



SECURITY COUNCIL REPORT UPDATE REPORT



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Kenya

Expected Council Action

On 1 and 2 June, the Council will visit East Africa with a brief passage through Nairobi, Kenya. While the main topic for discussion in that part of Africa is likely to be Somalia, inevitably recent developments in Kenya will be in the minds of Council members.

This *Update Report* presents an overview of recent developments in Kenya and related issues.

Key Recent Developments

On 6 February, the Council adopted a presidential statement under agenda item "Peace and Security in Africa" which:

- emphasised the need for dialogue, compromise and action to end to the violence by Kenya's political leaders;
- recalled the need to avoid impunity;
- welcomed the decisions by the High Commissioner for Human Rights and the Secretary-General's Special Advisor on the Prevention of Genocide to dispatch missions to Kenya; and
- requested the Secretary-General to report on UN support to the mediation and the regional impact of the Kenyan crisis, including on UN operations.

On 25 February, Under Secretary-General John Holmes briefed the Council on the humanitarian situation in Kenya and regional implications. Members then expressed concern about the humanitarian, reconciliation and socio-economic aspects and the importance of returns, justice and protection of human rights.

On 28 February, following difficult negotiations mediated by the panel led by former Secretary-General Kofi Annan, a power-sharing agreement was signed between the Party of National Unity (PNU) of President Mwai Kibaki and the Orange Democratic Movement (ODM) of opposition leader and former presidential contestant Raila Odinga.

On 5 March, the Council heard a Secretariat briefing on Kenya. Members apparently welcomed developments but expressed concern about the fragile security situation. Members also underlined their expectation of further Secretariat reporting—as requested in the 6 February presidential statement—as well as interest in briefings by the High Commissioner for Human Rights and the Secretary-General’s Special Adviser for the Prevention of Genocide.

It seems that in the past two months the humanitarian situation in Kenya has improved somewhat but acute problems remain in some areas. 100,000 civilians still remain in camps. There have also been concerns about some returns not being voluntary and about safety of the returnees, including from the Secretary-General’s Representative on the Human Rights of Internally Displaced Persons, Walter Kaelin who visited Kenya between 19 and 23 May. Furthermore, there are reports of a looming food crisis and increasing tensions over property and land in particular in areas with heavy displacement and strong ethnic divisions.

The power-sharing deal provides for the establishment of a new post of prime minister with authority to “coordinate and supervise the execution of the functions and affairs of the Government of Kenya”. The prime minister must be an elected parliamentarian and leader of the largest party or coalition in the national assembly. Removal from office would require a motion of no confidence from the assembly. As the leader of the largest party, Odinga would become prime minister.

Under the new arrangement, the cabinet includes the president, the prime minister, two deputy prime ministers (one from the ODM and another from the PNU) and other ministers. The cabinet’s composition is to take into account the principle of portfolio balance between the PNU and the ODM, and reflect relative parliamentary strength. The ODM-PNU coalition would accordingly be dissolved if the parliament is dissolved (or elections are held, currently scheduled for 2012), or if both parties agree in writing, or one of them withdraws from the coalition.

On 18 March, the Kenyan national assembly approved a constitutional amendment and the National Accord and Reconciliation Act, which reflects the provisions of the agreement. However, tensions and divisions between the ODM and the PNU loomed over the appointment of ministers.

An agreement on portfolios was only reached in mid-April. This involved an increase in the number of ministries to forty. The most important portfolios reportedly remain with the PNU except for agriculture and local government.

Odinga was sworn in as prime minister on 17 April. However, there is potential for further tensions between the ODM and PNU, in particular regarding the precise extent of the prime minister’s powers as well as issues of justice and accountability and truth-seeking regarding the elections and the subsequent violence.

Other agreements between the ODM and the PNU on 4 March include:

- establishment of a **constitutional review process** in five stages, starting with the adoption of a parliament statutory review and a timetable by late April. It is envisaged that the process should by then be completed within 12 months, culminating in a popular referendum;
- establishment of a **commission of inquiry on post-election violence**. Following the appointment of its three members, the commission is due to start working within thirty days and to report within three to four months;
- creation of an **independent review committee** to look into the conduct and management of the elections. The committee is due to start working no later than 15 March and produce a report within three to six months; and
- establishment of a **truth, justice and reconciliation commission** to inquire into human rights violations and major economic crimes (including corruption, historical land injustices and land acquisition and concentration, a highly controversial issue in Kenya) that took place between 12 December 1963 (the date of Kenyan independence) and 28 February 2008. It is envisaged that “no blanket amnesty” will be provided. Individual amnesty in exchange for the truth is possible provided it does not include serious crimes (i.e. crimes against humanity, war crimes and genocide), or persons bearing the greatest responsibility for crimes investigated. The commission will consist of seven members—three international, to be appointed by the Panel of Eminent Personalities, and four Kenyan—and is due to report in two years.

