

## AFRICA RISK CONSULTING

### Country briefing – Kenya

25 November 2013

## Summary

*The government's failure to improve Kenya's security sector raises the probability of further terror attacks. The International Criminal Court postpones president Kenyatta's trial until February 2014 amid increasing anti-Western sentiments. Government tightens control over spending at national and county levels. Energy Regulatory Commission raises tariffs by between 3-12.8%.*

### 1.1 Politicised and corrupt security forces increase risk of terror attacks in Nairobi

Politicisation, corruption and failure to reform the security sector raises the risk of further terror attacks, while the government's slow response to the Westgate Mall attack has undermined perceptions of government competence. In a **Daily Nation** report card evaluating the performance of the cabinet secretaries, interior secretary **Joseph Ole Lenku** scored lowest with 1.5 out of 10.<sup>1</sup> The problems that hampered the security forces' ability to prevent or respond adequately to the Westgate Mall highlight systemic problems rather than one cabinet minister's failings. **Transparency International (TI)** ranks Kenya in Band D for its corruption defence anti-corruption index meaning that there is a "high" risk of corruption. For a regional comparison, TI ranks **Ethiopia** (D-, "high") and Uganda (E, "very high"). Politicisation, patronage and corruption within the security forces and state security system help explain the government's failure to act on warnings it received before the attack on Westgate Mall. Without the necessary political will to reform the security sector, the probability of a similar attack will remain high. This should be assessed as a national security system failure rather than just army and intelligence service failure.<sup>2</sup> The main impact of this is a lack of coordination between various agencies. There is no major-incident risk management system within the security infrastructure. Kenyans and Western risk management planners question Kenya's security and emergency services' ability to respond to major threats when they occur.

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<sup>1</sup> Daily Nation, 24 Nov 2013

<sup>2</sup> Source: Western diplomat, Nairobi

Even before Westgate there was recent evidence of operational decay during the August 2013 fire at **Jomo Kenyatta International Airport (JKIA)** in Nairobi. What was initially a small fire escalated into a full-blown inferno that gutted the international arrivals lounge. The JKIA fire was an indicator of the serious limitations of Kenya's disaster management system.<sup>3</sup> A Kenyan civil rights lawyer described the security system as an organisation where "the rot sets in at the top and travels downwards".<sup>4</sup> The same source said the failure of command and control during major incidents and the reported looting of shops in Westgate by security forces came as no surprise to most ordinary Kenyans. A military source discussing the same issue said there were many non-corrupt members of the security forces but conceded corrupt soldiers, officers and officials have a free hand because of a lack of political oversight.<sup>5</sup>

Attempts to reform the security agencies and security forces have achieved limited success. A major reform effort took place after serious election-related violence in 2007-2008. However, reform initiatives were tardy and hampered by internal wrangling and a lack of transparency. With the current president and vice president awaiting trial over their role in the same violence, it is not surprising that senior security officers have lacked vigour in their reform attempts.<sup>6</sup> Additionally, the management system within which the police and other agencies operate is not sufficiently flexible. *"The police remain a reactive force with only moderate proactive law enforcement techniques and initiatives."*<sup>7</sup>

In the wake of Westgate there have been urgent calls for immediate changes in the security forces and an overhaul of government oversight of intelligence matters. Although too soon to assess what changes the Westgate debacle will force on government and security forces, some change will almost certainly have to take place. Early assessments identified a systemic failure in Kenya's counter-terrorist response and a failure of command and control at the highest levels.

