

TESTIMONY

PREPARED FOR THE SENATE FOREIGN RELATIONS COMMITTEE'S SUBCOMMITTEE ON
AFRICAN AFFAIRS

“Hearing on the Immediate and Underlying Causes and Consequences of Flawed Democracy in Kenya”

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Chairman Feingold, Senator Sununu; thank you very much for inviting me to appear before the Subcommittee on African Affairs this morning to share my assessment of the current situation in Kenya and its consequences for the future of democracy in that country, and in the region. My knowledge of Kenya and its tortuous quest for democracy is based on following its politics since my first visit to the country as a student in 1962, my academic research, and my work there for USAID as the first democracy and governance advisor in the early 1990s, and subsequent work there for USAID and the World Bank.

Time is short so I am going to condense my remarks into a series of bullets under four headings: (1) The 2007 elections in historical perspective. (2) The political stalemate, violence and economic losses that have followed the elections. (3) The prospects for breaking the stalemate under the African Union mediation effort led by Kofi Annan. (4) What the US should do to support the Annan effort. Before doing so, however, I want to commend you, Mr. Chairman and your fellow Senators for the resolution on Kenya passed by the Senate last Tuesday, January 29th. I hope this will encourage the Administration to be more proactive in its effort to encourage a negotiated and lasting settlement to the current crisis.

The Elections in Historical Perspective: Expectations vs “20-20 Hindsight”

- The elections which triggered the current crisis were the fourth since Kenya returned to multiparty politics in 1992, and were to be the crowning event in the country's 20 year struggle to establish democratic governance.
- Each of the two previous elections held in 1997 and 2002 were better than the one that preceded it, and the expectation and hope was that the 2007 elections would also be better than the last. The 1992 election—Kenya's first multiparty election in 24 years—was a “C minus” election despite heavy engagement by the United States. The playing field before the election was not level. The electoral commission was neither independent nor neutral. Opposition candidates were continuously harassed. And there was widespread violence in the western Rift Valley on a scale equal to that

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which has occurred during the past month—nearly 1,500 killed, and roughly 250,000 Kikuyu settlers displaced from their homes in the western Rift Valley. The one bright spot in that election was that for the first time in Kenya's history, roughly 8,000 domestic observers established a toehold in the electoral process with the active diplomatic and financial support by the United States and like minded donors.

The 1997 election was better but still flawed—a “B minus” election. It was also associated with violence but the number of domestic observers nearly doubled, and the election was preceded by a series of “mini-constitutional reforms” that enlarged the electoral commission to include commissioners nominated by the opposition and other reforms—most notably that the then president of Kenya, Daniel arap Moi, would no longer nominate 12 members to the National Assembly on his own, but on the recommendation from Kenya's political parties to reflect the proportions of seats each party won in the elections. This resulted in a near parity of seats between government and opposition in the National Assembly. From that point onward, Moi could no longer govern Kenya on his own. Most notably, and with US support, the National Assembly began to emerge as a legislature to be reckoned with, and a check on executive power.

The 2002 election was better still—a “B plus/A minus” election—the logistics were better; harassment of opposition candidates all but ceased, *all* polling places covered by an increasingly robust and sophisticated cadre of 24,000 domestic monitors, and Kenya experienced its first alternation of government via the ballot box (though not the defeat of the incumbent president) since independence. That election brought Mwai Kibaki to power as head of a broad based pan-ethnic coalition in which Raila Odinga campaigned tirelessly for Kibaki and arguably won him the election. Unfortunately, their alliance was short lived as Kibaki chose to rely heavily on a small group of elderly cohorts from his own ethnic group, the Kikuyu, and two related groups, the Embu and the Meru. The result was both an ethnic divide *and* *generational divide* that polarized the country and set the stage for the current standoff. (For details see my 2004 article, “Kenya After Moi” in *Foreign Affairs* at www.foreignaffairs.org and my more recent articles, “Too Close to Call: Why Kibaki Might Lose the 2007 Election” and “Breaking the Stalemate in Kenya” at www.csis.org/africa which I submit for the record).

