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## **Statement of the NDI and IFES Pre-Election Delegations to Ukraine's 2010 Local Government Elections**

*Kyiv, Ukraine, October 8, 2010*

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### **Introduction**

This statement is offered by two international pre-election delegations organized by the National Democratic Institute (NDI) and the International Foundation for Electoral Systems (IFES), to assess the electoral environment in Ukraine in advance of the October 31 local elections.

From October 3 through October 7, 2010, the NDI delegation, consisting of civic and political leaders from the U.S., Canada and Europe, met with party leaders, senior government officials, election authorities, non-governmental organizations (NGOs), and representatives of the media in Kyiv. During this same period, electoral experts from IFES met with a range of electoral stakeholders, including representatives from the Central Election Commission, Territorial Election Commissions, domestic election observation organizations, political parties, candidates, and international organizations.

The delegations seek to offer an impartial assessment of the electoral environment in light of Ukrainian laws and international standards and to demonstrate the support of the international community in democratic elections. The delegations conducted their activities in accordance with the laws of Ukraine and the Declaration of Principles for International Election Observation, which embraces the principles of noninterference, impartiality and professionalism for international election observers and is endorsed by 35 intergovernmental and international organizations, including IFES and NDI.

In particular, NDI and IFES welcome President Victor Yanukovich's pledge to ensure that these elections, the first since he took office, are democratic. This statement is offered in the spirit of assisting in that effort. NDI and IFES do not seek to interfere in the electoral process, however, and recognizes that it is the Ukrainian people who will ultimately determine the credibility and meaning of the October elections as well as any future changes to the electoral process.

NDI and IFES wish to express their appreciation to the United States Agency for International Development, which has funded the work of these assessments and has supported the organizations' democracy assistance programs in Ukraine. The delegations also express their

appreciation to the government of Ukraine for its invitation to observe pre-election preparations as well as to everyone with whom they met.

## **SECTION I: NDI OBSERVATIONS AND RECOMMENDATIONS**

### **Summary**

Genuine democratic elections require that the public, including political contestants, have confidence that the authorities will administer the elections in a fair and impartial manner and thus that the results of the elections will reflect accurately the free choice of the voters. The delegation notes that extraordinary political changes currently underway in Ukraine pose challenges to maintaining such confidence. In addition, these elections will be conducted in an atmosphere of extreme political polarization and lack of confidence that political opponents will behave ethically.

A number of leaders expressed alarm at a recent constitutional court ruling, overturning the constitutional reforms that followed the 2004 “Orange Revolution” and subsequent legislative changes which have resulted in a restructuring of the balance of executive/legislative power in favor of the president. The delegates’ conversations showed that these sweeping legislative changes, enacted by parliament with little debate, while the delegation was in Kyiv, have fed existing doubts about the government’s ability to behave as a neutral administrator. On the eve of elections, such perceptions inevitably also affect confidence in even-handed administration of the election. This statement concludes with recommendations as to steps that can be taken to promote greater transparency and confidence in electoral processes both before local elections and before the next parliamentary elections.

The legal framework for local elections contains improvements over earlier laws, including some changes to the local election law previously recommended by NDI and the International Republican Institute (IRI). However, additional measures are urgently needed in the implementation of the laws to increase transparency and build voter confidence in these elections. The delegation is very concerned by reports of harassment of civic activists by security services as well as multiple, credible allegations of government intimidation of candidates. Another significant concern is the potential for abuse of discretion by electoral commissioners. In the context of the extreme politicization of local election commissions, the delegation notes widespread fears that those in control of the commissions will abuse their authority in vote counting, tabulation, and other matters.

### **Political and Electoral Context**

The last several elections in Ukraine, including the 2010 presidential poll were widely considered to meet international standards for democratic elections. The October 31 local elections represent an important opportunity to build on and consolidate that accomplishment. In contrast to Ukraine’s recent experience, elections held from 1991 through the first round of voting in 2004 were increasingly fraudulent. The most common problems included: widespread abuse of administrative resources; manipulations of the voter lists; a lack of transparency in the

tabulation of votes; and overwhelming media bias in favor of pro-power candidates or parties. In the pre-election period, the free movement of opposition candidates or their supporters to campaign events and citizens' rights to peaceful assembly were not always respected.

The overall political environment in which the fall local elections are taking place is marked by a high level of political polarization and voter cynicism. According to an October 2010 IFES poll only 51% of Ukrainians believe the local elections will be completely, or even somewhat, free and fair. Furthermore, the president's critics charge that the Yanykovich administration has sought to stifle opposition since taking office. Journalists have complained of creeping censorship and non-governmental organizations have reported security service surveillance.

Recent political developments have not served to allay mistrust among political factions. Rather, changes to the electoral law and calendar have been greeted with suspicion that the legal framework is being manipulated for political ends. Local elections were originally scheduled to take place in May 2010, but the parliament voted to postpone them until fall of 2010. Parliament canceled elections outright in Ternopil oblast and in Kyiv. In July 2010, the parliament acted with little debate to revise the local election law. Changes to the election law include changes to the way lower level election commissions are composed, the introduction of single mandate constituencies, changes in party registration requirements, the role of the Central Election Commission's (CEC's) authority, a shortened election calendar, the reduction of information to voters, and provisions for domestic observation. Most significantly, parliament quickly passed new legislation this week that significantly strengthens presidential powers. This new legislation follows a court ruling invalidating the current balance of power

## **FINDINGS**

### **Areas of Improvement**

#### **1. LEGAL FRAMEWORK**

These will be the first local elections in which Ukrainian non-partisan groups are legally authorized to field observers. This is a welcome change that brings Ukrainian law into alignment with international democratic standards as laid out in the Organization for Security and Cooperation in Europe's (OSCE) Copenhagen Document.

