



Kenya since the 2007/08 crisis

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Authors: Jon Lunn

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The violence that followed the December 2007 presidential election in Kenya left over 1000 people dead and displaced an estimated 300,000 people across the country. To end the crisis, a power-sharing accord was agreed. This accord still holds and a significant proportion of its provisions have been fully or partly implemented. The power-sharing government formed under it remains in office. However, Kenya is very much still dealing with the legacies of the crisis. Two of the political leaders implicated – Deputy Prime Minister Uhuru Kenyatta and former Minister William Ruto, both with high political ambitions in elections now re-scheduled to March 2013 – face trial by the International Criminal Court for crimes against humanity. The trials are scheduled to begin in April 2013, potentially before a presidential second round is held. This could yet thwart their political ambitions. The two men have recently formed an unlikely electoral alliance that many view as little more than a marriage of convenience. Kenyatta is expected to be the presidential candidate, with Ruto his deputy. If Kenyatta does make it onto the ballot paper, he will likely face Prime Minister Raila Odinga, who has formed his own alliance with Vice-President Kalonzo Musyoka. Odinga, who is strongly backed by the international community, is the narrow favourite to win.

Amidst the ongoing domestic political turbulence, in October 2011 Kenya launched a military incursion into southern Somalia against the armed militant group known as al-Shabaab. The UK Government, the EU and the US all gave the Kenyan incursion their support – provided it remained consistent with international law. Kenyan forces have subsequently formally become part of the African Union Mission in Somalia, although this has so far meant little in practice. They played a big part in the capture of the vital southern Somali port of Kismayo at the end of September. Questions remain about just how far Kenya is pursuing its own interests in Somalia.

Economic growth during 2011 and 2012 has been at just over 4% per annum and the IMF projects a further increase in growth rates up to 2016. But these apparently positive prospects could be undone if there is a resurgence of political violence. Kenya has been identified as one of the UK Department for International Development's 27 focus countries in its recent bilateral review, triggering a 72% increase in aid over the period 2011/12 to 2014/15.

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1 Political background

1.1 The grand coalition

The violence that followed the December 2007 presidential election in Kenya left over 1000 people dead and displaced an estimated 300,000 people across the country.¹ To end the crisis, a power-sharing accord was agreed.² It was formalised in the *National Accord and Reconciliation Act*, signed on 28 February 2008.³ The former UN Secretary General Kofi Annan helped mediate negotiations between the two protagonists, President Mwai Kibaki and his main political challenger, Raila Odinga. The power sharing accord allowed President Kibaki to remain head of the Government with extensive executive powers. However, the post of Prime Minister was created and filled by Raila Odinga, who was given the authority to co-ordinate and supervise departmental ministries.

The main coalition partners were the Party of National Unity (PNU) headed by President Kibaki, with Uhuru Kenyatta, Deputy Prime Minister and until recently Minister of Finance; the Orange Democratic Movement (ODM), led by Raila Odinga; and the Orange Democratic Movement-Kenya (ODM-K), led by Vice President Kalonzo Musyoka.

Many have criticised the power sharing agreement for entrenching, rather than combating, Kenya's long-standing tradition of polarised ethnic politics, which underpinned the post-election violence that erupted at the end of 2007.

The power-sharing accord has remained intact since February 2008, although party alignments and names have changed along the way. Disagreements between the coalition partners, compounded by corruption scandals, have blocked many reform efforts. There have been several public falling-outs amongst the coalition partners, mainly revolving around the sharing of executive power between the various camps of President Kibaki, Prime Minister Odinga and Vice President Musyoka. For example, in February 2010, after Raila Odinga tried to suspend then Agriculture Minister William Ruto and Education Minister Sam Ongeri for three months after their implication in corruption scandals, President Kibaki overturned the suspensions, claiming Odinga did not have the right to suspend them.⁴ Odinga boycotted cabinet meetings until his right to suspend ministers was acknowledged.

The first corruption scandal involved the misuse of funds that were supposed to subsidise the purchase of maize for poor Kenyans. An investigation by Price Waterhouse Cooper reported that over US\$28 million had gone missing. It found evidence that cheap maize which had been bought had been sold to middlemen, and then sold on at inflated prices.⁵ The second scandal related to nearly \$1 million that had disappeared from the Ministry of Education's fund for free primary schools. As a result, both Britain and the US suspended their education assistance in early 2010.⁶

By late 2010, political jockeying began to intensify as the next elections – originally expected in December 2012 – appeared on the horizon. There remained uncertainty about the

¹ [Around Kenya: After the violence](#), *BBC News Online*, accessed 18 Aug 2010

² ["Key points: Kenya power-sharing deal"](#), *BBC News Online*, accessed on 7 October 2010

³ [Acting together for Kenya: Agreement on the principles of partnership of the coalition government](#)", accessed on 18 August 2010

