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***Rewarding the losers* - A case study of the Electoral Commission of Kenya (ECK) and the Zimbabwe Electoral Commission (ZEC)**

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EXECUTIVE SUMMARY

The conduct of the Electoral Commission of Kenya (ECK) and the Zimbabwe Electoral Commission (ZEC) during the 2007 and 2008 elections respectively casts doubt into their independence, impartiality, professionalism, integrity and transparency in the delivery of free and fair elections to the electorate. Kenyan general elections were held on 27 December 2007 whilst the Zimbabwean harmonized elections were held on 29 March 2008, followed by the 'one man' Presidential run-off election that took place on 27 June 2008. The elections under review were given a blaze of publicity, all for wrong reasons. Public attention was drawn by the controversy surrounding the election results and the conflicts that emanated therefrom. The electorate was painfully let down when the losers were rewarded. Democracy lost its meaning because of individuals masquerading as neutral and fair yet their motive was to serve the interests of appointing authorities. The two cases under review should be perceived as important lessons for emerging and established democracies in the world. The case scenarios of Kenya and Zimbabwe are however contradicted by what recently came out of the Ghanaian elections in which the opposition won after a re-run and the electorate accepted the results.

The conduct of the ECK and ZEC triggered conflicts that resulted in loss of life, internal displacements and extreme insecurity in the two countries. In Kenya alone, the violence left more than 1,200 people dead and 350,000 uprooted.¹ In Zimbabwe, at least 160 people were killed² and about 30,000 were internally displaced. Other effects of the bungling by the ZEC is that the state was left paralysed, effectively with no government in place from March 2008. In the case of Kenya deaths occurred as a result of the stolen election whilst those in Zimbabwe occurred in the context of the deliberate and calculated delay in announcing the results and contrived run-off presidential election pursuant to the requirements of the country's electoral laws which required such a run-off in the case of any of the presidential candidates failing to garner the requisite 50% plus votes.

In light of the above, the report recommends that appropriate action should be taken against all those responsible. This is in the spirit of nurturing national reconciliation as happened in post Apartheid South Africa and this will be a great source of healing for the disappointed electorate, relatives and friends of the victims, and communities which were ravaged. It will be a great disappointment and betrayal if no action is taken against the ECK and ZEC and individuals in charge of these institutions.

More specifically, the investigation made the following fundamental findings:-

(i)- Major findings

- 1) **The ECK and ZEC failed or deliberately neglected to execute their mandates in a fair, independent, professional, transparent and impartial manner:-** There are credible reports confirming that the ECK and ZEC violated their founding principles³ in favour of Mwai Kibaki and Robert Mugabe respectively.

¹ <http://www.nation.co.ke/News/-/1056/455464/-/tjnsir/-/index.html> (Accessed on 13/08/2008)

² http://www.news24.com/City_Press/News/0,,186-187_2346098,00.html (Accessed on 28/08/2008)

³ The preparation and conduct of elections incorporates political, legal, administrative and technical aspects. Politically, it means that elections are the conduits or means through which power of political parties is transformed into state power. The **legal aspects** means that electoral rights and the entire election process are regulated by law

- 2) **Violence that occurred in Kenya and Zimbabwe before, during and after the elections were directly and/or indirectly triggered by the conduct of the ECK and ZEC:-** The unprofessional conduct, lack of independence, accountability and transparency and impartiality of the two bodies is linked to the conflicts that took place. The ECK and ZEC should therefore be held partly responsible for the violence and the resulting deaths and suffering of the people that took place after the elections had been conducted.
- 3) **A corrupt relationship existed between ZEC, ZANU PF and the Executive arm of the government of Zimbabwe:-** In the case of Zimbabwe, Robert Gabriel Mugabe, who allegedly stole the presidency with the help of the ZEC, promoted the Chairperson of ZEC, George Chiweshe, from the rank of Brigadier General (rtd) to that of Major General⁴ accentuating the suspicions that ZEC was more of a state agent rather than an independent electoral body. Also intriguing is whether a retired soldier can be promoted whilst on retirement.
- 4) **Flawed election processes in Kenya and Zimbabwe produced illegitimate leaders:-** Robert Gabriel Mugabe (President of ZANU PF) and Mwai Kibaki (President of PNU⁵) were generally viewed as illegitimate leaders even after being sworn in. For instance a number of influential individuals (e.g. Prime Minister Raila Odinga), institutions and governments (Botswana, Zambia, Nigeria, Liberia, Uganda, South Africa and Tanzania) refused to accept Robert Gabriel Mugabe as a legitimate leader.⁶ It is a known reality that democratic elections are the basis of the authority of any representative government. The fact that both Presidents from Kenya and Zimbabwe agreed to enter into governments of national unity (GNU) exposes them as suffering from guilt conscience.
- 5) **Political parties, candidates and other institutions of state power interfered with the work of the ECK and ZEC:-** There were credible confirmed reports of interference in Kenya whilst in the case of Zimbabwe there were credible suspicions.
- 6) **Poor management of elections led to voter apathy:-** A trend emerged in the Presidential run-off in Zimbabwe that few people voted as compared to those who participated in the first general election. The numbers of all those who participated in the Presidential run-off could have been much lower if the electorate was not allegedly coerced to vote. Also important to note is that the opposition MDC withdrew from the election and the reasons cited include the lack of independence of ZEC and the violence that preceded such run-off.⁷

and that it is a requirement to implement and obey these laws during the election process. This requires professional staff in order to correctly conduct them in a fair way. To this end, electoral bodies are required to comply with the principles of impartiality, **independence** (from political parties, candidates and other institutions of the state power), **professionalism** in legal, administrative and technical cases) and **transparency** (in terms of its activities and decisions).

