



In brief: Kenya – six politicians fight their indictment by the International Criminal Court

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Kenya's political mood experienced a brief upswing following the decisive endorsement of a new Constitution by an August 2010 referendum. Since then, however, the mood has again darkened. The announcement on 15 December by the Prosecutor of the [International Criminal Court \(ICC\)](#) that he was issuing indictments for crimes against humanity against six leading political figures has destabilised and paralysed Kenya's Grand Coalition government.

The six men indicted are:

- Uhuru Kenyatta (Minister of Finance, ally of President Kibaki)
- Francis Muthaura (Head of the Civil Service and Cabinet Secretary, ally of Kibaki)
- Major-General Mohammed Hussein Ali (Postmaster-General, ally of Kibaki)
- William Ruto (suspended Higher Education Minister, estranged ally of Prime Minister Odinga)
- Henry Kosgey (Minister for Industry, ally of Odinga)
- Joshua arap Sang (Broadcaster and supporter of Odinga)

ICC Prosecutor Luis Moreno-Ocampo has issued indictments accusing them of playing leading roles in the organisation of the violence that took place during the period following the 2007 elections. The ICC Prosecutor reportedly intends to try the men in two cases: Ruto, Kosgey and Sang on charges of planning and organising violence against Kibaki's Party of National Unity for a year before the elections and of murder, deportation and persecution; and Kenyatta, Muthaura and Ali for retaliatory violence, using the police and the Kikuyu-based *Mungiki* sect. Ocampo has talked of trials beginning at the end of 2012 - around the time of the next elections. This is subject first to the ICC judges agreeing with him that the six have a case to answer. That is the next stage in the judicial process.

The six men have been summoned to appear at The Hague for a pre-trial hearing on 7 April. All have said that they will attend in person but will challenge the ICC's jurisdiction. Their best hope is that the pre-trial judges decide that their alleged crimes, while serious, are insufficiently grave to be considered 'crimes against humanity'. Ruto, who is also under investigation for corruption within Kenya, took the extraordinary step of voluntarily travelling to meet with ICC investigators in The Hague a month before the indictments were issued. It appears to have done him no good. Both he and Kenyatta are known to harbour presidential ambitions, seeing themselves as the main future challengers to Odinga. Their indictment raises major questions about whether they will be able, or allowed, to stand. The new

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Constitution does not allow anybody charged with a crime to stand for parliament.

Polls suggest that the vast majority of Kenyans support the ICC indictments. The indictments triggered a sudden re-energisation of a long-stalled government initiative to establish a domestic tribunal to try those accused of greatest responsibility for the post-2007 election violence. Kibaki and Odinga now find themselves on opposite sides in this argument, with Odinga and his party, the Orange Democratic Movement – after a period of reflection (or hesitation) – coming out in favour of the ICC process, Odinga and his backers have been able to prevent these renewed efforts to establish a local tribunal. An attempt to get a private members bill passed by parliament calling for Kenya to withdraw its accession to the Rome Statute has also been repelled. However, Kibaki and allied ministers have also been seeking support abroad for bringing the ICC process to a halt. They have had some success. In February 2011, the African Union called for the trials to be deferred for a year (in the first instance) at the request of the UN Security Council, as provided for by Article 16 of the Rome Statute. Kibaki personally addressed the UN Security Council in New York on 16 March to press for a deferral, warning that the ICC indictments increase the danger of renewed violence, if potential presidential candidates are barred from standing, when the 2012 elections come around. Critics ask whether trying them at home, as Kibaki continues to claim Kenya is willing to do, would be any less destabilising. ‘Homegrown solutions’ have a poor record in Kenya. The Truth, Justice and Reconciliation Commission appears to have lost all credibility in recent months, with its chair, Bethuel Kiplagat, forced to stand down.

The US, UK and France have already made it clear that they would veto any resolution that calls for deferral. China supports the Kibaki initiative. In terms of the non-permanent members, South Africa supports a deferral. Whether it will insist on putting the issue to the vote by formally tabling a resolution remains to be seen. Uhuru Kenyatta has also said that he will attend the pre-trial hearing at The Hague on 7 April and ask why Raila Odinga has not also been indicted. The Prosecutor has expressed concerns that some of the indictees might threaten potential witnesses. Some witnesses have been relocated to Europe.

The Kibaki-Odinga split on the issue has brought the coalition government to another of its periodic standstills. Odinga is sounding increasingly negative about the legacy of the ‘power-sharing’ arrangement that was so central to the political deal struck in 2008 as part of efforts to bring the post-election violence to an end. Sounding not unlike Tsvangirai in Zimbabwe, he said in an interview: “I’ve been telling people that the Kenyan example is not an example to be emulated. In fact, it is an impediment to democratisation that losers will cling to power in the hope that power sharing arrangement will be negotiated post-election.” His convictions are likely to have been strengthened by his experience in recent months of mediating between Gbagbo and Ouattara in Ivory Coast - a role which the AU has now relieved him of. Whatever people’s opinion about past events, few dispute that Kenya faces a bumpy two years ahead. The threat of renewed violence in the context of the 2012 elections is real.

Fighting in Gedo region, southern Somalia, along the border with Kenya, has placed the Kenyan army on high alert. The security forces say that there has been al-Shabaab ‘infiltration’ of Kenya, arguing that a bomb attack in Uhuru Park in June was the work of Kenyan al-Shabaab sympathizers. Al-Shabaab has not admitted responsibility but has said that it is considering carrying out attacks in Kenya. Four Somali pirates are currently facing trial in Kenya. Finally, there continue to be allegations that Kenya is acting as the main transit point for arms shipments to South Sudan, violating the UN arms embargo against Sudan.

For further background, see [SN/IA/5733](#), “Kenya since the 2007/08 crisis” (27 October 2010).