

THE CARTER CENTER



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The Carter Center is a not-for-profit, nongovernmental organization that has helped to improve life for people in more than 80 countries by resolving conflicts; advancing democracy, human rights, and economic opportunity; preventing diseases; and improving mental health care. 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.

The Carter Center's Democracy Program works globally to promote democratic elections and governance consistent with human rights. The Center has monitored more than 100 elections in 39 countries since 1989, forging many of the techniques now common to the field. Recognizing that democratic transitions involve much more than elections, the Center also conducts long-term monitoring of political transitions and works to strengthen civil society organizations to support democratic governance. The Democratic Election Standards (DES) initiative aims to build consensus on standards for democratic elections, based on state obligations under public international law.

Introduction

1 - During the second UPR Cycle, Kenya accepted a number of recommendations including on; protection of refugee rights; extra-judicial killings; freedom of expression and press; protection from sexual and gender-based violence; equality and discrimination; on the rights of children; and institutional reform.

2 - Kenya has ratified several international treaties including the African Charter on Democracy, Elections, and Governance (ACDEG), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); African Charter on Human and Peoples' Rights; African Convention on Preventing and Combating Corruption; International Convention on Civil and Political Rights (ICCPR); and The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Overall, Kenya has made efforts to ensure the enforcement of human rights since the last UPR Cycle, this includes the passage of domestic laws that comply with human rights obligations, such as the Prevention, Protection, and Assistance to Internally Displaced Persons and Affected Communities Act; Prevention of Torture Act (POTA) 2017; the 2016 Amendments into the Election Laws; Persons Deprived of Liberty Act; Small Claims Court Act; Magistrates and Judges Vetting Act; National Police Service Act; and the Legal Aid Act 2016.¹

3 - This report addresses the degree to which the recommendations of the last cycle have been implemented and the degree to which Kenya's human rights obligations have been fulfilled.

4 - *The Carter Center in Kenya:* The Carter Center first deployed international observation missions in Kenya to assess the 2002 presidential and parliamentary elections. A summary of its findings can be found [here](#). Additionally, the Center also observed the national elections of 2012 and 2017. Key summaries of these missions can be found [here](#) and [here](#), respectively.

Findings for Consideration

5 - Kenya has struggled to deliver on its human rights promises and pluralist democratic goals from its inception. The country lived under a single-party political framework for decades, finally ending in 1992. President Daniel arap Moi and his Kenya African National Union (KANU) won the first two presidential elections and then groomed his successor Uhuru Kenyatta to replace him in the 2002 election. Kenyatta was defeated by the opposition coalition led by Mwai Kibaki, who was backed by Odinga in 2002, however, due to a later altercation between Kibaki and Odinga the alliance between the two ended. Kenyatta later supported Kibaki in 2007. The 2007 elections proved highly controversial as the results flared ethnic tensions and political outrage. The violence saw 1,300 people killed and more than 600,000 people displaced by violence. Authorities

attempted to investigate inciters of the violence but ultimately referred the inquiry to the International Criminal Court. Six individuals were indicted on charges of inciting ethnic violence against Odinga's supporters, including Kenyatta and his later running mate William Ruto.

6 - Charges were ultimately dropped due to lack of evidence, but the post-election violence led to the 2008 National Accord and Reconciliation Act. This made Odinga the first Prime Minister since 1964, and Kenyatta his deputy. A new constitution was adopted in 2010 and elections under it were held in 2013. Kenyatta defeated Odinga, however, Odinga's party, the Orange Democratic Movement (ODM), ultimately won the most seats in the National Assembly.

7 - The elections in 2017 unintentionally led to further disintegration of democratic institutions and credibility in the electorate's eyes, along with an increase in human rights violations. The elections were observed by international observers, including The Carter Center. The first election on August 8 saw Kenyatta running for President against Odinga and a national election for the legislatures. Kenyatta won the contest for President, however, Odinga filed a lawsuit alleging the election was tampered with by hackers. The Supreme Court heard Odinga's argument, and representatives were allowed to audit the election results from Kenyatta's Jubilee party and Odinga's coalition, between the National Super Alliance (NASA) and the ODM. After arguments and deliberations, the Supreme Court nullified the election on September 1, calling for new elections to be held in 60 days. The rerun election was held on October 26, but Odinga refused to participate unless there were legal and constitutional guarantees against fraud. He was never satisfied with the reforms taken by the Independent Electoral and Boundaries Commission (IEBC), who oversaw the election process, and organized for his coalition to boycott the election. This boycott allowed President Kenyatta to easily win, yet it threatened the legitimacy of his mandate to lead the country. The full report of The Carter Center's election observation mission in 2017 can be found [here](#).

