



MALAWI

FINAL REPORT

**PRESIDENTIAL AND PARLIAMENTARY ELECTIONS
MAY 2009**

**EUROPEAN UNION
ELECTION OBSERVATION MISSION**

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I. EXECUTIVE SUMMARY

General elections were held on 19 May 2009 for voters to elect a president, who is elected as Head of State and 193 parliamentary members elected for a five year term in single seat constituencies. Periodic elections have taken place following a referendum in 1993 and these were the fourth general elections to be held including those in 1994. The European Union Election Observation Mission (EU EOM) was present in Malawi from 7 April to 13 June 2009 following invitations from the Ministry of Foreign Affairs and Electoral Commission. The EU EOM was led by Luisa Morgantini, vice president and Member of the European Parliament. The mission deployed 77 observers from 23 European Union Member States and Norway to all 28 districts of the country to assess the electoral process against international and regional standards for elections as well as the laws of Malawi. The EU EOM is independent in its findings and conclusions and adheres to the *Declaration of Principles for International Election Observation* commemorated at the United Nations in October 2005. On election day, observers visited 471 polling stations in 125 of the 193 constituencies throughout Malawi to observe voting and counting.

The 19 May 2009 presidential and parliamentary elections were conducted in an environment in which fundamental freedoms and rights of assembly, expression and movement have been generally respected. The right to stand for election and the right to vote were also guaranteed. Central institutions such as the Electoral Commission and the judiciary demonstrated an ability to remain impartial and election day was calm and well managed by polling officials and the universal nature of the franchise was largely guaranteed. Despite this the elections fell short of fully meeting Malawi's commitments to international and regional standards for elections as a number of key problem areas exposed structural and regulatory weaknesses. These included limited capacity of the Electoral Commission, the editorial policy of state owned broadcasters that excluded opposition parties, use of state resources for campaign purposes and a lack of a level playing field for campaigning.

The Electoral Commission organised these elections in a largely independent manner and although it faced many logistical and organisational challenges that exposed a lack of capacity, it managed to prepare for an election day that largely guaranteed universal suffrage. Tight deadlines and limited capacity meant that important areas such as effective training of polling officials, transparency measures, auditing and public accountability were not always adequate. Furthermore, the Electoral Commission's preparations for these elections were carried out in an environment characterised by a general lack of confidence in its ability to supervise the elections and confidence building measures were poorly designed. In spite of this the Electoral Commission did manage to deliver key operational needs and despite the challenging environment made concerted efforts to deliver the election.

In general the legal framework provides a good basis for the conduct of democratic elections in line with international and regional standards. The constitution and election related legislation ensure the protection of political and civil rights and guarantee genuine elections and freedom of association, assembly, movement and expression. Nevertheless, the timeframes provided for in the constitution and statutory legislation for the different parts of the electoral process such as the dissolution of parliament and length of campaign period are not consistent and created legal uncertainty. There is also a lack of clear legal provisions for funding of political parties and financing of election campaigns that would provide for public accountability.

The voter register was completely revised in 2008 after widespread recognition that the one used in 2004 was substandard. A computerised register with voter identity cards has been introduced and a large number of registered voters recorded. However, the verification period for the voter register that started at the end of March 2009 exposed serious shortcomings in its accuracy and initiated a large scale internal audit in order to make corrections to it. This audit was hindered due to poor archiving and retrieval of material from the voter registration exercise and only a certain percentage of registrations were subsequently verified for accuracy. A large number of anomalies therefore remained in the voter register most of which were related to errors in the recording of names. The decision of the Electoral Commission to print a secondary register that was available in polling stations with all entries ordered according to the voter registration number included on the voter registration card together with other measures ensured voters were able to vote on election day.

There were no discriminatory requirements for candidates to submit their nominations to contest the elections. The increase in financial deposits required to contest elections in 2008, although very unpopular and particularly burdensome for smaller political parties, did not result in any significant reduction of candidates from previous elections and in many cases these fees were paid on behalf of candidates by political parties. The technical requirements to register as a candidate are reasonable.

Generally freedom of assembly, expression and movement were respected and candidates and parties campaigned freely without interference in most parts of Malawi. Campaign rallies were generally small and localised with a few larger rallies of presidential candidates. The candidates also freely canvassed voters door-to-door in an attempt to attract votes down to the grass roots level. Whilst the rallies were peaceful with a festive like atmosphere, and at a national level little tension was evident the campaigning of some of the presidential candidates was very personality driven and critical towards opponents and at times defamatory and inflammatory. This was far less so at constituency level with parliamentary candidates discussing more policy driven issues.

The use of state resources for campaign purposes was overt during the whole of the campaign period and there was a blurring of the boundaries between the presidential office and campaigning that included the use of state owned vehicles, public media and security services. During the campaign period the president also attended a number of official ceremonial openings of public and private sector projects that received wide coverage in the media. There was a lack of a level playing field in this respect, with Democratic Progressive Party (DPP) candidates enjoying both access to far greater financial resources as well as some of the resources attached to the presidential office.

Freedom of speech in the media was respected during the campaign period with no reports of any significant restrictions of movement or access of journalists. The only notable incident occurred on election day when the police entered the premises of the radio station Joy FM in an unproportionate response to this station airing material that breached the campaign moratorium. In respect to campaign coverage the state owned media in particular failed to fulfil even their minimum obligations as publicly owned broadcasters as their coverage lacked any degree of balance and was openly biased in favour of the DPP. The election coverage of Joy FM was also similarly biased to the advantage of the United Democratic Front (UDF) and Malawi Congress Party (MCP). In contrast, private radio stations Capital and Zodiak provided impartial and balanced coverage of the political parties contesting the elections as did newspapers.

From a total of 1,184 parliamentary candidates 232 were women and from the seven candidates contesting the presidential election one of these was a woman and two running mates were female. There were some targeted projects to help increase the visibility of women candidates. In general, and reflecting their position in public life, women candidates faced economic and social constraints both in the process of being nominated as a candidate, and where they were nominated, campaigning on a level playing field against their male counterparts. Despite this there was an increase in women elected to a total of 42 parliamentarians working towards Malawi's regional commitments for the representation of women in political and decision making structures. A woman was also elected as vice president for the first time in the history of Malawi.

There are no obstacles to minority groups participating in the elections as either candidates or voters. No provisions are included in candidate or party registration requirements that are discriminatory to minority groups in Malawi. Likewise the voter register is open to all individuals who have reached the age of 18 years and there are no obstacles to being included in the register based on ethnicity or disability. At polling stations there were provisions for assisted voting and tactile ballot guides were available for blind voters.

A total of 75 civil society organisations were accredited by the Electoral Commission to implement civic and voter education programmes. Many of these programmes started too late in the election process and this had an impact on the success and reach of the initiative. European Union observers reported inadequate levels of voter education in the field and particularly in remote areas of the country.

Civil society organisations also played an important role in providing increased transparency at polling stations. Domestic election monitors were deployed to nearly all polling stations in the country providing for increased transparency. The main groups to deploy monitors for these elections were the National Initiative for Civic Education (NICE) that deployed some 4,200 monitors to polling stations and the Malawi Election Support Network (MESN) which deployed 1,400 monitors.

Channels for election related complaints are generally clear and offer voters and candidates the right of appeal to any decision of the Electoral Commission to the High Court. A small number of formal complaints were submitted to the Electoral Commission and there were three legal challenges to the decision of the Electoral Commission not to accept nominations papers. The Multiparty Liaison Committees that were established to deal with campaign related complaints at local level played a positive role in resolving disputes.

Overall, voting was conducted in a calm manner and the process was well organised. Polling procedures in 85 per cent of polling stations visited by European Union observers were assessed as satisfactory or positive and although there was inconsistency in following certain procedures, including security checks related to the voter register, the intent of the officials was to be inclusive. Although procedures were generally followed by polling officials during the counting process and it remained transparent there were a high number of instances of mistakes made in reconciliation.

The aggregation process that followed counting at district level was slow as material was retrieved from polling centres. Whilst it remained transparent and monitors and other stakeholders had unobstructed access in order to observe, significant problems were experienced, with the system set up to transmit the results. Confusion as to what procedures

to follow and which forms to send were the result of poor instructions and training on this part of the process. The most critical problem appears to have been a combination of factors leading to a total breakdown of the fax transmission system to relay results from the districts to the national results centre in Blantyre. After 24 hours the Electoral Commission decided to receive the aggregated results in hardcopy from the constituency returning officers that on one hand expedited the release of national results, but on the other hand, meant security measures and auditing to identify and correct errors were neglected.

Election results for the presidential election were released on 22 May 2009 declaring the incumbent president Bingu wa Mutharika, of the DPP elected for a second term in office. The president received a total of 64.3 per cent of the popular vote followed by John Tembo with 29.8 per cent. The parliamentary election results were announced on 31 May 2009 showing that the DPP had won 112 seats, MCP 27, UDF 18 and independent candidates winning 32 seats. Aford won one seat, MMP one seat and Mafunde one seat. The results mean that the DPP has an absolute majority in parliament and is able to obtain a two thirds of seats required to change the constitution with the support of the independent parliamentarians.