⁴ <http://www.timesonline.co.uk/tol/news/world/africa/article4517700.ece> (Accessed on 13/08/2008)

⁵ Party of National Unity

⁶ Chimakure, C. (12 July 2008). Legitimacy Crisis Haunts Mugabe. Zimbabwe Independent.

⁷ Letter to the Chairperson of ZEC from Morgan Tsvangirai, dated 23 June 2008.

To this end, the following recommendations are made to the ECK, ZEC, Governments, Political parties and the SADC/AU/UN:-

(ii)- General Recommendations

- The Policy Board and Secretariat of Electoral Management Bodies (EMBs) should not or at all be appointed on partisan lines.
- The functioning of EMBs should not be subject to the direction of any other person, authority or political party. It must function without political favouritism or bias.
- African countries and others that have impending elections should learn from the mistakes of Kenya and Zimbabwe and draw lessons from the Ghanaian experience.
- The EMB should be able to operate free of interference, simply because any allegation of manipulation, perception of bias or alleged interference will have a direct impact not only on the credibility of the body in charge but on the entire election process.
- Prosecution of members of ECK and ZEC by appropriate national, regional and international bodies and an investigation of the sincerity of the state machinery regarding the conducting of elections.

(iii)- Recommendations to ECK and ZEC

- All those responsible for mismanaging the said elections should immediately resign since their conduct during the elections under review has been found wanting.
- Having regard to the bad reputation earned in the preparation and conducting of the elections under review, it is important for ECK and ZEC to allow international experts to commission investigations in order to better understand the nature of the internal problems.
- The code of conduct for electoral officials should be enforced and observed at all the times.
- In the event of being asked to work outside the guiding norms and values, electoral commission officials are encouraged to dissociate themselves from any wrongdoing.
- Organise learning trips to Ghana to learn more about how Ghana as a country has matured democratically.

(iv)- Recommendations to the government of Kenya

It is recommended that the government should:-

- Implement the recommendations of Justice Johann Kriegler Commission without any further delay.
- Take action against political parties (including candidates), the ECK and security forces responsible and liable for the deaths, torture and ill-treatment of political activists, human rights defenders, the electorate and other bodies.
- Investigate and prosecute violators of the electoral code of conduct and barred from holding public office in future.
- Delegate the responsibility of appointing election officials to independent bodies.

(v)- Recommendations to the Zimbabwean authorities.

It is recommended that the Zimbabwean authorities should:-

- Set up an independent commission of enquiry into the conduct of the elections by ZEC. The findings of such an enquiry should be made public and its recommendations fully implemented in the spirit and mood of genuine national unity.
- Hold political parties (including candidates), ZEC and security forces responsible and liable for the deaths, torture and ill-treatment of political activists, human rights defenders, the electorate and other bodies.
- Investigate and prosecute violators of the electoral code of conduct and barred from holding public office in future.
- Delegate the responsibility of appointing election officials to independent bodies.
- Organise learning trips to Ghana to learn more about how Ghana as a country has matured democratically.
- Investigate the state machinery as it influenced the election results.
- Investigate the state-controlled media, especially, the Zimbabwe Broadcasting Corporation (ZBC), the Herald⁸ and others, in view of its bias regarding access of political parties during national elections.
- Investigate the Registrar General's office regarding voter registration and the production and dissemination of an up-to-date Voters' Roll.

(vi). Recommendations to political parties

- Desist from interfering with functions of independent electoral bodies.
- Conduct training on democracy and its cardinal principles to members of political parties.
- Organise learning trips to Ghana to learn more about how Ghana as a country has matured democratically.
- Conduct internal investigations and institute disciplinary measures against members implicated in political violence.

(vii)- Recommendations to law enforcement agents

- Investigate fully and impartially the conduct of ECK and ZEC and take appropriate actions.
- Investigate fully the abduction and subsequent killing of Mr. Ignatius Mushangwe, a ZEC official who was abducted in June 2008 and killed and prosecute all those responsible.

(viii)- Recommendations to AU, SADC and UN

- Put in place early warning mechanisms and proactively respond to conflicts before they reach embarrassing proportions. The Kenyan and Zimbabwean experience should be seen as an important lesson. There is a sad trend that such bodies only want to concern themselves with trouble countries yet most of the trouble could have been prevented by the same institutions.
- Set up specialized regional tribunals responsible for presiding over electoral conflicts and disputes.

⁸ Herald is supposed to be a public listed company although the state controls its operations.

- Commission formal enquiries into the conduct of electoral commissions in Kenya and Zimbabwe. The recommendation is strongly recommended for Zimbabwe since Kenya has already done that.
- Member states should openly critique outcome of elections deemed to be short of being free and fair.
- Other AU/UN/SADC member states should learn from the Kenyan and Zimbabwean elections so that they prevent similar cases from taking place in their countries and take good practices from the Ghanaian elections.
- Fund exchange visits in the spirit of sharing constructive notes on the theory and practice of democratic elections.

