



## Statement EU EOM Kenya 2017

### 18 RECOMMENDATIONS - PROGRESS UPDATE

Nairobi, 16 October 2017

On 14 September the EU Election Observation Mission (EOM) published an Interim Statement with findings since the 8 August elections and 18 recommendations for the re-run of the presidential election.<sup>1</sup> These 18 recommendations are all consistent with the 20 September detailed judgement of the Supreme Court, which affirmed the need for the results process to meet the constitutional requirement of being “*simple, accurate, verifiable, secure, accountable and transparent.*”<sup>2</sup> The EU EOM 18 recommendations are not an exhaustive list of possible improvements, but key practical points offered for consideration by national stakeholders, including the election administration, political leaders, media and other actors. The EU EOM has undertaken a review of progress on its 18 recommendations, to identify measures taken to date and remaining shortcomings. This will be subject to further review through the electoral process, particularly during polling and the results process.

The EU EOM has observed the Independent Electoral and Boundaries Commission (IEBC) undertaking positive measures at this stage in regards to nearly all of the nine recommendations that relate to the election administration. If implemented as planned, these provide a foundation for an improved technical process, with stronger transparency and integrity measures. Plans for much stronger coverage by the media of tabulation in tallying centres should enable the public to see the results tabulation process and totals. The EU EOM will continue observing actual implementation of the measures put in place to assess their effectiveness. The IEBC is responsible for organizing the electoral process, but multiple actors are responsible for its success and compliance with the Constitution.

EU EOM recommendations made to political contenders have not seen improvements. The IEBC, judiciary and civil society have been subject to further attacks. Political aggravation has resulted in a stand-off, with violent confrontations between groups of demonstrators and state security forces. A highly controversial electoral amendment bill, passed by Jubilee MPs in Parliament and awaiting presidential assent, has furthered divisions. The amendments are not required under the Supreme Court’s 1 September ruling, and their timing is not consistent with good practice for electoral law reform.<sup>3</sup> The National Super Alliance (NASA) has declared that there will be “*no election*” as scheduled, stating that its candidates will not participate in the event that the amendments are adopted by the executive and there are not profound changes at the IEBC. Worryingly, there is also concern that “*no election*” means NASA supporters could obstruct polling and tallying. Such actions from both sides of the political divide are seriously damaging democratic functioning. Dialogue and cooperation are urgently needed for compromises so there can be a peaceful electoral process with integrity and transparency and Kenyans can choose their President.

The EU EOM will continue observing with a core team in Nairobi and 24 long-term observers currently deployed across the country. Following the Supreme Court’s decision and detailed judgement, the EU EOM will focus particularly on the results process, looking at integrity and transparency. A key part of

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<sup>1</sup> EU EOM [Interim Statement, 14 September 2017 “Recommendations for the Re-Run Based on Findings Since the 8 August Election Day”](#).

<sup>2</sup> Constitution of Kenya, article 86

<sup>3</sup> For further EU EOM commentary on the timing and content of the amendment bills see [EU EOM statement, 3 October 2017](#).

transparency is that the IEBC be clear about any deficiencies, so any errors that occur can be seen and discussed with stakeholders.

Below is an update on the EU EOM's 18 recommendations based on the information available in Nairobi and to the 24 EU EOM long-term observers.

For the IEBC:

***1. Adopt policies and plans for 1) timely reform actions for the re-run 2) regular and meaningful stakeholder consultation and 3) frequent comprehensive public communication***

After some delay, the IEBC has given public information on its reforms, including a list of 10 improvements. Consultation was initially lacking, for example on the election date. However, the Chairperson then proposed weekly meetings with candidates' representatives (although these did not work out), and the IEBC maintained an open-door policy, has organised meetings with each camp and has also given written responses to NASA's requests (its "*irreducible minimums*"). Consultation meetings have been held with religious leaders and observers. While public information has been lacking, the IEBC has stated it will be undertaking regular news releases and daily updates.

***2. Develop more detailed and transparent procedures for the counting, tallying and results transmission processes (including scanning and the "complementary mechanisms" to be used in case of technology failure). Make these publicly available ahead of the election, and train staff accordingly with clear, unequivocal written instructions***

The IEBC has developed more elaborate and clearer procedures with improved instructions for presiding officers and returning officers, including Quick Reference Guides. Accountability and awareness could be improved by making the guides fully public. On 12 October the IEBC gazetted the results path and the complementary mechanism for results transmission in case of technology failure at a polling station.<sup>4</sup> The EU EOM has observed improved staff training, with lessons learned from field staff, review of legal compliance with the Supreme Court ruling, and more emphasis on the results process. However further clarity is still needed on how the 34B forms (from constituencies) and the 34C form (at the national level) will be compiled. Any further changes to procedures will need to be clearly communicated to staff and the public as soon as possible.

