



**STATEMENT OF THE NDI PRE-ELECTION ASSESSMENT
MISSION TO KENYA'S 2017 GENERAL ELECTIONS
Nairobi, April 7, 2017**

The National Democratic Institute (NDI) deployed an international delegation to Kenya from April 3-7, 2017. The purpose of the mission was to assess preparations for Kenya's August 2017 elections and to support Kenya's efforts to conduct credible, peaceful polls. This mission was the first activity in NDI's international election observation effort, which will be followed by ongoing monitoring and an international observation mission for the August 8 elections.

NDI's delegation included regional and election experts from Africa, Europe and North America: former chair of South Africa's Independent Electoral Commission Dr. Brigalia Bam; former chair of Nigeria's Independent National Electoral Commission Professor Attahiru Jega; International Republican Institute board member and former U.S. Assistant Secretary of State for Africa Constance Newman; NDI senior associate and director of electoral programs Patrick Merloe; NDI senior associate and director for southern and east Africa, Keith Jennings; and NDI director of gender, women and democracy programs, Sandra Pepera. During the mission, the delegation consulted with a wide range of election stakeholders to examine election preparations, assess the political environment, and offer recommendations to ensure the integrity and peacefulness of the electoral process.

The delegation conducted its activities in accordance with the laws of Kenya and the *Declaration of Principles for International Election Observation*, which was launched in 2005 at the United Nations. The delegation met with: the Chairman and Commissioners of the Independent Electoral and Boundaries Commission (IEBC) as well as its CEO; political party leaders; government officials; the Chief Justice; the Speaker of the National Assembly, religious and civic leaders, including gender, youth, peacebuilding, election monitoring and media sectors; and representatives of the international community. NDI expresses its appreciation to the United States Agency for International Development (USAID) for supporting this delegation and NDI's other democracy assistance programs in Kenya.

SUMMARY

Kenya's August 8, 2017, polls present a critical opportunity to consolidate the country's democratic path under its new constitution through a set of credible, peaceful elections. With just 123 days ticking away before the polls, however, crucial challenges to organizing the elections and mitigating potentials for politically motivated violence around the elections must be met. A number of killings and other violence with political implications already have taken place, and difficulties for meeting the electoral calendar are apparent.

Concerted efforts will be required of all electoral actors for credible, peaceful elections to be realized. This includes political leaders, aspirants for nomination and candidates, party activists, the IEBC and other state bodies, the media, and civic, religious and business leaders. Cooperation among electoral stakeholders, particularly among the political leaders and the IEBC, is essential for the sake of the nation, even as electoral competition is bound to sharpen. The delegation was encouraged by the strongly expressed desire of all stakeholders to work towards those ends.

OBSERVATIONS

ENSURING ELECTORAL INTEGRITY

Political and legal wrangling delayed the installation of new IEBC members until January 20 of this year, leaving less than seven months for them to organize the polls. That timing would be difficult in any country and is compounded by the fact that the electoral environment is extremely polarized, which increases potentials for political violence particularly at local levels. Further, the IEBC's administrative latitude is constrained by exceptionally detailed timelines provided in the legal framework, which increases tensions around the election process. In addition, that process presents complex issues for organizing and adjudicating elections for six different types of offices, extraordinary numbers of electoral aspirants, and sensitive procurement issues.

While the IEBC has responsibility for organizing credible elections, other state agencies, the electoral contestants, media and civil society all have responsibilities for achieving credible, peaceful polls. That includes promoting electoral participation and public confidence in the IEBC and electoral processes. The IEBC commissioners have dived into their work and expressed confidence that they will meet their challenges.

Election-Day Technologies. According to law, the new Kenya Integrated Elections Management System (KIEMS) is to be procured by April 10, so that there is time to test it, train officials in its use and deploy the integrated technology for verifying voter's biometric data at the polls, reconciling the number of voters with ballots cast, and to transmit to the IEBC polling station results for the presidential election. Problems with the tendering process led to cancelling the original contract and engaging another company approximately one week ago, which may complicate the delivery, training and deployment process. Potential legal challenges could create further complications and threaten the electoral calendar. Amendments to the Electoral Act provide for paper backup for the KIEMS procedures. Those procedures require detailed planning and implementation of numerous safeguards while the electronic systems are put in place and rigorously tested.