1) INTRODUCTION

The AU Declaration on the Principles Governing Democratic Elections in Africa, together with the SADC Principles and Guidelines Governing Democratic elections, have gone a long way in regulating the electoral processes in most African states. Zimbabwe and Kenya have benefited from the said principles and guidelines, and have further established Electoral Management Bodies (EMBs) in the form of the Electoral Commission of Kenya (ECK) and the Zimbabwe Election Commission (ZEC) to ensure compliance with the same. EMBs are usually bodies dedicated to electoral politics and affairs. While these EMBs exist, a question exists as to their independence and impartiality in the management of free and fair democratic elections. Parallel will be drawn between the two mentioned countries, looking at the recent elections which the two countries have held.

2) PRINCIPLES & GUIDELINES GOVERNING DEMOCRATIC ELECTIONS

(i) AU Declaration on the Principles Governing Democratic Elections in Africa

The AU 2002 Declaration on the Principles Governing Democratic Elections in Africa outlines principles of democratic elections as including impartiality, all-inclusive competent accountable electoral institutions staffed by well- trained personnel and equipped with adequate logistics, amongst other principles. (Article II of the Declaration).⁹ Kenya and Zimbabwe are signatories to this Declaration.

(ii) SADC Principles and Guidelines Governing Democratic Elections

The SADC Guidelines of 2004 also provide for the independence of the judiciary and impartiality of the electoral institutions, acceptance and respect of the election results by political parties proclaimed to have been free and fair by the competent National Electoral Authorities in accordance with the law of the land.

It has been in accordance with these guidelines and principles that Zimbabwe and Kenya have Electoral Management Bodies (EMBs) in form of the ECK and ZEC to oversee and manage elections in those countries. The question remains as to whether the electoral institutions in these two countries managed to execute their mandates successfully.

⁹ II. PRINCIPLES OF DEMOCRATIC ELECTIONS

1. Democratic elections are the basis of the authority of any representative government;
2. Regular elections constitute a key element of the democratization process and therefore, are essential ingredients for good governance, the rule of law, the maintenance and promotion of peace, security, stability and development;
3. The holding of democratic elections is an important dimension in conflict prevention, management and resolution;
4. Democratic elections should be conducted:
 - a. freely and fairly;
 - b. under democratic constitutions and in compliance with supportive legal instruments;
 - c. under a system of separation of powers that ensures in particular, the independence of the judiciary;
 - d. at regular intervals, as provided for in National Constitutions;
 - e. by impartial, all-inclusive competent accountable electoral institutions staffed by well-trained personnel and equipped with adequate logistics;

(<http://www.pogar.org/publications/other/elections/declaration-africa-02.pdf> accessed on 12/08/2008)

(iii) Major guiding principles for electoral management bodies (EMBs)

EMBs are required to operate independently, transparently and impartially. Once formed, EMBs should be impartial and should serve the interests of all citizens and electoral participants. The key attributes of EMBs, include the following:

Independence and impartiality- The functioning of the EMB should not be subject to the direction of any other person, authority or political party. It must function without political favouritism or bias. The EMB must be able to operate free of interference, simply because any allegation of manipulation, perception of bias or alleged interference will have a direct impact not only on the credibility of the body in charge but on the entire election process.

Efficiency and effectiveness- Efficiency and effectiveness are integral components of the overall credibility of an election. Efficiency is critical to an electoral process insofar as technical breakdowns and problems can, and do, lead to chaos and a breakdown of law and order. Efficiency and effectiveness depend upon several factors, including staff professionalism, resources and, most importantly, sufficient time to organize the election and train those responsible for its execution.

Professionalism- Elections should be managed by a specialized group of highly trained and committed experts who manage and facilitate the electoral process and who are permanent employees of the EMB.

Impartial and speedy adjudication- The legal framework should make provision for a mechanism to process, adjudicate and dispose of electoral complaints in a timely manner.

Transparency- The overall credibility of an electoral process is substantially dependent on all relevant groups (including political parties, government, civil society and the media) being aware of and participating in the debate surrounding the formation of the electoral structure and processes. An informed debate in these groups should also take place regarding the functioning of the EMBs. In this respect the value of constant consultation, communication and cooperation among EMBs, the political parties and the institutions of society cannot be over-emphasized.

3) ELECTORAL MANAGEMENT BODIES in KENYA AND ZIMBABWE

(i) The Electoral Commission of Kenya (ECK).

All elections and referenda in Kenya are organized and administered by the ECK, a permanent body established by the Constitution.¹⁰ According to the Constitution, the ECK is responsible for the registration of voters including maintenance and regular revision of the register; it directs and supervises the Presidential, National Assembly and local government elections; it promotes voter education throughout Kenya and has further functions as prescribed by law necessary to conduct “free and fair” elections.¹¹

¹⁰ Section 42A of the Kenyan Constitution

¹¹ Ibid

The independence of the ECK is protected by a set of legal provisions. The Constitution states that “in the exercise of its functions under this Constitution the Commission shall not be subject to the direction of any other person or authority.”¹² According to the National Assembly and Presidential Elections Act, the Code of Conduct for Members and Staff of the Electoral Commission, requires that “every member of the Commission shall serve impartially and independently and perform the functions of a member in good faith and without fear, favor or prejudice, and without influence from the Government, any public officer, any political party, any candidate participating in an election, or any other person or authority”. Other provisions secure the tenure of the Commissioners and protect them from arbitrary removal from office. However, the rules governing the ECK also contain some limits to its independence, such as those governing the nomination of the Commissioners. It also lacks financial independence as it is funded by the Government.¹³ Whilst the ECK is authorized to make regulations they must be submitted to and adopted by the National Assembly.¹⁴ Currently the ECK has 22 Commissioners, including a Chairman and vice Chairman, who can take decisions by a simple majority¹⁵.