***3. Improve the results transmission software and network selection provision, so that 34A polling station results forms are reliably sent through the KIEMS***

A modification has been made to the Kenya Integrated Elections Management System (KIEMS) results software so that now polling station scanned results forms (34As) and keyed-in results must be sent simultaneously, thereby in principle allowing all 34A forms to be transmitted promptly and made available to the public swiftly. Improvements have reportedly been made in the selection of mobile network operators, so a greater number of polling results should in principle be sent immediately from polling stations. The IEBC has also gazetted that if results cannot be electronically transmitted from the polling station, this must be done at the nearest location with network coverage or at the constituency tallying centre.<sup>5</sup>

***4. Arrange for constituency tallying centres to project and display the real-time entering of data on to 34B forms by ICT clerks, so that all agents and observers can see what exactly is being tallied***

<sup>4</sup> The Kenya Gazette, 12 October 2017. This includes clear requirements for failure of electronic results transmission to be publicized "*through electronic or print media of national circulation, or any other accessible medium.*"

<sup>5</sup> The Kenya Gazette, 12 October 2017.

The IEBC has committed to visually projecting polling station results as they are entered into the spreadsheet used for tallying in all constituencies. This will enable candidates' agents and observers to see exactly how numbers are being added up and if there are any errors or omissions. Any problems can then be identified and addressed before constituency results are announced.

**5. *Standardise constituency results forms used (34Bs), complete with security features, and take necessary measures for their consistent and accurate use by Returning Officers***

The IEBC has developed 290 customised Excel spreadsheets with a standard layout.<sup>6</sup> There has been increased emphasis in training on the use of individually-serialised forms with security features for all pages of the 34B forms, correct printing of data on to the statutory forms, stamping and signing, and completing the handover sections. The IEBC has committed to inviting agents to inspect draft versions of results forms, thus enabling corrections to be made before results finalisation.

**6. *Ensure that all forms 34Bs and 34As are published on the IEBC website promptly to allow time for checking and preparation of possible petitions. Account for any updates of scans, with time stamps and original copies kept available on the portal***

The IEBC has this time arranged for the automatic uploading of 34A forms to the public portal, rather than the manual process used in August. Reportedly, the uploading of forms should start without delay and with progressive updates at 30-minute intervals. Any problems with this will need to be noted to stakeholders, with explanations given on any changes. The IEBC reports that the 34B forms will this time be uploaded within the KIEMS system and promptly published on the public portal.

**7. *Improve accountability mechanisms for cases when a voter's biometric data is not matched in the Kenya Integrated Elections Management System (KIEMS) kits in polling stations, so there is a complete record of who has voted***

Some stronger accountability mechanisms are planned, including more comprehensive records of who has voted through the use of forms and marking of names in the voter register.<sup>7</sup> However the KIEMS identification software has not been sufficiently improved, making the proper use of procedures all the more important (this has been emphasized in training sessions).<sup>8</sup>

**8. *Undertake full field pilot testing of procedures and technology. Provide public information on testing processes and results, and follow up with stakeholder discussion***

Regrettably, the IEBC states that no pilot testing of technology is planned due to late changes in the process, including the number of candidates. However, an external certification of the KIEMS system and cloud server is being conducted, primarily for assessing security. Public information is needed on the methodology of any testing that is undertaken, as well as on test results. Simulations are warranted, particularly of compilation of 34B forms at the constituency level and the 34C form at the national level.

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<sup>6</sup> These 290 spread sheets will now need to be re-worked to include the additional candidates that the High Court determined should be added (on 11 October). There will also be a 34B for the diaspora vote.

<sup>7</sup> A new supervisor validation form will be used when biometric identification does not return a match but the voter can still be identified through alphanumeric data contained on the KIEMS. When the identification technology fails altogether, form 32A will be completed, with a greater number of forms due to be available than for the August election.

<sup>8</sup> On the 8 August elections, the EU EOM observed that presiding officers were often not validating in the KIEMS voters who had been identified by their alphanumeric data alone (resulting in these voters not being accounted for in the KIEMS). The software has now been modified by adding a pop-up question on whether the clerk wants to proceed without validation, which still leaves open the possibility for this to happen.

