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**FINAL REPORT**

**2017 Kenya General and Presidential Elections  
March 7, 2018**

**EXECUTIVE SUMMARY**

Kenya's 2017 general electoral process was marred by incidents of unrest and violence throughout the extended electoral period, and by harsh attacks by top political leaders on electoral and judicial authorities that seriously undermined the independence of the country's democratic institutions and the rule of law. The confrontational tactics and actions of Kenya's political leaders polarized the country and exposed the deep tribal and ethnic rifts that have long characterized its politics. Regrettably, the elections represent a major setback in Kenya's democratic development.

***Overview of Key Findings***

*Pre-election Period.* The pre-election period included a reasonably adequate but flawed voter registration process, which included an independent audit and corrective actions to address some of the many errors in the list. While the voter list retained serious problems, the introduction of the KIEMS biometric voter identification system provided a strong safeguard against multiple voting on election day. The level of political competition in the various races was high, and there was a significant increase in the number of independent candidates.

*Aug. 8 Election.* Carter Center observers found that the voting and counting processes during the Aug. 8 election were generally well-administered. However, observers noted problems during the subsequent processes of electronically transmitting polling station results and tabulation of results at county-level tallying centers. While these were designed to allow for thorough checks and verification of election results, and should have been possible to implement, the process of tallying and tabulating final results suffered from delays and a lack of transparency. The situation was made worse by heightened political tensions and confrontational statements by political leaders.

By the morning of Aug. 9, the day after the elections, as the Independent Electoral and Boundaries Commission (IEBC) began announcing provisional results showing President Uhuru Kenyatta with a roughly 10 percent lead, opposition presidential candidate Raila Odinga and his National Super Alliance (NASA) claimed that there had been massive fraud and that the results had been hacked. On the afternoon of Aug. 9, the IEBC's nearly complete provisional results showed President Kenyatta with 54 percent of the vote, leading by a margin of some 1.4 million voters over opposition presidential candidate Raila Odinga, with about 45 percent of the vote. Although

the IEBC noted that the process of tallying and submitting official results forms to the national IEBC center was proceeding at a slow pace, it did not highlight or clarify that the results broadcast on TV were unofficial provisional results received electronically directly from polling stations. Unfortunately, for unexplained reasons, the IEBC did not utilize the full seven-day period provided by the law to consolidate and post all of the official polling-station results forms.

Instead, the IEBC hastily declared the final presidential election results on Aug. 11, just three days after election day, based on the constituency-level results forms, and prior to the receipt of all polling-station level results forms. Worse still, election authorities failed to ensure that parties had timely access to official polling-station level results in the days following the announcement of official results, which made it impossible for parties and observers to fully verify and cross-check the results against their internal data and reports in time to include any key evidence in court petitions.

While the lack of IEBC polling-station data hindered the parties' ability to verify results, it is important to note that a Kenyan citizen election observation organization (Election Observation Group, or ELOG) conducted a parallel vote tabulation (PVT) that provided an independent verification of the official results. ELOG's PVT was based on results data gathered from a representative random sample collected by about 1,700 observers deployed around the country. The PVT's estimated results, which were released on Aug. 11, were consistent with the IEBC's official results.<sup>1</sup>

*Supreme Court Decision.* After initially refusing to take these claims to court and saying his supporters had the right to protest in the streets, Odinga and NASA decided to file a petition challenging the results shortly before the deadline. Several weeks later, in an unexpected ruling announced on Sept. 1, the Supreme Court annulled the results of the presidential election, finding that the tabulation procedures failed to fulfill the constitutional requirement that all elections be "simple, secure, transparent and verifiable." It called for the election to be rerun in "fresh" polls within 60 days. The court's historic decision to overturn a presidential race was highly unusual and was seen by NASA as vindication of its claims of fraud and hacking, even though the court found no evidence to support either claim. Neither did the court find malfeasance on the part of staff of the IEBC.

The ruling party and others, however, criticized the ruling for not taking into consideration the fact that there was no evidence demonstrating that the alleged irregularities were of a sufficient magnitude to affect the results. While this guiding principle is commonplace in international election law, Kenya's law at the time of the decision did not require a finding that alleged irregularities affect the results in order to annul the election.<sup>2</sup> Based on the evidence introduced regarding the lack of transparency and verifiability, and the failure of the IEBC during the court hearings to respond to legitimate concerns raised in the petition, the court was well within its bounds to annul the election results.

*Oct. 26 Election.* In the period leading up to the Oct. 26 "fresh" election, the IEBC took several steps to correct shortcomings identified in the court's ruling, including the introduction of more

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<sup>1</sup> <http://elog.or.ke/index.php/resource-centre/item/20-verification-statement-of-the-official-2017-presidential-results>

<sup>2</sup> See Steve Brickerstaff's "International Principles of Vote Recounts and Election Contests," in International Election Remedies, John Hardin Young (ed), 2016, American Bar Association, p. 200; and "Electoral Justice: The International IDEA Handbook," para. 546, p. 178.

transparent and verifiable results tallying and transmission processes. While IEBC Chairman Wafula Chebukati indicated the IEBC was prepared to conduct the polls on schedule, he also made clear that the continued refusal of the two leading candidates to meet jointly with the IEBC to discuss an agreed-upon way forward constrained the IEBC's ability to conduct a credible election. In the meantime, Odinga announced his withdrawal from the Oct. 26 election, citing a lack of real electoral reform and level playing field, and called for his supporters to boycott the Oct. 26 polls.

With several petitions before the Supreme Court, the court was scheduled on Oct. 25 to review cases that could have resulted in a decision to delay the election, which also would have allowed more time for political leaders and the IEBC to agree on any additional electoral process reforms needed to hold a competitive, inclusive, and credible election as soon as possible.

Unfortunately, however, Kenya's political leaders missed a critical opportunity to ensure an inclusive and transparent election. The scheduled Supreme Court hearing did not take place, as only two court justices appeared, three short of the five needed for a quorum. While the circumstances surrounding the missed court hearing are disputed, the environment leading into the Oct. 26 election was marked by increased insecurity, an uncertain political environment, and an opposition boycott that resulted in a largely uncontested election.

In light of the NASA boycott, turnout for the fresh presidential election dropped significantly. In addition, voting had to be cancelled in some opposition areas because of fears of violence and related hindrances that prevented poll workers from carrying out their responsibilities. The postponement of elections in 25 constituencies because of security concerns impeded citizens' ability to exercise their right to vote and undermined the credibility of the election. Incumbent Uhuru Kenyatta won 98.27 percent of the Oct. 26 vote.

Several civil society organizations challenged the conduct and results of the Oct. 26 election in court on a variety of grounds.<sup>3</sup> The Supreme Court dismissed the petitions on Nov. 20, finding them without merit. President Kenyatta was inaugurated on Tuesday, Nov. 28.

*Aftermath.* Taken as a whole, the 2017 electoral process damaged Kenya's key democratic institutions and its social cohesion, leaving the country deeply divided after an annulled presidential election, followed by a rerun election marred by violence and an opposition boycott. While Kenya was able to avoid the large-scale violence that undermined several past elections, the 2017 elections were characterized by a tense political environment throughout the electoral period, from the party primaries in April to the rerun presidential election in October. The key political leaders repeatedly took steps that harmed the process, taking hardline positions, failing to seek common ground, and using inflammatory and divisive political rhetoric. There were multiple violent protests, more than 100 reported deaths, and many more injuries. Victims included children.

In the months since the election, there have been continued political confrontations that threaten key democratic actors, including the courts, civil society, journalists, and others. To change course,

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<sup>3</sup> Petitioners claimed, inter alia: that the IEBC failed to conduct the election in conformity with the constitution following the withdrawal of one of the two candidates by not calling for fresh candidate nominations; that the election violated the principle of universal suffrage, given that many areas of the country did not vote; and not holding the election in all 290 constituencies simultaneously as required by the constitution. Petitioners also alleged that the IEBC lacked the independence, neutrality, and transparency mandated by the constitution.

Kenya's political leaders must demonstrate the courage and foresight to prioritize actions that foster genuine dialogue and reconciliation, and take concrete steps to advance Kenyans' collective interest in inclusive governance, foregoing narrow and short-term partisan interests. Political stakeholders should take action as quickly as possible to organize national stocktaking exercises and to develop and implement key electoral reforms well in advance of the 2022 election. The process should be guided by principles of inclusion and shared values grounded in the country's constitution.

### ***Additional Findings***

*Legal Framework.* Kenya has a generally sound and comprehensive electoral and legal framework for the conduct of democratic elections. However, the volatile electoral period exposed gaps and inconsistencies in the electoral framework and reinforced the importance of resolving legal complaints swiftly. Some last-minute changes to the legal framework that allowed the IEBC vice chairman to carry out the chairman's duties in his absence and that reduced the quorum for IEBC meetings from five to three, allowing decisions to be taken by a vote of just two IEBC members, weakened the IEBC's authority and appeared to benefit the ruling party, and were contrary to international best practice.

*Election Administration.* The Independent Electoral and Boundaries Commission, appointed in early 2017, faced challenges in meeting strict constitutional and legislative deadlines for the conduct of the elections. In spite of intense political pressure from opposition and ruling parties throughout the electoral period, the IEBC successfully registered an unprecedented number of new voters, and 80 percent of voters cast ballots in August. The IEBC recruited and prepared staff despite a tight timeline and numerous court challenges affecting its work. It conducted an audit of the voter register and worked to implement some of the resulting recommendations. However, there was a lack of transparency in the IEBC's operations and inconsistent communication with electoral stakeholders and the public. The murder of the head of the IEBC IT department, Chris Msando, still unsolved, in the lead-up to the Aug. 8 election created a climate of uncertainty that lingered throughout the electoral period.

The breakdown in the IEBC's results transmission system in the days after the Aug. 8 election critically undermined the transparency of the tallying process and severely hindered verification efforts by parties and independent observers, leading to legitimate questions about the accuracy of the results. The Supreme Court found that the IEBC failed to transmit results electronically from all the polling stations to the National Tallying Center at the same time as the tally forms, in violation of Section 39(1c) of the Elections Act, and that the IEBC had used results forms of questionable authenticity. The court ruling also criticized the IEBC for failing to grant sufficient access to its computer servers during the court hearings on the NASA election petition, which was contrary to Kenya's constitutional requirement of transparency and verifiability of the electoral process. Despite efforts to improve its administration of the polls for the Oct. 26 rerun election, especially of the ICT systems for transmitting and tabulating results, the IEBC suffered from a lack of public confidence.

*Campaign Period.* The political environment was highly polarized and divisive throughout the 2017 electoral period. Instances of violence occurred beginning with the political party primaries and continuing through the post-election period. The campaign for the Aug. 8 general election was highly competitive. Voters had a wide choice of candidates for the majority of seats at all levels of government in the August polls. The political environment became more volatile and worsened

significantly in the lead up to the Oct. 26 election, which was boycotted by opposition NASA candidate Raila Odinga. Carter Center long-term observers noted a significant drop in campaign activity compared to the August polls. In those regions where campaigning took place, the Jubilee Party held large rallies, conducted car caravans, and purchased billboard ads. Several politicians from both Jubilee and NASA were arrested on hate speech charges, and reports of violence against women and other marginalized groups increased.

*Political Participation.* Women aspirants and candidates faced a hostile political environment, including propaganda, smear campaigns, and violence. Many lacked sufficient finances to run for office. Youth and Persons with Disabilities (PWDs) also faced similar barriers to participation. Positively, nomination fees were reduced to promote participation by these special-interest groups. The IEBC established a youth coordinating committee on elections to provide advice on how the commission could help ensure meaningful youth engagement. Women candidates numbered 1,300 out of a total of 14,523 candidates (9 percent), and only 172 (13 percent) were elected. Three women governors and three women senators were elected for the first time. A youth was elected governor for the first time. Eight PWDs were elected to office. Nonetheless, even in light of these important firsts, political participation for women, youth, and PWDs fell far short of international standards and failed to meet Kenya's constitutional requirements, especially the one-third quota for women. Of particular concern, women and other special-interest groups are especially vulnerable to violence.

*Electoral Dispute Resolution.* Kenyan legislation on dispute resolution is complex, involving multiple resolution bodies with, at times, overlapping jurisdiction and inconsistent deadlines. While courts prioritized election-related cases and resolved most of the disputes in a timely fashion, the lack of a single appeals process, combined with short timelines for resolving pre-election disputes, failed to guarantee an effective and timely remedy. This was particularly a problem for challenges regarding the party primaries, candidate nominations, and candidate registration. For future elections, Kenya's parliament should consider extending the deadline for the Supreme Court to resolve challenges to the results of a presidential election from the current 14 days to a minimum of 30 days to allow for a thorough consideration of all issues and sufficient time for verification exercises. These and other amendments should flow from broad political consultation and enjoy wide political support.

*Role of Civil Society.* Civil society organizations and faith-based groups engaged in a robust manner, conducting voter education and peacebuilding efforts prior to the elections. Many groups observed the entire electoral period, covering both the Aug. 8 and Oct. 26 elections, releasing reports on findings and recommendations for reforms. However, CSO engagement was less visible for the Oct. 26 polls. Concerns were raised about constraints on civil society in the post-election period, as the government threatened the registration of two prominent Kenyan human rights organizations. Following an outcry by local CSOs and the international community, the acting interior cabinet secretary halted the de-registration process to allow for further investigations.

*The Security Situation.* Over the course of the extended electoral period, observers voiced concerns on multiple occasions about excessive use of force by security personnel. Several people, including children, died in post-election violence during clashes with security forces. The charged campaign environment, coupled with the violent protests and excessive use of force by security, increased the vulnerability of special-interest groups, especially women and children. Following the Aug. 8 elections, there were reports of human rights violations, including beatings and killings by security forces as well as sexual violence against women and girls. Multiple organizations and agencies

joined an appeal to the inspector general of police and other government agencies charged with protecting the rights of women and girls, raising concerns about sexual violence perpetrated in the electoral period, reportedly by police officers.

The security situation deteriorated further in the period leading up to the Oct. 26 “fresh” election, as many opposition politicians stated that they would not allow the election to take place in their areas and Odinga began a campaign to encourage his supporters to boycott the election. Election day itself was marred by violent protests in NASA’s strongholds in western regions of the country and in Nairobi’s volatile slum neighborhoods. The IEBC could not deliver election materials to some of these areas because of blocked roads. Some of the polling staff in the affected areas did not show up for work. As a result, the IEBC postponed the election by two days in the four counties where polls were unable to open. Polling in these locations was later postponed indefinitely after it became clear that the security situation would not improve sufficiently in the days following the election.

#### *The Carter Center’s Election Observation Mission in Kenya*

The Carter Center deployed a core team of experts and long-term observers in Kenya in April 2017 to monitor key parts of the electoral process, including voter registration, campaigning, electoral preparations, and the resolution of disputes in the courts. Former U.S. Secretary of State John Kerry and former Senegalese Prime Minister Aminata Touré led a short-term election observation mission for the Aug. 8 elections that included more than 100 observers from 34 countries. Observers traveled throughout the country to assess the balloting, counting, and tallying processes.

Following the Sept. 1 decision by the Supreme Court to annul the August election, the Center extended its presence to observe the Oct. 26 presidential rerun. Long-term observers were redeployed to various locations in the country to observe critical pre- and post-election processes. Because of the insecurity surrounding the polls, the uncertain political environment, and the lack of a fully competitive election, The Carter Center did not deploy a short-term observer delegation for the October polls. The team was limited in size and geographic scope and therefore did not conduct a robust assessment at the polling-station level on election day.

The Center conducts its observation missions in accordance with the Declaration of Principles for International Election Observation, which was endorsed by the United Nations in 2005. The Center’s mission for the 2017 Kenya elections assessed the process based on Kenya’s legal framework and on international standards for democratic elections.

The Center issued multiple public statements at various points during the electoral process, including a pre-election statement on Jul. 27, a preliminary statement about the Aug. 8 election on Aug. 10, a statement regarding the tabulation process on Aug. 17, and two statements on the Supreme Court ruling and its implementation on Sept. 1 and Oct. 4. A pre-election statement was issued on Oct. 24 and a preliminary statement on the Oct. 26 election on Nov. 6. These public statements are available at [www.cartercenter.org](http://www.cartercenter.org).

This report presents the Carter Center’s comprehensive findings and conclusions for Kenya’s 2017 electoral period and offers recommendations to help strengthen Kenya’s future electoral processes.

