

THE
CARTER CENTER



Carter Center Statement on Kenya's Pre-Election Period

With less than two weeks until election day, The Carter Center observation mission issues this pre-election report and findings, based on three months of observation activities. The Carter Center is conducting a comprehensive international election observation mission for Kenya's Aug. 8 general election. It established a field presence and deployed a core team of experts and 12 long-term observers (LTOs) in mid-April. LTO teams have visited 37 counties and 153 constituencies and have observed over 50 rallies to date. Former U.S. Secretary of State John Kerry and former Prime Minister of Senegal Aminata Touré will lead an 80-person short-term delegation from 34 countries to assess the voting, counting, and tabulation process during the immediate election period. This statement reflects key preliminary observations made to date by Carter Center observers. In a spirit of cooperation with the Kenyan electoral authorities, the Center recommends several steps that the Independent Electoral and Boundaries Commission (IEBC), political parties, and other stakeholders can take to increase public confidence in the election.

Overall, the Center notes the heightened political competition in Kenya and the inclusion of many independent candidates, which is evidence of a strengthening democratic culture. At the same time, the Center maintains genuine concerns about the level of violence that has prevailed throughout the pre-election period. Incidents of violence, incitement, and the harassment of candidates and their supporters are unacceptable infringements of democratic norms.

Electoral Violence. All Kenyans should reaffirm their commitment to competitive elections without conflict, and a peaceful electoral environment. The Center was encouraged when both President Uhuru Kenyatta and his main challenger, Raila Odinga, called for an end to political intolerance. Politicians, civil society activists, and citizens have a responsibility to denounce acts of violence and violations of the electoral Code of Conduct during the campaign and through the final announcement of results. The IEBC, along with other electoral stakeholders — including security forces and the National Cohesion and Integration Commission — should continue to hold accountable those responsible for violations of the electoral code.

Voter register and election administration. The IEBC's dedication to a comprehensive and independent audit of the voter register is a promising step and positive sign that the IEBC is committed to addressing shortcomings and stakeholder concerns noted in prior elections. Careful planning for the distribution and maintenance of electronic Kenya Integrated Elections Management System (KIEMS) devices also reflects positively on the IEBC. However, the election commission should follow through on its plan for a countrywide KIEMS simulation before the election to ensure that the technology will function properly and that each polling station has sufficient back-up batteries so that the devices are assured of working for the entire election day.

The success of KIEMS is of vital importance to enhance public confidence in the IEBC and the electoral process.

Voter Registration. Successful and inclusive voter registration is essential to aligning Kenya with international best practice. Inaccuracies in the voter registry have been a source of contention in previous electoral cycles. Accordingly, in December 2016, the IEBC began a massive voter registration effort (MVRI) with the intention of expanding and updating the voter register from 2013. The IEBC aimed to register more than 6 million new voters for the 2017 elections, to bring the voter registry to more than 20 million. Kenya had an estimated 25.2 million eligible voters of a total population of 45.4 million in 2016. Through MVRI 2016, an additional 1.5 million voters were registered, for a total of 15.9 million. Falling short of its initial goal, the IEBC initiated a second mass voter registration campaign (MVR II), which commenced on January 16, 2017, and closed on February 21, 2017. In the second effort, an additional 3.7 million were registered, bringing the register to 19.6 million registered voters — a 36 percent increase over the 2013 register, which contained 14.4 million voters.

The IEBC contracted the international consulting firm KPMG to conduct a full and independent audit of the voters register as required by the elections law. Although this was a positive step, court challenges caused significant delays, constraining the IEBC's ability to implement all KPMG recommendations in advance of the election, even though the law requires follow-up within 30 days. The audit process was criticized by some political parties and civil society members for a lack of transparency and public outreach.

While the IEBC has taken efforts to correct inaccuracies in the voter register identified during the audit, it was not able to act on all recommendations in the time remaining before the polls. During the preparation of the register, IEBC took into consideration findings of both the biometric verification exercise and the independent audit by KPMG. The IEBC retained 171,476 records that had invalid IDs when compared with the National Registration Bureau database to minimize chances of disenfranchisement. While the IEBC expunged a total of 88,602 deceased persons from the register, clean-up of the list remains insufficient, as a high number of deceased voters remain on the roles. The IEBC correctly argues that the biometric voter identification should not allow any malpractice on election day; however, the success of that system is dependent on the proper functioning of the nationwide KIEMS network under full election-day strain.