⁴ [Kenya: Two ministers suspended in corruption scandal](#)", accessed on 4 Aug 2010

⁵ *Africa Confidential*, Vol. 51, No 4, 18 February 2010

⁶ ["US suspends Kenya school funding"](#), *BBC News online*, accessed on 4 Aug 2010

prospects of Uhuru Kenyatta, who has been indicted by the International Criminal Court (ICC) [see below]. The same applied to William Ruto, who was reshuffled to Higher Education after he was cleared of corruption in the maize scandal discussed earlier.⁷

While the outside world focused much of its attention on issues of justice and accountability in the wake of the post-election violence (see below), a no less important – indeed, in many ways, interconnected – issue has been that of land. Many ethnic groups were displaced from their homelands during the colonial period and have unresolved claims over what they view as their right to return. Since independence, the situation has been exacerbated by further ‘land grabbing’ by members of the political elite. This has exacerbated tensions and contributed to growing landlessness and (a strategy for survival) squatting. There has also been escalating environmental degradation.⁸ Many took the opportunity presented by the post-election violence to ‘settle scores’ over land, which contributed significantly to levels of displacement resulting from that violence. The coalition has been forcibly evicting people deemed to be squatters, despite the fact that those being evicted have sometimes lived and worked on the same land for generations. Implementation of the National Land Policy passed by parliament in January 2010, in tandem with the new Constitution, may help to defuse the issue. A long-awaited National Land Commission is due to begin work, but President Kibaki is yet to appoint its Commissioners.⁹ However, the ‘land question’ retains the potential by itself to lead to another upsurge in violence in future.

1.2 The August 2010 Constitutional referendum

The popular endorsement of a new Constitution in a referendum in August 2010 prompted hopes that a turning point in Kenyan politics might at last have been reached.

A key element of the power sharing accord agreed to between President Mwai Kibaki and Prime Minister Raila Odinga was agreement that there should be a new Constitution for Kenya, in which, amongst other things, the previously overwhelming power of the President would be considerably reduced. The constitutional referendum campaign turned competing factions within the ruling coalition government against each other. For much of the campaign it looked as if the country would be left more divided by its end, rather than more united.

Both President Kibaki and Prime Minister Odinga gave their full endorsement to the proposed new Constitution. Some claimed that this was in part because the Obama administration in the US had made it clear that flows of US aid and investment would be reduced if the new Constitution did not pass.¹⁰ Some commentators asserted that Kibaki and Odinga also had their own personal motivations for working together in the ‘Yes’ campaign: Kibaki wanted to ensure his political legacy was a positive one, while Odinga wanted the official endorsement of Kibaki of his presidential candidacy ahead of the next elections.

There was more muted support for the proposed new Constitution by Odinga’s rivals within the ‘Yes camp: Vice-President Kalonzo Musyoka and Uhuru Kenyatta gave only lukewarm support to the campaign. The strong and vocal ‘No’ campaign was, led by the former President Daniel Arap Moi and supported by William Ruto. The ‘No’ camp had the support of

⁷ *Africa Confidential*, Vol. 50, No. 4, 20 February 2009,

⁸ For a useful summary of the ‘land question’ in Kenya, see an April 2010 paper by Ibrahim Mwathane on the issue, presented to a World Bank conference. This paper is available via Google.

⁹ “Kibaki blamed for delayed Land Commission”, *The Star*, 26 November 2012

¹⁰ “Obama’s stand: US goodies tied to reforms”, *Kenyan Standard*, 28 June 2010

various church and religious leaders, who feared that the proposed new Constitution would legalise abortion and give preferential rights to Muslims.¹¹

The referendum on the proposed new Constitution took place on 4 August 2010. Kenyans voted 69% in favour and 31% against, on a turn-out of 71% of the population.¹² It came into force later the same month.

A Kenyan analyst summarised the new Constitution as follows:

The new Constitution seeks to introduce a system of checks-and-balances that will strive to keep future presidents from exploiting the state for their own personal gain. In particular, the new Constitution establishes a bi-cameral parliament, with a legislative assembly and a Senate. The Senate will have a limited role in developing legislation and will primarily function as a checks-and-balance mechanism for legislation developed by the Members of Parliament (MPs). The Senate will also be able to exert oversight on the activities of the executive. In particular, a future Senate will be able to impeach the president of Kenya if circumstances require this to be done.

The Parliament has powers of accountability including reviewing the conduct of the executive, including the president, and exercising oversight over other state organs. In order to entrench the accountability of MPs to the people, the proposed Constitution also provides for the right to recall parliamentarians. A notable feature of this new constitution is the extent to which public participation in the conduct of parliament has also been made a constitutional obligation.

