apologize for the very lengthy memo, but I believe that this is the best mechanism for me to express my views. The country is in a precarious situation. Everyone is counting on us to salvage it. I plead that we do not lose this opportunity. I plead that we seize the moment and show leadership. Having spent the past few weeks with Returning Officers at the various trainings, I am confident that technically, operationally and logistically, we are ready for the election. However, an election is more than logistics and operations. It is also about the political environment and the confidence of Kenyans in our systems.

I count on your leadership, Mr. Chairman, in ensuring that we do not lose this opportunity to do all within our power to get both candidates to participate in this election.

I want to assure you of my full commitment to work with you and my colleagues to save our country. History will judge us harshly if we do not.



Roselyn Akombe (PhD)
COMMISSIONER

Cc: All Commissioners

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION**INTERNAL MEMO FROM COMMISSIONER AKOMBE TO CHAIRMAN CHEBUKATI**

TO: Chairperson of the Commission

FROM: Commissioner Akombe

REF: IEBC/RA/02/2017

DATE: 16 October 2017

RE: STATUS OF PREPARATIONS FOR THE FRESH PRESIDENTIAL ELECTION

As we get closer to the 26 October 2017 election, I wish to share with you my report of a visit to four counties and my observations.

I am concerned at the lack of seriousness we are taking to the concerns raised by our staff on their security in the counties of Migori, Homa Bay, Siaya and Kisumu. We surely cannot say that we are fully prepared for this election if we do not complete training and effectively dispatch material.

I hope that the report will help us re-evaluate where we are heading as a Commission and avert a crisis of broader proportions than we currently face.

Roselyn Mombe (PhD)
COMMISSIONER

Cc: All Commissioners

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION



REPORT OF VISIT TO NAIROBI, KISUMU, SIAYA AND HOMA BAY COUNTIES

1.0 INTRODUCTION

1.1 On 13 October 2017, I visited Luke Hotel off Thika Road to assess the training of SETS for Nairobi County. I was impressed by the high level of discipline and involvement of the County Election Manager and all the Returning Officers. It was clear that the messages we had passed to our staff when we addressed them at Safari Park were absorbed and acted on. I went through all the 10 different classes and left there feeling very encouraged.

1.2 The following day, 14 October, I visited our team at Tom Mboya Labor College in Kisumu County. I witnessed the same level of discipline and commitment under the leadership of the County Election Manager and the ROs. The same was the case in Homa Bay Country where I visited on the same day and Siaya County where I visited on 15 October. This report will focus on these three counties.

2.0 DISCUSSIONS IN KISUMU, SIAYA AND HOMA BAY COUNTIES

2.1 The Common theme in my visit to Kisumu, Homa Bay and Siaya was the issue of the withdrawal of Rt. Hon. Raila Odinga from the presidential race and the impact it may have on the security of the staff and operations.

The trainees raised concerns about their security and asked to be paid risk allowance as well as insurance as it was a risk to work for the Commission. They noted that as staff working for the Commission, they are often expected to know everything about the Commission and therefore sought answers from me. In this report, I will highlight just a few of those questions asked.

2.2 The participants questioned the decision to insist on having Rt. Hon. Raila Odinga on the ballot even when had withdrawn. They wanted answers on why

the servers had not been opened to assuage public concerns. They questioned what was difficult in letting go some of the Secretariat officials mentioned adversely by political actors. The trainees asked me about the quality of the lawyers we have and why we always lost cases. They also asked specific questions related to the training that I responded to.

2.3 I held separate meetings with the CEMS and ROs in each of the three counties. They told me that protestors had thrown stones at the venues of their training on 13 October but were repulsed by the police. In Ugunja, on that same day, the Governor of Siaya had led politicians and protestors to the ROs office and she was lucky to have been at the training venue. The ROs explained to me that they had devised ways to deal with protestors. That they had to “pamba” their official and personal vehicles with leaves as other protestors to disguise themselves. They also avoid having uniformed police with them and instead pay well known touts to be in their cars when they cross town. They also avoid any item in their cars with IEBC logos.

2.4 Although they had contacted the security authorities in their various counties and constituencies, there were no concrete plans yet, noting that even in the last election there were not enough security personnel to be deployed especially in escorting polling materials to polling stations. In most cases, the OCS or the Chief (in Uniform) accompanied the presiding officers and left them on their own to repeat the same procedure for other polling stations. In some tallying centers, after the dispatch of material on the eve of the election, the returning officer was left alone without the police.

They wondered what will happen on 25 October if they are left without armed police. They also noted that in some cases, the police coming from the same counties seemed to side with the protestors.

2.5 The Constituencies with Islands expressed more concerns noting the ease with which ROs could be kidnapped and taken off to Uganda by boat while there were rumors making rounds of planned attacks/killing of ROs/POs as a deterrent for the Commission from holding the election. The Ugenya RO for instance indicated that following the 8 August election there are two poll officials murdered, in his constituency under mysterious circumstances including a presiding officer who was a witness in a petition filed against the Commission.

2.6 Several ROs requested to be moved from their current locations. Five ROs in in the counties I visited. requested to be moved and replaced by ROs from the County. The direst though is the RO for Muhoroni, Kisumu County. She told

me that she had been profiled because of her ethnicity and would want to be urgently moved from her current location. I promised to pass on her request as a matter of priority.

- 2.7 The staff informed me that they had delayed training of KIEMS to 14 October as they could not access the material from the various location during the protests. The also had lost hours during protests but were struggling to catch up.
- 2.8 The Staff expressed concern that the next level of training will even be more challenging as it was non residential and would begin on the days that protests were ongoing. They expressed concerns that protestors would storm the venues of the training or even attack the trainers when coming in and out of the training venues. They were concerned that the SETS and trainees may not show up for the training. They explained that some SETs had intimated that they had turned for the training for the free accommodation, food and allowances but would not risk their lives.

3.0 OBSERVATIONS

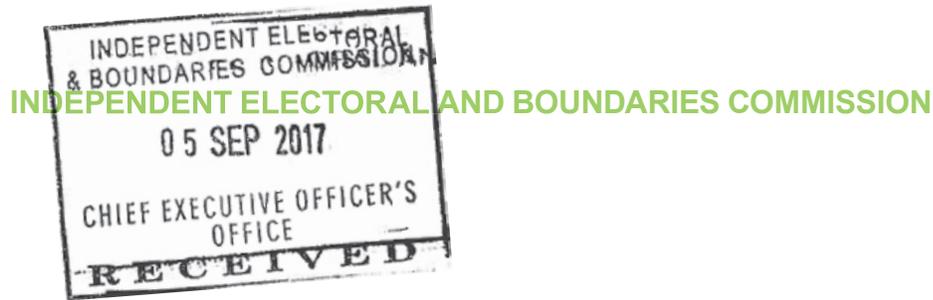
- 3.1 The protests will obviously have an impact on our operations. First, in terms of training, the ROs have adjusted the programme to focus on the critical changes related to KIEMS on the first day so that in case of disruption by protestors, the trainees will at least have that training. The concern is that if training on forms is not done, then we risk the same mistakes we had during the last election. In addition, there are new forms we have introduced in this election that they may not have the time to train on.
- 3.2 The Second impact is on availability of service providers. Several vendors of vehicles and tallying centers have already indicated that they will not be providing the services. The question is how the material will arrive at the polling stations.
- 3.3 The third impact is on cost. Some vendors are already inflating prices, for instance a tallying center that cost KES 8000 per day on 8 august is now charging KES 15,000 are asking for advance payment. Demands for more allowances from staff including on security will increase.
- 3.4 The fourth and most important of all is the safety and security of our staff and voters. It is difficult to contemplate how in the midst of daily protests we will guarantee the safety and security of polling officials, material and voters.

- 3.5 The last one is fundamental. It relates to scenarios that may unfold on election day. What guidance shall we provide to ROs in cases where polling stations do not open at all or where a small number of polling stations open but no voters turn up? Hope we will get a chance to go through these scenarios very soon to ensure that we provide guidance to the ROs and POs in good time.

A handwritten signature in blue ink that reads "Roselyn Akombe". The signature is written in a cursive style with a large initial 'R'.