- Notwithstanding Kenya's polarized political climate, the expectations for the recently concluded elections were very high. Although polls indicated that the election was too close to call and that the temptation to engage in fraudulent practices by both sides was therefore very high, most Kenyans as well as the international community believed that the leaders of both of the two largest parties [the Party of National Unity (PNU) and the Orange Democratic Movement (ODM)], and the Electoral Commission of Kenya (ECK) would rise to the occasion. These expectations were based on five considerations: (1) Kenya's fine record at democratization during Kibaki's presidency, arguably the best since independence. (2) The country's resurgent economy. (3) The pre-election campaign which was largely “free and fair” though there were some isolated incidences of violence. (4) The preparations for the

elections by the ECK and the near universal confidence in its chairman, Samuel Kivuitu. (5) The expectation—especially by the international community—that the effort by domestic monitoring organizations would be as robust as in 2002.

- In the aftermath of the elections and with “20-20 hindsight” we now know that the international community, including the United States, was overly complacent about how the polls would unfold in at least three ways: (1) The fact that the register of voters was not fully purged of deceased voters was largely ignored by advisors responsible for following the run-up to the election. With the voters rolls inflated by 5-10 percent, a fact acknowledged by the chairman of the ECK three weeks before the election, the prospect for inflating the vote without getting caught was very real. (2) Too much focus and emphasis was placed on the person of Sam Kivuitu rather than the ECK as a whole. The international community lobbied hard for his reappointment as chair of the Commission to guarantee a well administered poll, but paid insufficient attention to the appointment of five new commissioners by Kibaki or the procedures for reporting the vote. (3) The international community also missed the fact that Kenyan civil society failed to reestablish the robust organization for domestic observation that it had mounted in 2002. (4) Last but not least, the United States failed to respond quickly to the problems that unfolded during the two days after the election. Indeed just the opposite. The State Department issued a statement of congratulations to the Electoral Commission on its handling of the election on the very day—December 29, 2007—that the election came apart at the seams. That statement was later amended on December 31st.
- I was in Kenya as an international observer for the International Republican Institute (IRI) and witnessed what most nearly all other international observers saw: An election that was reasonably well administered on election day—the polls opened roughly on time; the presiding officers were adequately trained; there were adequate supplies of ballots and other required materials; all or nearly all voters who wished to vote did so by the time the polls closed; the counting of the paper ballots at the polling stations was transparent. The problem occurred in the tabulation of the vote at the ECK office at each parliamentary constituency, and in the reporting and tabulation of the total vote at the ECK headquarters back in Nairobi.
- Fraud in the form of inflating the vote was arguably perpetrated by both sides, but there is little doubt in my mind that it was far greater by supporters of President Kibaki. For details, one can consult the statements and reports by KEDOF, the Kenyan Domestic Observer Forum, and by the European Union which mounted the largest (over 130 members) and most intensive monitoring operation involving international observers. While it is impossible to argue with certainty that Raila Odinga won the election, it is possible to argue with near certainty and evidence that Mwai Kibaki did not win. Indeed, Kibaki may also have failed to meet the requirement that the winning candidate received at least 25 percent of the vote in five of Kenya’s eight provinces, a test Raila Odinga easily passed.

- Although the European Union rightly called for an internationally supervised forensic audit immediately following the election, it does not really matter at this juncture who in fact won the election if in fact it can ever be determined. Rather, the principal outcome of the election was that neither Kibaki and the PNU nor Odinga and the ODM was supported by more than 43-46 percent of the population. Neither side can govern Kenya by itself.
- That in turn means that some form of power sharing deal is imperative to resolve the current crisis.

