

## THE CARTER CENTER



### **Carter Center Commends Tunisia on Successful Completion of 2019 Electoral Process**

The Carter Center commends the Tunisian authorities and its people on the successful completion of the 2019 electoral process. Electoral authorities, civil society organizations, and political parties made concerted efforts to prepare for and implement the 2019 election cycle, which resulted in competitive polls that were carried out effectively. Although the Independent High Authority for the Elections (ISIE) experienced the added challenge of a compressed timeframe for the elections because of the death in office of the president, it conducted a credible electoral process for all three elections. With the inauguration of the new president on Oct. 23 and the swearing in of the new parliament on Nov. 13, Tunisia set an example for the region and the world in conducting a peaceful democratic transition.

On Nov. 15, President Kais Saied charged Habib Jemli, an independent designated by Ennahda, the party with the largest number of seats in parliament, to form a government. Under the constitution, the prime minister designate has one month within which to form a government and one additional month if he does not succeed. Jemli has been unable to form a government in the first month and has informed the president that he would require an extension, as allowed by the constitution, prolonging the period of government formation until Jan. 15, 2020.

The election of a politically diverse parliament in which no party has enough seats to form a government on its own makes it crucial for Tunisian political leaders to move quickly to form a government. Elected officials must find common ground, setting aside their political and ideological differences and forging inclusive solutions to the country's difficult political and economic challenges that were the root cause of the 2011 Tunisian revolution. In addition, the new parliament and government need to swiftly form the Constitutional Court and other independent constitutional authorities, including by replacing the three ISIE members whose mandates will expire in January.

At the time of the release of the Carter Center's preliminary statements on the presidential and parliamentary elections, tabulation was ongoing, and the election dispute-resolution process had not been finalized. Following the conclusion of the electoral process, the Carter Center's international election observation mission found that tabulation processes improved progressively from one election to another, and election dispute-resolution processes were conducted within the timelines allowed by law. Although hearings at the Administrative Court were orderly and parties were given the opportunity to present their cases, the short deadlines did not allow lawyers sufficient time to prepare or present their cases, which affected the parties' ability to support their claims with credible evidence and legal reasoning, and to seek effective legal remedy.

## **The Tabulation Process**

According to international obligations, counting should be transparent and observable. International good practice establishes that observers, candidate representatives, and the media must be allowed to be present and have access to records; results must be transmitted to the higher level in an open manner.<sup>1</sup>

Throughout the electoral cycle, Carter Center observers noted that tally centers differed in their procedures for receiving material, conducting recounts, and granting access to observers. The ISIE's failure to promulgate detailed regulations on tabulation procedures was partially responsible for these inconsistencies.

After the first-round presidential election, however, the ISIE conducted a two-day assessment for presidents, coordinators, legal officers, and administrators of the 33 IRIEs and addressed several shortcomings. Staff received additional training on the use of a software application that calculates the results automatically at the tally-center level. The military also changed the routes used to collect and deliver election material to the tabulation centers.

With these changes, the tabulation process for the presidential runoff was conducted more efficiently and transparently than in the previous two elections. Tally centers received the electoral materials from the polling centers more quickly and, consequently, were able to compile the results in a more timely manner. International observers were afforded a greater level of access to the process and were able to conduct a meaningful observation of the process in most tally centers.

## **Election Dispute Resolution**

The guarantee of a timely remedy is integral to the principle of effective means of redress.<sup>2</sup> Appeal procedures, and especially the powers and responsibilities of the various bodies involved in them, should be clearly regulated by law in order to avoid any conflicts of jurisdiction. In addition, the right to file such appeals must be granted as widely as possible, open to every elector in the constituency and to every candidate running in the election.<sup>3</sup> International treaties require that the judgment, judicial proceedings, and legal reasoning of the judgment be made public in all cases.<sup>4</sup>

*Presidential election.* Because of the president's untimely death, parliament shortened the legal timelines for litigation in order to elect a new president within the 90-day constitutional deadline. The shortened timelines raised concerns from different stakeholders that candidates and their legal representatives would not be able to collect the necessary evidence to show that any alleged violations could have substantially affected the results of the elections, as required by law. These concerns appeared valid, as the shortened timeline contributed to a high number of the dismissals of challenges on procedural grounds, although the law requires that challenges shall be filed by

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<sup>1</sup> CoE (Venice Commission), Code of Good Practice, Sec. 1.3.2.xiii and xiv.

<sup>2</sup> U.N., ICCPR Article 2; AU, AfCHPR, Article 7.

<sup>3</sup> Para. 99 of European Commission for Democracy through Law (Venice Commission), Code of Good Practice in Electoral Matters, CDL-AD (2002) 23.