The **2012 Prevention of Terrorism Act**, which was passed after extensive discussion over religious and ethnic profiling, is expected to be up for debate once more in the wake of the Westgate siege. Data gathered from social media responses suggest a popular desire for punitive measures, the

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<sup>3</sup> Source: Corporate risk management adviser, East Africa

<sup>4</sup> Source: Leading civil society advocate, Nairobi

<sup>5</sup> Source: Western military officer, Nairobi

<sup>6</sup> Source: Western diplomat, Nairobi

<sup>7</sup> Source: Western police investigator, Washington (formerly seconded to Kenya advisory team)

introduction of profiling and greater leeway for security forces to act on intelligence reports.<sup>8</sup> A parliamentary move to sack the head of Kenya's **National Security Intelligence Service (NSIS)** led to counter-accusations blaming incompetent politicians for ignoring warnings. A leaked intelligence document claimed the NSIS had issued several warnings of likely terrorist attacks. The warnings were contained in reports sent to an intelligence committee which included representatives of the defence, interior and foreign ministries. Internal politics, empire-building within ministries and departmental faction fighting appear to be hampering the effectiveness of the government's intelligence functions.<sup>9</sup>

## 1.2 International Criminal Court postpones President Kenyatta's trial

The **International Criminal Court (ICC)** agreed on 31 October to postpone President **Uhuru Kenyatta's** trial until 5 February 2014.<sup>10</sup> The ICC trial is beginning to create tensions within the ruling coalition and encouraging a rise in anti-Western rhetoric.

The ICC on 26 November also reversed a previous ruling allowing President **Uhuru Kenyatta (2013-present)** to miss parts of his trial.<sup>11</sup> The ICC ruled that the president "*as a general rule must be present in court*", saying that it would judge future requests to be excused on a case to case basis. The ruling is likely to further strain relationships between the ICC and Kenya. Should Kenyatta spend much of the trial period, expected to last years rather than months, outside Nairobi, it will undermine effective policy making and governance.

Kenyatta's lawyers requested the postponement citing the "national and international crisis" of the attack on the Westgate Mall in September. ICC prosecutors said that they did not agree that Kenyatta's presidential duties were a sufficient reason to delay the trial but they would acquiesce to a delay as it would allow them further time to investigate claims raised by the defence. The postponement came before a resolution at the **United Nations Security Council (UNSC)** failed to gather sufficient support to delay the trials of Kenyatta and his deputy **William Ruto** at the ICC.<sup>12</sup> Of the UNSC member states, eight including the **United States (US)** and **United Kingdom (UK)** abstained while seven, including **China** and **Russia** voted in favour. To have been successful, the **Rwandan** authored draft resolution would have required nine votes and no vetoes by any of the five permanent members.

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<sup>8</sup> Source: Numerous reports in Kenyan media

<sup>9</sup> Source: Senior Western intelligence official, East Africa

<sup>10</sup> Daily Nation, 5 February 2013

<sup>11</sup> Daily Nation, 26 Nov 2013

<sup>12</sup> Daily Nation, 15 Nov 2013

The US and UK both argued that the ongoing ICC assembly of state parties was a more appropriate forum to introduce reforms to the ICC and said they would be willing to support a motion allowing heads of state to appear by video. Rwanda, Kenya and the **African Union (AU)** all criticised the decision, perceiving it as a referendum on the UNSC's support for Africa. Speaking for the AU, **Ethiopia's** ambassador to the UN, **Tekeda Alemu**, said opponents of a deferral have "offended Africa", while Kenya's foreign ministry in a statement accused the UNSC of "*a reckless abandonment of global leadership... that humiliated the continent*".<sup>13</sup> In an indication that Kenyatta and Ruto may be returning to the anti-Western rhetoric that helped them win the March 2013 election, Ruto told a rally, "*what happened at the Security Council is a testimony of Kenya's genuine friends, who can stand with us at all times. We now know who we can work with and who we cannot.*"<sup>14</sup> National Assembly majority leader **Aden Duale** said, "*it has clearly come out who our friends are and who we will do business with. Those who voted against us can look for business elsewhere because we shall not conduct business with our enemies*". The county government expelled three **British** officials from their hotel in **Eldoret** on 22 November, accusing them of collecting evidence for the ICC.<sup>15</sup>