The delegation also notes two other positive recent changes to the local election law and notes the parliament's willingness to revisit the election law in August. Positive changes include the removal of restriction on competition in the elections by party branches in existence for less than a year and the addition of new seats on territorial election commissions (TEC) for parties not represented in parliament.

## **Areas of Continued Concern:**

### **1. LEGAL FRAMEWORK FOR ELECTIONS:**

#### **a. Practical Impediments to Observation by Domestic Groups:**

The delegation notes potential problems with new procedures for accreditation of domestic observers. The observer groups with which the delegation spoke were concerned that the process, which requires review and approval from both the Ministry of Justice and Central Election Commission, could be very lengthy. Particularly in the event of denials and appeals, there is a possibility that the necessary approval will not be granted by election day. The regulations also allow the CEC to reject observer groups' accreditation on the basis of even minor problems with a single observer's name. This appears to be overly restrictive and thus not in keeping with obligations of the Copenhagen Document paragraph 24 (on legal restrictions). This restriction may lead to long delays, potentially jeopardizing the ability to observe on election day.

#### **b. Shortened Timeframe for Campaign Period**

Several interlocutors told the delegation that the compression of the entire campaign period into 50 days, with only three weeks to campaign, leaves insufficient time for electoral authorities to make administrative preparations, candidates to campaign, and voters to become informed about their choices.

#### **c. Composition of Territorial Election Commissions (TEC)**

The delegation heard a wide divergence of views on TEC composition. Opposition parties vehemently denounced the system used to allocate seats on the TECs as unfair. They oppose the distribution of seats by parliamentary faction which has given the three parties that comprise the parliamentary majority more seats and TEC leadership positions than the 12 parties that comprise the opposition. NDI's experience worldwide has found that confidence in an electoral system and a perception of fairness are as important as the letter of the law. Therefore, when concerns are raised about the fairness of an electoral system, additional safeguards and measures of transparency should be introduced, even if the law otherwise meets acceptable standards. NDI therefore recommends that additional steps be taken to ensure that the proceedings of TECs are inclusive, open and transparent, and that existing procedures to guard against abuses in vote counting and other problematic election day activities are scrupulously enforced, and if need be, expanded by the CEC.

#### **d. Election Day Quorum Requirements for TEC Members**

The delegation understands the reasoning behind removing election day quorum requirements for TECs in the current election law. The laudable intent, as reported to us by a member of the CEC, is to remove the motivation for TEC members who might boycott TEC meetings in order to deprive the bodies of a quorum and thus deliberately invalidate election results.

In practice, the abolition of the election day quorum requirement may have unintended consequences. It allows as few as three of the 18 TEC members to certify election results and make other critical decisions, including canceling registration of candidates. This has sparked fears that a TEC's deliberations may be easily dominated by just a few members and used to the advantage of one electoral subject. Such scenarios are hypothetical so far. However, the delegation has been told of instances in which opposition TEC members were not allowed to enter meetings. In other cases, CEC and TEC meetings were not publicized, as required by law, which prevents independent observers from attending them.

#### **e. Invitation of International Observers**

Most government officials with whom the delegation met expressed the hope that international organizations would monitor on election day. It is unfortunate that because of the compressed time schedule it may be difficult for some of the major international organizations to organize full observation missions.

### **CONDUCT OF THE CAMPAIGN**

#### **a. Intimidation and Harassment of Candidates and Non-Partisan Civic Activists**

The delegation has heard of a pattern of harassment of candidates and civic activists. Six of the seven party leaders with whom the delegation met - the exception being the Party of Regions - described intimidation of their candidates by government employees. They recounted instances of potential candidates being told either not to run at all or to run as Party of Regions candidates. The threat most commonly employed was loss of a job when the potential candidates were teachers or others dependent on state budgets. In some of these cases, law enforcement authorities applied pressure by warning that they would open criminal cases or would send the tax police on an inspection. Credible allegations also surfaced regarding the freezing of a municipal bank account in order to disadvantage an incumbent mayor seeking re-election. These instances have a chilling effect on free and open competition nationwide.

Intimidation has also been directed at members of nonpartisan civic groups. Three members of the non-partisan group Opora reported that, when their intention to observe the elections, became known in their communities, they received visits from representatives of the state security service. The officials asked them both about their plans to observe and about other unrelated activities in their personal lives. The delegation notes with great concern the violent attack on the Kherson representative of the Committee of Voters of Ukraine, another non-partisan observer group.

#### **b. Pressure on Media**

Journalists reported threats of administrative actions and other government pressure on the business interests of media owners. They further informed the delegation that this deters the media outlets from covering the election in ways that may be unwelcome to the government. The delegation is also concerned about reports over the last few months of an increase in violent attacks against journalists.

### **c. Local Party Branch Representation**

Many parties raised with the delegation what they referred to as “cloning,” or the creation of more than one group claiming to represent a local party branch. “Cloning” undermines a party leader’s ability to field slates of candidates who genuinely represent the party. In addition, voters may be misled and confused as to which putative local party organization truly represents the party’s values and ideology.

## **NDI RECOMMENDATIONS**

In the spirit of international cooperation, and in the interest in supporting Ukrainians’ interest in genuinely democratic elections, the NDI delegation offers the following recommendations:

All electoral authorities, parties, candidates and other actors in the electoral process have a responsibility to act in accordance with the letter and spirit of the election law in order to increase confidence in the election process.

### **Government**

- In order to help restore public confidence in the elections, the highest levels of government should immediately investigate allegations of misconduct by public officials surrounding the elections, including any form of harassment or interference with candidates or observers. Public officials should be held strictly accountable for any infringements of election laws or procedures.
- The government should take all necessary steps to ensure a level playing field and an enabling environment for free elections. For example, managers in law enforcement, security, and heads of large institutions, such as universities, should be specifically instructed to refrain from discussion of candidacies or other issues with subordinates that could be construed as attempts to intimidate.
- Administrative resources should not be used to benefit the campaign of any candidate or party.