Although the IEBC took commendable steps within the limited timeframe it had available to clean up the voter register, the lack of transparency during the audit process and the initial reluctance by the IEBC to release the full KPMG report hindered public confidence in KPMG's work and the subsequent steps taken by the IEBC.

The voter verification exercise commenced on May 11 and was finalized on June 9. Voters were given the opportunity to check whether they were included in the register and if their information was correct. The exercise was carried out with the use of 11,000 KIEMS devices. Turnout for the voter verification exercise was disappointingly low; approximately one-third of registered voters verified their information. Many Carter Center interlocutors told LTOs that this was because of voter apathy and the lack of sufficient voter education regarding the verification exercise.

Voter Education. With less than two weeks to go before election day, the Center’s observers have noted a lack of education on voting day procedures. Educating voters on what will happen when they enter the polling station, how they will be identified, and how to cast a valid ballot is especially important because there are six separate ballots to mark. The Center urges the IEBC, political parties, and civil society to use the available time before election day to substantially increase their voter education and outreach efforts.

The IEBC accredited 2,900 voter educators, two per ward from civil society. In addition, 47 county and 290 constituency-based educators were accredited. Many interlocutors told Carter Center LTOs that the number of educators per constituency is insufficient to conduct a thorough voter education campaign. Civil society groups that have been certified by the IEBC have complained to Center observers about a lack of funding and materials.

Party primaries. The party primaries, which were conducted by the parties without a role for the IEBC, generated tension and attracted international concern. The primaries were marred by accusations that candidates close to party leaders had contests rigged in their favor, some evidence of pre-marked ballot papers, and sporadic outbreaks of violence and unrest. Some party members were unable to vote because their names were missing in the party registers. Voters and candidates in some primaries were left deeply unhappy with the outcome.

As a consequence, many candidates who lost in the primaries did not accept the results and resigned from their parties in order to run as independent candidates. This resulted in an unprecedented number of independent candidates running in the election. One quarter of the contestants — 4006 candidates — are registered as independents.

While The Carter Center did not directly observe the entire process of the political party primaries, conversations with electoral stakeholders and observation of the re-run primaries ordered by the Political Parties Dispute Tribunal (PPDT) revealed high voter turnout and fierce competition for all positions — governors, Members of Parliament (or MPs), senators, and Members of County Assembly (or MCAs). Unfortunately, the primaries were shambolic and conducted with little regard for the rules, particularly the requirement that only party members be allowed to vote in the primary. Because political parties do not have up-to-date party lists, and many of the existing lists contain names of people who either never actually joined the party or belong to other parties, there was no way to control who voted in the primaries. As a result, several of the initial votes were overturned by the PPDT on the basis that non-party members voted in the primary, leaving the parties little time to prepare re-run elections.

The primaries were also marked by instances of bribery; violence, intimidation, and harassment of aspirants and supporters; destruction of voting materials; lack of coordination at the tallying centers; and targeted attacks against minority and marginalized groups, such as woman aspirants. The parties’ lack of preparedness to administer them undermined the credibility and integrity of the entire exercise.

The chaotic party primary nominations and the associated violence have led to widespread fears that the Aug. 8 elections will be marred by violence as well, especially in gubernatorial and county assembly races. Many stakeholders report that some violence is almost certain.

Carter Center LTOs have reported that in some areas identified as hot spots, concerns have emerged about militias and criminal gangs used by politicians to provide “security” during rallies and to intimidate their rivals. The violence during and around election time is an indicator of underlying socioeconomic and political tensions arising from land injustices, marginalization, and disenfranchisement. The Center was encouraged when, on July 16, both President Uhuru Kenyatta and his main challenger, Raila Odinga, called for a stop to the spate of political intolerance. Both condemned political hooliganism, while the IEBC warned of penalties against any candidate found to be linked to violence and lawlessness.

The National Cohesion and Integration Commission (NCIC) and the Supreme Council of Kenya Muslims (Supkem) and other leaders demanded an end to hooliganism and expressed fears that electoral violence could re-emerge ahead of the Aug. 8 polls. The Jubilee Party and National Super Alliance (Nasa) also issued separate statements asking their supporters not to engage in violence.

Politicians and other stakeholders should continue to denounce all acts of violence and violations of the electoral Code of Conduct in the remaining days of the campaign. Candidates also should refrain from using any campaign tactics or language that could incite their supporters to engage in violent or illegal behavior.