The national laws governing the Kenyan 2007 general elections are *inter alia* the Constitution of Kenya, the National Assembly and Presidential Elections Act, the Local Government Act, the Election Offences Act, the Public Order Act, the Registration of Persons Act, and the Police Act. The Electoral Commission of Kenya (ECK) also issued supplementary regulations on the registration of electors, election petitions and election procedures. In general, this patchwork of election-related laws provides a workable basis for holding elections. Despite the fact that all these laws and regulations were in place to govern the 2007 elections, the ECK failed to deliver on its mandate. The Final Report by the EU Electoral Observer Mission cited a number of the ECK’s shortcomings and failures in the execution of its mandate where the 2007 elections were concerned. Civil Society organizations also voiced their dissatisfaction on how the electoral process was handled. These shortcomings of the ECK will be discussed in detail below.

According to the EU Election Observers,¹⁶ the ECK failed to meet international standards of transparency in key areas of its mandate. Crucial safeguards against malpractices such as those designed to ensure full confidence in the results were lacking. In more than a third of polling stations visited by EU Election Observers, the results were not posted at the polling station level. Contrary to international best practice, ECK made no provision for results to be posted at the constituency tallying centres. Furthermore, since results were not published down to the level of polling stations, they could not be systematically corroborated by party agents or observers. A month after the announcement of the results, there were still results from constituencies missing on the ECK website.¹⁷ The EU EOM was informed by the ECK election officer Suleiman Chege on 5 January 2008 that result certificates of at least 20 constituencies were still missing, indicating the premature announcement of results. ECK Chairman Kivuitu admitted publicly on 2 January 2008 that he acted under pressure when announcing results. The declaration of a presidential winner in the absence of all

¹² Section 41(9) of the Kenyan Constitution

¹³ See the EU Election Observer Mission, Kenya 27 December 2007 Final Report on the General Elections

¹⁴ *Ibid*

¹⁵ Chapter 7 of the National Assembly and Presidential Elections Act

¹⁶ See fn 4 above

¹⁷ See the EU EOM Final Report

original result certificates and the external pressure on the ECK to prematurely announce the presidential results are indications of a breach of the Constitution and the electoral law.

The ECK failed to issue clear and written regulations on tallying procedures, which, according to EU EOM observers, resulted in inconsistencies in the tallying at constituency level and hampered the transparency in the tabulation of results. In several constituencies Returning Officers refused to provide constituency results to EU EOM observers and allegedly also to a number of party agents, which is in violation of election regulations. The ECK was apparently not in full control of Returning Officers, given that Chairman Kivuitu mentioned to the media on 29 December 2007 that some of his Returning Officers had disappeared, switched off their mobile phones and “pocketed the results”. The announcement of results was significantly delayed due to missing result certificates, which Returning Officers were due to deliver to Nairobi. When the ECK eventually announced the results, it relied on the assumption that missing result certificates from constituencies would not make a difference as to the winner of the presidential election. Evidence, however, corroborating this assumption has so far not been made public. Finally, the ECK also undermined the confidence in the good conduct of the elections by limiting the access for observers to its decision-making and in the final tabulation of results.¹⁸

Tallying at national level and the plenary sessions of the ECK were held *in camera* without public access. Furthermore, Kenya’s electoral laws fall short on a number of key issues essential for ensuring transparency in the electoral process particularly in the tallying and announcement of results. Most significantly, there is no requirement to release results per polling station in the publication of final results.¹⁹ In addition, neither the electoral acts nor issued regulations define clearly the procedures and reasons that might lead to an alteration of result certificates. Also, it is not clear who is entitled to modify result certificates. According to information given to the EU EOM, there are no regulations regarding the tallying procedures on constituency or national level. These are all basic transparency requirements that should have been implemented during an election process to enhance confidence in the final results.

Inconsistencies were evident in a number of procedural components of the elections. The EU EOM final report²⁰ observed/reported that during the weeks prior to the elections, the ECK issued contradictory instructions regarding the right to vote for those who registered twice. By law, voters who registered more than once lose their right to vote and face prosecution. The ECK issued late instructions allowing voters to vote as long as they had not registered more than twice – an attempt to accommodate requests from several political parties. The ECK also issued contradictory instructions regarding assistance to voters, leaving much to the discretion of Presiding Officers and as a consequence, rules were not consistently applied. Assistance given to voters in polling stations exceeded normal practice, which increased the risk of breaching the secrecy of the vote, amongst other things.

¹⁸ Ibid

¹⁹ Ibid

²⁰ Ibid

(ii) The Zimbabwe Electoral Commission (ZEC).