Roselyn Akombe (PhD)
COMMISSIONER

16 October 2017



INTERNAL MEMO FROM COMMISSIONER AKOMBE TO CHAIRMAN CHEBUKATI

TO: COMMISSION SECRETARY/CEO

FROM: CHAIRMAN

REF: IEBC/CP/CON/1/2/VOL.1(51)

DATE: September, 5th 2017

RE: SC ELECTION PET 1 OF 2017
RAILA ODINGA & ANOTHER VS IEBC & 2 OTHERS

The above subject matter and the press statement released by the Chairperson on behalf of the Commission on Friday the 1st of September, 2017 refer.

In executing the preparations for the fresh elections as directed by the Supreme Court, I write in respect thereof as follows:

1. First, you issued a Memo to the Commission's staff dated 1st September, 2017 referenced IEBC/CEO/1/1/09/2017; in the said Memo you appear to contradict the position adopted by the Commission and communicated by the Chairperson on behalf of the Commission vide a Press Statement on the 1st of September, 2017. Further the Memo also fails to appreciate the grave indictment by the Supreme Court in the above subject Petition, with regard to the manner in which the Commission conducted the impugned presidential elections. Respond and explain the basis for your contradiction;
2. The Commission contracted Messer Al Ghurair, to print the Country's ballot papers and various statutory forms to be used in the Presidential election; under defined contractual terms and obligations. Respond and explain what happened to the printed forms that were meant to have various approved security features and names of candidates printed in accordance with the ballot proofs and as verified by the due diligence teams the Commission sent to Dubai;
10. Additionally respond and explain why the Commission experienced non-validation of individuals/voters after the KIEMS identification, essentially obfuscating the logs

- on voters cleared per polling station to vote. Respond on how many voters were subsequently allowed to vote by manual identification and why;
11. Further respond and explain why 682 polling stations had an equal number of rejected votes vis-à-vis the number of registered voters in those polling stations; and.
 12. Lastly, respond and explain why KIEMS GPRS and Geo-fencing features were switched off from the 5th August, 2017.

A handwritten signature in black ink, appearing to be 'W.W. Chebukati', written over a diagonal line.

W.W. CHEBUKATI
CHAIRMAN

For you comments of the 15/9 by 9am to enable us do a response.

**Raila Odinga Presidential
Campaign Secretariat
Capital Hill Square
4th Floor
Upper Hill**

14th September 2017

**Mr. WafulaChebukati,
Chairman
Independent Electoral and Boundaries Commission
Anniversary Towers
Nairobi**



Dear Sir,

RE: FRESH PRESIDENTIAL ELECTIONS

Your communication titled Status update on the Commission's Preparedness for the Fresh Presidential Election (undated) and your letter dated the 13th September 2017 refers.

We note that the communication opens with reference to the Supreme Court's annulment of the presidential election you conducted on August 8, and the attendant orders for a fresh election. It conveniently failed to acknowledge that the court found the Commission culpable for "illegalities and irregularities."

The Commission is now proposing to proceed as if these illegalities and irregularities never happened. This is despite your acknowledgement of the same by way of the widely publicized memorandum written by the Chairman to the CEO detailing these acts which in their entirety constitute one of, if not the most egregious and cynical breach of trust committed by public officials in our Nation's history. The Supreme Court judgement, the unprecedented public outrage, and our engagement with you so far has clearly failed to impress upon you the gravity of your misdeeds.

We need not remind the Commission that the Supreme Court (a) declared the presidential election null, void and invalid and (b) stated unequivocally that elections are to be adjudged on the constitutional threshold of a free and fair election. We see no evidence that the order. This is not just an election matter, but a fundamental issue of fidelity to the constitution and rule of law.

info@rao.co.ke

Telephone +254 20 2172496/97/98

P.O. Box 10311-00100

Nairobi, Kenya

MAMBO YABADILIKA

4. You have indicated in your letter that the servers used for the August 8 election will be audited before they are used for the election. This is woefully inadequate. By your own admission *vide* Chairman’s memorandum to the CEO referenced above, there were massive technology related irregularities, some self-evidently of a criminal nature. We surmise from the letter that technology did not fail, it was failed. We ought not to remind you of Chris Msando’s murder. We insist on a thorough independent transparent end-to-end audit and quality assurance of the election technology ecosystem. The terms of reference for the audit should be agreed by all the parties to the election.

5. Going forward, we insist on restoration of a stakeholder technology oversight committee with unfettered access rights to the system.

Election Personnel

6. It is not evident that the Commission will take any disciplinary action against the officers and/or its agents who perpetrated the electoral fraud. This is unacceptable. Accountability aside, these people cannot be allowed to participate in organizing and conducting the next election.

The court ordered scrutiny of results established that up to 80 Forms 34BS were fake and therefore illegal. Officers who were complicit in processing results through these illegal forms being the respective returning officers and national tallying center officers who allowed the illegal documents to pass as results must not play any role in the fresh electoral process.

7. NASA rejects the proposed Project Team. This team is comprised in its entirety of the “second tier” officers who were intimately involved in the August 8 election. They are as it were “persons of interest”. Furthermore, your communication suggests that their superiors are now back in charge. This is a glaring example of the “see, hear, speak no evil” charade that is unacceptable to us, and the overwhelming majority of the Kenyan people.

We insist that all the Returning Officers, Deputy Returning Officers and Presiding Officers be vetted with the involvement of the parties to the election. Furthermore, we will insist that posting of returning officers be done by balloting in public.

Polling stations

9. Polling stations must be gazetted, names and respective GPS locations published in at least two daily newspapers with national circulation.

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Telephone +254 20 2172496/97/98
P.O. Box 10311-00100
Nairobi, Kenya

Results Declaration and Reporting

10. IEBC shall ensure that media will be given unfettered access to the election and specifically counting of votes and announcement of results at the polling stations, tallying and declaration of the presidential results at the constituency. The IEBC shall provide public access and media presence during the declaration of presidential results and live national coverage at all the 290 constituency tallying centres similar to the coverage provided at the national tallying centre (Bomas)

Further engagement with the Commission

11. We have pointed out severally that our experience with the IEBC does not inspire confidence regarding good faith or keeping its word. We note in this regard, that the Chairman committed himself publicly to not announcing the presidential results until all results were in, then proceeded to go back on his word. This being the case, we have made the considered decision that will henceforth engage the Commission in the context of an open structured national stakeholder dialogue in which binding resolutions will be made.

Sincerely,



Hon. Musalia Mudavadi;
Chairman, NASA Coalition Campaign Team
Encl.

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Telephone +254 20 2172496/97/98
P.O. Box 10311-00100
Nairobi, Kenya
MAMBO YABADILIKA

NASA POSITION PAPER ON IRREDUCIBLE MINIMUMS BEFORE THE FRESH ELECTIONS ARE HELD:

1. Forms 34Bs

- All Forms should be preprinted indicating names of polling stations and candidates.
- Returning Officers to physically fill in the Forms and make a formal announcement at the Constituency level. The above process to be done in the presence of agents, media, observers and the public.
- There should be no use of Excel documents in filling results Forms.
- All Forms to be standardized.

2. Printing of Ballot papers and Forms

- Al Ghurair Company printed non standardized elections results declaration Forms which were used in the impugned presidential elections.
- Another printer should be contracted to print ballot papers and results declaration Forms in the fresh elections.

3. Election Monitors

- Introduce election monitors selected from a multi-sectoral group to have a role in signing off for elections materials and results declaration forms at polling stations and the Constituency tallying center.
- Elections Monitors to sign off on the Forms 34As and 34Bs before the results are announced.

4. Returning Officers

- A new slot of returning officers to be appointed for all the 291 constituencies.
- Current serving ROs to remain as Constituency Elections Managers and not play any role as Returning Officers in the fresh elections but provide logistical support to the appointed ROs.
- Appointment of ROs should be from a pool provided by political parties of nominees.
- Posting of ROs should be done through open balloting in public to determine constituencies where the officers are to be posted.

