



An Election Delay Can Help Avert Kenya's Crisis

Crisis Group Africa Briefing N°132
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What's happening? On 26 October, Kenya is scheduled to hold repeat presidential elections following the Supreme Court's annulment of the previous vote held on 8 August. Proceeding in current conditions risks escalating the political crisis.

Why is the vote contentious? President Uhuru Kenyatta says he is ready for the vote, while opposition leader Raila Odinga refuses to participate, citing the lack of electoral reform since 8 August. The election commission chairman has said that he cannot deliver a credible election on 26 October.

Why does it matter? The risk of clashes between rival supporters or between security forces and protesters seeking to block the vote is high. New violence would be devastating for Kenya, the economic hub of East Africa.

What should be done? The election commission chairman should petition the Supreme Court for an election postponement of 30 to 45 days, which would permit a delay without violating the constitution. All parties should contest the new vote, accept the outcome or pursue complaints through the courts.

I. Overview

The rerun of Kenya's presidential elections, scheduled for 26 October, threatens to provoke a serious political crisis. Opposition leader Raila Odinga has declared he will not participate; an Independent Electoral and Boundaries Commission (IEBC) commissioner recently resigned and fled the country; and the IEBC chairman has signalled that he cannot guarantee a credible vote within the expected timeline. The risk of deadly clashes between the two main parties' supporters, or between security forces and groups seeking to block the vote, is high. Proceeding under current conditions would deepen Kenya's ethnic cleavages and prolong a stalemate that has already claimed dozens of lives and come at a high economic cost. Kenyan institutions and political leaders should consider a short delay; Odinga in turn should pledge to take part; business elites as well as Kenya's neighbours and donors should help promote such an outcome.

II. A Contested Electoral Process

Kenya's Supreme Court 1 September annulled the presidential election held on 8 August. It did not find evidence of widespread fraud or question the outcome – according to official results Kenyatta won 54 per cent to Odinga's 45 per cent – but found irregularities and illegalities during the IEBC's results transmission and announcement of tallies. It ordered the electoral body to conduct a new vote within 60 days “in strict conformity with the constitution and applicable election laws”.

As Crisis Group noted shortly after the court decision, the manner in which political leaders have responded to the judgment has hindered preparations for a new poll. Members of Parliament from President Kenyatta's Jubilee Party have used their majority in the National Assembly to push through contentious electoral reforms. These include provisions that declare that an election cannot be annulled on the basis of a failure to relay or record tallies electronically – key grounds for the Supreme Court's invalidation of the 8 August ballot. As the European Union (EU) and other observers have indicated, passing such legislation so close to election day runs against global best practice. Parliament endorsed the amendments on 11 October but Kenyatta is yet to sign them into law.

For his part, Raila Odinga responded to a court decision that appeared to vindicate many of his complaints about the election's administration by drawing up a list of conditions for his participation in a new vote. On 10 October, the IEBC wrote to Odinga saying that it would implement some of his requested changes, including improvements to its IT management and security protocols. The Commission also gave party agents and observers further access to key aspects of the electoral process, including to its IT systems, within the limits permitted by its security protocols. Other demands, it said, such as replacing the service providers for the IT vote management system and using another company to print ballots and returns forms, were not feasible in the time remaining before the vote. That same day, Odinga withdrew from the election. His statement some days later that “no election” would take place on 26 October was interpreted by diplomats, media commentators and the government itself as an implicit threat of violence.

Tensions, already high, have further intensified. Several parliamentarians from Odinga's coalition, the National Super Alliance (NASA), have been arrested for assaulting election officials and disrupting IEBC training seminars in NASA strongholds. On 20 October, Odinga called on his supporters to end attacks on electoral staff and Jubilee supporters. He also reiterated his intention to boycott the vote and promised to address the nation on the “way forward” on 25 October.

