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Before the

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON FOREIGN AFFAIRS
SUBCOMMITTEE ON AFRICA, GLOBAL HEALTH, GLOBAL HUMAN RIGHTS
AND INTERNATIONAL ORGANIZATIONS

April 16, 2013

“KENYA’S 2013 ELECTIONS: AN EFFECTIVE ASSISTANCE MODEL?”

Mr. Chairman, Members of the Subcommittee, thank you for this opportunity to comment on the electoral and political processes surrounding the March 4, 2013, elections in Kenya.

NDI has worked in Kenya since the mid-1990s and for the last five years has concentrated on helping to facilitate peaceful, credible processes around the 2010 Constitutional Referendum and on peaceful and credible elections in 2013, as well as continued progress beyond them. Mr. Chairman, NDI’s electoral programming in Kenya addresses the following areas.

- The Institute’s work to promote dialogue among the political parties, the Registrar of Political Parties (RPP) and the Independent Elections and Boundaries Commission (IEBC) through the Political Parties Liaison Committees (PPLCs) - nationally and in the 47 counties - creates a sustainable foundation for political dialogue at the county level going forward, as well as for national stocktaking on the election process. The national and county level PPLCs provided a basis for sharing information and concerns, which allowed issues to be addressed and mitigated potentials for violence. NDI’s work with individual parties to carry out internal reforms helped them comply with the new legal framework and also helped them to prepare for peaceful participation in the 2013 elections.
- NDI has also been able to facilitate forums (Inter-Party Action Group) among senior members of political parties on important reform issues in Kenya. This work started before the 2010 referendum on the draft constitution. Through these dialogues, senior political leaders from the major parties were able to reach consensus on contentious issues in the draft constitution. Since 2010, these forums have met regularly and have been instrumental in securing political consensus, such as on regulations to the 2011 Election Act and 2011 Political Parties Act.
- By facilitating Kenya’s first multi-party youth work through the Inter-Party Youth Forum (IPYF), hundreds of emerging leaders forged relationships that served as a brake on violence

across the country in a manner that can continue to contribute positively over the years ahead.

- NDI's support for increased women's political participation and representation included training more than 700 women and supporting 96 women candidates to share their platforms through radio programs prior to party nominations. This led to more women being nominated for positions in party primaries and promoted more women as political leaders in their communities.
- NDI's engagement with civil society organizations working to ensure the participation of persons with disabilities improved advocacy and awareness of marginalized groups in the March elections and also a stronger focus among the organizations themselves to continue working for their rights within the political system.
- NDI provided technical assistance to 11 key faith-based and civil society organizations in forging Kenya's Election Observation Group (ELOG), which conducted long-term observation and independent verification of the Constitutional Referendum and 2013 presidential election through highly accurate Parallel Vote Tabulations (PVTs). ELOG's PVTs confirmed that the official results were within the range of PVT statistical projections, and ELOG identified areas for action to improve processes and establish accountability for shortcomings, thus reducing political volatility and improving potentials for furthering electoral integrity.
- NDI also organized an early pre-election delegation, headed by former Botswana President H.E. Kitimele Masire, that identified key gaps in the process, leading to actions on its recommendations. During the March 4 polls, the Institute liaised with ELOG, international election observers and other key actors.¹

NDI's activities were supported by a wide variety of international funders including the U.S. Agency for International Development (USAID), the State Department's Bureau of Democracy Human Rights and Labor (DRL), the Norwegian Ministry of Foreign Affairs, the Kingdom of the Netherlands Ministry of Foreign Affairs and the United Nations Development Programme (UNDP). The financial assistance NDI received, especially from USAID, occurred well ahead of the elections, allowing the Institute sufficient time to plan and implement a range of long-term activities and also to respond to last minute contingencies. We believe the funders understood what was at stake in the elections in Kenya and responded accordingly.

Mr. Chairman, an accurate and complete assessment of any election must take into account all aspects of the process, and no election can be viewed in isolation from the political context in which it takes place. It should also be noted that no electoral framework is perfect, and all electoral and political processes experience challenges. The March 4 elections were the most complex in Kenyan history; six elections took place on the same day, within a completely new legal framework both for political parties and the election management body. It is also important to remember that the elections took place five years after more than 1,000 people were killed and more than 600,000 were displaced in violence that occurred after Kenya's 2007 elections. In addition, the political

¹ Please see Annex 1 for a description of NDI's program activities in Kenya. Annex II is a presentation of the ELOG's PVT findings.

environment was highly polarized, especially due to the ongoing cases in the International Criminal Court against one of the major presidential candidates and his running mate.