Geographically, Kenya will now be divided into 47 counties which will be headed by an elected governor. The Constitution also stipulates that 15 per cent of the national budget will be disbursed to the counties for their own developmental, education and health initiatives. This will ensure that state resources are not monopolised by the metropole or entirely controlled by the national government, but equally distributed to all sections of the country.

The new Constitution will also entrench a Bill of Rights as well as promote gender equality. In particular, the Constitution stipulates that as a general rule state institutions should not have more than two-thirds of one gender to the exclusion of the other. Furthermore, the Constitution has established a framework for the comprehensive review of land reform. It creates legal protection against corruption to enable businesses to flourish, unhindered by state exploitation.¹³

The new Constitution also includes important reforms to strengthen the judiciary and provides in principle for full devolution, which has long been a combustible issue within Kenyan politics.

It is also worth noting that the new Constitution makes it potentially less attractive to seek high office; anyone running for the presidency in future must relinquish their parliamentary seat and pick a running mate before they can run. In addition, losing candidates are not allowed to try again for political office for the next five years.

The promulgation of implementing legislation provided for in the new Constitution was completed in August 2012 with the signing into law by President Kibaki, following their passage through Parliament, of the Kenya Defence Forces Act, the National Intelligence

¹¹ "The Battle Over Kenya's New Constitution" *Time Magazine*, 18 August 2010

¹² "Kenya votes for new constitution", *Daily Telegraph*, 18 August 2010

¹³ T. Murithi, "Kenya's constitutional renewal: A post-referendum analysis", *Pambazuka News*, Issue 498, 29 September 2010

Service Act, the Leadership and Integrity Act, the National Security Council Act, the Assumption of Office of President Act and the Petitions to Parliament (Procedure) Act. However, there has so far been little progress towards devolution, in particular through the establishment of county governments. This will be a major agenda item for the next government, following the March 2013 elections.

1.3 The search for accountability after the violence

To date, there has been next to no political or legal accountability for the violence which erupted after the 2007 presidential election.¹⁴ Both President Kibaki and Prime Minister Odinga initially argued that the violence was overwhelmingly spontaneous rather than organised by sections of the political elite. However, many people were astonished at the time by the speed with which the violence escalated after the presidential election, leading to strong suspicions that there was indeed a significant degree of pre-meditation behind it. Those sceptical that the Kenyan political and judicial system could be relied upon to conduct credible investigations and bring alleged perpetrators to justice were soon suggesting that those with the greatest responsibility for the violence might ultimately have to be investigated by the ICC. Kenya is a signatory to the Rome Statute, which established the ICC.

As part of the power sharing accord, it was agreed to set up a national commission of inquiry to investigate the post-election violence. The Waki Commission, officially known as the Commission of Inquiry on Post Election Violence (CIPEV), was established in February 2008 by the Government and was named after its chairperson, Justice Philip Waki. Its report, which was published in October 2008, recommended that the Government should establish a national tribunal to investigate and prosecute those responsible for the violence. Justice Waki raised the stakes yet further by giving Kofi Annan, who had continued to play an active role in Kenya, a sealed list naming ten alleged key organisers and financial sponsors of the violence.

The Government initially promised to implement the recommendations of the Waki Commission but was soon stalling. In July 2009, with no indication being given by the coalition that it was going to create the national tribunal called for by the Waki Commission, Kofi Annan gave the list of names produced by the Waki Commission to Luis Moreno-Ocampo, the Prosecutor at the ICC. The ICC announced on 31 March 2010 that it would investigate the post-election violence, citing its role under the Rome Statute (Articles 17 and 18) as a court of last resort.¹⁵

It is important to note that, in August 2008, Kenya's statutory national human rights institution, the Kenya National Commission on Human Rights (KNCHR), published its own report into the post-election violence. It included a list of 219 alleged perpetrators, including senior politicians such as William Ruto and Uhuru Kenyatta. It has been assumed in many quarters that the KNCHR list includes those on the shorter list produced by the Waki Commission.¹⁶ However, the Waki list has still not been released to the public, so this remains impossible to verify.

¹⁴ The first murder conviction by a Kenyan court in connection with the violence came in June 2012. There are reportedly over 5,000 cases still under investigation by the Attorney-General's office. "Post-election violence: murderer first to get life sentence", *Capital FM*, 12 June 2012

¹⁵ [International Criminal Court press release 31 March 2010](#)

¹⁶ *Africa Confidential*, Vol. 49, No. 17, 22 August 2008; Kenya National Commission for Human Rights, "On the Brink of the Precipice" (August 2008). For the KNCHR's list of alleged perpetrators, see Annex One of its report.

There was also controversy when Sudanese President Omar al-Bashir, who has been indicted by the ICC and subject to an arrest warrant, which signatories to the Rome Statute are obliged to implement when they have the opportunity, attended the ceremony in Nairobi to mark the coming into force of Kenya's new Constitution in August without official hindrance.

