Kenya’s Next Test: Democracy, Elections and the Rule of Law

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It is a pleasure to be here once again. There are few institutions in the world more renowned for the calibre of their policy discussions than Chatham House, and its ‘rule’ is quoted at meetings held in all corners of the world. So thank you Alex, and all the staff, for arranging this discussion at very short notice.

Let me begin by saying that I have, in these two days, held a number of very productive meetings with current and former British government ministers. I feel confident that my message for the need for greater engagement by our international partners in helping to find solutions to the intense current crisis was heard. I also had a very useful discussion with the head of the Anglican Church, Archbishop of Canterbury Justin Welby, who sought my views on the situation in Kenya, about which he was very aware and about which he expressed concern. I value greatly the wise counsel that the Archbishop imparted. I would like to thank all the leaders I have met in this very short visit.

The electoral crisis in Kenya, as all of you in this room know, has been dragging on for months now. This crisis has caused serious economic dislocation and financial suffering for the poor, the middle class and business enterprises large and small. And with each passing day, it is also deepening divisions, polarization and radicalization across the country. But the world is inevitably focused on the August election’s dramatic political consequences, which continue to get prominent coverage in the global media. At the moment, there is particularly intense interest in why I decided, two days ago, to withdraw from the upcoming 26 October election, which I am not certain will be held.

In fact, it should not be held. Our courageous Supreme Court annulled the August election because the Electoral Commission had ‘failed, neglected or refused’ to conduct it according to the law, and it was riven with too many ‘irregularities and illegalities’. No doubt worried that the next election might be conducted in an equally corrupt way, the Court took the remarkable step of explicitly stating in its judgment that it would not hesitate to annul the next election as well if it was not conducted under the laws and safeguards of the Constitution. But, astoundingly, the Electoral Commission has not focused on the essential reforms to the electoral processes needed; instead focusing on inconsequential measures, contending that there was insufficient time to do anything significant. The new election, therefore, is going to be conducted in as corrupt a manner as the one last month and its outcome would in no way represent the will of the people.

We must ask: Is an election held to fulfil some legal requirement, regardless of whether it will be demonstrably free and fair? Elections lie at the heart of democracy. There is no greater symbol, nor more potent expression, of a people’s will and determination to decide the kind of country they want and to choose leaders who are committed to taking them there. But now, after three rigged elections in a row, it is not elections, but democracy itself that is gravely threatened, along with the rule of law that protects it.

We in NASA have insisted that the fresh election be held to the standard ordered by the Supreme Court, that is, in strict conformity with the Constitution and written law. We have provided a checklist of what we deem to be the ‘irreducible minimum’ changes required to ensure compliance. The validity of the checklist of the requirements for free and fair elections proposed by NASA has not been disputed by anyone, not by the IEBC, not by Jubilee or other actors and observers. The EU Observer Mission has made recommendations in conformity with our ‘irreducible minimum’.

Jubilee and the other proponents of an election without reforms are saying ‘any election will do’. But we in NASA are calling for a credible election. In a constitutional democracy, we should not be debating about a free and fair election, or compliance with court orders, or accountability for breach of public trust. We should have been working together to ensure that we uphold these values, as they are not only our
national values, but are also the foundations of a credible electoral system. Instead the IEBC has stonewalled meaningful deliberations on the necessary reforms to ensure that the elections of 26 October are free and fair. It has wasted valuable time engaging in public relations exercises intended to create the illusion of motion without any movement.

We therefore came to the conclusion that there is no intention on the part of the IEBC to undertake any changes to its operations and personnel to ensure that the ‘illegalities and irregularities’ that led to the invalidation of the 8 August election do not happen again. All indications are that the election scheduled for 26 October will be worse than the previous one. My participation in it, therefore, would only legitimize a corrupt exercise. It would also implicitly signal something much more ominous: my acceptance of the current drive by the Jubilee Government to dismantle fundamental democratic rights that Kenyans have struggled and sacrificed for over decades.

It is vital for Kenya’s friends and economic partners to realize that the crisis in Kenya is not only about who was or will be the next lawfully elected President of our great nation. The real crisis is that those in power have abundantly shown - before, during and after this utterly failed election - their determination to hold on to power by any and all means. For example, the effort to subvert the election went beyond rigging to include the torture and murder, a week before the election, of Chris Msando, the Electoral Commission Chief of Technology responsible for the security and integrity of the entire voting system. Because of his renowned integrity, he had received many death threats and had sought police protection in vain, the Electoral Commission’s chairman announced after his death, adding that he was tortured in order to obtain the passwords that protected the tallying and transmission system.

After the August election, and even before the new one, they are moving to dismantle the entire edifice of the rule of law enshrined in Kenya’s Constitution to consolidate their long-term power. For example, after the Supreme Court annulled the election, President Kenyatta, having first saying he accepted the decision, quickly changed tack and threatened to ‘fix’ the Chief Justice and Associates. He accused them of having carried out a ‘coup’ against him, and ridiculed them by asking how only four people could overturn the votes of the eight million people he claims voted for him.

The ruling Jubilee Party has subsequently passed new legislation that will gut many current electoral safeguards and also severely limit the powers of the Supreme Court to annul an election outcome. It will also diminish the authority the Chairman of the Electoral Commission currently has, by making it possible for any member of the Commission to announce the result of a Presidential election. President Kenyatta is expected to sign that legislation into law any moment now. These laws are being changed in the middle of an election cycle. It is like changing the rules of a soccer match at halftime in order to help the home team win.

We know that we have good international partners with deep ties and strong interest in what happens in Kenya and we need them to support Kenyans in this struggle once again to protect and defend its democratic institutions and processes. We recognize that we’re living in a new global order in which security and stability concerns overshadow the long-held Western commitment to support democracy and the rule of law. But any policy which puts security and stability over people’s democratic freedoms and rights is very short-sighted and indeed counterproductive. We do not have to look far to see the tragic result of the strangulation of people’s democratic hopes and economic aspirations. It is such conditions that are linked, amongst others of course, to the rise in extremism, which has destabilized not only their own regions but every part of the globe.
Despite great international interest in the current situation, not many are aware that the crisis in Kenya goes much deeper and, unless it is addressed, will soon shred our society’s security and stability, potentially exposing us to the spectre of the terror always lurking around the corner.

Kenya needs its international partners, who have been stalwart friends in the past, to support Kenyans in this struggle to protect and defend its democratic institutions and processes. Our partners enjoy enormous respect for the role they played in helping us to overcome the decades-long yoke of one-party rule in the 1990s. And in 2007, after the rigged election led to the worst violence independent Kenya had ever seen, it was our partners, in a robust and unprecedentedly speedy intervention, who pulled us back from the brink.

Such was the interest in preserving Kenyan peace that highest-level international leaders travelled to Kenya in search of a durable solution. They included someone I am very pleased to see has joined our discussion today, the great Kenya friend and then British cabinet minister Lord Mark Malloch Brown. Then US Secretary of State Condoleezza Rice also travelled to Nairobi to push for needed compromises. That historic intervention, spearheaded by the former United Nations Secretary-General Kofi Annan, did not merely address the 2007 electoral crisis, but the deep-rooted causes of the violence that successive governments refused to address. It was that well thought-through and caring approach that led to the consolidation of the rights in a new Constitution that engendered a period of vibrant civil society engagement and enhanced national harmony.

Like then, we cannot tackle the current challenge alone. I am aware that the new world that we now live in is less compassionate than what prevailed just a decade ago. But at the same time, there are hugely pragmatic reasons to help preserve the democracy that has given Kenya the stability to become the linchpin for peace and prosperity in our vast and strategic region.