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Carter Center Pleased with Kenya Election Preparations, Urges Politicians and Citizens to Commit to Credible and Peaceful Elections

Carter Center observers in Kenya have found the electoral campaign generally peaceful thus far, and the Center urges all Kenyans to commit themselves to nonviolent participation in the electoral process.

The Center's observers report that Kenyans have been able to assemble freely and parties and candidates able to convey their messages to potential voters. The March 4 elections for president, parliament, governors, and county assemblies will be the first held under the new constitution of August 2010. The legal framework, election commission, judiciary, and especially the presidential candidates, are under intense scrutiny following post-election violence in 2007.

In contrast with the chaotic internal primaries organized by a number of political parties, the Center's observers report that the Independent Electoral and Boundaries Commission has administered election preparations in a competent manner and has been responsive to the additional pressure to deliver peaceful and credible elections. Of particular note is the election commission's willingness to work with the judiciary during the pre-election period to strengthen Kenyan access to justice and rule of law.

The Carter Center is nevertheless concerned by a number of developments that could undermine the integrity of the electoral process. Among these are the apparent exclusion of a number of youth, women, internally displaced persons, and pastoralists from the voter register; shortcomings in voter education that have led many Kenyans to believe incorrectly that they will be using electronic voting machines; and the complex scale of managing polling, counting, and transmission of results for six ballot papers for different elected offices.

The Carter Center calls on political parties and candidates to abide by the electoral code of conduct and to reiterate their commitment to nonviolent participation in the electoral process and peaceful acceptance of the will of Kenyan voters. Furthermore, the Center calls on Kenyans to play their role in a peaceful election by not succumbing to political manipulation and violence, instead taking their complaints through the legal process to preserve peace and democracy.

The Carter Center launched its election observation mission in Kenya in January 2013 with the deployment of 14 long-term observers from 11 countries. They will be joined by 38 short-term observers from 19 countries to observe voting and counting. The mission will be led by former Zambia President Rupiah Banda and Carter Center Vice President for Peace Programs Dr. John Stremmlau.

The Carter Center is observing the elections at the invitation of the Independent Electoral and Boundaries Commission and will provide an impartial and independent assessment of the electoral process to be made available to Kenyan public and the international community through periodic public statements, available at www.cartercenter.org. The Center makes its assessment based on Kenya's legal framework and its obligations for democratic elections contained in regional and international treaties. The Center's observation mission is conducted in accordance with the Declaration of Principles of International Election Observation and Code of Conduct for International Election Observation adopted at the United Nations in 2005, and all its observers have signed the Independent Electoral and Boundaries Commission Code of Conduct for Election Observers. The Carter Center has observed 93 elections in 37 countries, including the 2002 elections in Kenya.

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**The Carter Center International Election Observation Mission
to Kenya's March 4, 2013, Elections**

**Pre-election Statement
Feb. 21, 2013**

Kenya's March 4, 2013, elections for president, parliament, governors, and county assemblies will be the first held under the new constitution of August 2010. The legal framework, election commission, judiciary, and especially the presidential candidates, are under intense scrutiny following post election violence in 2007. In contrast with the chaotic internal primaries organized by a number of political parties, the Independent Electoral and Boundaries Commission (IEBC) has administered the electoral process thus far in a competent manner, including its management of candidate registration and cooperation with the judiciary during the pre-election period.

Carter Center observers report that a generally peaceful electoral campaign thus far has allowed Kenyans to assemble freely and for parties and candidates to convey their message to potential voters. The Center is nevertheless concerned by a number of developments that could reduce the integrity of the electoral process, including the exclusion of a number of youth and women from the voter register; shortcomings in voter education that have led many Kenyans to believe incorrectly that they will be using electronic voting machines; and the complex scale of managing polling, counting, and transmission of results for six ballot papers for different elected offices.

