



**SUBMISSION TO THE KENYA NATIONAL DIALOGUE AND
RECONCILIATION TEAM
OCTOBER 10TH 2012**

Introduction

In the following we, the members of Kenyans for Peace with Truth and Justice (KPTJ), and colleagues in civil society, highlight issues which we believe should be of concern to the members of the African Union Panel of Eminent African Personalities in their capacity as members of the Kenya National Dialogue and Reconciliation Team and indeed to Kenyans as the country enters the decisive stretch before the elections on the fourth of March 2013.

We note that in respect of the forthcoming elections:

- *Perceptions of lack of transparency, effectiveness and weak leadership in the Independent Election and Boundaries Commission (IEBC) jeopardise peaceful, credible elections:* The IEBC has suffered damage to its image through its controversial handling of the biometric voter registration (BVR) procurement exercise and the exposure of internal rivalry and competing interests. Interference by the Executive in reversing the decision on procuring BVR bodes ill for the independence of the IEBC. Further, doubts persist as to the capacity of the IEBC to effectively deliver on its mandate viz. timely registration of voters and its preparation to credibly manage the most complicated elections in Kenya's history. Trust in the impartiality and competence of this institution will make the difference between peaceful elections or a renewed outbreak of conflict.
- There is a failure to firmly enforce discipline on political parties and their members with regards to issues such as party hopping. Lack of clarity has been allowed to continue on critical issues such as the deadline for political aspirants to resign
- Kenya is going towards elections without a substantive Registrar of Political Parties; the incumbent's term has expired. Neither the acting Registrar nor the IEBC are firmly enforcing rules. Lawmakers have also deliberately weakened electoral statutes to their advantage.

Recommendations:

- The Panel should closely monitor the adherence of the IEBC to the required election deadlines; the IEBC should give public reports frequently on the state of electoral preparedness of the country. Mitigating measures where lapses are foreseeable must not be left too late.
- The IEBC must be encouraged to jealously guard its independence against further encroachment by the Executive and cultivate openness and transparency towards the public. Information must be made proactively available to the public using modern technology.
- The Panel must insist that the IEBC show commitment to enforcing discipline on political parties and in the electoral process.

In respect of security sector reform, and ongoing threats to security:

- *Government intransigence against seriously embarking on security sector reform (SSR) is undermining the constitutional aim of making the security sector more professional, respectful of human rights and more prepared to ensure sustainable security in the country.*
- The Executive stubbornly clings to the dominance of an ethnic cabal in the sector's leadership and repeatedly violates the rule of law, thus raising the risk of insecurity.
- The failure to appoint Inspector General, a Deputy Inspector General and a Police Commission are hampering progress in reforming the police force, which is still mired in the past, compared to the other agencies.
- *Violence is already occurring in various locations around the country and could spread.* Much of the violence has been in response to demarcation of electoral boundaries, resource conflicts and specific local issues but there are also growing perceptions that these aspects are overlaid by increasing political instrumentalisation of violence, e.g. in Tana River.
- *An increase in extra judicial executions and forced disappearances* has been reported by human rights organisations in connection with criminal investigations of alleged Al Shabaab associates raising questions about the approach to counter-terrorism. The killing of radical Muslim cleric Sheikh Mohamed Aboud Rogo led to widespread violence, loss of lives and inter-communal violence against

Christian targets. Elsewhere, a grenade attack on a Sunday school led to anti-Muslim violence. Public uncertainty has been expressed as to the true motives and authors of some of the attacks.

- Government has often been slow to respond appropriately and in a timely manner to outbreaks of violence, despite early warning from organisations on the ground.

Recommendations

- The Panel should call on the two principals to urgently make the necessary appointments to promote further SSR; a new Inspector General (IG), a Deputy IG, and a Police Commission.
- The Panel should raise the issue of Kenya's counter-terrorism approach against Al Shabaab with the Executive - and with the international partners who are supporting counter-terrorism - in terms of the strategy's effectiveness, the necessary respect of human rights and the rule of law, and the potential for increased incidents of inter-religious violence and further alienation of marginalised groups, particularly youth.
- The Panel should insist to government that senior officials, who have been named in connection with violence in Tana River, and elsewhere, must be dismissed and investigated, and, if necessary, prosecuted. Resources must be made available for the speedy and effective investigation of all major incidents of violence.