## **Main Report: Findings and Conclusions**

### ***Political Background***

The dynamics of the 2017 general elections were heavily influenced by the political and electoral events of the last decade. The elections were the third since 2007, taking place a decade after Mwai Kibaki was re-elected in December 2007 amid charges of vote-rigging from Orange Democratic Movement (ODM) candidate Raila Odinga. Post-election violence erupted, in which an estimated 1,500 people died. Former U.N. Secretary-General Kofi Annan led an African Union-sponsored mediation effort and brokered a power-sharing accord in February 2008. The accord brought Odinga into government in the position of prime minister and included a broad reform agenda, the centerpiece of which was constitutional reform.

In August 2010, Kenyans overwhelmingly adopted a new constitution in a national referendum. The new constitution introduced additional checks and balances to executive power as well as significant devolution of power and resources to 47 newly created counties, and created the position of deputy president. It also eliminated the position of prime minister following the first presidential election under the new constitution, which was held in March 2013.

The 2013 general elections were the first administered by the new Independent Electoral and Boundaries Commission (IEBC) created under the 2010 Constitution. The presidential elections were effectively a contest between Uhuru Kenyatta of the National Alliance (TNA) and Raila Odinga of the Orange Democratic Movement (ODM). Kenyatta was backed by the Jubilee Alliance (which later formed the Jubilee Party), while Odinga was supported by the Coalition for Reforms and Democracy (CORD). Kenyatta defeated Odinga in a very tight race, crossing the constitutional threshold of 50-percent-plus-one required to avoid a runoff by a mere 63,115 (if counting only valid votes cast). Odinga alleged fraud and challenged the election results in court.<sup>4</sup> The Supreme Court upheld Kenyatta's victory.

Concerns noted during the 2013 election included questions about the accuracy of the voter register, the failure of technology during results transmission, and various delays in implementation of the electoral calendar, among other issues. Electoral stakeholders looked closely at these aspects of electoral administration in preparing for the 2017 elections.

As in 2013, the 2017 election was a hotly contested race between President Kenyatta (with deputy president William Ruto as his running mate) and Raila Odinga (with Kalonzo Musyoka as his running mate). The opposition National Super Alliance (NASA) led by Odinga included the Orange Democratic Movement (ODM), the Wiper Democratic Movement, the Amani National Congress (ANC), and Ford-Kenya. President Kenyatta aimed to secure a second term, and Odinga sought to claim the presidency, which he and his supporters believed had been stolen from him in the previous two elections.

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<sup>4</sup> The margin would have been only 8,632 votes if spoiled ballots were included in the count of total votes. The Supreme Court ruling that upheld Kenyatta's victory determined that vote shares were to be based on valid votes cast, not including spoiled ballots.

The current IEBC commissioners began serving in January 2017, following the resignation of the previous commission due to pressure from the opposition, which claimed that the commission was operating in a partisan manner and had not administered the 2013 elections in a fair and equitable manner. The new IEBC faced several challenges, including a compressed electoral calendar and questions regarding transparency and capacity, amid numerous legal cases that impacted its work.

### ***Electoral System and Legal Framework***

The establishment of a clearly defined electoral system based in law is an essential component for holding genuine democratic elections and is necessary for the effective administration of democratic elections that adhere to national and international standards.<sup>5</sup>

*Kenya's Legal Framework for Elections.* Kenya has ratified major international instruments that cover electoral rights and uphold compliance with these treaties through its constitution.<sup>6</sup> Elections are primarily regulated by the 2010 Constitution; the 2011 Election Act, last amended in 2017; the Independent Electoral and Boundaries Commission Act of 2011; the 2011 Political Parties Act; the Public Order Act, last amended in 2014; and other acts.<sup>7</sup>

Kenya has a generally sound and comprehensive electoral and legal framework for the conduct of democratic elections. However, the volatile electoral period exposed gaps and inconsistencies in the electoral framework and reinforced the importance of resolving legal complaints swiftly. Some late changes to the legal framework, introduced at the last minute contrary to international best practice, weakened the IEBC's authority and appeared to benefit the ruling party (e.g., allowing the IEBC vice chairman to carry out the chairman's duties in his absence and reducing the quorum for IEBC meetings from five to three, allowing decisions to be taken by a vote of just two IEBC members). These actions and the negative reaction to them underscored the need for transparency and public consultation on reforms to support a genuine and trusted process.

Looking forward, steps should be taken to eliminate the overlapping jurisdictions of the IEBC and the Political Parties Dispute Tribunal (PPDT); to reduce deadlines for the resolution of electoral disputes, including candidate nominations; to introduce regulations or procedures for resolving election-day disputes; to apply consistent timelines for voter registration that will also allow for a timely verification and audit of the voter register; and to clarify nomination criteria and some election-day procedures.

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<sup>5</sup> U.N., Universal Declaration of Human Rights, Article 21(3). See also UNHRC, General Comment 25, para. 21: "Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by Art. 25 and must guarantee and give effect to the free expression of the will of the voters." The UNHCR Comment 19 indicates that "... elections must be conducted fairly and freely on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights."

<sup>6</sup> Article 2 (6) of the Constitution of Kenya states that "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." Kenya has ratified major international instruments that cover electoral rights, including the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and People's Rights (ACHPR), the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the African Union Charter on the Principles Governing Democratic Elections in Africa (AU CPGDEA), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (ACHPR-PW), and the Convention on the Rights of Persons with Disabilities.

<sup>7</sup> The new 2016 Election Offences Act replaced Part VI of the Elections Act 2011.



*2017 Election System.* Kenyan voters cast six ballots on Aug. 8: for president, National Assembly, senators, governors, member of county assembly (MCA), and national assembly women representatives. The 2010 Constitution made significant changes in the shape of the government and created a new administrative structure for the country. The constitution devolved power to county assemblies and governors. All elections apart from the presidential are held under the first-past-the-post system.<sup>8</sup> Citizens vote directly for the president in one nationwide constituency for a five-year term. The winning candidate must receive 50 percent plus one of the votes cast nationally and at least 25 percent of the votes cast in 24 of the 47 counties in order to be declared the winner.<sup>9</sup> If no candidate achieves this majority in the first round, the constitution states that a runoff must be held “within 30 days after the previous election” between the two leading candidates. In case of nullification of the presidential election, a fresh election is held within 60 days from the date that the court nullifies the results.

Recent legislative changes addressed several key issues, including restricting the practice whereby a candidate who loses a party primary switches parties in order to secure a nomination, known as “party hopping”; introducing an independent audit of the voter register; and extending deadlines for consideration of complaints by the IEBC to 10 days, among others.<sup>10</sup> Notwithstanding these improvements, several aspects of the legal framework on elections remained vague, including nomination rules, particularly those regarding candidate eligibility and signature requirements. In addition, the regulations for resolving election-day disputes were lacking, and the timelines for conducting voter registration and the subsequent verification and audit of the voter register were inadequate, resulting in a shortened voter registration period and potential disenfranchisement of voters.

Critically, the absence of campaign-finance legislation undermined transparency in campaign spending and likely gave significant advantage to the wealthiest candidates and parties. Moreover, the parliament failed to fulfill its constitutional obligation to enact a rule that says no more than two-thirds of any elected body can be of the same gender, despite several court decisions compelling it to do so.<sup>11</sup> This failure undermines the constitution and the right of women to participate in formulation of government policy, as required under Kenya’s ratification of the Convention on the Elimination of all Forms of Discrimination against Women.

Prior to both the Aug. 8 and Oct. 26 elections, some polling-day procedures, including criteria for determining the validity of ballots, were still unclear, and IEBC officials provided inconsistent information to poll workers during the trainings.<sup>12</sup> The IEBC and the courts made key decisions about the electoral framework very late in the electoral calendar prior to both the Aug. 8 and Oct.

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<sup>8</sup> Article 138 of the constitution.

<sup>9</sup> Following the petition challenging the 2013 presidential election results filed by Odinga, the Supreme Court held that rejected votes should not be included in the count and that the law needed to be further clarified. However, no amendments were passed in this regard. Article 138 of the 2010 Constitution of Kenya.

<sup>10</sup> Additional amendments decreased the number of voters per polling station from 1,000 to 700 and provided for registration of prisoners. Moreover, amendments to Section 22 of the Elections Act raised the academic requirements for parliamentarians to a university degree but suspended the application of the new requirements until after the 2017 general election. This amendment was passed despite a High Court decision that declared degree requirements for MPs unconstitutional.

<sup>11</sup> The constitution stipulates that not more than two-thirds of the members of any appointive or elective body should be of the same gender. Kenya constitution, Article 81(b).

<sup>12</sup> The IEBC issued conflicting clarifications on the validity of correctly marked but unstamped ballot papers. On Aug. 3, through an internal memo, the IEBC directed returning officers, constituency returning officers, and deputy returning officers to consider unstamped ballots as valid. Two days later, it reversed its opinion.

26 elections, which affected the uniform application of procedures and contributed to legal uncertainty prior to the poll date. On several occasions prior to the Aug. 8 election, the courts declared some of the provisions of IEBC regulations unconstitutional, including the verification and modification of presidential results by the IEBC, the requirement that support signatures for independent candidates be submitted by non-party members, and the obligation of public officers contesting the elections to resign from their government jobs at least six months before an election.<sup>13</sup> Although no formal changes were made to the regulations, the IEBC adapted its procedures to align with these legal rulings.

Article 138 of the constitution refers to the procedure of a runoff as “fresh elections,” contributing to legal uncertainty. The question of exactly what is entailed in a “fresh” election and whether or not there should be a new candidate-nomination process became critical after nullification of the Aug. 8 presidential election. Unfortunately, neither the constitution nor the Elections Act provides sufficient clarity about these and other key questions and procedures related to “fresh elections.”

In response to a petition, the High Court ruled on Oct. 11 that the 60-day period within which the fresh election must be held was not adequate to conduct new nominations, and therefore the candidates who participated in the invalidated Aug. 8 election were qualified to contest the Oct. 26 fresh presidential election. The Supreme Court confirmed that the law lacks clarity in this regard and ruled that because the “fresh election” was a continuation of the previous electoral process, only those candidates validly nominated for the nullified election were able to stand.

*Late Changes to Legal Framework.* Last-minute changes to an electoral law in the lead-up to an election are contrary to good electoral practice, especially in the absence of political consensus. Amendments were made to the electoral law in January 2017, only eight months before the Aug. 8 election. In addition, amendments to the regulations were submitted to parliament in early March, just five months ahead of elections, and were quickly passed, which did not leave time for effective and inclusive public consultation, contrary to international good practice.

Moreover, on Sept. 27, only one month before the fresh elections, the ruling party introduced further amendments to the Elections Act, stating that they were necessary to address some of the problems cited by the Supreme Court in its ruling that annulled the results of the Aug. 8 presidential election. However, the Supreme Court’s ruling had found that it was the implementation of the law that was at fault and not the law itself. Indeed, IEBC Chairman Wafula Chebukati stated that changing the law at such a late stage would impose substantial challenges for the organization of the fresh election. Unfortunately, once again, the ruling party passed the amendments in an expedited manner in parliamentary sessions boycotted by the opposition, with no time for effective and inclusive public consultation.<sup>14</sup> The amendments further complicated the IEBC’s efforts to

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<sup>13</sup> The ruling of the High Court on April 7, 2017, nullified Section 39(2) and (3) of the Elections Act and Regulations 83(2) and 87(2)(c) of Elections (General) Regulations 2012. Section 29 and 43(5) of the Elections Act were declared unconstitutional. The Employment & Labour Relations Court ruled that civil servants do not have to resign their positions to stand as candidates in an election.

<sup>14</sup> 2001 Protocol on Democracy and Good Governance, The Economic Community of West African States (ECOWAS): “No substantial modification shall be made to the electoral laws in the last six months before the elections, except with the consent of a majority of political actors. The Code of Good Practice in Electoral Matters of the Venice Commission states that “the fundamental elements of electoral law, in particular the electoral system, membership of electoral commissions and the drawing of constituency boundaries, should not be open to amendments less than one year before an election.” Point II.2.b.

achieve consensus between the two leading presidential candidates on the procedural changes necessary to comply with the ruling of the court.<sup>15</sup>

The amendments were sent to the president for signature on Oct. 13. Although the president refrained from signing the law, reportedly because of the lack of national consensus and the perception that the changes would give his party an unfair advantage, the amendments nonetheless became law on Nov. 2, after being published in the official gazette.<sup>16</sup>

Some of the amendments diminish the independence of the IEBC by introducing procedures that reduce the IEBC's accountability and inclusive decision-making. For example, the amendments provide for the possibility of the vice chairman carrying out the chairman's duties in his absence and reduce the quorum for IEBC meetings from five members to three, making it possible for two members to make decisions.

Another amendment makes it more difficult to overturn an election in court by raising the evidentiary bar for challenging election results and mandating that the Supreme Court find that alleged irregularities in an election affect the results before annulling an election on procedural grounds. While this amendment would make Kenya's law more consistent with broad international practice and could provide greater assurances that the will of the voters will be respected, the manner in which it was passed – shortly before the presidential rerun and without political consensus – reinforced the divisive nature of the polls.<sup>17</sup> Three petitions challenging the legality of the bill were filed with the High Court, requesting their suspension pending determination of the court.<sup>18</sup>

*Summary.* While Kenya's electoral and legal framework is generally strong and provides for the conduct of democratic elections, the compressed timeline for implementation of the polls and the contentious political environment exposed several gaps and inconsistencies in the electoral framework that should be reformed through a genuinely transparent process that includes broad public consultation conducted well in advance of the 2022 electoral cycle. These steps could help increase public confidence in the IEBC. Moving forward, electoral reform is needed to effect some key changes. Reforms should clarify the jurisdiction of the IEBC and the Political Parties Dispute Tribunal (PPDT); shorten deadlines for the resolution of some electoral disputes, including candidate nominations; introduce regulations or procedures for resolving election-day disputes; apply adequate timelines for voter registration and related audits and verification exercises; and clarify nomination rules and some election-day procedures.

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<sup>15</sup> An elections law amendment bill was tabled in parliament on Sept. 27. The bill was discussed on Sept. 28. Opposition MPs forced Deputy Speaker Moses Cheboi to call for physical voting after they lost the first round of voting by acclamation.

<sup>16</sup> The bill was published in the Official Gazette and entered into force on Nov. 2.

<sup>17</sup> On the principle requiring that alleged irregularities should be demonstrated as having affected the outcome before results can be annulled, see Steve Brickerstaff, "International Principles of Vote Recounts and Election Contests," in *International Election Remedies*, John Hardin Young (ed), 2016, American Bar Association, p. 200; and "Electoral Justice: The International IDEA Handbook," para 546, p. 178.

<sup>18</sup> On Dec. 5, 2017, the High Court suspended the bill and scheduled a hearing for March 16, 2018.

## ***Election Administration***

An independent and impartial election management body that functions transparently and professionally is internationally recognized as an effective means of ensuring that citizens are able to participate in the electoral process and that international human rights obligations pertinent to the electoral process are upheld.<sup>19</sup> Best practice indicates that an election management body should ensure accountable, efficient, and effective public administration as it relates to elections.<sup>20</sup>

*Election Administration Structures.* Elections in Kenya are administered by a four-tiered election administration, comprised of the IEBC in Nairobi, 290 constituency election offices, 47 county offices, and 40,883 polling stations.<sup>21</sup> The IEBC is the principal institution responsible for oversight of the electoral process, with a broad constitutional mandate. The current commissioners were appointed in late January 2017, eight months before the general election, following opposition demonstrations and street protests calling for the removal of the previous commissioners. While there was a complete turnover of commissioners, Chief Electoral Officer Ezra Chiloba has been in place since 2015. In addition, several technical staff who administered the elections in 2013 remained in their positions for the 2017 elections.

*In its July 27 pre-election statement, the Center found that in the face of many challenges, the IEBC moved forward with preparations for the Aug. 8 election. However, it called on the IEBC to take steps to improve communication and transparency. Despite a chaotic party primary process, political competition was high, including a significant increase in the number of independent candidates. The level of election-related violence, including harassment and intimidation of candidates and supporters, and reports of violation of the Code of Conduct were of concern. The Center urged sufficient testing of KIEMS as a means to increase public confidence in the electoral process. Despite the strong provisions in the constitution to increase the participation of women, youth, and persons with disabilities, these groups faced serious obstacles to participation.*

*Transparency in Election Information.* Although the newly appointed IEBC commissioners started with a clean slate, they were burdened with the distrust that affected their predecessors and a compressed timeline in which to organize the elections. The IEBC provided intermittent public updates on election planning during the electoral period.

Prior to the Aug. 8 election, the IEBC held a national election conference over several days to report on election planning. Notwithstanding these commendable efforts, the IEBC continuously failed to meet its constitutional obligation of transparency during the extended electoral period. It did not inform the public of its decision-making processes and consistently failed to publish the minutes of its meetings and its internal voting records.<sup>22</sup> Despite urging by diverse stakeholders, including The Carter Center, the IEBC failed to communicate clearly and regularly about the status

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<sup>19</sup> ICCPR, General Comment 25, para. 20 requires that “[a]n 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.”

