



FOR IMMEDIATE RELEASE

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Carter Center Announces Election Observation Mission to Kenya

At the invitation of the Independent Electoral and Boundaries Commission and the welcome of political parties, The Carter Center has launched an international election observation mission for Kenya's March 4, 2013, elections.

The early deployment of long-term observers will allow the Center to assess pre-election preparations. The Carter Center also will monitor closely legal and political developments that may impact the election. A field office has been established in Nairobi to guide these efforts.

"The Carter Center hopes that this election observation mission will reassure the Kenyan people that their efforts to reform political institutions can succeed. Competitive and peaceful elections would be one more step in Kenya's transition away from politics of division and strife," said Carter Center Election Mission Field Representative Stephane Mondon.

The Center will deploy 14 long-term observers across Kenya to gain firsthand knowledge of the activities of the election commission, political parties, civil society organizations, and the international community, as well as other domestic and international election observation missions. Their deployment coincides with the formal nomination of candidates.

These observers will be joined by an additional 30 members shortly before the elections. The Center will release periodic public statements on electoral findings, available at www.cartercenter.org.

The Center's observation mission is conducted in accordance with the Declaration of Principles for International Election Observation and Code of Conduct that was adopted at the United Nations in 2005 and has been endorsed by more than 40 election observation groups. Center assesses the electoral process based on Kenya's

national legal framework and its for democratic elections contained in regional and international agreements.

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"Waging Peace. Fighting Disease. Building Hope."

A not-for-profit, nongovernmental organization, The Carter Center has helped to improve life for people in more than 70 countries by resolving conflicts; advancing democracy, human rights, and economic opportunity; preventing diseases; improving mental health care; and teaching farmers in developing nations to increase crop production. The Carter Center was founded in 1982 by former U.S. President Jimmy Carter and his wife, Rosalynn, in partnership with Emory University, to advance peace and health worldwide.



Feb. 21, 2013

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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 Stremlau.

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.

The full pre-election statement is attached.

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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.

The Carter Center has observed 93 elections in 37 countries including the 2002 elections in Kenya. The Center conducts election observation 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. The Center assesses electoral processes based on states'

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

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Visit: www.cartercenter.org to learn more about The Carter Center.



FOR IMMEDIATE RELEASE

Feb. 27, 2013

CONTACTS: Atlanta, Deborah Hakes +1 404 420 5124; Nairobi, Stephane Mondon +254- 727-582-926

Former Zambia President Rupiah Banda to Lead Carter Center Delegation for Kenya's Election

The Carter Center announced today that former Zambia President Rupiah Banda and Carter Center Vice President for Peace Programs Dr. John Stremlau will co-lead the Center's 60-person delegation representing 29 nations to observe Kenya's March 4 elections.

President Banda and Dr. Stremlau will meet with key stakeholders including the Independent Election and Boundaries Commission, political parties, independent candidates, civil society organizations, and the international community, and will observe polling, counting, and tabulation on election day.

The Carter Center urges the Independent Election and Boundaries Commission to address technical issues that arose during the recent polling simulation to ensure a smooth voting process on election day. The Center further encourages political parties, movements, and independent candidates to demonstrate commitment to the ideals of democracy and appeal to their supporters to respect the rule of law and the codes of conducts signed by candidates and political parties.

The Carter Center's long-term observers have been deployed since January and are now joined by short-term observers to be briefed in Nairobi and deployed ahead of election day. The Center is observing Kenya's election at the invitation of the Independent Election and Boundaries Commission and the welcome of political parties.

The Center's observation mission is conducted in accordance with the Declaration of Principles for International Election Observation and Code of Conduct that was adopted at the United Nations in 2005 and has been endorsed by 37 election observation groups. The Center assesses the electoral process based on Kenya's national legal framework and its obligations for democratic elections contained in regional and international agreements.

The Center's previous statements on the Kenyan election process may be found at www.cartercenter.org. The Center will release its preliminary findings on the Kenya election shortly after the process concludes.

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March 3, 2013

Observer Groups Call for Peaceful Polls, Urge Kenyans to Await Results

Observer groups from the African Union, The Carter Center, the East African Community, Intergovernmental Authority on Development, Common Market for Eastern and Southern Africa, International Conference on the Great Lakes Region, the Commonwealth, and the European Union call on Kenya's political parties and candidates to abide by the Electoral Code of Conduct and to respect their commitment to nonviolent participation in the electoral process. The observers also trust that the government of Kenya and the security forces will secure all stakeholders in a transparent and impartial manner.

The observer groups also call on all Kenyans to respect the right of fellow voters to choose their elected representatives free from fear of intimidation or violence. The observers hope that all political actors will abide by the rule of law and allow the Independent and Electoral Boundaries Commission to conduct the polling, counting and tabulation process.

The observer groups urge anyone with a complaint about the electoral process to follow the established judicial procedures.

His Excellency Joaquim Chissano
African Union Mission Leader

His Excellency Rupiah Banda
Carter Center Co-Leader

Hon. Abdulrahman Kinana
East African Community Head of Mission

Dr. Aisha Abdullahi
Political Affairs Commissioner
African Union Deputy Mission Leader

Dr. John Stremlau
Carter Center Co-Leader

Mr. Alojz Peterle, MEP
European Union Chief Observer

Amb. Dr. Barhane Ghebray
Leader of IGAD Mission

Amb. Simbi Veke Mubako
Leader of COMESA Mission

H.E. Festus Mugae
Leader of Commonwealth Observer Group



THE
CARTER CENTER



FOR IMMEDIATE RELEASE
Nairobi, 5 March 2013

The Observer Missions of the African Union, the Carter Center, the Commonwealth, the European Union, Common Market for Eastern and Southern Africa, Intergovernmental Authority on Development, East African Community, International Conference on the Great Lakes Region and Electoral Institute for Sustainable Democracy in Africa to the 2013 Kenya Elections headed by His Excellency Joaquim Chissano, His Excellency Rupiah Banda, His Excellency Festus Mogae, Mr. Alojz Peterle, Amb. Simbi Veke Mubako, Amb. Dr. Berhane Ghebray, Hon. Abdulrahman Kinana and Mr. Vincent Tohbi, respectively, have observed the voting and counting process across the country.

We are pleased that the voting and counting took place in a peaceful and transparent atmosphere and that the people of Kenya demonstrated strong commitment to their democratic process by turning out in significant numbers to cast their votes.

We call on all stakeholders of the Kenya electoral process to ensure that this peace and transparency continues to inform the remainder of the process. We further call on political party leaders to encourage their supporters to conduct themselves with the highest responsibility.