On the announcement of the final results there was general acceptance of the integrity of key parts of the election process. A comprehensive set of detailed recommendations is included at the end of this report for consideration by the relevant authorities in order to further improve certain areas in the election process. Key recommendations include:

- Enhanced transparency measures to be introduced by the Electoral Commission at all levels of the electoral administration to guarantee accountability throughout the election process. The Electoral Commission should also undergo a review of procedures and capacity structures for it to be able to organise elections and introduce greater performance guarantees.
- A continued review of the voter register to be undertaken as well as a review of the procedures and safeguards currently in place to ensure its accuracy. Greater transparency measures should also be introduced to ensure stakeholder confidence in the register.
- An adequate and reliable results system should be designed to ensure the integrity and reliability in the collection, aggregation and publication of results. Key procedures should be reviewed and suitable measures put in place to ensure the accuracy and security of results as they are collected from polling stations.
- The introduction of statutory provisions establishing clear rules for regulating the campaign environment as well as the introduction of greater transparency measures in the financing and expenditure of political parties to enhance public accountability. Furthermore, independent regulatory oversight should be introduced to ensure a separation between the resources attached to public office and campaign activities.
- A satisfactory statutory framework developed for the broadcasting sector is introduced including provisions clearly setting out the obligations of broadcasters and the establishment of an independent regulatory authority with a clear mandate for the regulation of this sector.

II. INTRODUCTION

The European Union Election Observation Mission (EU EOM) was present in Malawi from 7 April to 13 June 2009 following invitations from the Ministry of Foreign Affairs and Electoral Commission. The EU EOM was led by Luisa Morgantini, vice president and Member of the European Parliament. The mission deployed 77 observers from 23 European Union Member States and Norway to all 28 districts of the country to assess the electoral process against international and regional standards for elections as well as the laws of Malawi. The EU EOM is independent in its findings and conclusions and adheres to the *Declaration of Principles for International Election Observation* commemorated at the United Nations in October 2005. On election day, observers visited 471 polling stations in 125 of the 193 constituencies throughout Malawi to observe voting and counting.

III. POLITICAL BACKGROUND

A. Political Context

Following a referendum in 1993 and the introduction of a multi party system of democracy periodic elections have taken place in Malawi every five years and these were the fourth general elections including those conducted in 1994. Elections were held on 19 May 2009 to elect a president and vice president and 193 parliamentary representatives in single seat constituencies to serve a five year term using a first-past-the-post system elected on the basis of universal adult suffrage. The incumbent president, Bingu wa Mutharika, stood for a second term in office as the presidential candidate of the Democratic Progressive Party (DPP) against six contestants including one independent candidate. He was elected president in 2004 as a candidate of the United Democratic Front (UDF), but in 2005 left the party, to establish the DPP. The nomination papers of one of his main challengers and, the former president, Bakili Muluzi, of the UDF were rejected by the Electoral Commission, a decision that was subsequently upheld by the courts. The former president, Bakili Muluzi, was also involved in two cases in the Blantyre High Court during the campaign period involving corruption charges that are ongoing. In March 2009 a high level delegation from the African Union visited Malawi composed of the former president of Mozambique, Joaquim Alberto Chissano and former president of Ghana, John Kufuor. Under the auspices of this delegation the three main political parties committed themselves to the principles contained in a Declaration of the Malawi Inter Political Parties Dialogue to ensure peaceful and violence free elections.

Of the remaining presidential candidates John Tembo of the Malawi Congress Party (MCP) was the main contender to the incumbent. A total of 16 political parties put forward candidates for the parliamentary election with a high number of independent candidates contesting parliamentary seats. On 8 April 2009 the UDF and MCP formed an alliance to contest the presidential election and Bakili Muluzi endorsed the candidature of John Tembo. Subsequently a memorandum of understanding was signed by these two political parties that further strengthened MCP's challenge to the incumbent president. Traditionally the highly populated central and southern parts of the country have represented strongholds for the main political parties with the MCP popular in central and the UDF and splinter party DPP receiving their support in the south of Malawi. The political situation remained charged throughout the campaign period and the increasingly acrimonious relationship between the DPP and UDF continued as the presidential candidate of the latter party challenged his disqualification from standing in the presidential election.

B. Key Political Actors

Three major political parties and a range of smaller parties competed in the 2009 presidential and parliamentary elections with the incumbent president, Bingu wa Mutharika, of the DPP standing for election for a second term in office. The incumbent president was elected president in 2004 as a candidate of the UDF, but in 2005 left the party, to establish the DPP. In October 2008, the DPP's national governing council unanimously selected the president as the party's candidate to contest the 2009 presidential election. Bingu wa Mutharika's running mate, Joyce Banda, has been a member of parliament and cabinet minister. As a relatively new party the DPP went into this election with very few developed grass roots structures. It also shares its main regional support base with the UDF in the south of the country. The DPP administration is generally perceived to have introduced sound economic reforms to the economy and its key ideological commitment for these elections was to continue these reforms aimed to alleviate poverty and provide for continued growth and poverty reduction.

The two main opposition parties to the DPP, and the two parties to offer a credible challenge, were the UDF and MCP. In April 2008 Bakili Muluzi was selected as the UDF presidential candidate at the UDF convention, despite questions about his eligibility due to a constitutional ceiling placed on presidential term limits. Even though he was subsequently disqualified this party remained a key political actor in the parliamentary election and in supporting the presidential candidate of the MCP provided the possibility of being a divisive factor in the south of the country. The party has been dominant in Malawian politics for the past 15 years and has its core support base in the populous south of the country. The last of the big three parties, the MCP, selected John Tembo as their presidential candidate at their convention in 2008. Since losing the 1994 elections to the UDF the MCP has acted as the main opposition party in the country. This party's heartland is in the central region of Malawi. His running mate, Brown Mpinganjira, was a member of the UDF until he agreed to become vice presidential candidate for the MCP.

A further 13 political parties put forward candidates to contest the parliamentary election and four of these political parties contested the presidential election together with one independent candidate. All of these remaining political parties are relatively small and were unlikely to receive any significant proportion of the popular vote. They included the Peoples Transformation Party (PETRA), the Alliance for Democracy (Aford) a party based in the north of Malawi, the New Rainbow Coalition (NARC) which was established by this party's presidential candidate after failing to receive the nomination from the Aford party, and the New Republican Party (NRP). A total of 480 independent candidates also contested the parliamentary election.

IV. LEGAL ISSUES

A. Legal Framework

The legal framework governing presidential and parliamentary elections in Malawi provides for a reasonable basis for the conduct of genuine and democratic elections in line with international and regional standards. The constitution and election related legislation ensure the protection of political and civil rights and guarantee genuine elections and freedom of association, assembly, movement and expression. The right to vote and to be elected in periodic elections through universal and equal suffrage by secret vote are also entrenched in

the constitution as well as the right of access to justice and legal remedies and the right to a fair trial.

B. Universal and Regional Standards

Malawi has ratified all major treaties containing international and regional standards for elections. These include the 1966 International Covenant on Civil and Political Rights (ICCPR), 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the 1966 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 1952 Convention on the Political Rights of Women (CPRW), the 1981 African Charter of Human and People's Rights (ACHPR) and its Protocol on the Rights of Women. Further, Malawi is politically committed to the 2002 African Union Declaration on Principles Governing Democratic Elections in Africa, the 2004 South African Development Community (SADC) Principles and Guidelines Governing Democratic Elections, the 1997 SADC Declaration on Gender and Development, the 2002 New Partnership for Africa's Development (NEPAD) Declaration on Democracy, Political, Economic and Corporate Governance and the African Charter on Democracy, Elections and Governance that was adopted in 2007 but yet to enter into force.

C. Other Applicable Election Legislation

The presidential and parliamentary elections are governed by the Constitution of the Republic of Malawi of 1994 as amended, Parliamentary and Presidential Elections Act of 1993 as amended, the Electoral Commission Act of 1998, the Political Parties (Registration and Regulation) Act of 1993, the Communications Act of 1998 and provisions of the 1930 Penal Code as amended. In addition to the Electoral Code of Conduct for Political Parties and Candidates, in March 2009 the three main political parties committed themselves to the Declaration of the Malawi Inter Political Parties Dialogue for the conduct of fair and violence free elections under the auspices of the African Union.

Whilst in general the legal framework satisfactorily guarantees democratic elections there are areas that need to be addressed. These include regulations on procedures for challenges and complaints regarding voter registration as well as provisions for funding of political parties and financing of election campaigns that would provide for public accountability. The deadline for petitions to be submitted challenging the results of the elections of 48 hours after their declaration provided by law are also considered to be insufficient. Finally, the timeframes provided for in the constitution and statutory legislation for the different parts of the electoral process including the dissolution of parliament and length of the campaign period are not consistent and created legal uncertainty in respect to sitting parliamentarians standing for re-election.