5. Results Transmission

- No text messaging in sending elections results.
- Only scanned images to be sent through the KIEMS kit to the constituency and national tallying center.
- Commission to proactively announce exact number of persons who have voted at 5 pm based on tabulations from KIEMS Kits before the counting starts.
- Elections results to be announced at the Constituency level. Only scanned images to be sent through the KIEMS kits or results transmitted by Presiding Officers and Returning Officers may be tabulated.
- National tallying center should not display results before they are verified and announced at the constituency level. No results should be displayed unless political party and candidates' agents are given full access to all transaction logs and databases.
- National tallying center should only display scanned images of result Forms once publicly announced at the Constituency tallying centers.
- Media Houses should proactively cover all results announcements at the respective constituencies and show live feed of the outcome.
- Candidates' agents should be part of receiving teams at the constituency and national tallying centers. Receiving teams to verify all Forms 34As delivered and confirm that accurate entries are made on the Forms 34Bs and sign off before announcement is made.
- Observers should be allowed access to this process.

6. Candidate Agents and tallying center

- Candidate's agents should be present at all levels and processes of the elections. These include the deployment and receiving of elections materials.
- Candidates should have IT agents present to oversee the entire IT infrastructure of the Commission and be present or have access at all data centers, where controls are maintained and servers hosted/configured.

7. ICT Infrastructure

- Independent International Experts should be engaged to manage the entire ICT framework of the elections with close supervision of the Candidates agents and the IEBC.
- Results transmission system to be designed on the Oracle platform and overseen by Oracle Consulting. No use of cloud servers in results transmission.
- IBM was contracted to provide end to end security testing of the KIEMS system. IBM to be allowed to provide security and monitoring of users, networks and servers used in results transmission.

- Administrator and root accounts must be disabled on KIEMS servers. All system administrators accessing the servers must use their own accounts.
- IEBC to avail API to be made available to all stakeholders in time and relevant documentation.
- Commission should provide full information on the following;
- Entire ICT infrastructure, list of support partners and their respective Service Level Agreements (SLAS), full disclosure of implementation documentation by each partners.
- Firewall configuration including ports configuration.
- Disclose all database transaction logs including: alert logs, archive/redo logs, audit trail, data files, OS command history, network logs, sql.net logs database vault logs and trace files.
- Physical view and inspection of IEBC servers, portal access to the servers and IP addresses of all 20 servers.
- Full access and copy of all servers and databases it is using.
- Disclose all support partners with SLAs and escalation matrix.
- Disclose firewall configuration including ports configuration.
- Entire enterprise architecture of the landscape.
- GPS coordinates of KIEMS.
- KIEMS sim card numbers for all kits
- Telkom and network structure with all service providers (provide agreements and implementation details.
- Transaction logs of all databases and servers.

8. Polling Stations

- IEBC should provide a list of all polling stations and registered voters per all those polling stations in advance. List should indicate the GPS locations of all polling stations and the network coverage.

9. Complicit Elections Personnel

- A scrutiny of the Forms 34Bs from the constituencies showed that 80 constituency Forms were fake and therefore illegal. Officers who were complicit in processing results through these illegal Forms being the respective returning officers and national tallying center officers who allowed the illegal documents to pass as results should not play any role in the fresh electoral process.
- Officers who also facilitated the display of figures purporting them to be results but which at the Supreme Court hearing were disowned by the Commission as mere statistics should equally be barred from participating in the fresh elections.
- These officers include;

ANNEX 4

- 1) Comm. Abdi Guliye
- 2) Comm. Molu Boya
- 3) Ezra Chiloba (CEO)
- 4) Marijan Hussein Marijan
- 5) Betty Nyabuto – Deputy Commission Secretary (Operations):
- 6) James Muhati, Director ICT
- 7) Immaculate Kassait:
- 8) Praxedes Tororey:
- 9) Moses Kipkoge
- 10) Sidney Namulungu
- 11) Nancy Kariuki
- 12) Silas Rotich

Hon Musalia Mudavadi;
Chair,
National Campaign Committee
September 12, 2017

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION



INTERNAL MEMO

FROM: CHAIRMAN

TO: ALL COMMISSIONERS

REF: IEBC/MPA/09/06[3]

DATE: SEPTEMBER 12th, 2017

RE: ISSUES EMERGING OVER THE COMMISSION'S DEPLOYMENT OF ICT IN THE
8th AUGUST GENERAL ELECTIONS

The above subject and our deliberations variously on the same refers.

Further to our discussions, kindly find forwarded as enclosed herewith, the following documents for your perusal and advice:

1. A memo from the Director, ICT through the CEO/CS, dated 31st August, 2017 on the creation and use of the "National Returning Officer Account" during the 8th August General Elections;
2. Meeting Notes of the meeting held between the Chair, Commissioners and the ICT Team, on the 31st of August 2017, at Anniversary Towers; and,
3. The subsequent memo issued under my hand to the CEO on the issues emerging from the "SC Election petition 1 of 2017 – Raila Odinga & Another Vs IEBC & 2 others" and my demand for responses and explanations thereto.

W.W. CHEBUKATI
CHAIRMAN



Encl. (3)

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION



INTERNAL MEMO

TO: THE CHAIRMAN

FROM: ICT DIRECTOR

THROUGH THE COMMISSION SECRETARY

SUBJECT: NATIONAL RETURNING OFFICER ACCOUNT DATE: SEPTEMBER 12th, 2017

RE: ISSUES EMERGING OVER THE COMMISSION'S DEPLOYMENT OF ICT IN THE
8th AUGUST GENERAL ELECTIONS

I refer to our meeting this morning in your office with yourself, Commissioners Roselyn Akombe, Prof Abdi Guliye and Margaret Machwanya. Present from ICT Team was Paul Mugo and Boniface.

Following the Court of Appeal ruling that Presidential Election results as announced by the Returning Officers (ROs) at the Constituency shall be final and that the same results shall be electronically transmitted to the National Tallying centre for purposes of collation and final declaration by the National returning officer (Chairman), several meetings were held, one in which you were present and the solution for file copy and drop (FTP) and sending of the forms via email was accepted as options for electronically transmitting the form 34Bs since the window for making further changes to the KIEMS RTS for the purpose of electronic transmission was closed.

In the minutes (minutes attached) of a meeting held on 21st July 2017 in the Director of ICT office to discuss the Electronic transmission of Form 34B to the National Returning Office at the National Tallying Centre, in the discussions there was need for the an "Account" for the National Returning Officer for accessing the forms transmitted electronically and the Returning Offices for sending or transmitting the Form 34Bs. These were to be transactional and facilitative accounts for purposes of ensuring forms are received at the National Tallying centre in the shortest time possible.

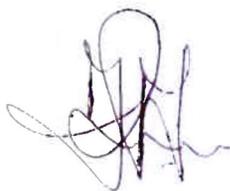
The function of the National returning officer SFTP account was for downloading the form 34Bs only, notably this was a laborious and manual process. Each downloaded form was printed and given to the Quality Assurance Team led by Deputy Commission Secretary Hussein Marjan, many forms which were incomplete either due to image quality or some pages left out or got corrupted in the process of transmission were required to be transmitted again or over and over again to the satisfaction of the quality assurance team. The incomplete or corrupted forms would then be deleted from the folder.

It is important to note that Form 34Bs which were being received at the NTC were scanned or image documents and therefore they could not be manipulated.

We wish to confirm that the ICT environment for the election was very secure in its design, secure Firewalls had been deployed, and environment monitoring tools were in place 24x7 a week to and after the election. We wish to reiterate that the SFTP server was also secure with limited user access.

The ICT Directorate conducted and managed the technology and the associated processes in utmost good faith and diligence. We also welcome an independent audit of the processes and technology used in the election to confirm.

I have attached the minutes and the adopted workflow.