Given failures of electronic technologies in the 2013 and 2007 elections, cooperation among the stakeholders is vital for ensuring effective performance and public confidence in this aspect of the elections. Should there be problems meeting legal deadlines or performance difficulties as the KIEMS is deployed, such cooperation will be all the more important. Transparency in implementing these technologies will be key to providing the basis for that cooperation.

Voter Registry. In early 2017, the IEBC undertook a second and final round of mass voter registration. The provisional voters roll stands at 19,743,716, an increase of 37 percent over the 2013 roll. The law requires that the voter registry be independently audited. That requirement has yet to be met because the award of its tender to KPMG was contested in the courts. The IEBC received a ruling, and on that basis, KPMG preparations are moving forward. Important political contestants and sectors of civil society claim that the voter registry is bloated by inclusion of dead people as well as fictitious and multiple entries. At the same time, they claim that some population sectors are under represented on the voter roll.

Given that the voter registry is vital to enfranchising eligible voters and preventing illegal voting, it is critical to go to elections with a registry that is both accurate and trusted by the contestants and the public. The scheduled public exhibition of the registry from May 11 to June 9, with revision of the final registry scheduled by June, would be greatly enhanced by the completion of the independent audit. In addition, providing machine readable and easily

analyzable digital copies of the provisional roll to the political parties and interested civil society monitors for their verification and report to the IEBC and the public would do a great deal to remove controversy around the voter registry and build public confidence in the electoral process.

Results Verification by Political Parties, Citizen Election Monitors and Media. Kenya's legal framework specifies that the IEBC is the source for producing official election results. Simultaneously, the people have a right to genuine elections and to know that the election process is honest, which is only possible through transparency. The electoral contestants and citizen representatives through monitoring groups and the media therefore have a right to witness critical electoral procedures, including inside polling stations and tabulation centers. This includes recording polling station vote counts and tabulation center results. Typically, political parties and candidates will gather and add up results from official tally sheets, and the media and citizen election monitors may also gather copies of results as part of their independent verification exercises.

Those activities substantiate official election results, allow political parties to collect evidence should they seek to lodge legal challenges, and encourage the public to have confidence in electoral outcomes. At the same time, political parties as well as civil society and the media should act responsibly with their information and not usurp the role of the IEBC in announcing official election results.

Dialogue and IEBC Communications. The Political Party Liaison Committee (PPLC), comprised of the parties (organized by a steering committee led by smaller parties), the Office of the Registrar of Political Parties (ORPP) and the IEBC is designed to provide constructive dialogue at the national and county levels. The PPLC, due to a variety of factors, has not been providing that vital function for some time. For elections to be successful, it is important that the IEBC and the electoral competitors cooperate; that requires dialogue. The IEBC must be able to provide timely information simultaneously to the parties and indicate where and how their help is needed. The parties need to raise issues with the IEBC and with each other to prevent problems and tensions from escalating. The IEBC therefore should be allowed to convene the contestants in the electoral period in an inclusive forum that provides for effective dialogue.

The IEBC also has a leading role to play in helping the citizenry to understand the nature and functioning of various processes in order for the public to build trust in the credibility of the elections. Convening a forum with religious and civic leaders concerned with the elections and with the media has proven valuable in other countries for building public trust and decreasing tensions that could lead to violence. Such activities are best approached as part of a broad strategic communications plan that engages media and social media through rapid response and pro-active messaging. These activities go beyond traditional voter education efforts, which given the complexity of the 2017 polls, are also needed to help inspire informed electoral participation.

Achieving Inclusive and Representative Politics. While the constitution provides a framework for an inclusive political process, barriers to increasing the representation of women as well as young women and men as political actors still exist. There are many aspects to this, including in each element of the electoral process under examination in this report. For example, the full costs of nomination, campaigning and (if necessary) dispute resolution can pose a high hurdle for women and young people. Specifically, for young people, difficulties in acquiring national ID cards - a prerequisite for voter registration - is

still a pervasive problem, and estimates indicate that youth registration stands at around 57 percent of the eligible youth voting population.