D. The Electoral System

Presidential office and parliamentary terms are for a period of five years, with a limit of two consecutive terms placed on holding presidential office. A first-past-the-post system is used to elect both parliamentary members and the president on the basis of universal adult suffrage. A vice president is elected concurrently with the president, both names appearing on the same ballot paper. The president may, in the national interest, appoint a second vice president who must be from a different party. In such cases the vice president is designated as the first vice president. The president appoints a cabinet, whose members need not be

members of parliament. Malawi has a unicameral parliament, the National Assembly. Its 193 members are elected by popular vote from single member constituencies.

E. Delineation of Constituency Boundaries

The Electoral Commission has responsibility for the delimitation of constituencies ensuring that these contain approximately equal numbers of voters eligible to register based on population density and geographical features pursuant to Section 76 (2 (a) and (b)) of the 1994 constitution and Section 8 (1 (a) and (b)) of the Electoral Commission Act of 1993. Constituency boundaries shall be reviewed at intervals of not more than five years. However, the Electoral Commission has not reviewed the demarcation of constituencies since 1999 when the parliamentary seats increased from 177 to 193 seats. As a result of population trends and this hiatus the current delimitation based on the 193 constituencies does not accurately reflect equal proportions of the electorate in each constituency. Consequently the highly populated areas are under-represented in terms of seats in parliament compared to less populated constituencies. According to the voter register for these elections, the number of registered voters varies from 9,468 in Chitipa Wenya to 93,608 in Lilongwe City Centre constituencies.¹ A total of 98 constituencies have below 30,000 registered voters and 15 have above 50,000 registered voters while 80 constituencies have between 30,000 and 50,000 voters. The Electoral Commission acknowledged this fact in 2004 although the political impasse at the National Assembly led to the proposal for a new delimitation submitted in 2008 being blocked. As a result the existing lack of balance undermines the principle of equal representation of voters.

V. ELECTION ADMINISTRATION

A. Structure and Composition of the Election Administration

Article 75 of the constitution establishes the Electoral Commission as an independent body for the purposes of organising and supervising all public elections in Malawi. A board of eight Commissioners appointed by the president currently oversees the Electoral Commission's work. The permanent structure of the Electoral Commission is composed of a Secretariat that is managed by a Chief Elections Officer. The Chief Elections Officer has two deputies managing the work of the Secretariat's departments. Below the Secretariat there are a number of departments: electoral services, information technology, media and public relations, voter education, finance and administration and personnel. There are also three regional election offices and in the 28 districts election clerks located at the District Commissioners' offices. In order to conduct general elections 193 returning officers in each of the constituencies are appointed as well as approximately 27,000 polling station staff. Presiding officers for polling stations are also appointed from headmasters of schools and most temporary staff is drawn from the education sector.

The Electoral Commission is accountable to the president and has the power to regulate its own procedures by standing orders and powers to vary, suspend or revoke those standing orders. Further, the Minister of Justice, on recommendation of the Electoral Commission, may introduce regulations to enable it to improve its work. The Electoral Commission also

¹ Article 25 of the International Covenant on Civil and Political Rights (ICCPR), United Nations Human Rights Commission, General Comment No. 25, paragraph 21: "The drawing of electoral boundaries and method of allocating votes should not distort the distribution of voters."

received significant technical assistance from the United Nations Development Programme that was funded by the international community which, although supportive to the operational aspects of the elections, its capacity building legacy remains to be assessed.

B. The Administration of the Elections

In accordance with its mandate and international and regional standards the Electoral Commission organised these elections in a largely independent manner and although it faced many logistical and organisational challenges that exposed a lack of capacity, it managed to prepare for an election day that largely guaranteed universal suffrage.² It reacted to fundamental challenges to the schedule of the elections such as the large number of errors identified in the voter register in a positive manner demonstrating an ability to respond, to some extent, to the demands of stakeholders. The Electoral Commission's lack of adequate management as well as operational and logistical structures were however, exposed in its handling of the preparations for these elections. And at times its capacity risked jeopardising the timetable for the elections. Tight deadlines and limited capacity meant that important areas such as effective training of, and communication with polling officials, transparency measures, auditing and public accountability were not always adequate.³

The Electoral Commission's preparations for these elections were also carried out in an environment characterised by a general lack of confidence in its ability to supervise the elections and key stakeholders including opposition political parties constantly questioned its independence. The unilateral appointment of the Commissioners by the president that was unsuccessfully challenged in the courts only served to further reduce the confidence of opposition parties in the Electoral Commission. The contested manner in which the Commissioners were appointed also led to considerable delay in the posts being taken up by the appointees.

The Electoral Commission subsequently failed to react to the issue of the lack of confidence in its work with adequate confidence building mechanisms and it failed to provide for an inclusive environment. Generally key essential transparency requirements were poorly designed and not implemented to the extent needed to ensure full transparency. Whilst there was a lack of confidence and only a limited degree of transparency in the process the Electoral Commission did manage to deliver key operational needs. In contrast to the negative perception held by stakeholders of the Electoral Commission at national level, at local level its staff received broader confidence in their work. Polling staff worked professionally on election day and demonstrated a high degree of commitment.

² Article 25 ICCPR, United Nations Human Rights Commission, General Comment No. 25, paragraph 20: "An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant." See also Article 17 (1) African Union (not yet signed), African Charter on Democracy, Elections and Governance, 2007.

³ Section 2, Article 4 (e), the African Union Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII), 2002: "Democratic elections should be conducted [...] by impartial, all inclusive competent and accountable electoral institutions staffed by well trained personnel and equipped with adequate logistics." See also South African Development Community (SADC) Principles and Guidelines Governing Democratic Elections of 2004, Section 7, Article 7.3.

VI. VOTER REGISTRATION

A. The Right to Vote

The right to vote is established by the constitution and by the Parliamentary and Presidential Elections Act of 1993 and is based on reasonable criteria in line with international and regional standards. Disqualification from registration applies only to persons who have either been declared mentally incompetent, sentenced to death by a court or to persons convicted of any violation of any law relating to elections. For the latter offence this shall only be valid for the elections in question and not for subsequent elections.⁴ However, there remain discrepancies between the constitution and the Act regarding age criteria for qualification. While the Act allows any citizen of Malawi, or any foreign citizen ordinarily residing in the country for seven years, who has attained the age of 18 years on or before polling day to be registered as a voter, the constitution stipulates that to be eligible for registration a person must be 18 years old at the time of registration. For these elections, the Electoral Commission registered persons that although had not reached the age of 18 years at the time of registration they would be 18 years of age on polling day therefore following the Parliamentary and Presidential Elections Act's provision.

Despite the law providing the Electoral Commission with authority to deal with any complaints regarding the electoral process in general, there are no clear procedures to deal with challenges to the voter register. In June 2008 the Electoral Commission issued the Registration Procedures Manual and the Inspection of Voters' Roll Manual for the training of registration officers, which contains some procedural directions though insufficient and not available to the general public. Further, Section 89 of the Parliamentary and Presidential Elections Act of 1993 regarding complaints received during the voting process are applicable to the registration process. It states that any complaint received shall be deliberated upon among the registration officers opening space to misuse and manipulation and above all inconsistencies in the application of criteria since it can be left to the discretion of registration officers. As any decision of the Electoral Commission can be appealed, it is understood that a citizen who has been denied the right to be registered may appeal to the High Court. Nevertheless, considering the population density in the large rural areas where the High Court is not present this procedure is ineffective and unclear.

B. Voter Registration Procedures

The voter register was completely revised in 2008 after widespread recognition that the one used in 2004 was substandard. A computerised register has been introduced with voter identity cards and a large number of registered voters recorded. Between August 2008 and January 2009 the Electoral Commission originally estimated that it registered 5.9 million voters, out of 6.2 million eligible people recorded in the 2008 census (95 per cent) on the new register. There were, however, significant problems compiling the register. The Electoral Commission's registration clerks experienced difficulties using the technology for registration and a lack of adequate training and complex procedures to fill in peoples' details in the registration forms led to a large number of errors in the voter register database. A verification period that was held between 30 March 2009 and 3 April 2009 to allow the

⁴ Article 25 ICCPR, United Nations Human Rights Commission, General Comment No. 25, paragraph 14: "If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence."

public to inspect the register was extended for a period of seven days due to an initial low level of public interest. This period exposed serious shortcomings in the accuracy of the voter register and initiated a large scale internal audit in order to make corrections to it with the Electoral Commission employing around 500 clerks to work on checking entries. The auditing of the voter register ended on 11 May 2009 with registration details in 3,611 registration centres corrected from a total of 3,897. The audit was hindered due to poor archiving and retrieval of material from the voter registration exercise and of these registration centres only a certain percentage, estimated to be approximately 42 per cent, of registrations were checked.