1. Political and Civil Rights Violations

8 – Kenya's international agreements clearly codify its obligations regarding political and civil rights. The elections of 2017 had multiple examples of violations against tenants of these agreements and proved Kenya failed to act on the recommendations of the previous cycle, as provided below.

9 - Women aspirants and candidates reported to The Carter Center observers that they were subject to physical harassment and intimidation. Perpetrators were often reported to be influential male aspirants and candidates. A candidate's store was burned in Nanyuki; her home was the target. Several examples illustrate the problem faced by women. A candidate in Uasin Gishu reported

receiving anonymous threats that her children would be kidnapped. A candidate in Kakamega reported receiving anonymous threats against her own safety.

10 - Women were more vulnerable and subject to smear campaigns and “dirty politics” throughout this period. Women were targets of false accusations, propaganda, and disinformation campaigns often perpetrated by male opponents, though there also were reports of female opponents engaging in such tactics. In Kiganjo, for example, one female candidate’s opponent falsely informed voters that she had been arrested in the past for charges related to stolen ballot papers. The accusation irreparably damaged her image and voters’ perceptions of her integrity. It was difficult to correct misinformation, to undo the harm done, since not all voters could be reached again to set the record straight. In Nakuru and Nyeri, women aspirants reported being labeled prostitutes and irresponsible.

11 - Cyberbullying also increased. Several incidents serve to illustrate aspect of the problem. In Nakuru, a woman aspirant was subjected to bullying via Twitter and Facebook due to her father’s non-Kenyan origin, and she was accused of not understanding the challenges faced by everyday Kenyans. Given the pervasive nature of social media, the criticism was emotionally draining to her and her family. She reported to observers that she is unwilling to run again unless controls for cyberbullying are put in place. A candidate in Mombasa reported that she was ridiculed via social media by her male opponents. A woman leader asserted that the community “starts absorbing stereotypical propaganda spread against women candidates through the social media.” A youth leader stated that when “a man is involved in a scandal, it dissolves quickly. But when a woman gets involved in one, she is ruined in politics.” Some interlocutors said most women opt out of politics for the fear of exposure of their private lives, something exponentially threatened by social media.²

12 - These examples of discrimination, harassment, and double standards violate several articles, including articles 3, 21, and 25 of the ICCPR It also violates article 7 of CEDAW. Additionally, these incidences contravene articles 8 and 29.2, 29.3 of ACDEG.

2. Violence During Elections

13 - Though election violence was not as severe as seen in the 2007 election, the 2017 election was still colored by excessive use of force by security forces, violent protests, sexual violence perpetrated by security forces and a deteriorating security atmosphere.

14 - Although the pre-election environment was generally calm, the acting head of IEBC’s IT department, Chris Msando was murdered only a week before the elections. In addition, given

Msando's important role in the election machinery, his death affected the public mood and raised concerns about insecurity. On August 4, NASA offices were ransacked, allegedly by security personnel. Finally, the government deployed some 180,000 police and other security officials around the country. Argued to be essential for maintaining law and order, many regions opposed to NASA regarded this use of force as threatening, given the country's recent history of elections. In the aftermath of the election, some episodes of violence occurred in various parts of the country, including the death of two people who were reportedly shot by police officers in the outskirts of Nairobi.

15 - The charged campaign environment, coupled with the violent protests and excessive use of force by security, increased the vulnerability of women. Following the August elections, there were reports of human rights violations, including beatings and killings by security forces as well as sexual violence against women and girls. Multiple organizations and agencies joined an appeal to the inspector general of police and other government agencies charged with protecting the rights of women and girls, in order to raise concerns about cases of sexual violence perpetrated in the electoral period and some reportedly committed by police officers. At least 86 cases of sexual and gender-based violence were either reported or documented in Nairobi County in the run-up to the 2017 election and after, with 62 percent of the sexual violence cases perpetrated by police and 38 percent by civilians.³

16 - During the October 26 election in the Nyanza region and in Nairobi, protests turned violent after youths clashed with security forces. Security forces retaliated with the use of live ammunition and excessive force, resulting in at least six dead and scores injured. This is an example of the multiple violent protests, more than 100 reported deaths, and many more injuries which occurred in the run-up to the 2017 elections. Victims included children.

17 - Violence from security forces, including arbitrary murder, and sexual violence against women, violates articles 6 and 17 of the ICCPR; article 4 of the African Convention on Human and Political Rights; and article 4 of the Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. The Kenyan government committed itself to mitigating sexual and gender-based violence during the Second UPR cycle.