Mr. Chairman, we would like to emphasize that NDI did not conduct a comprehensive international election observation mission for Kenya's elections and that ultimately it is the people of Kenya who must determine the meaning of the March 4 polls. However, it is the Institute's view, based on its intensive work, that Kenya's presidential election results were credible, though the process included important flaws.

The unanimous ruling by Kenya's Supreme Court affirming the outcome of the elections, which was accepted by presidential candidate Raila Odinga after his legitimate challenge before the Court, marks an important milestone. The detailed ruling from the Supreme Court is due today and may shine further light on the election process, with implications for future elections in Kenya.

With the formation of the newly elected government, including both houses of Parliament, county assemblies, governors, as well as the national executive, Kenya also has established its formal opposition and embarked on a critical constitutionally-mandated process of devolution and an improved system of checks and balances. At the same time, Kenya's vibrant civil society, which has been central to Kenya's reform process, has a meaningful role to play going forward. It is the Institute's view that the attention of Kenyans and the international community over the years since the 2007-2008 tragedy has been warranted, and continued heightened attention is needed to help Kenya address the difficult issues and critical challenges that are immediately ahead.

Mr. Chairman, the 2013 elections were not only an opportunity for the Kenyan people to redeem the country's reputation; they were critical for the stability of the second largest non-oil producing economy in Africa and the hub for security and economic advancement in all of East Africa. The elections and the process following them are important for other reasons as well.

This time the international community was proactive in supporting Kenyan calls for peace, which were so resounding that a few politicians even complained of "peace fatigue." While it ultimately was the Kenyan people who decided that elections would be peaceful or violent, the work of the international community, through its engagement with all the key players and sectors early on in the process, was also instrumental in achieving a peaceful outcome.

The bloodletting in 2007-2008 was only ended through Kenya's National Reconciliation and Dialogue, a mediation led by former UN Secretary General Kofi Annan, as head of the African Union's Panel of Eminent African Personalities. That mediation launched a reform process, which included: the Waki Commission's inquiry into post-election violence; the Kriegler Commission's independent review of the election process; the National Integration and Integration Commission; an exceptional process leading to the adoption of the new constitution; unprecedented judicial reform; as well as establishment of the IEBC. In addition, much was done by Kenyan civil society to campaign against the use of political violence and to ensure electoral integrity.

Elections are always the product of a political process, and Kenya's 2013 elections resulted from popular reforms that not only set the stage for the vote but for the type of governance that might follow the elections, if the people remain engaged and governance is representative. The success of assistance to Kenya's elections therefore depends in significant part on whether the gains of the reform process are maintained going forward.

Indeed the reform process in Kenya has occurred over two decades starting with the opening of multi-party democracy in the early 1990s. Much of this progress is a result of the demand driven advocacy of civil society, in the words of former civil society activist and now Chief Justice of the Kenya Supreme Court, Willy Mutunga, who called this process “constitution making from the middle.” If progress is to continue, Kenya’s international development partners must continue to support the efforts of Kenyan civil society.

The 2013 elections, the first under the new constitutional order, saw more than 85 percent of Kenyans came out to vote in a process where the political choices were clear. Voters withstood very long waits in line, frustrations over technology failures and other problems, as they exercised their political franchise.

It is important to look at more than the presidential result in the March 4 elections.

- The Jubilee Coalition won 195 of the 349 National Assembly seats, while the Coalition for Reform and Democracy (CORD) won 143.
- In the new Senate, Jubilee secured 34 seats, while CORD won 27 of the 67 seats.
- At the county level, Jubilee has 24 governors and CORD has 23, while Jubilee controls 26 County Assemblies and CORD controls 21.
- Unfortunately, not one woman was elected as a governor or to the new Senate.

Mr. Chairman, this illustrates that there should not be a zero-sum political attitude suggesting that the “winner takes all and the loser loses all” following the March elections.

While there are likely to be substantial difficulties, especially in the devolution process, there is a basis for positive development — particularly if genuine political space is maintained for opposition voices and for dialogue and accountability efforts by a vibrant civil society and robust media. The constitutionally prescribed distribution of powers among the central government and the counties and among the executive, parliament and the courts will be enlivened or diminished depending on whether all sectors of Kenyan society are enabled to contribute to representative governance. Correspondingly, the international community is faced with determining how to best assist Kenyans working for that.