### **Election Administration**

- TECs and PECs (precinct election commissions) should take additional measures to promote confidence in their activities. This includes steps to promote attendance at commission meetings by minority members and to advance transparency. For example, all commission agendas should be made available to all TEC members and observers, meetings should be held at a reasonable hour, and the commissioners should widely publicize meetings.

- The CEC and Ministry of Justice should expeditiously consider accreditation requests from domestic monitoring organizations and, in the spirit of the law, it should also refrain from undue delays in approving lists of monitors on purely procedural grounds.

### **Longer Term Recommendations**

The following recommendations cannot be implemented before the elections but should be considered in the post election period and prior to the next national elections:

- Ukraine should fulfill its commitments to implement recommendations on election reforms set out by the OSCE and the Council of Europe.
- Invitations to international observers should be issued sufficiently early in the campaign process to enable organizations, such as the OSCE, the time required by their internal protocols and international standards to mount full observation missions.
- Complaints of government pressure on the business interests of media owners should be fully investigated as part of the government's commitment to protecting freedom of speech.
- Ukraine should continue to take steps to strengthen the independence of the judiciary in order to advance the rule of law and to create greater public confidence that the court system can provide an effective remedy for complaints.
- The election law provisions regarding timing of local elections should be applied consistently across the country.
- Any further revisions to the election law should be accompanied by an open and transparent process of consultation, aiming at the broadest possible consensus.
- Procedure for certification of local party representation should be examined in an effort to address instances of "cloning." Ukrainian authorities should consider the creation of a multi-partisan task force to analyze the role of the parties, courts, executive branch authorities and make recommendations to avoid a similar situation prior to the next election.
- To address a lack of confidence in the impartiality of election commissions the Verkhovna Rada (parliament) should explore options for setting up non-partisan, independent electoral commissions based on a consensus of the major parties.
- To prevent a perception of arbitrarily and politically driven decision-making by TECs, an effective mechanism for review of election commission decisions, in which all parties have confidence, should be explored.

- Procedures for accreditation of domestic observers should be simplified and timelines for accreditation lengthened.
- Parliamentary elections set for 2012 should not be postponed unless there is wide agreement among ruling and opposition political parties based on broad public debate. Democratic governance requires periodic elections, occurring at regular intervals and the stability of institutions with set terms of office. For a sitting parliamentary body to extend its own term of office could appear to the public to be a conflict of interest.

All of these recommendations are offered on the understanding that legal and technical improvements to the electoral system cannot in themselves re-establish confidence in Ukraine's electoral process. This will require a strong demonstration of political will by all participants, particularly by the government and those administering the election.

## **SECTION II: IFES OBSERVATIONS AND RECOMMENDATIONS**

The system of elections to local government institutions in Ukraine is extremely complex, with different levels of councils being elected at the level of oblast (region), Autonomous Region of Crimea, rayon (district), city, city district, town and village. Not only are deputies to councils elected for each of these levels, but Mayors are also elected at many of these levels of local government. The electoral systems for different councils vary, with town and village councils elected solely from First Past The Post single member constituencies. All other councils are elected through a parallel electoral system, with half of the members elected from First Past the Post single member constituencies and the other half through a closed list Proportional Representation system.

The system of local governance is defined by the Law on Elections of the Deputies of Verkhovna Rada of Autonomous Republic of Crimea, Local Councils and Village, Town and City Mayors (the "Local Election Law"), and this provides a constant context for the assessment that IFES has conducted of the pre-election environment. Due to the fact that this new legislation was passed only 3 months before the election there is considerable confusion amongst stakeholders on the changes that this new legislation has introduced.

The assessment findings concerning the Electoral Legal Framework are at the core of IFES' work, and the consequences of the electoral legal framework permeate all of the other issues identified by IFES during this process. IFES has tried at all times to relate its findings to Ukraine's legal obligations to international treaties and domestic legislation, and also to reference international electoral standards and good practice.

### **1. Electoral Legal Framework**

The legal framework for elections is fundamental to the entire electoral process, and provides a basis for all aspects of the conduct of elections. This legal framework should be clear and should be supplemented by supporting regulations and decisions of the CEC where additional clarification is required. The Venice Commission's Code of Good Practice in Electoral Matters



indicates that the electoral legislation should not be amendment less than one year before the conduct of an election, and where it is, the previous legislation should remain in effect for this election.

The passage of a complete Local Election Law by the Ukrainian Parliament in July 2010, signed by the President on 31 July 2010, for local government elections to be held on 31 October 2010, clearly violates this Venice Commission Code. In addition to this, the Local Election Law was passed through parliament with very little discussion. Despite over 1,350 amendments being submitted, very few were considered. Additionally, there was only a 12 day period between the first and second (and final) readings of the law, after which it was passed by parliament.

Furthermore, a completely new Law on the State Registry of Voters was passed on 5 October, less than one month before the election. The new Local Election Law contained many differences from the previous system of local government elections, and was further amended again in significant ways on 30 August 2010. Importantly, the new Local Election Law introduced a new electoral system.

The result of this frequently changing electoral legal framework has been to modify the rules of the electoral process at a late stage and in ways which could be seen as deliberately creating confusion amongst electoral participants. A good example of this concerns the exclusion in the Local Election Law on political party blocs participating in the local elections. This was contrary to provisions in the previous Local Election Law and clearly affected opposition parties more than governing parties as both parliamentary opposition entities were elected as political blocs – Our Ukraine and Bloc of Yulia Tymoshenko. The effect was to throw the candidacy and campaigning plans of these political blocs into disarray. It also had significant implications for the representation of these blocs on the Territorial Elections Commissions and lower level Election Commissions.