<sup>20</sup> AU, ACDEG, art. 32(1); Venice Commission, Code, Sec. II.3.1.c.

<sup>21</sup> Forty-seven county IEBC offices replaced 17 regional offices, resulting in an increased coverage of the country. The IEBC permanent field staff were rotated to enhance trust in their impartiality and accountability.

<sup>22</sup> The IEBC Act, Second Schedule, para. 10 requires that the IEBC keep minutes of all meetings. Para. 19 of the 2011 UNHRC General Comment No. 34 to Article 19 of the ICCPR states, “To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective, and practical access to such information.” U.N., UNCAC, art. 13(1)(a); AU, Convention on Corruption, Article 12(2); CoE (Venice Commission), Code of Good Practice, sec. II.3.1.80.

of preparations, challenges, and plans for addressing issues proactively. This lack of transparency negatively affected the confidence and trust of the electorate, civil society actors, and political parties in the work of the IEBC.<sup>23</sup>

Although Carter Center long-term observers (LTOs) enjoyed full access to IEBC personnel at the local level, access by core staff at the national level was erratic. IEBC officials provided limited and conflicting information, suggesting that it lacked a uniform understanding of the law and procedures. While reiterating its open-door policy throughout the process, the IEBC either failed or refused to provide copies of their decisions to the Center on numerous occasions.<sup>24</sup>

*Electoral Preparations.* The IEBC worked diligently to prepare for the Aug. 8 and the Oct. 26 elections despite a limited timeframe to prepare for both and significant legal and other challenges faced throughout the electoral period. Procurement of critical election materials, including ballot papers, was also hampered by the late appointment of the commissioners and legal challenges to the procurement process. Despite a compressed timeframe, IEBC recruited and prepared polling staff to implement the electoral process on election day. The IEBC established 40,883 polling stations, each capped to serve no more than 700 voters. This represented a 25 percent increase from 32,613 polling stations in the 2013 polls.

Carter Center LTOs followed the recruitment of polling officials in several constituencies across Kenya prior to the Aug. 8 poll and evaluated the overall process as positive. Polling officials blacklisted in 2013 for their performance were not eligible to apply.<sup>25</sup> Poll workers who did not perform their duties satisfactorily for the Aug. 8 election were not rehired for the Oct. 26 election.

The IEBC conducted training for its staff in line with the electoral calendar prior to Aug. 8, and the process was largely positive. Carter Center observers assessed the training as well-organized, comprehensive, and interactive. While all workshops followed the same agenda, in some instances trainers relayed inconsistent information about the marking of ballots, the participation of agents, and the validity of ballots, among other issues. Non-sensitive election materials were largely distributed on time, albeit sometimes unevenly, and IEBC personnel were reportedly reactive and swift in addressing these problems. The weakest aspect of the training for the Aug. 8 election related to the tabulation and results transmission process, which manifested itself as a major problem on election day. Although voting-day processes were generally well-administered, concerns surfaced during the tabulation and transmissions processes.

*KIEMS Integrated Electronic Software.* The 2016 legislative amendments in the Elections Act required the establishment of an integrated electronic system covering all aspects of biometric voter identification and registration, candidate registration, and transmission of results. It also required the IEBC to test the new system – called the Kenya Integrated Election Management System or KIEMS – at least 60 days before the elections. However, the procurement of the KIEMS

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<sup>23</sup> Article 81 of the constitution sets out transparency as one of the main principles of free and fair elections. Para. 19 of the 2011 UNHRC General Comment No. 34 to Article 19 of the ICCPR calls on states' parties to proactively provide access to information on issues of national importance.

<sup>24</sup> These included all the decisions following resolutions of disputes, as well as the decision on suspension of the campaign taken by the Siaya County returning officer as reportedly directed by the management.

<sup>25</sup> After the timeframe for hiring had passed, Carter Center observers noted that the selection process had not been finalized in some areas (Nairobi, Narok, Kilifi), and the recruitment had to be reopened because of a lack of sufficient qualified candidates. One reason given for this deficiency was that the application was online, which prevented some potential candidates from applying.

and ballot papers was delayed by legal challenges. The initial kits arrived on April 14, and delivery was completed in early June. The staggered and late delivery of KIEMS negatively impacted the voter verification process.

The IEBC conducted a limited test by the legal deadline and held a countrywide simulation on Aug. 2, less than a week before the Aug. 8 general elections. Though all counties took part in the simulation, the IEBC opted to display results from only a limited number of counties. This reversal of their stated plans detracted from the transparency of the process and decreased public trust in the operation of the system. More intensive testing and posting of results might have revealed the deficiencies that contributed to the failure of the results transmission during the Aug. 8 election. No nationwide KIEMS simulation was conducted prior to the Oct. 26 fresh election.

*Preparations for the Oct. 26 Election.* While the IEBC took preliminary steps to address the weaknesses cited by the Supreme Court in its Sept. 1 ruling, the court did not release its detailed judgment until Sept. 20, leaving less than a month to enact reforms and exerting great pressure on the commission. The period before the Oct. 26 election was marked by a continued lack of transparency, limited communication, and a more pronounced dysfunctional internal operation of IEBC, which further reduced an already fragile public confidence and trust in its work.

The internal disorganization and disagreements within the IEBC spilled out into the public when, on Oct. 18, IEBC Commissioner Roselyn Akombe resigned and left the country, alleging that the IEBC had become a party to the electoral and political crisis and that commissioners were voting along partisan lines. Akombe maintained that in the current political environment, “the elections as planned cannot meet the basic expectations of a credible election.” This assessment was supported by Chairman Chebukati, on Oct. 18, when he said that although the commission was technically ready to administer the polls, political agreement and critical changes in key secretariat staff were needed for him to commit to serving as the national returning officer and to hold a free, fair, and credible election.

In addition to the internal divisions, the IEBC faced a volatile and polarized political environment throughout the electoral period. This intensified prior to the Oct. 26 election as the main political actors became more entrenched in their positions. The Jubilee Party stated that it had no requests for any procedural reforms, and party officials, including the president, pushed for the Oct. 26 election to take place as scheduled, despite numerous legal challenges.

Meanwhile, NASA presented a set of demands known as its “irreducible minimums” to be met before it would participate in the election. These included the replacement and prosecution of IEBC staff they saw as responsible for the problems that led to the nullification of the Aug. 8 election and securing new companies to print the ballot and results forms, and to design and oversee the electronic results transmission platform. Some of the demands could not realistically be met during the timeframe allotted. Others would have impinged upon the IEBC’s independence.

For example, the IEBC refused to replace OT Morpho/Safran, the IT company that supplied the software for the electronic results transmission system, despite NASA demands to do so, given the tight timeframe involved. However, in response to the opposition’s request to fire IEBC personnel, the IEBC chairman did exclude some key personnel from the project team set up to oversee the election. One week prior to the election, CEO Ezra Chiloba, one of the key staff whom NASA blamed for the initial election’s irregularities, announced his departure on a three-week leave.

Although Chairman Chebukati stated on Oct. 19 that the IEBC was technically ready to administer the elections, he insisted that the two principal presidential candidates sit down together with the IEBC to discuss pending issues and work out a way forward to allow credible elections to take place on Oct. 26. He extended an open invitation to host a joint meeting with the two leaders. Regrettably, because of the intransigence of the two main political leaders, this meeting never took place.

In response to the court's findings regarding tabulation and transparency of results data, the IEBC took several positive steps to address problems that arose during the Aug. 8 election. It standardized polling-station and constituency-result forms (Forms 34A and 34B, respectively); reconfigured the KIEMS system to transmit scanned images with numerical results only; and provided observers and parties with read-only access to servers, databases, and logs. These steps proved crucial for the improved transparency of the Oct. 26 election.

Prior to the Oct. 26 election, the IEBC held a joint training for county election managers, returning officers (ROs), and deputy ROs to introduce staff to the new procedures and corrective measures taken to address the irregularities and illegalities identified by the Supreme Court. IEBC trainers paid particular attention to tallying, data entry, and transmission procedures, and effectively communicated the procedural changes to polling staff. The IEBC produced updated training materials and quick reference guides, which were particularly helpful to IEBC poll workers and staff on election day. Further, the IEBC issued detailed gazette notices on the results transmission at all levels and put complementary mechanisms in place. These actions helped to improve the results management process significantly during the Oct. 26 elections.

However, the divisive political environment greatly affected IEBC staff at the polling-station level for the Oct. 26 election. The calls for a boycott by the opposition hampered the ability of the IEBC to recruit and train poll workers. Polling officials were harassed and intimidated. In some areas, simply showing up for work was perceived as supporting the holding of the polls on Oct. 26. In the week before the election, IEBC trainings were attacked and disrupted by gangs of youth in Kisumu, Viniga, Siaya, Homa Bay, Migari, and parts of Kakamega County.

*Summary.* Kenya partially fulfilled its obligations to establish an independent and impartial election management body. The IEBC conducted two elections within a 10-month period despite its late start and in the face of significant internal and external challenges, including numerous court petitions, which affected its administration of the elections. The challenges were magnified after the murder of the head of the IT department, Chris Msando, on July 29, which greatly affected the IEBC and its staff.<sup>26</sup>

As noted above, the Aug. 8 elections were undermined by a series of problems in the tabulation and results transmission processes. Following the elections, the IEBC implemented corrective measures that improved the election process on Oct. 26, despite the deteriorating political environment and external pressures on the IEBC and its staff. These included intimidation and threats to IEBC staff before the Oct. 26 election and a multitude of court cases challenging each step of the process.

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<sup>26</sup> The murder of Mr. Msando remains unsolved as of the editing of this report in February 2018.

Notwithstanding the corrective steps, the IEBC's continued lack of transparency in decision-making and its inefficient communication strategy hindered the IEBC throughout the electoral period. This lack of transparency and failure to provide sufficient public information is contrary both to international standards and to Kenya's constitutional requirement that elections be transparent. These failures damaged public confidence in the IEBC and its ability to administer the polls. In addition, late decision-making about electoral procedures contributed to incomplete and inconsistent training for IEBC officials and poll workers.

Most significant in terms of the credibility of the elections, the IEBC failed to provide stakeholders with sufficient means to independently verify key aspects of the information and communications technology (ICT) systems, especially the tallying and tabulation of results during the Aug. 8 elections. This played a key role in fueling distrust in the electoral process and the official results.

### **Election Day, Tabulation and Results Transmission**

International standards protect citizens' right to vote and call on states to ensure that voting takes place in an environment where the security of the process and the safety of voters are assured.<sup>27</sup> Reporting and transmission of results should be transparent, with partisan and non-partisan observers having meaningful access to the voting and results tallying processes.<sup>28</sup>

*Overview.* The Aug. 8 election day was characterized by a large voter turnout and a generally peaceful environment. Voters waited patiently in long lines to cast their ballots, and party agents were present in 99 percent of the polling stations observed by Carter Center teams.

In stark contrast, protests and violence prevented polling in opposition-leaning parts of the country on Oct. 26, and turnout dropped by half. While the tallying and results transmission process suffered significant flaws in August, the IEBC improved these processes significantly for the Oct. 26 polls. Political party agents and domestic observers were present for both elections, although in smaller numbers for the Oct. 26 presidential polls. NASA agents were mostly absent on Oct. 26 because of the party's boycott of the election.

It is important to emphasize that the Oct. 26 election day was marred by violent protests in the western regions of the country, a NASA stronghold, and in Nairobi's volatile slum neighborhoods. The IEBC could not deliver election material to some of these areas because of blocked roads. Some of the polling staff in the affected areas did not show up for work, reportedly because of intimidation. As a result, the IEBC postponed the election for two days in four counties – Kisumu, Homa Bay, Siaya, and Migori – where polls were unable to open.<sup>29</sup> Polling in these locations was

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<sup>27</sup> U.N., ICCPR, Article 9 and 25; AU, AfCHPR, Article 6 and 13(1).

<sup>28</sup> U.N., ICCPR, Article 19(2) and General Comment 25, para. 20; AU, Convention on Corruption, Article 9 and ACDEG, Articles 19-22.

<sup>29</sup> Article 55B of the electoral code allows the IEBC to postpone an election in a constituency, county or ward if: There is reason to believe that a serious breach of peace is likely to occur if the election is held, or it is impossible to conduct the elections as a result of natural disaster or other emergencies. If the IEBC is satisfied that the results in the affected areas would not change the result from the rest of the country — that is, if the margin of victory is larger than the number of votes in the affected areas so that even if there were elections held in those areas the results would not change — it can declare a winner without the results from the affected areas.



*In its Aug. 10 preliminary statement, the Center found election day voting and counting processes functioned smoothly. However, the electronic transmission of results from the polling stations to constituency centers, where official results are tallied, proved unreliable. The Center urged the IEBC to continue to collect and publish results transparently until the process was concluded and to ensure that all parties and their agents enjoyed full access to the IEBC's tallying processes at all levels to review any discrepancies. The Center urged candidates and parties to use established legal channels to resolve disputes and to call on supporters to remain calm.*

later postponed indefinitely after it became clear that the security situation would not improve sufficiently in the days following the polls to allow voting to take place.

### **Aug. 8 Election Day**

The Carter Center deployed a full short-term observation delegation for the Aug. 8 election day. The Center observed polling in 39 counties, covering 424 polling stations in 185 constituencies.<sup>30</sup> Election day was mostly calm and peaceful, with high voter turnout and well-managed polling, with minor instances of irregularities. While the KIEMS devices generally functioned properly to identify voters, in a limited number of cases, the devices were unsuccessful in recognizing the voter's fingerprint, causing polling staff to have to search for their voter

information alphanumerically in the KIEMS system. Observers noted that polling staff did not consistently fill out a "supervisory form" (32A) to document the voter, as required, in these instances. Some polling stations lacked sufficient quantities of the form.<sup>31</sup>

Closing procedures were well-administered in over 80 percent of the 424 polling stations visited. Three teams found that IEBC staff poorly administered the counting process. Carter Center teams gathered counting data from 36 polling stations on election day. The results from 34 of the 36 polling stations were consistent with Forms 34A (polling-station results form) and 34B (constituency-results form) posted officially on the IEBC website.<sup>32</sup>

After the polls closed, Carter Center observers visited 37 tallying centers on Aug. 8 through Aug. 9. Observers reported that the work was slow, and many IEBC officials were fatigued. Despite an initially chaotic process in some centers, most were managed in a transparent manner. In many tallying centers, officials entered the results data into Excel spreadsheets and then transferred the data to the constituency-level result form. Only 30 percent of Carter Center teams observed copies of the Form 34A that were received as scans from the polling stations. Two-thirds of the teams reported observing the original paper 34A forms, which were being scanned at the constituency tally center because of problems with the KIEMS system or connectivity that prevented them from being sent electronically from polling stations.<sup>33</sup>

In most centers, officials announced the results. However, there were multiple instances in which the results were not displayed, or the displayed results reflected the results posted at the national

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<sup>30</sup> The Center did not deploy short-term observers to Wajir, Tana River, Lamu, Garissa, Marsabit, Turkana, and Samburu counties.

<sup>31</sup> Carter Center observers reported limited instances in which the KIEMS was not used, and poll workers used the complementary mechanism (Form 32A) in half of these instances. A small number of polling stations reported not having sufficient quantities of the form to meet the need.

<sup>32</sup> In two cases with discrepancies, Odinga's results were less by one vote than the number indicated in Forms 34A and 34B.

<sup>33</sup> At stations in Kilifi North, the KIEMS devices were not working sufficiently because of poor internet connection. There were only hard copies of the results forms available with no electronic transmission. Stations in Ol Jorok also experienced difficulties with electronic transmission because of limited internet coverage.

level rather than the constituency level. Teams in two constituency tally centers found the process lacked credibility because of discrepancies between the results announced locally and those displayed at the Bomas National Tally Center.<sup>34</sup>

Carter Center observers reported that party agents were present in most polling stations visited, including agents from Jubilee, NASA and affiliated parties, and smaller parties. Agents signed the results form in most polling stations observed at counting. In most tallying centers, party agents were present and positively engaged. Domestic citizen observers were well-represented at polling stations and tallying centers. Observers noted slightly more than one-third of presiding officers were female.

While the numerical results from the KIEMS system were transmitted successfully to the national tally center (located at Bomas), the early display of these tallies was often not accompanied by scanned copies of the polling-station results forms (34As) for the presidential race, as required by law. Nor were the tally results displayed at Bomas clearly labeled “unofficial.” Presidential results were announced using constituency results Forms 34B, which were not fully verified against the 34A forms. Both scanned 34As and the original 34As were slow in reaching Bomas, in some cases taking more than a week to arrive. At least several thousand forms were still outstanding one day before the deadline to lodge a petition challenging the presidential results. While the IEBC communicated with the opposition NASA coalition about their requests to make the scanned forms available, regular updates about the status of the tallying and tabulation process were not provided to the public.

