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Carter Center Calls for Dialogue and National Reconciliation to End Kenya's Protracted Political Impasse

Kenya's Oct. 26 presidential elections, scheduled following the Supreme Court's annulment of the Aug. 8 race, unfolded in a context of heightened tensions stemming from the protracted electoral process, confrontational tactics and harsh verbal attacks by key political leaders, and outbursts of violence around election day. These problems severely undermined the ability of Kenya's electoral administration to implement the fresh presidential elections. Rather than consolidating support for a national political program, the election served to polarize the country and exposed the deep tribal and ethnic rifts that have longed characterized its politics. Incidents of violence and insecurity have harmed the country's economy and democratic processes. While legal challenges to the Oct. 26 election are still pending, The Carter Center urges Kenya's political leaders to engage in constructive dialogue to bridge the growing gap between the opposition and ruling parties, and their respective supporters.

Kenya's fresh presidential election was marked by insecurity, political uncertainty, and the lack of a fully competitive election. Throughout the period following the Aug. 8 election, key political leaders took uncompromising positions and confrontational actions, attacking the Independent Electoral and Boundaries Commission (IEBC) and the judiciary, and dimming the prospects for a successful election. These actions were a disservice to the Kenyan people and their democratic rights and aspirations.

Despite the substantial efforts of the IEBC to adopt reforms following the Supreme Court's ruling and to meet the demands placed upon it by the opposition, presidential challenger Raila Odinga withdrew from the election on Oct. 10, arguing that the electoral reforms were insufficient and that there was an uneven playing field. He called for his supporters to boycott the polls. Six challengers from the August polls (who collectively garnered less than 0.89 percent of that vote) were added by court order to the ballot weeks before election day.

Following several attempts to postpone the elections through court action, the polls moved forward in a tense and polarized environment on Oct. 26. Polling was postponed in some opposition strongholds due to disruptions on election day, and fears of further attacks created an insecure voting environment in other areas. The boycott resulted in a low voter turnout, which the IEBC reported as 38.84 percent. Incumbent Uhuru Kenyatta was re-elected with 98.27 percent of the vote.

The Carter Center emphasizes that the credibility of an election rests not only on the technical aspects of its conduct but also on respect for fundamental rights and freedoms in a conducive political and security environment. Every democratic exercise comprises numerous institutions and actors throughout the pre-election, election-day, and post-election periods, all of which affect the transparency, inclusiveness, accountability, and competitiveness of the election.

Regrettably, the actions of Kenya's political leaders served to weaken its democratic and independent institutions, constrain the ability of citizens to participate in the civic affairs of their country, and damage the nation's democratic development. Kenya is in dire need of dialogue and reconciliation. Though both President Kenyatta and former Prime Minister Odinga have made calls for peaceful coexistence to their supporters, it also is important for the politicians to engage in dialogue to resolve this protracted political standoff. In the long term, a national reconciliation process is needed to address the underlying ethnic and tribal tensions that resurface during every electoral cycle. In addition, key stakeholders, including the IEBC, parliament, civil society, and political actors, should pursue a stock-taking exercise and conduct public consultations to identify necessary reforms to the legal framework well in advance of future elections.

This statement provides an initial summary analysis of political and electoral developments between the Aug. 8 elections and the fresh elections held on Oct. 26. The Center will release a comprehensive statement on the overall election process in the coming days after its conclusion. In addition, a detailed final report will be published in early 2018.

Because of the level of political tensions and insecurity, and the lack of full competition for the fresh elections, the Center scaled back its planned observation team and deployed only a limited mission of 10 long-term observers and a small core team. Based on its field assessments and reporting, the Center's key preliminary findings and conclusions for the Oct. 26 election include:

- **Electoral Administration:** The uncertain and tense circumstances in which the Oct. 26 election took place negatively affected IEBC's preparations for the fresh elections. These circumstances included the withdrawal of the main opposition candidate, calls for an election boycott, the resignation of an election commissioner who claimed the IEBC was unable to conduct a credible election, court rulings issued a day prior to election day, and attacks on IEBC polling staff. Moreover, the IEBC continually failed to meet its constitutional obligation of transparency, which further affected an already fragile public confidence and trust in its work. Despite urging by diverse stakeholders, the IEBC did not communicate clearly about the status of preparations, challenges, and plans for addressing those challenges proactively.