Stalemate, Violence, Economic Loss

- The political stalemate resulting from the elections is slowly becoming a “hurting stalemate,” but until both sides recognize the costs in both lives and economic losses neither side will begin to negotiate seriously over a power-sharing deal. This is the reality of the present situation and the challenge to former UN Secretary-General Kofi Annan as he tries to mediate an agreement for the modalities of negotiations. In the meantime the costs to Kenya mount.
- The extent of the violence occurring across Kenya has been vividly brought home by the international media, and by the reports issued by such respected organizations as the Kenya National Human Rights Commission, the Kenya Human Rights Commission, Human Rights Watch and the International Crisis Group: More than 1,000 have been killed and more than 300,000 people displaced from their homes. Although toll has only now reached the total of the violence that occurred in the run-up to the 1992 elections, it is more widespread geographically, and its perpetrators and victims are Kenyans on both sides of the political divide and members of at least five ethnic groups—the Kikuyu (especially in the western Rift Valley and in the town of Kisumu), the Luo (in Nairobi), the Kalenjin (in Nakuru and Naivasha), and the Luhya and Kisii in scattered areas. While the initial violence immediately following the election may have been spontaneous, it is clear that most of the present violence is organized, politically motivated and conducted by informal militias and gangs.
- The police have also clearly contributed to the current situation of unrest. It is also unclear whether the police including its paramilitary units have the capacity to contain further outbreaks of violence. Rather it will require an intensive effort at the grassroots by prominent political leaders including members of the Kenya National Assembly (i.e. MPs) to persuade their followers to put down their weapons and return to their homes. If there is a bright sign in the current crisis it is that there *is* now such a group of 105 MPs known the IPPG II,² that is beginning to directly engage the population in this way. The IPPG II is also committed to enacting constitutional reforms to resolve the crisis and achieve a lasting peace.

² IPPG II refers to the first Inter-Parties Parliamentary Group (IPPG I) that diffused the violence and later passed a package of “mini” constitutional reforms prior to the 1997 elections.

- The economic costs of the crisis are mounting at roughly \$500 million a week and now exceed all the economic aid that Kenya receives annually. Kenya's thriving tourist industry is all but dead. Kenya's horticultural exports have been adversely affected as have Kenya's prospect for attracting foreign direct investments to accelerate the growth of a emerging call-center industry. Shares on the Nairobi Stock Exchange have dropped 25 percent while the Kenya shilling has fallen 13 percent against the dollar. The ripple effects are spreading throughout the region—to Uganda, Rwanda, eastern Congo and the Southern Sudan as these landlocked states cannot move their exports and imports through the Port of Mombasa. Gas in Kampala, Uganda is now reported to be \$15 a gallon.

Breaking the Stalemate: Will the Annan Mission Succeed?

- As indicated above, the current political stalemate will not be resolved nor will a permanent peace be restored without a negotiated arrangement for power-sharing between the two sides. What does power-sharing mean? First, it does *not* mean a mere sharing of positions in a government of national unity (GNU). While this may be one mechanism for moving to a permanent settlement it is not the objective of Raila Odinga and the ODM. Indeed, they have been there before—following the 2002 election. Instead, any lasting power-sharing agreement will require an agreement on institutions—the conclusion to Kenya's long delayed quest for a new constitution, a quest that has unfolded in fits and starts since 1992.
- While the Annan mission has focused on four sets of issues—(1) ending the violence, (2) dealing with the humanitarian crisis, (3) dealing with the political crisis and (4) addressing long-term socio economic grievances—only the third and the fourth will restore order. However, it is unclear whether and how, under item (3) Annan and the rival negotiating teams are focusing on three sets of constitutional issues that must be ultimately be resolved. These are:
 1. *Establishing the institutional modalities to guarantee that future elections in Kenya are “free and fair” and will not be compromised like the just concluded poll.* These include but are not limited to: (i) The future method of appointment of members of the Election Commission of Kenya, their terms of office, etc. (ii) Procedures to insure the future accuracy and integrity of the register of voters. (iii) Procedures beyond the current procedures to insure the future accuracy and transparency of the tabulation and reporting of the vote from the polling stations to the public. (iv) Procedures for auditing the vote should disputes arise. (v) The resolution of other issues including the design of Kenya's electoral system—whether it should retain the present system of “first past the post”, whether more parliamentary constituencies should be established, whether constituency boundaries should be redrawn, etc.—also need to be determined.
 2. *Redressing the balance of power between the executive and legislative branches of government.* Although the Kenya National Assembly has in recent years

