

AFRICA RISK CONSULTING**Country briefing – Kenya****27 October 2014**

1 Summary

President Uhuru Kenyatta (2013 – present) becomes the first sitting head of state to attend a hearing at the International Criminal Court (ICC). The most likely scenario remains the termination or adjournment of the case. Isiolo County residents complain of fresh land-grabbing attempts linked to the Lamu Port South Sudan Ethiopia Transport (LAPSSET) corridor project. Kenya remains Ebola-free.

1.1 President Kenyatta appears at The Hague

President **Uhuru Kenyatta** (2013 – present) on 8 October attended a status conference at the **International Criminal Court (ICC)** in **The Hague (The Netherlands)** where he faces charges of crimes against humanity for his alleged role in the violence that followed the disputed 2007 elections.¹ Kenyatta temporarily delegated his presidential powers to his deputy **William Ruto**, who is currently on trial at the ICC on similar charges.

Kenyatta became the first head of state to appear at the court in person but did not speak at the hearing. His lawyers immediately requested that the ICC throw out the case and give their client a not guilty verdict. The prosecutors instead requested another indefinite adjournment.² Judges at the court will now decide whether there is any chance of a trial taking place, considering that the prosecution has failed to find fresh evidence despite being granted an extra six months to do so.

The case is unlikely to proceed. Prosecutors admitted they still do not have enough evidence to proceed with a trial.³ Many Kenyans who support Kenyatta are increasingly angry at the court's delays and are demanding that the case be thrown out. **Stephen Kay** QC, Kenyatta's lawyer, told the court's judges:

¹ Daily Nation, 8 Oct 2014.

² The Telegraph, 8 Oct 2014.

³ Source, journalist Nairobi



“We are now in the position that this case has failed, and failed in a way that there is no prospect of it going ahead in the future.”⁴

Kenyatta used his appearance for domestic political gain, portraying himself as the “*returning, conquering hero*”.⁵ His motorcade made no fewer than nine stops over the 15-kilometre distance that separates **Nairobi’s Jomo Kenyatta International Airport** from **Harambee Avenue** downtown. Some of his more fervent supporters went as far as declaring that 9 October was “*the greatest day in the history of Kenya*”.⁶

Kenyatta denies five counts of crimes against humanity, including being an “indirect perpetrator” of murder and rape, over his alleged role in Kenya’s post-election violence almost seven years ago, when 1,300 people died. Kenyatta was obliged to attend the status hearing in accordance with the 2011 decision against the **Ocampo Six** (Kenyatta, Ruto, local radio presenter **Joshua Arap Sang** and three other officials or former officials against whom the ICC dropped cases). The ICC ruled that the six would not be detained but one of the conditions of release was that they might be required to attend a status conference. Four status conferences had already been held between Kenyatta becoming president in April 2013 and the latest status conference. One took place in September 2013, two in February 2014 and one in July 2014. The last time the judges saw Kenyatta was via videoconference in February 2013.

“The judges thought the case had reached a critical juncture and that it was important to see him (Kenyatta) in court.”⁷

According to a journalist who is following the Kenyan cases at the ICC, the judges will determine the fate of the case against Kenyatta in the next few weeks.

“I’m expecting them to make a decision in the coming weeks. There is no set schedule, but given everything that they have done so far, my assumption is that it will be before the Christmas break and the court goes into recess on 12 December.”⁸

The ICC judges have two major options, termination or adjournment. Termination could take two forms: the judges can decide to terminate the case “as is” and leave open the possibility for the prosecution to come back in the future and revive the case, or they can terminate the case and say

⁴ Daily Nation, 8 Oct 2014.

⁵ Source, journalist Nairobi

⁶ Source, member of the Kikuyu community, Nairobi

⁷ Source, political analyst

⁸ Source, journalist

that Kenyatta should not face additional trial proceedings. Kenyatta's defence lawyers have been pushing for the second option.