The ICC cases are raising tensions within the ruling **Jubilee Alliance**. Deputy majority leader in the Senate, **Charles Keter**, accused Kenyatta's inner circle of "fixing" his deputy, setting him up to remove him from Nairobi to alone face responsibility at **The Hague**.<sup>16</sup> While officials of Kenyatta's **National Alliance** deny the claims, they are indicative of growing frictions with their governing partner, the **United Republican Party**. The **Coalition for Reform and Democracy** is facing similar disunity. **Wiper Democratic Movement** leaders in **Coast**, disgruntled by the dominance of **Raila Odinga's Orange Democratic Movement** in the coalition, launched a new faction **Mombasa Movement for Change** and threatened to join Jubilee.<sup>17</sup>

### 1.3 Government tightens control over spending

The government's proposed public finance (administration and management) regulations will tighten its control over both national and county spending to reduce public debt (see below). The financial management regulations set borrowing limits, put caps on recurrent expenditure and harmonise

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<sup>13</sup> The Standard, 15 Nov 2013

<sup>14</sup> The Star, 16 Nov 2013

<sup>15</sup> The Standard, 22 Nov 2013

<sup>16</sup> Daily Nation, 15 Nov 2013

<sup>17</sup> The Star, 20 Nov 2013

fiscal management systems.<sup>18</sup> The bill will also make government officials directly responsible for their public expenditure decisions. The **National Treasury** and each county treasury will establish a single account allowing for clearer oversight of the financial status and the curbing of borrowing under the new devolved system. At a national level, the regulations state that government debt at the end of a fiscal year should not exceed 60% of the projected GDP of that year. The budget controller has confirmed that 22 county governors are yet to receive their county revenue funds having submitted unbalanced claims in June.<sup>19</sup> The National Treasury said in a debt bulletin in November that public debt stood at 54.7% of GDP.<sup>20</sup> This was an increase from 52% at the end of June, and follows a rise in domestic and external loans. External debt increased by \$145m between June and August to \$10.4 billion.

#### 1.4 Energy Regulatory Commission announces tariff revision

The **Energy Regulatory Commission (ERC)** has allowed **Kenya Power** to increase power tariffs for high income consumers and heavy industries.<sup>21</sup> In May, deputy president Ruto prohibited Kenya Power from implementing the 25% tariff increase it originally sought [see *ARC Briefing Kenya July 2013*]. The tariff increase therefore suggests that the Kenyan government is feeling confident enough to make unpopular decisions for the sake of the economy. The increase will be from 3 -12.8%. Domestic consumers and small commercial enterprises will get a reduction of between 2.5- 7.9%. The price of individual units will, however, decrease from Ksh15.95 (\$0.185) to Ksh15.51 (\$0.18) per kilowatt hour in December, and again in July 2014 to Sh13.44 (\$0.16) and in 2015 to Sh12.26 (\$0.14). The **Consumer Federation of Kenya** warned that the increased tariffs will result in higher prices of manufactured goods. The tariffs will come into force from December and will remain in place until June 2016. There will be reviews of the increments in June 2015 and June 2016.

## 2 Implications

The 2010 constitution calls for greater oversight and accountability in the country's security sector, but this has been repeatedly hampered by vested interests and a lack of political will. The government's continuing inability to overcome this raises the risk of a repeated attack on the scale of Westgate.

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<sup>18</sup> The East African, 11 November 2013

<sup>19</sup> Capital FM, 6 November 2013

<sup>20</sup> Daily Nation, 3 Nov 2013

<sup>21</sup> Business Daily, 19 Nov 2013



African members of the ICC will continue to press for sitting heads of state to be excused from prosecution, but are unlikely to win the argument. The video link proposal is likely to pass, which would eliminate many of the security and governance risks associated with Kenyatta's possible extended absence from Nairobi. The ICC's conciliatory and flexible approach so far will reduce the risk of African states leaving the institution en masse. The increase in anti-Western sentiments is a concern for those hoping that the ICC trials would not be detrimental to international companies conducting business in Kenya.

The raising of tariffs will allow Kenya Power to raise sufficient capital to upgrade and expand transmissions without compromising operations and deter investors. It is also a sign that President Kenyatta is happy to make unpopular decisions for the sake of the economy.