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UNIÃO AFRICANA

Addis Ababa, Ethiopia P. O. Box 3243 Telephone: +251 11 551 7700 / Fax: +251 11 551 7844
Web site: www.au.int

PRE-ELECTION STATEMENT

The African Union Election Observation Mission to Kenya's 2017 Elections

Nairobi, Kenya

Wednesday, 2 August 2017

1. Introduction

Kenya will hold General Elections on 8 August 2017 to elect a President, Governors, Senators, County Women Members to the National Assembly, Members of Parliament and Members of the County Assemblies. This will be the second consecutive elections following the coming into force of the 2010 Constitution. These elections, therefore, present a golden opportunity for the country to nurture its democratic governance, as well as to consolidate its stability and peace, all of which are so critical for the country's socio-economic development and structural transformation in the long term perspective.

Following an African Union Pre-election Assessment Mission (PAM) deployed in Kenya on 18 – 28 June 2017, and at the invitation of the Independent Electoral and Boundaries Commission (IEBC) and Government of Kenya, the Chairperson of the African Union Commission (AUC) deployed 14 Long Term Observers (LTOs) to 29 counties as part of the African Union Election Observation Mission (AUEOM). The objective of the AUEOM is to provide independent, objective and impartial assessment of the preparations and conduct of the elections in Kenya. This includes an assessment of the extent to which the elections comply with the legal framework of Kenya and other regional, continental and international principles for democratic elections.

Since deployment, the AUEOM has consulted various stakeholders and observed various aspects of the electoral process including campaigning, the preparation and distribution of non-sensitive materials, the recruitment and training of election staff, the conduct of civic and voter education, the resolution of electoral disputes, amongst others. Similarly, the Chairperson of AUC, His Excellency Moussa Faki Mahamat, the Commissioner for Political Affairs, Her Excellency Minata Samate Cessouma as well as the Head of the AUEOM, His Excellency, President Thabo Mbeki, visited Kenya on 18 -22 July 2017. They engaged with key stakeholders in the electoral process, notably, the NASA and Jubilee presidential candidates, the IEBC, the Judiciary, the UNDP and the African Diplomatic Corps, among others. Key among the issues discussed were the delayed publication of the register of voters by the IEBC, waning confidence among the key political parties in the IEBC's capacity to hold credible elections, security challenges vis-a-vis the perceived bias of security agents and the rise of vigilante/militia groups. In separate press briefings by the Chairperson and the Head of Mission on 20 and 22 July 2017 respectively, both leaders called on electoral stakeholders to improve consultation and dialogue with each other and refrain from actions that will bring the image of institutions such the IEBC and the Judiciary into disrepute.

The high-level visits were well received by stakeholders with some of the recommendations duly implemented, most notably the publication of the voter's register by the IEBC and the reduction of political attacks on the IEBC and Judiciary by the political parties.

With six (6) days to the General Elections, this statement presents key findings and recommendations towards enhancing the credibility of the electoral process, building public trust in the electoral process and ensuring the legitimacy of its outcome. The AUEOM will issue further statements and a more comprehensive report of its assessment of the electoral process after the elections.

The AUEOM recognises the IEBC's continued assurance of operational and technical readiness to conduct the elections in spite of numerous litigations that challenged the timelines of the elections. The AUEOM notes delays in the printing of presidential ballot papers, deployment of the Kenya Integrated Election Management System (KIEMS) aimed at improving the integrity and efficiency of the poll and distribution of non-sensitive election materials to the counties are clear indications of the IEBC's preparedness. The AUEOM also notes the expeditious manner in which the Judiciary has resolved the various electoral disputes brought before it as well as assurances from the Kenya Police Service of its readiness to maintain law and order before, during and after the elections. Finally, the AUEOM recognises attempts to promote peace and build confidence in the electoral process by Civil Society Organisations (CSOs) across the country and calls for all stakeholders to avoid situations that can undermine the credibility of the electoral process and the stability of the Republic of Kenya.

2. Summary of Key Findings

2.1. Political and Electoral Environment

The AUEOM noted that the general political environment was characterised by mistrust and breakdown in constructive dialogue and consultation amongst the key electoral stakeholders. This has heightened political tensions at both national and local levels. AUEOM also reported keen contestation among the various political actors at the national and county levels. While the AUEOM welcomes such contest as an acceptable feature of democratic elections, it takes note of the following challenges:

- Exploitation of ethnic divisions through the use of deeply polarising campaign messages by major political actors;
- Proliferation of politically-aligned vigilante groups;
- Participation of public officials in political campaigning contrary to the electoral laws;
- Persisting attacks on the integrity of the Judiciary, IEBC and the Security Service by political actors; and
- Declining public confidence in the preparedness of the IEBC to conduct the polls.