For women, the Constitution of Kenya specifies that no more than two-thirds of either gender may occupy elected or appointed offices. However, the 2013 elections failed to produce that result, and there appears to be no immediate path to overcome the unconstitutional circumstance. Including those seated by special measures, women represent only 20 percent of the 11th Parliament. Though more than 600 women contested seats for the county assemblies in 2013, only 82 were directly elected to the 1,450 seats. In order to meet the gender rule, approximately a further 600 women were appointed to the assemblies through special measures. No women were elected among the 47 county governors, and other organs of government have also not met the rule. The Supreme Court advised in 2012 that the measure had to be progressively implemented, giving Parliament until 2015 to act. Several bills were introduced to that effect, though Parliament has not passed one. On March 29, 2017, the High Court ruled that legislation should be enacted within 60 days to enforce the gender rule, but this will not happen before the adjournment of this Parliament.

Political parties were required to file candidate nomination rules to the IEBC by March 2, 2017 and submit candidate names for their primaries by April 5. In some cases, only one person sought nomination for specific elected office, which amounted to a direct nomination. It therefore remains to be determined how the political parties are to ensure that the constitutional requirement as applied to Parliament is to be met. It is also unclear how the courts will be able to enforce this constitutional provision should the 2017 elections fail to meet the gender rule.

Political Party Financing and Its Regulation. While the legal framework provides for public financing of Kenya's 68 political parties, Parliament set requirements so high that only the three large parties qualify. Treasury has not appropriated fully the amount due to the qualified parties, and disbursement of the funds appropriated has not been fully transmitted. These matters are presently before the courts. In addition, while a campaign financing law was passed, it was suspended for the 2017 elections. These circumstances disadvantage smaller political parties and larger parties that do not have equal access to resources.

The law also requires that political parties allocate 30 percent of their public financing to promoting marginalized groups, including women candidates. No political party demonstrated its compliance with that legal requirement for the 2013 elections, and there is no indication that parties are implementing this requirement for the 2017 elections. This blatant deficiency contributes to noncompliance with the Constitution's gender rule for elected offices.

These factors negatively affect the fairness of electoral competition for all levels of office, and they add tensions to the campaign environments at the county and national levels.

Political Neutrality of Government Personnel and Use of State Resources. A number of people with whom the delegation met raised concerns about the misuse of state resources for electoral advantage. In Kenya, as in all countries, there is typically a political advantage to holding elected office for a political party or candidate standing in elections. However, the government and its resources belong to the citizens and should not be expropriated for private gain or the advantage of a particular political party, which is clear in Kenya's legal framework. Incumbents are challenged to make this point forcefully and publicly to their supporters, including those who work in government. Monitoring by media, citizen groups, competing electoral contestants and law enforcement agencies is an important feature of ensuring political neutrality of government personnel in conducting their official duties and

the appropriate use of state resources. That is all the more important because campaign financing is not clearly regulated and political party financing faces challenges.

Electoral Disputes Resolution and Prosecutions. Following the 2013 legal challenge to the presidential election result, the Judicial Committee on Elections recommended lengthening the time for processing such challenges. Parliament, however, did not accept the recommendation. The timeframe for petitioners to collect and present evidence and for the Supreme Court to conclude the case, therefore, remains quite compressed, though the Court has clarified procedures. The Supreme Court has also conducted specialized training in electoral dispute resolution for the lower courts and magistrates, including instructions to give priority for such cases. The training addressed to prosecutors and criminal investigators concerning the Electoral Offences Act of 2016, including the need for expedited processing in order to insure electoral justice serves as a deterrent to politically motivated violence and other offenses. In addition, a memorandum of understanding was recently concluded between the IEBC and Political Parties Dispute Tribunal (PPDT) on jurisdiction for legal challenges arising during the political party primaries and nomination processes.