A further significant change in the Local Election Law concerned the ability of independent candidates to run for office. In contradiction to the previous Local Election Law, independent candidacy at all but the lowest levels of local government (Town and Village Deputies and Mayors) has now been excluded. This is especially significant for the position of City Mayor, a powerful position to which there is a significant history in Ukraine of successful independent candidacy.

This restriction on independent candidacy is a violation of Ukraine's international obligations and international electoral standards. The OSCE's Copenhagen Document<sup>1</sup> and its Existing Commitments for Democratic Elections in OSCE Participating States clearly re-iterate this right, requiring that states ensure the right of persons to seek public office "individually or as representatives of political parties . . . without discrimination". The United Nations Human Rights Committee in General Comment 25 also states that "persons who are otherwise eligible to stand election should not be excluded by unreasonable or discriminatory requirements". It also appears to be a violation of the Constitution of Ukraine, which in Article 64 states that the constitutional rights and freedoms of citizens, of which the right to stand for elections is one, cannot be restricted. This is a clear restriction of the right to stand for office.

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<sup>1</sup> This is a Preliminary report. Full citation to follow

While too late for these local government elections, the right to independent candidacy should be again extended for the positions of city Mayors and for candidacy in the single member constituencies elected under the parallel plurality/PR system used for some councils.

The Local Election Law passed on 31 July also restricted participation in the elections to those branches which have been registered for one year or more. Subsequently this provision was amended on 30 August such that any political party whose local branch is registered with the Ministry of Justice can participate in the local government elections. While this amendment represents a positive change and ensures less restrictions on the right to stand for office, this late change to the electoral legal framework does not make it easy for political parties to plan an effective campaign. The legislative process for the passage of the new Local Election Law should have taken place far in advance of the elections themselves, providing time to properly review and amend the law before the election schedule was announced.

## **2. Formation of Lower Level Election Commissions**

Despite the fact that the Central Election Commission is the highest-level election management body in Ukraine, the implementation of local elections is primarily the responsibility of Ukraine's hundreds of Territorial Election Commissions and over 30,000 Precinct Election Commissions. The formation of these bodies is described in Articles 22 and 23 of the Local Election Law respectively. There seems to be considerable concern in Ukraine, expressed by many stakeholders, about the process of Territorial Election Commission formation.

The Local Election Law provides for each party and bloc receiving representation in the Parliament to receive an equal number (3) of members on each Territorial Election Commission, which has been heavily criticized. As a system, this proportional division is not necessarily flawed. Parties, particularly smaller parties, often entered the parliament only through their decision to join a bloc.

There is, however, an inherent contradiction in the selection process for Territorial Election Commissions, in that while blocs are the basis for allocating seats to Territorial Election Commissions, blocs themselves are prohibited from putting forward their candidate in the local elections. Moreover, the members within blocs have been forced to compete for places on the same Territorial Election Commission. The legal provisions concerning the submission by political blocs of nominees for Territorial Election Commissions need to be re-examined to ensure a fairer distribution of members between bloc members.

The process of filling these parliamentary bloc nominations on the Territorial Election Commissions also raises serious concern. First, there is a lack of specific instruction in deciding which members of the blocs to choose – whether this should be equal representation from different parties, a maximum threshold of seats, etc. The only guidance provided by the law states that members are selected taking into consideration their experience working on election and referendum commissions (Article 22(3)). The applications filed by parties contained relatively brief information on this experience, and this is a highly subjective criteria for selection. Moreover, as Central Election Commission members were entrusted with different territories within Ukraine, and as the law was relatively silent with regards to selection criteria,

they were free to choose different ways to select members. In addition to this, during meetings of the Central Election Commission to approve the final Territorial Election Commissions composition, a majority of members could object to the proposed nominees and substitute their own candidates.

With regards to the non-parliamentary parties, a public lottery was held to determine the allocation of the 3 seats on Territorial Election Commissions allocated to these parties. However, only one lottery was held, due to time and resource constraints. As a result of the draw, parties were ranked 1-109. As the Central Election Commission turned to each Territorial Election Commissions, the three highest ranking parties that had submitted a candidate received a seat. In this way, a party that was listed 1, 2, or 3 via the lottery could in fact have obtained representation on every Territorial Election Commission in Ukraine, if they had submitted candidates for every Commission. In reality, this did not happen, as many smaller parties were drawn high on the list, enabling approximately 70% of non-parliamentary parties to nominate some members. According to the Central Election Commission, all parties were notified of the time and place of the lottery. The lottery was broadcast on television.

It is recommended that individual lotteries be held to form Territorial Election Commissions in the future. The use of a single lottery, while time-effective, has the potential to greatly distort membership in Territorial Election Commissions in favor of parties who fared well in this one draw, and against parties who came at the bottom of the list.

With regards to the selection of administrative positions within the Territorial Election Commissions, the law is again silent. This has left open the door for a highly subjective process of selection, one that ignores any concept of proportionality between the parties comprising the Territorial Election Commission and contesting the election. In fact, analysis of the allocation of executive positions on the Territorial Election Commissions has shown that a large proportion of the seats have been allocated to parties supporting the governing coalition. Executive positions should be allocated in a fairer manner, such that political parties/blocs could receive a roughly proportional allocation of executive positions on Territorial Election Commissions and lower level commissions.

Depending on the precinct size, defined by the number of voters, Precinct Election Commissions can have anywhere between 10 and 24 members. Concerns for the Precinct Election Commission member selection mirror those expressed in the Territorial Election Commissions. These concerns are perhaps for the Territorial Election Commissions as they will potentially be conducting Precinct Election Commission selection in very different ways due to the lack of clear procedure provided by the law.