A combination of time constraints and the fact the Electoral Commission could not locate a large number of the original script based parts of the registration forms to check against the database compounded problems. This meant that a large number of anomalies remained in the voter register that was used on election day most of which were related to misspelling or inconsistent entry of names. Because a large number of mistakes were due to misspelling of names the decision to print a secondary register that was available in polling stations with all entries ordered according to the voter registration number included on the voter registration card ensured that voters were able to vote on election day. However, time constraints meant there was no exhibition of the revised voter register and although the Electoral Commission agreed with the political parties that it would distribute the register to them in electronic format; it was unable to fulfil this commitment in time for this to have been of any use as a transparency mechanism before election day.

VII. REGISTRATION OF CANDIDATES AND POLITICAL PARTIES

A. Registration of Political Parties

Legal provisions for the registration of political parties in Malawi are reasonable and generally in line with international and regional standards relating to freedom of association.⁵ Registration of political parties in Malawi is under the authority of the Registrar of the Ministry of Justice and Judicial Affairs. The constitution provides for the political rights of citizens including the right to form, join and participate in the activities of a political party as well as to participate in political activity intended to influence the composition and policies of the government. Additionally, the Political Parties (Registration and Regulation) Act of 1993 establishes the principles for the registration of political parties and allows any citizen of Malawi who has reached the age of 18 years to be a member of a political party. Registration is refused to political parties whose purpose and object is unlawful including ethnic, racial or religious discrimination, seeking political change through violence or aiming secession of any part of the territory of Malawi. If the registration of a political party is refused or cancelled the decision can be challenged in the High Court.

⁵ Article 25 ICCPR, United Nations Human Rights Commission, General Comment No. 25, paragraph 26: "The right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25." See also Article 10 of the African Charter of Human and Peoples' Rights OAU Document CAB/LEG/67/3 rev, 1986 and African Union Declaration on the Principles Governing Democratic Elections in Africa, IV. Elections: Rights and Obligations, paragraph 5: "Every citizen shall have the freedom to establish or to be a member of a political party or Organization in accordance with the law."

B. Registration of Candidates

There are no discriminatory or unreasonable requirements to register as either a parliamentary or presidential candidate. Presidential candidates must be at least 35 years of age and should be citizens of Malawi by birth or descent whereas parliamentary candidates must be citizens of Malawi of at least 21 years of age and shall possess a level of English language enabling them to take an active part in the proceedings of parliament. An individual is not eligible for election either as president or as member of parliament if they have been declared bankrupt or convicted of a crime involving dishonesty or any violation relating to elections in the past seven years. Additionally, parliamentary and presidential candidates should neither be serving members of the defence forces or the police nor be holders of any public office.⁶ As the candidate nomination period occurred in January 2009 before the dissolution of parliament on 20 March 2009, this ban on individuals holding public office from standing as a candidate caused some technical problems as incumbent members of parliament who are effectively classified as holding public office put forward their nominations. The solution was found in withholding the official announcement of nominated candidates until the dissolution of parliament. Nevertheless, Section 39 of the Parliamentary and Presidential Elections Act of 1993 clearly states that once nomination papers are delivered and accepted by the returning officer a candidate shall be deemed to stand nominated.

For presidential and parliamentary elections, candidates shall submit their nomination papers together with supporting signatures of at least ten registered voters in each of the 28 districts of Malawi and pay a nomination fee. The increase in financial deposits required to contest elections in 2008, although very unpopular and particularly burdensome for smaller political parties, did not result in any significant reduction of candidates from previous elections and in many cases these fees were paid by political parties on behalf of the candidates. For presidential candidates the nomination fee amounted to MK500,000 (€2,400) whereas for parliamentary candidates the fee was MK100,000 (€480) both refundable unless the candidate withdraws or the number of valid votes cast for the candidate is less than five per cent of the total valid votes cast.

The Electoral Commission announced that they had accepted the candidatures of seven persons for the presidential elections and rejected two on the 21 March 2009: the candidates that were disqualified were the former president Bakili Muluzi due to the Electoral Commission's interpretation of Article 83 (3) of the constitution and Tionge Juda Maywa, due to lack of payment of the nomination fee. The single most controversial issue related to the registration of candidates was the eventual positioning of presidential candidates on the ballot paper. The incumbent president requested to use his first name on the ballot and subsequently positioning him at the top which was in contravention to laws stipulating the name included on the nomination forms be used at time of registration. A decision of the Electoral Commission that was continuously criticised by opposition political parties.

⁶ Article 25 ICCPR, United Nations Human Rights Commission, General Comment No. 25, paragraph 10: "Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation," and paragraph 16: "Conditions relating to nomination dates, fees or deposits should be reasonable and not discriminatory." See also the African Union Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII), 2002.

A total of 1,184 candidates had their nomination papers accepted to contest the 193 parliamentary seats. One nomination was initially rejected for Jeremiah Chihana of the NARC as he had been convicted for a criminal offence. On appeal he was reinstated. In all a total of 16 political parties put forward candidates for the parliamentary election. The DPP had 193 candidates contesting, UDF 171, MCP 134, People's Progressive Movement (PPM) 50, NARC 33, Aford 29, NRP 24 and PETRA 16. The remaining parties fielded a limited number of candidates and a number of parties only one single candidate. There were also a large number of 480 independent candidates contesting seats. The independent presidential candidate James Nyondo also paid the nomination fees for a total of 120 of these independent parliamentary candidates in return for their support for his candidature.

VIII. ELECTION CAMPAIGN AND PRE-ELECTION ENVIRONMENT

A. Background to the Election Campaign

Campaign related provisions are established in the Parliamentary and Presidential Elections Act of 1993, the Electoral Code of Conduct for Political Parties and Candidates issued by the Electoral Commission and a declaration of the Malawi Inter Political Parties Dialogue signed by the main political parties on 13 March 2009. The official campaign period commences two months prior to election day and ends with a 48 hour campaign moratorium. In general, the law provides that all political parties have the right to conduct their campaigns freely and on a level playing field. The main principles of campaign regulations include the right to equal access to public places to hold rallies and affix campaign material and equitable access to the media. They also prohibit the use of inflammatory, defamatory or insulting language or incitement to public disorder, violence or intimidation and any defacement or removal of election material. In terms of campaign rallies prior permission is required from District Commissioners and the police should be informed of such an event in the interests of the maintenance of public order. There are also legal provisions prohibiting the use of state resources for purposes other than what is required in public office. In the constitution Section 193 (4) explicitly prohibits state resources being used to campaign on behalf of a political party.

B. Overview of the Election Campaign

The political parties campaigned across the country in an environment whereby generally the freedoms of assembly, movement and speech were respected.⁷ Candidates and parties campaigned freely without interference in most parts of Malawi. The Multiparty Liaison Committees that were established to deal with campaign related complaints at local level, received broad confidence from stakeholders, and played a positive role in resolving disputes. Despite this there were frequent violations to the campaign code of conduct and the declaration agreed between the main political parties on 13 March 2009. Whilst there were no incidents of officials limiting the campaign activities of the candidates, there were some cases of restrictions or undue influences in parts of the country. These included arbitrary decisions by traditional leaders and chiefs regarding access to political parties to campaign venues as the candidates followed cultural convention and approached them for permission, which was refused on occasions. As well as in some cases these chiefs and traditional leaders openly

⁷ Article 25 ICCPR, United Nations Human Rights Commission, General Comment No. 25, paragraph 12: "Freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected." See also Section 4, Article 3, the African Union Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII), 2002.

campaigning for parties. On a limited number of instances rallies were also intentionally disrupted by opposing parties and at times this led to isolated clashes between supporters, particularly in the south of Malawi.

Campaign rallies were generally small and localised with a few larger rallies of presidential candidates. The parties campaigned to varying degrees with the DPP campaign by far the most organised and visible across Malawi. Each DPP parliamentary candidate also received a quota of bicycles and t-shirts from the party to campaign and an elaborate cavalcade toured with the president throughout the country. In comparison the other parties' campaigns were far more subdued as they lacked funding and resources. Following the disqualification of the former president and presidential candidate of the UDF, Bakili Muluzi, this party publicly supported the candidacy of the MCP presidential candidate John Tembo and attended numerous joint rallies between the two parties. The major parties published manifestos with campaign commitments and employed a wide range of campaign strategies including rallies and door-to-door canvassing of voters. Whilst presidential candidates toured the country the parliamentary election was more localised in the constituencies. The rallies were peaceful with a festive like atmosphere, however, the campaigning of some of the presidential candidates was very personality driven and critical towards opponents. At times the speeches of candidates at rallies were also defamatory and inflammatory. This was far less so at constituency levels with parliamentary candidates discussing more policy driven issues.