A large number of disputes arose during the last party primaries, and even more are expected given the intensified competition for county level candidacies. Orderly and fair resolution of disputes arising out of the primaries, broader nomination processes, and the August 8 election would reinforce public trust in the courts, while effective legal redress of disputes and timely prosecution of electoral offences would promote electoral integrity and curtail potentials for electoral related violence.

ENSURING PEACEFUL ELECTIONS

While there were relatively peaceful elections in 2013, a great deal of attention went to mounting anti-violence efforts by electoral stakeholders and citizens in general. The high motivation for those efforts came from the strong desire to prevent a repeat of the killings in 2007/8 of over 1,000 people, including disproportionately women and children, and the internal displacement of over half a million people, over 75,000 of whom though no longer in camps remain displaced. Significant early warning platforms are functioning today, but anti-violence efforts do not match those mounted in the run-up to the last elections. The heavy drought has led to deaths resulting from farm invasions by pastoralists in politically volatile areas, and killings and other violence with political implications have already occurred this year.

Virtually everyone with whom the delegation met expressed serious concern about the potentials for violence before, during and/or immediately following the August 8 elections. Numerous stakeholders asserted to the delegation that the question is not whether there will be violence but how much and where. Electoral related violence discourages young women, men and other new entrants from engaging in politics.

Many noted that the increased interest in county level elected positions of governor and assemblies is likely to increase potentials for violence at that level. That over 40,000 people are expected to seek candidatures for 1,450 county level seats indicates that competition will be sharp.

Electoral integrity and peaceful elections are inextricably interrelated and extraordinary efforts are needed in both areas. The political contestants themselves need to provide leadership on this front in rejecting the use of violence by their supporters, while state

agencies and civil society and religious leaders need to mobilize to prevent killings and other violence on large or small scales.

Political Party Primaries and Candidate Nominations. In many parts of the country one political party dominates particular electoral constituencies, particularly concerning county level offices. In other places a party may not dominate, but its candidate has a strong chance of winning election. Competition within such parties for securing nominations becomes a high stakes endeavor that can be marked by intra-party violence. Parties are to establish National Election Boards (NEBs) for organizing their primaries, though the lack of capacity across parties has undermined their abilities to organize fair competition for nominations. That includes inadequate internal enforcement of the Political Party Code of Conduct provided in the Political Parties Act and the general absence of internal dispute resolution mechanisms.

Party primaries are to be conducted between April 13-26, which places responsibility on parties and law enforcement agencies to take effective measures to prevent intra-party violence. Effective dispute resolution mechanisms noted above will also be important in helping to ensure that tensions in the primaries do not exacerbate potentials for politically motivated violence in the run-up to the August 8 polls. The IEBC reports that it has formed a team to enforce the Political Parties Code of Conduct and that candidates could be barred if they gravely violate the code.

Peace Pledge and Parties' Enforcement of Codes of Conduct. The Electoral Code of Conduct and the Political Party Code of Conduct contain detailed provisions that apply to party leaders and supporters concerning both internal matters and behavior toward others. The letter and spirit of the codes, however, only can come to life if parties educate their activists and supporters about their provisions and establish internal capacities to discipline those who violate the codes and the broader legal framework for credible, peaceful elections. Enforcement of the codes is important for campaigners, election-day party polling agents, activists, and supporters, particularly upon announcement of primary and election results.

In numerous countries, including examples set in Nigeria's and Ghana's last elections, the presidential candidates and key party leaders came together under the auspices of respected national and international interlocutors, including religious and other traditional leaders, to join in a public ceremony and make a peace pledge for the elections. The positive impact on public confidence in both cases was notable. A timely action of that nature by Kenya's candidates could be important for promoting peaceful elections and electoral participation. Such pledges in hotly contested elections for governor would also likely make valuable contributions to the electoral environment. When such pledges are combined with forceful actions within the parties to ensure activists honor the candidates' pledges, the peace pledge can be particularly effective. Civil society monitoring of whether such pledges and codes of conduct are honored also adds important value.

Role of the Religious Community. Religious leaders of Kenya have periodically convened the Multi-Sectoral Forum to deliberate on matters of governance, election management, and looming insecurity. The faith-based community has played a key role in ensuring a peaceful pre- and post-election environment. That must be their role in the up-coming elections.