We urge all electoral stakeholders to respect the official election results that will be announced by the Independent Electoral and Boundaries Commission (IEBC) with calmness and in full respect of the Constitution of Kenya and the democratic process. In this regard, we appeal to all political parties and candidates that have concerns to follow the legal process laid down in the Constitution and the Electoral Code for the resolution of any disputes related to the electoral process. A special responsibility lies with the political leaders of Kenya to continue to abide by their pre-election commitments to peace.



March 6, 2013

FOR IMMEDIATE RELEASE

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Carter Center Congratulates Kenyan Voters on Peaceful Election, Urges Patience While Results Processed

The Carter Center finds that Kenya's polls were well-conducted in a peaceful environment. Voter turnout appears to have been high. The Independent Electoral and Boundaries Commission has made important commitments to improve the transparency of the counting and tabulation of votes. Although partial provisional results are available, the full tabulation of results is ongoing.

The Center regrets the security incident at the coast that happened on the eve of the election day that led to the unfortunate loss of lives and the death of an IEBC agent during the course of his duties. Their extreme sacrifice is a constant reminder of the importance of peace and security in the conduct of democratic elections.

The Center has observed a high number of rejected votes and appeal to the IEBC and other stakeholders to make address this in the short term.

At this stage, with the tabulation of final results still underway, it is too early to provide an overall assessment of the electoral process. Carter Center observers will continue to observe the tabulation process, dispute resolution, and the post-election environment.

In the meantime, political parties and their leaders should refrain from releasing one sided figures or making inflammatory statements. Instead we advise them to cooperate with the IEBC and appeal to their supporters to remain calm, refraining from any action that may lead to compromising security the elections in general and the Kenyan people in particular.

The Center encourages political parties and candidates to continue to exercise patience as the results process continues and to bring any complaints they may have to the appropriate legal channels.

The Center launched its election observation mission in Kenya in January 2013 with the deployment of 14 long-term observers from 11 countries. They were joined by an additional 38 short-term observers from 19 countries to observe voting and counting. The mission was led by

former Zambia President Rupiah Banda and Carter Center Vice President for Peace Programs Dr. John Stremlau. On election day, Carter Center observers visited 265 polling stations in 34 counties.

The Carter Center is in Kenya 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 citizens and the international community through periodic public statements. 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 for International Election Observation and all its observers have signed the Independent Electoral and Boundaries Commission Code of Conduct for Election Observers.¹ The Carter Center has observed 94 elections in 37 countries, including the 2002 elections in Kenya.

This statement is preliminary; a final report will be published in the coming months following the conclusion of the electoral process. The full preliminary statement is attached.

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

Statement of Preliminary Findings and Conclusions

On March 4, 2013, Kenya held its fifth elections since the re-establishment of multi-party politics in 1991. The country has a longstanding history of ethnic fuelled electoral violence, which culminated in post-election violence in 2007 and 2008, leaving more than 1,000 dead and over 600,000 internally displaced people. The March 4 elections were the first conducted under the terms of the new constitution adopted by referendum in 2010, with a new electoral management body, the Independent Electoral and Boundaries Commission (IEBC).

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 were joined by 38 short-term observers from 19 countries to observe voting and counting. The mission was led by former Zambia President Rupiah Banda and Carter Center Vice President for Peace Programs Dr. John Stremlau. On election day, the Center's observers visited 265 polling stations in 34 counties. Carter Center observers will continue to observe the tabulation process, dispute resolution, and the post-election environment.

The following observations are preliminary and may be amended as The Carter Center continues its assessment. Any commentary or recommendations offered in the spirit of support for genuine democratic elections in Kenya.

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 Republic of Kenya has committed itself to a number of regional and international treaties through which it has obliged itself to follow key human rights standards.¹ Kenya has ratified a series of international and regional human and political rights instruments that are relevant to the electoral process. These treaties include the Convention of the Political Right of Women, (CPRW), the International Convention on the Elimination of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights, (ICCPR), the Convention of the Elimination of all Forms of Discrimination Against Women (CEDAW), the African Charter on Human and Peoples' Rights (ACHPR), 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.

¹ Art. 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."

The Elections Act, the Independent Electoral and Boundaries Commission Act, and the Political Parties Act provide solid grounds for genuine elections. In addition, with two codes of conduct, the legal framework provides for a solid framework for a peaceful campaign. Effective access to the legal framework is made difficult by the variety of acts and the profusion of subsidiary legislation, published in the Kenya gazette without further dissemination. The legal framework could be made more accessible to stakeholders and especially voters by a compilation of its regulations.

In contrast with 2007 elections, the current legal framework provides for a credible dispute resolution mechanism thanks to the reform of the judiciary, described in more detail below.

The Carter Center regrets the decision not to apply the two-thirds gender quota, which represent 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.²

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.

The Center regrets the disenfranchisement of prisoners, whom in spite of a court recommendation to include them in the voter register, were not permitted to participate in the process.

Election Administration

An independent and impartial electoral authority that functions transparently and professionally is internationally recognized as an effective means of ensuring that citizens are able to participate in a genuine democratic election and that other international obligations related to the electoral process can be met.³

The constitution provides for the establishment of the IEBC under Article 88. After the enactment of the new constitution in 2010, one of the critical pieces of legislation enacted by the parliament was the Independent Electoral and Boundaries Commission Act, which provided the process for the recruitment and selection of the commissioners to the IEBC.⁴

² Ratified by the Republic of Kenya on March 9, 1984.

³ UNHRC General Comment No.25, para. 20

⁴ Internal Electoral and Boundaries Commission Act, art. 5

The Carter Center welcomes the introduction of new selection criteria for the recruitment of the IEBC. The recruitment of IEBC commissioners was handled through multiple independent institutions, which was a departure from the selection of commissioners in the previous general elections. The process was spearheaded by the IEBC selection panel, which received all applications for the positions of IEBC commissioner. The president and prime minister then forwarded names to parliament for approval. In spite of attempts at political interference at various points in the process, the process enjoyed a high degree of impartiality, which has enhanced the credibility of the IEBC with both political parties and the general public.

The constitutional responsibilities of the IEBC include the continuous registration of voters and revision of the voter's roll, the delimitation of constituencies and wards, the regulation of political parties process, the settlement of electoral disputes, the registration of candidates for elections, voter education, the facilitation of the observation, monitoring and evaluation of elections, the regulation of money spent by a candidate or party in respect of any election, the development of a code of conduct for candidates and parties, and the monitoring of compliance with legislation on nomination of candidates by parties.

The Center is concerned about the low voter registration in pastoralist areas of Kenya and appeals to the IEBC to devise better methodology of reaching nomadic communities in future.