Candidate Nominations. Carter Center LTO’s observed the nomination process at each level in their areas of operation. Most interlocutors reported that the IEBC was generally responsive to candidates and the process was well-conducted. The IEBC cleared a total of 14,523 candidates. Eight are vying for the presidency, 210 for the 47 available governor’s seats, 256 for the 47 available Senate seats, 299 for 47 woman representative seats, 1893 for 290 National Assembly seats, and 11,857 for the 1,450 MCA seats. The high number of candidates for all posts is encouraging and means that voters have a genuine choice.

Contrary to the constitution, the Elections Act requires that party-nominated candidates be supported only by registered voters who are also party members and that independent candidates be supported only by voters whose names do not appear on any party’s list. These requirements were found to be problematic and burdensome both for party-backed and independent candidates, because candidates had no way of verifying whether individuals signing their forms were registered voters, as the register had not been finalized by the date that signatures needed to be submitted to IEBC. As such, it emerged in the end that some of those who signed support forms were not registered voters.

The Ethics and Anti-Corruption Commission (EACC) compiled and forwarded to IEBC a list of 106 aspirants from the national to the ward levels whose integrity was under questions for several reasons, including forged university diplomas and criminal convictions. The report questions 11 candidates for governor, one for Senate, two for woman representative, 13 National Assembly candidates, and 14 county assembly candidates. While the report was submitted to the IEBC in due time, no actions were taken by the IEBC, and all candidates in question were cleared to run for office. The Supreme Court is currently considering a case that seeks to clarify the criteria that should be used in determining whether a candidate has met the leadership and integrity

requirements of the constitution. The Carter Center recommends that these criteria be clearly spelled-out well in advance of future elections so that prospective candidates understand the requirements for running for office. In addition, the roles of the IEBC and the EACC in reviewing whether a candidate has met the criteria should be clearly defined.

Political Parties Disputes Tribunal. The Political Parties Disputes Tribunal (PPDT) heard some 300 cases related to the party primaries. 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 for the National Assembly, and 159 to county assemblies.

Many lawyers and candidates complained before the High Court that their cases were dismissed by the tribunal without careful consideration of all the facts. The Carter Center mission noted that in many instances, the tribunal issued oral rulings without giving reasons and instructed litigants to return later for a reasoned judgment. According to the law, the tribunal has no legal obligation to conclude the review of nominations cases within the timelines prescribed by the IEBC. The IEBC timelines only allocated 30 days for the resolution of disputes by political parties and the PPDT, a deadline that was extended several times. Less than a few weeks before the election, there were still a number of cases related to party primaries and nominations pending in courts. The lack of resolution may result in additional court challenges and increase the likelihood of local re-runs and by-elections.

Election Management. The current IEBC commissioners were appointed in late January 2017, only eight months before the general election. In spite of the tight timeframe, they have worked to keep preparations for the elections on track — an especially difficult task because most of their major decisions have been challenged in court, further delaying preparations.

Polling Staff. According to the IEBC, 40,883 polling stations will be established for the elections, each capped to serve no more than 700 voters. The IEBC received over 982,381 applications for 362,858 temporary polling official positions.

The Center LTOs followed the recruitment of polling station staff in several constituencies across Kenya and evaluated the overall process as positive. The selection procedures followed were generally the same, composed of an interview, a written test (for higher positions), a background check for non-partisanship, and a check of polling officials who were blacklisted in 2013 and thus in principle not eligible for positions in these elections. 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 was the fact that the application was online, which prevented some potential candidates from applying.

Ballot Tender Decision. On July 20, the Court of Appeal overturned the decision of the High Court nullifying the tender for printing of the presidential ballots. The High Court had ruled that the IEBC had failed to meet the constitutional requirement for public participation in the procurement process. The Court of Appeal ruled that there was no requirement for public participation in direct procurement and found that the High Court wrongly exercised its discretion on the constitutional timelines, disregarding the issue of public interest in this case. In light of this decision, the IEBC

proceeded with printing of the ballots by Al Ghurair in Dubai. On July 18, the IEBC received the ballot papers for governor, woman representatives at the county level, and senator from the same company. The ballots are being held in a secure warehouse until distribution to the polling stations.

Printing of the presidential ballot papers commenced on the same day the Court of Appeal issued its ruling, two days after the initially planned date. IEBC stated that it plans to deliver the ballots on time regardless of the delay created by the High Court ruling. Other materials were printed and delivered on time.

Constituency Result Tallying Decision. In a decision rendered on April 7, the High Court found that constituency results for the presidential election are final and cannot be “confirmed” or modified by the IEBC. The Court declared unconstitutional the provisions of electoral laws that stated that results announced at the polling station and at the constituency level were only provisional, pending confirmation by the IEBC.