Coordination of Electoral Security Planning and Protection of Electoral Rights. Violence takes place outside and in the electoral context. Extremists who seek to destabilize the state employ violence around elections to advance those ends. Criminal syndicates may employ violence in an attempt to influence electoral outcomes to advance their fortunes. Aspirants for nominations, candidates and parties may use incitement and violence to gain

electoral advantage. The goals of such violence may be to suppress voter turnout or to remove a candidate in the pre-election period, disrupt polls on election day or to prevent election officials, party agents and monitors from safeguarding electoral integrity, or seek to change electoral outcomes when results are unfavorable.

In all of those circumstances, violence has a differing gender impact, disproportionately affecting women as voters, candidates, and other electoral actors. Security planning to prevent, mitigate, and stop the varying forms of violence requires coordination of the IEBC, police and other security forces. The National Steering Committee on Peacebuilding and Conflict Management brings together various security agencies and concerned civil society organizations. Strengthening its response mechanisms would build public trust and awareness of its activities. Professional and impartial engagement of police and other security bodies is crucial in addressing public safety and protection electoral rights. Providing training and clear instructions to them, including measures to protect women's electoral participation, would be important. Those instructions should address preventing the use of excessive force when violence occurs, and they should ensure police accountability.

Civil Society and Media Space for Credible, Peaceful Elections. Kenya's civil society groups lead important early warning and response mechanisms to mitigate election related violence. A few examples illustrate this. Uwiano and Ushahidi short messaging service (SMS) platforms, respectively, aid district peace committees and crowd reporting of incidents. The Multi-Sectoral Forum established by religious leaders promotes tension reducing political dialogue. Long-term and election-day observation by citizen observer groups, including verification of election results through a statistically based parallel vote tabulation, reduces volatility around election processes, particularly concerning large scale post-election violence. Social media platforms such as Twitter, WhatsApp and Facebook are an increasing factor for promoting credible, peaceful elections, with approximately half of Kenya's population receiving at least sporadic Internet service.

Kenya, like some other countries in the region, has limited the space for civil society and media organizations, which could adversely affect their contributions to credible, peaceful elections and broader democratic processes. In December 2015, the NGO Coordination Board threatened to close over 900 NGOs, many of which promote electoral rights. Traditional media are facing reduced funding from several fronts, including reduced opportunities from government advertising, and cases against some journalists under the defamation and incitement provisions of libel laws are often cited as negatively affecting media's free expression, which is vital for credible, peaceful elections. The possibility of Internet shutdowns around elections, as has happened in some neighboring countries, is also cited by social media and broader election related platforms as a further concern. Protecting and even expanding space for civil society, including NGOs and the media, is essential for the electorate to receive information upon which to develop a free and informed political choice at the polls and to providing accurate information to dispel rumors and counter incitement that subverts peaceful elections.

RECOMMENDATIONS

The delegation developed its observations based on consultations with a broad range of electoral stakeholders. In the spirit of international cooperation and based on our comparative experience, it respectfully offers the following recommendations.

General recommendations:

- **Election-Day Technologies.** In order to establish trust among the electoral contestants and public confidence in the KIEMS integrated system, as well as paper back-up systems, the IEBC should include political party and civil society technical representatives in each stage of testing and deployment of those systems, as well as, in the training of election officials in their use. The IEBC should develop a clear methodology with appropriate safeguards on the collation verification and transmission of results, both through the use of technology and manual systems.
- **Election Results Verification.** Political parties, citizen election observers and media that independently collect election results from polling stations and tallying centers should act responsibly with their information and not usurp the role of the IEBC in announcing official election results, while the IEBC should guarantee access to counting and results processes. That includes providing security for party agents, media and election observers.
- **Political Party-IEBC Dialogue.** Political parties and the IEBC should develop an effective forum for inclusive and constructive dialogue to address challenges and requirements for achieving credible, peaceful elections on August 8.
- **Voter Education.** The IEBC, civil society and political parties should conduct broad campaigns to inspire electoral participation, especially among youth.
- **Inclusion.** All key stakeholders - political parties, IEBC, civil society, media and the security sector - must put in place urgent measures to remove obstacles that hinder the full participation of women, young people, the disabled and other marginalized groups in all aspects of the electoral process.