In respect of gender equality

- *There appears to be no political will to address the constitutional gender equality principles.* In fact, there have been threats to completely remove the provisions within the Bill of Rights that require respect for this principle. Failure to implement the so-called 2/3 principle will leave the country open to a constitutional crisis and prepare the ground for conflict between the Judiciary and the Legislature.
- *Political party leaders have displayed unwillingness to resolve this impasse through direct party nominations that would allow the additional gender seats to be catered for within the provided seats, to prevent a bloated and economically unsustainable legislature at national and county level.*

Recommendations

- Political party nomination rules should ensure that the 2/3 gender rule is provided for.
- The Elections Act could also be amended to provide for options which address this problem by having seats reserved on a rotational basis (the India model) whereby the IEBC could ballot randomly a quarter of the constituencies which would be reserved for women only to run. This would happen for consecutive elections so that after four elections, every constituency in the country would have had a chance to be represented by a woman.
- Alternatively, the 80 new seats could be filled through a proportional representation system whereby political parties would submit lists with two candidates of opposite gender on them and upon the completion of the elections and having seen how many women candidates got elected in the traditional 210, then pick the women in the 80 seats.

In respect of the Truth, Justice and Reconciliation Commission (TJRC)

- *The TJRC has failed to finalise its report and thus conclusively failed to execute its mandate.* Set up in 2009, initially for two years, the TJRC was required to report on its findings and make recommendations on measures needed to achieve its objects, including prosecution and/or reparations. Instead, in August 2012, it applied for a renewed extension of its deadline until after the elections.
- Another extension of the Commission's mandate until after the next elections would have the effect, we believe intended, of allowing people to stand for elections who may otherwise be adversely mentioned in the report and thus disqualified, if Chapter Six requirements were effectively enforced. This is a betrayal of the trust of thousands of victims of extreme human rights abuse who had placed their hopes in the commission. The TJRC process must for the present be regarded as still-born.

Recommendations

- The Panel of Eminent African Personalities must exert its influence to ensure that the TJRC's report is released now, whatever stage it is at. The delays in publishing its conclusions are dangerous and counter to the dialogue agreement; they must certainly be made public before the next elections, as originally intended.

- The KNDR Chair should use his influence to seek ways of securing the report of the TJRC, which is a product of his mediation, before it is disbanded. This is so as to avoid the danger of the materials being impounded by those who may have been the subject of the Commission's deliberations. Credible and independent solutions for the archiving of the materials must be urgently sought.

We note that in respect of political leadership for implementation of reforms under the constitution:

- While the Judiciary has made great strides, Parliament and the Executive, and, indeed, other institutions in the justice chain lag behind. This exposes judicial reform to claw-back by anti-reformers resentful of progressive rulings.
- The vetting process has faced challenges, which have contravened Section 23 of the sixth schedule, which sought to protect the process from judicial interference. The recent court decision, which seeks to postpone vetting by the responsible board raises conflict of interest concerns.
- The other arms of government have been consistent in their attempts to subvert the constitution and perpetuate impunity. Parliament has passed legislation watering down the integrity and leadership provisions of the constitution; and diluting electoral discipline provisions among other things. The Executive has undermined the rule of law and the transition to devolved government by appointing county commissioners in defiance of court rulings.
- There have been no serious local attempts to achieve accountability for post-election violence, including police involvement, despite the establishment of a new Task Force by the Director of Public Prosecutions.
- Government support for the ICC suspects standing for presidential elections has increased ethnic polarization and the potential for electoral violence, particularly in response to the commencement of the ICC trials. There is a very real possibility of non-cooperation with the ICC, particularly as the fate of two accused who are presidential candidates hangs on this. The elections thus risk ushering in a relapse into the dark past rather than the dawn of a new dispensation.

Recommendations

- The Panel should insist on the necessity of increasing the capacity of the entire justice chain if judicial reform is to be protected.

- The judicial vetting process has been critical in raising public support levels to unprecedented heights and it must be protected against interference.
- The Panel should marshal international support in making it clear that a non-cooperation scenario will not be tolerated.

With respect to the Panels involvement in Kenya over the last four years:

- Civil society expresses our deep gratitude to the Panel for their commitment in shepherding the process of mediation and reform thus far through some very difficult periods. Significant challenges still lie ahead and we look forward to the panels continued support during the pre and immediate post-election period in 2013

(ends kptj/1012/ja)