The establishment and the mandate of ZEC can be attributed to the adoption of the SADC principles and guidelines on elections by Zimbabwe. ZEC was brought into existence on February 1, 2005, in conformity with the Zimbabwe Electoral Commission Act. On August 30, 2005 a constitutional amendment was passed which, among other legal issues, abolished the Electoral Supervisory Commission (ESC) and reestablished the ZEC on a constitutional foundation by substituting a new Article 61 for the existing one (Constitution of Zimbabwe Amendment (No 17) Act 2005). A further constitutional amendment (Constitution of Zimbabwe Amendment (No 18) Act 2007) abolished the Delimitation Commission and transferred its functions to the ZEC.²¹

Section 61(4) outlines the following functions to be carried out by ZEC, *inter alia*, to prepare for, conduct and supervise elections and referenda and to ensure that they are conducted efficiently, freely, fairly, transparently and in accordance with the law; to supervise voter registration; to compile, preserve and maintain rolls and registers of voters and to accredit observers.²² The Zimbabwe Electoral Commission Act adds the following functions to those established by the constitution; undertaking and promoting research on electoral matters, developing electoral expertise and technology, promoting co-operation between the Government, political parties and civil society keeping the public informed about registration, delimitations, the location and boundaries of polling stations, voters rolls inspection and on political parties and candidates, and making recommendations to Parliament on public financing for political parties.²³

ZEC is founded on the following values, independence, impartiality, transparency, integrity, commitment, professionalism and ethical conduct.²⁴

Zimbabwe held its harmonized elections in 2008, the first round on the 29th of March 2008, and the run-off election on the 27th of June 2008. These elections tested ZEC's core values of independence, impartiality and transparency, amongst others. The reports from civil society and the media, and the manner in which ZEC conducted itself during these elections undermined its credibility as an independent, impartial and transparent institution. No official results were announced for more than a month after the first round. This is only true of the presidential election results since there was a three tier presidential, parliamentary and local government election. ZEC did not only delay the announcement of the results but also suspiciously ordered a recount of results in 23 constituencies before the release of the results.

The delay in timeously and expeditiously releasing the election results was strongly criticized by the MDC Tsvangirai formation, which unsuccessfully sought an order from the High Court to force their release. ZEC had a mandate and authority to timeously and expeditiously release the election results. The Presidential results were finally released more than a month after the elections were held, after a recount of the votes was conducted. There are credible reports that the ultimate results were greatly massaged. The admitted evidence on the ground suggests that recounts were conducted

²¹ <http://www.eisa.org.za/WEP/zimzec.htm> (accessed 25/07/2008)

²² Section 61(4) of the Zimbabwean Constitution

²³ Chapter 2:12,4 of the Zimbabwe Electoral Commission Act

²⁴ www.zimelectoral.commission.org/zec.co.zw (accessed 25/07/2008)

in certain constituencies, and only for purposes of allegedly satisfying disputes relating to parliamentary/constituency elections. According to the Electoral Act, a run-off election was to be held within 21 days, after the announcement of the results.²⁵ ZEC announced the runoff election date on the 19th of May. The run off took place on June 27 2008, after the 21 days had elapsed, which rendered the runoff election unlawful in terms of the Electoral Act. The legal effect of the failure to hold the Presidential re-run is that the re-run results were null and void also worsened by the fact that the other candidate withdrew, which made the re-run a mockery and a political shame.

Some members of the international community were denied accreditation to observe the March 2008 harmonized elections in Zimbabwe. Such bodies like the Commonwealth and the European Union, including the international media networks like the CNN, BBC and Skynews were denied access into Zimbabwe during the elections. The SADC-Parliamentary Forum was granted accreditation under the SADC mission. The other bodies invited to send observer missions to Zimbabwe during the 2008 elections included the AU, COMESA, EISA, Pan African Parliament, SADC Electoral Commissions Forum and African and Caribbean Pacific, amongst others.²⁶

The first round generally received a thumbs-up from most observers, including COMESA and PAP. Most observers referred to, endorsed the first round of the Zimbabwean elections as having been peaceful, free of violence and fair.²⁷ Their legitimacy was also not questioned, despite the fact that civil society organizations in Zimbabwe reported an increase in politically motivated intimidation in the build-up to the March elections.²⁸ ZEC's incompetence as an independent, impartial and transparent electoral institution was greatly challenged as it failed to deliver on its mandate and seriously brought to the fore after the actual balloting as referred to above.

The runoff election on the other hand received a vote of no confidence from the Observer missions, civil society and the international community at large. The AU Observer Mission deployed its members to the provinces which included Harare, Midlands, Mashonaland East, West and Central, Bulawayo, Matabeleland North and South, Manicaland and Masvingo. The AU carried out an assessment of both the political environment and the actual organization and conduct of the elections. In the light of these consultations and observations, the African Union Observer Mission to the Zimbabwe Presidential Run-Off gave the following report, that:

- There was violence in the run down to the elections;
- The fear of violence deterred popular participation in the electoral process;
- There was no equitable access to the Public Media.²⁹

In the context of the AU Declaration on the Principles Governing Democratic Elections in Africa, the African Union Observer Mission concluded that the Election process fell short of accepted AU standards.³⁰ The PAP Observer mission also reported high levels of intimidation and violence in all provinces it visited, with abductions, internal