expanded its powers, Kenya remains a presidential system with most power concentrated in the office of the president. Whether Kenya will now adopt a parliamentary system of government as Raila Odinga has called for in the past or whether there will be modest changes to the constitution is hard to determine. The retention of a presidential system, however, will, at a minimum require the repeal of the president's power to prorogue, suspend, and dissolve parliament, and a constitutional amendment that specifies that MPs will henceforth be elected for fixed terms of five years. Other outstanding issues are whether the National Assembly will ratify judicial appointments, approve borrowing by the government, as well as parliament's role in the budgetary process.

3. *Devolution and Federalism* The most contentious issue is whether and in what forum Kenya will be restructured as a federal political system, and if so what the balance of powers between the center and subnational units of government will be. The issue has been the focus of all constitutional debates in Kenya for more than fifty years, and must be resolved on the basis of consensus and a negotiated settlement. Kenya is today a centralized political system, and the continuation of this arrangement is strongly favored by President Kibaki and the PNU, and especially by the Kikuyu which are the largest (22 percent) and most prosperous of Kenya's 42 ethnic groups. Raila Odinga and the ODM, however, favor some form of devolution as the mechanism for accommodating the needs and addressing the grievances of Kenya's other groups, none of which constitute more than 12 percent of the population, and most of which are poorer compared to the Kikuyu.

Discussion in Kenya over federalism or *Majimbo* as it is termed in Swahili is highly emotional. It need not be, and the Annan team, or its successor must diffuse the emotive aspects of federalism by disaggregating it into its various components as details to be negotiated and resolved. These include (i) the number of regions or states to be established to accommodate group interests. (ii) The assignment and balance of powers between the central government and the states. (iii) The determination of boundaries, (iv) Determination of the sources of adequate revenue for the regions or states. (v) The rights of ethnic minorities residing within any new states or regions. The experience of India and Nigeria suggest that the resolution of these issues can go a long way in reestablishing peace in a multiethnic and plural society.

- It is unclear as of this writing whether the rival negotiating teams representing the ODM and the PNU and meeting under the guidance of Kofi Annan will reach agreement on these issues. While the costs of the current stalemate are clearly "hurtful" to both sides, the main impediment to serious negotiations and a viable agreement are the small group of "hardliners" in both camps who still do not accept the need for true power-sharing to resolve the crisis. This is especially true of the hardliners around president Kibaki.³ While Raila and ODM have informed Kofi

³ Hardliners associated with the president are Njenga Karume, the former Minister of Defence; John Michuki, the former Minister for Internal Security and current Minister for Works; Marthua Karua,

Annan that they are willing to negotiate the thorniest of issues to resolve the crisis, the team representing the PNU have not. Indeed, their *modus operandi* appears to be that of stalling for time. Evidence of this intent is the PNU's rejection on Monday of Cyril Ramaphosa of South Africa, as the mediator to succeed Kofi Annan and to hammer out a final agreement. What is puzzling, and very disturbing is that as the human and economic costs continue to mount, including costs to the Kikuyu business community that has heretofore supported Kibaki, that the hardliners around him seem prepared to bear these costs.

What the United States can and should do to restore political stability in Kenya.