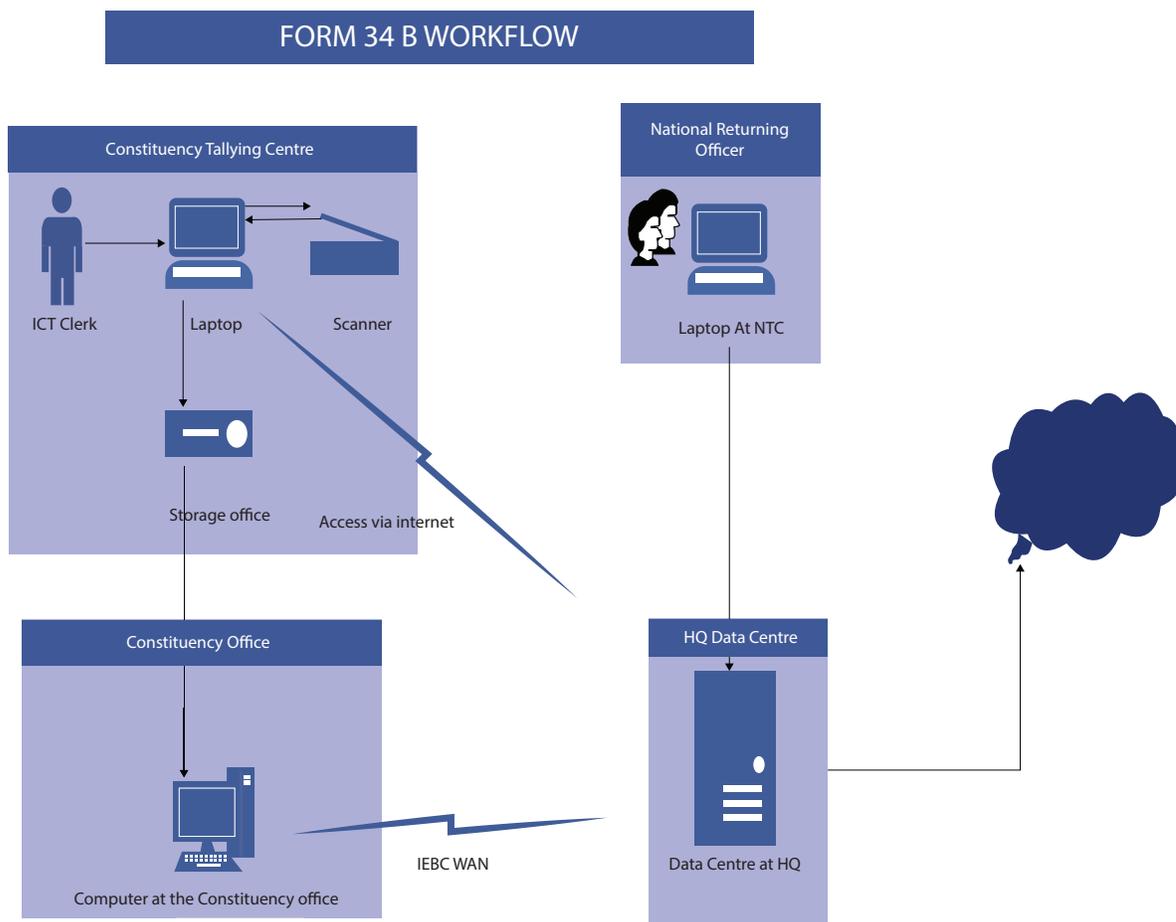
31/8/2017

James Muhati

PROPOSED WORK FLOW FOR THE DELIVERY OF FORM 34B FROM THE CONSTITUENCY TALLYING CENTER OR FROM THE I.E.B.C CONSTITUENCY OFFICE TO THE NATIONAL TALLYING CENTER.

SN	OPTION 1 – DELIVERY VIA EMAIL	OPTION 2 – DELIVERY VIA SFTP.
1.	<p>(i). The RO scans the form 34B onto a storage device.</p> <p>(ii). The constituency RO renames the form 34B the scanner assigned name to Form34B-[Constituency name- Constituency code].</p> <p>(iii). The RO at the constituency tallying center, connects to the IEBC email and sends the form 34B to a designated IEBC results email address (<i>presidential@iebc.or.ke</i>).</p> <p>(iv). If there is no connection at the constituency tallying center, the RO moves to the IEBC Constituency office to access the wide area network (WAN) and emails the form 34B to a designated IEBC email address for results (<i>presidential@iebc.or.ke</i>)</p> <p><u>Security</u></p> <p>(i). Only the 290 ROs can be able to send emails to the designated email address.</p> <p>(ii). Email Encryption.</p>	<p>(i). The constituency RO shall scan the results form 34B onto a storage device.</p> <p>(ii). The constituency RO renames the form 34B file from the scanner assigned name to Form34B-[Constituency name- Constituency code].</p> <p>[iii]. The constituency RO connects to the ftp server from the constituency tallying center and securely transfers the file into an FTP server at Head office.</p> <p>[iv]. If there is no connection at the constituency tallying center, the RO moves to the Constituency office and securely transfers the file onto an FTP server at Head office. The transfer will be done via a secure sftp service.</p> <p><u>Security</u></p> <p>(i). Only the 290 ROs have access to the designated ftp server and are restricted to read and write.</p> <p>(ii). Deletions and overwriting not allowed.</p> <p>(iii). The mode of transfer is via a secure channel(SFTP)</p>
2.	<p><u>At the National Tallying Center</u></p> <p>(i). The National RO shall access the designated email address to receive the emailed results from the constituency returning officer.</p> <p>(ii). The National RO shall print the form34B downloaded from the email.</p>	<p><u>At the National Tallying Center</u></p> <p>(i). The National RO shall access the designated FTP Server to retrieve the scanned results form 34B.</p> <p>(ii). The National RO shall print the form34B downloaded from the ftp server.</p> <p>(iii). The National RO shall call the constituency RO to confirm the authenticity of the form 34B.</p>

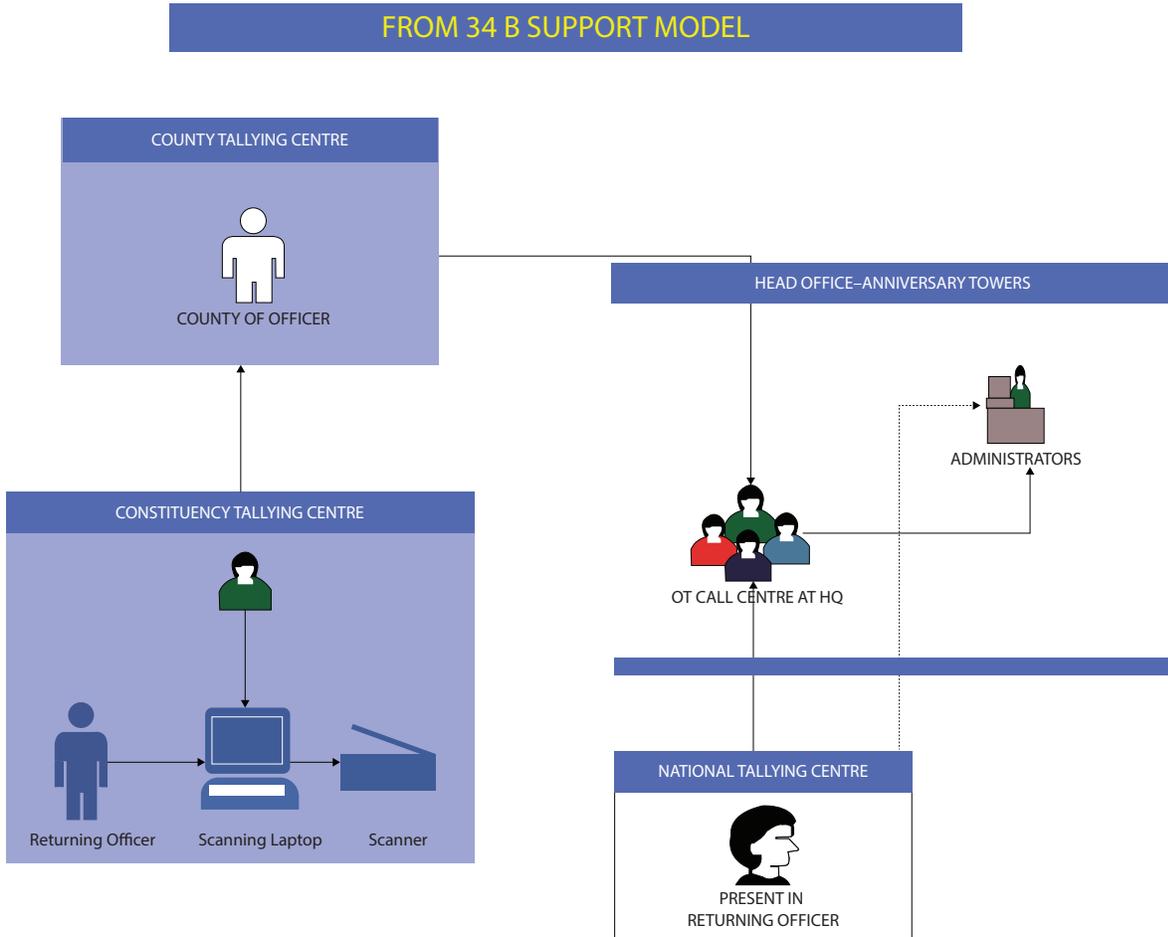
FORM 34B WORKFLOW



FORM 34 B SUPPORT MODEL.