Despite the delays in receiving the 34A tally forms at the national level, the IEBC did not take advantage of the seven-day deadline provided by the law to announce results. Instead, the IEBC hastily declared presidential election results on Aug. 11, just three days after election day. The Elections Act requires IEBC to publish presidential election results forms on an online public portal. Out of 40,883 results forms, only 30,000, or three-fourths of the scanned 34A forms, were published on Aug. 9. The remaining 34As were only uploaded after the deadline for filing petitions on Aug. 25. Constituency-results forms (34Bs) were posted only two days before the deadline for filing a petition to challenge the results of the presidential elections.<sup>35</sup>

This breakdown in the results-transmission system critically undermined the transparency of the tallying process and severely hindered verification efforts by parties and independent observers, leading to legitimate questions about the accuracy of the results. The failure of the system to work as expected fueled NASA’s challenge of the presidential election results, as well as the court’s ruling to annul the election.

*In an Aug. 17 statement, the Center urged the IEBC to finalize the posting of the Forms 34A as expeditiously as possible, noting the Aug. 18 deadline for filing challenges to the presidential election results, as access to official results data is critical for interested parties to cross-check and verify results. The Center expressed concern about the excessive use of force by the police and constraints on CSOs monitoring the electoral process.*

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<sup>34</sup> Teams in Saboti and Taita Taveta found the process lacked credibility because of significant disorder in the tally center and discrepancies between results being announced by the constituency returning officer and those displayed at Bomas, respectively.

<sup>35</sup> The forms from the Aug. 8 election are no longer posted on the IEBC website.

After the presidential results were announced, NASA scrutinized the results forms and compared the 34As and 34Bs gathered from the IEBC with those of their party agents. It alleged significant irregularities in the results tally forms and said that the IEBC IT system had been hacked and the results changed. NASA's claims were included in their petition challenging the results, which included a request to access the IEBC server to verify whether or not it had been infiltrated. The IEBC could have avoided some of these issues if it had used the time available to it before announcing the results to collect and post all of the 34A forms, enabling all sides to compare them to the county-level 34B forms.

### ***Oct. 26 Election Day***

Given the non-competitive nature of the Oct. 26 election and the inability of observers to access NASA strongholds, The Carter Center deployed only a limited observation team for the Oct. 26 election. The Center's direct observations were limited to a small sample of polling stations and tally centers and did not attempt to provide a robust assessment of the quality of the process.<sup>36</sup> The IEBC postponed elections in 25 constituencies because of security reasons.

The Carter Center observed tally centers in Nairobi, Kiambu, Eldoret, Bomet, Nyeri, and Mombasa and found that staff worked in an orderly fashion, with a clear operational flow and in accordance with the new procedures instituted as a result of the Supreme Court ruling. The process was well-organized and transparent, although in a few cases, the screen displaying the results was too far away for observers to read it easily or was not active at all.

Party agents and domestic observers were present for the Oct. 26 election, but in substantially fewer numbers than in August. Observers noted the presence of Jubilee Party agents in more than 90 percent of the polling stations visited during polling and in all stations observed for counting. Citizen observers were present in approximately 30 percent of the polling stations visited.<sup>37</sup> Jubilee agents and citizen observers were present in all tally centers. As a result of the NASA boycott, its agents were not present in the polling stations and tallying centers visited, which undermined a key safeguard on the election process.

Technological changes implemented by the IEBC in response to the court's ruling improved the overall administration of the fresh presidential election and increased transparency and efficiency of the electronic transmission of results. Scans of the 34A forms were received from the vast majority of the polling stations without undue delays. From those areas where voting took place,

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<sup>36</sup> The Carter Center observed voting in 79 polling stations in Nairobi, Kiambu, Nyeri, Mombasa, Bomet, Uasin, and Gishu counties. In the limited areas where Carter Center observers were deployed, they found that the overall environment was calm, that there were not any major irregularities in the voting process, and that turnout was significantly lower than for the Aug. 8 elections. The "supervisory form" to be filled out when voters were recognized alphanumerically by the KIEMS, rather than by their fingerprints, was not used consistently as required. The procedure is as follows: If the KIEMS does not recognize a voter's fingerprints after three attempts, the clerk has to search for the voter alphanumerically. Once the voter is identified alphanumerically, the fingerprints are scanned again for verification, and a "supervisory form" (Form 32A) has to be filled in and signed by a party agent. Polling staff followed closing and counting procedures, and counting was completed in an orderly manner.

<sup>37</sup> Observers from the following groups were noted in polling stations observed: Office of the Registrar of the Political Parties, the Law Society of Kenya, the Kenya National Commission on Human Rights, the Catholic Justice and Peace Commission, Haki Africa, the Kenya Human Rights Commission, the National Cohesion and Integration Commission, and the Chartered Institute of Public Relations.

the IEBC received and displayed 37,187 of the 40,833 polling-station forms (34A) and 266 of the 290 constituency forms (34B) prior to the declaration of results on Oct. 30.<sup>38</sup>

In the Bomas National Tallying Center, electoral staff verified scanned forms multiple times against the originals brought by the constituency returning officers. While this exercise was time-consuming, it contributed to the transparency and reliability of the final results. In addition, the IEBC provided agents and observers read-only access to the results transmission and the ICT room in the national tally center throughout the tallying of the results.

The IEBC again released conflicting information about voter turnout at the national level during the tally process. Discrepancies in the turnout figures were caused by gaps between the number of voters identified by the KIEMS devices and the hard copy tallies, as voters who were identified through the complementary mechanism (Form 32A) were not included in the initial turnout figures. These discrepancies further underscore the need for a thorough review of the role of ICT technology in the electoral process and its management.

*Oct. 26 Election Results.* The IEBC announced on Oct. 30 that President Kenyatta had been re-elected with 7,483,895 votes. The other six candidates on the ballot received less than 140,000 votes combined.<sup>39</sup> The IEBC announced the final turnout as 42.36 percent in the constituencies where voting took place and 38.84 percent of all registered voters nationwide, a significant decline from previous elections.<sup>40</sup> Because Kenyatta won by a far greater margin than the total of approximately 1.6 million votes in the four counties in which the election was postponed, the IEBC declared Kenyatta the winner without results from those counties, as allowed under Article 55(b) of the Elections Act, and postponed indefinitely the elections in those areas.

*Summary.* Conditions during the Oct. 26 elections fell significantly short of international standards for a genuine election. With NASA's boycott, there was not a genuinely competitive election, and polling stations were not opened in significant parts of the country. In contrast to Aug. 8, the security of voters and IEBC staff was threatened. While the improved tally and transmission procedures contributed to a better-managed technical process on Oct. 26, these did not take place in all areas of the country.

## **Use of ICT in Kenyan Elections**

International standards require that the tallying and transmission of results be verifiable, transparent, and open.<sup>41</sup>

*ICT and the Kenya 2017 Elections.* Information and communication technologies (ICTs) played a major role in the Aug. 8 general elections and Oct. 26 fresh presidential election. Voter

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<sup>38</sup> The IEBC received 27,124 forms within hours after polling, and a total of 35,438 forms within nine hours after the closing of the polls.

<sup>39</sup> According to the IEBC, the verified results from the 266 constituencies where the vote took place were: valid votes, 7,616,217; rejected ballots, 37,713; Kenyatta, 7,483,895 votes, or 98.27 percent; Odinga, 73,228 votes, or 0.96 percent; Aukot, 21,333, or .28 percent; Dida, 14,017, or .19 percent; Kaluyu, 8,261, or .11 percent; Wainaina, 6,007, or .08 percent; Nyagah, 5,554, or .07 percent; and Jirongo, 3,832, or .05 percent.

<sup>40</sup> Turnout for the Aug. 8 election was reported by the IEBC as 77.48 percent.

<sup>41</sup> U.N., ICCPR, Article 19(2); AU, Convention on Corruption, Article 9; CoE (Committee of Ministers), Recommendation (2004)11 on e-voting, Article 98; CoE (Venice Commission), Code of Good Practice, sec. 1.3.2.xiv.

identification and result transmission relied heavily on the use of ICT. However, paper versions of electoral registers and results reporting forms, such as the 34A and 34B forms, were also used.

Since 2016, the legal framework required Kenya to gradually introduce ICT into the voting process, with the goal of increasing the transparency of the election. In theory, ICTs should improve voter identification, prevent double voting, and facilitate fast and accurate results transmission and tabulation. In practice, however, the use of ICT did not deliver the desired levels of transparency or efficiency. This was evidenced by the announcement of incompatible voter turnout numbers, unexplained differences between the official KIEMS report and the national overall election results reported in Form 34C, and the failure to post all scanned results forms so that stakeholders could independently verify the results.

*In its Nov. 7 preliminary statement, the Center found Kenya's fresh presidential election was marked by insecurity, political uncertainty, and the lack of a fully competitive election. Polling did not take place in some parts of the country. Technological changes implemented by the IEBC improved the overall administration of the election and increased the transparency and efficiency of the electronic transmission of results in the areas of the country where polling took place. The election served to heighten the polarized political environment and deepened ethnic divisions in the country.*

The information technology systems deployed by the IEBC in the Aug. 8 and Oct. 26 elections are complex, and their inner workings are very difficult to observe, even for computer security experts. Additional challenges to transparency and credibility were posed by the potential for ICT software defects, the lack of nationwide network connectivity, and vulnerabilities to possible cyberattacks. Given the difficulty of such challenges, it is important to ensure that stakeholders have sufficient access to key information, at appropriate times, so that they can verify the accuracy of the election results and other important data.

During the Aug. 8 elections, the IEBC relied heavily on the KIEMS system to identify voters and transmit polling-station results to the constituency and national levels. Poll workers identified voters using a biometric fingerprint scanner, with a printed electoral register as back up. Following the count, staff used the KIEMS system to transmit polling-station results and scans of the 34A results forms by SMS to the constituency and national tally centers. This process broke down however, as not all of Kenya's polling stations had internet connectivity, requiring polling staff to transport the KIEMS device to a different location to send the results. Additionally, the scans of some of the forms failed to send. While the voting materials and paper results forms were delivered physically to the constituency tally centers where polling station-level results were tallied and consolidated, the IEBC staff at the Bomas national tally center did not cross-check the 34A scans against the 34B forms that were sent from the constituency tally centers to the Bomas national center. The voter turnout figures announced at Bomas inexplicably differed from those announced at the constituency tally level, and the IEBC posted only some of the forms to its website, which inhibited independent verification of the figures. Finally, the IEBC announced the presidential results based on the constituency-level tally forms (Form 34B), prior to the receipt of all polling-station tally forms (Form 34A).

For the Oct. 26 election, observers and political party agents were granted greater access to the operations of the ICT tabulation system, which was verified against the paper evidence produced at polling stations and tallying centers — the paper Forms 34A and 34B. The process functioned more smoothly and adhered more closely to international standards than during the August polls.

The successful verification of this evidence ultimately led to the increased transparency of the election process in those areas where the election took place.

*Summary.* Overall, the IEBC has taken important steps to improve ICT processes following the 2007 elections, although vulnerabilities remain.<sup>42</sup> Looking forward, it is essential that the results transmission process is more transparent and verifiable. If a large ICT component is retained in future elections, the results process should combine two separate results systems, one that is purely electronic and another that is purely paper-based, which can be checked and compared at constituency and national tally centers. The system must be relatively simple to execute and understand, easy to maintain, less resource-intensive, more transparent, and more secure. In addition, providing for a post-election statistical audit to verify the digital election results against the original ballot box would reinforce the accuracy of the electoral results and bolster the transparency and accountability of the process.

### *Voter Education*

Comprehensive voter education is essential to inform the electorate of their rights and to clarify their election-related questions ahead of election day.<sup>43</sup> It promotes a more inclusive electoral process and reinforces the international obligation to universal suffrage.<sup>44</sup> The right to voter education is contained in Kenya's constitution and Elections Act.<sup>45</sup>

*IEBC and Voter Education.* The IEBC has a constitutional responsibility for voter education and should provide leadership in this regard. While the commission implemented voter education activities for the Aug. 8 and Oct. 26 elections, its outreach was initially limited by delays in delivering materials and resources to voter educators. Unfortunately, the IEBC voter education materials on the procedure for voters to verify their registration information were distributed late in the process. While efforts intensified in advance of the Aug. 8 elections, voter education surrounding the fresh election in October was minimal.

The IEBC recruited 2,900 voter educators (two per ward), as well as 47 county and 290 constituency-based educators to implement its voter education program. Voter educators were expected to cover large geographic areas but were not consistently provided with travel stipends to pay for their transportation costs. In addition, there were only two educators per ward, resulting in a limited voter outreach campaign.

The IEBC's voter education literature explained that citizens have the right to accurate and timely information to support informed participation in the electoral process. Materials were developed to address the needs of special-interest groups such as minorities, youth, people with disabilities, and other marginalized persons.

In the weeks leading up to the Aug. 8 election day, Carter Center LTOs reported a significant improvement in the timeliness of material delivery and preparation and supervision of voter educators. Voting-day procedures were broadcast on the main TV channels. The IEBC placed

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<sup>42</sup> See Kriegler Report at [https://kenyastockholm.files.wordpress.com/2008/09/the\\_kriegler\\_report.pdf](https://kenyastockholm.files.wordpress.com/2008/09/the_kriegler_report.pdf).

<sup>43</sup> The ICCPR General Comment No. 25 states that "Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community." See also AU, ACDEG, Article 12.

<sup>44</sup> ICCPR Article 25: States must ensure that voter education reaches the broadest possible pool of voters (United Nations Human Rights Committee, General Comment 25, para. 11).

<sup>45</sup> Article 88.4(g) of the constitution, Section 40 of Elections Act.

informational ads in national newspapers, ran publicity spots on radio stations, and sponsored voting-day simulations in the majority of the counties.

Although the IEBC redeployed voter educators for the Oct. 26 election, Carter Center observers reported lower levels of activity than in the run-up to the August elections.<sup>46</sup> Voter educators reported that it was challenging to conduct their work in NASA strongholds because of a lack of receptiveness among voters.<sup>47</sup> During post-election interviews in western Kenya, interlocutors reported that voter educators feared being perceived as advocating for the Oct. 26 election. Such safety considerations hindered the already-limited education efforts.

*CSO Voter Education Efforts.* Although the IEBC accredited some 200 organizations as voter education providers, some electoral stakeholders reported limited CSO voter-education efforts. This is likely the result of a lack of funding made available to them, which significantly impaired their capacity.

*Summary.* The IEBC had limited success in discharging its constitutional responsibility to carry out voter education. Standard voter education curriculum and training manuals were developed, including materials focused on youth and persons with disabilities.<sup>48</sup> However, materials were distributed late, prompting voter educators to implement activities without any supporting documents to explain key information to voters.<sup>49</sup> While voter-education activities significantly improved in the period before election day in August, they were almost nonexistent before the Oct. 26 election. Overall, they were marked by a lack of sufficient personnel and funding. These problems also affected CSOs that conducted voter-education activities.

### ***Voter Registration***

Universal suffrage requires that the broadest possible pool of citizens' can participate.<sup>50</sup> An inclusive and accessible voter registration process promotes universal suffrage.

*Kenya's Voter Registration System.* Under Kenyan law, every Kenyan citizen who is 18 years old and possesses an identification document qualifies for registration as a voter.<sup>51</sup> Citizens of unsound mind and those declared bankrupt are excluded, which is at odds with international standards on the right to vote.<sup>52</sup>

Kenya has a manual civil registration system without a consolidated database, which poses additional challenges to maintaining a reliable, accurate, and up-to-date voter register. The

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<sup>46</sup> The IEBC reported that for the October election, voters' main questions focused on whether elections would take place, and voter educators' messaging rested on reassuring them that elections would be held as scheduled.

<sup>47</sup> In Kajiado and Kiambu counties, for example.

<sup>48</sup> Materials were printed in English and Kiswahili only and were not printed in other languages prevailing in some areas of the country.

<sup>49</sup> For the voter verification education activities, voter educators were trained without the pertinent materials, resulting in their lack of clarity about how to use them.

<sup>50</sup> AU, ACDEG, Article 4(2); OAS, ACHR, Article 23(1)(b); ICCPR, General Comment 25, para. 4 and 11.

<sup>51</sup> As voter registration closes prior to election day, those who have turned of age on election day but have not been registered are effectively disenfranchised.