The need for 24 commission members, even for large polling stations, is questionable. As the Precinct Election Commission formation process has yet to begin, it is recommended that the Central Election Commission issue further clarification to Territorial Election Commissions on this process. This clarification should create the grounds for a reasonable degree of equal representation in the executive positions of the commissions.

### **3. Conduct of Elections**

Regardless of the representation of various political parties in the creation of the Territorial Election Commissions and other lower level Election Commissions, there is a clear obligation that election administrators conduct elections in an impartial and independent manner, showing no bias for any electoral participants. The fundamental right of every citizen to seek access to public service on terms of equality is clearly stated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. In order to achieve this obligation, elections are required to be conducted in an impartial and non discriminatory manner.

Unfortunately this clear obligation under international law and international electoral standards is not properly embedded into domestic law. While Central Election Commission members are required to take an oath promising to conduct their duties in a non-partisan, honest, objective and unbiased manner, no similar provisions exist for lower level Election Commissions. This can be dealt with through the development of a Code of Conduct for Electoral Officials, but no such code exists in Ukraine.

The concern that the politically unbalanced Territorial Election Commissions and lower level Election Commissions might implement elections in a biased manner was a consistent concern expressed by Ukrainian counterparts during this assessment. While the true extent of this will only become apparent over the coming weeks as election preparations continue, already serious issues have been identified which question the neutrality of the work of the Territorial Election Commissions.

One significant impediment to impartial conduct of elections by the Territorial Election Commissions, and lower level Election Commissions, is the possibility that a political party may recall and replace its nominees on the relevant Election Commission at any time (Article 29(4,6) of the Local Election Law). This power could clearly be exercised should a member of an Election Commission take a decision which is not in compliance with party interests. Once appointed, members of Election Commissions should be free of undue influence from any outside interests, including from political parties - even their own. The possibility for recall of political party representatives on Election Commissions should be removed from the law, or should be properly regulated to ensure that such recall is not used to influence the work of a member of an Election Commission.

Transparency in the work of Territorial Election Commissions and other lower level Election Commissions is an important international electoral standard and also a crucial anti-corruption mechanism. The Local Election Law ensures that electoral participants and observers have a right to attend Territorial, and other, Election Commission meetings (Article 27), but there is no requirement in the law stating how these meetings should be notified to non-members. Election Commissions should be required to issue public notification of all meetings at least 24 hours in advance of the meeting.

One vitally important component of the work of Territorial Election Commissions that has already been concluded concerns the delimitation of the single member constituencies created as part of the new parallel plurality/PR electoral system. The way that boundaries are constructed in single member constituencies can have a significant influence in who is elected. The Local

Election Law provides little guidance to the Territorial Election Commissions in this regard, merely requiring that districts of approximately equal numbers of voters be established (Article 17(4)). The process of boundary delimitation has been conducted in a closed manner, with no public consultation or possibility for reviewing and challenging electoral boundaries. The delimitation process merits greater consideration as it is potentially one way in which results could be manipulated, as seen in other counties around the world.

The design of ballots and the order in which parties and candidates appear on the ballot is another issue of concern. Mayoral candidates and candidates for single member districts are ordered alphabetically on the ballot, with parties placed in the order in which they submit their lists of candidates. Several stakeholders expressed concern that the electoral process indicates that the procedure of party ballot ordering has been manipulated to ensure that particular political parties obtain the top positions on the ballot. It is recommended that the Local Election Law be amended to require a public lottery to take place to determine the order of candidates and parties on all ballots used for local government elections.

A consistent concern raised by those interviewed as part of the assessment concerned the possibility of manipulating results through inserting fake results protocols into the process. There is currently no requirement for Territorial Election Commissions or the Central Election Commission to post or publish results by precinct. This important issue can be dealt with effectively through transparency in the results tabulation process. The OSCE's Guidelines for Reviewing a Legal Framework for Elections (page 29) states that all electoral document should be publicly accessible, and that, "detailed tabulations of overall results, including the voting results in each polling station, should be posted at each election commission". While copies of results protocols are shared widely with observers and candidate agents in the precinct, tabulated results showing the protocols submitted by each Precinct Election Commission should be made publicly available as soon as the overall result is published.

Concerns about the manipulation of results are also expressed by some when discussing changes made in the new Local Election Law to the decision making arrangements of Precinct Election Commissions. On election day the quorum of 50% of members required at other times is no longer necessary, and a simple majority of members present (but not less than 3 members) can take a decision (Article 27(4)). This amended voting procedure on election day allows the potential for decisions about election results to be taken by a few members of the Precinct Election Commission and should be removed.

#### **4. Voter Registration**

The act of voting is a fundamental human right identified in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The Council of Europe's Code of Good Practice in Electoral Matters clearly states that, "The proper maintenance of electoral registers is vital in guaranteeing universal suffrage". The OSCE's Existing Commitment for Democratic Elections in OSCE Participating States declares that, "Voter lists should be current, accurate, complete, easily accessible for inspection by qualified voters". Ukraine should be commended for taking significant measures to achieve these obligations through the development of an automated voter registry, moving from a paper-based system of voter lists used up to and including the 2007 parliamentary elections. The new State Registry of

Voters was first used in the 2010 Presidential Elections, and currently draws its sources of information from the Ministry of Interior and other state agencies.

Despite this new system of voter registration, some concerns persist about the voter registration process. On a principal level, concerns were raised through an earlier IFES assessment about the lack of control of the voter registration process by the Central Election Commission. While it is the custodian of the registry, it has seemingly little control over the activities of the Registration Management Bodies, who are subjects of local authorities.