A support model is a combination of people, processes, infrastructure and services developed to meet the current needs and goals of the commission depending on the task to be executed and the goals to be met.

For the purposes of the delivery of form 34B, the below support model will be used.



MINUTES FOR THE MEETING ON PRESIDENTIAL ELECTION RESULTS TRANSMISSION HELD ON 21ST JULY 2017 AT THE DIRECTOR ICT OFFICE STARTING 10.00AM

Present

- | | |
|-----------------------|---|
| 1. James Muhati | -Director ICT |
| 2. Immaculate Kassait | -Director Voter Registration and Electoral Operations |
| 3. Praxedes Tororey | -Director Legal and Public Affairs |
| 4. Mwaura Kamwati | -Manager Electoral Operations |
| 5. Salome Oyugi | -Manager Political Parties Liaison |
| 6. Grace Mugo | -ICT Training |
| 7. Boniface Wamae | -ICT Officer |
| 8. Jefferson Matura | -ICT Officer |
| 9. Benjamin Kimwei | -Training Coordinator |
| 10. Paul Mugo | -ICT Coordinator |

Agenda

1. Electronic transmission of FORM 34B to the National Returning Officer at the National Tally Center.
2. A.O.B

Minute 01/21/07/2017

The meeting started with a presentation on the proposed options for transmission of FORM 34B which is the Form containing Presidential Election results at the Constituency. It was appreciated that the Court of Appeal ruling upheld the ruling of the High court that the Presidential Election results at the constituency Tallying centre are final. It was also appreciated that under the Constitution the Chairperson of the IEBC shall declare the results in respect to the Presidential Elections.

The meeting was thus convened to discuss the options of getting the results to the Commission Chairperson on time for the purpose of declaring the winner in the 2017 Presidential Election. Two options were presented:

Option 1: Use of Secure File Transfer Protocol (FTP)

It was proposed that the Returning Officers send the scanned FORM34B using a secure File Transfer Protocol (FTP). In this method, the Returning Officers upon collation of the FORM34As from the Polling Stations into FORM34B at the Constituency Tallying Centres, shall proceed and scan the FORM34B into pdf and rename as follows:

FORM34B-CONSTITUENCYCODE

e.g. FORM34B-290

The Returning Officers shall upload the renamed file into an FTP by dragging it into an FTP platform. Upon dropping it on the platform the Chairman will access the FTP platform and download the file, print, file and use it to declare results for the Presidential Elections.

Option 2: Use of electronic mail

It was proposed that an email (results@iebc.or.ke) be created and the password be given to the Chairman. It was postulated that after the returning officers in a constituency tallying centres have collated the presidential elections into FORMS 34B, he shall scan the form into pdf format and rename as follows:

FORM34B-CONSTITUENCYCODE

e.g. FORM34B-290

The Constituency Returning Officers shall send the renamed pdf document to the above email. The Chairman shall open the email and download the document, print and file and use it to tally the results for the Presidential Elections. The meeting sought to know if the Chairman himself will be the one opening the email or he will delegate. It was agreed that the Chairman will be working with a team and he will assign the team members tasks as he may wish. To confirm the authenticity of the FORM34B emailed, it was proposed that the concerned RO is called and the contents of the document be confirmed. It was also inquired if the results for the diaspora will be transmitted to the Chairman in FORM34B. It was clarified that diaspora is a constituency on its own complete with a Returning Officer who shall deliver the results as the other returning officers.

Internet Connectivity

The meeting was informed that both options require internet connectivity at the Constituency Tallying Centres and at the National Tallying Centre. Currently, there are 103 modems against 290 required.

It was resolved that the 187 modems need to be procured and that the Returning Officers will procure the SIM cards and airtime from the telecommunications service provide whose network the strongest at the respective tallying centre. The national tallying centre will be connected to the internet via cable.

Concern was raised on the reliability of electricity in building where the server for the email and FTP shall be hosted. It was proposed that the Commission seeks assurance that the building standby generator is working on the material days to avoid any disruption of the transmission of results from the Constituency Tallying centres and the national tallying centres using the above discussed methods.

Physical Security of Equipment

It was reported that the department of ICT receive a high number of traffic especially those seeking help on issues related to the register of voters. The meeting was concerned especially on the security of the results transmission servers and suggested that a desk be set up by the directorate of ICT preferably in a different floor to act as front office to deal with inquiries.

Tallying Centres Workflows

The meeting agreed that DVREO shall come up with workflow charts for the tallying centres both at the Constituency and at National Tallying Centre.

The meeting proposed that an excel file of the results transmitted by the PO from the Polling Station to the National Tallying Centres be extracted for purposes of cross-checking with FORM34Bs emailed by the Returning Officers.

It was also noted that FORMS34As from the Presiding Officers may contain arithmetic errors yet the results from the Polling Stations are final. In this circumstance the RO shall note in the Polling Station Diary (PSD) the disparities and cannot alter the contents of the Form 34As. Suggestions were made to create a form to capture such cases.

Resolutions

The meeting made the following resolutions:

- i) That both options of transmitting results will be used. Priority shall be given to the secure FTP option followed by the email option. This means that the RO shall upload the FORM34B into the FTP and then go ahead and send it via email to results@iebc.or.ke

- ii) That the Constituency Returning Officers shall physically deliver the FORM34Bs and FORM34As to the Chairman at the National Tallying Centre since the Supreme Court Rules require that physical and certified result Forms be submitted to the Supreme Court 48hrs upon service of a Presidential Petition.
- iii) That the naming protocol for the FORM34Bs shall strictly adhere to the following convention:

FORM34B-CONSTITUENCYCODE-CONSTITUENCYNAME
e.g. FORM34B-290-MATHARE
- iv) That the Results Transmission System (RTS) team start developing the public portal for the display of election results as required by law.

Minute 02/21/07/2017: A.O.B

There being no other business, the meeting ended at 12 noon.

MINUTES OF THE MEETING BETWEEN COMMISSIONERS AND THE ICT TEAM, HELD AT ANNIVERSARY TOWERS, 6TH FLOOR, COMMISSION BOARDROOM, HELD ON 31 AUGUST 2017

Present

Mr. Wafula Chebukati	-	Chairman
Dr. Roselyn Akombe	-	Commissioner
Prof. Abdi Guliye	-	Commissioner
Ms. Margaret Mwachanya	-	Commissioner
Mr. James Muhati	-	Director, ICT
Mr. Boniface Gathee	-	Staff, ICT Directorate
Mr. Paul Mugo	-	Staff, ICT Directorate

Summary

The Chairman called the meeting to order and stated the objective of the meeting as earlier communicated to the director of ICT as being an evaluation of the reports in the petition by NASA on the logs. The Chairman further inquired if the CEO would be joining the meeting.

The director noted that the CEO was not feeling well and therefore would not join the meeting. Director Muhati then passed to the meeting participants a draft affidavit (see attached) that aimed at responding to an affidavit submitted and subsequently rejected by the Supreme Court by the Petitioner (NASA). The draft affidavit from NASA had made allegations on several ICT issues (see attached). Mr. Muhati directed the participants to the last page of the submission that summarized the issues.

The Chairman noted that the draft was not signed and asked for a signed report that addressed all the ICT related issues in the affidavit by NASA. He noted that he had a number of questions but would like to have a written and signed report owned by the director. He inquired about reports that his account and password were used to log in to the system more than 9000 times.

Director Muhati said that the log in credentials for the Chairman were not the same as those of his email. He explained that 291 new accounts had been established for all returning officers including the national returning officer (the Chairman). These accounts were used to upload forms 34B and the Chairman had the account to enable him to download the forms. These were not dormain accounts and each RO was notified of their creation established their passwords.

The Chairman inquired about his own log in information. He wanted to know when he, like the other returning officers had established his own password. He asked if he had been given the password.