The IEBC results showed: 6,173,433 votes (50.07 percent) for Mr. Uhuru Kenyatta; 5,340,546 (43.31 percent) for Mr. Raila Odinga; and 6.62 percent for the remaining six candidates and the rejected ballots. The result for Mr. Kenyatta was only 0.037 percent different from ELOG’s PVT statistical projection for him, which was well within the PVT’s 2.7 percent margin of error. ELOG, in confirming the credibility of the IEBC results, also called on the IEBC to immediately make public any information relevant and material to the results announced, urged those who felt aggrieved by the outcome to seek redress through the courts and called upon the courts to act expeditiously and to apply fairness in ensuring equal protection of the law. In NDI’s view, ELOG correctly combined its confirmation of the credibility of the presidential results with a call for further urgent actions to ensure electoral integrity, and that approach applies equally following the Supreme Court’s unanimous ruling.

There were widespread failures in the functioning of electronic poll books on election day, though backup hard copies of voter lists were used. The system for electronic transmission of results from

the polling locations failed, though in accordance with the law official paper tally sheets were used to tabulate official results. Party agents and international observers were excluded from part of the results tabulation at the national level, raising concerns, suspicions and tempers among the parties. Lack of clarity in advance of polling caused uncertainty and controversy over whether all or just valid ballots should be used to determine percentages of votes won by the presidential candidates, and other problems and issues emerged. All of the issues took on greater importance in light of the small margin by which Mr. Kenyatta was reported to have avoided a runoff with Mr. Odinga.

In these circumstances, the IEBC has much to do to address lessons learned and to fulfill its commitments to transparency -- notwithstanding its considerable accomplishments. For example, it has yet to release all results at the “polling stream” level. That action is not only called for by the IEBC’s commitments, it is vital to parties, candidates, citizen election monitors and others seeking to examine electoral strengths and weaknesses, and it is at the heart of electoral transparency. Without releasing such disaggregated election results, suspicions will likely fester, while their release will allow confidence to be reinforced as a result of comparisons of tally sheet copies issued on election night and other independent verifications. The IEBC also should involve the parties through the Political Party Liaison Committees and civil society in stock-taking and sharing lessons learned about flaws and strengths identified for election-day and the pre-election processes.

Mr. Chairman, elections are a mechanism by which citizens can hold elected leaders to account, and there must be accountability in the administration of elections for public confidence to be established and sustained. In close elections, where nearly half the population is disappointed in the outcome, and particularly where flaws are apparent, transparency and accountability are vital. Inclusiveness in lessons learned stock-taking is essential to ensure participation in future elections. The efforts of ELOG and others in civil society and political sectors, including points advanced by parties through the PPLCs and in other ways, will be essential for defining a realistic, meaningful and immediate agenda for correcting flaws in the electoral process. This is an urgent, immediate post-election challenge.

At the same time, the political process beyond Kenya’s elections is the key to further development. Working with the newly elected Governors, County Assemblies, members of both houses of parliament and other governmental agencies will be critical. In addition, in order to secure full implementation of the 2010 Constitution, it will be vital to: continue work with political parties at the national and county level to support the development of political parties as institutions with a focus on policy implementation; strengthen representation of women and youth within governance structures; and secure more and active citizen participation in government at all levels.

In addition, it will be important to support continued work with civil society on electoral reform and constitutional implementation, continued work with young people and other marginalized sectors of the population; continued support for Kenya’s democratic institutions, particularly at the county level, and including assistance to political parties to strengthen party branches and adapt to the changes that devolution brings; support for inclusive social and economic development processes; and civic education to address gaps in understanding among the Kenyan public regarding the purposes and functions of devolution and the new elected and appointed bodies.

Mr. Chairman, the Kenyan electoral process presents lessons that are useful when considering other countries in Africa and beyond. A few of the more salient lessons are as follows.