On a national level there was little tension evident, although in pockets of the country, where the DPP were contesting against UDF candidates, or where independent candidates were contesting against opponents whom they lost the primary elections to there were increased tensions. The DPP and to a lesser extent the UDF and MCP and the smaller parties all distributed t-shirts, printed cloth and other party paraphernalia at rallies. There was a marked difference between the political parties in terms of their investment in these handouts with the DPP's campaign team distributing these widely and the remaining parties and candidates all complaining about the lack of adequate resources to mount an effective campaign. This was in contrast to DPP candidates who enjoyed both access to far greater financial resources as well as the resources attached to the presidential office that created an unlevel playing field between contestants.

C. Use of State Resources

Section 193 (4) of the constitution prohibits the use of state resources for campaigning for a particular political party. However, the use of these resources for campaign purposes was overt and there was an evident blurring of the boundaries between the presidential office and campaign activities. The president also attended a number of official ceremonial openings of public and private sector projects during the campaign period that received wide coverage in the media. There were reports from European Union observers throughout the country that state resources were being used for campaigning. Given that there was a lack of measures to prevent such use this went unabated. The president travelled throughout the country during the campaign period and he was observed using a range of state owned resources for campaigning including a helicopter, vehicles for his campaign team and supporters, security services and it was reported that regulatory agencies were used to print out campaign material. State owned media also provided an almost exclusive platform for the activities of members of the DPP. Incumbent parliamentarians were also observed using state owned transport for campaign purposes.

D. Campaign Finance

The constitution provides for public funding of political parties represented in parliament, which achieve one tenth of national vote, though this is not intended to finance campaigns but ensure sustainability of the political party and to represent its constituencies. Section 66 of the Parliamentary and Presidential Elections Act of 1993 foresees that in order to finance the election campaign, political parties are allowed to receive contributions from any individual, from any non-governmental or private organisations either inside or outside Malawi. The legal framework does neither provide for any limit on campaign expenditure nor for disclosure of the amounts and sources of funding.⁸ Electoral best practices on transparency require regulations governing the funding of political parties and disclosure of funding sources for electoral campaigns and the system presently in place does not meet these basic requirements.

E. Voter Education

A total of 75 civil society organisations were accredited by the Electoral Commission to implement civic and voter education programmes and 34 of these organisations received funding from the international donor basket fund for the elections. These initiatives included plans for a range of programmes to increase public awareness of both the voting procedures and the rights of voters. In this respect, voter education included advertisements in the media, some grass roots level outreach and printed material. Many of these programmes started too late in the election process and many of the organisations responsible for these programmes complained of delays in receiving funds. This had an impact on the success and reach of the initiative. European Union observers reported inadequate levels of voter education in the field and particularly in remote areas of the country. There were, however, some very successful programmes including a series of town hall meetings with parliamentary candidates debating their manifestos that were organised by the National Initiative for Civic Education (NICE) across the country.

IX. MEDIA AND ELECTIONS

A. Media Environment

Freedom of speech in the media was generally respected during the campaign period with no reports of any major restrictions of movement or access of journalists who were relatively free to cover the campaigns of the candidates and parties. The only notable incident of restrictions to the media during the period of the elections was on election day when armed police entered the premises of the radio station Joy FM and, in an unproportionate response, this led to the suspension of this station's factual programming after it aired material that breached the campaign moratorium.⁹

⁸ Article 25 ICCPR, United Nations Human Rights Commission, General Comment No. 25, paragraph 19: "Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party."

⁹ The United Nation's Human Rights Committee recognises a three pronged test for such restrictions which should: 1) be provided by law 2) be for the purpose of safeguarding one of the legitimate interests listed; and 3) be necessary to achieve this goal. Article 25 ICCPR, United Nations Human Rights Commission, General Comment No. 25, paragraph 25: "The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion."

Although radio and television broadcasters and newspapers are available radio is the only medium to have any significant reach in the country. The state owned Malawi Broadcasting Corporation (MBC) is the dominant media company and it operates the most listened to radio stations in Malawi, Radio 1 and 2 that have a reach of almost 90 per cent of the country. There are some 20 private radio stations and the major ones include Capital Radio, Malawi Institute of Journalism (MIJ) Radio, Power 101, Zodiak Radio and Joy Radio. These stations have more limited coverage than the MBC stations. Other radio broadcasters include Radio Islam, Calvary Family Church Radio, Transworld Radio and Radio Maria that are religion based. Television of Malawi (TVM) is the only terrestrial television broadcaster in the country and it is state owned. Whilst it is estimated to transmit to 70 per cent of the country its audience reach is less significant than that of MBC because television is less prevalent in rural areas. There are two private daily newspapers: *The Nation* and *The Daily Times*. A number of weekly newspapers are also published including *The Guardian*, *The Chronicle*, *The News* and *The Tribune*.

B. Legal Framework for the Media and Elections

Articles 35 and 36 of the constitution guarantee freedom of speech and expression. There is a range of legal and self regulatory provisions related to the media's coverage of elections. All major media outlets also signed a code of conduct in 2008 that established basic principles for election coverage. The code contains standard commitments to remain objective and balanced as well as accuracy requirements. The Communications Act of 1998 establishes a requirement placed on the regulatory agency, Malawi Communications Regulatory Authority (MACRA), 'to ensure equitable treatment of political parties and election candidates by all broadcasting licensees during an election period.' (Article 45, 1f). It further stipulates that the Authority may include a provision for equitable and balanced reporting in licenses for broadcasters according to Article 51 (3a) as well as a provision for party political broadcasts. In the schedules of the Communication Act a code of conduct is included that states 'during any election period, all broadcasting licensees shall ensure equitable treatment of political parties, election candidates and electoral issues' (Article 6). The Act does not, however, include provisions to define the role of MACRA in enforcing these measures and it therefore leaves a regulatory vacuum.

The state owned broadcaster, MBC is also covered by the Act. Article 86 et seq., establishes both the powers and mandate of this broadcaster as a public service broadcaster. Article 87 requires that its television and radio services should provide balanced coverage and refrain from expressing an opinion. Moreover, MBC should provide a general service to inform, educate and entertain as is standard legal form for public service broadcasters. The Parliamentary and Presidential Elections Act of 1993, Section 63, also grants all political parties the right to have their campaign reported on MBC's news coverage and in its bulletins. Finally, the Electoral Commission may enter into an agreement with MBC to allocate political parties time on radio and television.

There are therefore a number of legal measures related to the media's coverage of elections, but in practice the lack of implementation and enforcement of these provisions and a number of grey areas means there is an insufficient framework for the media to operate within. In this respect, during these elections the media, especially the state owned media, operated outside any regulatory parameters and lacked independence that led to an absence of balanced, or even proportionate coverage, of political actors that excluded contesting parties from key media coverage. The unsatisfactory regulatory framework, poor financial resources of media

outlets and lack of editorial independence of state owned media also meant that in key areas the election coverage of some sections of the media did not meet international or regional standards.¹⁰ Furthermore, the state owned media in particular failed to fulfil even their minimum obligations as public service broadcasters as established in the Communications Act of 1998. Whilst the Electoral Commission managed to introduce an initiative to provide for free airtime for party political broadcasts on the private radio stations Capital and Zodiak, this had limited success because it started late in the campaign period and the failure of the state owned media to participate in the scheme undermined its full potential.

C. Monitoring of Media Coverage of the Elections

The state owned radio and television broadcasters, the MBC and TVM, allocated a dominant share of their coverage of political actors to the president, government and DPP. On MBC the president, government and DPP received a total of 81 per cent share of coverage of political actors with the MCP receiving seven per cent and UDF six per cent. Similarly on TVM the president, government and DPP was afforded 81 per cent share of coverage, MCP seven per cent and UDF six per cent. On both of these channels the tone of coverage of the incumbent was largely positive. None of the other political parties received any notable coverage on both of these channels and when they did receive coverage it was consistently negative in tone. The content of the private radio station Joy FM also demonstrated imbalance with the UDF and MCP receiving 45 and 41 per cent share of this station's coverage of political actors respectively. The DPP received 13 per cent share of coverage on this radio station.

In contrast, the remaining private radio stations and newspapers monitored Capital, MIJ Radio, Power 101 FM and Zodiak, and *The Nation* and *The Daily Times* provided impartial and more balanced coverage of the political parties contesting the elections. On Capital the DPP was afforded 23 per cent of coverage, the government four per cent, UDF 31 per cent and MCP 14 per cent with independent candidates receiving 20 per cent. A similar balance was evident in Zodiak's programming with the DPP receiving 23 per cent share of coverage, MCP 19 per cent, UDF 16 per cent, PETRA 10 per cent and Aford and NRC six per cent each. Power 101 FM afforded the UDF 30 per cent, MCP 22 per cent, DPP 18 per cent and independents 19 per cent in its coverage and MIJ Radio the DPP 39 per cent, independents 25 per cent and the UDF and MCP 13 and 12 per cent each share of its coverage of political actors. The daily newspapers also provided diverse coverage of the contesting parties and candidates: *The Nation* allocated 30 per cent of its coverage of the campaign to DPP and the government followed by UDF with 20 per cent and MCP 17 per cent. Independents received seven per cent share and NRC and Aford between five and seven per cent share. In *The Daily Times* the UDF received 31 per cent share of coverage and the DPP and government 31 per cent and the MCP 17 per cent share.