At press time, a bill with a framework for the constitutional review process was being prepared. Media reports suggest that the bill may be tabled for debate in the Kenyan parliament in June. Observers note that several challenges lay ahead, including agreement between the ODM and the PNU on the contents of a future draft constitution to be submitted for popular referendum, the risk of collapse of the coalition government and related potential for violence especially if and when the referendum is carried out. Controversial issues include whether to continue with a parliamentary system.

President Kibaki appointed Kenyan Appeals Court Justice Philip Waki in early April to chair the commission of inquiry on post-election violence. The appointment apparently drew criticism from Kenyan media outlets due to the risk of damage to public perception of the Kenyan judiciary given the issue’s political contentiousness. Other members reportedly appointed are Gavin Alistair McFayden of New Zealand and Pascal Kambale of the Democratic Republic of the Congo.

South African Justice Johann Kriegler was named in mid-March to chair the independent review committee on the elections.

The national assembly is currently considering a bill establishing the truth commission. The bill has met with criticism from human rights groups for not barring amnesty for war crimes, acts of torture not amounting to crimes against humanity and crimes of sexual violence. They also note problems with ensuring the commission’s independence, since the justice ministry would be empowered to review the commission’s accounts, and the lack of immunity from lawsuits for the commission.

Criticism has also surfaced against a reported proposal by Odinga and the ODM to grant amnesty to those arrested in connection with post-election violence as a gesture of reconciliation. The issue led to divisions within the cabinet. At press time, it seemed that no agreement on Odinga's proposal had been reached.

(it seems that the ODM leadership is under pressure from within the party to secure the amnesty. Some ODM parliamentarians have recently joined other PNU MPs in a new a political opposition group.)

Former Nigerian Foreign Minister Oluyemi Adeniji was nominated as new chief mediator for the Panel of Eminent African Personalities.

On 18 March, the Office of the High Commissioner for Human Rights issued the report of its fact-finding mission to Kenya on post-election violence. The report notes that violence in Kenya followed three patterns:

- spontaneous outbursts in Nairobi and Kisumu slums;
- targeting of individuals perceived to be pro-PNU in the Rift Valley somewhat organised and instigated by local leaders; and
- retaliation against perceived opposition supporters.

While acknowledging the limitations and constraints faced by the Kenyan government, the report concludes that evidence suggests that government forces used excessive force and failed to protect the population.

The report further notes that underlying causes for the violence include inequality and poor living conditions. It says that the "colonial legacy and mismanagement of land distribution especially in the Rift Valley has generated conflict over what is often perceived as the most important form of wealth and source of political power: arable land." Accordingly, the "consistent failure to embrace institutional reforms—constitutional, judicial, police and civil service reform—has left the Kenyan State with a diminished ability to tackle the root causes of violence and human rights violations and little credibility that it would do so."

The report presents a set of recommendations including:

- a mandate for the truth commission to recommend criminal prosecutions and the establishment of a reparations programme;
- a bill against hate speech; and
- ensuring the rights of the internally displaced to return or resettle; and
- reporting and protection mechanisms on sexual violence.

Options for Council Members

Continuation of the current wait-and-see approach on Kenya seems to be the most likely option for Council members for now. One option, which most members seem likely to want to keep open, is the possibility on suitable occasions of receiving interim, informal briefings on political reconciliation and the humanitarian situation.

Other options for the Council—especially should the situation seem likely to deteriorate—include:

- bringing forward the Secretariat report requested on 6 February;
- inviting the High Commissioner for Human Rights and the Secretary-General's Special Advisor on the Prevention of Genocide to brief the Council;
- working in partnership with the AU Peace and Security Council and concerned member states perhaps in a discussion in an Arria-style meeting, or perhaps through the Council's Ad Hoc Working Group on Conflict Prevention in Africa; and
- holding an open debate and adopting a statement with participation by the AU Peace and Security Council.

UN Documents

Selected Presidential Statement
<ul style="list-style-type: none">• S/PRST/2008/4 (6 February 2008) was the statement on the Kenyan crisis.
Other
<ul style="list-style-type: none">• Report of the High Commissioner for Human Rights on the February 2008 fact-finding mission to Kenya• S/PV.5845 (25 February 2008) was the humanitarian briefing by Under Secretary-General John Holmes.

Other Relevant Facts

Panel of Eminent African Personalities
Kofi Annan (Ghana) Graça Machel (Mozambique) Benjamin Mkapa (Tanzania)