<sup>4</sup> U.N., ICCPR ; Article 14(1) ; CoE, ECHR Article (6)(1).

an attorney at law who is admitted to practice at the Cassation Court (and by consequence, has at least 10 years of experience). The Administrative Courts of Appeal and the General Assembly of the Administrative Court dismissed a majority of the cases for procedural mistakes, as it did not allow for corrections in documents and strictly applied its procedural rules.

After the announcement of the preliminary results of the first round of the presidential election, the Administrative Courts of Appeal received six challenges. Most claimed that the ISIE had failed to sanction candidates who had committed campaign violations.<sup>5</sup> All six cases were dismissed. Five complainants appealed to the General Assembly of the Administrative Court, which dismissed the challenges. Although the court hearings were orderly and the parties were given the opportunity to present their cases, the timeline did not allow enough time for lawyers to prepare their cases, which affected the parties' ability to support their claims with credible evidence and legal reasoning. No challenges were filed to the results of the second round of the presidential elections.

*Parliamentary elections.* The ISIE announced the preliminary results from the parliamentary elections on Oct. 9. The Administrative Court received 102 challenges to the preliminary results. Even though the number of challenges was low given the total number of candidate lists competing in the elections (1,506), it created noticeable pressure on the Administrative Court. In order to meet the short deadline for deciding challenges, the court heard approximately 75 challenges on one day – Oct. 17 – raising concerns about due process.<sup>6</sup>

Attorneys before the court expressed general discomfort about the procedures it adopted to hear the arguments. Those cases heard first enjoyed time to argue their cases orally. However, because of the high volume of cases, the court sharply limited the amount of time lawyers had to plead their cases as the day wore on. This forced attorneys to adapt their arguments. As a result, most of the hearings focused on whether or not the pleadings met the procedural requirements rather than on the substance of the challenges. The large number of cases also led to delays in notifying some complainants about the court's decisions.

While parliament shortened the timelines to meet the 90-day constitutional deadline to elect a new president, the timelines, coupled with the rigid application of the procedures, limited the right of presidential and parliamentary candidates to seek an effective remedy to electoral challenges.

### **Announcement of Results and Post-Election Developments**

Prior to announcing preliminary results, the ISIE council organized a meeting after each election to consider whether reported campaign violations substantially impacted the results tallied by the 33 IRIEs. The ISIE deployed some 1,500 monitors across the 33 constituencies to assess and

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<sup>5</sup> Under Article 143 of the Organic Law 23-2012 related to the ISIE of Dec. 20, 2012, as amended on Nov. 1 and Dec. 28, 2013 ("the electoral law"), the ISIE can annul in part or in whole electoral results before announcing preliminary results if campaign violations were deemed to have affected the results in a "substantial and decisive manner."

<sup>6</sup> The Administrative Court in Montplaisir, where the hearings were held, has only one courtroom. Given the large volume of cases, the different judicial circuits took turns holding hearings, which lasted from 8:30 a.m. to 8:30 p.m.

report on violations.<sup>7</sup> The ISIE announced the final results of the second round of the presidential election on Oct. 17 without making any changes in preliminary results based on reported violations. Kais Saied won the presidential election with an absolute majority of 72.71% of votes cast (2,777,931 votes), and Nabil Karoui came in second with 27.29% of votes cast (1,042,894 votes).<sup>8</sup> Karoui subsequently accepted the result and congratulated the new president.

For the parliamentary election, the ISIE announced that several reported campaign violations had impacted the results in constituencies where the winning margin between the lists was narrow. It changed the results in two constituencies, France2 and Ben Arous, using its authority under Article 143 of the electoral code.<sup>9</sup>

In France 2, the ISIE removed one seat from the 'Ich Tounsi Coalition and awarded it to the Democratic Current, after it determined that a sponsored ad run by 'Ich Tounsi on its official webpage violated Article 57 of the electoral code prohibiting political publicity. The ISIE warned the party during the campaign that the ad violated the regulations, but the party did not remove it. Although similar notifications were issued to candidates during the campaign, the ISIE said it sanctioned only 'Ich Tounsi because the margin between the two lists in the race was small and affected by the noted violations.

In Ben Arous, according to the HAICA report, the head of Al Rahma party list spent 67 hours and 19 minutes during the electoral period campaigning on radio Quoran, exceeding the legal limits. The ISIE canceled the party's seat and awarded it to the Echaab Movement, which came in second.<sup>10</sup>

The administrative court overturned the ISIE decision to cancel the Al Rahma party seat in Ben Arous and upheld the ISIE decision in France 2. Because the General Assembly of the Administrative Court had yet to release its written decisions publicly at the time of the drafting of this statement, the basis for its judgments in the cases is not known. The electoral law, which gives the ISIE the authority to cancel results before it announces the preliminary results and judicial challenges are filed, is vague about the criteria the ISIE should use to determine if a specific violation has in fact affected the results. Likewise, the ISIE did not provide any information about violations noted by its monitors during the campaign, nor about how it determined whether reported violations had affected the results.