¹⁰ African Union, (not yet signed) African Charter on Democracy, Elections and Governance 2007, Chapter 7, Article 17 (3): State Parties shall "Ensure fair and equitable access to contesting parties and candidates to state controlled media during elections." See also Section 4, Article 12, African Union Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII), 2002: "Every candidate and political party shall respect the impartiality of the public media by undertaking to refrain from any act which might constrain or limit their electoral adversaries from using the facilities and resources of the public media to air their campaign." Article 2.1.5 South African Development Community (SADC) Principles and Guidelines Governing Democratic Elections of 2004: SADC member states [shall provide] "Equal opportunity for all political parties to access the state media."

X. PARTICIPATION OF WOMEN AND MINORITIES

A. Participation of Women

The constitution guarantees equal rights for the sexes and there are no legal impediments for women to stand for election or be registered as a voter. However, their representation in Malawian public and political life remains limited even though women represent 52 per cent of the electorate. From a total of 1,184 parliamentary candidates 232 were women and from the seven candidates contesting the presidential election one of these was a woman and two running mates were female. There were some targeted projects to help increase the visibility of women candidates under the direction of the 50:50 campaign and these included advertisements and capacity building.

There was also some recognition by the political parties of the need to provide greater support for women in public life and particularly DPP raised a number of gender issues in their campaign manifesto to promote the position of women in society. In general women candidates faced economic and social constraints both in the process of being nominated as a candidate, and where they were nominated, campaigning on a level playing field against their male counterparts. They experienced obstacles ranging from a lack of financial resources, male dominated local social structures as well as the generally low opportunities women have afforded to them in the educational system. Despite these obstacles an increase in elected women in parliament has been recorded as 42 were elected and there is a female vice president for the first time in the history of Malawi working towards meeting regional commitments for the representation of women in political and decision making structures.¹¹ A total of 31 of these elected women stood as DPP candidates, seven as independents, three MCP and one as a UDF candidate.

B. Participation of Minorities and Special Needs Voting

There are no obstacles to any specific minority group participating in the elections as either candidates or voters. No provisions are included in candidate or party registration requirements that are discriminatory to minority groups in Malawi. Likewise the voter register is open to all individuals who have reached the age of 18 years and there are no obstacles to being included in the register based on ethnicity or disability. The constitution provides for the fullest possible participation of the disabled in all spheres of society. At polling stations there were provisions for assisted voting and tactile ballot guides were available for blind voters demonstrating a positive policy towards inclusion of all groups in society. Although there were no specific voter education programmes for disabled persons, there has been an effort from the Malawi Union of the Blind to inform the blind how to cast their vote on election day.

XI. PARTICIPATION OF CIVIL SOCIETY

Civil society organisations played an important role in providing increased transparency at polling stations as well as during the counting and aggregation processes. These organisations also attempted to broaden the policy debate in the country by publishing their own manifesto

¹¹ Article H (i) of the South African Development Community (SADC) Declaration on Gender and Development, 1997: SADC member states [are committed to] “Ensuring the equal representation of women and men [...] and the achievement of at least 30 per cent target of women in political and decision making structures by year 2005.”

for civil society. Domestic election monitors were deployed to nearly all polling stations in the country providing for increased transparency. The main groups to deploy monitors for these elections were NICE that deployed some 4,200 monitors to polling stations and the Malawi Election Support Network (MESN), which deployed 1,400 monitors. International observer missions from the African Union, the Commonwealth and the South Africa Development Community (SADC) observed the elections as well as the Electoral Institute of South Africa (EISA).

XII.COMPLAINTS AND APPEALS

The judiciary enjoys broad confidence and is perceived as independent and impartial. The legal framework provides generally sound mechanisms for the enforcement of its provisions. Channels for election related complaints are generally clear and offer voters and candidates the right of appeal to the High Court any decision of the Electoral Commission. The constitution provides for the Electoral Commission to determine petitions and complaints related to the conduct of elections while also affording the High Court unlimited original jurisdiction to hear and determine any civil or criminal proceedings. Therefore, the Electoral Commission has the authority to deal with any complaint or petition relating to the election process as long as it is not of criminal nature. Electoral offences, considered criminal acts, and petitions challenging election results fall clearly under the jurisdiction of the judiciary. In order to improve the legal timelines and the lack of deadlines to deal with election related cases, the Chief Justice issued a practice direction abridging the time periods for these cases to be dealt with. The document stipulated the steps and timeframe for proceedings to be respected by the High Court, Supreme Court of Appeal and the parties involved to avoid unnecessary delays.

A. Electoral Offences

Electoral offences are set out in part XII of the Parliamentary and Presidential Elections Act of 1993 and include *inter alia* double registration, false statements regarding qualification for registration, falsification of registration certificates, holding unauthorised meetings, campaigning within the 48 hour moratorium, destruction of campaign material, unauthorised voting, impersonation and violation of the secrecy of voting. Other offences during an election period are also provided for in the Penal Code of 1930 as amended such as defamation, inflammatory or insulting speech and incitement to public disorder or violence. Electoral offences under the Parliamentary and Presidential Elections Act of 1993 are considered as criminal in nature therefore following criminal procedure under the jurisdiction of the courts. Penalties include a fine of MK5,000 (€24) and/or two years imprisonment. The court may also order the suspension of the convicted person's right to vote in the election or barring the person to perform the duties of their office in connection with the election. The decision of the Magistrate Court might ultimately be appealed to the High Court.

There were 17 cases of electoral offences reported to the police including seven cases of illegal possession and attempts to sell voter certificates, eight cases of destruction of campaign material, one case related to the disruption of a rally in Blantyre and one unauthorised rally at Nkhata Bay Central. The Electoral Commission has also referred to the police 485 cases of double registration detected during the cleaning of the voter register. Further, there were several arrests made by the police prior to and after election day. Hophmally Makende, UDF deputy secretary general and Kamlepo Kalua, president of the MDC were accused of seditious offences and incitement to violence at a rally. Gwanda

Chakuamba, president of the NRP, also faced charges of incitement to violence against the Lhomwes, the tribe of the incumbent president. On election day, when the police suspended the services of Joy Radio two journalists and a technician were arrested and face prosecution for non compliance with the electoral law. Another arrest occurred on the evening of the election when the director of research for the UDF, Humphrey Mvula, was allegedly caught with and charged of being in possession of official result forms. Finally, Gilbert Tembo, an editor for the Ministry of Information was arrested on 23 May 2009 and charged with being in possession of seditious publications.¹² He was found with brochures containing the biography of MCP leader John Tembo describing him as the president of Malawi.

B. Complaints and Appeals

Sections 76 (3) and (5) of the constitution and sections 40 and 114 of the Parliamentary and Presidential Elections Act of 1993 as amended provide that any decision of the Electoral Commission may be reviewed by the High Court by judicial review and that any complaint regarding irregularities during the election process shall be submitted by way of petition to the Electoral Commission whose decision may also be appealed to the High Court in accordance with international standards.¹³

Three candidates challenged the decision of the Electoral Commission to reject their nominations in the High Court. The most high profile case of those disqualified was that of former president Bakili Muluzi at the Constitutional Court relating to the interpretation of Section 83 (3) of the constitution. The court upheld the decision of the Electoral Commission that no candidate could stand for more than two terms in presidential office. Another presidential nominee, Tionge Juda Mauya whose nomination papers were rejected by the Electoral Commission because he did not pay the nomination fee also appealed the decision. However, he demonstrated to the court his intention to withdraw the matter. Finally, a parliamentary candidate, Yerehiah Chihana, whose nomination papers were refused by the Electoral Commission because of a criminal conviction, also appealed his disqualification. The High Court ruled that the Electoral Commission did not have the right to disqualify him from standing because his conviction was not under the category of disqualified offences. Nevertheless, the Electoral Commission appealed to the Supreme Court of Appeal against the decision of the High Court in Mzuzu, although this candidate was included on the ballot paper.

Prior to election day the Electoral Commission received approximately 30 formal complaints. Most of these referred to the voter verification exercise and the omission of names in the voter register as well as false information during candidate nominations. There were a few complaints concerned with campaigning and defacement of campaign material. A large percentage of complaints related to the campaign were resolved by consensus at the Multiparty Liaison Committees. Following election day the Electoral Commission received an additional 135 complaints regarding irregularities during polling day. The majority of

¹² According to the amended Penal Code of Malawi of 1930, Section 45, seditious publication means a publication having seditious intention. Section 50 defines seditious intention as “an intention a) to bring into hatred or contempt or to excite disaffection against the person of the President, or the Government.”