There is also a Truth, Justice and Reconciliation Commission in Kenya. However, it has been widely viewed as lacking credibility and operational effectiveness. Many viewed its chair, Bethuel Kiplagat, as unsuitable for the role, due to his partisan political past (see also below).

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

2 Main developments since 2011

2.1 Elite manoeuvrings, the ICC and the March 2013 elections

The six men indicted by the ICC were:

- Uhuru Kenyatta (Deputy Prime Minister and then 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)

The indictments accused them of playing leading roles in the organisation of the violence that took place during the period following the 2007 elections. The six men were summoned to appear at The Hague for a pre-trial hearing on 7 April. All attempted to challenge the ICC's jurisdiction. Polls at the time suggested that the vast majority of Kenyans supported 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 found 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 were 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 was also repelled.

Kibaki and allied ministers also sought support abroad for bringing the ICC process to a halt. They 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 increased the danger of renewed violence, if it led to potential presidential candidates being barred from standing, when the 2012 elections come around. The new Constitution does not allow anybody charged with a crime to stand for parliament, which appeared to many observers to rule out Kenyatta and Ruto from running. But some contested this assessment, or asserted that a way round would ultimately be found if necessary.¹⁷

The US, UK and France made it clear that they would veto any UN Security Council resolution that called for deferral. China supported the Kibaki initiative. In terms of the non-permanent members, South Africa also supported a deferral. However, in the end, Kenya did not seek to put the issue to the vote by formally tabling a resolution. Meanwhile, the Prosecutor expressed concerns that some of the indictees, or actors close to them, might threaten potential witnesses. All prosecution witnesses have subsequently been relocated to Europe.¹⁸

The Kibaki-Odinga split on this issue brought the coalition government to another of its periodic standstills – a condition in which it largely remained during 2011. The passage of laws to implement key aspects of the new Constitution fell far behind schedule. However, in June 2011, the Government announced a range of official appointments designed to show that it was serious in its plans to reform the judiciary. Willy Mutunga, the respected and experienced lawyer and activist, was appointed the new Chief Justice (after a failed attempt to get somebody much more pliable into the post) and Keriako Tobiko, a former Director of Public Prosecutions accused by some of being reluctant to take action against powerful politicians, was appointed Attorney General.¹⁹

The ICC held ‘confirmation of charges’ hearings in September/early October 2011. In the days preceding these hearings, the Kenyan Government again called on the ICC to allow local courts to take over the cases. This appeal was dismissed.²⁰ In his statement before the ICC, Uhuru Kenyatta alleged that Raila Odinga was “politically responsible” for the post-election violence.²¹

In November 2011 it was reported that the ICC had written to the Kenyan Government to ask it to ensure that none of the suspects transfer assets to third parties until the cases have been completed.²² Then, in January 2012, it declared that there was strong enough evidence against four of the six indictees to proceed to trial: Ruto, Sang, Muthaura and Kenyatta. Kenyatta resigned as Minister of Finance soon afterwards.

There are expected to be two trials running concurrently. Ruto and Sang are to be tried together on charges of planning and organising violence against Kibaki’s PNU for a year before the elections and of murder, deportation and persecution; Kenyatta and Muthaura are to be tried together for organizing retaliatory violence, in doing so deploying the police and the Kikuyu-based *Mungiki* sect.

¹⁷ “Cabinet amendments will steal the dream of a new Kenya”, *Nairobi Star*, 8 November 2011

¹⁸ *Africa Confidential*, 10 June 2011

¹⁹ *Africa Confidential*, 24 June 2011

²⁰ “ICC dismisses Kenya’s bid to halt post-poll trials”, *Nation*, 31 August 2011

²¹ “Kenyan politician uses the dock to give stump speech”, *Independent*, 1 October 2011

²² “ICC seeks embargo on Uhuru and Ruto assets”, *Nation*, 20 November 2011

However, both Ruto and Kenyatta insisted that they still intended to stand for the presidency despite the fact that they both faced trial by the ICC. They embarked on nationwide rallies designed to mobilize their supporters.