<sup>52</sup> U.N., (CCPR) General Comment 25 para. 4: "Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria (...) The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable."

possibility of deceased voters being present in the register is increased when a voter register is not linked to a reliable civil register and automatically updated.

The IEBC conducts voter registration on an ongoing basis at its 290 constituency offices and occasionally at polling/registration centers around the country through voter registration exercises. The IEBC pursued its legal obligation to capture biometric data, alphanumeric data, and pictures of the applicants through use of the Kenya Integrated Electronic Management Systems (KIEMS) devices.

*Voter Registration 2017.* The IEBC held two massive voter registration efforts in preparation for the 2017 elections in February 2016 and again from January 16, 2017, to February 19, 2017. These efforts brought the total number of registered voters to 19.6 million — a 36 percent increase over the 2013 register.

The IEBC also implemented a voter verification exercise, which allowed voters an opportunity to confirm their registration status and the accuracy of their information. The IEBC conducted this process from May 11 to June 9, 2017, using 11,000 KIEMS devices to cover 40,883 polling stations. Turnout for the voter verification exercise was low. Approximately one-third of registered voters verified their information. The low turnout was attributed to voter apathy and a lack of sufficient voter education. In some areas, a mobile process was implemented in an effort to increase accessibility for voters. The IEBC developed a schedule to cover all polling stations; however, it was not followed consistently, and the IEBC failed to communicate consistently about when and where the voter registration staff and the KIEMS machines would be available. This led to some voters showing up on dates and at times when IEBC staff were not present. In other areas, verification clerks went door-to-door to verify voters in their areas of responsibility, which proved more effective.

*Voter Audit.* The Elections Act requires a full and independent audit of the voter register, and requires the IEBC to follow up on recommendations within 30 days.<sup>53</sup> The IEBC contracted an international consulting firm, KPMG, to conduct the audit. Court challenges caused significant delays in the audit, constraining the IEBC's ability to implement all recommendations in advance of the election. Some political parties and civil society members criticized the process for its lack of transparency and public outreach. NASA and members of the public criticized KPMG for delays in delivering the audit report and the IEBC for failing to communicate the reasons for the delay and for not immediately releasing the audit to the public. NASA also criticized both for not disclosing the methodology used in a timely fashion. The full report was released to the public on July 11, one month after its submission to the IEBC.

KPMG's audit identified more than 2.9 million inaccuracies in the register, primarily involving inconsistencies in names, gender, and dates of birth versus information in the national ID and passport data. In addition, the audit found slightly more than 450,000 instances of either duplicate ID or passport data in the register, or ID or passport data for persons on the register who were not found in the National Registration Bureau or Directorate of Immigration, respectively. According to KPMG, many of these discrepancies could have been caused by clerical errors when inputting data.

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<sup>53</sup> Elections Act, 8A(6).



The IEBC addressed some findings from the audit and verification exercises when it finalized the official voter register, correcting some inaccuracies. The IEBC expunged a total of 88,602 deceased persons from the register and deleted 93,548 duplicate entries. However, the IEBC retained registrants whose IDs did not match data on the National Registration Bureau database (a total of 171,476) in order to minimize chances of disenfranchising legal voters. Despite these efforts, KPMG estimated that more than 1 million deceased voters remained on the voter register.

Because of the concerns about inaccuracies in the list, the KIEMs biometric voter identification provided a critical safeguard against malfeasance on election day by preventing multiple voting and guaranteeing that only eligible voters could cast a ballot.

According to the Elections Act, the IEBC should undertake voter registration and transfer requests up to 60 days before an election. However, the IEBC suspended both on March 7 because of the late start of the KPMG audit and the need to allow time to implement the recommendations from the audit before the Aug. 8 election.<sup>54</sup> This decision likely significantly decreased the opportunity for interested persons to register to vote or transfer to a preferred location for voting, thus disenfranchising some voters.

Despite repeated calls from political parties and a pending court case, the IEBC did not publish the voter register until July 22, decreasing the overall transparency of the process.<sup>55</sup> The High Court decided the case on Aug. 3, ordering the IEBC to publish a confirmation that the register of voters was open for inspection. Prior to this, the IEBC allowed voters to verify their individual data via an SMS platform.

*Summary.* The IEBC met many of its responsibilities to build an accurate and comprehensive voter register despite significant time constraints beyond its control. It implemented a number of steps within the limited timeframe to register a significant number of new voters and to clean the voter register. Nonetheless, public confidence in the audit and the subsequent steps taken by the IEBC to update the register was diminished by a lack of transparency during the process and the IEBC's delay in releasing the full KPMG report. The delay in implementing the audit negatively impacted the registration period and resulted in the disenfranchisement of some voters.

Biometric voter identification through the KIEMS helped to stem concerns about a bloated register and provided a safeguard for the deficiencies that were not addressed before election day. However, the lack of sufficient KIEMS units during the verification exercise limited voters' ability to access the process. In future elections, the IEBC should implement KPMG's recommendations and issue regular public reports on its progress to increase public confidence in the accuracy of the voter register and to meet international standards.

### ***Candidate Nominations***

Equitable treatment of candidates and parties during elections is important to protecting the integrity of democratic elections and the right of every citizen to be elected.<sup>56</sup> It is unreasonable to restrict the right to participate based on race, sex, religion, ethnic origin, language, and physical

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<sup>54</sup>Gazette notice 1813 of Feb. 27, 2017, Election (Registration of voters) Regulation 2012, sub-regulation 15. See [http://kenyalaw.org/kenya\\_gazette/gazette/volume/MTQ1Nw--/Vol.CXIX-No.26](http://kenyalaw.org/kenya_gazette/gazette/volume/MTQ1Nw--/Vol.CXIX-No.26).

<sup>55</sup> Elections Act, 6a (3)b. There are no regulations dictating a specific deadline for public posting of the official register.

<sup>56</sup> U.N., ICCPR, Article 25(b); AU, ACHPR, Articles 2 and 13.

disability.<sup>57</sup> Kenya's constitution and electoral law enshrine the right to be a candidate for public office, participate in the activities of a political party, and campaign for a political party or cause.

*Kenyan Candidate Requirements.* The requirements to run for public office in Kenya stipulate that parliamentary aspirants must be registered voters who satisfy the educational, moral, and ethical requirements listed in the constitution, the Leadership and Integrity Act, and the Elections Act. Candidates can be nominated by a political party or run as an independent. Candidates must have been citizens of Kenya for the past five years and be of sound mind. However, a person who has declared bankruptcy is ineligible.

In addition to these criteria, candidates for president must be Kenyan citizens from birth and hold a university degree. This educational requirement disproportionately disadvantages and restricts the rights of female, rural, and youth candidates, who may not have had equal access to educational opportunities, and is at odds with international standards.<sup>58</sup> Further, Kenya's blanket restriction on individuals of "unsound" mind is contrary to Article 29 of the 2006 U.N. Convention on the Rights of Persons with Disabilities (CRPD), which stipulates that there should be no restriction upon the political rights of such persons, irrespective of the type of disability.<sup>59</sup>

*Political Party Primary Elections.* Under the Election Act, party candidates are required to demonstrate the support of party members who are registered voters, generally through party primary elections. Independent candidates must demonstrate the support of voters who are not affiliated with a party. Both party-backed and independent candidates found these requirements problematic and burdensome. Candidates had no way of verifying whether individuals signing their forms were registered voters or members of a party, as the voter register was not finalized before the deadline to submit signatures to the IEBC, and political parties did not maintain accurate membership lists to cross-check. As such, it emerged that some people who offered potential candidates their support did not fulfill the signatory requirements as a registered voter or did not have the appropriate political affiliation.

The political party primaries enjoyed high voter turnout and competition at all levels of government (governor, MPs, senator, MCAs, and women's representatives). However, political parties' lack of preparedness and poor management of the process greatly affected the credibility and integrity of the entire exercise, which was widely described by stakeholders as "shambolic."

The primaries were plagued by a wide range of irregularities, including incidents of bribery; use of violence, intimidation, and harassment; destruction of voting material; chaotic counting processes; lack of accurate party lists to identify eligible voters; and targeted attacks against minority and marginalized groups, including women aspirants. Roughly one in five (18 percent) incumbents lost their primary race, leading to a significant increase in independent candidates for all offices, as many of the losing candidates filed to run as independents.<sup>60</sup> Multiple candidates

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<sup>57</sup> U.N., ICCPR, Article 2.

<sup>58</sup> Para. 15 of the 1996 UNHCR General Comment No. 25 to the ICCPR states that "any restrictions on the right to stand for election ... 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."

<sup>59</sup> Article 29 of the 2006 CRPD requires states to "guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others."

<sup>60</sup> Five governors out of a possible 47 lost; two out of 47 senators lost; 22 MPs out of 290 lost; 10 out of 47 women reps lost; 300 MCAs out of 1,450 lost.

made allegations of vote-rigging and fraud, and lodged disputes with the Political Parties Dispute Tribunal (PPDT).

Following the primaries, Carter Center long-term observers (LTOs) assessed the registration of nominated candidates at each level in their areas of operation. Most interlocutors reported that the IEBC was generally responsive to candidates and conducted the candidate registration process well. The IEBC cleared a total of 14,523 candidates for the Aug. 8 elections.<sup>61</sup> The high number of candidates for all posts offered voters a genuine choice.

The IEBC set up an electronic candidate registration management system (CRMS) to verify the accuracy of candidate details by cross-matching the voter register and political party register. Candidates and parties complained that the CRMS proved unreliable because of poor internet connections. When a stable internet connection was not available, staff used a manual procedure. Some aspirants' records were not in the system, which slowed the nomination procedures. Inconsistencies in the application of procedures were also noted.<sup>62</sup> The IEBC disqualified some candidates because of an insufficient number of qualified supporters, an incomplete application, or insufficient proof of educational degrees.

*Candidate Integrity at the EACC.* The nominations process highlighted the uncertainty about the criteria for candidates to meet the requirements of chapter six of the constitution on leadership and integrity, and the ineffective enforcement of this provision. The Ethics and Anti-Corruption Commission (EACC) is mandated to ensure enforcement of the leadership and integrity provisions, and helps to vet candidates during the nomination process.<sup>63</sup> Various stakeholders raised questions during the nomination process about whether persons charged with or convicted of crimes, among other legal and fiduciary questions, could be barred from running for office. The EACC compiled and forwarded to the IEBC a list of 106 aspirants whose integrity was under question for several reasons, including forged university diplomas and criminal convictions. The report questioned 11 candidates for governor, one for senate, two for woman representative, 13 National Assembly candidates, and 14 county assembly candidates. Although, the report was submitted to the IEBC before the deadline for candidate nominations, the IEBC cleared all candidates in question to run for office.

*Summary.* Reform of the candidate nomination process, including in the party primaries and the process of determining whether candidates meet the legal criteria, is needed to strengthen compliance with international standards. The ability of the parties to conduct the primary process needs to be strengthened to ensure consistent application of the procedures and that only eligible party members are allowed to vote in primaries. Current educational requirements for candidates disproportionately disadvantage women, youth, and rural aspirants. The standards and procedures

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<sup>61</sup> Eight for the presidency, 210 for the 47 available governor's seats, 256 for the 47 available senate seats, 299 for 47 woman representative seats, 1,893 for 290 National Assembly seats, and 11,857 for the 1,450 county assembly seats.

<sup>62</sup> Some ROs would accept data on compact disc, while others would not (only flash drives); aspirants were normally given a sample of the ballot paper but in some locations, did not receive it (none in locations observed in Nairobi, Machakos and Kajiado counties). It was reported that in Nakuru and Kericho, the system failed to print in some cases. Some ROs would update incomplete or missing profiles in the CRMS; others would require the aspirant to come back at a later stage, as they stated they did not have the authority to update the CRMS on the spot. In Nairobi and Nyeri, in some cases, the lists of supporting voters were barely verified.

<sup>63</sup> A multi-agency team was set up to vet candidates for these elections, comprised of the EACC, IEBC, Office of the Attorney-General, Office of the Director of Public Prosecutions, and the Registrar of Political Parties.

for verifying candidate eligibility are unclear, including the role of the IEBC in determining whether candidates meet the leadership and integrity standards established in the constitution.

### ***Campaign Environment***

The maintenance of an open and secure campaign environment is important to protecting the integrity of democratic elections and the right of every citizen to be elected.<sup>64</sup> Candidates must enjoy the ability to campaign freely and share their platforms with supporters and prospective voters. Supporters and voters must have full opportunity to demonstrate support for candidates and learn candidate policy agendas and commitments as guaranteed by the constitution.

*Overall Environment.* The political environment in Kenya was highly polarized and divisive throughout the entire 2017 electoral period. Instances of violence occurred beginning with the political party primaries and continuing through the Oct. 26 post-election period. The campaign for the Aug. 8 general election was highly competitive. In contrast, the Oct. 26 presidential election was boycotted by the Raila Odinga, the NASA candidate. The political environment became more volatile and worsened significantly in the lead-up to the Oct. 26 election. Jubilee and NASA leaders became more entrenched in their positions, which exacerbated the deep divisions between communities within the country. Leaders attacked the IEBC and the judiciary. Protests became violent and led to loss of life and injury, including of children, and precipitated the suspension of voting in four counties.<sup>65</sup>

*Campaign for Aug. 8 Elections.* Voters had a wide choice of contestants for the majority of seats at all levels of government for the Aug. 8 elections, resulting in competitive elections in most areas of the country. The campaign for the Aug. 8 general elections took place from May 28 to Aug. 5. The leading presidential candidates held large rallies across the country, including areas outside their traditional strongholds.

Campaigning for lower-level races was subdued because of a lack of financial resources. Small parties and many independents campaigned door-to-door, at small gatherings or with vehicle caravans. Candidates in down-ballot races joined the presidential and deputy presidential candidate rallies to increase their exposure. Although candidates campaigned without interference from the state, government vehicles were used to transport candidates to campaign events. In addition, cabinet secretaries also used state resources for their campaigns. The government launched projects during the election period, which were promoted as government achievements. Cabinet secretaries were hosted in various media outlets, where they spoke of development works. Despite protests by the opposition, the IEBC stated that cabinet secretaries were free to stump for the president, as they are exempted from the law barring civil servants from campaigning.

Carter Center LTOs reported violations of some parts of the Electoral Code of Conduct, including violent altercations between ruling and opposition supporters that were not addressed by any of the responsible institutions.<sup>66</sup> The IEBC did not investigate violations of the code of conduct proactively, and instead appeared to consider potential violations only in response to complaints.

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<sup>64</sup> U.N., ICCPR, Article 25(b); AU, ACHPR, Articles 2 and 13.

<sup>65</sup> *Preliminary Findings of the 26th October Repeat Election in Kenya*, released by Kenya National Commission on Human Rights on Nov. 3. (<http://www.knchr.org/Newsroom/PressStatements.aspx>)

<sup>66</sup> Other violations included harassment and intimidation of a female National Assembly candidate, destruction of campaign materials, and distribution of funds for attending a party rally.

A distinctive feature of the 2017 general elections was the large number of independent candidates, numbering more than 4,600, compared to just 350 in 2013. This was a direct result of Kenya's chaotic primary process and the fact that nearly 20 percent of incumbents and party candidates failed to win their political party nominations. Prohibitions on "party hopping," or candidates switching parties after they lost their primary race, contributed to this dynamic. The large number of independents created challenges for parties and aspirants at all levels, as it was difficult for political leaders to support a party candidate running against a former member contesting the same seat as an independent. The large number of independents contributed to hotly contested down-ballot races, which increased political tensions and caused greater insecurity at the local level.

Both Odinga and Kenyatta promoted so-called "six-piece" voting, encouraging their supporters to vote a straight party ticket across all six ballots, and to support official party nominees to the detriment of independent candidates. Party supporters rejected this approach in some areas, as evidenced by the final results, suggesting that voters demonstrated greater interest in specific candidates and what they would do for their constituency.<sup>67</sup>

The tone of political debate throughout the campaign period was polarizing, including at the highest level. Kenyatta and Odinga both pulled out of a much-touted presidential debate slated for July 10, accusing the organizers of failing to consult them. Kenyatta also did not participate in the July 24 televised debate, providing Odinga with a national platform in the final days of the campaign. The two candidates' unwillingness to issue a joint call for peace during the election period was a troubling sign for the post-election period. Indeed, the political leaders' intransigence foreshadowed the volatile and divisive political environment that emerged after the annulment of the Aug. 8 presidential election.