Independent Electoral and Boundaries Commission:

- **Voter Registry.** The IEBC should facilitate the early completion of the independent voter registry audit and make the findings publicly available. It would be best if the provisional registry is made timely available to political parties and citizen election monitors in a machine-readable, easily-analyzable format. That would allow them to offer suggestions for improving the registry. The IEBC also should conduct broad public education about how, when and where prospective voters can validate their biometric voter registration and seek any needed corrections during the prescribed inspection and verification period.
- **IEBC Communications.** The IEBC should enhance its public outreach and communications efforts, including engaging in forums with interested civil society organizations and the media. Direct public outreach should also include robust proactive and rapid response capacities through social media platforms.

Government:

- **Coordination of Electoral Security.** The IEBC, security agencies and groups working on early warning and peaceful elections, should share information and strengthen coordination efforts for the elections. Instructions should be issued to not use excessive force, and a clear statement should be made concerning the accountability of security forces.
- **Party Financing.** Disbursement of appropriated funds to political parties under the legal framework should be completed expeditiously.
- **Civil Society and Media Space in Elections.** Relevant regulatory agencies for NGOs and the media should affirm their commitment to ensuring unhindered exercise of the right of association and the right to seek, receive and impart information, including Internet access.

- **Safeguarding Citizen Participation.** In consultation with the parties, security agencies should provide protections for the citizens participating in the primaries.

Religious Leaders, Civil Society, and Media:

- **Religious Leaders.** Religious leaders should use their moral authority and convening power to ensure credible, peaceful and transparent elections.
- **Civil Society Monitoring.** Civil society should sharpen its efforts to monitor the elections, including long-term observation and verification of election day processes. They should also continue to advocate for electoral transparency, including access to data concerning key processes, and monitoring incitement and hate speech that can lead to violence.
- **Media.** Media should continue robust coverage of electoral issues, guided by principles for accuracy and fairness.

Political Parties:

- **Election-Day Technologies.** Political parties should designate technical representatives to review the KIEMS technologies and should cooperate in developing solutions to problems identified in the installation and running of such systems. The technical committee on ICT should provide an effective forum for that cooperation.
- **Primaries and Nominations.** Political parties should establish mechanisms to effectively enforce among their members the political party and electoral codes of conduct. Political parties should focus on expanding and supporting the numbers of women and young people participating as candidate agents.
- **Financing for Marginalized Groups.** To comply with the law, parties should immediately allocate to marginalized groups, including women candidates, 30 percent of public financing they receive.

Judiciary:

- **Electoral Dispute Resolution Mechanisms.** The Office of the Registrar of Political Parties should ensure that the parties understand when to turn to the IEBC, the Political Party Dispute Tribunal (PPDT), and the courts, respectively, to resolve electoral disputes. Given the extraordinary number of disputes anticipated, these entities should be properly resourced, and in particular the PPDT should receive additional funding and human resources to effectively carry out its mandate.

International Community:

- The international community should continue to respect the sovereignty of Kenya and provide further support to Kenyans' efforts to meet the challenges for credible, peaceful elections on August 8. International organizations should coordinate their various observer efforts. Assistance agencies should identify places where additional resources may make important contributions to electoral integrity and a peaceful process.

CONCLUSION

The delegation listened to the many Kenyans who generously gave their time to inform its efforts. NDI and the delegation wish to express their appreciation for their cooperation and warm welcome that the delegation received. The delegation members were taken by the sense of urgency that was conveyed concerning electoral preparations and the seriousness of the challenges for achieving a peaceful electoral process. It also appreciated that all stakeholders

expressed a strong desire to work to achieve orderly, credible and peaceful elections. The delegation hopes that the observations and recommendations presented in this statement may be helpful in the days remaining in the lead-up to the August 8 polls. NDI will continue to monitor the electoral process and will continue to support those working to achieve credible, peaceful elections in Kenya.