As election day approaches, The Carter Center calls on political parties and candidates to abide by the electoral code of conduct of the IEBC, the code of conduct for political parties, and to reiterate their commitment to nonviolent participation in the electoral process and peaceful acceptance of the will of Kenyan voters. Furthermore, the Center calls on Kenyans to play their role in ensuring a peaceful election by not succumbing to the political manipulation and violence that have undermined the electoral process in the past and never served the best interests of the Kenyan people.

The Carter Center launched its election observation mission in Kenya in mid-January 2013 with the deployment of 14 long-term observers from 11 countries. Closer to election day, they will be joined by 38 short-term observers from 19 countries to observe voting and counting. The mission will be led by former Zambia President Rupiah Banda and Carter Center Vice President for Peace Programs Dr. John Stremlau. The Center is in the Republic of Kenya at the invitation of the IEBC and will provide an impartial and independent assessment of the electoral process to be made available to Kenyan citizens and the international community through periodic public statements. The Carter Center makes its assessment based on Kenya's legal framework and its obligations for democratic elections contained in regional and international treaties.¹ The Center's observation

¹ Kenya has signed and ratified, amongst others: African Union (AU) Charter on Human and People's Rights, AU Convention on Combating and Preventing Corruption, UN International Covenant on Civil and Political Rights (ICCPR), UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and UN Convention on the Rights of Persons with Disabilities (CRPWD), and UN Convention against Corruption. United Nations Human Rights

mission is conducted in accordance with the Declaration of Principles for International Election Observation and all its observers have signed the IEBC Code of Conduct for Election Observers.²

Introduction

The Republic of Kenya is preparing for its fifth elections since the re-establishment of multi party politics in 1991. The country has a longstanding history of ethnic fueled electoral violence, which culminated in 2007-2008 leaving more than 1,000 dead and over 600,000 internally displaced people. The 2013 elections represent a unique occasion for Kenya to turn away from past electoral violence. These elections will be the first to be conducted under the terms of the new constitution adopted by referendum in 2010, with a new electoral management body, the IEBC. The registration of 14.3 million voters and the organization of two by-elections in 2011 have reinforced public trust in the IEBC, however, shortcomings and subsequent delays in the procurement of registration kits and failure to include numbers of youth and women have cast shadows on the institution.

Legal and electoral framework

A sound legal electoral framework is essential for the effective administration of democratic elections that adhere to national and international rights. The legal framework includes the rules found in the national laws of the country that regulate how all aspects of the electoral process will unfold, including electoral management, boundary delimitation, campaigning, voter education and registration, voting operations, and counting and dispute resolution.

The electoral framework was completely renewed after the adoption of the constitution in August 2010. The Elections Act, the Independent Electoral and Boundaries Commission Act, and the Political Parties Act were adopted by the outgoing parliament in 2011. While the legal framework provides solid grounds for genuine elections, the decision by the Supreme Court to postpone the application of the one-third quota of women in elective positions is a step back from the constitutional commitment of Kenya to ensure equal eligibility and participate in formulation of government policy as stated in the Convention on the Elimination of all Forms of Discrimination against Women.³ The Carter Center regrets that the Kenyan parliament failed to pass specific legislation to implement the quota providing not more than two-thirds of the members of elective public offices to be of the same gender guaranteed by Art.81 a. of the Constitution. The Center also notes that the absence of campaign finance regulations reduces transparency in campaign spending and gives an unfair advantage to the wealthiest candidates.

Good practices in achieving elections that meet international standards advise that no substantial change to the electoral law should be made within six months prior to elections. Unfortunately, several amendments were made in this period, one of them withdrawing the obligation of party membership three months prior to party nomination. This allowed candidates to switch parties at the last minute, opening the possibility of "party hopping" for losing aspirants and thus withdrawing an essential safeguard against fraud, manipulation, and antedating of nomination documents.

Committee, General Comment 25 on "Rights to Participate in Public Affairs, Voting Rights and the Right to Equal Access to Public Service" is persuasive upon Kenya.