Candidates, Parties, and the Campaign Environment

The right of individuals to participate in public affairs, including through the establishment of and free association with political parties and participation in campaign activities, is protected by international principles and fundamental electoral rights.⁵ Equal 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 election process.⁶ The Constitution of Kenya also guarantees freedom of citizens to exercise their political rights under Article 38 and guarantees free and fair elections free from violence, intimidation, improper influence or corruption, and conducted by an independent body. Chapter VII of the Constitution of Kenya guarantees the representation of the people and covers critical areas of general principles for the electoral system, legislation on elections, registration as a voter, candidates for election and political parties to comply with code of conduct, and electoral disputes, amongst other issues.

The campaign ended on March 2 at midnight on a peaceful note. The last campaign rallies gathered numerous supporters and no clashes were observed. Kenyans were able to assemble freely while parties and candidates conveyed their message to potential voters. The Center's observers reported isolated cases of vandalism such as destruction of campaign posters. The Carter Center welcomed the organization of a public rally at Uhuru Park on Feb. 25 where all presidential candidates pledged to peaceful elections. The event gathered a big crowd of supporters and showed a strong moral commitment to a peaceful electoral process.

⁵ *ICCPR, Art. 25(a); ICERD, Art. 5(c); CEDAW, Art. 7 (b); UNHRC, General Comments 25, para. 2*

⁶ *AU-ACHPR, art.10 (1); IPU, Declaration on Criteria for Free and Fair Elections art.3 (3);*

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. Unfortunately, the 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. Financial resources continued to prevent a level playing field through the end of the campaign. While the wealthiest candidates were campaigning using helicopters, others struggled to afford billboards, media space, and televised advertising.

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.

Occurrences of hate speech were reported on vernacular radio; however, the Center commends the majority of Kenyan citizens for their commitment to a peaceful electoral process reaffirmed on numerous occasions during the campaign. The Carter Center welcomed the organization of two presidential and vice presidential debates where all eight candidates exchanged their views on live television and 33 radio stations across the country.

Participation of Women

State obligations to promote de facto equality for women derive, in part, from broader political obligations regarding absence of discrimination and the right of all citizens to participate in the public affairs of their country regardless of gender.⁷ Through ratification of international and regional treaties, Kenya has pledged to promote the political participation of women on an equal basis with men. It has also made specific provision for the rights of women in the 2010 constitution.⁸

In spite of a legal framework providing for a solid set of rules to enhance women participation in politics, The Carter Center observed a very low number of women competing for elective positions. While the Center welcomes the adoption of a quota system that ensures an immediate representation of women in parliament, rather than empowering women to fully engage in the political process as candidates and elected representatives, the reserved seats for women have served to segregate female candidates and to bar them from standing as candidates for any other seat in parliament.

Just one of the eight aspirants for the presidency is a woman. Only 167 women ran among several thousand candidates for the 290 elected seats in parliament. Seven women are in the race for the 47 governor seats and 17 are running for the one of the 47 senate seats. The majority of women candidates competed for the reserved seats in the National Assembly with 403 candidates vying for the 47 seats.

In spite of numerous dispositions aimed at ensuring a better representation of women in public office, The Carter Center regrets the undermining of the essential component of a modern society that is the promotion of women's representation in elective positions. The Political Parties Act

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

⁸ Constitution of Kenya 2010, Art. 59 (2) (b)

alone contains three significant articles focusing on gender equality in both party and government composition, however, their existence has failed to translate to higher political representation or participation by female candidates.⁹

Media

International obligations related to the media and elections include freedom of expression; opinion; and the right to seek, receive, and impart information through a range of media.¹⁰ While The Carter Center did not conduct comprehensive media monitoring, it offers the following observations on the overall media framework.

The Carter Center observed very intense media coverage of the electoral campaign, mainly concentrated around the two parties that were considered frontrunners by pollsters. The attention given to the two main presidential contenders, CORD and Jubilee, and their financial capacity to occupy the media did not create a level playing field for the other candidates.

The numerous public opinion polls reported during the campaign prepared the Kenyan people for a potential runoff and a very close race, inciting the media to focus even more on the two main presidential candidates. Throughout the campaign, the national media focused on the presidential elections, leaving aside the crucial competition for national and local assemblies, which will play a major role in the country's future with the implementation of the new devolution system. The Center finds that more attention should have been given to the five other elections that took place on March 4.

The Carter Center regrets the focus given by international media on the risks of violence that did not reflect the peace oriented messages sent by candidates, political parties, and all stakeholders.

Voting Procedures

The quality of voting operations on election day is crucial to determining how closely an election falls in line with a country's democratic obligations.¹¹ A core obligation under international law is that elections shall be held by secret ballot, which is recognized as a means of ensuring that the will of the people is expressed freely, and that a cast ballot cannot be connected with a voter to avoid intimidation and political retribution. Kenya appears to have largely met this important obligation in the March 4 elections.

Carter Center observers visited a total of 265 polling stations on election day, where they observed the opening of the polls and the polling, closing, and counting procedures. Overall, Carter Center observers reported strong voter turnout and that the process was well conducted by IEBC officials. Polling station staff generally performed according to procedures with a rating of good or very good in more than 90 percent of stations visited.

⁹ art 7.2.c, art 25.2(b), art.91 (f), art.100 of the Political Parties Act

¹⁰ UN, ICCPR, art. 19(2); United Nations Convention against Corruption, arts. 10(a) and 13(b); AU, Principles on Freedom of Expression in Africa, art. 6

¹¹ UN, ICCPR, art. 25; ACHR, art. 23; UN UDHR, art. 21

Polling operations throughout the day, including counting, were performed in a largely peaceful atmosphere. Two serious incidents of violence with multiple deaths seriously marred election day in the coast region and forced the relocation of a constituency tally center.

For the 2013 elections, there were approximately 32,400 polling stations with a significant variance in the number of voters per polling station. Some 50 percent of polling stations had more than 400 voters and many large polling centers were established, often as a single polling station with many “streams.” It appears that the high number of voters at some polling locations is attributable to the delayed voter registration period while the electoral law also required the IEBC to gazette the number of polling stations 90 days before the elections (and before the voter register was finalized). One consequence was that while the IEBC sought to limit most polling stations to fewer than 1,000 voters, many locations felt the pressure of several thousand people trying to enter through a single gate or other control. The result was incredibly long queues. Kenyans withstood these long lines from early morning through the heat of the day and many voters waited six or more hours to vote. While Kenyans did so with great patience, the imposition of this waiting time is unreasonable and the IEBC should take steps to reduce this and establish more voting locations, improved queue management with more polling staff, or other measures. In future elections, the IEBC should consider reducing the number of registered voters per polling station to facilitate polling operations and counting.

The official hours of voting were 6a.m. -5p.m. Polls that opened late were to remain open for 11 hours, and all polling stations were to allow the last voter in line at the time of closing to cast their ballot. Carter Center observers reported that 75 percent of polling station openings occurred by 6:30 a.m. Nearly all polling station areas were free from campaign materials and the appropriate number of security personnel was on hand and behaved accordingly.