The AUEOM notes that the entrenched and historical nature of the influence of ethnic formations in Kenya's elections. However, in view of the high political contestation and the proliferation of politically aligned vigilante groups, the exploitation of such ethnic divisions through polarising messages, has the potential to threaten the stability of the state before, during and after the elections. The continuous attacks on the integrity of the Judiciary, IEBC and the Police could further undermine public confidence in these institutions before, during and after the elections. In the event of limited public confidence, political stakeholders could resort to extra-legal efforts to resolve disputes thereby threatening the stability of Kenya.

2.2. Electoral and Legal Framework

The AUEOM noted that Kenya has a robust electoral framework. Vague areas in the framework were subjected to judicial interpretation through very active citizen engagement with the judiciary. The Kenyan laws adequately provide for and guarantee protection of the right to vote, secrecy of the ballot and the right to participate in public affairs, based on the principle of non-discrimination and equality of all citizens regardless of the status. It further provides for resolution of disputes. The AUEOM recognises recent actions taken to strengthen the legal framework for the elections. The AUEOM notes in particular, the enactment of the Electoral Offences Act of 2016, as well as steps taken to ensure that prisoners are able to vote in the 2017 Presidential election.

While commending Kenya for bringing its electoral framework in line with regional, continental and international legal standards for democratic elections, the AUEOM noted gaps in the implementation of the legal framework. It noted in particular, significant challenges to the implementation of the 2/3 gender parity principle in elective public positions as well as perceived bias in the application of the Election Offences Act.

2.3. Election Administration and Preparations

The Constitution of Kenya and the IEBC Act guarantee the independence of the Commission. The AUEOM recognises the devolution of the IEBC at county and constituency levels.

While applauding political stakeholders for resorting to legal channels in the settlement of electoral disputes, the AUEOM notes that the various court cases against the IEBC and the strict constitutional provision of 8 August as Election Day, limited the timeframe for the IEBC to prepare for the elections. The AUEOM, however, recognises assurances from the IEBC of its operational and technical readiness to deliver democratic, credible and peaceful elections.

The AUEOM notes the High Court's ruling that enables the IEBC to deploy a manual backup system should there be a breakdown in the KIEMS. The AUEOM also received concerns by some stakeholder regarding the lack of clarity on the grounds for deploying the manual system.

The AUEOM recognises efforts by the IEBC to update and audit the voters' register in spite of the limited timeframe. While commending the IEBC for the use of KPMG to independently audit the register, the AUEOM noted with concern, the inability of the IEBC to carry out all the recommendations from the audit. The AUEOM takes into consideration assurances by the IEBC that the deployment of KIEMS would prevent malpractices on Election Day. However, the AUEOM notes that this is dependent on the flawless functioning of the KIEMS. The AUEOM has noted concerns expressed by some stakeholders that the manual backup system does not give the same guarantees with regard to preventing malpractices.

Further, the disappearance and subsequent killing of Chris Msando, an ICT Manager at the IEBC under unconfirmed circumstances, barely a week to the elections has raised suspicion within several political quarters. Following this tragic news of the killing of Mr. Msando, the Chairperson of the African Union Commission issued a statement imploring the government of Kenya, political parties, candidates and all the electorate to shun political violence and always resort to dialogue in resolving their political differences. The Chairperson also called for a speedy investigation into the killing of Mr. Msando and bringing those responsible to justice. The AUEOM expresses its condolences to the family of the deceased, the IEBC and the Government of Kenya.

2.4. Electoral Campaigning

The AUEOM notes that political parties are able to conduct their campaign activities without any major disruption except in few cases. The AUEOM observes that the suspension of the Campaign Financing Act, 2013 and the absence of a financial ceiling has created an uneven playing field for parties and candidates during the campaign period.

While the campaign messages were often reflective of ethnic sentiments and character assassination at the expense of development issues, the AUEOM has noted police vigilance in addressing hate speech and provocative language.

The AUEOM also notes, with concern, attempts to use state resources during campaigning. This included propagation of party ideals and promises at official Government functions. While this is difficult to regulate, it has the tendency to create an uneven playing field and introduces unfairness into the electoral process.

2.5. Civic and Voter Education

The AUEOM recognises ongoing efforts to conduct voter education at ward, constituency and county levels. This includes the deployment of Voter Education Facilitators, development of voter education materials and other outreach efforts to sensitise the public at county and constituency levels.

The AUEOM notes concerns by some stakeholders regarding the inadequate number of Voter Education Facilitators across some constituencies and wards. The AUEOM notes, in particular, that two (2) voter educators per ward were inadequate to effectively deliver voter education to the electorate before the elections.