² The Declaration of Principles for International Election Observation was adopted at the United Nations in 2005 and has been endorsed by more than 30 organizations including the AU, European Union, Commonwealth, Organization of American States, National Democratic Institute and Electoral Institute for Sustainable Democracy in Africa.

³ Ratified by the Republic of Kenya on March 9, 1984.

Deadlines and the electoral calendar

While an elaborate legislative framework was adopted by parliament, critical electoral regulations were watered down to meet operational requirements. These modifications were allowed by reducing the time frame in which to amend the electoral framework from six months to four months prior to the elections.

- The voter registration period was reduced from 90 days before the elections to 60 days and the period for inspection of the voters register was reduced from 30 days to 14 days.⁴
- The requirement of submission of party membership list under section 28 of the Elections Act which was originally required to be done at least three months prior to the elections, was amended to 45 days before the elections.
- In addition, section 30 of the Political Parties Act was amended to reduce the deadline by which political parties must submit party membership lists to the registrar of political parties from 90 days before the elections to 60 days.
- However, the most controversial amendments were in relation to party hopping, where section 34 of the Elections Act was modified to reduce the three month party membership requirement to being a member on the day of submission to be appointed as candidate. This amendment allowed party hopping until the day of candidate nominations which created unnecessary confusion and withdrew a positive element of political stability.

Although in a technical sense there have been limited cases of missed deadlines, amendments whose only objective is to accommodate delay in the system or for the political convenience of parties and candidates set a bad precedent and results in creating loop holes in the electoral process, putting unnecessary pressure on IEBC operations.

Political party primaries and candidates nomination process

In their nomination process, parties should respect the principles of genuine elections guaranteeing the free expression of the will of the electors.⁵ According to international law, equitable treatment of candidates and parties during an election as well as the maintenance of an open and transparent campaign environment are important to protecting the integrity of the democratic process.⁶ Kenya's international commitments state that women shall enjoy equal rights to men, and that in some cases a state may take special, temporary measures to achieve de facto equality for women.⁷ Political parties should also embrace the principle of equal opportunity for female candidates.⁸ The Constitution and Political Parties Act each require that a political party undertakes and promotes a free and fair nomination process in accordance with the party's nomination and election rules.⁹

The selection of candidates by political parties was publicly perceived as disorganized at best, marred with technical difficulties, persistent rumors of fraud, and manipulation of results. The major political parties opted to have their nominations as close to the deadline as possible in order to prevent last minute party hopping. Far from having the expected result, moving the primaries very close to the IEBC deadline for submission of lists of candidates brought confusion to the candidate nomination process and pushed back the electoral calendar.

⁴ Sections 5 and 6 of Elections Act.

⁵ ICCPR Art.25 and General Comment No. 25

⁶ ACHPR, arts. 2 and 13(1); UN, ICCPR, art. 25(b)

⁷ UN, ICCPR, art. 3 and UN, Convention on the Elimination of all forms of Discrimination against Women, art. 3

⁸ CEDAW Committee, General Recommendation 23, para. 22

⁹ Constitution, Art. 91 and Political Parties Act, Sections 6(2)(e) and 21(1)(b).

In addition to the political tactics and administration of the party primaries, The Carter Center is concerned about the reaction of many losing candidates in the primaries who in some cases responded with inflammatory rhetoric, incited demonstrations and in at least one occurrence turned on the IEBC outside of the official dispute resolution mechanisms.

Given the very tight electoral calendar, any delay presents potentially serious subsidiary effects. The late conclusion of dispute resolution from the primaries delayed the transmission of candidates' lists to the ballot papers printing company, thereby delaying the delivery of ballot papers. With the names of candidates having been recently published in the gazette, further complaints of candidates expecting to be on the list could lead to legal proceedings, further disrupting the elections in several constituencies.