Voters are able to change their voting address on a temporary basis through an application to the Registration Management Body. As this process is easier to conduct than a formal re-registration of voting address through the Ministry of Internal Affairs, many voters choose to use this ‘temporary’ procedure to register a new voting address. This new registration address is normally maintained between elections. However, Article 3(1) of the Local Election Law requires that voters be members of the local community in order to participate in local elections and it appears that the changes in voter addresses submitted through this ‘temporary registration’ process will be reversed for the local elections. Voters will likely be unaware of this administrative decision by the Central Election Commission and many could turn up on election day unaware that their voting address has been changed. According to the State Registry of Voters, this could affect up to half a million voters whose addresses may revert back to their legal residence address.

The new Local Election Law changes the registration procedure for home voting by people who are unable to attend the precinct on election day. Previously, medical certificates explaining why the voter could not attend the precinct had to be included in applications for home voting, but this is no longer required. The conduct of voting outside of the precinct is always a concern, if only because it is more difficult to observe and ensure that appropriate voting procedures are complied with. Therefore, the Local Election Law should restrict such home voting to that which is absolutely necessary, and require appropriate supporting documentation.

In Ukraine voters can still be added to the voter list on election day. The OSCE Election Observation Report for the 2010 Ukrainian Presidential Election noted its concerns about this voter registration on the day of election. According to paragraph 1.2. of the Explanatory Report to the Venice Commission Code of Good Practice in Electoral Matters, polling stations should not be permitted to register voters on election day itself. Given historical issues concerning same day registration, it may be wise to eliminate this practice from Ukrainian elections.

As noted in the OSCE/Venice Commission Joint Opinion on the Law Amending Some Legislative Acts on the Election of the President of Ukraine, changes were made to Article 158 of the Criminal Code related to multiple voting. The Opinion noted that this law had been changed to impose criminal liability for “repeat voting at a polling station by a voter”. This seems to allow multiple voting in different precincts. These changes are also relevant to the local government election process. This article of the Criminal Code should be changed to make it clear that it is an offence to vote multiple times, whether in the same precinct or not.

Failure to address the above noted concerns and deficiencies, creates significant opportunities for, and maybe more importantly a perception of electoral fraud, and will have a detrimental impact on the public confidence in the election and by extension the legitimacy of elected bodies.

## **5. Training**

The training of electoral officials is an important aspect of electoral preparations as electoral officials cannot be expected to understand their responsibilities and to implement electoral laws and regulations properly if they have not been trained to do so. This training needs to be delivered to all levels of Election Commissions, and is especially necessary due to the widespread changes made to the Local Election Law, including the use of different electoral systems. The importance of training is also recognized by international electoral standards, as seen in the UN's Handbook on the Legal, Technical and Human Rights Aspects of Elections. This states that, "the dates set out for each phase of the (electoral) process must allow adequate time for . . . training and logistic arrangements to be made".

The passage of the Local Election Law so close to the date of the election, at the end of July 2010, and subsequent amendments made to this law on 31 August 2010, make the development and implementation of the required training virtually impossible. The creation and approval of materials based on the new legislation, printing and distribution takes time. Likewise, establishing a training team, recruiting and training trainers, implementing trainings across a network of hundreds of Territorial Election Commissions and over 30,000 Precinct Election Commissions is a huge logistical and technical task.

Furthermore, Article 23 of the Local Election Law states that Precinct Election Commissions are constituted only 15 days before the elections, making the training of these Commissions very difficult. The logistics of training 30,000 Precinct Election Commissions with between 10 and 24 members on each Commission is staggering, involving training in the region of half a million electoral officials. Given that Precinct Election Commissions also have substantive work to do before election day, the training window for these election officials is too short. Precinct Election Commissions should be established sooner in order to allow the possibility of receiving training.

While there are members of the Central Election Commission and staff within the secretariat structure assigned to training responsibility and functions, there appears to be no training unit or academy. The absence of such a structure will make it continuously difficult for the Central Election Commission to respond to elections, especially elections scheduled in such a short timeframe as the current local elections. For these elections, the delegation was informed by the Central Election Commission that it has no obligation to provide training for the Election Commissions. However, the Central Election Commission did secure funds in September for providing copies of the law and all regulations and other decrees to the Territorial Election Commissions.

Training efforts have largely been supported in elections past by the international community. Previous USAID funded election programs have contained significant training support from at least as far back as the mid 1990s, and more recently training for parliamentary and presidential elections had been provided by the OSCE Project Coordinator in Ukraine in cooperation with the Central Election Commission, but this is not the case for this election.

Ukraine's territorial administrative structure requires more than 20,000 elections to be held simultaneously. This requires election officials to administer several elections in each precinct at the same time. Mistakes in results protocol compilation will and have, delayed vote counting procedures significantly in Ukraine. Any delay in polling station results will lead to eventual delays in certification and announcement of final results. Such delays further undermine public confidence in the electoral process. These real concerns underscore the need for sufficient and comprehensive training and preparation of all Territorial and Precinct Election Commissions.

## **6. Voter Education**

Educating the electorate is an important aspect of any electoral process. This includes among other things describing to voters the electoral system, instructing voters on voter registration and ballot casting procedures, delivering information on candidate platforms, and inspiring or motivating citizens to participate in the electoral process. Numerous international documents refer to the state's obligation to provide for such education, such as the UN Human Rights Committee General Comment 25, OSCE Existing Commitments for Democratic Elections in OSCE Participating States, amongst others. Although Ukraine has experience with both majoritarian and proportional systems in both the parliament and local elections, the 2010 local elections nevertheless represents a significant change in electoral system for voters. The need for voter education is therefore significant and is matched by an obligation to provide such voter education materials.

The Local Election Law (Article 13) also requires Electoral Commissions to provide voter education on various topics. These topics include important issues such as the establishment of electoral districts, the general rights of voters, and instructions for voting. In practice such voter education at all levels is unlikely as there is no budget for these Commissions to conduct voter education campaigns, the Commissions are formed so late in the process as to make the conduct of these education campaign impossible, and there is no expertise to develop and deliver the necessary voter education materials.

