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ELECTION OBSERVATION DELEGATION TO THE GENERAL ELECTIONS IN KENYA (6-10 August 2017)

**Report by
David McALLISTER, Chair of the Delegation**

Annexes: A List of participants
 B Declaration of Mr David McAllister, Chair of the EP Delegation

INTRODUCTION

On 15 June 2017, Parliament's Conference of Presidents authorised the sending of a delegation to observe the General elections in Kenya, scheduled for 8 August 2017.

The EP Delegation was made up of seven members led by Mr David McAllister (Germany, EPP). The other members were Mr Joachim Zeller (Germany, EPP), Ms Željana Zovko (Croatia, EPP), Ms Julie Ward (UK, S&D), Ms Tanja Fajon (Slovenia, S&D), Mr Bernd Lucke (Germany, ECR), and Ms Marie-Christine Vergiat (France, GUE).

The European Parliament delegation conducted its activities in Kenya from 6 to 10 August 2017. In line with common practice it was associated with the EU Election Observation Mission (EOM) which was present in Kenya from mid June 2017 and was led by MEP Marietje Schaake (The Netherlands, ALDE)¹. The EOM - which comprised some 130 observers (including long-term and short term observers, the EP delegation, as well as diplomats from EU Member States resident in Kenya, plus Canada, Norway and Switzerland) over the Election Day period - was observing in approximately 240 of Kenya's 290 constituencies. Other international observer missions present in Kenya during the election period included the African Union (AU), the Commonwealth of Nations, the East African Community, the Carter Centre and the National Democratic Institute (NDI).

Parliament's delegation fully endorsed the findings of the EU EOM and underlined that - in a high stakes, polarised and competitive electoral contest - Kenyans came out in large numbers on Election Day and acted with patience, determination and enthusiasm in peacefully exercising their democratic rights.

The European Parliament delegation wishes to express its gratitude to Chief Observer Marietje Schaake, Deputy Chief Observer Hannah Roberts and their entire team for their excellent cooperation both before and during the mission. It also thanks Stefano Dejak, Head of the European Union Delegation to Kenya, and his colleagues for their support. It also underlines its appreciation of the hospitality of Kenya's authorities and its people and their cooperation in observing their election, demonstrating their commitment to international cooperation and their determination to be measured against the highest international standards in terms of fundamental freedoms, democracy and the rule of law.

BACKGROUND

According to the Constitution, Kenya is a presidential republic, with the Head of State - the elected President - being the chief executive. Legislative power is vested in the elected bicameral Parliament comprising the 349 members National Assembly (lower chamber representing the people) and the 67 members Senate (upper chamber representing the counties). It further guarantees for an independent judiciary headed by the Chief Justice.

¹ Preceding the deployment of the EU EOM, from April until 4 June a two-member Election Expert Mission (EEM) was deployed in Kenya to follow the preparations for the general elections, in particular the legal framework, the political party primary elections and voter registration.

For administrative purposes, the territory of Kenya is divided into 47 local government units referred to as 'counties'. For electoral purposes, each county is further divided into two or more constituencies for the National Assembly - the total number of constituencies being 290. The President is elected from one national constituency comprising the entire territory of Kenya. The governor of each county is elected from a constituency comprising the territory of the entire county; the same constituency elects one member of the Senate and one woman member of the National Assembly. All elections are conducted on the same day as the general election. As a result, each registered voter has the right to vote for six elected offices on the same day. All elections but the presidential one are conducted through the 'first past the post' (FPTP) system. In order for a candidate for President to be elected, he or she has to satisfy two cumulative conditions, first he or she has to receive more than half of all the votes cast in the election and second, he or she has to receive at least 25 percent of the votes in more than half of the counties. If no candidate is elected, a fresh election is to be conducted with the two strongest candidates and the candidate who receives the most votes is declared winner.

All elections and referenda in Kenya are conducted and supervised by the Independent Electoral and Boundaries Commission (IEBC), a permanent body established by the Constitution and vested with significant authority. The Chairperson and the members are identified and recommended for appointment by a selection panel, approved by the National Assembly and appointed by the President. The current members were appointed in late January 2017.

Kenya's political landscape is characterized by two key opponents, the Jubilee party led by incumbent President Uhuru Kenyatta and the National Super Alliance (NASA) coalition of five parties. NASA's joint presidential candidate is Mr Raila Odinga, in his fourth bid for the Presidency, who lost the 2013 presidential election to Mr Kenyatta with a narrow margin, amidst allegations for irregularities. Many perceive the political divide between the Jubilee and NASA to follow ethnic community lines, mostly between the Kikuyu and Kalenjin groups of Central Kenya on one side, and the Luo and Luhya groups of Western Kenya and the Mijikenda group in the coastal areas in Eastern Kenya on the other side. There are 61 officially registered political parties and one coalition.

As always, the stakes for the 2017 general elections were high. Last but not least, this is also due to the devolution of power from the central government to the counties as provided for by the Constitution. The economic consequences of devolution have raised significantly the political profiles of county governors and county assemblies' members.