*Campaign for Oct. 26 Election.* The campaign for the Oct. 26 fresh presidential election took place from Sept. 6 to Oct. 23. Carter Center long-term observers noted a significant drop in campaign activity, particularly in opposition strongholds. In those regions where campaigning took place, the Jubilee Party held large rallies, conducted car caravans, and purchased billboard ads. Divisive and confrontational tactics and increasing incidents of protests and violence marked the period. The negative rhetoric further polarized the nation and highlighted existing ethnic divides. Several politicians from both Jubilee and NASA were arrested on hate speech charges.<sup>68</sup>

Verbal attacks on the courts and the election commission by senior party representatives and candidates increased in the lead-up to the Oct. 26 polls. Although President Kenyatta initially said that he accepted the court's decision, he and other Jubilee officials attacked the Supreme Court and the judges who voted in the majority to annul the election, and threatened to make changes in the law to "reign in the court," while labeling the ruling a judicial coup. In a campaign speech on Sept. 2, President Kenyatta called the judges "crooks" and said that he would reform the judiciary when re-elected.<sup>69</sup>

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<sup>67</sup> Some candidates who did not win their parties' official nomination won as independent candidates in their respective NASA or Jubilee strongholds, including John Paul Mwirigi (MP Igembe South – Meru); Kawira Mwangaza (women representative – Meru), Patrick Wainaina (MP Thika Town – Kiambu); Janet Sitiene (MP Turbo – Uasin Gishu); Peter Masara (MP Suna West – Migori); Mohammed Ali (MP Nyali- Mombasa).

<sup>68</sup> Gatundu South MP, Moses Kuria (Jubilee), former Senator Johnstone Muthama (NASA), Embakasi East MP Paul Owino (NASA), and Ibrahim Omondi, MCA of Airport Ward in Mombasa.

<sup>69</sup> The Swahili word for crooks is "wakora."

While Jubilee leaders aimed most of their attacks at the Supreme Court, NASA leaders directed their charges against the IEBC. Despite the finding by the court that there was no evidence of criminal liability on the part of the IEBC or its staff, NASA and its candidates attacked the IEBC's integrity and called for criminal prosecution of responsible staff and commissioners. At rallies, NASA attacked the IEBC and called for its reconstitution ahead of the Oct. 26 poll.<sup>70</sup>

NASA called for countrywide peaceful demonstrations, initially dubbed “*No reforms, no elections*” and later rephrased “*No election on October 26,*” unless NASA's irreducible minimum reforms were met. Hundreds of protesters took to the streets, blocking roads, setting tires on fire, and engaging the police in running street battles. Protests took place mainly in the slum areas of Nairobi and the NASA stronghold region of Nyanza, with limited and generally peaceful demonstrations in Mombasa and Machakos counties. In the Nyanza region and in Nairobi, protests turned violent after youth clashed with security forces. Security forces retaliated with the use of live ammunition and excessive force, resulting in at least six dead and scores injured.<sup>71</sup>

The violence in Nyanza region spread to attacks on IEBC training staff, which forced the IEBC to postpone or cancel poll worker training in some areas. This led to the arrest of politicians from the region and contributed to the postponement of elections in four counties.<sup>72</sup> As the presidential election approached, the security situation deteriorated further, as many opposition politicians stated that they would not allow the election to take place in their areas and Odinga encouraged his supporters to boycott the election.<sup>73</sup> A day before the election, Odinga, while addressing supporters, announced that NASA would transform itself from a political coalition into a national resistance movement that would engage in civil disobedience and boycott companies that profit from doing business with the government.<sup>74</sup>

*On Oct. 24, the Center noted that the political and electoral context in Kenya was marked by increased insecurity, a lack of dialogue, and narrowing prospects for a credible presidential election on Oct. 26. The Carter Center urged Kenya's key political leaders to use the limited time remaining before the polls to find a mutually acceptable way forward for the conduct of the fresh presidential election in a peaceful and secure environment. The Center called for attacks on IEBC officials to stop and for security forces to exercise restraint in an increasingly insecure electoral environment.*

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<sup>70</sup> These minimums included the replacement and prosecution of IEBC staff whom they identified as responsible for the problems that led to the nullification of the Aug. 8 election; and securing new companies to print the ballot and results forms, and to design and oversee the electronic results transmission platform, among other demands. Some of the demands could not be reasonably met during the timeframe allotted. Others would have impinged upon the IEBC's independence.

<sup>71</sup> Police Inspector General Boinet claimed that 19 people lost their lives before, during, and after the two elections in 2017 (<http://www.nation.co.ke/news/Police-refute-brutality-claims/1056-4166280-1535535/index.html>).

<sup>72</sup> Kisumu Senator Fred Outa, former Kisumu deputy governor Ruth Odinga and Member of County Assembly (MCA) for Kondele Ward (Kisumu) were arrested after they disrupted an IEBC training seminar on Tuesday, Oct. 17.

<sup>73</sup> The following governors announced that no election would take place in their counties on Oct. 26; Wycliffe Oaranya – Kakamega County; Cornell Rasanga – Siaya County; Prof. Anyang' Nyong'o – Kisumu County; Okoth Obado – Migori County; Cyprian Awiti – Homa Bay County.

<https://www.standardmedia.co.ke/m/article/2001257764/nyanza-governors-declare-ban-on-october-election>; [https://www.the-star.co.ke/news/2017/10/20/no-election-will-be-held-in-kakamega-says-oparanya\\_c1655537](https://www.the-star.co.ke/news/2017/10/20/no-election-will-be-held-in-kakamega-says-oparanya_c1655537)

<sup>74</sup> On Nov. 3, NASA called for boycotting of Safaricom, Bidco, and Brookside Dairies.

*Violence Against Women and Children.* The charged campaign environment, coupled with the violent protests and excessive use of force by security, further increased the vulnerability of special-interest groups, especially women and children. Following the Aug. 8 elections, there were reports of human rights violations, including beatings and killings by security forces as well as sexual violence against women and girls.<sup>75</sup> Multiple organizations and agencies joined an appeal to the inspector general of police and other government agencies charged with protecting the rights of women and girls to raise concerns about cases of sexual violence perpetrated in the electoral period and reportedly committed by police officers.<sup>76</sup>

Throughout its long-term observation, Carter Center observers received reports of organized gangs and militia, primarily youth, being paid minimal fees by people linked to political parties to mobilize and instigate violence in both Jubilee and NASA strongholds. The Kenya National Commission for Human Rights noted increasing concern over the rise of politically instigated vigilante groupings that mounted attacks on members of the public. Unemployed youth are especially vulnerable to engaging in such provocation.

*Summary.* Political parties, candidates, and voters have the right to participate in an election, including in the campaign period, in a safe and secure environment. They also have the right to choose not to participate. The 2017 electoral period played out in a volatile and unsafe environment. Campaigns became increasingly polarized and confrontational over the extended electoral period, and several instances of hate speech by candidates and supporters were reported.<sup>77</sup> Protests became violent and led to loss of life and destruction of property. Party supporters, IEBC officials, and community members, including members of marginalized groups, were vulnerable to intimidation and violence, in contravention of international standards that protect the security of the person. Verbal attacks by the head of state on the judiciary for exercising its constitutional duty to adjudicate election disputes undermined the independence of the judiciary and likely reduced the public's trust in it. Attacks on the IEBC, especially by NASA, served to further weaken public trust in its independence. The credibility of the Oct. 26 fresh election was severely undermined by the deteriorated political and security environment, and the process was undermined by the lack of a competitive race following Odinga's decision to boycott.

### ***Participation of Women, Youth, Persons with Disabilities***

International standards prohibit discrimination against women, youth, and persons with disabilities (PWDs) as candidates, party members, and voters, and mandate the use of special measures to ensure their equal representation.<sup>78</sup> The Kenyan constitution has many provisions regarding the political participation of these special-interest groups. Kenya is also party to international treaties

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<sup>75</sup> See Human Rights Watch (HRW\_Kenya\_Post-Election killings, Abuse) and Kenya National Commission on Human Rights. The killings included a 6-month-old girl in Kisumu. A 2-year-old girl was also wounded by a stray bullet. Female IEBC staff were assaulted by protesting youth and politicians, who interrupted their trainings in Kisumu.

<sup>76</sup> <http://physiciansforhumanrights.org/library/phr-appeals-to-kenya-to-curb>.

<sup>77</sup> Both candidates and supporters engaged in hate speech. However, because candidates were required to sign a code of conduct, they were more closely monitored, which led to the arrest of several politicians on hate speech charges. Supporters spread hate speech mainly on social media.

<sup>78</sup> U.N. ICCPR, Articles 25 and 26; AU, AfCHPR, Article 2; U.N. CEDAW, Article 3; U.N. CRPD, Articles 4 and 5(4).



protecting their rights.<sup>79</sup> Despite the existence of these progressive provisions, advances in the participation of these groups, especially in the political sphere, has been very limited.

*Women's Participation.* The constitution stipulates that not more than two-thirds of the members of any appointive or elective body should be of the same gender. This provision has not been implemented by the National Assembly, and the quota was not met in the 2017 elections. Two Kenyan groups, the Center for Rights and Education and Awareness (CREAW) and the Community and Advocacy and Awareness Trust (CRAWN), filed a court case seeking an injunction to stop the newly elected parliament from convening because it failed to meet the gender quota. The petition asked the court to force the parliament to pass legislation to implement the gender quota during their first week. The High Court denied the request for an injunction, leaving the constitutional requirement to meet the gender quota unmet.<sup>80</sup>

Women aspirants and candidates faced a hostile political environment, including propaganda, smear campaigns, and violence. Many lacked sufficient finances to run for office. These challenges led some to drop out of their races. Nonetheless, almost 50 percent of the 86 female incumbents ran for office again in the Aug. 8 election. Political parties encouraged women candidates to run in the political party primaries, with the understanding that they would be included in the party lists for MCA, National Assembly, and the Senate if they lost. However, the parties did not honor their commitment. Many women candidates ran as independents, while others were unable to do so because of a lack of finances. Some women who lost the primaries and believed they had credible evidence to dispute the election results were unable to challenge the results through the Political Parties Dispute Tribunal (PPDT) because of the prohibitive costs of the dispute process, including the need to travel to Nairobi to defend their case.

Nomination fees were lowered by half for women (and as well for youth and PWDs) to promote their participation. In addition, the IEBC directed that political party lists alternate female and male candidates (the “zebra” strategy) with the top nominee a woman.<sup>81</sup> Although the parties followed this strategy, they were inconsistent in placing women as the top nominee. Only two parties – the Orange Democratic Movement (ODM) and Ford Kenya – fulfilled this requirement.<sup>82</sup> While the number of women in office would have increased if the requirement had been met, the two-thirds gender balance would still not have been realized. Overall, women candidates numbered 1,300 out of a total of 14,523 candidates (9 percent) and only 172 (13 percent) were elected. Positively, three women governors and three women senators were elected for the first time. In addition, political parties nominated 673 women through party lists to assume seats awarded through affirmative-action requirements.

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<sup>79</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW 1979), International Covenant on Civil and Political Rights (ICCPR 1966), Convention on the Rights of Persons with Disabilities, ratified in 2008, and the African Charter on the Rights of Women in Africa (Maputo Protocol) 2003.

<sup>80</sup> Court cases challenging the convening of the 12th parliament were lodged by the Federation of Women Lawyers in Kenya (FIDA) and the Center for Rights and Education and Awareness (CREAW) and the Community and Advocacy and Awareness Trust (CRAWN).

<sup>81</sup> The Constitution of Kenya, Article 90 (2)(b) provides that each party list should comprise the appropriate number of qualified candidates and alternate between male and female candidates (the zebra strategy).

<sup>82</sup> While addressing women candidates on June 26, 2017, IEBC Chairman Chebukati warned political parties that the party list would be rejected if the top nominee were not a woman ([https://www.the-star.co.ke/news/2017/06/26/top-nominee-must-be-woman-or-party-list-will-be-rejected\\_c1585924](https://www.the-star.co.ke/news/2017/06/26/top-nominee-must-be-woman-or-party-list-will-be-rejected_c1585924)). However, this was not enforced by the IEBC, as some of the lists published by the commission had a male as the top candidate.



There was no woman candidate in the Oct. 26 fresh presidential election. However, women were present in significant numbers as IEBC poll officials, domestic observers, and political party agents.

*Participation by Youth and Persons with Disabilities.* Youth and PWDs faced similar barriers to participation in the political arena. The IEBC established a youth coordinating committee on elections to provide advice on how the commission could help ensure meaningful youth engagement. In order to safeguard the special seats reserved for PWDs in parliament and county assemblies, and on the recommendation of disabled person’s organizations, the IEBC agreed to verify that all PWD nominated members in party lists possessed a registration card from the National Council for Persons with Disabilities (NCPWD).

These efforts were helpful. A youth was elected governor for the first time.<sup>83</sup> Records from disabled person organizations indicate that 27 PWDs (out of 150 who participated) emerged as winners in the party primaries and competed in the various elective positions on Aug. 8. Of those, eight were elected to office. An additional 42 PWDs were nominated through the party lists to take seats.<sup>84</sup>

Youth also made up a large number of IEBC polling officials.

*Summary.* Overall, marginalized groups made only minimal gains in the 2017 election. Political participation for women, youth, and PWDs fell far short of international standards, and failed to meet Kenya’s constitutional requirements, especially regarding the one-third quota for women’s representation. Of particular concern, women and other special-interest groups are especially vulnerable to violence, with their security of person at great risk. Significant effort is needed, including by political parties, the IEBC, and other government structures, to increase political participation for these vulnerable groups, to ensure their safety, and to fulfill the progressive principles and the gender quota laid out in the constitution.

### ***Electoral Dispute Resolution***

Efficient electoral dispute mechanisms, including the provision of a fair and public hearing before a tribunal, are essential to ensure that effective remedies are available for the redress of violations of fundamental rights related to the electoral process.<sup>85</sup> Effective dispute-resolution mechanisms are an integral part of ensuring that the will of the people is upheld during an electoral process.<sup>86</sup>

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<sup>83</sup> Stephen Sang, age 32, was elected governor of Nandi County. Article 55 of the Kenyan constitution defines youth as those aged between 18 and 35.

<sup>84</sup> The umbrella body representing CSOs working on behalf of PWDs, United Disabled Persons of Kenya, and the National Gender and Equality Commission filed a court case asking that party lists be nullified for not complying with constitutional requirements for nominations of PWDs. PWDs were not on the party lists in 17 counties, in contravention of the constitution.

<sup>85</sup> ICCPR, Article 2(3): “Each State Party to the present covenant undertakes: (a) to ensure that any person whose rights or freedoms are herein recognized as violated shall have an effective remedy, notwithstanding that the violation has been committed by people acting in an official capacity; (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative, or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) to ensure that the competent authorities shall enforce such remedies when granted.” UNHRC, General Comment 32, para. 25: “The motion of fair trial includes the guarantee of a fair and public hearing.”

<sup>86</sup> U.N., UDHR, Article 21; AU, ACHPR, Article 7. “Every Individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights

*Overview.* In Kenya, electoral dispute resolution is primarily governed by the constitution, the Elections Act, the IEBC rules of procedures on settlement of disputes, and the Political Parties Act. The legal framework grants broad legal standing to all stakeholders to file electoral complaints. For the Aug. 8 election, multiple election-related disputes were filed, including a challenge to the presidential election results that ultimately led to the unprecedented annulment of the election. The Oct. 26 fresh election was also challenged in court.

*Election Dispute-Resolution Framework and Processes.* The legislation on dispute resolution is complex, involves multiple resolution bodies, with at times overlapping jurisdiction, and inconsistent deadlines.<sup>87</sup> While courts have prioritized election-related cases, and resolved most of the disputes in a timely fashion, the lack of a single appeals process and short timelines for resolving pre-election disputes by the judiciary does not guarantee an effective and timely remedy, contrary to international and regional standards.<sup>88</sup>

Many decisions of the IEBC on key parts of the electoral process were challenged in court, including the presidential results at the constituency level, ballot tendering, the procurement of KIEMS devices, the complementary mechanism for voter identification, and the results transmission system.

Pre-election disputes for the 2017 elections were generally related to party primaries and the nomination of candidates, electoral offenses, voter registration disputes, and violations of the Electoral Code of Conduct.<sup>89</sup> The IEBC, the Political Parties Dispute Tribunal (PPDT), and the judiciary all have jurisdiction to consider election-related complaints. Petitions challenging the results can only be filed with courts.<sup>90</sup> The Supreme Court is the court of final instance in all cases.

The PPDT and IEBC entered into a memorandum of understanding to delineate the jurisdiction of each body in order to avoid forum shopping for disputes related to party primary and nominations processes, which occurred in previous elections. The PPDT dealt with cases related to party primaries, while the IEBC handled those concerning candidate nominations. However, there was a lack of clarity regarding disputes related to nominations through party lists. IEBC instructions did not clearly resolve the matter.<sup>91</sup>

*Primaries and the Political Parties Dispute Tribunal Decision.* In 2016, parliament amended the Political Parties Act to increase membership of the PPDT from five members to seven following

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as recognized and guaranteed by conventions, law, regulations and customs in force” and “the right to be tried within a reasonable time by an impartial court or tribunal.”