²⁵ Section 110 of the Electoral Act

²⁶ <http://www.eisa.org.za/WEP/zim2008eom.htm> (accessed 25/07/2008)

²⁷ See the Official Preliminary Statement by the COMESA EOM on the 2008 Harmonized elections on Zimbabwe at www.eisa.org.za/PDF/zim2008comesa.pdf (accessed 25/07/2008)

²⁸ See the Zimbabwe Human Rights NGO Forum Political Violence Report for January

²⁹ See Preliminary Statement of the AU Observer Mission at <http://www.eisa.org.za/PDF/zim2008au.pdf> (accessed 25/07/2008)

³⁰ Ibid

displacements, houses burnt down, people assaulted and sustaining serious injuries.³¹ The PAP Mission also noted that ZEC failed to ensure that there was “*reasonable access to the media*” by both parties.³² Regrettably, the State-controlled media was used as a vehicle to discredit the opposition candidate in all forms. Numerous complaints received by the Mission indicated that the postal voting was conducted in a non-transparent manner. Attempts by the mission to observe and verify were met by denial of access by ZEC officials who informed the Mission that as the law stands, only the commanding officer is the authority who grants access to observers using his/her discretion.³³ The role of ZEC in the runoff election was found more wanting and its deafening silence was alarming and created a perception of a sequestered body.³⁴

The SADC Observer Mission reported that the pre-election phase was characterized by politically motivated violence, intimidation and displacements.³⁵ The SADC Mission also cited that the process leading up to the presidential run-off elections held on 27 June 2008 did not conform to the SADC Principles and Guidelines Governing Democratic Elections, even though the Election Day was peaceful. Overall, the Mission was of the view that the prevailing environment impinged on the credibility of the electoral process and also that the elections did not represent the will of the people of Zimbabwe.

On the negative side, the Defense Minister Sydney Sekeramayi announced the promotion of the Zimbabwe Electoral Commission Chairperson, George Chiweshe, from the rank of Brigadier General (retired) to that of Major General (retired). This was perceived as a gesture of appreciation for the role played by ZEC during the elections. The article below was quoted from the Zimbabwe Times (<http://www.thezimbabwetimes.com/?p=2486>).

An anticlimax to the Zimbabwean political saga on elections under review is the abduction and killing of a ZEC official, Mr. Ignatius Mushangwe. Mr. Mushangwe, the ZEC Director of Training and Development was abducted in June 2008 and his partially charred body was found dumped in Norton. Raising a lot of suspicion, security agents allegedly fast tracked his burial and took the body from his Waterfalls home and buried it in Mukumba village of Chihota.

4) EMERGING GOOD PRACTICES (GP).

Two important Good Practices (GP) are important to mention herein and these include:-

- The refusal to accept Robert Mugabe and Mwai Kibaki as legitimate leaders by African leaders.
- Commission of enquiry into the flawed Kenya and elections.
- Active involvement of regional and sub-regional bodies in trying to settle election disputes.
- The Ghana election outcome

³¹ See Preliminary statement of the PAP EOM at www.eisa.org.za/PDF/zim2008pap/pdf (accessed 25/07/2008)

³² Section 3 of the Electoral Act

³³ Fn 10 above

³⁴ Ibid

³⁵ See the SADC EOM Preliminary Statement at www.eisa.org.za/PDF/zim2008sadc2.pdf (accessed 25/07/2008)

(i) Refusal to endorse Robert Mugabe and Mwai Kibaki as legitimate leaders by African leaders.

It has been widely reported that a number of influential individuals, institutions and governments refused to accept Robert Mugabe³⁶ and Mwai Kibaki³⁷ as legitimate leaders. This is important and should be encouraged if similar cases occur in future. According to ZESN (2008:10)³⁸ countries such as Botswana, Zambia, Britain and United States openly rejected the results. Botswana, in particular, called for expulsion of Zimbabwe from the SADC and AU. The Zimbabwe Exiles Forum (ZEF) should also be congratulated for taking the matter of Robert Mugabe's legitimacy to the SADC Tribunal. Considering the devastating effects of the behaviour of ECK and ZEC, that produced controversial results, most of the African Union and SADC member states were expected to speak out instead of keeping quite and in the process fanning dictatorial regimes.

(ii) Commission of enquiry in Kenya

In response to flawed Kenyan elections, a former South African judge was appointed to lead a panel of experts investigating Kenya's disputed 2007 presidential elections. Justice Johann Kriegler and six other members were named to hold a public inquiry into allegations of electoral fraud during the 2007 elections. This was in response to an outcry by the opposition that it was robbed of victory by the leader of the ruling party. Justice Kriegler is assisted by Horacio Boneo, an Argentinean election expert, and Tanzania's Justice Imani Daudi Aboud. The setting up of the Commission follows an agreement between Mwai Kibaki's Party of National Unity (PNU) and the Orange Democratic Movement (ODM). Both sides identified two representatives while the panel of eminent persons led by former UN Secretary General Kofi Annan picked Justice Kriegler and two foreign experts.³⁹ A similar Commission of enquiry in Zimbabwe would be useful in order to establish the root of the problem and make recommendations on the way forward.