Election preparation and readiness

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 a genuinely democratic electoral process.¹⁰ It is also the responsibility of an election management body to take necessary steps to ensure that international human rights obligations apply to the entire electoral process. An election management body also should ensure accountable, efficient, and effective public administration as it relates to elections.¹¹

The Carter Center recognizes that efficient management of the 2010 constitutional referendum and subsequent by-elections have reinforced public confidence in the IEBC as well as raising expectations for the March elections. However, multiple problems induced by shortcomings in the procurement of essential election materials (biometric voter registration machines and ballot paper printing, for example) have cast a shadow on an otherwise high level of public trust. Management of public expectations will be an essential task for the IEBC as a recent poll indicated that many Kenyan voters were expecting to vote electronically, further confirming the need for more voter education. The swift delivery of results in the 2010 referendum has also set a precedent that will be difficult for the IEBC to match in a complicated election with six ballot papers and where the individual candidates have considerable political stakes.

Carter Center long-term observers report that preparations for the elections have been ongoing and appropriately timed in spite of the many procedural and logistical challenges facing the IEBC. Training has been reported to have been in line with the electoral calendar, although specific training on electronic poll books has not been delivered to national trainers due to the delay in delivery of the equipment. Non-sensitive election materials have largely been distributed on time, albeit sometimes unevenly, and IEBC personnel have been reported to be reactive and swift in addressing problems.

Carter Center observers have enjoyed full access to IEBC personnel in their area of responsibility. The Center encourages the IEBC to continue its cooperation with election observation missions in order to ensure the full transparency of the process at all levels and to strengthen public trust in the institution. The Center especially welcomes the presence of non-partisan domestic election observers from multiple organizations, notably those organized by the Elections Observation Group (ELOG).

Due to the high number of voters per polling station and with six ballots to be cast, it is anticipated that it will take a significant amount of time for each voter to complete the polling process. Queue management by polling station officials will be important as only a smooth flow of voters will

¹⁰ UNHRC, General Comment No. 25 para. 20.

¹¹ Venice Commission, Code, sec. II.3.1.c.

allow the IEBC to complete voting operations in the 11 hours authorized for election day. Although all voters in the queue at closing time are to be allowed to vote, The Carter Center encourages voters not to wait for the last minute to arrive at the polls. Delayed poll closings also have their own knock-on effects, slowing the transmission and tabulation of results.

The Carter Center observers report that the IEBC has been relying heavily on outside partners to implement their civic education programs. It also has been reported that voter education programs have lacked technical and financial support from the IEBC. A late start, along with deep rooted tribal customs, poverty, and illiteracy, also has impacted the efficiency of voter education programs.

Preparedness of the judiciary

Effective dispute resolution mechanisms are essential to ensure that effective remedies are available for the redress of violations of fundamental rights related to the electoral process.¹² The renewed public and political confidence in the judiciary provides effective opportunities for due process that did not exist in 2007. The Carter Center encourages all candidates and parties to use these instruments to seek a peaceful resolution of any election related disputes.

The Carter Center commends the judiciary for the decision to fast track all elections related matters presented to the courts and the establishment of a Chief Justice of the Judiciary Working Committee on Election Preparations, which has been tasked with developing strategies to manage elections disputes efficiently and effectively.

The Carter Center also welcomes the finalization of training for all the judges, magistrates, and court registrars in election disputes and the adoption of Election Petitions Rules and Supreme Court Rules that provide instruments for faster determination of election disputes.

The efficient distribution of cases between magistrate's courts for county representatives; high courts for parliamentary, senatorial, governorship, and women representative contestants; and the Supreme Court for the presidential elections will be instrumental to a swift resolution of disputes. However, with only 70 high court judges in place and a period of six months to determine election disputes, along with the priority put on electoral cases, there is a strong likelihood that the courts will hold up on their normal work, potentially impeding access to justice for Kenyans. In a highly charged political atmosphere for election to entirely new offices, Kenyans will have to be patient just as the judiciary must ensure that full access to redress is enabled.