The March 4 elections were the first to use the electronic voter register, requiring each polling station to have a functioning electronic voter identification (EVID) machine to conduct biometric voter identification. However, Carter Center observers found that while polling workers were adequately trained on how to use the machines, many EVIDs malfunctioned or were not provided with an adequate power supply to maintain function for all 11 hours of voting. In 41 percent of polling stations visited by Center observers these electronic devices were not operating. This failure resulted in some confusion regarding the voters list which was further compounded by some 35,000 voters being included in the paper registry but not in the biometric system.

Polling stations also were issued with printed voter lists including photographs. Fortunately, polling station staff quickly reverted to the paper register to keep the voting process moving. While the technical difficulties and voters list confusion significantly slowed the voting process in certain areas, voting was able to continue and voters were not reported to be disenfranchised.

The IEBC is commended for its efforts to acquire, produce, and distribute both sensitive and nonsensitive election materials. Carter Center observers found that 95 percent of polling stations visited had all necessary materials by the time polling stations were to open at 6 a.m.

Carter Center observers noted that in some 20 percent of locations visited, the layout of the polling station and placement of the voting booth, particularly those in stations with limited

space, could have compromised the secrecy of the vote. However, in these cases Carter Center observers did not report serious concerns about violations of ballot secrecy or incidents of intimidation or concern among voters.

According to public international law, all persons have the right to participate in the public affairs of their country.¹² This includes the right of citizens to participate in non-governmental organizations as well as the right of citizens to participate in citizen observer organizations and contribute to voter education efforts. Through these means, civil society can actively play an essential role in upholding an electoral process that is accountable and in which all participants can have confidence.

Political parties and independent candidates' agents from more than one party were present at almost all of the polling stations observed. Very few polling station complaints were recorded officially. Domestic observers were also prevalent at 60 percent of polling stations. The Center also notes the impressive work of the Elections Observation Group, which released two rolling assessments on election day and implemented a parallel voting tabulation as an independent check on the counting process.

Counting

The accurate and fair counting of votes plays an indispensable role in ensuring the electoral process is democratic and reflects the will of the voters. International and regional commitments indicate that votes be counted by an independent and impartial electoral management body whose counting process is public, transparent, and free of corruption.¹³

In the polling stations visited by Carter Center observers, closing and counting took place in a peaceful atmosphere and largely according to procedure. A significant number of counting operations did not reconcile the number of ballot papers properly, but otherwise most stations completed the appropriate results correctly. Party agents and/or observers signed the results declaration forms in nearly 100 percent of cases. In nearly a quarter of counts observed the results form was not posted, missing an important safeguard on the transparency of the counting process.

The Center has observed a high number of rejected votes and appeals to the IEBC and other stakeholders to address this in the short term. In the meantime, political parties and their leaders should refrain from releasing one sided figures or making inflammatory statements. Instead we advise them to cooperate with the IEBC and appeal to their supporters to remain calm, refraining from any action that may lead to compromising security of the elections in general and the Kenyan people in particular.

Tabulation

To promote transparency and reduce corruption, the IEBC has followed international best practice by providing party agents with signed copies of the polling station results. Polling

¹² UN, ICCPR, art. 25; AU, AfCHPR, art.13

¹³ African Charter, art. 17(1); UNHRC General Comment 25, para. 20; UN Convention against Corruption, art. 1819

station tallies were posted at the completion of the count and presiding officers were to transmit the presidential results directly to the national tally center via an electronic results system designed for use via mobile handset. In theory, every polling station result for the presidential election would have been transmitted to the national tally center once counting was completed on election night. Media and the public also have direct access to this feed, an impressive commitment to transparency and providing an important means to get provisional results into the public domain quickly. Unfortunately this has not been the case and while a significant number of results (representing some 40 percent) were posted within 24 hours of the close of polls, the majority were not.

The legal official results are on paper tally sheets from each polling station and these are to be transported securely to the 290 constituency tally centers, where once again they are to be available for scrutiny of party agents and observers and publicly posted. At the time of this statement, Carter Center observers report that this process has largely occurred without problem. Once completed at the constituency level, presidential tallies are to be delivered directly to the national tally center for final compilation by the IEBC.

Meanwhile, the remainder of the tabulation process will continue for the other elections and move up the chain to the 47 county tally centers. The Center hopes that political parties and observers will continue to follow the tabulation process to its conclusion to ensure that clear, detailed results by polling station are recorded and confirmed. Carter Center long-term observers will remain deployed to the completion of the results process.

The detailed, written procedures and guidelines for the organization and processing of polling station results have not been made available by the IEBC to the Center. General procedures were published but while the tally process appears to have been well-conducted thus far, written procedures are essential in the event of any election disputes that may arise. In future elections, the IEBC should strive to release procedures earlier.

The Center encourages political parties and candidates to continue to exercise patience as the results process continues and to bring any complaints they may have to the appropriate legal channels.

The Judiciary

Impunity within the justice system undermined the rule of law and underscored the need for urgent corrective measures to prevent a crisis similar to what Kenya experienced in the last elections. In 2011, the Vetting of Judges and Magistrates Act was passed by parliament, establishing the Judges and Magistrates Vetting Board to vet the suitability of all judges and magistrates who were in office on the effective date of the new constitution. The work of the board has resulted in a clean-up of the judiciary with judges whose qualifications and integrity were questioned being dismissed from service.

In addition to the vetting process, the new constitution provided for a deep reform of the judiciary system as a whole. The Supreme Court has the highest jurisdiction in the country, followed by the Court of Appeal, High Courts, Magistrate's Courts, and other Subordinate Courts. The appointment and dismissal of judges and magistrates, vested by an independent Judicial Service Commission, was an essential step to renew the trust of Kenyan citizens in their

judicial system. The renewed judiciary and legal framework provides a credible dispute resolution mechanism that renders unjustifiable the use of violence as a tool to contest election results.

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 be forced to prioritize electoral disputes over their normal work, potentially impeding access to justice for Kenyans. In a highly charged political atmosphere for elections to entirely new offices, Kenyans will have to be patient just as the judiciary must ensure that full access to redress is enabled.

Electoral Dispute Resolution

Efficient electoral dispute mechanisms, including, as necessary, 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.¹⁴ The Carter Center welcomes the fast tracking of all elections related matters by the judiciary and the establishment of the Judiciary Working Committee on Election Preparations by the chief justice to develop strategies to efficiently and effectively manage elections disputes. The Center also commends the special training received by all judges, magistrates, and court registrars to handle elections offences and disputes. The judiciary's adoption of the Election Petitions Rules and Supreme Court Rules on Presidential Election Petitions enhances the transparency and credibility of the institution while providing stakeholders with clear rules for the settlement of disputes. The Carter Center also commends the judiciary for having published the rules governing electoral petitions in the newspapers, making them clear and accessible to all stakeholders.