Adjournment could take three forms: the judges can decide to adjourn proceedings until a given date so that the Kenyan government can provide evidence that the prosecutor has been asking for since April 2012. Or they can adjourn *sine die* (adjourned without the court specifying a date for resumption). They could also decide to refer the case to the ICC's **Assembly of State Parties**. That body would then schedule a discussion on Kenya and its alleged lack of cooperation with the ICC. The Assembly of State Parties can either convene a special meeting to do this or decide to discuss the case at its annual meeting. The assembly will hold its thirteenth session from 8-17 December at the **United Nations** headquarters in **New York**. The judges can decide to adjourn the case until the Assembly of State Parties reaches a consensus. Since the assembly has 122 members with widely differing agendas, reaching consensus could take some time. In the final adjournment option, the judges can decide to adjourn the case for a certain period and call on the Kenyan government to provide the evidence that the prosecution has been asking for.

In the meantime the case against Ruto, who is charged jointly with Sang, will resume on 17 November at the ICC. The court has so far heard 25 witnesses for Ruto's case. The last set of witnesses testified in September. Among them was the group of reticent prosecution witnesses that the ICC compelled to testify (see *ARC Kenya September 2014 Briefing*). The prosecution used their testimony to try to show the extent of witness interference. In return the ICC granted them impunity on the basis that they give a full and honest account of what happened. The Ruto and Sang case resumes on 17 November, when the prosecution will continue to present witnesses.⁹

1.2 *Fresh land grabbing accusations arise*

Fresh allegations of land grabbing have emerged around the **Lamu Port South Sudan Ethiopia Transport Corridor (LAPSSET)** mega infrastructure project. The allegations are similar in nature to those that led to the government revoking land title deeds for 2,000 square kilometres of land allegedly acquired "*under dubious and corrupt circumstances*" in August (see *ARC Kenya August 2014 Briefing*). The \$24 billion LAPSSET project, still at an embryonic stage, comprises a deepwater port in Kenya's **Lamu County** – aimed at reducing congestion at nearby **Mombasa** port – and connecting roads and oil pipelines aimed through **South Sudan** and southern **Ethiopia**.

⁹ Source, journalist



This time, however, local community leaders are alleging the involvement of the defence ministry.¹⁰ **Maasai** tribesmen from **Leparua Community Conservancy** just outside **Isiolo** town travelled to Nairobi to meet with defence principal secretary **Mutea Iringo** in mid-October.¹¹ The tribesmen accuse the military of seeking to appropriate their lands. The military already operates the **Soi School of Infantry** on land to the southwest of Isiolo.

Aerial photographs show the trace of a bulldozer that the military have used to demarcate the land they want to take.¹² The Leparua residents say the tract of land the military wants is so vast that it cannot possibly be for an extension of the training school. They insist they will fight for their land “until death”.¹³

The ministry claims to have had an allotment letter of this land since 2000 and a title deed to it since 2006. The Leparua residents say the ministry obtained these documents in an irregular fashion and that documents in the **National Archives** in Nairobi prove that they have been on the land since 1929. The same tribesmen say this is not the first attempt and that different branches of the Kenyan authorities have tried to secure the land over the past three decades.¹⁴

In 1989 local elders took a division of the livestock ministry to court, accusing the body of trying to appropriate their land for the construction of a meat factory – a project that never got off the ground.¹⁵ The court ruled in favour of the elders, but a higher court overturned the decision on appeal. The community complained that the appeal hearing was conducted in a secretive manner and said they suspected bribery affected the judgment.¹⁶

There is a long history of land grabbing in Kenya. In colonial times white settlers appropriated all the fertile land, notably in the **Rift Valley**. After independence the country’s first president, the late **Jomo Kenyatta** (1963 – 1978), father of the incumbent president, acquired huge tracts of land and encouraged his fellow **Kikuyus** to settle in both the Rift Valley and on the coast. The practice continues. The much-vaunted **Konza Techno City** or **Silicon Savannah** project in the town of **Machakos** south-east of Nairobi, for example, is looking increasingly like a project meant to stimulate real estate speculation. The chief promoter of the project reportedly bought vast tracts of land in and