**9. IEBC own and be fully responsible for critical ICT results systems and information, and allow controlled stakeholder access**

Crucially, the IEBC has stated that agents and observers will get access, on a read-only basis, to information transmitted from the KIEMS to the servers. Although the IEBC reports that it is now “*in charge*” of its ICT results system and that there are stronger checks and balances, institutional ownership generally remains an area for improvement. Dependence on the capability of private service providers has impacted the timelines and can create additional pressures on the institution.

For political contenders:

**10. Organise agents in each tallying centre and polling stations and check results accordingly**

A new arrangement for submission of agents’ details is needed following the 11 October High Court decision resulting in all presidential candidates from August being allowed to run.<sup>9</sup> The IEBC is expected to allow up to five agents per party/candidate in each tallying centre, which in principle would allow for constant and robust coverage. Jubilee Party report that they have finalized recruitment of 41,000 agents to be deployed in each polling station and tallying centre. The financial costs of recruiting and paying for such a number of agents can be a burden for political parties.

**11. Respect institutions**

Respect for key state institutions has deteriorated with increasingly attacks undermining democratic functioning. NASA’s announcement on the withdrawal of its candidates referred to the “*criminal enterprise that perpetrated the fraud in the August election is firmly in charge of the Commission*”. NASA MPs have not participated in the opening of Parliament nor the select committee on the Elections Law (Amendment) Bill. Leaders of the ruling Jubilee Party have continued to strongly criticise the judiciary with derogatory language, including senior officials alleging “*infiltration by NASA*”.<sup>10</sup> There is a strong concern among a variety of stakeholders about political reprisals by the executive against the judiciary, including cuts to budget and staff.

**12. Avoid hate speech and use language to build and unite the nation**

The National Cohesion and Integration Commission (NCIC) reports an increase in the number of cases of hate speech, with over 300 under investigation. This is despite a few more arrests of prominent politicians from both camps.<sup>11</sup> Slogans and campaign messages often address the need for one united Kenya, yet actions from both political sides appear to be divisive,<sup>12</sup> with risk of exacerbating ethnic tensions.<sup>13</sup>

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<sup>9</sup> On 13 October the IEBC gazetted the five previous presidential candidates (in addition to Uhuru Kenyatta and Raila Odinga) to run in the fresh election, after one previous candidate was declared bankrupt by a court order.

<sup>10</sup> On 19 September the Chief Justice, as Chairperson of the Judicial Service Commission, issued a statement on the aggressive attacks against the judiciary. The statement refers to demonstrations bordering on violence, to an intention to intimidate and to senior political leaders threatening to cut the judiciary down to size.

<sup>11</sup> For example on 19 September, the Jubilee Party chairman in Nakuru, David Manyara, addressed a public rally in Nakuru town saying “*Let Raila be warned that we are ready for a war... from today the real Kenyans are going to rise up.*” One week later Manyara was taken into custody and charged with incitement to ethnic violence. He was later released on bail. At the same time, NASA Embakasi East MP, Paul Ongili, was charged with creating disaffection against the presidency at a campaign event.

<sup>12</sup> For example allegations are reportedly being investigated against Moses Kuria (Jubilee MP) for asking the Inspector General of Police to shoot the opposition leader (25 September). Also NASA MP Gladys Wanga is alleged to have said on the same date that President Kenyatta and his deputy William Ruto spread cholera.

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For other state agencies:

**13. Undertake thorough investigations of alleged electoral offences in order to promote prosecutions where warranted, including of IEBC staff**

The Office of the Director of Public Prosecution (ODPP) reports no additional convictions for electoral offences to date, but further information is due to be available about county-level convictions on Tuesday 17 October. Investigations are being carried out by the Directorate of Criminal Investigations (CID), the Ethics and Anti-Corruption Commission (EACC) and the National Cohesion and Integration Commission (NCIC), with reports due on Monday 23 October, including in regard to high-profile complaints filed by NASA and Jubilee.

**14. Support civil society organisations having full freedom to contribute to the electoral process**

Civil society organisations (CSOs) report decreasing space for those whose work might be seen as critical of the government. Civil society has been referred to as “*evil society*”, bearing responsibility for the “*judicial coup*” (following the annulment of the presidential election), with social media profiling including personal contact information (telephone numbers etc.).<sup>14</sup> The state does not appear to have taken any positive counter-steps and the actions of the NGOs Co-ordination Board continue to be controversial.<sup>15</sup> The Kenya National Commission on Human Rights (KNCHR), a constitutionally independent institution that works closely with NGOs, reports a recent budget cut of more than 25% decided by the executive.