In response to the Supreme Court's findings regarding tabulation and transparency of results data, the IEBC took several positive steps to avoid repeating the problems of the Aug. 8 election. These included standardizing polling station and constituency result forms; reconfiguring the biometric voter registration and results transmission devices (known as the Kenya Integrated Elections Management System, or KIEMS) to transmit numerical results only if scanned images accompanied the transmission; and providing read-only

access to servers, databases, and logs for observers and parties.¹ It also produced updated training materials, issued detailed gazette notices on the results transmission at all levels, and enacted complementary voter identification and result transmission mechanisms.

- **Legal Framework:** Last-minute changes to the electoral law were passed in an expedited manner in parliamentary sessions that were boycotted by the opposition, and which did not leave time for effective and inclusive public consultation. These late changes to the legal framework are at odds with international good practice. The amendments, perceived to serve the political interests of the ruling Jubilee party, introduced procedures that reduced the IEBC's accountability and inclusive decision-making, including reducing the quorum for IEBC meetings from five members to three and making it possible for two members to make decisions. The amendments also limited the Supreme Court's ability to annul an election on procedural grounds. The amendments became law on Nov. 2.
- **Campaign Period:** The campaign for the fresh presidential election took place from Sept. 6 to Oct. 24. It was dominated by confrontational tactics and bitter and negative rhetoric, which further polarized the nation and highlighted the existing ethnic divides. Politicians from both the Jubilee and NASA parties were arrested on hate-speech charges during the campaign.²

Carter Center long-term observers noted a significant drop in campaigning in comparison to the August polls, particularly in opposition areas. In those regions where campaigning took place, Jubilee held large rallies, conducted car caravans, and purchased billboard ads.

The campaign was also characterized by increased verbal attacks on the courts and the election commission by senior party representatives and candidates. While President Kenyatta initially said he accepted the court's decision nullifying the elections, he and other Jubilee party leaders criticized the Supreme Court throughout the campaign.

NASA leaders were similarly uncompromising. When the NASA coalition held rallies, they reiterated their call for a long list of reforms, attacked the IEBC, and called for its reconstitution ahead of the Oct. 26 poll.³ A day before the election, Odinga, while addressing his supporters, announced that NASA would transform itself from a political coalition into a national resistance movement that would engage in civil disobedience, resist all orders by the illegitimate government, and boycott all companies that profit from doing business with the government as a way to force the Jubilee government to step down.⁴ Despite initial calls for protests on Oct. 26, Odinga instructed his supporters to stay at home and refrain from demonstrating on election day for fear of clashes with the police.

¹ The KIEMS is used to identify voters and to electronically transmit results.

² Gatundu South MP Moses Kuria (Jubilee), former Senator Johnstone Muthama (NASA), Embakasi East MP Paul Owino (NASA), and Ibrahim Omondi, MCA of Airport Ward in Mombasa.

³ These included the replacement and prosecution of IEBC staff they saw as responsible for the problems that led to the nullification of the Aug. 8 election and securing new companies to print the ballot and results forms, and design and oversee the electronic results transmission platform, among other demands. Some of the demands could not be reasonably met during the timeframe allotted. Others would have impinged upon the IEBC's independence.

⁴ On Nov. 3, NASA called for boycotting of Safaricom, Bidco, and Brookside Dairies.

- **Security and Violence.** The pre-election period saw significant insecurity and instances of violence. In Nyanza and Nairobi regions, protests against the Oct. 26 election turned violent after youth clashed with security forces. The government security forces retaliated with the use of live ammunition and excessive force, leading to at least six dead and scores injured. The violence in the Nyanza region spread to attacks on IEBC training staff, which forced the IEBC to postpone or cancel training in some areas. This led to the arrest of politicians from the region.⁵ It also contributed to the postponement of elections in four counties – Kisumu, Homa Bay, Migori and Siaya.