<sup>87</sup> While the polling station diary provides for a complaint record form, the law does not establish any procedure for handling election day complaints.

<sup>88</sup> U.N., ICCPR, Article 2; AU, AfCHPR, Article 7, AU, ACDEG, Article 17 (2).

<sup>89</sup> The 2016 Election Offences Act stipulates various electoral offences, including offences relating to the register of voters, maintenance of secrecy at elections, election day offences, malpractice by IEBC staff, personation, treating, bribery and undue influence. Provisions of the Act overlap with provisions of in the Penal Code, the Public Order Act, and National Cohesion and Integration Act.

<sup>90</sup> The efficient distribution of cases between magistrates’ courts for county representatives, high courts for parliamentary, senatorial, governorship, and women’s representative contestants, and the Supreme Court for the presidential elections is instrumental to a swift resolution of disputes.

<sup>91</sup> The IEBC handled internal party disputes, which should have been left to the PPDT, contrary to their agreement to refer litigants to the appropriate body. Some cases were simultaneously filed to both bodies, creating the possibility of conflicting decisions.

a recommendation by the Judiciary Committee on Elections and in anticipation of the heavy workload the tribunal would face during the party primaries. The PPDT considered and concluded a total of 300 appeals arising from party primaries.<sup>92</sup> Many lawyers and candidates complained before the courts that the tribunal dismissed their cases without carefully considering the facts because of their workload and the strict timelines imposed on the proceedings.

In many instances, the PPDT issued oral rulings without providing further detail, instructing litigants to return later for a reasoned judgment. Because of the compressed electoral calendar, the IEBC allocated 30 days for the resolution of disputes arising from the party primaries, a deadline that had to be extended several times. The PPDT had no legal obligation to conclude the cases within the timelines prescribed by the IEBC. According to the Political Parties Act, the PPDT has three months to conclude cases, with no shorter timelines specified for party primary cases, although these cases required a quick resolution in order to meet the deadline for candidate nominations.

*IEBC and Candidate Nomination Decisions.* The IEBC Election Dispute Resolution (EDR) Committee considered 250 disputes involving candidate nominations for the Aug. 8 election, mostly related to the IEBC's rejection of nomination papers submitted by candidates judged as not meeting eligibility requirements. The IEBC initially announced that it would hear disputes for 10 days starting June 5. However, two days later, the EDR committee stated that all disputes had to be concluded by the end of that day, leaving more than 100 cases to be heard in less than 24 hours. Because of time constraints, parties were not given adequate time to present evidence, depriving them of a fair hearing or effective remedy.<sup>93</sup> The committee issued judgments on cases at the time of the hearing, raising questions as to whether the committee had properly considered their merits. The committee dismissed the majority of the disputes as unsubstantiated.

*Electoral Code of Conduct Enforcement Committee.* The IEBC Electoral Code of Conduct Enforcement Committee (ECCEC) resolved 69 cases concerning violations of the code of conduct during the Aug. 8 election period. These included instances of violence and intimidation, mostly involving clashes during rallies, as well as the defacing of campaign posters and the abuse of party symbols by independent candidates. Parties to the cases included candidates running for governor, woman representative, National Assembly and MCA.<sup>94</sup> The IEBC did not proactively investigate violations and instead only considered violations in response to complaints.

The law does not clearly regulate the ECCEC's rules of procedures, and at times the IEBC assumed jurisdiction over cases that should have been heard by other institutions.<sup>95</sup> This was underlined by a High Court ruling following the request for judicial review of the ECCEC's decision to suspend

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<sup>92</sup> Twenty disputes were related to county governor seats, 10 to members of the Senate, 96 to members of the National Assembly, five to county woman representatives of the National Assembly, and 159 to county assemblies. The highest number of cases were filed by the candidates of Orange Democratic Movement, with 151 cases, and by the Jubilee Party, with 72 cases. One hundred PPDT decisions were appealed to the High Court. Of these, 10 were further appealed to the Court of Appeal and one to the Supreme Court.

<sup>93</sup> Most cases were determined on the basis of information presented in writing at the filing of the complaint.

<sup>94</sup> Two gubernatorial candidates, a member of the National Assembly, and a member of county assembly aspirant were issued fines for violence and intimidation. A one-week campaign ban for all contenders in Siaya County appeared to lack legal basis, as the code of conduct bans only those responsible for a violation from campaigning. The Marsabit governor campaign was suspended for the duration of the campaign period following the death of three people during a Jubilee rally.

<sup>95</sup> The new Election Offences Act adopted in 2016 contains a number of offences that overlap with the Electoral Code of Conduct, the Penal Code, the National Cohesion and Integration Act, and the Public Order Act.

campaigning in Migori County based on violations of the electoral code of conduct. The court ruled that the ECCEC took an arbitrary decision and overstepped its jurisdiction, acting as both a court and prosecutor. In addition, none of the decisions of the IEBC Dispute Resolution Committee or Code of Conduct Committee were made publicly available, undermining transparency in the dispute-resolution process.

The Office of the Director of Public Prosecutions (ODPP) is mandated to investigate all violations of the Election Offences Act through magistrate courts within 12 months.<sup>96</sup> There were some 95 election-related criminal cases reported by ODPP, mostly related to destruction of electoral material, obstructing election officers, creating disturbances, vandalism, and violence. As of early 2018, five individuals had been convicted by courts for electoral offenses.

*Summary.* Overall, the courts dealt with pre-election disputes, including those involving the party primaries, candidate nominations, violations of the Electoral Code of Conduct, and criminal cases, in a professional manner and in line with international standards. However, there were a number of inconsistencies in the legal framework, including the lack of a single appeals process and short timelines for resolving pre-election disputes. In addition, the abbreviated manner in which the election commission at times handled complaints did not guarantee an effective and timely remedy on a consistent basis, contrary to international and regional standards.<sup>97</sup>

## **Presidential Election Dispute Resolution**

A petition against the results of the presidential election can be filed by any citizen of Kenya. The president-elect and the IEBC are automatically included as respondents to any petition against the results of presidential elections. Petitions must be submitted within seven days of the declaration of results and decided by the Supreme Court within 14 days after their filing.<sup>98</sup> Supreme Court decisions are final and not subject to appeal.

Stakeholders and independent analysts agree that Kenya's 14-day timeframe for the court to conduct hearings and issue a decision on challenges to the presidential elections is too short. The timeframe challenges the right to an effective remedy, as it does not allow for sufficient time for the court to scrutinize evidence or conduct a recount, if deemed necessary.

*Sept. 1 Ruling on Aug. 8 Presidential Election.* On Sept. 1, in an unexpected and precedent-setting ruling, the Supreme Court annulled the results of the presidential election held on Aug. 8, finding that the election was not held in compliance with the Kenyan constitution and the electoral legal

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<sup>96</sup> There are no clear deadlines to conclude the prosecution.

<sup>97</sup> The Universal Declaration of Human Rights states, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." (Article 8), and "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." (Article 10). The ICCPR, Article 2, states, "... any person whose rights or freedoms as herein recognized are violated shall have an effective remedy..." Article 14.1 of the ICCPR states, "... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

<sup>98</sup> Constitution, Article 140.2.

framework.<sup>99</sup> Specifically, the court found that the IEBC failed to organize the election in compliance with the constitutional requirement that all elections be “simple, secure, transparent and verifiable.”<sup>100</sup>

On Sept 20, the court released its written decision detailing its reasoning for annulling the results. Despite the approximately 1.4 million vote margin separating the top two candidates, the court cited severe deficiencies in the IEBCs management of the election, specifically non-compliance with the electoral provisions governing the electronic results transmission system. According to the decision, the IEBC acted contrary to the law when it announced presidential results solely based on the constituency-level tally forms (Form 34B), and prior to the receipt of all polling station tally forms (Form 34A).

Notably, the IEBC failed to transmit results electronically from all the polling stations to the national tallying center simultaneously with the tally forms, in violation of Section 39(1c) of the Elections Act. In addition, the court found that the IEBC had used results forms of questionable authenticity, in violation of the law. The court ruling also found that the failure of the IEBC to grant the petitioners sufficient access to the computer servers at the national tally center was a violation of the constitutional requirement that elections be conducted in a transparent manner.

The Supreme Court scrutinized the results tally forms that the IEBC had submitted for review and found several errors. For example, Form 34C – the final national tally form for the presidential election – had neither a watermark nor a serial number, and the form appeared to be a photocopy. Fifty-six of the 291 constituency-level tally forms (Form 34B) bore no watermark, five were not signed by the returning officer, 31 had no serial number, and 32 were not signed by the respective party agents. In addition, the “hand over” section of 189 forms had not been filled in, and the “take over” section of 287 forms had not been filled in.<sup>101</sup>

*On Oct. 4, the Center encouraged the IEBC to make the necessary changes based on the Supreme Court ruling annulling the results of the Aug. 8 presidential election to ensure compliance with the legal provisions related to result tallying and announcements. The Center further reiterated its call for transparency. Further, the Center urged Kenya’s political leaders to work with the IEBC to come to a consensus on the changes necessary to hold the Oct. 26 fresh presidential election. The Center called on all stakeholders to stop attacks on the judiciary and IEBC.*

The IEBC’s failure to comply with the court order to grant access to its computer servers, user log-in history, and the electronic results transmittal log also weighed in the court’s decision. The court concluded that the failure of IEBC to provide this access ran contrary to the constitutional requirement of transparency and verifiability of the electoral process. According to the court, this meant that either the IEBC’s ICT system was infiltrated and compromised, and the data therein interfered with, or IEBC officials themselves interfered with the data, or the IEBC simply refused to accept that it had bungled the transmission system and were unable themselves to verify the data fully.

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<sup>99</sup> Chief Justice David Maraga, Deputy Chief Justice Philomena Mwili, Smokin Wanjala and Isaac Lenaola gave the majority decision, while two judges, Jackton Ojwang’ and Njoki Ndung’u, dissented.

<sup>100</sup> Kenya constitution, Article 81.

<sup>101</sup> The Carter Center reviewed the forms from the constituencies to which Carter Center observers were deployed and found that none of the 34B’s in these constituencies had the takeover section signed. Sixteen (43 percent) had the handover section signed. All forms were signed by the presiding officers and by party agents. Six (16 percent) forms did not have watermark, and three (8 percent) did not have a serial number.

*In its Nov. 20 statement, the Center urged stakeholders to respect the unanimous decision of the Supreme Court upholding the election results for the Oct. 26 election. In addition, it urged political leaders to engage in sustained political dialogue to promote healing in the post-election period. The extended electoral period was characterized by strident political rhetoric and harsh attacks by political leaders on Kenya's judiciary and IEBC, and election-related violence that resulted in numerous deaths, injuries, and damage to property. The Center found the protracted electoral process undermined the rule of law in Kenya and the country's democratic institutions.*

Further, the court found that the IEBC failed to respond adequately to several allegations made by the petitioner, including claims that several results forms originated from polling stations that had not been published in the official gazette as required by law. Nor could the IEBC explain why there were approximately 500,000 more votes in the presidential election than votes cast in gubernatorial or parliamentary elections, a fact that weighed heavily against the IEBC, according to the court.

The court declined to make a finding of criminality on the part of individuals within IEBC and instead stated only that there were “systemic institutional problems” but no clear evidence about which individuals were allegedly responsible for committing said illegalities and irregularities.

The Carter Center observed the entire process in the Supreme Court and found that the proceedings were conducted in a professional and rigorous manner, despite the very tight two-week timeframe for conducting the hearing and deciding the case. All parties were given the opportunity to present and argue their case. Lawyers involved in the case praised the Supreme Court's dedication to their work. The proceedings were conducted in a transparent manner, with court judgments made public shortly after their pronouncement. However, both the court and the parties to the case found the constrained timeline problematic. In its ruling, the Court noted that the constitution's 14-day deadline for court decisions on the presidential election, which had been discussed in parliament but left unaltered, does not provide sufficient time for the court to order certain verification exercises, such as a recount of the votes or scrutiny of election materials, which might have clarified some questions about the accuracy of the results and/or otherwise affected the outcome of the petition.

The ruling party and other legal experts have criticized the court's decision for not taking into consideration the fact that no evidence was introduced to demonstrate that the alleged irregularities were of sufficient magnitude to affect the results. While this principle is commonplace in international election law, at the time of the decision, applicable Kenyan law did not require a finding that the alleged irregularities affect the results in order for the court to annul an election.<sup>102</sup> Based on the evidence introduced and the failure of the IEBC to respond to legitimate concerns raised by the petition, the court was well within its bounds to annul the election results.

After the Oct. 26 election, two petitions were filed questioning the constitutionality and legality of the fresh presidential election and one requesting sanctions against NASA.<sup>103</sup> The court consolidated the two petitions challenging the legality of the results and heard oral arguments from

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<sup>102</sup> See Steve Brickerstaff's “International Principles of Vote Recounts and Election Contests,” in International Election Remedies, John Hardin Young (ed), 2016, American Bar Association, p. 200; and “Electoral Justice: The International IDEA Handbook,” para. 546, p. 178.

<sup>103</sup> These were filed by former Kilome MP Harun Mwau and two civil society activists, Njonjo Mue and Khelef Khalifa. A third petition was filed by the Institute for Democratic Governance, seeking a declaration that the NASA principals committed a number of electoral offenses arising from their irreducible minimums demands, boycott of the election, and calls for demonstrations, alleging that these actions denied many people the chance to vote.

all interested parties in an open and transparent manner that afforded due process to all litigants. On Nov. 20, the court unanimously dismissed both petitions as being without merit.<sup>104</sup> A reasoned opinion was partly read out on Dec. 11, within 21 days of the ruling, in line with the law. However, the full decision was not released publicly until Dec. 20. No explanation was offered for the delay.

The two consolidated petitions were narrowed down to eight issues for consideration, including legal standing of the petitioners, the consequences of withdrawal of one of the candidates from the election, the failure of the IEBC to conduct the election in conformity with the constitution and the law by, among other things, not calling for fresh candidate nominations, violating the principle of universal suffrage, and not holding the election in all 290 constituencies simultaneously as required by the constitution.<sup>105</sup> Petitioners also alleged that the IEBC lacked the independence, neutrality, and transparency mandated by the constitution.

Whether the law required the holding of fresh nominations was central to the petition. The court ruled that nominations carried out for the Aug. 8 election were valid and that there was no need for fresh nominations.<sup>106</sup> The court held that the IEBC was guided by the decision of the High Court in Ekeru Aukot's case, which recognized the right of Aukot and other previously registered presidential candidates to access the ballot for the Oct. 26 polls. The court additionally found that the withdrawal of Odinga, although legally binding, did not necessitate the cancellation of the Oct. 26 election and the calling of a new election with fresh nominations. The issue of withdrawal from a fresh presidential election is not addressed by the constitution or the Elections Act.<sup>107</sup>

The petitioners argued that the election was not held in an environment conducive to the holding of free and fair elections, as high numbers of voters were disenfranchised. They alleged that the low voter turnout was a manifestation of an electoral process that lacked credibility, as evidenced by various irregularities and illegalities. These included the appointment of returning officers declared invalid by a High Court decision, arbitrary relocation of numerous polling stations, discrepancies in the voter turnout in the polling station forms versus those transmitted by the KIEMS, various errors in the results forms, and an unreliable voter register.

The court found that the petitioner's allegations of illegalities and irregularities were general in nature and effectively rebutted by the respondents. The court dismissed these allegations and stated that the petitioners did not provide sufficient evidence to meet their burden of proof that the alleged violations compromised the legitimacy and credibility of the fresh presidential election. The court attributed low voter turnout to the active call for boycott, the violent demonstrations, and voter fatigue.

While the petitioners argued that the IEBC failed to conduct elections in all constituencies contrary to the constitution, the court ruled that the violence that occurred in the opposition strongholds was instigated by the opposition and therefore could not serve as the basis for nullifying the fresh

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<sup>104</sup> NASA stated that the Supreme Court took the decision under duress and that it does not recognize the new government.

<sup>105</sup> The Supreme Court held that one does not need to be a voter to challenge an election, as previously addressed by the Advisory Opinion 2 of 2012.

<sup>106</sup> While Jirongo was declared bankrupt, the IEBC included him in the ballot as his status was challenged in court.