The Center notes the renewed public trust enjoyed by the judiciary and the role it has taken in solving disputes arising from candidate nomination. However, the high number of cases submitted to the courts has interfered with IEBC preparations and may delay the elections in some constituencies if unsuccessful primary candidates are reinstated in their right to stand through court decisions. The high number of petitions filed regarding disputed party primaries, IEBC procurement procedures, and the eligibility of some presidential candidates is a testimony of public trust in the judicial system, however it should not be used as a tool to undermine or disrupt the electoral process. In addition, the high cost of petition could be a deterrent for voters and parties with the lowest financial capacity.

Conflict resolution mechanisms

The Carter Center welcomes article 84 of the Constitution and sections 51 and 110 of the Election Act, which require that all candidates and political parties comply with the Electoral Code of

¹² Art. 40 SSRC Rules and Regulations on Polling, Sorting, Counting and Declaration of Results.

Conduct as prescribed by the IEBC and contained in the Second Schedule to the Election Act. The Electoral Code of Conduct is wide and comprehensive requiring every political party, candidate, and leader, chief agent, agent, or official of a referendum committee to promote the object of the code to enable free political campaigning and open public debate to take place in all parts of Kenya during an election period. The presence of two codes of conduct provides concrete guidance on acceptable political behavior and contributes to the creation of a campaign environment free from violence and hateful rhetoric.¹³

The Center is encouraged by section 110(6) of the Election Act under which, subject to the provisions of the Criminal Procedure Code, the IEBC can designate any of its officers to conduct any prosecution for an offense under the Election Act and the Electoral Code of Conduct. This provides prosecutorial powers to IEBC officials in order to deter electoral offenses and facilitate quick prosecution of offenders. Further, under section 7 of the Electoral Code of Conduct, the IEBC has a number of measures to resort to if there is a violation of the electoral code.

Enforcement of the Codes of Conduct will be a persistent challenge in the run up to the elections, especially if parties and candidates use the same rhetoric and behavior that have prevailed during party primaries. The strong legal powers given to the IEBC can serve as strong deterrent to behaviors that could arm the electoral process. The Center encourages the IEBC to use its entire legal arsenal to ensure a peaceful and genuine election.

Failure to comply with the order of the commission in this regard can result in the prohibition of the defaulting party from participating in ongoing and future elections. The commission further may either of its own motion or in consequence of any report made to it, institute proceedings in the high court in case of any alleged infringement of the code. The high court may then cancel the right of such party to participate in the election concerned; and/or make an order disqualifying, in the case of a person who is a candidate, that person from being a candidate or deleting the name of that candidate from the list or lists of candidates concerned.¹⁴

Campaign environment

In addition to being open and transparent, a genuinely democratic election requires a campaign period in which rights such as freedom of opinion and expression, freedom of association, freedom of movement, security of the person, and access to information are respected and upheld by the election management body as well as by political parties and other electoral stakeholders.¹⁵ These are international obligations to which the government of Kenya has committed itself.

Carter Center observers report a generally peaceful electoral campaign thus far has allowed Kenyans to assemble freely and for parties and candidates to convey their message to potential voters. The Center observers have reported isolated cases of vandalism such as destruction of campaign posters. Campaign finance is provided to national political parties by public funding in proportion to the strength of their representation in parliament or votes garnered in previous elections.

While the IEBC did not provide an initial date for the launch of the official campaign period, it did issue a notice on Feb. 11 to establish midnight on March 2 as the end date. Unfortunately, the

¹³ IEBC, Electoral Code of Conduct and Political Parties Act, Political Parties Code of Conduct.

¹⁴ Section 11 of the Code requires that the High Court ensure that these proceedings are dealt with in priority to all other matters brought before it and that the decision of the court is given before the date of the election concerned.

¹⁵ UN, ICCPR, art. 9, 12, 19, 22; AU, AfCHPR, art. 6, 10, 12; AU, Convention on Corruption, art. 9; ACHR, art. 7(1), 13, 16, 22

absence of a fully defined official campaign period tends to penalize candidates and parties who lack the resources to run a long and expensive campaign.

