

THE KENYA NATIONAL DIALOGUE AND RECONCILIATION (KNDR) MONITORING PROJECT¹

Review Report

June 2011



¹ Supported by a grant from Foundation Open Society Institute (Zug).

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ACRONYMS

ADB	African Development Bank
AU	African Union
CBK	Central Bank of Kenya
CDF	Constituency Development Fund
CIC	Commission on the Implementation of the Constitution
CIOC	Constitution Implementation Oversight Committee
CIPEV	Commission of Inquiry into Post-Election Violence
CoE	Committee of Experts
CRA	Commission on Revenue Allocation
DPCs	District Peace Committees
DPP	Director of Public Prosecution
ERS	Economic Recovery Strategy
FGD	Focus Group Discussion
GoK	Government of Kenya
ICC	International Criminal Court
IDPs	Internally Displaced Persons
IIEC	Interim Independent Electoral Commission
JSC	Judicial Service Commission
KACC	Kenya Anti-Corruption Commission
KKV	Kazi kwa Vijana
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
KNDR	Kenya National Dialogue and Reconciliation
KTN	Kenya Television Network
LATF	Local Authority Transfer Fund
MMPR	Mixed Member Proportional Representation
MOSSP	Ministry of State for Special Programme
MPs	Members of Parliament
NARC	National Rainbow Coalition
NCIC	National Cohesion and Integration Commission
NGOs	Non-Governmental Organizations
NSC	National Steering Committee on Peace Building and Conflict Management
ODM	Orange Democratic Movement
PEV	Post-Election Violence
PNU	Party of National Unity
PRIC	Police Reforms Implementation Commission
SLDF	Sabaot Land Defence Force
SMS	Short-text Message Service
TJRC	Truth Justice and Reconciliation Commission
TV	Television
UNCERF	United Nations Central Emergency Response Fund
UNDP	United Nations Development Programme
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
YEDF	Youth Enterprise Development Fund

EXECUTIVE SUMMARY

1. Kenya adopted a new constitution in August 2010. This marked a key turning point in the country's political life. Kenya had failed to produce a new constitution in spite of efforts over a long period to develop one. Political divisions deepened in the process, culminating in the post-2007 election violence. The post-election violence exposed deep-seated weaknesses in Kenya's political system and institutions of the state generally. The violence ended after the two parties to the dispute, the Government/Party of National Unity (PNU) and the Orange Democratic Movement (ODM), signed the Kenya National Dialogue and Reconciliation (KNDR) agreement (referred to here as the National Accord), under the mediation by the African Union's (AU) Panel of Eminent African Personalities, led by Mr Kofi Annan.
2. The dialogue and reconciliation process identified constitutional and institutional reforms as critical for the achievement of sustainable peace and stability. The new constitution is, thus, an important achievement of the KNDR process. It marks a fresh start for Kenya.
3. This review report covers the period between April and June 2011. It examines the progress in implementing reforms during this transition period. It has focussed on the key themes under the KNDR agreement. Previous reports are found at www.dialoguekenya.org

Findings

4. Data collected between 2008 and 2010 period reveal that the social-political and economic situation did improve after the signing of the National Accord and got better. By the end of 2010, many people stated that life was better compared to 2008 and they felt safer. By June 2011, however, people cite the rising cost of living and inflation in general as the main challenges facing the country. Only half of the respondents feel safer. Many people feel life is getting worse as compared to one year ago. The difficult socio-economic situation requires to be addressed urgently because its negative social consequences could exacerbate political difficulties and destabilise the framework for reforms and the society in general.

The ICC and the fight against impunity

5. The ICC intervention in the Kenya situation has increasingly become a driver of the politics around the 2012 elections. It is seeking to re-establish accountability in Kenya's political culture and is, therefore, causing anxiety among political elites. It has occasioned the formation and fragmentation of ethnic coalitions. Nonetheless, many Kenyans still believe that prosecution of perpetrators of violence will prevent a recurrence of violence. They are disillusioned by the lack of progress in arresting lower and middle level perpetrators and holding senior and influential people to account.
6. Politicians are widely viewed as sponsors of illegal armed groups that took part in the violence, and which transformed into extortion gangs. Up to 42 per cent of respondents in the survey think these illegal groups will emerge and play a political role before 2012. Failure to prosecute political and civil crimes has eroded public confidence in the government's ability and willingness to fight impunity. It has slowed the momentum of citizen advocacy for prosecution or other forms of accountability.
7. National baseline survey data show that more than 50 per cent of respondents are optimistic that there will be no violence in 2012. Nonetheless, lethargy in the fight against impunity for political violence is causing public disillusionment. Deterrence

measures promised under the framework of the National Accord have not been effected. Given past experience with violence during election years, failure to take concrete steps to break the cycle of impunity is increasing public anxiety as the 2012 elections approach.