(iii) Power sharing talks

In the two countries talks were speedily conducted as a strategy of resolving the conflicts that were allegedly caused by the ECK and ZEC. In Kenya, the crisis was resolved and leader of the opposition, ODM, Raila Odinga is now the Prime Minister, whilst, Mwai Kibaki remains the President. In Zimbabwe, Mr. Morgan Tsvangirai of the main MDC formation is the Prime Minister-designate, whilst Robert Gabriel Mugabe remains as the President. The most disappointing to the electorate in the two countries is the fact that Mwai Kibaki and Robert Mugabe who had lost the elections managed to salvage their political careers through violence and fraudulent activities of the ECK and ZEC.

(iv) The Ghana election outcome (2008)

Ghana held its election in 2008. None of the Presidential candidates from the opposition National Democratic Congress (NDC) and the ruling New Patriotic Party (NPP) garnered the requisite 50% plus votes. A re-run took place and Prof. John Evans

³⁶ Chimakure, C. (12 July 2008). Legitimacy Crisis Haunts Mugabe. Zimbabwe Independent.

³⁷ <http://www.zimbio.com/President+Mwai+Kibaki/articles/24/Unrest+Continues+Kenya+Legitimacy+Kibaki+Victory> (Accessed on 26/08/2008)

³⁸ Zimbabwe Election Support Network, 2008. Report on the Zimbabwe 29 March harmonized election and 27 June 2008 Presidential run-off

³⁹ <http://news.bbc.co.uk/2/hi/africa/7296557.stm> (Accessed on 13/08/2008)

Atta Mills (NDC) polled 4 521 032 (50.23%) votes against 4 480 446 (49.77%) for Nana Akufo Addo (NNP)⁴⁰. The opposition leader Prof. John Evans Atta Mills won the election. Important to note, is that there was acceptance and respect of the election results by the two candidates and their political parties. This testifies the fact that Ghana has a more mature, well defined and disciplined democratic process which has been tested with time.

5) CONCLUSION AND RECOMMENDATIONS

(a) Conclusion

It is the major finding of this report that the ECK and ZEC failed or neglected to execute their mandates in a fair, independent, professional, transparent and impartial manner. It is becoming clearer, that these electoral bodies are responsible for keeping unpopular regimes in power. In the context of Kenya and Zimbabwe, their conduct had disastrous consequences on development. In Kenya, the violence left more than 1,200 people dead and 350,000 displaced.⁴¹ In Zimbabwe, at least 160 people were killed⁴² and about 30,000 were internally displaced. Other effects of the bungling by the ZEC are that the state was left paralysed, effectively with no government in place from March 2008. Zimbabwean authorities also failed to deal with the cholera outbreak on their own because of a situation instigated by the conduct of ZEC. On the development plane, the conduct of the said bodies is a reversal of the gains made under efforts towards achieving the Millennium Development Goals (MDGs), the New Partnership for Africa's Development (NEPAD) and other development plans.

A number of recommendations have been made as shown below.

(b) Recommendations

The following recommendations are made to the ECK, ZEC, Governments, Political parties and the SADC/AU/UN.

(i)- General Recommendations

- The Policy Board and Secretariat of Electoral Management Bodies (EMBs) should not or at all be appointed on partisan lines.
- The functioning of EMBs should not be subject to the direction of any other person, authority or political party. It must function without political favouritism or bias.
- African countries and others that have impending elections should learn from the mistakes of Kenya and Zimbabwe and draw lessons from the Ghanaian experience.
- The EMB should be able to operate free of interference, simply because any allegation of manipulation, perception of bias or alleged interference will have a direct impact not only on the credibility of the body in charge but on the entire election process.
- Prosecution of members of ECK and ZEC by appropriate national, regional and international bodies and an investigation of the sincerity of the state machinery regarding the conducting of elections.

⁴⁰ Before the run off Prof. John Evans Atta Mills had polled 4 056 634 (47.9%) votes against 4 159 439 (49.13%) for Nana Akufo Addo. A total of 8 465 834 votes had been cast.

⁴¹ <http://www.nation.co.ke/News/-/1056/455464/-/tjnsir/-/index.html> (Accessed on 13/08/2008)

⁴² http://www.news24.com/City_Press/News/0,,186-187_2346098.00.html (Accessed on 28/08/2008)

(ii)- Recommendations to ECK and ZEC

- All those responsible for mismanaging the said elections should immediately resign since their conduct during the elections under review has been found wanting.
- Having regard to the bad reputation earned in the preparation and conducting of the elections under review, it is important for ECK and ZEC to allow international experts to commission investigations in order to better understand the nature of the internal problems.
- The code of conduct for electoral officials should be enforced and observed at all the times.
- In the event of being asked to work outside the guiding norms and values, electoral commission officials are encouraged to dissociate themselves from any wrongdoing.
- Organise learning trips to Ghana to learn more about how Ghana as a country has matured democratically.

(iii)- Recommendations to the government of Kenya

It is recommended that the government should:-

- Implement the recommendations of Justice Johann Kriegler Commission without any further delay.
- Take action against political parties (including candidates), the ECK and security forces responsible and liable for the deaths, torture and ill-treatment of political activists, human rights defenders, the electorate and other bodies.
- Investigate and prosecute violators of the electoral code of conduct and barred from holding public office in future.
- Delegate the responsibility of appointing election officials to independent bodies.