In the period building up to the elections, the judiciary addressed multiple cases directly affecting the electoral process. These included all the matters arising from the delimitation of electoral units at the constituency and ward levels and questions on the election date. A number of cases relating to the procurement process of the IEBC and one against international observers also were filed and concluded before the elections.

Of significance to note is the case on procurement of ballot papers filed and concluded a few days before the elections. This case presented a tense period for the voters as its determination had significant impact on the IEBC meeting critical operational deadlines. A recent decision of the court was given in regards to the integrity of a presidential candidate and his running mate on Feb. 15, 2013. The efficiency with which the courts have dealt with matters coming before it has increased the credibility of the judiciary's ability to settle electoral disputes with impartiality.

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The Carter 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

¹⁴ ICCPR, Art. 2(3), UNHRC, General Comment No. 32, para. 18

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.¹⁵ The Carter Center has observed 94 elections in 37 countries, including the 2002 elections in Kenya.

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¹⁵ 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.



April 4, 2013

For Immediate Release

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The Carter Center Finds Kenya Election Results Reflect Will of Voters

The Carter Center finds that in spite of serious shortcomings in the Independent Electoral and Boundaries Commission's (IEBC) management of technology and tabulation of final election results, the paper-based procedure for counting and tallying presented enough guarantees to preserve the expression of the will of Kenyan voters.

The Center congratulates Uhuru Kenyatta on his election as the next president of Kenya, and praises outgoing Prime Minister Raila Odinga for taking his concerns with the conduct of the election to the Supreme Court and accepting their ruling, which upheld the final results announced by the IEBC on March 9. The presidential election petition proceedings conducted by the Supreme Court were held in a very professional and rigorous manner.

The Carter Center finds that several key areas related to the tabulation of results did not receive sufficient attention. The initial release of inaccurate figures transmitted by electronic means challenged citizen confidence in the IEBC. A lack of transparency in the national tally marred the final stages of the process. Party agents and observers were unable to observe these proceedings adequately, and the Center hopes that future tabulation processes will be organized in manner that allows for appropriate observer access.

While the IEBC met its constitutional obligation to publish final results within seven days of the March 4 election, the Center regrets the IEBC's continued unwillingness to publish results by polling station, thereby missing an additional opportunity for the public to confirm that their choice was accurately recorded and reported.

"These realities point to the need for continued citizen vigilance and government acceptance that a vibrant civil society is key for Kenya's democratic development," said Carter Center Vice President for Peace Programs Dr. John Stremlau.

The 2013 elections presented the Kenyan people with their first opportunity to exercise their rights under the new constitution and to elect representatives to new bodies at the national and newly-created county level. This experiment in democracy and devolution of authority is a work in progress, and the Center hopes that all Kenyans will work together to strengthen democratic institutions.

A full statement is attached for more details on the Carter Center's findings. A final comprehensive report of the Center's overall assessment of the elections will be published in coming months.

The Carter Center has observed 94 elections in 37 countries, including the 2002 elections in Kenya. The Carter Center's 60-member delegation was in Kenya at the invitation of the IEBC. The Center conducts election observation 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. The Center assesses electoral processes based on states' obligations for democratic elections contained in their regional and international commitments and in their domestic legal framework.

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The Carter Center International Election Observation Mission to Kenya

Post-election Statement on Tabulation and Announcement of Final Election Results April 4, 2013

Introduction

On March 9, Ahmed Issack Hassan, chairperson of the Independent Electoral and Boundaries Commission (IEBC), announced the results of the presidential election, declaring Uhuru Kenyatta of The National Alliance (TNA) elected with 50.07 percent of the valid votes, ahead of his main challenger, Raila Odinga of Orange Democratic Movement (ODM), who garnered 43.3 percent of valid ballots cast. The tabulation of final results for parliamentarian, senator, female representative to parliament, county governor, and county assembly representative also had been completed at constituency and county level. The final turnout figures for the presidential election showed that over 86 percent of registered voters turned out to cast their vote.

The Center's observers visited 40 constituency and county tally centers. The Carter Center finds that several key areas relating to the tabulation of results did not receive sufficient attention from the IEBC. The release of inaccurate figures from the electronic transmission of results and lack of transparency of the national tally marred the final stages of the process, however, the Center notes that in spite of discrepancies in early numbers released to the public, the IEBC managed to secure final results within the constitutional period of seven days. The Center welcomes the publication of results forms 34 and 36 on the IEBC website, although most of them were not effectively accessible, and regrets the IEBC's continued unwillingness to publish results by polling station.

In view of an electoral process marred by technological and operational failures, The Carter Center congratulates the Kenyan people for having kept the peace in spite of suffering very long queues on election day, receiving inaccurate electronic results and information on spoiled votes, having not been provided with a secure electronic voter identification system, and being presented with uneven turnout figures on Forms 36. The IEBC should conduct an internal review of its handling of the voter register and an audit of its tally procedure in order to avoid these deficiencies in future elections. Despite serious shortcomings of the IEBC's management of technology and release of information, The Carter Center finds that the paper-based procedure for counting and tallying presented enough guarantees to preserve the expression of the will of Kenyan voters.

Failure of Electronic Transmission of Results

Upon completion of the count at polling stations, the presiding officer was to key in the results on a handheld device that transmitted the information to a central server at the IEBC's national tally center in Nairobi. The IEBC's electronic transmission of results system was set up to display provisional results as they arrived without any filter or verification of incoming figures from the polling stations. In an effort to make the provisional results process transparent, the media received

these figures simultaneously. The information displayed was often inaccurate, displaying sums that did not match numbers on the screen and changes that were made overnight.

Two controversies in particular were created by the unchecked display of provisional results. The first originated from the display of more than 300,000 rejected ballots on March 5 that was reduced overnight to 30,000. The IEBC wrongly attributed the high number of rejected ballots on March 5 to the complexity of a simultaneous vote for six different positions, only later to state that the original high number was the product of a server malfunction that multiplied spoiled votes by a factor of eight. This controversy signaled an inadequate handling of numbers by the IEBC and undermined confidence in their capacity to tally final results with accuracy. The second controversy was created by the IEBC's other March 5 announcement that rejected votes would be factored into the total sum of votes cast, which served as the basis for calculating the 50 percent threshold for the presidential election. This last-minute interpretation of the definition of "votes cast" in Article 138(4) of the constitution should have been taken well in advance and shared with stakeholders in order to avoid the confusion that followed this decision on such a crucial issue.¹

In the 2010 constitutional referendum, the use of an electronic data transmission system made the results available within 48 hours and strengthened public confidence in the IEBC. Since that referendum, technology has been used in biometric registration of voters, fingerprint scans at polling stations on election day to identify voters, and electronic transmission of provisional results from polling stations. In the use of electronic voter identification and electronic transmission of results, reliance on technologies that were only partially successful during the mock election exercise threatened to undermine the very trust they were designed to enhance. Although more thorough self-assessment by the IEBC and the collection of observer statements will hopefully yield lessons for the conduct of future elections, it appears that some of the problems encountered by the IEBC could have been avoided by using simpler, more reliable, and less costly solutions.