- Ultimately, it is the people of a country who determine the credibility of their elections and the country's democratic development. Additionally, while elections are a key ingredient of democracy, it should be understood that they are not synonymous with democracy. Thus, there is much more to be done to advance Kenya's democratic process.
- Assistance by the international community to support democratic processes should begin early and be robust, coordinated and conducted in a proactive manner that respects the sovereignty of the host country. In this sense, election assistance must be seen as much more than a technical matter and should address important factors in the broader political environment, which was done in Kenya. This is a valuable point for approaching other countries, including those that are vulnerable to political violence.
- Just as democracy is much more than elections, genuine elections are requisite for it. Democratic elections serve three basic functions in any country: they are the means to resolve peacefully competition for political power; they are the vehicle by which citizens express their will to determine who should have their authority to govern; and they are the way the electors choose policies that they believe will deliver improved lives for the citizenry. To be credible, elections must be inclusive, transparent and encompass accountability; to the degree these elements are robust, public confidence will be high, and, to the degree any or all are deficient, public confidence in the elections and the resulting government will fall. These measures should be applied in a forward looking manner as well as considering Kenya's electoral process up to March 4, and this stance is important for other countries as well.
- When elections fail, particularly where there is widespread violence and national trauma, as was the case in Kenya in 2007-2008, extraordinary efforts at dialogue across political divides, stock-taking, reconciliation and reform are required to regain the potential for stability and progress. Even then, the circumstances remain fragile and require sustained attention. These steps are widely applicable to other countries.
- Mounting peaceful elections with integrity is a complex challenge that stretches across numerous institutions and processes – and requires engagement from all segments of a country's population. The quality of an election process typically reflects the democratic character of governance leading to an election and can be an important indicator of the nature of government that results from an election. Following up on elections in a rigorous manner that allows the country to understand the strengths of the process as well as to grasp the dimensions and impact of flaws is central to establishing public confidence and demonstrating accountability. It is also essential to ensure future peaceful, credible elections. Much was done in Kenya in these respects since 2008, and these lessons need to be applied in appropriate measure to the 2013 election process. The points are also relevant to many other countries.
- Systematic observation of election processes by nonpartisan citizen election monitoring organizations, which engage constructively with election management bodies, can make vital contributions to improving electoral integrity and public confidence. ELOG's long-term observation of the process shines light on important factors, and its PVTs reduced uncertainty and volatility concerning the results of the Constitutional Referendum and the March 4 presidential election, while pointing to immediate steps needed by the IEBC,

political parties and the courts. Such systematic, credible, independent and nonpartisan verification was not present in the 2007 elections. In examples of close elections, like Kenya's March 4 poll and Ghana's 2008 presidential election, PVT's by nonpartisan citizen observers contributed significantly to peaceful outcomes and confidence that the vote tabulation was credible. This lesson is important for other countries as well.

- Developing reliable communication among political parties and electoral authorities can improve the credibility of election processes and mitigate potentials for election-related violence. The efforts of the IEBC and the parties through the PPLCs at the national and county levels increased the potential for peaceful, credible elections, including over the tense election results consolidation period. The relatively long-term efforts at building the PPLCs demonstrate their value over Election Day and beyond. This lesson, learned in South Africa's 1994 elections, requires considerable effort and is too often not adequately applied.
- There appears to be an emerging adherence to the rule of law and recourse to the courts for resolution of election-related disputes, as opposed to past practices of taking to the streets and inciting violence. The court cases in Kenya and Ghana, challenging the election results, were watershed moments in Africa's democratization process, especially because the contestants accepted the authority of the country's highest court in both cases.
- Elections – and politics -- are processes, not single events. Assistance in Kenya took place over a relatively long term, and – if the efforts are to be fulfilled – immediate attention is needed to follow-through in an election cycle that is not fully completed and in a political process that is continuing at a critical juncture.

In conclusion Mr. Chairman, it is clear that the recent Kenyan electoral process represents a reversal of the country's 2007-2008 electoral violence. In fact, the elections, and the challenge to the results, strengthened the democratic institutions of Kenya and hopefully will serve as a hallmark in steering the country toward a culture of peace and tolerance during future elections.

The political violence in the time leading to the March 2013 elections and the isolated incidents of violence on election day, nonetheless, cannot be ignored. And, the need to address long term issues and solutions related to the 2007-2008 tragedy remains. If the governance processes following the March 4 elections proceed in the spirit of that reform process and the compact envisioned in Kenya's new constitution, it will be easy to say that Africa and other parts of the world will benefit from Kenya's example. NDI is committed to continue to assist such a process and urges others to support it as well.

Thank you.