Over the following months, there was fierce political debate in Kenya about when the next elections would or should take place and whether the two men could or should be able to stand for the highest office in the land. There is currently a court case before the High Court seeking a ruling on whether they are eligible to stand. A cabinet reshuffle in March 2012 appeared to be carried out largely at the expense of those who favoured co-operation with the ICC. In a feverish atmosphere, there were claims that leaked documents proved that the UK Government was leaning on the ICC to pursue Ruto and Kenyatta so that they were unable to stand for the presidency. However, the documents were quickly shown to be forgeries.²³

In March 2011, despite protests from many quarters, the Election Commission announced that the presidential and parliamentary elections would not be held until 4 March 2013 – a delay that it justified on the grounds that this was the earliest date that credible and fair elections could be held. If no candidate crosses the 50% threshold, a second round will be required; it is currently scheduled to take place on 11 April. However, some claim that the terms of all current office-holders will expire in December 2012, meaning that, if they remain in post, they will be doing so illegally. In November 2011, it was reported that UNDP, Denmark, UK, Japan and the US had agreed to cover at least 10% of the costs of the next electoral process.²⁴

The other uncertainty shaping people's electoral calculations was when the ICC would schedule the two trials to begin. On 9 July 2012, that uncertainty was resolved when it was announced that they would begin in April 2013. Most took this to mean that the trials would begin after the elections had been held, meaning that Ruto or Kenyatta might be president (or president-elect) by that time – and therefore in the same category of indictee as President al-Bashir of Sudan, who continues to elude the ICC's grasp. But the ICC subsequently clarified the dates on which their trials would begin as 10 and 11 April 2013, overlapping with any second round and meaning that neither would yet be president or president-elect.²⁵

Both the US and the UK Government's have reportedly indicated to the Kenyan Government that it would be for the best if neither Ruto nor Kenyatta stood for the presidency. Kofi Annan visited Kenya earlier this month and called on Kenyans not to vote for any candidates subject to ICC indictments.²⁶ He also warned that Kenya would almost certainly face international sanctions if the two men are elected.²⁷ However, the ICC itself has said that it has no powers to tell Kenya who can or cannot run for the office and will not seek to interfere in domestic politics.²⁸

Ruto and Kenyatta are refusing to stand down. Kenyatta recently warned countries that have 'interfered' in Kenyan politics that he will not work with them if he becomes president.²⁹

²³ *Africa Confidential*, 13 April 2012

²⁴ "'Donors pledge Kenya poll funding", *Business Daily*, 16 November 2011

²⁵ "No extension of ICC cases, says Bensouda", *The Star*, 6 October 2012

²⁶ "Don't vote for ICC suspects, Annan warns", *The Star*, 6 December 2012

²⁷ "Kenyan presidential aspirant warns against 'reincarnation of colonialism'", *BBC Monitoring Africa*, 13 December 2012

²⁸ "Clinton's Kenya ICC cases comments dismissed by David Masyoka", *Xinhua News Service*, 7 August 2012

²⁹ "Kenyan presidential aspirant warns against 'reincarnation of colonialism'", *BBC Monitoring Africa*, 13 December 2012

Helpfully for them, the Ethics and Anti-Corruption Commission has said that individuals should be prohibited from standing for office only if they have been *convicted* of a crime, rather than simply charged with one.³⁰ The Kenyan courts are unlikely to adjudicate decisively on the eligibility of Ruto and Kenyatta to stand before the March elections; a legal challenge is still pending.³¹

Ruto and Kenyatta launched a major gambit on 2 December 2012 when they announced that they were forming an electoral alliance, in which it is expected that Ruto will stand for the vice-presidency and Kenyatta for the presidency under the slogan 'Umoja Kenya' (United Kenya). Odinga responded two days later, the deadline for doing so under the Political Parties Act, by announcing that he had formed an alliance with current Vice-President Kalonzo Musyoka called the Coalition for Reform and Democracy (CORD). A third alliance, called Pambazuka, is unlikely to carry as much weight as the other two. This rush towards cross-ethnic alliances is in part prompted by the fact that victorious candidates are required under the new Constitution to gain at least 25% of the vote in at least 24 of the 47 counties.

Kenyatta and Ruto's severe difficulties over their ICC indictments should play into their great rival Raila Odinga's hands. But Odinga does have his own problems. An influential former ally – with a particularly strong constituency among the Luhya ethnic group, from which he hails – Wycliffe Musalia Mudavadi, has fallen out with him. Although he originally said he would stand for the presidency, he has now aligned himself with Kenyatta and Ruto and, according to some observers, may step in if both or either are, in the end, unable to stand. Both alliances have attracted a range of other politicians and parties to their standards.³²

Other likely presidential candidates include Peter Kenneth and Martha Karua. But most now agree that the contest is essentially between Kenyatta and Odinga. The unlikely Ruto-Kenyatta alliance brings together the Kikuyu and Kalenjin constituencies (the first and third largest in the country) – on the face of it forms a powerful electoral bloc. It appears to be well funded. Some commentators, not entirely convincingly, characterize the alliance as a major step towards 'national reconciliation'. Others view it as pure political opportunism – a marriage of convenience and nothing more.