The Director replied that he had asked Paul Mugo to establish the password but had not given it to the Chairman. The Chairman inquired if it was normal for a password to be created for somebody without their knowledge. Mr. Mugo responded that he had created the account and password as instructed by his director and had hoped that the director had briefed the Chairman. The Director said that he had not informed the Chairman as he had not had the opportunity to do so. He had assumed that during the simulation of the technology, the Chairman had been aware.

The Chairman expressed his surprise that the Director could refer to the public simulation as the forum where he could have known of the password when he had not even been asked to log in to the system. He found it unacceptable that lack of time would be a reason for him not been informed of the central role that his password would play in the process, especially as the super administrator. He sought further information on the nature of the accounts used for Forms 34B.

The Director explained that they had used an FTP server where ROs transferred files from their desktops and dumped them into a server at Bomas. The Chairman asked if File Zilla had been used and if the team was aware that it was easy to compromise. He wondered why a more secure system was not used. Mr. Mugo responded that File Zilla was used because it was easy to use and that ROs were given access to only their folder.

The Chairman inquired if the ROs could change their forms after sending them. The Director responded in the affirmative noting that on some occasions, forms were returned from Bomas if they were not signed. ROs that were not able to use the FTP emailed the form as an attachment. Prof. Guliye and Dr. Akombe noted that at Bomas they had inquired on what happened when an RO sent a revised form and if the previous one could be retained in the system. Assurance had been provided that the previous form would still be in the server. It was therefore surprising to see very many deletions in the logs. Director Muhati said that ROs had rights to edit and delete files.

The Chairman noted that there had been 3 mobile telephone operators that had been contracted for transmission. He inquired why the logs showed other providers such as Zuku, liquid telecom, mwananchi. He asked if this was a reflection of strangers, other than ROs accessing our servers. He wanted to know who else logged in beside the ROs. The Director said that ROs had been asked to purchase modems and public IP addresses were given to them to access the system. There were no strangers that logged in to the system. NASA was confusing the

logs from the RTS and the FTP ones. The Chairman noted that this was not about NASA but rather about internal processes and how matters had been handled.

The Chairman expressed outrage that his account was used 9934 times without his knowledge. If only 290 forms were to be downloaded using his account, why would there be over 9000 transactions. Prof. Guliye inquired why Modems were being used outside the three mobile operators and why the internal network was not being used.

Mr. Boniface Gathee explained that the 3 MNOs were only restricted to the RTS. The Director added that there was no internal network in the national tallying centers. Prof. Guliye requested for a breakdown of IP addresses for all the 290 ROs including the network provider used.

The Chairman sought clarification on the forms that were being dumped in the servers at Bomas. The Director responded that it was only Forms 34 B. Dr. Akombe noted that there were some Forms 34 A in the server. The Director added that those might have been included by mistake by the ROs.

The Chairman asked if there was any relationship between issues raised on the servers and the memo issued for all staff to change their passwords. The Director said that it was a routine measure to increase security of the technology infrastructure.

The Chairman requested for a signed report from the Director within an hour that should include the following:

- Explanation on the creation of an account and password for the Chairman without his knowledge;
- Explanation on who used the Chairman's password to log in;
- Details of all transactions done using the Chairman's account; Breakdown of IP addresses for all the 290 ROs including the network provider used.

There being no other business the meeting adjourned.

10 THINGS TO BE DONE DIFFERENTLY DURING THE OCTOBER 26TH FRESH PRESIDENTIAL ELECTION

In order to enhance the efficiency of the electoral process and to ensure compliance with the ruling of the Supreme Court of Kenya on September 1st, the Commission is revolutionizing electoral operations to increase transparency and verifiability. Here are 10 things to expect to be done differently in the October 26th Fresh Presidential Election.

No.	Item	How it will be different
1.	Training of polling officials	<ul style="list-style-type: none"> • Training has been standardized and harmonized. • There has been a national training of Returning Officers (ROs) and Deputy Returning Officers (DPOs) at one venue using one curriculum. • The training of over 700 officials, who will be Trainers of Trainers (TOTs), was undertaken between 6th and 8th October at The Safari Park Hotel, Nairobi. • The training focuses on transparency, verifiability and standardization • The Commission has introduced a guide which dictates, with a checklist, what needs to be done at polling stations. • The Commission is leaving nothing to chance this time as training also has practicals on how to use a printer, satellite communication technology and photocopier. • The training of electoral officials is tailored towards ensuring procedures are followed to the latter thereby ensuring the process meets the constitutional and legal standards of elections management.
2.	Polling stations	<ul style="list-style-type: none"> • The polling stations being the primary unit of the Elections, the Commission will ensure unrestricted access of information to all authorized officials to increase transparency. • IEBC will this time be providing names and coordinates of 40,833 polling stations in the country. This will be given to all the candidates to avoid issues of “ungazetted polling stations”.

3.	Standardization of Forms 34B and 34C	<ul style="list-style-type: none"> • IEBC has standardized all Forms 34B & 34C templates which will have number of registered voters of each polling station, one will only need to write the votes of the candidates and rejected votes. • Returning Officers cannot make changes to the statutory forms. • They have provided test papers – to test if the printer works to avoid damaging the statutory forms. • Form 34C will have all election results of all county polling stations.
4.	KIEMS kits	<ul style="list-style-type: none"> • The Returning Officers will have the backend access of the KIEMS kits at the constituency level to enable them to check which station has sent its results and which one hasn't sent yet. • As the Returning Officer enters the results into form 34B, the members of the public at the Tallying centre will be able to witness. • Provision of satellite phones in all constituencies and polling stations that don't have good network coverage. • The KIEMS kits have been reconfigured so that they transmit both text and images.
5.	“Complementary System” in case of KIEMS failure	<ul style="list-style-type: none"> • In case of total failure of the KIEMS at the polling station a replacement will be ordered, if the replacement fails, the Presiding Officer will call the Returning Officer who then calls the Director of ICT to give authority to use printed register to identify voters at the polling station affected.
6.	Safaricom sim-cards in every KIEMS kit to increase transmission capacity	<ul style="list-style-type: none"> • Each KIEMS kit at each polling station will use Safaricom card as the primary network and another one as the secondary network. • The kits will also transmit GPS coordinates so that if the Presiding Officer moves from one polling station to another or to another area of network coverage an explanation will be possible to avoid any issues of “ungazetted polling stations”.
7.	Tallying centres	<ul style="list-style-type: none"> • All Returning Officers will project results as they are keying them in to increase transparency. • All forms 34B will be printed out and given to agents for verification. • A procedure has now been provided for opening of ballot boxes in case a polling official erroneously seals forms inside a ballot box.

8.	Results transmission path	<ul style="list-style-type: none"> • Once the Presiding Officer has filled the form 34A he will transmit results on KIEMS. • Then physically bring form 34A to the Returning Officer for collation of form 34B. • Upon filling the form 34b the Returning Officer will take all the physical form 34A and printed form 34B to the National Returning Officer at the National Tallying Centre.
9.	Live media coverage	<ul style="list-style-type: none"> • Accredited media will be given unrestricted access to film results as they are received and announced at all 290 Constituency Tallying Centres. • Accredited media will be given copies of form 34B.
10	Agents	<ul style="list-style-type: none"> • Agents at the Polling Stations, Constituency Tallying Centres and National Tallying Centre will be provided with all appropriate information they require or ask for at every level for transparency.

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION



Press Statement by Dr. Roselyn Akombe 17 October 2017, New York

For many months now, I have questioned my role as a Commissioner at the Independent Electoral and Boundaries Commission. But I have soldiered on hoping that we could collectively find a way of addressing the crisis our country faces today.

I have agonized over the decision to leave my committed IEBC **FIELD** staff and my country. My decision to leave the IEBC will disappoint some of you, but it is not for lack of trying. I have tried the best I could do given the circumstances. Sometimes, you just have to walk away, especially when potentially lives are at stake. The Commission has become a party to the current crisis. The Commission is under siege.

It has become increasingly difficult to continue attending plenary meetings where Commissioners come ready to vote along partisan lines and not to discuss the merit of issues before them. It has become increasingly difficult to appear on television to defend positions I disagree with in the name of collective responsibility. I have concluded that I am no longer making any significant contribution to the Commission and to my country as a Commissioner.