2.6. The Role of the Media

The AUEOM notes that the media in Kenya tends to be polarized. The AUEOM further notes the weak regulatory framework for the media. The AUEOM also observed concerns by stakeholders regarding social media, which though vibrant, is equally polarized and difficult to monitor.

2.7. Dispute Resolution

The Kenyan Constitution provides for formal and alternative dispute resolution mechanisms. The AUEOM notes efforts made by the Judiciary for amendments to the Political Parties Act which would have allowed the Chief Justice to appoint 15 *ad hoc* officers to the Political Parties' Dispute Tribunal to assist in resolving some of the disputes relating to nomination in a timely manner.

The appointment of 92 Special Magistrates to hear election petitions and offences by the Chief Justice was noted by the AUEOM. While recognising the appointments as crucial to the timely consideration of election offences, some stakeholders indicated the need for the numbers to be increased.

The AUEOM notes with concern, statements by political actors that impinged on the integrity of the judiciary, which have the tendency to reduce public confidence in the neutrality of the judiciary.

2.8. Election Security

The AUEOM notes that the tension in the political environment could be exploited to disturb the peace and stability of Kenya. The AUEOM, however, recognises assurances from the security agencies of their readiness to provide adequate security before, during and after the elections.

While acknowledging the preparedness of the security agencies, the AUEOM nevertheless noted sustained concerns about the heavy deployment of police at opposition strongholds, voluntary migration of people for fear of violence, the emergence of political vigilante group in a number of counties and threats from Al-Shaabab mainly in the northern part to disturb the stability of Kenya.

Following attacks in Jima and Pandaguo villages near the border with Somalia, which resulted in the loss of lives and general insecurity, a dusk to dawn curfew was imposed in parts of Lamu, Garissa and Tana River counties from 9th July to 9th October 2017 (Legal Notice no. 107)¹. Whereas, the imposition of the curfew may afford some security for residents to go about their normal activities, some stakeholders have expressed concerns that the presence of security may instil some fear in residents in these areas and prevent them from casting their votes, others opine that the curfew is a targeted political decision to prevent their supporters from participating in the process.

The seeming absence of a clear strategy for countering inflammatory statements on social media was also recognised as offering potential threats considering the deep internet penetration in Kenya.

3.0. Conclusion

¹ The affected areas are Holugbo Borderpoint, Galmagala, Sangailu, Masolani, Bodhei, Milimani, Baurre and Basuba. The rest are Mangai, Mararani, Ijara, Hola, Garsen, Kipini, Kipini, Kiunga, and the Ishakani-Dar-es-salaam border.

The AUEOM recognizes the desire by Kenyans for a democratic, credible and peaceful electoral process leading to a legitimate outcome. In order to achieve this noble goal, the AUEOM encourages all Kenyans, specifically political parties and candidates, to exercise restraint and avoid situations that will undermine the country's democratic governance, peace and stability of Kenya. The AUEOM is cognizant of the centrality of democratic governance, peace and security for the long-term socio-economic development and structural transformation of Kenya. As the Election Day draws closer, the AUEOM is confident of the assurances and commitment shown by the IEBC and key stakeholders to promote democratic, credible and peaceful elections.

4.0. Recommendations

On the basis of the analysis above and the conclusion, the AUEOM offers the following recommendations

4.1. To the Electoral Commission:

- Ensure that the KIEMS is fully functional in all constituencies across the country;
- Scale up voter education efforts to sensitise voters on the basis for deploying the manual backup system on Election Day;
- Continue building stakeholder confidence in the electoral process through sustained engagement with stakeholders;
- Demonstrate transparency in dealings with all stakeholders;
- Continue working with stakeholders at county and constituency levels to build confidence in the electoral process.

4.2. To Political Parties and Candidates:

- Refrain from making statements aimed at discrediting key institutions such as IEBC and Judiciary;
- Focus on development issues rather than regional-ethnic inclinations during political campaigns;
- Urge their supporters to abstain from violent and provocative actions before, during and after elections.

4.3. To the Media:

- Strive for fair and balanced reportage in a way that contributes to the maintenance of peace and security before, during and after the elections;
- Exercise self-censorship in disseminating polarizing messages.

4.4. To the Security Agencies:

- Sustain security to ensure that the environment is peaceful before, during and after elections;
- Strengthen security arrangement to guarantee the protection of IEBC staff and their families before, during and after the elections;

- Remain vigilant in coastal regions to forestall attacks by terrorist and violent extremist groups;
- Work towards disbanding vigilante groups;
- Ensure the deployment of humane policing tactics and effective crowd control measures; and
- Develop a crisis communication strategy to respond to possible abuse of social media.