The Center welcomes the organization of two presidential and deputy presidential debates that gives the candidates an opportunity to air publicly their positions and differences in a peaceful manner.

However, there are other limitations to the goal of a level playing field based on financial resources and access to media. Several Kenyan organizations have reported on the particular disadvantages facing women candidates who frequently lack the resources of male contenders and who often do not receive help from their parties. The Center found that high candidate nomination fees can create unreasonable obstacles to the right to stand for election with regards to international commitments.¹⁶

Security

Too many Kenyans continue to lose their lives or face displacement through inter-communal and political violence. The police have a responsibility to serve and protect all Kenyans without prejudice and to investigate criminal activity.

The Carter Center is also concerned about the recent violence in some parts of the country, especially Tana River, Kuria, and Baringo, and displacement of people from these regions. This is likely to lead to potential voter displacement, voter apathy, and disenfranchisement of voters.

The security of polling officials and materials, candidates, voters, and other stakeholders prior to and during polling day is paramount to the conduct of democratic elections. After the precedent created by the post electoral violence surrounding the 2007 elections, Kenya's security forces are expected to play an essential role in securing the process. The Carter Center understands that police intend to mobilize other uniformed services (prison services and the wildlife service) to release regular policemen from static duties. The Carter Center welcomes the plan to deploy two security personnel to each polling station while still enabling them to create reserves and quick reaction forces.

The Center encourages the police force to use non-lethal crowd control measures to secure the life of the citizens it aims to protect. The presence of policemen, while acting as a deterrent, should not influence voters in any manner while exercising their democratic choice.

Recommendations

The Carter Center international election observation mission to Kenya offers the following recommendations to support the conduct of credible elections. The Center will offer additional observations and recommendations in subsequent public reports:

To the IEBC:

- Make a final push in the week before the elections to ensure that Kenyans understand where and how to cast their vote.
- Ensure procedures are well established in advance for the counting and tabulation procedures and that these are communicated to candidates and parties.
- Take special care to ensure the proper training of all polling station officials to manage a complex six-ballot polling experience for voters. Additional attention should be given to

¹⁶ ICCPR Art.25 and General Comment 25

closing and counting procedures, which are often neglected and suffer in the wake of pressure to staff and deploy thousands of election workers.

- Ensure that sufficient election staff members are deployed to polling centers, especially the ones with the highest numbers of voters.

To the candidates and political parties:

- Continue to respect and reinforce the Code of Conduct and encourage fair practices among party supporters.
- Spread the message among supporters that the election results may take some time to be tabulated and announced by the IEBC. While party agents have the right to serve as an important check on polling station results they should also remember that the election unfolds across more than 33,000 polling stations, not just the one location where they are stationed.
- Use the established means for any election complaints that may arise and take every measure to calm their supporters and call for patience.

To the media:

- Uphold the responsibility to report without bias on the conduct of all aspects of an election but not to become political actors themselves.
- Journalists, editors, and media owners understand the technical and political activities they are reporting and remain aware of the impact of that reporting, especially as partial results become available.

To the police:

- Ensure that the conduct of the polls runs smoothly and that voters may go the polls without fear, even though the national police service is in the midst of transformation and faces many pressures.
- Leadership and officers must remain mindful that serve the people of Kenya and not any one political party or interest.

To the judiciary:

- Reinforce the rule of law and to dispense justice without prejudice on behalf of all Kenyans.
- Implement the law in the knowledge that resolution of election disputes carries a special burden given the stakes and consequences of elections.

To the people of Kenya:

- Honor and respect those who have lost their lives or been displaced by political violence in the past, and recall that all Kenyans have the right to choose their elected representatives without fear of reprisal or intimidation. It is the conduct of genuine elections themselves that enable the people to hold their leaders accountable.

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obligations for democratic elections contained in their regional and international commitments and in their domestic legal framework.

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