It broke my heart in the last few days to listen to my staff in the field, majority of whom truly want to do the right thing, express to me their safety and security concerns. I shared detailed reports from staff in four of the Counties most hit by the ongoing protests – Nairobi, Siaya, Kisumu, and Homa Bay – with the hope that this will bring sobriety to our decision making. Instead this was met with more extremist responses from most Commissioners, who are keen to have an election even if it is at the cost of the lives of our staff and voters. It is unacceptable for any party to disrupt, attack and injure our staff in Mumias, Bungoma, Homabay, Siaya and Kisumu as they did today. These acts must be condemned by all and action taken against the perpetrators.

I acknowledge that the Supreme Court gave us orders to organize the presidential election within 60 days. The current political conditions did not exist on the 1st of September when the order was issued. It would therefore have been logical for the Commission to be frank

with the Kenyan people and clearly state the challenges we face in organizing a free, fair, and credible election.

It is critical that all political actors and the Commission take a pause to review where we are leading this country. It is not too late to save our country from this crisis. We need just a few men and women of integrity to stand up and say that we cannot proceed with the election on 26 October 2017 as currently planned.

We need the Commission to be courageous and speak out, that this election as planned cannot meet the basic expectations of a CREDIBLE election. Not when the staff are getting last minute instructions on changes in technology and electronic transmission of results. Not when in parts of country, the training of presiding officers is being rushed for fear of attacks from protestors. Not when Commissioners and staff are intimidated by political actors and protestors and fear for their lives. Not when senior Secretariat staff and Commissioners are serving partisan political interests. Not when the Commission is saddled with endless legal cases in the courts, and losing most of them. Not when legal advice is skewed to fit partisan political interests. The Commission in its current state can surely not guarantee a credible election on 26 October 2017. I do not want to be party to such a mockery to electoral integrity.

Our people are resilient. Our people are patient. What we are faced today is a political crisis that cannot be solved by the Commission alone. Let us solve the political crisis we have at hand and then chart the way forward towards a credible presidential election. The lessons from 2007/8 are too fresh, lest we forget.

A handwritten signature in black ink, reading "Roselyn Akombe". The signature is written in a cursive, flowing style.

Roselyn Akombe (PhD)
Commissioner, IEBC

Dr. Roselyn Akombe
55 Eastern Parkway,
Hillside, NJ 07205

19 October 2017

His Excellency
President Uhuru Kenyatta
State House
NAIROBI

Excellency,

RE: RESIGNATION

I hereby wish to inform you of my resignation effective 17 October 2017 as Commissioner at the Independent Electoral and Boundaries Commission.

Sincerely,

A handwritten signature in black ink that reads "Roselyn Akombe". The signature is written in a cursive, flowing style.

Roselyn Kwamboka Akombe (PhD)

Cc:

Mr. W.W. Chebukati
The Chairperson
Independent Electoral and Boundaries Commission
Anniversary Towers
NAIROBI

Mr. Joseph K. Kinyua
Chief of Staff and Head of Public Service
State House
NAIROBI

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION



**CHAIRMAN'S ADDRESS ON STATUS OF PREPAREDNESS FOR THE ELECTIONS – 18TH
OCTOBER. 2017**

Fellow Kenyans,

Kenya has some of the best brains in the world who are respected and celebrated globally. These brains would love to serve their nation but unfortunately because of the arrogance and narcissism of our political class we cannot attract these minds and even if we do we cannot retain them as demonstrated in the resignation of Dr. Roselyn Akombe from the commission. She is one of our finest brains and it is very sad to see that we could not provide an environment for such minds to find full expression without fear for their lives. At the time of her departure Dr Akombe was the Chairperson of the Election Operations Committee, a critical organ in the Commission. She discharged her responsibilities with diligence, commitment and excellence. This development and others make it pertinent for me to address you today.

I address you today first as a Kenyan, a parent of Kenyan youth, as a lawyer and lastly as the National Returning Officer for the presidential election.

As a Kenyan I am very proud of the strides this country has taken over the last decade. Unfortunately when you have something it is easy to take it for granted. Just like a person seated inside a fast moving jet cannot appreciate how fast it is moving, many inside this Kenya jet do not appreciate the development that Kenya has gone through since the dark days of our recent past.

In a study of great empires such as the Egyptian Empire, the Babylonian Empire, the British Empire and even the American Empire, one common thread that ran through them all was that they were places where people could migrate to from all over the world, settle, establish themselves and even become citizens. In Africa today, no country has this like this immediate hurdle ahead of us, we are very well on our way to becoming an African super economy.

I address you as a senior lawyer because I chose this noble profession in order to defend the law at all costs without fear or favor and without any form of partiality, come what may. I

became a lawyer so I could defend people who had no one to defend them and since I started my practice over thirty years ago, that is what I have been doing.

Having built a successful law firm, an opportunity came for me to represent the people of Kenya, to ensure that the voice of every single Kenyan was heard as I presided over the elections and specifically in the position of the National Returning Officer. With gratitude to GOD AND THE Kenyan people that gave me this opportunity, that is why I have now come directly to the Kenyan people because you deserve to know the state of the Country's preparedness for the FPE.

I am under no illusion that all will be happy with my decision to come directly to the people who gave me this assignment – the people of Kenya, but then with the rapid twisting and turning of events between August and now, I turn to you in recognition of the words of our great constitution that, 'all sovereign power belongs to the people of Kenya...' I am fully convinced that the Kenyan people, on whose behalf I serve, have the power to determine how we move together as a people.

Since 20th January 2017 when I took the oath of office, I recognize that I am a custodian of the trust of the people and I serve at the pleasure of the Kenyan people and not the Kenyan elite. Democracy is about the people and I took an oath to preserve it and that is why I now turn to you. You have a right to know the state of things in our beloved country. I have chosen to communicate directly also to ensure that you do not get speculative ideas or outright false news from the fake news mongers.

Since the annulment of the presidential election by the Supreme Court on 1 September 2017 I have consulted widely with many of our returning officers and reviewed our performance in the 8 August 2017 election. I do not take lightly the indictment of the Supreme Court and I have therefore been working to ensure that this second opportunity we have been given is not in vain.

As an advocate of the High Court, I hold that strict compliance to the constitution and electoral laws in organizing the fresh presidential election is fundamental. The commission has reviewed the Supreme Court judgment and has developed a matrix on its compliance to all the aspects of the constitution and the law. This has guided all the preparations for the elections with the goal of ensuring transparency verifiability and accountability. In the words of our Honorable Chief Justice David Maraga, "An election is not an event, it is a process from the beginning to the end," ... As such, I have vowed to ensure transparency, verifiability and accountability in the entire process from beginning to end.

There are numerous calls for peace but we all appreciate that peace without fairness and justice is an illusion of peace. Credibility is the fountain where true peace flows from. The Bible tells us in 2 Samuel 23:3 He that ruleth over men must be just, ruling in the fear of God while the Koran reminds us in Quran 49:09 that Verily! Allah loves those who are just.

Fellow Kenyans,

We are faced with a dilemma as a country, one between the status of operational preparedness and the political environment for credible elections. The technical, operational and logistical arrangements for the election are on course. Printing of ballot papers and forms began this week with extra attention paid to standardization of forms and security features. The Commission intends to engage stakeholders in monitoring of the printing, packaging and shipping of the electoral material. Procurement of all strategic and non-strategic material is complete with dispatch to constituencies' ongoing. Logistical arrangements for the deployment of ballot papers and forms are in place.

The Commission has worked with OT-Morpho/Safran to ensure that the technology is reconfigured to comply with the directives of the Supreme Court especially as it relates to transmission of results. To increase network coverage we have deployed Safaricom SIM cards in all the KIEMS tablets, as a primary and seconded by the other two major Mobile Network Operators [MNOs] as secondary. The Commission has embedded technical experts from the international organizations into the ICT team and intends to do the same with representatives seconded by each Party/Candidate.

Standardized training to all our poll officials has commenced. We have ensured that all policies and practices required for the election are contained in one document rather than several advisories. The Commission has developed a comprehensive presiding officer's guide and a new returning officers guide with specific do's and don'ts and checklists. Our current training involves all aspects of the work of the poll officers including mundane issues such as the use of printers and scanners. The Commission has already completed three phases of training, and the fourth phase of training of presiding officers is ongoing. The commission has constituted a "Fresh Presidential Election Implementation Team" which is overseeing the management of the new election. I am therefore confident that from an operational angle, we are ready for the 26 October 2017 election as directed by the Supreme Court.