Political disagreements are not the sole impediment to the repeat election. Just as before the 8 August vote, court cases filed by politicians and others and the rulings on those cases may have had a bearing on preparations for the new vote. An 11 October High Court judgment, for example, ruled that all eight candidates in the 8 August vote – not just Kenyatta and Odinga as initially planned – could contest the fresh election. The IEBC has indicated that it has insufficient time before 26 October to reconfigure the electronic results transmission kits to include all candidates.

The IEBC itself is in disarray. Disagreement among commissioners over how to handle the court's decision and the refusal by some to entertain a postponement

were among the reasons cited by IEBC commissioner Roselyn Akombe for her resignation and departure to the U.S. on 18 October. A day later, with public pressure mounting, IEBC chief executive officer Ezra Chiloba, whose departure Odinga has demanded, departed, reportedly on leave. Kenyan media outlets report he will play no role in the repeat election.

III. Delaying the Election Rerun

Kenya has made remarkable progress since the violence after the disputed 2007 elections, notably in the adoption of a new constitution in 2010. But the zero sum calculations of political elites persist. Such calculations are driving Kenya towards a crisis that could imperil both the country's and the region's stability. A way forward that can address concerns of both sides and settle the political stalemate sensibly should reflect the following principles:

- ❑ The IEBC chairman should publicly confirm the position he took during an 18 October media conference that holding a credible election on 26 October under current conditions is impossible. He should petition the Supreme Court for a limited extension of 30 to 45 days, which would allow the election to be rescheduled without violating the constitution. Precedent for this exists: the High Court in January 2012 delayed elections by six months, which helped ensure a credible and peaceful vote.
- ❑ The Supreme Court should favourably consider such an extension given the IEBC chairman's own acknowledgment that the commission cannot guarantee a credible vote within the allotted timeline. Because only parliament or the Supreme Court can allow a postponement, and given that parliament would need a minimum of two weeks to debate and pass a bill extending the 60-day window for a new vote, such a call at this point only could come from the court.
- ❑ Should it grant a delay, the court ought to state clearly that President Kenyatta would remain in office pending the fresh vote. The constitution is silent on who holds power in the event no election is held within 60 days of the annulment of the previous vote. But insofar as the court, in its 1 September decision, concluded that the president had committed no offence leading up to the 8 August election, he should remain in office until the new balloting occurs. Such a clarification would assuage the concerns of some in his camp who fear the constitutional ambiguity on this point could encourage legal challenges to his position. If the court rejects such a petition, Odinga should accept the decision of a court he praised not so long ago and urge his supporters to abide by the judges' orders.
- ❑ Odinga should participate in a delayed vote without additional conditions. He should renew the welcome public pledge against violence that he made on 20 October. He also should rein in and hold accountable supporters who have attacked election officials, made inflammatory threats to disrupt the election or otherwise broken Kenyan law. He should stress that disputes should be resolved by Kenya's institutions and not through violence. If Odinga nonetheless decides

to boycott a postponed election, he should encourage supporters to stay home rather than disrupt balloting, attack voters or otherwise stoke trouble.

- ❑ Both President Kenyatta and Odinga should publicly commit to supporting the IEBC if a new poll date is set and accept the results or take complaints to the courts.
- ❑ The Kenyan police chief should issue clear instructions to officers to restrain and arrest – not shoot – demonstrators breaking the law.

In light of the extreme breakdown of trust between both camps and to avert a protracted political crisis, the African Union should help nudge the parties to accept a short delay under the conditions described above to allow the commission to ready itself, and crucially, seek assurances from President Kenyatta and Raila Odinga that they will accept the vote's outcome.

Many Kenyans are exhausted by the extended election drama, one that already has damaged the economy and further polarised the country. But faced with two bad options – proceeding with a vote despite the boycott of a candidate who won some 45 per cent of votes the last time round; or accepting a limited delay – the latter option is the better one. The IEBC should seek a limited postponement to allow sufficient time to prepare for an election that both main parties contest. Kenya's political leaders should support such an extension and commit to participate in a new vote.