The charged campaign environment, coupled with the violent protests and excessive use of force by security, increased the vulnerability of special interest groups, especially women and children. Following the Aug. 8 elections, there were reports of human rights violations, including beating and killings by security forces as well as sexual violence against women and girls.⁶ Multiple organizations and agencies joined an appeal to the inspector general of police and other government agencies charged with protecting the rights of women and girls, raising concerns about sexual violence perpetrated in the electoral period, reportedly by police officers.⁷

As election day approached, the security situation deteriorated further as many opposition politicians stated that they would not allow the election to take place in their areas and Odinga began a campaign to encourage his supporters to boycott the election.⁸ Election day itself was marred by violent protests in western regions of the country, which are NASA strongholds, and in Nairobi's volatile slum neighborhoods. The IEBC could not deliver election materials to some of these areas because of blocked roads. Some of the polling staff in the affected areas did not show up for work. As a result, the IEBC postponed the election by two days in the four counties where polls were unable to open.⁹ Polling in these locations was later postponed indefinitely after it became clear that the security situation would not improve sufficiently in the days following the election.

⁵ Kisumu Senator Fred Outa, former Kisumu Deputy Governor Ruth Odinga, and MCA Joachim Omieno (Kondele Ward, Kisumu) were arrested after they disrupted an IEBC training seminar on Tuesday, Oct. 17.

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

⁷ <http://physiciansforhumanrights.org/library/phr-appeals-to-kenya-to-curb.html>

⁸ The following governors announced that no election would take place in their counties on Oct. 26; Wycliffe Oaranya – Kakamega County; Cornell Rasanga – Siaya County; Prof. Anyang' Nyong'o – Kisumu County; Okoth Obado – Migori County; Cyprian Awiti – Homa Bay County.

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

⁹ Article 55B of the electoral code allows the IEBC to postpone an election in a constituency, county, or ward if: There is reason to believe that a serious breach of peace is likely to occur if the election is held, or it is impossible to conduct the elections as a result of natural disaster or other emergencies. If the IEBC is satisfied that the results in the affected areas would not change the result from the rest of the country — that is, if the margin of victory is larger than the number of votes in the affected areas so that even if there were elections held in those areas the results would not change — it can declare a winner without the results from the affected areas.

- **Election Day – Voting and Counting.** As noted above, The Carter Center deployed a limited observation mission on election day and did not conduct an in-depth assessment of voting, counting, and tabulation procedures. The observers visited 79 polling stations during the voting phase and reported that the process passed with no major irregularities observed. Turnout was noted as significantly lower than for the Aug. 8 elections. Closing and counting procedures were generally followed in the polling stations visited, and counting was completed in a swift and orderly manner with no interference or pressure from any actor. Polling stations results forms (34As) were successfully transmitted, and no official complaints were lodged in the polling stations observed.
- **Vote Tallying and Results Transmission.** The Center’s observers reported that tally centers they visited functioned in an orderly fashion, with a clear operational flow and in accordance with the new procedures instituted as a result of the Supreme Court ruling. The process was well-organized and transparent, although in a few cases the screen displaying the results as they were typed in was too far away to be easily readable, or was not active at all. Jubilee party agents and citizen observers were present in all tally centers observed. Technological changes implemented by the IEBC in response to the court’s ruling improved the overall administration of the fresh presidential election and increased the transparency and efficiency of the electronic transmission of results. The IEBC received scans of Forms 34A from the vast majority of the polling stations without undue delays.

Commendably, the IEBC received all hard copies of forms from polling stations and constituency tally centers where voting took place and published all 37,187 polling station results forms (34As) and all 266 constituency results forms (34Bs) prior to the declaration of results on Oct. 30. The IEBC verified the scanned forms multiple times against the originals brought by the constituency returning officers. While this exercise was time-consuming, it contributed to the transparency of the final results. In a positive development, IEBC also provided agents and observers with read-only access to the results transmission and the ICT room in the National Tally Center throughout the tallying of the results.