Fellow Kenyans,

But even as I assure you of our election preparedness, as an election manager, I am aware that an election is not about the logistics and the operations alone. That credible elections, if they are to meet the high bar set by our Supreme Court, require that there be a conducive environment for the voters to exercise their rights.

To quote former United Nations Secretary-General Ban Ki-Moon. "It is important to recognize that conducting genuine elections requires more than improving technicalities or comparing processes against international obligations and practices. I wish to emphasize that elections

are fundamentally political, rather than technical events; and more importantly they are not an end in themselves”

This raises an important question for us to answer.

As a country, are we convinced that in addition to the technical preparations we have a conducive environment for Kenyans to freely express their choice? In the past few weeks I have pondered over various issues.

A leading candidate who garnered more than 6 million votes has withdrawn from the race. While it is his right we must think beyond him and think of the 6 million Kenyans who will feel disenfranchised by this action. Do we just go on as if this withdrawal means nothing?

In Zimbabwe, after the withdrawal of Mr. Morgan Tsavingirai from the 2008 presidential run off, their economy has never recovered from its then 5.8% economic growth to the current 0.7%. While President Robert Mugabe had a resounding victory after the withdrawal of the opposition leader from the race, issues of legitimacy continue to dog his legacy to date.

In our neighboring Burundi, President Pierre Nkurunziza won the presidential election in 2015 after all the 17 opposition political parties withdrew from the presidential race. Economic growth nose-dived from 4.5% to its current negative 0.5%

There are many more similar examples in our continent and elsewhere, such as Bangladesh and Thailand both in 2014 showing us the negative political and economic impact, of using the business as usual approach to managing elections. The lesson we can pick from these countries is that dismissing withdrawal of candidates with a large number of voters does not improve the economic, political or social situation in the country. In fact, it leads to a deeper crisis.

Fellow Kenyans

While today I want to confirm to you our full technical preparedness for this election, I want to state categorically that I shall not go down in history as the National Returning Officer that plunged the country into a further crisis than I had found it. It is already painful to be on record as the Chairman of the IEBC that presided over a presidential election that was nullified by the Supreme Court.

I have made this point on numerous occasions to my colleagues at the Commission. I have made several attempts to make critical changes but all my motions have been defeated by a majority of the Commissioners. Under such conditions, it is difficult to guarantee free fair and credible elections. I am convinced that without critical changes in key Secretariat staff we may not have a free, fair and credible election. I ask the staff who have been adversely mentioned to step aside and allow the project team to function without interference.

And yet, the burden placed on me as the Chairman is huge. The expectations Kenyans have of me are high. Yet, I cannot move forward with a divided Commission. I cannot move forward when presidential candidates refuse to put their personal interests aside and for once serve the country. If candidates on all sides put the country first it will affect the quality of decisions they make. They will realize that for the greater good of the country, there are things that they would like to do that they will have to stop, and things that they do not want to do that they will have to do for the sake of the country.

I took this job to make Kenya better, not to draw it to a crisis. As a victim of the 2007 post-election violence, I will not sit at the helm of the commission as we plunge the Country into a possibly worse situation than we had in 2007/8. We cannot miss the significance and relevance of the Koffi Annan led Serena talks. In early 2008, world leaders converged in our Country, to help save us from ourselves. For those who may not remember: neighbor turned against neighbor, and violence nearly engulfed the entire nation, simply, on account of our political intolerance. We ought not to have forgotten that so easily or quickly; but it appears so.

As a lawyer, I cannot continue to be pushed by majority Commissioners to accept legal opinions that serve partisan interests and are not grounded in the Constitution or the law. In the least, this is intellectual dishonesty for which my professional training demands that I abhor.

I would rather bow out with my name intact and my head lifted high than to be a part of a process where personal interests dwarf the interest of the nation. I realize that my actions in this noble office will define me for life. My actions will become my legacy and the reference point not only for my life but that of my family. I am therefore not ready to sacrifice an eternal legacy for short term gains that will sear my conscience.

Fellow Kenyans

I welcome the actions of the religious leaders, civil society and the international community to “convene, facilitate and mediate high level talks on resolving the political crisis” in our country, I fully concur that what the country urgently needs now is National Dialogue. I therefore urge all political leaders to turn their attention to work on this National Dialogue to give us a chance to save the soul of our country.

Our economy is hurting. The investors are watching from a distance as we wrangle. Our Churches, temples and Mosques are filled with anxious Kenyans praying for a peaceful, free, fair and credible election. Our neighbors are watching, praying that we do not go over the cliff as we almost did in 2007/8. The international community is watching with bated breath hoping that the country pulls itself together to avoid further destabilizing the Great Lakes and the Horn of Africa region.

I appeal to leaders and supporters of the Jubilee Party and the NASA Coalition, to forge together towards a political dialogue that will help restore the dignity, genuine independence and respect for our institutions. Political and economic problems cannot be fixed through elections or legal mechanisms alone. As such as the referee of this contest, I am extending an open invitation to the candidates to a meeting that I will preside over so that they can talk. Once the Kenyan people see that their leaders are talking and are putting Kenya First, then we can douse the tension in the air. Politics should not make people enemies. It is only in primitive societies that divergent views lead to enmity. If we cannot disagree and remain friends, then the foundations of our friendship are shaky. We are the hope of Africa and we must display this in every aspect of our existence. The fact that we disagree does not mean we are enemies who will allow our supporters to kill each other. It is truly time for the candidates to stop thinking like divisive politicians and start putting Kenya first. Without this, what example are they showing the next generation? If we don't curb this mess, I fear for the future because a new generation will perfect the intolerance for divergent views and will plunge us to the birthing of a nation that the founding fathers will not recognize.

Once there is a political agreement as a result of dialogue; when there is a genuine commitment to let the Commission work independently; when all the Commissioners and staff truly commit to serving the country rather than partisan political interests; And when we work together to create a conducive environment for Kenyans to express their sovereign will, then I can truly be confident of having a credible presidential election. Only then can I commit to serve as the National Returning Officer in order to deliver a free, fair and credible election.

As the referee I want to issue a stern warning to the players of this game on all sides that they should stop all attempts to interfere with the process. Failure to do this will result in consequences as I have made up my mind to uphold the constitution and the will of the people of Kenya regardless of threats, intimidation or pressure. No one side is absolved from this and that is why my warning goes to all parties involved. Let me and my Commission do our job and we shall deliver. Interfere as you have been doing and we get stuck as a country. Anyone who truly loves this country will not want it to be destroyed by the selfish ambitions of a few people. I love this country which is why I have chosen to serve and because of my love for the country and dedication to the people of Kenya I address you as I do today. I will not allow anyone to destroy this country as long as I am the referee of this contest.

Let me close by reminding us all that peace is the end result of all things being done in an open and transparent manner. It is the result of the winner and the losers understanding why they won and why they lost without their confidence in the process wavering at all. Peace is what we get when the losers having faith in the transparency and fairness of the process and get inspired to work harder next time. Peace is what we get when the supporters of the losers are satisfied that the process was fair and transparent. Peace is what we get when the winner did

not have to help the process. Peace is what we get when we embrace true democracy – where nobody needs to be aided to become somebody.

If Kenya burns it will be because we have not addressed these issues and because we have created an Orwellian society where some are more equal than others. Never forget the fact that the people for whom it burns all have the resources to relocate their families abroad in a minute. The people that will suffer are the innocent people of Kenya whose lives would have been permanently altered because of the inability of the people they look up to as leaders to dialogue. When we do things right, we will get right things.

I know there are elements who would love nothing more than to hear me announce my resignation at this point. In reality, that will be the easier thing to do but we all have to put Kenya first and that is why I am determined to make this Commission work. Ironically, the very people – the political leaders that are supposed to build the nation have become the greatest threats to the peace and stability of the Nation and so today let me be very clear that this is a yellow card to both sides. I will not tolerate the interference in the commission anymore. Kenyans are paying a lot of money for this election and as their custodian I will not let the money of the Kenyan people or the development partners go to waste anymore. I will not tolerate threats to my staff.

Fellow Kenyans, this is the state of your nation as at today.

I thank you very much. God Bless you. God Bless Kenya.

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W.W. CHEBUKATI
CHAIRMAN

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