The IEBC appealed the decision of the High Court to the Court of Appeal, which on June 23, affirmed the lower court’s decision, meaning that the IEBC can only tally the results sent from the constituencies, without any verification or modification. The Court of Appeal was emphatic that allowing the IEBC chairperson to verify and modify results that have been scrutinized by candidates and their agents at the polling stations and constituency tallying centers amounted to giving too much power to one individual and that this was antithetical to the various principles of the electoral system in the constitution.

Although the IEBC has continued to state that the decision in this case was incorrect and would result in many challenges to presidential results at the constituency level, the IEBC chose not to appeal the case to the Supreme Court. It remains to be seen what, if any, impact the decision will have on the tallying of results on election day. However, it will increase the importance of scrutiny of the tallying process at the constituency level by observers and political party agents.

Summary. Notwithstanding the short timeframe and court challenges, the IEBC has still met most of the legal deadlines and has moved forward with preparations for the election. The Carter Center commends the IEBC for its efforts. Unfortunately, some of the candidates have used the court challenges to criticize its authority and competence, in an attempt to delegitimize the IEBC. In addition, the courts, which have exercised their constitutional duty to resolve legal dispute, have been attacked for the decisions they have made. To date, the High Court has received more than 280 election-related petitions, which include appeals from PPDT decisions, the IEBC Dispute Resolution Tribunal, the IEBC Code of Conduct Committee, and appeals of IEBC actions/inactions and decisions.

These challenges have been made more difficult by the IEBC’s inadequate communication with stakeholders and insufficient transparency regarding their decision-making. This lack of transparency has negatively affected the confidence and trust of the electorate and political parties in the work of the IEBC.

The Carter Center recommends that the IEBC consider taking steps to increase the transparency of their work so that electoral stakeholders and the public are effectively informed during the

remaining electoral period. Politicians also have a responsibility not to make unsubstantiated allegations against these institutions that only serve to delegitimize them and reduce public trust in the electoral process.

Campaign Environment. The election campaign for the different races¹ officially started between the end of May and the beginning of June. Apart from the presidential race, campaigns for all other races have predominantly consisted of small gatherings, door-to-door canvassing, small vehicle parades, and distribution of pamphlets. The two main presidential candidates, on the contrary, have conducted a mix of large road shows and rallies.

Beginning in July, Carter Center observers noted an increase in the number of campaign events throughout the country. The increase in the intensity and visibility of the campaigns has also brought an increased number of reported incidents of poster defacing and some instances of confrontation between supporters of opposing sides at rallies. This is especially true as the candidates have increasingly been campaigning in areas perceived to be the stronghold of the other party. Candidates have been able to campaign freely all over the country without any restrictions or interference from authorities.

Carter Center LTOs have reported increased violations of some parts of the Code of Conduct that were not addressed by any of the responsible institutions. The IEBC has not proactively initiated cases regarding violation of the Code of Conduct and instead has generally considered potential violations only in response to complaints. The Center urges the IEBC to be more proactive in identifying and prosecuting violations of campaign regulations in order to uphold the rule of law.

As the campaign continues to heat up and election day draws near, the IEBC, candidates, and citizens should be vigilant in condemning incidents of conflict, destruction of property, and other serious violations of the Code of Conduct.

Two presidential debates were initially scheduled. The first was canceled because the top contenders announced they would not attend. A debate was held on July 24, attended by opposition leader Raila Odinga. President Uhuru Kenyatta abstained, accusing the organizers of failing to consult on the rules for the debate. This deprived voter of their only opportunity to see the two candidates answering questions on the same stage.

Security Preparedness for Polling Day. The IEBC, in partnership with the Inspector General's office, will deploy 180,000 security personnel for election day, including police and personnel from the forestry department, prison wardens, and administration police. The National Police Service, the IEBC, and the NCIC have mapped out hotspots in all the 47 counties to prepare for any risk of political violence. Carter Center observers report regular coordination meetings between IEBC staff and security personnel in several parts of the country. It is imperative that all security personnel deployed for election day be properly trained and prepared for all eventualities that could emerge to ensure that they respond in an appropriate and impartial

¹ Official gazette, vol. cxix—no. 35: Presidential, county assembly wards and members of the Senate: May 28; county woman members to the National Assembly: May 30; members of the National Assembly and county governors: June 1.

manner. It is also important that security forces are not deployed in such a way as to deter voters from voting.