The ISIE's lack of transparency and its failure to publish reports about electoral campaign violations from its IRIE-based and social media monitors undermined the decision-making

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<sup>7</sup> Under Article 143 of the electoral law, the ISIE verifies reported violations of campaign and financing regulations. It must decide on the partial or total annulment of the results if it is proven that the violations of these provisions have affected the election results in a substantial and decisive manner. Its decisions must be justified. In this case, the results of the parliamentary, municipal, or regional elections are recalculated, irrespective of the votes cast. For the presidential election, only candidates are reclassified without recalculating the results.

<sup>8</sup> ISIE Decision 29, dated Oct. 17, 2019, for announcing the final results of the runoff.

<sup>9</sup> In France 2, 'Ich Tounsi received 892 votes and Democratic Current 772 votes, a difference of 120 votes. The ISIE disqualified 207 votes from 'Ich Tounsi without providing any explanation as to how they arrived at this figure. For Ben Arous: Al Rahma party had 12,482 votes and Echaab Movement had 4,576 votes. The ISIE annulled all of the votes for the Al Rahma party in the preliminary results.

<sup>10</sup> The ISIE issued its decision to cancel the seat on Oct. 9, 2019.

process and deprived the public and election observers of the necessary information to analyze its decisions.

### **Challenges Facing the ISIE**

On Nov. 1, 2019, two ISIE members, Adel Brinsi and Nabil Azizi, made public unfounded allegations of financial and administrative mismanagement at the ISIE, citing corruption and foreign interference.<sup>11</sup> In reaction to their statements to the media, the ISIE president announced on Nov. 6 that it had filed a complaint with the public prosecutor at the Tunis-based Court of First Instance over "irresponsible" statements made by two ISIE board members.<sup>12</sup> During an ISIE council meeting on Nov. 8, commissioners discussed whether to ask the parliament to revoke those members' ISIE mandates. A proposal to refer the matter to parliament for debate failed by a 5-4 vote.

This incident exposed serious internal divisions within the ISIE council that threaten to undermine the ISIE's ongoing lessons-learned process and the public's perception of the body, including public confidence in its ability to conduct future elections according to international standards. It would be difficult for the ISIE to lead electoral reforms based on the lessons-learned exercise without a unified council. The ISIE is also in the process of organizing several municipal by-elections, which will require the council to exercise its decision-making authority. These divisions are compounded by the expiring mandate of three members of the council, including the current president, in January 2020. By law, the newly elected parliament should elect three new members to replace those retiring. The parliament's composition may make it difficult to reach the required two-thirds majority.

Together, these dynamics may portend significant challenges for the ISIE to fulfill its mandate and protect its reputation as a nonpartisan, independent constitutionally mandated body.

*Background: The Carter Center in Tunisia.* The Carter Center has maintained an office in Tunisia since 2011. The Center observed the 2011 National Constituent Assembly elections, the constitution-making process from 2012-2014, and the 2014 presidential and parliamentary polls.

For the 2019 elections, The Carter Center deployed a core team in May 2019 to launch its mission to observe the electoral process. In mid-July, the Center deployed 16 long-term observers to monitor in Tunisia's regions. The core team and long-term observers represented 18 different countries. The Center deployed a short-term mission to observe each of the 2019

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<sup>11</sup> In an announcement to the media, two ISIE members expressed concerns about the role played by what they described as a U.S. lobbying company, IFES. They reportedly alleged that IFES had successfully infiltrated the different levels of the ISIE through its technical assistance, such as funding the training of ISIE agents and facilitating voter registration, which granted IFES possession of the databank of all registered Tunisian voters. According to news reports, Brinsi and Azizi also alleged that IFES is known to interfere in the elections of certain countries and cited the presidential elections in Kenya as an example. Brinsi and Azizi reportedly alleged that IFES tampered with the Tunisian elections in preparation for a larger-scale intervention in Algeria. <https://www.tunisienumerique.com/lisie-a-ete-infiltree-par-une-societe-de-lobbying-americaine-qui-a-manipule-les-elections/>. Retrieval date: Dec. 17, 2019.

<sup>12</sup> The ISIE president, Nabil Baffoun, reportedly told the Tunisian Press Agency that the complaint was filed by the ISIE against Adel Brinsi and Nabil Azizi, whose statements related to suspected financial and administrative corruption and foreign interference.

elections and released a preliminary statement after each election. A comprehensive final report, including recommendations for future electoral reform, will be published in early 2020.

The Center wishes to thank Tunisian officials, political party members, civil society members, individuals, and representatives of the international community who have generously offered their time and energy to facilitate the Center's efforts to observe the parliamentary and presidential election process. The Carter Center assesses Tunisia's electoral process against the Tunisian constitution, the domestic electoral legal framework, and obligations derived from international treaties and international election standards. The Center's observation mission is conducted in accordance with the Declaration of Principles for International Election Observation.