The challenge of resettling IDPs

8. The government has made efforts to find durable solutions to IDPs: food, shelter, counselling, money, land and peace efforts. However, IDPs are still in camps. The challenges that have encumbered the resettlement programme stem from failure to carry out a comprehensive registration and profiling of IDPs from the onset. Such a profiling exercise would have identified the different categories of IDPs and appropriate solutions for each.
9. Allocating land to landless IDPs has attracted land-hungry persons into camps seeking to benefit from the exercise. Efforts to allocate land have also triggered local discourses of favouritism and exclusion, as well as local rejection of IDPs. This suggests that local level grievances, particularly around land, are yet to be resolved. It is important to emphasise that the presence of IDPs in camps, three years after the signing of the National Accord, indicates that communities have not fully reconciled and that reforms have been insufficient in this regard. As the next General Election approaches, greater effort needs to be put into establishing the identity and origin of those in camps and why they are unable to return, in order to provide appropriate durable solutions.

Implementation of the new constitution

10. The promulgation of the new constitution in August 2010 marked a new beginning in Kenya. The country has had a tortuous and protracted two-decade struggle for comprehensive constitutional reforms. A new constitution is an important milestone in Kenya's history. It clearly marks a new beginning and a transition from the older order to the new one. There is progress in making some of the laws prioritised under Schedule Five. However, there are many laws to be finalised by 27 August 2011, the deadline imposed by the constitution. Parliament will have to speed up the legislative process to meet this deadline. Divisions in Parliament along party and other cleavages, however, will have to be resolved for Parliament to effectively meet this challenge.
11. A conservative political culture and the old order threaten implementation of the new constitution. Lack of bi-partisan leadership, internal conflicts in the coalition and in Parliament are slowing the pace of implementing the constitution. Further, civic education providers have not been active yet awareness on the new constitution is critical for building citizens knowledge to create demand for reforms. However, the public is supportive of the new achievements, such as the public participation in the appointment of key state officers.
12. The constitution is one major achievement thus far. It is opening a new window for reforms and offering a fresh start. It has set new standards in the appointment of public officers. But there has been limited progress in some areas such as reforming the police, national cohesion and reconciliation, and the fight against impunity in general. As the country approaches the next elections, there is need to fast-track police reforms and enactment of electoral laws in order to make adequate preparations for a clean and peaceful poll.

Long-term issues and solutions

13. Another General Election is fast approaching when progress in institutional reforms such as the police has been slow. Communities have not fully reconciled and IDPs are in

campus. Nonetheless, the new constitution also spells out the reform measures to be undertaken to improve the police. Change of attitude and behaviour, and adherence to modern democratic norms is an imperative for the police as the country moves towards another election. Thus, vetting of the police must be opened to the public in line with the new standards. This will improve public confidence in the police and begin creating a culture of transparency.

14. There is progress in reforming the Judiciary. The Chief Justice and the Deputy Chief Justice are in office through a process that had public participation at its core. Nominees for other Judges of the Supreme Court were also recruited through a transparent process; a new standard entrenched by the constitution. There is also increased vigilance in the recruitment process. Public litigation efforts have increased in this respect.

Conclusion

15. The report has emphasised that the Agenda 4 reforms under the KNDR agreement were aimed at securing sustainable peace by addressing all the fault lines from which the post-election violence evolved. The discussion has also noted that the new constitution firmly anchors all the Agenda 4 reforms. The spirit of constitutionalism – based on values and principles espoused by the new constitution – is required to move the country forward. The new constitution is not an end in itself; it is a means for achieving the goal of ‘sustainable peace, stability, and justice in Kenya’.
16. Not all the fault-lines around which post-2007 elections occurred have been bridged. Political competition is still organised around ethnic coalitions and alliances. The high cost of living is fuelling new grievances, which could converge with other political dynamics to destabilise the framework for reforms as the country moves towards another election. Critical institutions, laws and processes for the next elections should be put in place early enough to enable adequate preparations. There is need to fast-track police reforms and enact electoral laws to ensure a clean and peaceful election. Importantly, the date for the next General Election must be clarified as soon as possible in order to prepare everyone and to put in place in good time the requisite institutional and logistical measures.