(iv)- Recommendations to the Zimbabwean authorities.

It is recommended that the Zimbabwean authorities should:-

- Set up an independent commission of enquiry into the conduct of the elections by ZEC. The findings of such an enquiry should be made public and its recommendations fully implemented in the spirit and mood of genuine national unity.
- Hold political parties (including candidates), ZEC and security forces responsible and liable for the deaths, torture and ill-treatment of political activists, human rights defenders, the electorate and other bodies.
- Investigate and prosecute violators of the electoral code of conduct and barred from holding public office in future.
- Delegate the responsibility of appointing election officials to independent bodies.
- Organise learning trips to Ghana to learn more about how Ghana as a country has matured democratically.
- Investigate the state machinery as it influenced the election results.
- Investigate the state-controlled media, especially, the Zimbabwe Broadcasting Corporation (ZBC), the Herald⁴³ and others, in view of its bias regarding access of political parties during national elections.

⁴³ Herald is supposed to be a public listed company although the state controls its operations.

- Investigate the Registrar General's office regarding voter registration and the production and dissemination of an up-to-date Voters' Roll.

(v). Recommendations to political parties

- Desist from interfering with functions of independent electoral bodies.
- Conduct training on democracy and its cardinal principles to members of political parties.
- Organise learning trips to Ghana to learn more about how Ghana as a country has matured democratically.
- Conduct internal investigations and institute disciplinary measures against members implicated in political violence.

(vi)- Recommendations to law enforcement agents

- Investigate fully and impartially the conduct of ECK and ZEC and take appropriate actions.
- Investigate fully the abduction and subsequent killing of Mr. Ignatius Mushangwe, a ZEC official who was abducted in June 2008 and killed and prosecute all those responsible.

(vii)- Recommendations to AU, SADC and UN

- Put in place early warning mechanisms and proactively respond to conflicts before they reach embarrassing proportions. The Kenyan and Zimbabwean experience should be seen as an important lesson. There is a sad trend that such bodies only want to concern themselves with trouble countries yet most of the trouble could have been prevented by the same institutions.
- Set up specialized regional tribunals responsible for presiding over electoral conflicts and disputes.
- Commission formal enquiries into the conduct of electoral commissions in Kenya and Zimbabwe. The recommendation is strongly recommended for Zimbabwe since Kenya has already done that.
- Member states should openly critique outcome of elections deemed to be short of being free and fair.
- Other AU/UN/SADC member states should learn from the Kenyan and Zimbabwean elections so that they prevent similar cases from taking place in their countries and take good practices from the Ghanaian elections.
- Fund exchange visits in the spirit of sharing constructive notes on the theory and practice of democratic elections.

ANNEXES

Annex 1- Mugabe honours ZEC Chairperson

Mugabe honours JOC, ZEC members⁴⁴

August 12, 2008

By Our Correspondent

HARARE - Members of the Joint Operations Command who stood by President Robert Mugabe in his hour of greatest need after he suffered humiliating defeat in the presidential election held in March have been rewarded for their loyalty.

⁴⁴ <http://www.thezimbabwetimes.com/?p=2486> (Accessed on 13/08/2008)

Defence Minister Sydney Sekeramayi has announced the promotion by President Robert Mugabe of two JOC members as well the Zimbabwe Electoral Commission chairman, George Chiweshe, from the rank of brigadier general to that of major general.

Chiweshe, a lawyer by profession, who was the central figure in the controversial March 29, harmonised and June 27 presidential election re-run was honoured in retirement from the army. He was appointed a Judge of the High Court on retirement from the army but was subsequently appointed to head the ZEC thereafter.

Chiweshe's role in the two elections has been steeped in controversy as he has been accused of bias in favour of ZANU-PF. His major failure was to delay the announcement of the election results by up to five weeks in the case of the presidential election and without offering any plausible explanation for the delay. The fact that Zanu-PF and the MDC were awarded almost similar results in the parliamentary, presidential and Senate elections virtually confirmed in the public mind the allegation of manipulation in favour of ZANU-PF.

Morgan Tsvangirai won the presidential election by too narrow a margin for him to form a new government, resulting in the staging of a second presidential election on June 27. Tsvangirai boycotted this election at the last minute leaving Mugabe to win the ensuing one-candidate poll "by a landslide".

Retired brigadier generals Happyton Bonyongwe, Paradzai Zimondi and Richard Ruwodo were also promoted to the rank of major general.

Bonyongwe who is the director of the Central Intelligence Organisation and Zimondi who heads the prison service both sit on the Joint Operations Command which has effectively usurped executive powers from Mugabe. The JOC, which also includes Commissioner General Augustine Chihuri and Air Marshall Perrence Shiri is headed by Zimbabwe Defence Forces commander Constantine Chiwenga.

Meetings are chaired by Emmerson Mnangagwa, Minister of Rural Housing. Mnangagwa, who was Zimbabwe's first minister of state security is said to be extremely wealthy. His name has been linked to various allegations of corrupt self-enrichment.

Mnangagwa's aide, Lawrence Tanda, is a member of the Zimbabwe Electoral Commission. A source recently described Tanda as "Mnangagwa's man on the commission".

Extract from the Zimbabwe Times (<http://www.thezimbabwetimes.com/?p=2486>)
(Accessed on 13/08/2008)