<sup>107</sup> The procedure for candidate withdrawal is stipulated in Regulation 52 of the Elections (General) Regulations of 2012 and requires the candidate to submit the letter of withdrawal within three days of the nomination deadline. However, nominations were not the basis of nullification of the Aug. 8 elections, therefore it is not applicable in this case.

election. Moreover, according to the law, the IEBC has the legal right to announce nationwide results of elections when it is shown that the results in the 25 constituencies where the election was not held would not affect the overall result.<sup>108</sup>

Further, the petitioners argued that the Elections Laws (Amendments) Bill, which came into force in November 2017, was intended to diminish the role of technology in elections, open election results to manipulation, and signal to voters that it would not be possible to challenge the results of the fresh presidential election successfully, even if the same were to be unconstitutional, unlawful, or irregular. The court dismissed these allegations, holding that the Elections Act of 2011, not the 2017 amendments, was the law applicable to the Oct. 26 election. The court further stressed that the High Court has the jurisdiction to determine the constitutionality of the recent Election Amendment Bill, which respondents argued was unconstitutional.<sup>109</sup>

*Summary.* In a politically charged atmosphere, which included threats targeting the judiciary, the Supreme Court provided a fair hearing for the petitions challenging the presidential election results for both the Aug. 8 and Oct. 26 elections, despite a short deadline that prevented the court from scrutinizing the evidence more thoroughly. It conducted hearings in a professional manner and in a public and inclusive environment. All parties were provided opportunity to present their cases. The court's decision overturning the results of the Aug. 8 presidential election was unexpected and precedent setting. While the ruling was based on provisions in Kenya's laws that were at odds with common international principles requiring that an annulment of elections only be declared when the irregularities are shown to affect the outcome of the election, the court's ruling was based on Kenyan law. In addition, given the strong political pressure it faced, the court's decision reinforced the independence of the judiciary.

### ***Civil Society and Citizen Observation***

Citizen engagement in the electoral process supports an inclusive, transparent, and accountable election.<sup>110</sup> Civil society organizations (CSOs) assess and report on the electoral process, conduct voter education campaigns, support the inclusion and safety of marginalized communities, and promote peace and reconciliation efforts.

*Kenya's CSOs and the 2017 Elections.* Kenya has a vibrant civil society that participates in various aspects of elections. CSOs were active during both the general elections and the fresh election. However, CSO engagement was less visible for the Oct. 26 fresh election. CSOs assessed and reported on the entire electoral process, providing recommendations for reforms. In addition, they informed voters of their rights and supported broad participation in the process.

For the Aug. 8 election, CSOs and faith-based organizations promoted peace efforts and collaborated to provide early warning systems for potential violence in identified hot spots. CSOs also offered civic and voter education on the role of women, youth, and PWDs in the electoral process, the roles and responsibilities of elected officials, the importance of a peaceful and safe election environment, and the polling-day process.

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<sup>108</sup> Section 55B of the Elections Act.

<sup>109</sup> On Dec. 13, the High Court suspended the Election Amendment Bill pending the delivery of a judgment scheduled for March 16, 2018.

<sup>110</sup> AU, AfCHPR, Article 10(1).



Advocacy groups continued activities for the Oct. 26 election; however, Carter Center observers reported a significantly reduced presence of CSOs in the several weeks prior to the fresh presidential election. Though local and religious leaders continued to promote peace messaging in community and faith gatherings, the Center observed fewer CSOs conducting voter education and peacebuilding programs. The insecure environment in some areas influenced deployment efforts, as evidenced by reports from the Election Observation Group (ELOG) documenting attacks on its observers. Limited funding may have also affected deployment, as some CSOs had not planned for a second round of polling.

Kura Yangu Sauti Yangu (KYSY) worked with the IEBC and other partners to organize the National Election Conference held in June, providing the public with updates on election planning. KYSY deployed observers for the Aug. 8 and Oct. 26 elections, releasing periodic reports.

ELOG deployed 290 long-term observers to conduct a comprehensive observation of the entire election period, releasing periodic reports with recommendations.<sup>111</sup> For Aug. 8 election day, ELOG deployed 8,300 observers around the country, with 1,703 deployed to polling stations to conduct a parallel vote tabulation (PVT).<sup>112</sup> ELOG's PVT estimates were "consistent with the IEBC's official results for the 2017 presidential election."<sup>113</sup>

For Oct. 26, ELOG deployed 2,196 observers in 215 of the 290 constituencies, releasing periodic reports of their findings. According to their report, ELOG was unable to deploy observers across the country because of the security situation in many areas. They were barred from polling stations in Kibra, Ruaraka, and Nyali constituencies. Observers were attacked in Kilifi, Kibra, Ruaraka, and Nyali constituencies. The group highlighted the deaths of more than 60 persons and some 60 cases of sexual violence reported during the Oct. 26 electoral period, as well as numerous injuries and destruction of property.<sup>114</sup> ELOG found that the Oct. 26 election "considerably amplified the divisions in Kenya's society and body politic."

The Kenya National Commission on Human Rights (KNCHR) maintained 139 monitors across the country for the entire electoral period to gather information about election-related human rights violations. They released periodic reports throughout the process. Among other concerns, they called on security forces to refrain from excessive use of force, on the IEBC to ensure the safety of their poll workers, and on political parties to ensure their supporters protested lawfully and peacefully. The KNCHR also called attention to the government's efforts to clamp down on civil society actors. In its preliminary statement released after the Oct. 26 polls, it called attention to the protests, excessive force by security agents, civilian loss of life, and attacks on security officials and IEBC staff.<sup>115</sup> They called on all political leaders to put "Kenya citizens and Kenya first" and to work to restore peace and unity in the country.

*Restrictive Environment for NGOs.* In what some termed a government assault on CSOs that opposed the government and intended to file challenges to the results of the presidential election,

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<sup>111</sup> ELOG is a coalition of civil society organizations working to support a credible electoral process.

<sup>112</sup> Parallel vote tabulation (PVT) is an election observation methodology used for independent verification or challenging of election results.

<sup>113</sup> <http://elog.or.ke/index.php/resource-centre/item/20-verification-statement-of-the-official-2017-presidential-results>.

<sup>114</sup> The figures in the ELOG statement were based on reporting by ELOG, other observers, KNHRC, Human Rights Watch, Amnesty International, and media.

<sup>115</sup> <http://knchr.org/Newsroom/PressStatements.aspx>.

on Aug. 14, the CSO Coordination Board cancelled the registration of two prominent Kenyan human rights organizations: the Kenya Human Rights Commission (KHRC) and AfriCOG.<sup>116</sup> Following an outcry by local CSOs and the international community, the acting interior cabinet secretary halted the de-registration process to allow for further investigations into the allegations. The investigation is ongoing.

The CSO Coordination Board summoned Muslims for Human Rights (MUHURI), Katiba Institute, and INUKA Kenya to appear before the board on Nov. 6, hours before the deadline for filing petitions against the results of the Oct. 26 election.<sup>117</sup> The board alleged noncompliance with financial regulations and operating without proper registration. The organizations announced that they would not comply with the summons and alleged that the CSO Coordination Board was targeting them because they planned to file petitions challenging the results. Njonjo Mue, Chairman of International Commission of Jurists (ICJ) Kenya Chapter, and Khelef Khalifa, Chairman of MUHURI, filed a petition challenging the Oct. 26 re-election of President Kenyatta.<sup>118</sup> The CSO Board banned the operations of KYSY and the organization We the People for allegedly operating illegal bank accounts and funding political party operations in the country.<sup>119</sup> They were subsequently ordered to cease all political operations in Kenya.

*Summary.* CSOs play an important role in assessing and safeguarding democratic elections in all countries, and Kenya is no exception. Kenyan CSOs were effective in their efforts to promote awareness of the country's 2017 electoral process and voter engagement. Their reports provide a series of recommendations, which, if implemented, will serve to strengthen the electoral process. Their work is consistent with international standards for democratic elections and governance and should be strengthened, not hindered. It is commendable that the IEBC accredited 32,000 and 25,000 domestic observers for the Aug. 8 and Oct. 26 elections, respectively. However, the government action to limit or cease NGO operations runs counter to international standards and is deeply troubling.

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<sup>116</sup> The two are also members of KYSY.

<sup>117</sup> The three organizations are members of Kura Yangu Sauti Yangu (KYSY), a coalition of civil society organizations that joined efforts to proactively support Kenya's preparations for the 2017 elections.

<sup>118</sup> ICJ is a member of KYSY.

<sup>119</sup> KYSY is an election campaign initiative formed by a coalition of civil society groups, while We the People is a citizen alliance that focuses on good governance. KYSY was also accused of operating without registration.

## Recommendations

The Center respectfully offers the following recommendations in the hopes that they help inform the process of a national dialogue and electoral reforms as Kenyans confront the deep divisions exacerbated by the 2017 election process:

To the Parliament/Government:

1. *Review the electoral legal framework.* A comprehensive review of the electoral legal framework, including for party primaries and electoral dispute resolution, should be conducted to address gaps and inconsistencies identified by stakeholders, civil society organizations, and the election commission during the 2017 election cycle. This consultative process should be inclusive and start immediately, well in advance of the next election cycle, to enhance legal certainty and avoid unnecessary future litigation. Overall, the law would benefit from consolidation into one comprehensive electoral code.
2. *Extend the deadline to resolve presidential result challenges.* Parliament should consider extending the deadline for the Supreme Court to resolve challenges to the results of a presidential election from the current 14 days to a minimum of 30 days. This would allow for a thorough consideration of all issues and sufficient time to implement a recount if the court deems it necessary.
3. *Amend the election law provisions regarding criteria for annulling elections.* Depending on the outcome of a pending court case regarding the late amendments passed in October by the ruling party, another amendment might be necessary to clarify that election results should only be annulled when irregularities are shown to be of sufficient magnitude to affect the outcome. While a provision along these lines was included in October's proposed amendment, it might be necessary to introduce such a provision as part of a new amendment following broad political consultation.
4. *Implement the legally mandated two-thirds gender rule.* Effective measures should be put into place to ensure full and timely compliance with the constitutionally mandated two-thirds gender rule. A consultative process that includes parliament, relevant state institutions, political parties, and CSOs should be convened immediately to ensure that specific, actionable steps are identified and implemented to ensure rapid progress toward meeting the quota as soon as possible. This could include provisions to require that all upcoming by-elections be contested only by women candidates until the constitutionally mandated gender quota is met, or to introduce sanctions against political parties that don't field female candidates.
5. *Streamline electoral timelines.* All electoral timelines, including those related to party primaries and submission of party lists to the Office of the Registrar of Political Parties, as well as voter registry audits and voter registration, should be reviewed and amended to avoid the overlapping deadlines that impacted the 2017 primaries, delayed candidate nominations, and limited voter registration.
6. *Clarify and make more accessible party primary dispute processes.* The legal framework governing party primary dispute resolution should be reviewed, especially the timeframes for resolving disputes and the resources available to the Political Parties Dispute Tribunal. Consideration should be given to decentralizing this process so that candidates outside Nairobi have a reasonable opportunity to be heard without undue financial burden.
7. *Clarify leadership and integrity requirements.* The criteria used to determine whether candidates meet the leadership and integrity requirements enshrined in the constitution should be clarified well in advance of future elections so that prospective candidates understand the requirements for running for office. In addition, the respective roles of the

IEBC and the Ethics and Anti-Corruption Commission in determining whether a candidate has met the criteria and is eligible for public office should be clearly defined.

8. *Implement corrective measures to protect rights of special-interest groups in elections.* A comprehensive review of compliance with the constitutional requirements to protect and promote the rights of vulnerable communities, or special-interest groups, during the electoral period should be conducted, with a view to identifying corrective measures for implementation prior to the next electoral cycle. Women, youth, persons with disabilities, the elderly, members of minority groups, and other marginalized communities faced obstacles to participation in the process and were at risk of, and subject to, violence.
9. *Hold accountable security forces found culpable of misconduct.* The role of the security forces during the election should be reviewed. Allegations of excessive use of force or other misconduct should be investigated, with those found culpable of criminal acts held accountable.
10. *Further strengthen CSO capacity to observe, assess, and report on elections.* Civil society organizations' capacity to observe and assess the electoral process should be strengthened, not limited. The legal framework should ensure that CSOs can observe and comment publicly on the entire election process without undue restrictions. They should remain vital watchdogs engaged in consultations about electoral reforms.

To the IEBC:

11. *Implement independent electronic and paper-based results paths, with cross checks.* In order to avoid the concerns raised during both the Aug. 8 and Oct. 26 elections regarding the transparency and accuracy of the tabulation process, the IEBC should implement two independent results paths, one electronic and another paper-based. At strategic points in the process, it is essential to enable stakeholders and independent observers to compare the intermediate results of the electronic results path with the paper-based results path, to provide increased transparency and accountability in the tabulation process.
12. *Implement all KPMG audit recommendations and conduct an audit of the voter register prior to the 2022 election.* Deficiencies in the voter register identified in the KPMG audit should be addressed, and all remaining recommendations should be implemented as required by the Electoral Act. An audit of the voter register should be conducted at least one year before the 2022 elections to allow sufficient time to correct any deficiencies that are identified and to allow sufficient time for voter registry verification.
13. *Strengthen public outreach capacity and transparency in decision-making.* In order to enhance transparency for future elections, the IEBC should strengthen its public outreach capacity and provide prompt information on its decision-making. The commission should operate openly, hold public meetings, and publish and disseminate meeting minutes to inform the public of its decisions and votes. All key decisions, including dispute resolution, should be made public.
14. *Standardize training programs for staff/prioritize training in electoral calendar.* Training for IEBC staff should be standardized and conducted in sufficient time to allow for complementary training and capacity-building programs, as needed, to ensure full and common understanding of electoral regulations and procedures. Staff should be recruited earlier in the electoral calendar to allow time for a comprehensive training program.
15. *Strengthen and sufficiently fund voter education programs.* A review of the voter education program should be conducted to identify areas for improvement for the next election. Education efforts should start well in advance of the election and be consistent across the country. They should be well-funded. Materials should be available in local languages and

promote inclusion of special-interest groups. Education about the role and responsibilities of county- and local-level elected officials, voter registration, and what constitutes hate speech and related penalties, should be ongoing.

16. *Implement a post-election statistical audit for presidential results.* For the final verification of the digital election results, the IEBC should implement a post-election statistical audit to reinforce the accuracy of the electoral results and to bolster the transparency and accountability of the process.

To the political parties:

17. *Pursue inter-party dialogue at all levels of government.* Political party leaders should proactively pursue inter-party dialogue at the national to local levels to begin to address the deep political divides that emerged throughout the 2017 electoral period.
18. *Implement a zero-tolerance policy for hate speech.* Political parties should implement a zero-tolerance policy for hate speech, intimidation, and violence and hold party members and supporters accountable for violating the policy.
19. *Strengthen participation of women and other special-interest group in party decision-making.* Political parties should strengthen internal processes and structures that promote the political participation of women, youth, persons with disabilities, and other special-interest groups, including in party decision-making and leadership positions.

### **The Carter Center Observation**

*The Carter Center deployed a core team of experts and long-term observers in Kenya in April 2017 to monitor key parts of the electoral process, including voter registration, campaigning, electoral preparations, and the resolution of disputes in the courts. Former U.S. Secretary of State John Kerry and former Senegalese Prime Minister Aminata Touré led a short-term election observation mission for the Aug. 8 elections, which included more than 100 observers from 34 countries in Africa and around the world. On election day, Carter Center observers assessed the electoral process in 424 polling stations in 185 constituencies across 39 counties, and the vote tallying process in 36 constituency tally centers.*

*Following the Sept. 1 decision by the Supreme Court to annul the August election, the Center was invited by the Independent Election and Boundaries Commission (IEBC) to extend its presence to observe the Oct. 26 fresh presidential election. Long-term observers rejoined the core team on Oct. 4 and were deployed to various locations in the country to observe critical pre- and post-election processes. Because of insecurity surrounding the polls, the uncertain political environment, and the lack of a fully competitive election, The Carter Center deployed only a limited election observation mission to assess the Oct. 26 polls, with 10 long-term observers and a small team of election experts. The team was limited in size and geographic scope and therefore did not attempt to provide a thorough assessment of the quality of the entire electoral process, nor a robust assessment of polling-station level processes on election day.*

*The Center assesses the electoral process based on Kenya's legal framework and on international standards for democratic elections. The Center conducts its observation missions in accordance with the Declaration of Principles for International Election Observation, which was endorsed by the United Nations in 2005.*

*The Center has issued several public statements throughout the electoral process, including a pre-election statement on July 27, a preliminary statement about the Aug. 8 election on Aug. 10, a statement regarding the tabulation process on Aug. 17, and two statements on the Supreme Court ruling and its implementation on Sept. 1 and Oct. 4. A pre-election statement was issued on Oct. 24 and a preliminary statement on the Oct. 26 election on Nov. 6. These public statements are available at [www.cartercenter.org](http://www.cartercenter.org).*