3. Elections Credibility Damage

18 - The election cycle of 2017 undermined the credibility of the IEBC . This included the IEBC not investigating violations of the code of conduct proactively. Several politicians from both Jubilee and NASA were arrested on charges of hate speech, which consisted of politically divisive and polarizing rhetoric.⁴

19 - Additionally, for unexplained reasons, the IEBC did not utilize the full seven-day period provided by the law to consolidate and post all the official polling station results forms in 2017. Instead, the IEBC hastily declared the final presidential election results on August 11, just three days after election day, based on the constituency-level results forms, and prior to the receipt of all polling-station level results forms. Election authorities failed to ensure that parties had timely access to official polling-station level results in the days following the announcement of official results, which made it impossible for parties and observers to fully verify and cross-check the results against their internal data and reports in time to include any key evidence in court petitions.

20 - The rerun election on October 26 was marred by violent protests in the western regions of the country, a NASA stronghold, and in Nairobi's volatile slum neighborhoods. The IEBC could not deliver election 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, reportedly due to intimidation from partisans. As a result, the IEBC postponed the election for two days in four counties — Kisumu, Homa Bay, Siaya, and Migori — where polls were unable to open.⁵ In Nyanza region election violence spread to attacks on IEBC training staff, which forced the IEBC to postpone or cancel poll worker training in some areas. Politicians were arrested, as a result. Polling in four of the counties was postponed indefinitely, after it became clear that the security situation would not improve sufficiently to allow voting to take place in the days following the polls. Additionally, elections weren't conducted in these regions because the margin of victory for Kenyatta was so large, the provinces votes wouldn't have swayed the final result.

21 - These incidents contravene articles 12, 13, and 17, 17.4 of the ACDEG. Additionally, these events violate tenants of the Kenyan Constitution of 2010, including articles 81, section ii, iv, v, article 84, and article 86.

4. Eroding Democratic Legacy

22 - As a whole, the 2017 electoral process undermined Kenya's commitment to key democratic institutions and exacerbated issues with social cohesion, leaving the country deeply divided after the nullified presidential election, followed by a rerun election marred by violence and an opposition boycott. Voter turnout was less than 40 percent than that in the initial August elections. Voting was postponed in 10 percent of counties due to labelled security threats. Key political leaders repeatedly took steps that harmed the democratic process, taking hardline positions, failing to seek common ground, and using inflammatory and divisive political rhetoric. The elections represent a major setback in Kenya's democratic development.

23 - Verbal attacks on the courts and the election commission by senior party representatives and candidates increased in the lead-up to the October 26 polls. Although President Kenyatta initially said that he accepted the Supreme Court's decision overturning the results of the presidential election, he and other Jubilee officials attacked the court and the judges who voted in the majority to annul the election and threatened to make changes in the law to "reign in the court," while labeling the ruling a judicial coup. In a campaign speech on September 2, President Kenyatta called the judges "crooks" and said that he would reform the judiciary when re-elected.⁶

24 - While Jubilee leaders aimed most of their attacks at the Supreme Court, NASA leaders directed their charges against the IEBC. Despite the finding by the court that there was no evidence of criminal liability on the part of the IEBC or its staff, NASA and its candidates attacked the IEBC's integrity and called for criminal prosecution of responsible staff and commissioners. At rallies, NASA attacked the IEBC and called for its reconstitution ahead of the October 26 poll.⁷

25 - These developments constituted violations of articles 2.5, 13, 15.2, 17, 17.4, and 39 of the ACDEG.

References

1 Kenya National Commission on Human Rights Strategic Plan 2018 – 2023, page 9

2 The Kenya 2017 General and Presidential Elections Report, page 119

3 <https://www.theelephant.info/uploads/2017/10/KNCHR-Report-Mirage-at-Dusk.pdf>, page 72

4 Gatundu South member of Parliament Moses Kuria (Jubilee), former Senator Johnstone Muthama (NASA), Embakasi East member of Parliament Paul Owino (NASA), and Ibrahim Omondi, member of county assembly of Airport Ward in Mombasa

5 Article 55(b) 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, it can declare a winner without the results from the affected areas.

6 The Swahili word used was *wakora*

7 These minimums included the replacement and prosecution of IEBC staff whom they identified as responsible for the problems that led to the nullification of the August 8 election as well as securing new companies to print the ballot and results forms and to design and oversee the electronic results transmission platform, among other demands.