The political programmes of both alliances are sketchy, to put it mildly, leading some to see them as "two sides of the same coin".³³ Whichever, it cannot be assumed that ordinary Kikuyu and Kalenjin will simply act as a vote-bank for Kenyatta and Ruto. Odinga's support outside of this bloc amongst the Kamba and Luo is likely to have been reinforced by this development. For now Odinga remains the narrow favorite to win the presidential election next year.³⁴

Meanwhile, the Truth, Justice and Reconciliation Commission lost whatever credibility it had. Its chair, Bethuel Kiplagat, was finally forced to stand down in early 2011. The Commission has missed several deadlines in terms of publishing its final report and has now said that it will wait until after the 2013 elections are over. Civil society groups have said that they will challenge this decision in the courts.

³⁰ ""Should aspirants with pending court cases run in the elections?", www.mazalendo.com, 10 December 2012

³¹ "Kenya's ICC-indicted leaders strike election deal", *Agence France Presse*, 2 December 2012

³² The current cohort of MPs may not have endeared themselves to the Kenyan electorate by voting themselves lucrative 'golden handshakes' to mark the end of their terms. President Kibaki ultimately vetoed the decision.

³³ "Uhuru/Ruto and Raila/Kalonzo alliances are two sides of the same coin", *The Star*, 5 December 2012

³⁴ D. Waweru, "Kenya: the rise of the 'Uhuruto'", *African Arguments*, 5 December 2012

Instability is not far beneath the surface in Kenya as it prepares for elections. In September 2012, more than 100 people were killed in ethnic violence in the Tana Delta on Kenya's coast. The security forces were also accused of serious abuses after they were sent in to stabilize the situation. Politicians were accused of being implicated in fomenting the violence.³⁵ In early November, cattle rustlers ambushed and killed at least 42 police officers in northern Kenya. Two MPs were charged afterwards with inciting violence.³⁶ This followed many unsuccessful attempts to disarm pastoralist communities in that part of the country and prompted a major security operation.³⁷ Groups with links to al-Shabaab in Somalia (see below) have been attacking security officials in the north-east. There have also been small-scale bomb attacks in Nairobi and other urban centres by al-Shabaab over the past year or so, some causing fatalities. One in Nairobi in early December killed two people.³⁸ A bomb went off at a poll registration centre in Dadaab refugee camp yesterday. There are fears of further attacks over Christmas and the New Year. There have been instances of anti-Somali xenophobic attacks in retaliation and the police have arrested many young Somalis suspected of involvement with al-Shabaab, which has further raised tensions.³⁹

The Kenyan authorities have also been facing a dilemma about how best to handle a separatist group, the Mombasa Republican Council (MRC), which is campaigning for the coastal areas to break-away and set up their own state. Mombasa, the country's second largest city, and the surrounding coastal areas are predominantly Muslim and there have been growing concerns that some youths in the region were being drawn into involvement with militant groups, including al-Shabaab. A radical preacher with links to al-Shabaab was killed in Mombasa in August, provoking riots.⁴⁰ The MRC was banned by the Government on the grounds that its members were involved in criminal activities. The Mombasa High Court overturned the ban in August but it was subsequently reinstated. With the unrest increasingly affecting tourism, the authorities launched a crack-down in October, taking large numbers of MRC supporters and leaders into custody. The chairman, Omar Hamisi Mwamnuadzi, his wife and 35 other people face trial on a range of charges. The MRC has reportedly split, with one faction renouncing violence.

2.2 Election preparations – other issues

The 2010 Constitution stipulates that there should be 290 constituencies – up from the 210 that existed at the time of the 2007 elections – and sets out the broad criteria to be used in creating them. The 2008 Kriegler report declared that the previous arrangements had been characterized by gross disparities in the size of constituencies and their populations, and that a sense of injustice about these arrangements had often contributed to the violence that followed the 2007 elections.

The passing of the new Constitution in 2010 strengthened the impetus behind a constituency boundary review process that was in fact already under way – but which is today still unfinished.

The review process was begun before the new Constitution was passed by the Interim Independent Boundaries Review Commission (IIBRC), which then published a detailed report in November 2010, after the new Constitution had come into effect. The IIBRC report

³⁵ *Africa Confidential*, 21 September 2012

³⁶ "Two Kenyan MPs charged with incitement over police killings", *IHS Global Insight*, 20 November 2012

³⁷ "After massacre of police, army moves into northern Kenya", www.globalpost.com, 16 November 2012

³⁸ "Kenya blast kills two", *Birmingham Mail*, 8 December 2012

³⁹ "One killed in fresh violence in northeastern Kenya", *IHS Global Insight*, 21 November 2012

⁴⁰ "Riots in Kenya as Islamic radical shot", *Daily Telegraph*, 28 August 2012

set out proposals for 290 constituencies. However, by the time it reported, responsibility for finalizing constituency boundaries had been passed under the new Constitution to the Independent Electoral and Boundaries Commission (IEBC), which began work in earnest in late 2011.

The IIBRC's proposals had not been without controversy, so the IEBC knew that finalizing constituency boundaries would not be straightforward. It took the IIBRC's proposals as its starting point and began extensive public consultations.