This is a clear area where guidance and materials are required from the Central Election Commission, but the Central Election Commission appears to play little role in this process. The OSCE's Project Coordinator in Ukraine has been providing some assistance to the Central Election Commission with voter registration awareness and education materials, however this activity is an ongoing one and not specifically related to the upcoming election. It is recommended that the Central Election Commission take the lead on developing voter education materials, although the time available to do so is very short now.

One issue of voter information is clearly required by the Local Election Law, and this is the invitation slip that is required, under Article 31, to be sent out by the Precinct Election Commission to all voters. This voter invitation slip informs voters about the election taking place and the place at which they are registered to vote. The invitation is approved by the Central Election Commission and issued prior to election day.

In one important respect the information available to voters for local elections has been diminished. Under the previous election law, candidates and parties were required to submit as



part of their nomination papers an election program outlining their planned policies. This electoral program was made available to voters by the relevant Election Commission, providing a significant source of information to voters to use in deciding which candidate to support. The submission of this electoral program is no longer required in the Local Election Law, and consideration should be given to including this requirement again in future local elections.

## **7. Election Dispute Resolution**

Ukraine has a comprehensive legal process for the adjudication of complaints related to the electoral process. The relevant sections of the Local Election Law, Articles 85-90, regulate the procedures for challenging violations of election laws and the adjudication of disputes by Election Commissions at all levels. In addition to this, the Code of Administrative Adjudication of Ukraine requires that all claims be adjudicated in accordance with Articles 172-179 of the Code.

This legal framework establishes the rights not only of voters and candidates to submit complaints concerning electoral violations, but also extends this right to a host of electoral stakeholders, including local branches of political parties and official observers. Challenges can be submitted by these stakeholders against the decisions, actions or inactions of the Election Commissions, state bodies and officers, media, candidates, candidate agents, political parties and observers. While the legal framework for the adjudication of election disputes is therefore well established, there are some ways in which it could be improved.

The Venice Commission's Code of Good Practice in Electoral Matters states that the procedure for the submission of complaints must be simple and devoid of formalism, especially with respect to the submission of complaints. The procedure should not therefore be devised in such a way that substantive complaints are dismissed on technical grounds because of procedures for submission which are complex or difficult to comply with. In this regard, the Local Election Law governing the submission of complaints to an Election Commission appears to require a very high standard of information. Article 87(1) of the Law requires that complainants provide the phone number and email address of defendants, as well as indicating the "clearly formulated demands and the core of the decision . . . which a complainant is looking for". The former requirements may not be known to the complainant, and the latter require a far greater understanding of legal remedies that is reasonable for the average complainant.

The result of these requirements for the submission of complaints to an Election Commission means that it may be easier for a complainant to submit a complaint to the Courts under the Code of Administrative Adjudication of Ukraine, than to an Election Commission under the Local Election Law. Moreover, they may give relatively easy grounds for an Election Commission to dismiss a complaint. This would unduly restrict the opportunities of complainants to seek effective redress for electoral complaints, and accordingly the Local Election Law should be amended to simplify the procedure for submission of complaints.

A second concern with the election dispute resolution process relates to the timeframe for adjudication of disputes under the Code of Administrative Adjudication of Ukraine and the Local Election Law. Complaints to the court have to be lodged within 5 days of an electoral violation taking place, to an Election Commission within two days, and for a violation in a precinct by the

close of polls in that precinct. In all cases the court or Election Commission is to adjudicate the complaint within 2 days.

While such timely resolution of electoral disputes is to be commended, it is unclear if such speedy resolution provides the opportunity for potentially complex disputes involving a number of parties to be resolved in accordance with due legal process. The timeframes for such adjudication of disputes should be reconsidered and amended if required to ensure that due legal process can be applied in the resolution of these disputes.

Furthermore, the powers of the courts to apply a remedy that is effective in practice as well as law needs to be considered. This is of particular relevance to the timeliness of decisions of the courts, and the ability of the court to order a decision that will be immediately executed. The Code of Administrative Adjudication of Ukraine only permits for decisions to be immediately implemented with respect to decisions on the voter lists. All other decisions are only executed when they have entered into legal force, which only takes place after the possibility for and process of appeal has been concluded. This can mean that in legal terms a complaint may be upheld, but in practice the rights of the complainant are not effectively protected.

## **IFES CONCLUSIONS AND RECOMMENDATIONS**

The system of local government in Ukraine, as defined by the Law on Elections of the Deputies of Verkhovna Rada of Autonomous Republic of Crimea, Local Councils and Village, Town and City Mayors, is highly complex. The new version of this legislation only passed into law at the end of July and contained many significant changes to the electoral legal framework. While there were some positive developments in this new law, there were also many aspects of the new law which seem to entail deterioration in the legal framework for the conduct of elections.

In some cases changes to the law have weakened the legal framework and its compliance with international electoral standards, in other cases the law has been left vague or devoid of guidance. Where the law lacks clarity, this lack of clarity could be used to manipulate the electoral process and this is a serious cause for concern.

The late passage of new legislation and lack of clarity provided by this legislation has raised concerns by many about the likelihood of free and fair local elections on 31 October 2010. In this regard it is incumbent on the Government of Ukraine and the Central Election Commission to ensure that the following recommendations are implemented in order to support the conduct of legitimate local elections on 31 October and in the future:

### *Legal Framework*

- The Government of Ukraine should commit to complying with the Venice Commission Code of Good Practice in Electoral Matters and not pass important pieces of electoral legislation less than 1 year before the conduct of elections under that legislation.
- In line with established political practice in Ukraine, political blocs should be allowed to stand for election in local government elections.