- Although the United States was embarrassingly slow to recognize the shortcomings of the elections, the two visits to Kenya by Assistant Secretary of State Jendayi Frazer, and the Administration's coordinated effort with the United Kingdom and the European Community to support the Annan mission are to be commended. That said, we need to be much more proactive in pressuring the hardliners on both sides, especially those surrounding president Kibaki and perhaps Kibaki himself to engage on the most difficult issues. We must impress on both sides that neither can govern until the issues outlined above, including the need to amend or replace Kenya's current constitution are the basis for long-term peace, a return to economic growth and democracy.
- In this regard the United States should:
 1. Articulate with greater specificity what issues need to be resolved. This is not rocket science as they have been focus of constitutional discussions in Kenya for many years.
 2. Offer technical assistance, as required, to facilitate the negotiation of the details of the aforementioned constitutional issues (especially on the contentious issue of devolution) as well as the reestablishment and reconfiguration of the electoral commission and electoral procedures.
 3. Institute, with immediate effect, travel bans and asset freezes on the hardliners and coordinate such targeted sanctions with the United Kingdom and European Union to insure their efficacy. Extending such bans to family members of hardliners including those whose sons and daughters are residing in the United

Minister of Justice and member of the PNU negotiating team; George Saitoti, Minister for Internal Security; George Muhoho, Executive Chair of the Kenya Airports Authority; Joe Wanjui, leading businessman and long associated with Kibaki; Eddy Njoroge, chair of the Kenya Power Generating Authority and part of the highly unpopular Transcentury Group; General Cyrus Karingithi, retired army commander; Nicholas A.G. Wanjohi, Vice-Chancellor, Jomo Kenyatta University. ODM "hardliners" include William Ruto, a member of the negotiating team, Henry Kosgei MP and Ruto associate; Sally J. Kosgei, MP for Aldai and head of the civil service under former president Daniel arap Moi; Samson Cherambos, former GSU commander; ole Ntimama, MP; Zakayo Cheruiyot, former permanent secretary for internal security under Moi and other Kalenjin leaders linked to the violence against Kikuyus in the western Rift Valley.

States and Europe should be considered. The possibility of targeting of the personal economic interests of hardliners within Kenya should also be explored and if viable pursued.

4. Public diplomacy in support of Kenyan civil society to pressure their leaders to resolve the crisis. This would include support for such diverse groups as the Kenya Human Rights Commission, the Kenya Private Sector Alliance, the Kenya Association of Manufacturers, and the recently formed group of more than 200 CEOs who are growing increasingly impatient with the failure of the country's political leaders to resolve the crisis.
5. Public diplomacy in support of the group of 105 members of the National Assembly who have initiated the IPPG II coalition to resolve the crisis. IPPG II represents a classic "track 2" opportunity and should be supported as it holds out the prospect of moving faster than the Annan effort and passing its own solutions in parliament.
6. Continue public diplomacy by Ambassador Michael Ranneberger on local FM radio, especially stations that broadcast to distinct ethnic communities, to dampen down the violence. Step up monitoring of such stations and consider selective jamming those that broadcast hate speech. Explore what technical assistance (i.e. software), if any can be provided to Kenya's mobile phone providers such as Safaricom to block text messaging that promotes violence between ethnic groups.
7. Suspension of aid? This should only be done as a last resort recognizing that "the aid card" in Kenya is a much smaller percentage of the Government of Kenya's recurrent budget than it was during the 1990s when the international community, including the United States, suspended aid on a number of occasions to expedite political and economic reform. That said, the importance of aid, both humanitarian and financial, will rise as the economy declines and the revenues generated by the efficient Kenya Revenue Authority decline.

Thank you Mr. Chairman for your affording me the opportunity to discuss my views on this crisis.

Please see the attached articles and submit for the record:

Joel D. Barkan, "Kenya After Moi" www.foreignaffairs.org

Joel D. Barkan, "Too Close to Call" www.csis.org/africa

Joel D. Barkan, "Breaking the Stalemate in Kenya" www.csis.org/africa