The IEBC produced a [preliminary report](#) in January 2012 and then a [revised preliminary report](#) in February, which the Kenyan Parliament approved at the beginning of March.

The IEBC produced its [final report](#) on 7 March. It simply comprises a list of all 290 constituencies, plus the wards in each constituency. One [media outlet](#) reported that the IEBC had stuck to the proposals it had made in its preliminary report, ignoring concerns expressed by some parliamentarians. Elements within the Party of National Unity, President Kibaki's party, were said to have been particularly unhappy with the IEBC's proposals. However, in April, the [Kenyan High Court](#) reportedly froze the creation of 80 new constituencies in response to petitions from four councillors from Makueni County. But on 9 July, the Court was reported to have [upheld](#), with some minor revisions, the IEBC's plans.

In August 2012 the IEBC announced that it had decided not to use a Biometric Voter Registration system, as it had planned to – instead reverting to a manual registration system using optical mark readers. This followed problems with the tendering process for the project, which meant that tendering would have to be started afresh. Some expressed concerns that reverting to a manual system will mean that many of the problems with the voters roll that were encountered in 2007 and which were heavily criticised by the 2008 Kriegler report, could reoccur. The IEBC eventually reversed its decision, having received additional support from the Canadian Government and Standard Chartered Bank. However, with voter registration beginning on 19 November, the IEBC is currently expressing concern about the low turn-out, with ten million people reportedly having registered by 13 December, with only days to go to the 18 December deadline.⁴¹ The original target for registration was 18 million. An extension of the registration deadline appears possible, despite official denials.⁴² There are ongoing debates about why turn-out is low, but one likely reason must be the voter experience in the 2007 elections. Another probable cause is the requirement of those registering to be able to show either a national ID card or a valid passport.

There is also currently controversy over the entitlement to vote of an estimated three million members of the Kenyan diaspora. The IEBC has announced that only those who are physically in Kenya, Tanzania, Uganda, Rwanda or Burundi at election time will be able to do so. Lawyers for diaspora groups are seeking a reversal of this decision in the courts. If legal challenges succeed, this could also extend the voter registration period significantly.⁴³

The Election Regulations were gazetted at the beginning of November. Despite the many challenges currently being faced by the IEBC, the authorities are refusing to countenance

⁴¹ "Kenyan poll body reports 10 million registered voters 13 December", *BBC Monitoring Africa*, 13 December 2012

⁴² "Low voter registration worrying", *The Star* (Nairobi), 9 December 2012

⁴³ "Registered as voters or not, diaspora Kenyans can still sway this election", *The Star*, 8 December 2012

any possibility of a postponement of the March 2013 election date. But this outcome cannot be entirely ruled out.⁴⁴

3 Kenya's Somalia incursion

In early 2011, there was a burst of fighting in Gedo region, southern Somalia, along the border with Kenya, which placed the Kenyan army on high alert. The security forces subsequently said that there had been al-Shabaab 'infiltration' of Kenya, arguing that a bomb attack in Uhuru Park in June 2011 was the work of Kenyan al-Shabaab sympathizers.⁴⁵ Al-Shabaab admitted responsibility and said that it was considering carrying out attacks in Kenya. Then, as famine struck the Horn of Africa during the second half of 2011, tens of thousands of Somalis fled to the refugee camps at Dadaab in eastern Kenya, imposing a growing burden on the host state and local communities.

On 15 October 2011, following a mini-surge of attacks on and kidnappings of foreign tourists (Briton David Tebbutt was killed and his wife, Judith, amongst those abducted) and aid workers close to the Kenya-Somalia border, about 1,600 Kenya Defence Force (KDF) troops crossed the border into Somalia in operation 'Linda Nchi' (Protect the Nation). Originally described by the Kenyan government as an operation aimed at capturing those who had engaged in the attacks and kidnappings, it soon came to be characterised as Kenya's contribution to defeating al-Shabaab and creating peace in Somalia. The target of the Kenyan incursion was al-Shabaab strongholds in the south, with the ultimate prize the port of Kismayo.⁴⁶ In November 2011, the three Presidents of Uganda, the Transitional Federal Government in Mogadishu and Kenya announced a combined assault against al-Shabaab to inflict a decisive defeat on it.⁴⁷

At the time of the incursion, some also warned that Kenya had not formulated clear aims for its incursion and would be wise not to remain in southern Somalia for long.⁴⁸ But getting out is always harder than going in. An analyst for the International Crisis Group predicted: "I think the Kenyans are into a very long and messy intervention in Somalia."⁴⁹

During 2012, Kenyan forces have proceeded with a degree of caution. In fact, they have often left much of the fighting in the south of Somalia to their local allies in what is called the 'Ras Kamboni brigade'. The brigade is largely Ogadeni in composition. Al-Shabaab has undertaken several attacks on military and non-military targets in Kenya in 2012. In early July 2012 there were armed attacks against Christian churchgoers in eastern Kenya, in which at least 17 died. These were the worst terrorist attacks in the country since 2002. Al-Shabaab claimed responsibility. There have been continuing attacks in recent months (see above). But public opinion in Kenya still seems largely acquiescent about the incursion.