- The right of candidates to seek election on an independent basis, absent of political affiliation, should be restored for Mayoral candidates at all levels and established for candidates in majoritarian elections to local councils.

#### *Formation of Lower Level Election Commissions*

- Legal provisions concerning the submission by political blocs of nominees for Territorial Election Commissions need to be re-examined to ensure a fairer distribution of members between bloc members.
- Individual lotteries for each Territorial Election Commission should be held to select the non-parliamentary party representatives on these Commissions in future.
- The executive positions on Election Commissions should be allocated in a fairer manner, such that political parties and blocs receive a roughly proportional allocation of these positions on Territorial Election Commissions and lower level commissions.
- The process to be followed by Territorial Election Commissions in selecting Precinct Election Commission members and executive positions should be clarified by the Central Election Commission in order to ensure fairness and proportionality in these selection processes.

#### *Conduct of Elections*

- The Central Election Commission should develop a Code of Conduct for Electoral Officials which clearly outlines the duties and responsibilities of electoral officials to implement elections according to the law and regulations, and in an independent and neutral manner.
- Remove the possibility for recall of political party representatives on Election Commissions from the law, or properly regulate this power to ensure that such recall is not used to influence the work of a member of an Election Commission.
- The law should require that Election Commissions issue public notification of all meetings at least 24 hours in advance of the meeting.
- The process of delimitation of single member constituencies should be more clearly defined and open in the future, with the possibility of challenge by electoral stakeholders.
- The Local Election Law should be amended to require that a public lottery take place to determine the order of candidates and parties on all ballots used for local government elections.
- Tabulated results showing the protocols submitted by each Precinct Election Commission should be made publicly available as soon as the overall result is published.
- The quorum requirement for decisions by the Precinct Election Commissions on election day should be re-instated.

#### *Voter Registration*

- The Central Election Commission should inform voters that previous amendments to voting addresses submitted through the ‘temporary change of address’ process will not remain in effect for the local government elections. Voters should also be encouraged to check their voting details to ensure that they are able to vote on election day.

- The Local Election Law should restrict such home voting to that which is absolutely necessary, and require appropriate supporting documentation from voters applying to vote at home.
- Given historical issues related to same day registration in Ukraine, it may be wise to eliminate this practice from elections in Ukraine.
- Article 156 of the Criminal Code should be changed to make it clear that it is an offence to vote multiple times, whether in the same precinct or not.

#### *Training*

- Precinct Election Commissions should be established sooner in the electoral timetable in order to allow the possibility of receiving training.
- The Central Election Commission should establish a training unit tasked with developing training materials and training plans to ensure that all electoral officials receive appropriate training before the conduct of any electoral events.

#### *Voter Education*

- It is recommended that the Central Election Commission take the lead on developing voter education materials for the local government election, although the time available to do so is very short now.
- Consideration should be given to reestablishing the requirement for candidates and parties to submit electoral programs as part of their nomination papers in future local elections.

#### *Election Dispute Resolution*

- The procedures for submission of complaints to the Election Commissions under the Local Election Law should be simplified so that they do not unduly restrict the opportunities of complainants to seek effective redress for electoral complaints.
- The timeframes for the adjudication of disputes should be reconsidered and amended if required to ensure that due legal process can be applied in the resolution of these disputes.
- Revisions to the Code of Administrative Adjudication of Ukraine should be considered to ensure that where appropriate the court has the authority to order a decision that will be immediately executed, if necessary to protect the electoral rights of a citizen.

### **SECTION III. DELEGATION MEMBERS AND METHODOLOGIES**

The NDI delegation was co-led by David Collenette, Canada, and Katie Fox, United States. Collenette served as a member of the Canadian House of Commons for more than 20 years. He has headed a number of ministries in Canada, including State-Multiculturalism (1983-84), National Defense (1993-96), Veterans Affairs (1993-96); Transport (1997-2003) and Crown Corporations (2002-03). He also co-led the NDI observer mission to the Ukrainian presidential run-off election in November 2004. Katie Fox is NDI's deputy director for Eurasia programs and has monitored Ukrainian elections since 1998. Jennifer Collins-Foley, the director of the Center for National Policy, has served as an advisor to the U.S. Electoral Assistance Commission has overseen elections in Los Angeles County and other jurisdictions in the U.S., has monitored

elections in eight countries with NDI and OSCE and was previously director of NDI's Moscow office. Eka Siradze Delauney, is Executive Director of the International Society for Fair Elections and Democracy (ISFED), a leading Georgian non-governmental organization. Eka has participated in many election monitoring missions with OSCE/ODIHR. She is representing the European Network of Election Monitoring Organizations (ENEMO).

The IFES delegation was comprised of Gavin Weise and Ben Goldsmith. Gavin Weise currently serves as IFES' Deputy Director for Europe and Asia. From 2003 till 2008, Weise worked in Ukraine for various international organizations implementing programs in democratic development. He has been an observer with several organizations in over a dozen elections in the Eurasia region. Ben Goldsmith currently serves as IFES' Chief of Party in Pakistan and has over 10 years of experience advising and managing election administration projects in post conflict and developing democracies. Goldsmith has helped to conduct elections in Bosnia, Kosovo, Afghanistan, Iraq and the United Kingdom.

The delegations' purposes were to demonstrate the interest of the international community in the development of a democratic political process and democratic governance in Ukraine, and to present an accurate and impartial assessment. The pre-election period, including electoral preparations and the political environment, must be given weight when evaluating the democratic nature of elections. An accurate assessment of any election must take into account all aspects of the electoral process. These include conditions set up by the legal framework for the elections and the pre-election period before and during the campaign.

The delegations conducted their activities in accordance with the laws of Ukraine and the Declaration of Principles for International Election Observation, which embraces the principles of noninterference, impartiality and professionalism for international election observers.