

AFRICA RISK CONSULTING

Country briefing – Kenya

25 October 2013

Summary

The United Kingdom Serious Fraud Office (SFO) charges directors and employees of Smith & Ouzman for alleged bribery in East Africa. The International Criminal Court trial of President Uhuru Kenyatta is to begin in November, amid uncertainty about whether or not he will attend. Riots break out in Mombasa as authorities launch a crack down on radical preachers.

1.1 Serious Fraud Office announces corruption charges against UK company in Kenya

The **United Kingdom (UK) Serious Fraud Office (SFO)** has charged two directors and two employees of **Smith & Ouzman**, a UK based and registered company, with corruption.¹ The investigation serves as notice of a more aggressive approach by the SFO and a reminder that UK bribery legislation is applicable to all UK national and bodies incorporated under UK law anywhere in the world.² Smith & Ouzman specialises in the printing of security documents including ballot papers used in the Kenyan elections in March 2013, and **Somaliland** in 2010. The charges relate to payments worth over \$670,000 made in countries including Kenya and used to influence the award of business contracts, contrary to the **UK Prevention of Corruption Act 1906**. The alleged offences took place between November 2006 and December 2010 so should not be detrimental to the legitimacy of Kenya's most recent elections. In October the SFO said it was to begin to change its strategy from a reactive to a more proactive approach. This will entail conducting sweeps of entire sectors particularly vulnerable to corruption, including oil and gas, public contracts and construction. In a regulatory change, from 2014 the UK will allow **United States** style plea bargaining deals known as deferred prosecution agreements, whereby a company is charged but the prosecution is suspended in return for a fine or other sanctions.

¹ SFO statement, 23 October 2013

² FT, 25 October 2013

Corruption remains a major impediment to conducting business in Kenya. According to a business executive in **Nairobi**, *"it is impossible for any business importing goods in Kenya to do so without paying bribes"*.³ It remains, according to the **World Economic Forum**, the largest impediment to those doing business.

1.2 International Criminal Court trial of President Uhuru Kenyatta to begin in November

As the **International Criminal Court (ICC)** trial of President **Uhuru Kenyatta** draws closer, there is still uncertainty about whether he is willing to attend. The ICC uncertainty is, however, not having a detrimental impact on Kenya's economy. The shilling is close to a four-month high and the stock market is at an all-time high and poised to hit a new annual turnover record.⁴ Data released by the **Nairobi Securities Exchange (NSE)** shows that equity turnover for the nine months to end September 2013 stood at \$1.36 billion, compared to \$1.02 billion for the whole of 2012.⁵ In the words of one investment analyst,

*"The financial markets have looked at the ICC – and at Westgate in point of fact – and are basically making the calculation that counter-terrorism and the propulsion of Uhuru Kenyatta to the forefront of the global war on terror is changing the game. Investors think that the ICC and Uhuru Kenyatta will reach some sort of a compromise."*⁶

Seeing his deputy **William Ruto** appear before the ICC in September in a separate but similar case appeared to spook Kenyatta. It was, in the words of a political analyst, the first time Kenya was *"having to face an institution that couldn't be killed, bribed, intimidated or otherwise made to go away"*.⁷ If the trial does begin as scheduled on 12 November, it will be the first of a sitting head of state at the ICC.

President Kenyatta scored a partial victory against the ICC in October that will reduce the hearing's impact on Kenya's political stability. The court ruled that Kenyatta, who was already facing the charges for his alleged role in the post-election violence of 2007-2008 when he was elected president in March, need only attend the opening and closing sessions, the verdict and witness testimony.

³ Source, senior British business executive, Nairobi

⁴ Reuters, 23 October 2013

⁵ Business Daily, 24 October 2013

⁶ Source, investment analyst, Nairobi

⁷ Source, political analyst, Kenya

The question now is whether or not Kenyatta will continue to cooperate and travel to **The Hague**. If he does not attend, whatever arguments he invokes about Kenya needing its president at home in the aftermath of the **Westgate Mall** attack, he risks having an arrest warrant issued for him.⁸ He would then be in the same category as **Sudanese President Omar Al-Bashir**, indicted inter alia on genocide charges and who is a fugitive from the court. However, the regional economic and security role that Kenya plays will mean that Kenyatta avoids Al- Bashir's pariah status.