In May 2012, the important town of Afmadow fell to Kenyan forces. In July an enlarged Kenyan contingent of 4,600 formally became part of the mission of the African Union in Somalia (AMISOM).⁵⁰ However, this has so far meant little in practice. Relations between

⁴⁴ "Plan for August poll intensifies", *The Star*, 24 October 2012

⁴⁵ As discussed earlier, there is a group which favours secession for the coastal communities called the Mombasa Republican Council. It has been banned by the authorities and in recent months an official crackdown has been under way against the group.

⁴⁶ "Kibaki gambles on regional war with al Shabaab", *Africa Confidential*, 21 October 2011

⁴⁷ "Uganda, Kenya and Somalia in joint assault on al-Shabaab", *Monitor*, 17 November 2011

⁴⁸ "Kenya's political failure in southern region", *Garowe Online*, 12 November 2011. Concerns have also been expressed, particularly by Muslim leaders, about alleged Israeli military assistance to the Kenyan incursion.

⁴⁹ "Are Kenyans seeking a buffer zone in Somalia?", *BBC News Online*, 28 October 2011

⁵⁰ "Kenyan troops formally join AU mission in Somalia", *KBC Online*, 6 July 2012

Kenya and Somalia are complicated by disputes over ownership of oil reserves off the coast and by an undercurrent of mistrust about Kenya's intentions in the south following the incursion.⁵¹ There has been persistent speculation that Kenya's main intention is to create a buffer zone in southern Somalia and that to facilitate this it is encouraging a local polity along the border known as 'Jubaland' – also called 'Azania'.⁵² Since November 2012 the Intergovernmental Authority on Development has been holding meetings designed to achieve agreement over how Jubaland should be governed, and who by.⁵³

There were numerous moments when an assault on Kismayo was predicted by observers, but the approach appears to have been to exert gradual and growing pressure on al-Shabaab so that it decided, when the moment of truth finally came, not to defend it to the last man. This is essentially what happened at the end of September 2012. By this time, many civilians had fled. An AMISOM force joined with Kenyan troops and supporting militia and entered the city without much resistance. Al-Shabaab withdrew with most of its forces and equipment intact. Nonetheless, it was a serious blow to al-Shabaab.⁵⁴

Since its capture, who runs Kismayo has been a sensitive issue between Kenya and the new President of Somalia, Hassan Sheikh Mohamud. KDF troops remain based in the city and are not expected to withdraw in the near future.⁵⁵ Kenya's militia ally, Ahmed Mohamed Islaan Madobe, the leader of the Ras Kamboni brigade, appears to have been given control of the city by Kenya in return for giving some of its businessmen and members of the KDF a share of the proceeds from the lucrative trade in charcoal exports that goes through the port. This is in defiance of a ban on the trade on the part of the Somali Government in Mogadishu. To complicate matters further, the self-styled leader of 'Jubaland'/'Azania', Mohamed Abdi Mohamed Gandhi, also an Ogadeni, has sought a stake in Kismayo's governance but so far appears to have been excluded. Other clans are unhappy about possible Ogadeni dominance of Kismayo.⁵⁶ Whether by design or mishap, Kenya appears some way from achieving a stable basis for governance in Kismayo, which could yet create conditions for an al-Shabaab revival in this part of the country.

Further reading

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[Waki Report](#) (15 October 2008)

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[Proposed Constitution of Kenya](#) (6 May 2010. It was promulgated August 2010)

Human Rights Watch, ["Human rights concerns of Operation Linda Nchi"](#) (18 November 2011)

⁵¹ "Somalia, Kenya dispute oil blocks", *Global and Mail*, 7 July 2012

⁵² "Are Kenyans seeking a buffer zone in Somalia?", *BBC News Online*, 28 October 2011; "Kenya denies reports of plan to form administration in southern Somalia", *Shabelle Network*, 5 July 2012

⁵³ "Kenyan troops to stay in Kismaayo until Somalia's security stabilises", *Nation*, 14 December 2012

⁵⁴ *Africa Confidential*, 5 October 2012

⁵⁵ "Kenyan troops to stay in Kismaayo until Somalia's security stabilises", *Nation*, 14 December 2012

⁵⁶ "Africa Confidential", 16 November 2012

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International Criminal Court, [Situation in Kenya](#)

World Bank's web resources on '[Kenya's devolution](#)'