TCC observers have noted several initiatives advocating for peace and a conflict-free electoral process in the last few months. The initiatives are promoted by a large variety of civil society organizations and institutions and include a diverse range of activities, from peace walks to conflict prevention round tables and meetings. These have been attended by political representatives, election officials, civil society members, and politicians. Despite these positive and appreciable efforts, not many candidates took part.

Civil Society Engagement. The 2017 election enjoys the robust engagement of civil society actors. In a positive sign, the IEBC has announced that to date it has accredited 4,242 long-term observers, the overwhelming number of which are Kenyan nationals. It estimates that by the July 31 deadline for accreditation, it will accredit more than 100,000 short-term observers. Over 1,500 media have requested accreditation to cover the elections. The accreditation process has been open and transparent, and the large number of observers is a testament to the IEBC's commitment to supporting the engagement of Kenyan citizens in the civic affairs of their country.

A number of domestic CSOs have observed the pre-election period throughout the country, releasing periodic public statements and reports of their findings on the state of election preparedness. These groups also plan to observe the voting process, tallying, and transmission of results. Groups have also assessed special interest groups' participation in the process and have been engaged with peace promotion, early-warning mechanisms development, and conflict-mitigation efforts. Some groups have focused on the human rights environment around the election. Faith-based organizations have also contributed to peace promotion efforts around the country. State bodies such as the Kenya National Human Rights Commission, the Office of the Ombudsman, and the NCIC are also monitoring the electoral process.

Participation of Women, Youth, Persons with Disabilities (PWDs). The 2010 Constitution identifies six categories of persons as vulnerable or special interest groups (SIGs). These are women; older members of the society; persons with disabilities (PWDs); children, youth, members of minority or marginalized communities; and members of particular ethnic, religious, or cultural communities. Through various provisions, the constitution seeks to protect these groups against discrimination and address their needs.²

Despite the existence of these progressive provisions, the increase in participation of the SIGs, especially in the political sphere, has been slow in materializing. There are 1,462 female aspirants out of a total of 15,083 aspirants (10 percent) contesting for various positions in the 2017 elections. There are 10 female candidates for the governor's seat (4 percent), 38 for the senate's seat (10.8 percent), 151 for the MP seats (7 percent), and 932 for the MCA seats (7 percent). There is no female candidate for the presidency.

² These include Articles 21(3), 27(3)(4)(6), and 100. Specific gender issues are provided for under Articles 27(8), 81(b), 175(c), 177(1)(b) and 197(1). Issues regarding PWDs are addressed under Article 54 and those regarding the youth under Article 55 of the Constitution.

Although women have more strongly contested various seats in the 2017 elections, they still face numerous challenges in their quest for political leadership. During the party primaries, women encountered a hostile political environment. They were booed and heckled at rallies, sometimes subjected to smear campaigns and instances of violence, and suffered from lack of available funds.

The failure of the political parties to support affirmative action in fielding candidates means that the majority of women candidates are vying as independents. Unlike 2013, when none of the six female candidates was elected governor, the 2017 election presents an opportunity for Kenyans to elect their first female governor. This may well occur in Kirinyaga, Bomet, Machakos, or Kitui counties, where strong female candidates are contesting the elections.

The IEBC is making commendable efforts to engage and consult various stakeholders on issues related to effective SIG participation. Other stakeholders are also putting in place measures to safeguard and enhance participation of SIGs in the electoral process. Security for female candidates has also been increased following the violence experienced during the primaries.

The IEBC made an effort to reach out to youth by conducting voter registration in colleges and universities during the mass voter registration; giving youth the opportunity to participate in the National Election Conference as presenters and facilitators; adopting youth-friendly technology; launching the Youth Vote (Y-Vote) campaign to educate, engage, and motivate youth to participate in the elections through the use of social media and on-ground activities; and reducing complex requirements for youth employment by the IEBC so that experience is not required.

In addition, Persons with Disabilities (PWDs) will for the first time have tactile ballot guides on election day. Unlike in previous elections, the IEBC will verify that nominated members belong to a recognized PWD category by requesting a registration card with the national group for persons with disabilities in Kenya. This will safeguard the special seats reserved for PWDs in the national and county assemblies.

Summary. The Carter Center commends the IEBC for its efforts to meet strict electoral deadlines and implement a challenging electoral process in which an unprecedented number of candidates and voters are registered for the polls. The judiciary has also played a key role in contributing to a democratic and competitive electoral process. It is now incumbent on political leaders, candidates, and their supporters to reject violence, ensure peaceful participation in the election, and adhere to democratic principles. The smooth conduct of election day will help to allay the distrust and frustration that lingered after the 2013 elections and build public confidence in Kenya's democratic institutions.