Conflicting Definitions of a Rejected Ballot

Another definitional issue further clouded the understanding of rejected votes. Rejected ballots were defined in different ways depending on which IEBC document was referenced. In the IEBC *Election Manual*, rejected ballots are defined as: a) ballots that were not stamped in the back, b) votes given for more than one candidate, c) uncertainty for whom the vote is cast, d) ballots that had different serial numbers than those issued to the polling station, and e) unmarked ballots. However, in the IEBC *Polling Day Guide for Election Officials*, rejected ballots are defined as a) unofficial ballot papers, b) those for which the intent of the voter was not clear, or c) the voter could be identified, thus breaching the secrecy of the vote. The existence of two separate definitions of invalid votes created a double standard for the invalidation of ballots and undermined the principle that the vote of one elector should be equal to the vote of another.²

¹ "A candidate shall be declared elected as President if the candidate receives more than half of the votes cast in the election and at least twenty five per cent of the votes cast in each of more than half of the counties"

² General Comments of the HRC on Art 25 of the PIDCP

Tabulation of Results

Tallying is an integral and important phase of the electoral process that ensures the will of voters is accurately and comprehensively reflected in the final results.³ The IEBC procedures required that tallying take place at the constituency and county level for all elections, and then be transmitted to the national level for final tallying and compilation of results of the presidential election. Upon completion of counting at polling stations, the presiding officer compiled and displayed result forms 34 and 35 respectively for presidential, national, and local elections. The tally forms, ballots, ballot boxes, and other sensitive materials were then collected and brought to the constituency tally center by the presiding officer, where they were inspected by election officials under the responsibility of the returning officer in the presence of party agents and observers.

At the constituency tally center, the returning officer completed Form 36 for each election, providing total votes for all polling stations in that constituency and released the results for county assemblies and members of parliament. Forms 36 were then delivered to the county tally center for governor, senate members and reserved women seats in the national assembly and to the national tally center for the presidential election. At the county level, the returning officer released the results for senator, governor, and women's representative to parliament.

At the polling station level, Carter Center observers reported that nearly 100 percent of stations visited had party agents present, and that complaints were submitted in only 4.2 percent of the cases, indicating that overall, IEBC personnel were considered by party agents to be compliant with procedures. In 95 percent of the occurrences observed, tally workers understood their responsibilities, and subsequently Carter Center observers evaluated the overall tally process as good or very good in 95 percent of cases. The failure of electronic transmission of results was confirmed at constituency level, where the returning officer did not receive them in almost 60 percent of cases. However, the returning officers did receive all required forms in more than 97 percent of the instances observed. Carter Center observers noted that the recovery of all the forms 34, 35, and 36 from returning officers took time, especially for the most distant constituencies. The Center's observers reported the rate of complaints submitted by party agents was higher at tally centers, reaching more than 12 percent.

On the evening of March 5, the IEBC stopped the electronic tally of provisional results after the server receiving them proved unable to compile incoming data. In a televised press conference, the chairman of the IEBC explained that the paper record of tabulation was the only legal base for final results; therefore electronic display of provisional results would be stopped. Although this had been the case all along, the IEBC's prior emphasis on the electronic results system created a false public impression that the tabulation process was being started over from scratch when the legal tabulation process always had been ongoing.

Publishing of Tabulation Procedures

The availability of election-related procedures to the public in a timely manner in advance of an election is considered to be best practice for election management bodies.⁴ The Carter Center regrets that the IEBC did

³ International Covenant on Civil and Political Rights, art. 25(b); AU, Declaration on the Principles Governing Democratic Elections in Africa, art. 1.

⁴ International IDEA, International IDEA Code of Conduct: Ethical and Professional Administration of Elections, p.12-13

not prepare an operational manual of procedures for the national tabulation exercise. The absence of detailed procedures did not enable election officials to consistently troubleshoot data entry errors or counting discrepancies. The IEBC is also encouraged to provide adequate illustration of the layout of tally centers, and a clearly defined flow of materials and responsibilities for different election officials. These procedures should be published well in advance, shared with all stakeholders, and also address the review and audit of results by election officials to ensure adequate and transparent safeguards are in place and provide space and access for party agents, observers and media. In future elections, the Center recommends that the IEBC ensure that regulations and procedures regarding transmission, receipt, and data processing are communicated to electoral stakeholders well in advance and guarantee full access to the national tally center as stated in subsidiary legislation and recommend by both Kenya's international obligations and electoral good practices.⁵

Very brief descriptions of tabulation instructions were shared with Carter Center observers, but they appeared to be insufficient to guarantee the integrity and accuracy of numerical tabulation. Additionally, Carter Center observers did not have access to any written criteria for the placement on quarantine of mismatched results between forms 34 and 36 or other apparent errors on tabulation forms and the procedure put in place to troubleshoot them. The Center finds that while the tabulation process was open to observation at the constituency and county level, the national tally center did not provide enough transparency for observers or party agents to assess the overall integrity of tally of presidential results.

In spite of imprecise procedures, IEBC agents performed in an orderly manner and were able to compile results at the constituency and county level in due time. With more than 33,000 polling stations, an 86 percent turnout, and only a week to release the results, the potential for human error remained very high and led to discrepancies in the final results released by the IEBC.

Lack of Transparency and Tabulation of Results

One of Kenya's core obligations concerns promoting transparency in elections and other public processes.⁶ In order to ensure such transparency, accepted best practice requires ballot tallies to be transmitted openly, and for the results to be published in a timely manner, including at the polling station level.⁷ To enable the public and other stakeholders to verify the accuracy of the results and to increase public confidence, it is important for the IEBC to publish the election results disaggregated by individual polling stations on its website. The Center remains concerned that several weeks after the elections detailed preliminary results disaggregated at the polling station level have not been published, as is widely recognized as a best practice to increase transparency.

The Carter Center commends the IEBC for setting up the national tally center in an accessible, centralized, and appropriate location. The IEBC allowed the press to set up on site and convened regular press conferences to update the public on the tabulation process. The public display of electronic provisional results at the time of their arrival at the national tally center was a positive measure toward transparency; however, as described above, the unreliability of the data displayed through the tabulation process undermined public trust in the IEBC. The dissemination of

⁵ UN, International Covenant on Civil and Political Rights, art. 19(2)

⁶ UN, United Nations Convention against Corruption, art. 13(a); AU, African Union Convention on Preventing and Combating Corruption, art. 3(3)

⁷ CoE, Handbook for Observers of Elections, para. 4.6. EISA and Electoral Commissions Forum of SADC, PEMMO, p. 26

unchecked figures, especially the inaccurate number of rejected ballots, could have fueled a strong public reaction and damaged public trust in the ability of the IEBC to produce reliable election results.