**15. Promote accountability in the maintenance of public order. This includes providing information on security force deployment (including command structures), and allowing journalists to provide full coverage**

The police have had to deal with on-going demonstrations in various parts of the country since 26 September, not all of which were peaceful. Also conflicts between protesting groups, ensuing damage to property, and report an attack on a police station in Bondo Township on 13 October. Worryingly, security service actions have recently resulted in several deaths. Reports of excessive use of force need independent investigation and public explanation.<sup>16</sup> The lack of public information on which security force agencies are or have been deployed for demonstrations weakens responsibility and undermines accountability in case of problems. NASA refers to security force obstruction (with demonstrations prohibited in certain parts of three cities) and disproportionate use of force resulting in serious injuries and fatalities.<sup>17</sup> There is also increasing concern about possible involvement of militia groups and their unclear role in perpetuating disturbances and criminality.<sup>18</sup>

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<sup>13</sup> For example EU EOM long-term observers have in the last week seen evidence of leaflets in Thika constituency in Kiambu county stating “*Enough is enough!!! Every Luo community should leave Central Province within 48 hours.*”

<sup>14</sup> For example, a chart circulated on social media called “*Judicial Coup – Presidential Petition 2017*” contained the names, photos and personal contacts of over 30 representatives of judiciary, civil society, international organisations and the media.

<sup>15</sup> On 5 October a letter reportedly signed by the NGOs Co-ordination Board Executive Director was circulated (but not delivered), announcing the suspension of activities of the International Development Law Organisation (IDLO), which supports the judiciary. Although the authenticity of the letter is not entirely evident, the NGOs Co-ordination Board’s lack of clarification is seen as intimidating to the IDLO and others.

<sup>16</sup> A press statement from the Office of the Inspector General of the National Police on 13 October noted that “*two persons were unfortunately shot dead and one Police Officer seriously injured. The actual circumstances of the shooting are being investigated.*”

<sup>17</sup> See for example NASA statement, 14 October.

<sup>18</sup> NASA claims some Jubilee leaders are trying to revive the outlawed Mungiki group (under the new name of the “*Nairobi Business Group*”) to disturb peaceful NASA demonstrations, create chaos and in this way justify excessive use of force by the police.

***16. Provide full security for IEBC commissioners and staff***

While security personnel for the IEBC leadership is in place, there is growing concern about security risks for election administration staff in parts of the country where NASA supporters may not vote and could obstruct the process. Such concerns have already surfaced during training of returning officers and other staff.<sup>19</sup>

*For the media:*

***17. Promote live media coverage of constituency tallying centres to enhance the transparency of the results process***

Media owners and journalists have shown commitment beyond commercial interests to jointly provide stronger coverage of the results process at the constituency level. This should significantly increase transparency, enabling all stakeholders to see more of the reality of the results process. The IEBC has met with the Media Council and media outlets and agreed to facilitate live coverage at the 290 constituency tallying centres.

***18. Provide accurate and complete coverage of responses to the results announcement and security measures being taken***

The EU EOM has previously noted that the media are subject to self-censorship, including on political matters, in part because of reliance on advertising revenue from the government. In contrast to their coverage of the post-election disturbances in August, the media have provided more comprehensive reporting on the demonstrations and ensuing violence that has taken place since 26 September. In Kisumu on 9 October, security force personnel beat one journalist and others were apparently threatened and prevented from covering NASA protests.

This stocktaking of reforms, made against the EU EOM's 18 recommendations, is intended to identify changes made and to highlight the need for remaining improvement. The EU EOM's recommendations are in line with the Supreme Court's detailed judgement. As such the noted improvements are expected to contribute to addressing the problems identified by the Supreme Court.

The EU EOM is independent, separate from EU governments and embassies, and is led by Marietje Schaake, Member of the European Parliament from the Netherlands. The EU deployed an EOM to Kenya following an invitation from Kenyan authorities.

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This Interim Statement is available on the mission website (Website: [www.eueom.eu/kenya2017](http://www.eueom.eu/kenya2017)) and social media links: Facebook: [www.facebook.com/eueomkenya2017](https://www.facebook.com/eueomkenya2017), Twitter: [@eueomkenya2017](https://twitter.com/eueomkenya2017), Instagram: <https://www.instagram.com/eueomkenya/?hl=en>).

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<sup>19</sup> The Chief Justice's 19 September statement notes inaction by the Inspector General of Police in regard to the safety of judicial officers.