PROGRAMME OF THE DELEGATION

Prior to Election-day on 8 August, the European Parliament election observation delegation followed a programme of meetings with the President and Commissioners of the Independent Electoral and Boundaries Commission, the Chief Justice David Maraga, representatives of the political parties (including the opposition candidate Raila Odinga (representing NASA) and the Speaker of the Kenyan National Assembly Justin Muturi (representing Jubilee)), the media, religious leaders, civil society, other international observation delegations. Extensive briefings were made by the EU Ambassador to Kenya and the Heads of Missions of EU Member States, EU EOM Core Team, the EU Special Representative for the Horn of Africa Alexander Rondos, as well as lead analysts on Kenya and the region.

Parliament's delegation was divided into three teams for Election Day, covering the capital city, and the strategic areas Kajiado and Naivasha. All teams reached similar conclusions - Election Day was very peaceful (despite very long queues) and generally well organised, with the IT systems largely working and voting and counting procedures closely respected.

After Election day, the Head of the EP Delegation, together with the Chief Observer, took part in a coordination meeting with the Heads of the other internal election observation missions in the country (including Former South African President, H.E. Thabo Mbeki, leading the African Union mission; Former Ghanaian President, H.E. John D. Mahama, leading the Commonwealth mission; Former US Secretary of State and Massachusetts, Senator John Kerry, and Former Senegalese Prime Minister, Aminata Touré, co-leading the Carter Centre mission; Former Cabinet Minister in Uganda: Prof. Edward B. Rugumayo, leading the East African Community mission, etc). Opposition candidate Raila Odinga also participated in part of the meeting, presenting his claims for electoral fraud to the international community (see below Chapter on "Results").

The EP delegation had an extensive debriefing on the immediate post-election situation in the country by the political analyst, LTO coordinator, data analyst and security expert of the EOM, as well as by a prominent expert on Kenya and the region, Charles Hornsby. A joint debriefing with the EU Ambassador and Heads of Missions of EU Member States also took place.

On 10 August a very well-attended joint press conference was held involving the EU EOM and the EP Delegation.

ASSESSMENT OF THE ELECTORAL PROCESS

The European Parliament's assessment of the elections mirrored that of the EU EOM. It underlined that although Kenyan stakeholders have endeavoured to run a successful election, preparations for the elections have once again been challenging, conducted under very tight timelines and a source of contention. The lead up to the elections witnessed intimidation and even included the shocking murder of a leading official of the electoral commission. The Delegation strongly condemned such acts and called for those responsible to be prosecuted.

Persistent criticism of the integrity and neutrality of state institutions, including the IEBC and the judiciary, by the main party leaders negatively affected confidence in the election and the rule of law. The role of, and reliance on, technology in the election process was thus the focus of much pre-election anxiety and the focus of a high degree of scrutiny on Election Day. However, the lack of trust in the election process could not be compensated for by new technology.

In addition, the lack of applicable campaign finance legislation undermined equality of opportunity and transparency in the election campaign.

At the same time, MEPs reported positively on the conduct of voting on Election Day and expressed admiration for the determination of voters to cast their votes despite sometimes very

long waiting times. Agents of different parties were present in all polling stations observed. Closing and vote counting in polling stations were transparent.

The EP Delegation also commended the strong efforts of the IEBC and judiciary to work within the legal framework, uphold the rule of law and carry out their roles independently in this complex electoral environment. The delegation offered its full support to the IEBC in completing its work in the electoral process in the aftermath of election-day.

At the press conference, the EP Head of Delegation spoke directly to the political leadership at this critical moment in the electoral process by stressing the importance for Kenyan politicians to bring the people together and work towards an inclusive and socially cohesive society for all Kenyans. He also underlined the crucial role that political parties have in this process.

Finally, given that women made up only 9.4% of all candidates, the two-thirds gender principle of representation in elective and appointive positions, is highly unlikely to be met. This raised questions about the constitutionality of the 12th parliament. In this context, the EP delegation called upon all political parties to ensure that women's participation in political life is enhanced in line with the Kenyan Constitution. They also insisted that the new parliament adopts legislation to ensure that the two-thirds gender principle is implemented.

RESULTS

The day after election-day, the opposition convened a press conference claiming massive electoral fraud based on the hacking of the IEBC's main IT server. According to the opposition they had evidence that not only had the main server been hacked but key documents signed by the Presiding Officer and party agents at the polling stations (known as Forms 34 A) had been doctored in the transmission of the forms from the polling station to the IEBC's central server. As such, the claim fundamentally questioned the integrity of the electoral process.

The final results were announced by the IEBC on 11 August, according to which Mr Kenyatta (incumbent) won the elections with 54.3% of the vote to Mr Odinga with 44.7% share of the vote. International observers unanimously called on political leaders to act responsibly, to pursue any complaints through legal dispute mechanisms and to ensure their supporters remained calm.

On 18 August, NASA filed a 25 000-page presidential petition at the Supreme Court in Nairobi on President Uhuru Kenyatta and the electoral commission, challenging the declaration of President-elect Uhuru Kenyatta as the winner of the just concluded General Election. The petition requested the Supreme Court to, among other things, declare President Kenyatta's election victory invalid and order fresh a presidential election.