Firsthand access to information is key in conducting credible and impartial observation, and The Carter Center regrets the IEBC decision to confine party agents and observers to the gallery of the national tally center, making effective observation impossible. In the absence of access to compiled documents and to IEBC personnel, the national tally of the presidential results forms was effectively rendered non-transparent for stakeholders and observers. In future elections, the Center strongly recommends that the IEBC design a tabulation process that accommodates both the security and transparency of results. This advance provision for transparency will be especially useful to the IEBC when incomplete, inaccurate, or otherwise problematic tabulation forms arise and/or when administrative decisions change the results that have already been released to the public at a lower level.

The Center also regrets the publication of provisional results while voting was still ongoing on March 5 in polling stations in Laisamis, Samburu, Kuresoi south, Nakuru east and west, Bahati, and Wagir.

Presidential and Legislative Results

On March 9, 2013, Uhuru Kenyatta was declared the fourth president-elect of Kenya by the chairman of the IEBC. Uhuru Kenyatta obtained 6,173,433 votes or 50.07 percent of the votes cast, reaching the required double threshold of 50 percent plus one vote and 25 percent of the votes in half of the counties in order to be elected in the first round of election. This margin was achieved with 8,418 votes, making it a very close victory. His closest contestant, Raila Odinga, received 5,340,546 votes or 43.31 percent of expressed votes. In third place, Musalia Mudavadi obtained 3.93 percent, and the other five presidential candidates each received less than one percent. Based on a preliminary analysis of the announced results, it appears that compared to Uhuru Kenyatta, Raila Odinga suffered from lower rates of voter registration and slightly lower turnout in his strongholds.

At least nine out of 10 registered voters cast their votes in 17 counties, translating to a massive turnout that shaped the eventual results. Official results from each of the counties indicate clear voting patterns in favor of one of the two leading contenders. In Uhuru Kenyatta's stronghold of central Kenya, voter turnout was 94 percent in Nyandarua and Muranga counties and 93 percent in Nyeri county. For Raila Odinga, Homa Bay, Siaya, and Migori counties achieved voter turnout between 92 and 93 percent.

These figures reflect the critical regional and ethnic support for the two main contenders in the elections. Out of the 17 counties that reported the 90 percent-plus voter turnout, 11 were in Uhuru Kenyatta's strongholds, which show that his Jubilee coalition did well in rallying followers in its strongholds to get out and vote. In contrast, the counties with the lowest voter turnout in the country were in some of Odinga's Coalition for Reforms and Democracy (Cord) strongholds, notably, Kilifi (65 percent), Mombasa (66.6 percent), and Kwale (72 percent).

In both the Senate and the National Assembly, Kenyatta's Jubilee Coalition has secured the majority of seats and has marshaled their numbers to win the coveted speaker's position of both houses. In the National Assembly, Jubilee commands a majority of 195 seats whereas Cord secured

only 143 of the 350 seats. In the Senate, Jubilee and its affiliates secured the majority of 34 of the 68 seats while Cord managed 27 seats.

Only 193 women were candidates for parliamentary seats in the race outside of the reserved seats. Compared to the 12 elected members of the previous parliament, 16 women got elected outside of the reserved seats resulting in the overall increase of women in parliament, especially considering the augmentation of reserved seats for women in both chambers of parliament from 10 to a total of 63 reserved seats. However, no women were elected as governor or senator, which shows that progress needs to be made in order to fulfill the condition that no more than two-thirds of elective public bodies' members should be of the same gender⁸ and to provide equal opportunities for women and men in the political sphere.⁹ Of the seats reserved for women, both Jubilee and Cord won 23 and Amani won one. In the senate, the Jubilee coalition has 23 compared to Cord's 19.

In the new constitutional dispensation, parliament's powers have been enhanced and most appointments by the executive branch have to get MPs' endorsement. Therefore, parliament will be asked to approve cabinet nominees and diplomatic appointments. With Jubilee having the upper hand in both houses, it will find it easier to ensure proposals that require approval of the elected representatives are passed.

County Results

For the purposes of devolution, the constitution created 47 counties that are led by elected governors.

The official list of elected county assembly representatives reveals that parties allied to Cord enjoy a majority in the country's major counties of Nairobi, Mombasa, Kisumu, and Kakamega. Parties allied to the Jubilee coalition control Nakuru, Kiambu, and Uasin Gishu counties. The list shows that out of the 85 elected county assembly representatives in Nairobi, the two main Cord partners, ODM and Wiper Democratic Movement, enjoy a slim majority of 43 members against TNA and Alliance Party of Kenya's 42 members.

ODM is in total control in Mombasa county with all the 30 county representatives elected on its ticket. The Jubilee coalition is in control of the Nakuru county assembly with TNA and its principal ally, the United Republican Party (URP), having a total of 47 out of the 54 elected county representatives.

In Kiambu county, one of the biggest in the country with 59 wards, TNA enjoys a huge majority of 56 elected representatives with the remaining three elected on the tickets of Agano, GNU and Farmers parties. Cord is in control at the Kakamega county assembly which, like Kiambu, has 59 wards. Out of these, 41 county representatives are from Cord affiliate parties while the other eighteen are from parties allied to the Amani coalition, UDF, and New-Ford Kenya.

In Kisumu county with a total of 34 wards, ODM commands a majority of 29 elected representatives with its ally, the People's Democratic Party (PDP) having four representatives and another Cord affiliate, the Federal Party of Kenya has one county representative.

Further competition is expected in Bungoma county with a total of 44 wards, especially if the 18 members elected on parties allied to the Amani coalition decide to join forces with their three colleagues from the Jubilee coalition to face the 22 members elected on parties allied to Cord.

⁸ Art. 27 (8) and 21 (b) of the Constitution

⁹ Art. 27 (3) of the Constitution

Discrepancies in the Voter Register and Released Numbers

The comparison of final results for the presidential election (recorded on Form 36), which served as the basis for the compilation of results, showed worrying discrepancies. First, in some cases the recorded number of ballots cast differed by several hundred to several thousand for the different elections in the same polling station. This resulted in turnout figures being different for each elective position in a given polling station where voters were supposed to cast all six ballots without exception. Second, the Center notes that the number of registered voters published with the presidential results released by the IEBC on March 9 differed from the voter statistics per county published by the IEBC on Feb. 24.

The Center also observed discrepancies between the provisional list of voters registered published on Dec. 18, 2012, and the voter statistics per county published by the IEBC on Feb. 24. While small adjustments would have been expected, a total variation of about 100,000 voters between the two documents suggests that their data have been moved in the register from one county to another without an explanation from the IEBC or the possibility of public scrutiny.