- **Election Dispute Resolution:** The judiciary continues to play an important role in the electoral process following the Supreme Court’s decision to nullify the Aug. 8 presidential election. The courts received several petitions, which revealed a number of legal uncertainties, including the question of the right of candidates to stand in the fresh election, the definition of a “fresh presidential election,” whether only the IEBC chairman could verify the results, and the legitimacy of the appointment of returning officers.

Three petitions challenging the Oct. 26 election were filed by the Nov. 6 deadline questioning the constitutionality and legality of the election. The petitioners argued that the IEBC failed to conduct the election in conformity with the constitution and the law by, among other things, not calling for fresh nominations, violating the principle of universal suffrage, and not holding the election in all 290 constituencies as required. Petitioners also alleged that the IEBC lacked independence, neutrality, and transparency.

Significant pressure was exerted on the judiciary by political actors, especially the president and the ruling Jubilee party, in the pre-election period. On Sept. 19, the chief

justice of the Supreme Court issued a statement condemning these actions and called on all political actors to respect the independence of the judiciary. On the day preceding the elections, the Supreme Court failed to reach a quorum and thus was unable to hear a critical petition seeking postponement of polls. While the facts are unclear, there are concerns that the lack of a quorum was the result of external pressure and political interference on members of the court. These developments were deeply troubling and suggest the potential for future interference in the independence of the judiciary.

- **Voter Education:** Although the IEBC redeployed voter education staff for the Oct. 26 election, with topics covering the Supreme Court ruling and the voting process, Carter Center observers reported seeing few such activities. In some NASA strongholds, voter educators found it challenging to conduct their work for fear of being seen to be advocating for the Oct. 26 election. Voter education efforts were significantly less than for Aug. 8, and those efforts were themselves limited.
- **Civil Society and Citizen Observation:** Carter Center long-term observers reported a significantly reduced presence of domestic CSOs in the several weeks prior to the Oct. 26 election, in comparison with the Aug. 8 election. Fewer voter education and peacebuilding programs were observed, though local and religious leaders promoted peace messaging in community and faith gatherings.

The Elections Observation Group (ELOG) deployed over 2,196 observers in 215 of the 290 constituencies for election day, releasing periodic reports of their findings. The group was unable to deploy observers in all parts of the country because of security concerns. They were barred from polling stations in Kibra, Ruaraka, and Nyali. ELOG observers were attacked in Kilifi, Kibra, Ruaraka, and Nyali constituencies. ELOG found that the presidential rerun election “considerably amplified the divisions in Kenya’s society and body politic.”

The Kenya National Commission on Human Rights (KNCHR) maintained 139 monitors across the country through the Oct. 26 election to gather information about election-related human rights violations. They called on security forces to refrain from excessive use of force, on the IEBC to ensure the safety of its poll workers, and on political parties to ensure their supporters protested lawfully and peacefully. The KNCHR also called attention to the government’s efforts to clamp down on civil society actors.

Background:

The Carter Center has had a core team of experts in Kenya since April, monitoring key parts of the electoral process, including voter registration, campaigning, electoral preparations, and the recent resolution of disputes in the courts. That team was joined by a large group of observers who helped monitor voting, counting, and tallying in the days surrounding the Aug. 8 election. Following the Sept. 1 decision by the Supreme Court to annul the August election, the Center was invited by the IEBC to extend its presence to observe the Oct. 26 fresh election. Long-term

observers rejoined the core team on Oct. 4 and were deployed to various locations in the country to observe critical pre- and post-election processes.

Because of insecurity surrounding the polls, the uncertain political environment, and the lack of a fully competitive election, the Carter Center deployed only a limited election observation mission to assess the Oct. 26 polls, with 10 long-term observers and a small team of election experts. The team was limited in size and geographic scope and therefore did not have a representative sample. Given these factors, the Center did not conduct a robust assessment of polling station level processes on election day.

The Center has issued several public statements throughout the comprehensive electoral process regarding its observation and findings, including a pre-election statement on July 27, a preliminary statement about the Aug. 8 election on Aug. 10, another statement regarding the tabulation process on Aug. 17, and two statements on the Supreme Court ruling and its implementation on Sept. 1 and Oct. 4. A pre-election statement was issued on Oct. 24. These public statements are available at www.cartercenter.org.