¹³ See Article 2 ICCPR, United Nations Human Rights Commission, General Comment No. 25, paragraph 20: “There should be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes.” See also African Union, Article 7 of the African Charter of Human and Peoples’ Rights, OAU Document CAB/LEG/67/3 rev, 1986.

these related to instances of candidates campaigning on election day, political party representatives not receiving copies of result sheets, allegations of intimidation of voters and discrepancies between the number of registered voters and the number of cast ballots. There were also allegations of instances of results being changed after the signature of the political parties' representatives. Most of these incidents did not alter the results themselves and were mainly corrections to miscalculations. Conscious of the right to appeal and the right to petition by any aggrieved party, the Electoral Commission dealt with these complaints before announcing the results for the parliamentary elections. All of the remedies requested for the 135 complaints that included requests for recounting, re-runs of elections and declaring null and void the elections in certain constituencies were rejected by the Electoral Commission.

C. Petitions

According to the Parliamentary and Presidential Elections Act of 1993, the validity of the elections can be challenged by a petition presented before the High Court within 48 hours of the declaration of results.¹⁴ The only challenge to the presidential election results was submitted on 22 May 2009 by the presidential candidate John Tembo who filed a petition at the High Court in Lilongwe challenging the results. He requested the court declare the results to be null and void. The complainant contended that elections have not been free and fair due to several reasons such as bias in the media and misuse of state resources during the campaign. Furthermore, he has claimed a number of monitors were not provided with copies of result sheets and that during the transmission of results in some instances the vehicles transporting results were diverted.

In respect to the parliamentary election, a total of 59 petitions were filed at the High Court. The aggrieved parties did not wait for the decision of the Electoral Commission on their complaints and approximately 56 petitions were filed at the High Court before the announcement of results in the media. The premature filing of petitions was caused due to two main reasons: first, the uncertainty of when declared results are considered official and second, the limited timeframe for the filing of a petition after the declaration of results. The electoral law is unclear regarding the declaration and the publication of results. According to the Parliamentary and Presidential Elections Act of 1993, the Electoral Commission shall publish the national results of elections in the Gazette and by radio broadcast. Further, it states that a petition may be presented at the High Court within 48 hours of the declaration of the results. The law does not mention when results are considered to be declared, if at constituency level when returning officers announce the results or when results are radio broadcast or published in the Gazette and newspapers.

At the time of writing, two candidates had withdrawn their petitions and the court dismissed one petition relating to Blantyre Kabula constituency while another 16 petitioners have not pursued their original petitions through contact with their legal counsel allegedly due to the high fees. As for the remaining petitions, the court was still waiting either for the affidavits of evidence to be submitted or for the parties involved to be served in order to schedule a hearing. These petitions concerned allegations of undue influence of voters during the voting process either by village headmen or polling station staff, non registered voters being allowed to cast their ballot, discrepancies on the result sheets and on the number of registered voters

¹⁴ Article 2.1.10, South African Development Community (SADC) Principles and Guidelines Governing Democratic Elections of 2004: "SADC Member States shall adhere to the following principles in the conduct of democratic elections: Challenges of the election results as provided for in the law of the land."

and number of cast ballots. Further grounds for petitions included political parties' representatives not being allowed to observe the counting and the tally processes, campaign activities during election day and two petitions challenging the eligibility of the elected candidate for Lilongwe Nkhoma Mpenu, Joyce Azizi Banda, claiming she is a holder of public office. It is likely that a significant number of these petitions will be discontinued by the parties mainly due to the financial costs involved despite legal aid being provided by the state.

XIII. ELECTION DAY

A. Overview of Voting

Generally, all material required for voting and polling staff were present on opening to ensure voting started on time and voting commenced at the large majority of polling stations according to schedule. The death of a NARC candidate in the constituency of Blantyre Central led to the cancellation of the parliamentary election in this constituency. However, the presidential election went ahead as scheduled. Overall, voting was conducted in a calm manner and the process was well organised. Polling procedures in 85 per cent of polling stations visited by European Union observers were assessed as satisfactory or positive and although there was inconsistency in following certain procedures, including security checks related to the voter register, the intent of the officials was to be inclusive.

In a few polling stations visited some sensitive material was missing including items such as the secondary registers, but this did not affect the overall process. Following instructions from the Electoral Commission voters who were not included in the voter register but had a voter identity card were allowed to vote, and although this somewhat reduced the security measures put in place to ensure the integrity of the voter register, it generally ensured the universal nature of the franchise across the country. Polling staff were committed and overall acted professionally in the polling stations visited. It was also at times unclear as to the role of personnel at polling stations with some polling stations lacking clearly defined roles for security personnel and party agents in areas such as assisted voting. Furthermore, poor visibility material identifying party agents and observers made it difficult to distinguish between the two in some polling stations. Efficient processing of voters, use of controls and safeguards by polling staff and the secrecy of the vote were also assessed as very good or good in over 95 per cent of polling stations visited. European Union observers assessed the overall environment for polling positively. Closing was also assessed as fair to good in all polling stations visited.

XIV. RESULTS

A. Counting and the Announcement of Results

Immediately following the close of polling, counting commenced at all polling stations in clear sight of party agents and election observers. Counting was conducted in a calm and orderly environment with procedures mainly followed in very difficult conditions in many cases due to the poor visibility conditions. It went on across the country throughout most of the night. On the whole opening, voting itself and closing and counting were carried out transparently and in full view of monitors providing for an inclusive process. Although polling officials generally followed procedures during the counting process and it remained

transparent there were a high number of instances of mistakes made in reconciliation where either procedures were not followed or errors in arithmetic led to anomalies in reconciliation.

The aggregation process that followed counting at district level was slow as material was retrieved from polling centres. It remained transparent and monitors and other stakeholders had unobstructed access in order to observe. It therefore remained both transparent and largely consensual throughout all stages of the process. Some of the forms containing the aggregated results were transmitted to the national results centre in Blantyre. However, significant problems were experienced with the transmission system set up to receive the results. Aggregation forms received from the field with mistakes were sent back for corrections to be made that created confusion and generally the system failed. Furthermore, officials in the districts attempted to fax the wrong forms to the results centre and there was a general failure in this stage of the process. The most critical problem appears to have been a combination of factors leading to a total breakdown of the fax transmission system to relay results from the districts to the national results centre in Blantyre due to a lack of adequate training, complete absence of system checks and no quality assurance guarantees in place. After 24 hours the Electoral Commission decided to receive the aggregated results in hardcopy from the constituency returning officers that on one hand expedited the release of national results, but on the other hand, meant security measures and auditing to identify and correct errors were neglected.

Election results for the presidential election were released at 01:00 hours on 22 May 2009 declaring the incumbent president Bingu wa Mutharika, of the DPP elected for a second term in office. The official inauguration took place on 22 May 2009 in Blantyre. The results of the presidential election were generally accepted across the country. All of the political parties acknowledged them to some extent shortly after their release with the former president, Bakili Muluzi, of the UDF, publicly congratulating the president on his re-election on 21 May 2009. John Tembo, of the MCP, however, rejected the results at a press conference held in Lilongwe on 20 May 2009 citing numerous incidents of irregularities in polling and results, particularly in his traditional stronghold of Central Region. The Electoral Commission released the majority of uncertified results for the parliamentary election by 23 May 2009 and the final official results were published on 31 May 2009. Whilst overall there was general acceptance of the parliamentary results in most of the country there were contested areas that have seen complaints submitted to the Electoral Commission.

B. Political Overview of the Election Results

The results show a significant win in the presidential election for the incumbent president, Bingu wa Mutharika. The president received a total of 2,961,099 votes, his main challenger John Tembo of the MCP 1,373,459 and the next highest number of votes were attained by the PETRA candidate Walter Kamuzu who received a total of 35,296 votes. The number of valid votes was 4,600,757, a high turnout of 78.3 per cent. A total of 328,071 ballots were spoilt representing below one per cent of the total number of ballots cast. The president therefore received 64.3 per cent of the popular vote followed by John Tembo with 29.8 per cent. All of the remaining presidential candidates received below six per cent of the vote collectively.

In the parliamentary election the two main contesting parties, the MCP and UDF, have performed poorly at the polls and the DPP extremely well. These results include 192 constituencies. There will be a by-election in the final constituency of Blantyre Central because of the death of the candidate prior to election day. Another by-election will have to

take place in Zomba Malosa constituency where the vice presidential candidate of the DPP Joyce Banda stood for parliament and won. It is also possible that a by-election will have to take place in Machinga South West constituency because the UDF candidate who won this seat is in prison.