Additional discrepancies in the number of registered voters have emerged from the tabulation process. A significant number of registered voters recorded on Form 36 by returning officers in constituency tallies differed from those listed in the national voter register. While the number of voters recorded on forms 36 should have matched the voter register, it was very often not the case.

This lack of transparency in modifications to the national voting register that served as the basis for the organization of the elections is inconsistent with national and international standards for democratic elections.¹⁰

These numerical discrepancies in such important elections, the first under a new legal framework by a new IEBC, call for more rigor in the tally operation and more guidance for IEBC personnel. However, the Center has analyzed these discrepancies for all 290 parliamentary constituencies and concluded that although they raise serious concerns regarding the accuracy of numbers released by the IEBC, the differences did not favor any particular presidential candidate and therefore do not indicate an effort at partisan manipulation.

Election Dispute Resolution

Effective dispute resolution mechanisms are an integral part of ensuring that the will of the people is upheld during an electoral process.¹¹ With a renewed public confidence in its capacity to be a fair arbitrator of political divisions, the judiciary has played an active role since the very beginning of the electoral process. The most important role has been played by the Supreme Court, led by Chief Justice Willy Mutunga. The Carter Center commends the court for having upheld the highest standards of transparency of its hearing by having retransmitted live the entirety of the pre-trial conference and public hearing of the presidential election litigation process. As a pioneer measure, the Center hopes it will be reproduced in other parts of the world to ensure transparency and reinforce trust in electoral dispute resolution mechanisms.

A petition against the results of the presidential election can be filed by any citizen of Kenya. Any ground can be the basis for a petition as long as it is deemed sufficient by the court and is not

¹⁰ Art.81 of Constitution requires Transparency of the electoral system, General comments on Art 25, Paragraph 11

¹¹ UDHR, art. 21

frivolous, vexatious, or scandalous. The deputy president-elect and the IEBC are automatically included as respondents to any petition against the results of presidential elections. The petition has to be submitted within seven days of the declaration of results and determined within 14 days after its filing.¹² At the time of the filing, the petitioner must deposit a sum of 1,000,000 KSH as security for costs otherwise the petition will be dismissed. Article 83 of the electoral law gives extended powers to the courts in deciding on the outcome of the judicial process: *"No election shall be declared to be void by reason of non compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution or that the non compliance did not affect the result of the election."* This article has clearly been written for the final results and is silent on non compliance effecting results of a first round election. The disposition makes it more difficult to void a presidential election that respected very broad constitutional principles. The Supreme Court has the power to make any order it may deem fit and just in the circumstance. Supreme Court decisions are not subject to appeal.

With regards to the other elections, a constitutional timeframe of 28 days after the declaration of results by the IEBC is set up in Article 87 for all petitions concerning an election other than the presidential. As the results for all other elections than presidential were gazetted on March 13, the deadline is therefore set for April 10. The high courts are responsible for hearing matters pertaining to parliamentary and gubernatorial elections. Magistrates' courts are receiving petitions against county assembly elections. A petitioner seeking to challenge a parliament or a county governor must deposit 500,000KSH, while a petitioner seeking to challenge the election of a member of a county assembly shall deposit 100,000 KSH.

Three petitions against the presidential election results were submitted to the Supreme Court within the time frame indicated in the constitution. One petition from Jubilee supporters challenged the inclusion of rejected votes in the final tally of the presidential poll, while those from Raila Odinga and from the Africa Center for Open Governance (AFRICOG) both sought to invalidate the election and instigate the organization of fresh presidential elections. Attorney General Githu Muigai was admitted as friend of the court or amicus curiae.

There were five main arguments brought to the court by the petitioners:

1. Poll books, the biometric voter register, and the system for electronic transmission of results were poorly procured and prepared so they were bound to fail from the very beginning.
2. The failures of the electronic system and consequent return to printed lists of voters opened the system to manipulation which effectively took place on election day.
3. In spite of having been finalized and closed for registration on Feb. 20, the number of voters on the register was increased without any known explanation.
4. Forms 36 were manipulated in order to forge results as illustrated by instances of higher number of votes cast than voters registered.
5. The total number of votes cast for presidential candidates was higher than for the other elections even when taking into consideration spoilt and rejected ballots.

The court rejected a request from AFRICOG to require the IEBC to produce the manual register used in polling stations on election day on the basis of a lack of time to scrutinize documents from 33,000 polling stations. The court also rejected a demand from Cord for a forensic audit of the electronic tally system used by the IEBC to compile the presidential results and refused to accept a lengthy affidavit raising new allegations, including evidence from 122 constituencies, because the

¹² Art. 140 of the Constitution

evidence was filed without the permission of the Supreme Court and because there was no time for respondents to file a reasonable answer.

At the beginning of the proceedings, the Supreme Court ordered a verification of forms 34 and 36 for 22 polling stations to verify the number of votes cast, valid votes, and rejected votes. The judicial verification under the supervision of the registrar of the Supreme Court was not open to international observation, however Cord and Jubilee were able to send 10 observers each to scrutinize the process. The report from the registrar did not make mention of the figures obtained during the operation. The judicial team also scrutinized forms 34 and 36 for a total of 18,000 polling stations and found that 10 Forms 34 were missing along with 75 Forms 36. The team did not report on discrepancies between numbers in forms 34 and 36, thereby considerably reducing the added value of the exercise.

The two day pre-trial conference started on March 25 and was followed by two days of hearings. After another two days of deliberation, the Supreme Court rejected all petitions and confirmed the results of the presidential election on the last day of the constitutional timeframe, March 30. The written judgment of the Supreme Court will not be available for two weeks.

Raila Odinga made an appearance on TV acknowledging the decision of the Supreme Court and affirming his support for the rule of law and constitutional order. While reaffirming his arguments, his speech appealed for the respect for the Supreme Court decision and wished good luck to president-elect Uhuru Kenyatta and his vice president-elect William Ruto. The Carter Center encourages Cord supporters to remain calm and to respect the appeal of Raila Odinga for peace and unity of the country.

The presidential election petition proceedings were held in a very professional and rigorous manner. The lawyers representing petitioners avoided making personal accusations and the Supreme Court judges kept the hearings in line with the highest standards of professionalism and integrity necessary for the conduct of electoral litigation. The overall conduct of the presidential election disputes was conducted in accordance with international standards of democratic elections.

The Carter Center has observed 94 elections in 37 countries, including the 2002 elections in Kenya. The Carter Center's 60-member delegation was in Kenya at the invitation of the IEBC. The Center conducts election observation 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. The Center assesses electoral processes based on states' obligations for democratic elections contained in their regional and international commitments and in their domestic legal framework.

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