On 1 September the Supreme Court of Kenya declared the result of the Presidential election as "invalid, null and void". The re-run of the Presidential elections thus took place on 26 October. It was boycotted by the opposition.

The EP Delegation was on stand-by to observe the re-run. The delegation however was cancelled at the last moment in view of the tense security situation in the country.

CONCLUSIONS AND RECOMMENDATIONS

The EOM remained in Kenya during the entire electoral process and will produce a final report of the conclusion of the electoral process. This final report will contain recommendations aiming to improve aspects of the electoral process.

The European Parliament delegation was a key element in the evaluation of the electoral situation in Kenya. The Delegation, together with DEG, stayed in regular contact with CO Schaake and the EOM on the ground and closely monitored the developments in Kenya.

The EP delegation therefore recommends that the Democracy Support and Election Coordination Group (DEG), the Committee on Development and the relevant European Parliament delegations monitor the findings and recommendations of the final report of the EU EOM and use it as a basis for their political dialogue with Kenya. In addition, the DEG should keep Kenya high on its agenda for possible post-electoral activities in 2018, contributing specifically to the process of peace building and consensus-building in Kenyan politics and Kenyan society in general.

EUROPEAN PARLIAMENT

ELECTION OBSERVATION DELEGATION

GENERAL ELECTIONS IN KENYA

8 August 2017

Participants

Members

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Joachim Zeller, Germany, EPP

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Tanja Fajon, Slovenia, S&D

Bernd Lucke, Germany, ECR

Marie-Christine Vergiat, France, GUE

10 August 2017

**Declaration by David McAllister,
Head of the European Parliament's election observation delegation
(integrated in the EU EOM)**

Ladies and Gentlemen,

I am David McAllister, Member of the European Parliament and it is my pleasure to have this opportunity to speak to you on behalf of our Delegation of 7 Members of the European Parliament.

Kenya is a crucial pillar of stability in East Africa and a source of inspiration on the African continent. As such this highly competitive and closely contested elections have drawn the attention regionally and of the wider international community.

The European Parliament - the only directly-elected body of the EU, representing 500 million European citizens - also followed these elections. During our stay in the country, we met with representatives of the political parties, the electoral commission, the judiciary, the media, religious leaders, civil society, and other international observation delegations and, of course, we observed the conduct of the elections.

First of all, I would like to align the European Parliament Delegation with the conclusions of the European Union Election Observation Mission. We fully endorse the findings presented by the Chief Observer, Ms Marietje Schaake.

Although Kenyan stakeholders have endeavoured to run a successful election, preparations for the elections have once again been challenging, conducted under very tight timelines and a source of contention. The lead up to the elections witnessed intimidation and even included the shocking murder of a leading official of the electoral commission. We strongly condemn such acts and those responsible should be prosecuted.

We commend the strong efforts of the IEBC and judiciary to work within the legal framework, uphold the rule of law and carry out their roles independently in this complex electoral environment. We fully support their role in the aftermath of election-day.

As always, Kenyans came out in large numbers on Election Day, demonstrating that every vote counts in a genuinely competitive contest with no certainty as to which party was going to win outright. We would also like to express our admiration of all Kenyans in the way they have acted with patience, determination and enthusiasm in peacefully exercising their democratic rights. We would also like to commend the transparency and commitment of the staff at the polling stations we visited.

The role of, and reliance on, technology in the election process was the focus of much pre-election anxiety and the focus of a high degree of scrutiny on election day. We urge candidates and parties to let the IEBC to carry out its work, to use the legally provided channels of dispute resolution in case of any dissatisfaction with the process and to urge their supporters to remain calm.

We have also seen that women in Kenya have participated in large numbers as voters and in the organisation of the elections. Their determination had to overcome substantial challenges including intimidation. We call upon all political parties to ensure that women's participation in political life is enhanced in line with the Kenyan Constitution. We expect the new parliament to adopt legislation to ensure that the two-thirds gender principle is implemented. We also expect the new government to act accordingly by appointing women at local and national levels, including to the highest positions of leadership.

Having said this, I will not repeat the statement of the Chief Observer. Instead I would like to focus on the aftermath of the elections.

After such competitive elections, it is now time for Kenyan politicians to bring the people together and work towards an inclusive and socially cohesive society for all Kenyans. Political parties have an important responsibility in this process, including by becoming more programme and policy focussed, transparent in party management and financing, and overcoming their reliance on ethnic divisions.

Inclusiveness should also be pursued at all levels of governance including Presidential and Parliamentary. Devolved powers are especially important for achieving this and for bringing benefits closest to the people. We hope that the newly elected Governors will deliver upon the expectations of all citizens, by properly carrying out their enhanced responsibilities as set out in the Constitution.

In pursuing this future, you can fully rely on the European Parliament which is committed to supporting Kenya along its democratic path. We stand ready and look forward to further developing our relations soon after the elections.

Thank you for your attention!