Kenyatta continues to adeptly turn the charges against him from a potential blight on his career to a rallying cause for his supporters. He has characterised the charges as a neo-colonialist attack on the country. He used the rhetoric most recently in a speech on 20 October marking the country's fallen freedom fighters,

*"Let us confront without flinching those external forces seeking to thwart our collective aspirations... They may be powerful and rich, but so were the colonists. They may disrespect, but we have defeated their ilk before."*⁹

Kenyatta's anti-West, anti-ICC propaganda that the ICC is a tool of western powers pushing 'regime change' in Kenya has found favour among the population. This marks a reversal in popular opinion: Ruto initially coined the expression: *"Don't be vague. Go to the Hague."*¹⁰

Kenya and the **African Union (AU)** continue to lobby the **United Nations Security Council (UNSC)** to have the case deferred for a year, citing concerns about security in Kenya and the region. The AU has said the UNSC should defer the trial of President Kenyatta under article 16 of the court's Rome Statute, which allows for an initial delay of a year, or it would seek an alternative means of postponement. If the request for deferral – the latest in a series – is refused Kenyatta will most likely appear for the opening of his case unless other factors come into play in the meantime, for example if ICC prosecutor **Fatou Bensouda** appeals against the court's ruling to allow Kenyatta to skip parts of his trial.

Other **East African** countries, notably **Uganda** and **Rwanda** are supporting Kenyatta's stance. Analysts point out that the presidents of these countries fear ICC focus on their support for militant groups in the **Democratic Republic of Congo (DRC)**.

⁸ Source, journalist, Nairobi

⁹ VOA, October 23 2013

¹⁰ Source, journalist, Nairobi

“They came to the aid of Kenyatta not because they love him but because they can see the benefits... There may be the factor of seeing such high-profile people accused – the president and his deputy – that people start to ask themselves about past conduct – all those documents about Congo are out there.”¹¹

1.3 Riots break out in Mombasa

Riots hit **Mombasa** twice in October, serving as reminder of the city's wider instability. Islamist militants, harnessing the frustrations of Mombasa's young Muslims, sought to destabilise the city. Many young Muslims are unemployed.¹² Militant preachers, who have often undergone training with **al Shabaab** in Somalia, have radicalised a significant minority of young Muslims in recent years. Unknown gunmen killed radical cleric **Sheikh Ibrahim Ismail** and three associates in Mombasa on 4 October.¹³ The incident occurred outside **Masjid Musa** mosque where **Aboud Rogo Mohamed**, killed by security forces in 2012, also preached. Sheikh Ismail was considered a natural successor to Mohamed at the Masjid Musa mosque, which has ties with al Shabaab. The shooting of Sheikh Ismail triggered a day of rioting in which the **Red Cross** says four people were killed. Youth groups barricaded major roads in the city, looted businesses and set fire to a church near the mosque. The government deployed paramilitary police who used teargas to restore calm.¹⁴ Further riots broke out in **Majengo** on 24 October with police and youth fighting running battles, after authorities arrested **Sheikh Ramadhan Juma**, a preacher at the same mosque.¹⁵

2 Implications

The UK's Serious Fraud Office has faced criticism from anti-corruption campaigners for its inaction and inability to bring charges against those known to be engaged in corruption abroad. It has sought to justify its existence with a new strategy which will see it target companies by sector. These charges serve as a reminder of the costs of corruption: it can lead to criminal prosecution or regulatory censure both at company and senior management levels, as well as exclusion from bidding processes, and damage to reputation, brand and share prices. The changing nature of the SFO's approach and the greater regulatory tools it has access to, will increase the number of such investigations and charges.

While any compromise between the ICC and Kenyatta might be good for Kenya's short to medium term political and economic outlook, it could, in fact, pave the way for fresh large scale violence in the long term.

¹¹ Source, political analyst, Kenya

¹² Source, East Africa security analyst

¹³ DPA, 4 October 2013

¹⁴ VOA, 5 October 2013

¹⁵ The Standard, 25 May 2013

The AU's proposal about immunity for sitting heads of states raises the risk of leaders accused of human rights abuses refusing to stand down peacefully.

*"You're talking about people being massacred by militia and by state officials. Who knows if that won't happen again if we get rid of the ICC."*¹⁶

If Kenyatta unilaterally does not attend the ICC trial, Kenya could become politically isolated and targeted sanctions would be a possibility. A compromise involving promises of future cooperation is a more likely scenario. The attack on Westgate was a timely reminder of Kenya's regional counter terrorism role, and suggests that any international repercussions will be light.

Radical Islamists will use the death of Sheikh Ibrahim Ismail and constraints on preaching as a recruiting tool amongst Mombasa's disenfranchised youth. Until the government resolves grievances about unemployment and land, the risk of terror attacks and violent protests in the city will remain high.

¹⁶ Source, political analyst, Kenya