The results of the parliamentary election show that in the north DPP candidates have won 24 seats, independents eight and Aford one. In Central the DPP won 37 seats, MCP 27, independent candidates eight and Maravi (MMP) candidates one seat. In the south DPP won 51 seats, UDF 18 and independent candidates 16 seats with Mafunde winning one seat. Nationally this means the DPP have won 112 seats, MCP 27, UDF 18 and independent candidates have won 32 seats. Aford have won one seat, MMP one seat and Mafunde one seat. The results mean, although one constituency is outstanding, that the DPP has an absolute majority in parliament and is able to obtain a two thirds of seats (128) required to change the constitution with the support of the independent candidates who have been elected and have demonstrated their support for the DPP administration by joining the DPP benches following the swearing in ceremony. A total of 42 women candidates have been elected, a significant number of which stood as DPP candidates. Elected parliamentarians were sworn into office on 1 June 2009 in line with legal provisions.

XV. RECOMMENDATIONS

The following recommendations to improve the electoral process and related areas are offered for consideration and action by the Government of Malawi, Electoral Commission, political parties, civil society and the international community.

Legal Framework

1. The timeframes relating to the dissolution of parliament, nomination of candidates, campaign period and election day caused legal uncertainty regarding incumbent members of parliament. There is a need to align the electoral calendar to ensure different parts of the electoral process are consistent.
2. The framework regarding the regulation of campaign provisions should be clarified to ensure greater compliance to legal provisions in this area. Independent regulatory oversight with clear legal parameters should be introduced to ensure a separation between the use of state resources for public office and campaigning to minimise any areas of uncertainty.

Electoral System

3. A review of constituency boundaries should be undertaken to ensure boundary demarcations reflect population density and weighting in parliamentary representation. This should continue to be undertaken taking into consideration the geography and demographics of Malawi as is currently the case.

Election Administration

4. The Electoral Commission should conduct an internal review of its procedures and structures in light of its limited capacity in organising these elections. The external

expertise supplied by the United Nations Development Programme should also be assessed as part of this process.

5. Enhanced transparency measures to be introduced by the Electoral Commission at all levels of the electoral administration to guarantee accountability throughout the election process. The Electoral Commission should also undergo a review of procedures and capacity structures for it to be able to organise elections and introduce greater performance guarantees.
6. A legal department should be established in the Secretariat of the Electoral Commission under the direction of the Commissioners in order for it to more fully deal with complaints. This department should receive all necessary resources to guarantee complaints are processed in a timely and consistent manner.
7. The financial needs of the Electoral Commission should be independently assessed and options for adequate annual funding considered to ensure this institutions independence and capacity. Financial accountability and annual accounts should also be published to guarantee public accountability.
8. The procedures for the selection of the Electoral Commission's Commissioners should be reviewed in order to increase transparency. A two term limit could be considered and appointments should be made by an independent panel based on best practice principles for public appointments.
9. The political party consultative meetings should be developed as a more regular platform of dialogue between the Electoral Commission and the political parties. Full transparency measures need also to be introduced including formal rules for meetings and published minutes and consideration should be given to appointing a liaison officer for political parties and other stakeholders. Full financial transparency measures should also be introduced for the organisation of these meetings.
10. The returning officers should be supported at constituency level by two deputy returning officers during periods of elections. Consideration should be made to strengthening the role and increasing the resources available for the district electoral clerks. Furthermore, provisions should be made for the pool of temporary polling staff including presiding officers be drawn from a wider group of candidates and appointed after public advertisement of these posts.
11. The Electoral Commission should increase its training activities and design a permanent and rolling programme for polling officials to ensure all areas of the technical process are fully understood by officials. This should cover all election related processes ranging from voter registration and aggregation. Systems for communication from the Electoral Commission to the field need to be reviewed to ensure consistent and regular directions are communicated in a timely manner across the country.
12. An adequate and reliable results system should be designed to ensure the integrity and reliability in the collection, aggregation and publication of results. Key procedures should be reviewed and suitable measures put in place to ensure the accuracy and security of results as they are collected from polling stations.

13. A review of the electoral services and information technology departments of the Electoral Commission should be undertaken in respect to the system employed for the collection of the final results. Adequate training for staff responsible in the field for aggregation of results should be provided and more resources available to enable them to carry out their work.

Voter Registration

14. An extensive review of the voter register and the voter register exercise should be undertaken. A greater period of time should also be planned for public exhibition of the register and a permanent registration process should be considered. The parties should also receive copies of the register well in advance of elections, together with copies of all special voter lists at regional and national levels. These should also be displayed in public in the vicinity of polling stations.
15. Regulations should be issued governing the registration of voters specifying the procedures for challenges and complaints regarding voter registration, deadlines and the competent authority to deal with these complaints. In order to ensure consistency and simplification of the process, the Electoral Commission is advised to establish a body such as a District Registration Review Committee to deal with complaints, whose decision can be appealed to the Magistrate Court as it is physically closer to citizens.

Political Parties and Candidates

16. The national capacity of political parties needs to be strengthened. Consideration should be given to provisions on state funding not only for the sustainability of political parties but also for campaign funding that guarantees a more level playing field and a reduction of dependency on contributions. Clear and transparent rules for the distribution and accountability of such funding should be established.

Campaign Environment

17. The system for campaign spending should be reviewed as it is inadequate. Consideration should be given to placing a ceiling on spending and introducing an appropriate and transparent system for public accountability in campaign spending. The political parties should submit accounts of their donations and spending on a regular basis to a relevant authority for the duration of the campaign period ensuring maximum transparency.

Voter Education

18. More extensive and permanent voter and civic education should be introduced throughout the year to inform and educate voters of both their rights as voters as well as registration and voting procedures. The responsible institutions should also ensure this reaches grass roots level and the authorities provide an adequate budget for these activities to be undertaken.

The Media Sector

19. The provisions of the Communications Act should be clarified to ensure a satisfactory regulatory environment for the broadcast media, whilst respecting the principle of freedom of speech. It should set out programme standards and broadcaster obligations as well as provisions relating to media coverage of elections.
20. Legal clarification should be given to the provision for equal access to state-owned media for presidential candidates and political parties that takes into account the parliamentary representation and/or number of constituency seats political parties have candidates contesting.
21. An independent regulatory authority should be established for the audiovisual sector. This regulatory authority's functions and mandate should be clearly defined and it should have an adequately funded secretariat to undertake management responsibilities. It should also have statutory powers for it to adequately deal with complaints against programming and ensure editorial standards are maintained.
22. A regulatory structure should be established to ensure that the Malawi Broadcasting Corporation and Television Malawi fulfil their obligations as public service broadcasters. Mechanisms should be set up to ensure the independence and public accountability of state owned media and a clear monitoring mechanism introduced to guarantee impartiality and balance is maintained.

Promote the Participation of Women and Minorities

23. A stronger position for women and minorities in parliament, governance and political parties should be encouraged through affirmative action within the political parties themselves. Initiatives to encourage the representation of women in public and political life should also be considered and the Electoral Commission also introduce a pro-active gender policy to ensure women take up key positions.

Civil Society and Domestic Observation

24. The active position of civil society in Malawi should continue to be supported in respect to their election related work. Civil society organisations should continue to work together in observing elections to ensure coordination between organisations. The Electoral Commission should also actively engage with these groups to ensure their maximum potential is realised.

Complaints and Appeals

25. The timeframe to file a petition to the High Court challenging the results of elections should be realistic and effective. The Parliamentary and Presidential Elections Act of 1993 should be amended to include a timeframe of between 21 or 30 days after the announcement of results for petitions to be submitted. Furthermore, deadlines for conclusions to election petitions should be implemented providing an effective and timely remedy to petitioners.

Polling, Counting and Publication of the Results

26. There should be an increase in the number of polling stations in higher population density areas. A maximum ceiling of 600 voters should be placed on the number of voters registered at an individual polling station to ensure regular voting patterns and less crowding.
27. More training conducted well in advance of election day should be planned by the Electoral Commission. A permanent register of polling officials should be maintained with regular training sessions conducted throughout the country. This training should include polling officials, party agents, observers and security forces. It should also clearly outline the roles and responsibilities of the different stakeholders in respect to the election process.
28. Consideration should be given to adjusting the closing time of polling stations to ensure that counting can be conducted in a suitable environment with adequate lighting and visibility. This is particularly the case for polling stations that are situated outside in the open air.
29. The layout of polling stations should be redesigned to reduce confusion and crowding. A design based on ease of access, voter flows and security as well as transparency should be envisaged to ensure improvements in access and understanding of polling station layouts.
30. Increased visibility material should be made available for identifying polling officials, party agents and observers at polling stations. Furthermore, polling stations that are located in the open air should receive some form of temporary cover in case of rainfall.
31. Greater safeguards need to be introduced to guarantee the accuracy of the aggregation process. Forms for closing and tallying should be simplified and polling staff should receive advanced training in handling the forms, handover of documents and data entry and these should be simplified as they are overly complex in design. The systems used should be thoroughly tested before any further elections and staff receive training in how to handle the equipment.