10 Source, journalist, Nairobi

11 Source, journalist, Nairobi

12 Source, journalist, Nairobi

13 Source, journalist, Nairobi

14 Source, journalist, Nairobi

15 Source, journalist, Nairobi

16 Source, journalist, Nairobi

around the town.¹⁷ So far the Techno City has yet to break ground and the site has neither water nor electricity supply. Land grabbing remains politically contentious. In Nairobi, the opposition **Coalition for Reforms and Democracy** accuses police chief **David Kimaiyo** and criminal investigations chief **Ndegwa Muhoro** of land grabbing in the upmarket district of **Karen**.¹⁸

1.3 Health authorities remain on alert for Ebola

Kenyan authorities have been more diligent than many would have predicted when implementing measures to ensure that Kenya remains free of Ebola. Travellers coming in from **West** and **Central Africa** are subjected to mandatory temperature checks and are required to fill in a questionnaire and leave contact details. They are processed at a special airport arrivals annex normally used for security screening for passengers coming in from **Somalia**. Those found to be running a fever are locked up in a quarantine facility at the airport.

Kenya stopped allowing passengers from **Liberia**, **Sierra Leone** and **Guinea** into the country in mid-August (see *ARC Kenya August 2014 Briefing*), the same month the **World Health Organization** indicated that there was a high risk of the virus taking hold in the East African country, a major continental transit hub. Kenyatta, in what appeared to be a desperate – and probably doomed – attempt to revive Kenya’s troubled tourism industry, hard hit by a spate of Islamist attacks, tried to use the country’s Ebola-free status as a selling point. He made the remarks at the **Karisa Maitha Stadium** whilst visiting the coastal resort of **Kilifi County** after a local official, governor **Amason Kingi**, complained that authorities in **Italy** had erroneously declared there was an outbreak of Ebola in Kenya.¹⁹

2 Implications

Kenyan and foreign observers will watch the ICC case closely to see whether Ruto receives treatment different from that meted out to Kenyatta. If so, Kenya’s fertile **Rift Valley** region may see widespread unrest and communal violence potentially on a similar scale to that which followed the 2007 elections. Ruto’s fellow **Kalenjin** would see this as a case of their leader being sacrificed to appease the international community while **Kikuyu** Kenyatta, whom Ruto helped propel to victory in the 2013 elections, gets off without paying any consequences. On balance the entire trial is most likely to end in

¹⁷ Source, Ethics and Anti-Corruption Commission, Nairobi

¹⁸ Daily Nation, 24 Oct 2014.

¹⁹ Daily Nation, 24 Oct 2014.



acquittal for both leaders and a process of soul-searching for the ICC about its effectiveness in ensuring accountability. This scenario could result in further anti-**European** sentiment in Kenya.

Unless the Kenyan government halts the LAPSSET project or it falls through due to a lack of financing in the coming months, it will cause lasting social, economic and environmental change in the area around the Lamu archipelago. For those with land along the LAPSSET corridor, there is the possibility of being able to benefit from rising land prices. However, with corruption and uncertainty in the land sector, there is a high risk of competing claims of ownership. Anyone contemplating the purchase of land along the corridor faces the difficult task of determining legal ownership. Such investments are also a gamble as there is no guarantee that LAPSSET will go ahead.

It will take more than a reminder that Kenya is Ebola-free to lift the tourism sector out of the doldrums. Many operators are reporting a little business in December but are complaining of having had no trade in October and November. Thousands of workers have lost their jobs.²⁰ From an operational standpoint, travellers to Kenya running a fever not linked to Ebola risk being quarantined. This is a factor to bear in mind when timing vaccinations such as yellow fever.

²⁰ Source, tourism professionals