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Crisis Group's President & CEO, Jean-Marie Guéhenno, served as the UN Under-Secretary-General for Peacekeeping Operations from 2000-2008, and in 2012, as Deputy Joint Special Envoy of the United Nations and the League of Arab States on Syria. He left his post as Deputy Joint Special Envoy to chair the commission that prepared the white paper on French defence and national security in 2013.

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Appendix B: Reports and Briefings on Africa since 2014

Special Reports

Exploiting Disorder: al-Qaeda and the Islamic State, Special Report N°1, 14 March 2016 (also available in Arabic and French).

Seizing the Moment: From Early Warning to Early Action, Special Report N°2, 22 June 2016.

Counter-terrorism Pitfalls: What the U.S. Fight against ISIS and al-Qaeda Should Avoid, Special Report N°3, 22 March 2017.

Central Africa

Fields of Bitterness (I): Land Reform in Burundi, Africa Report N°213, 12 February 2014 (only available in French).

Fields of Bitterness (II): Restitution and Reconciliation in Burundi, Africa Report N°214, 17 February 2014 (only available in French).

The Security Challenges of Pastoralism in Central Africa, Africa Report N°215, 1 April 2014 (also available in French).

The Central African Crisis: From Predation to Stabilisation, Africa Report N°219, 17 June 2014 (also available in French).

Cameroon: Prevention Is Better than Cure, Africa Briefing N°101, 4 September 2014 (only available in French).

The Central African Republic's Hidden Conflict, Africa Briefing N°105, 12 December 2014 (also available in French).

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Congo: Is Democratic Change Possible?, Africa Report N°225, 5 May 2015.

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Cameroon: The Threat of Religious Radicalism, Africa Report N°229, 3 September 2015 (also available in French).

Central African Republic: The Roots of Violence, Africa Report N°230, 21 September 2015 (also available in French).

Chad: Between Ambition and Fragility, Africa Report N°233, 30 March 2016 (also available in French).

Burundi: anatomie du troisième mandat, Africa Report N°235, 20 May 2016 (only available in French).

Katanga: Tensions in DRC's Mineral Heartland, Africa Report N°239, 3 August 2016.

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Time to Reset African Union-European Union Relations, Africa Report N°255, 17 October 2017 (also available in French).

Cameroon: A Worsening Anglophone Crisis Calls for Strong Measures, Africa Briefing N°130, 19 October 2017 (also available in French).

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Sudan's Spreading Conflict (III): The Limits of Darfur's Peace Process, Africa Report N°211, 27 January 2014.

South Sudan: A Civil War by Any Other Name, Africa Report N°217, 10 April 2014.

Somalia: Al-Shabaab – It Will Be a Long War, Africa Briefing N°99, 26 June 2014.

Eritrea: Ending the Exodus?, Africa Briefing N°100, 8 August 2014.

Kenya: Al-Shabaab – Closer to Home, Africa Briefing N°102, 25 September 2014.

South Sudan: Jonglei – "We Have Always Been at War", Africa Report N°221, 22 December 2014.

Sudan and South Sudan's Merging Conflicts, Africa Report N°223, 29 January 2015.

Sudan: The Prospects for "National Dialogue", Africa Briefing N°108, 11 March 2015.

The Chaos in Darfur, Africa Briefing N°110, 22 April 2015.

South Sudan: Keeping Faith with the IGAD Peace Process, Africa Report N°228, 27 July 2015.

Somaliland: The Strains of Success, Africa Briefing N°113, 5 October 2015.

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How to Ensure a Credible, Peaceful Presidential Vote in Kenya, Africa Briefing N°129, 2 October 2017.

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Mali: Reform or Relapse, Africa Report N°210, 10 January 2014 (also available in French).

Côte d'Ivoire's Great West: Key to Reconciliation, Africa Report N°212, 28 January 2014 (also available in French).

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The Social Roots of Jihadist Violence in Burkina Faso's North, Africa Report N°254, 12 October 2017 (also available in French).



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