1. INTRODUCTION

17. On 27 August 2010, Kenya turned a new page by promulgating its constitution. This is an important development in the country's political history. Kenya had failed to produce a new constitution in spite of efforts over a long period to develop one. This failure to undertake comprehensive reforms deepened socio-political divisions, which found expression in the violence that followed the dispute over the 2007 presidential election. The violence exposed structural weaknesses in Kenya's political system and institutions of the state. The violence ended after the two parties to the dispute, the Government/Party of National Unity (PNU) and the Orange Democratic Movement (ODM), signed the Kenya National Dialogue and Reconciliation (KNDR) agreement, through the mediation by the African Union's (AU) Panel of Eminent African Personalities, led by Mr Kofi Annan.
18. The parties committed to undertake far reaching reforms to prevent a recurrence of violence. They committed to the goal of '*sustainable peace, stability, and justice in Kenya through the rule of law and respect for human rights*'. They committed to tackle four main issues expressed as Agenda Items 1-4.²
19. The dialogue and reconciliation process identified, under Agenda Item 4, constitutional and institutional transformation crucial to sustainable peace and stability and as a foundation for comprehensive reforms. The new constitution is thus an important achievement of the KNDR process. It marks a fresh start for Kenya because it is a transition from the older order to a new one.
20. This review report examines the progress in implementing reforms during this transition period. South Consulting has been monitoring implementation of the KNDR agreements from 2008. Previous reports can be found at www.dialoguekenya.org.
21. The report has utilised both quantitative and qualitative data. Quantitative data was collected through a national survey of 2,500 respondents drawn from across all the regions of the country. It also draws on data collected in earlier surveys. Qualitative data was obtained through interviews with key informants drawn from Government ministries, humanitarian organisations, civil society organisations, the media and the public at large. Secondary information was obtained by reviewing reports and documents by the Government, development agencies, the media and non-governmental bodies.
22. The review recognises too well that tracking progress of implementation of reforms is bound to excite interest in various quarters. In writing the report, therefore, we have taken care to remain objective and to let the data speak.
23. The report adopts a thematic approach, reflecting key reform issues in the constitution implementation process. The report is organised as follows:
 - a. Part II: The Socio-Political Situation and the Challenge of Impunity
 - b. Part III: The Challenge of Resettling IDPs
 - c. Part IV: The Status of the Coalition Government
 - d. Part V: Challenges to the New Constitution
 - e. Part VI: Conclusion

² Agenda Item 1: Immediate action to stop violence and restore fundamental rights and liberties; Agenda Item 2: Immediate measures to address the humanitarian crisis and promote healing and reconciliation; Agenda Item 3: How to overcome the political crisis; and Agenda Item 4: Addressing long-term issues, including constitutional and institutional reforms, land reforms, poverty and inequalities, youth unemployment, national cohesion, and transparency and accountability.

2. THE SOCIAL-ECONOMIC SITUATION AND THE CHALLENGE OF IMPUNITY

Introduction

24. The KNDR agreement recognised that fighting impunity was essential if the country was to address the root causes of violence. The mediation team noted that ‘the fight against impunity must underpin the entire reform agenda.’ Consequently, the Grand Coalition Government established the Commission of Inquiry into the Post-Election Violence (chaired by Justice Philip Waki)³ to investigate the facts and circumstances related to the post-election violence and to make recommendations on measures that should be taken to prevent its recurrence.⁴
25. At the end of its mandate, CIPEV observed that ‘impunity lies at the heart of preventing the kind of violence that has been witnessed in this country time and time again. The eradication of impunity will, therefore, not only blow off the cover for persons who break the law but also deter others who may contemplate similar deeds in future.’⁵ CIPEV recommended setting up a Special Tribunal for Kenya to investigate and try those responsible for the most serious criminal acts during the crisis period. It further recommended that an envelope containing the names of suspected perpetrators be handed to the International Criminal Court (ICC) if the government failed to set up a Special Tribunal.
26. This review report comprises a summary of major issues that have arisen in the fight against impunity thus far. It also documents public perceptions of the ICC and its contribution to this endeavour.

The social economic context

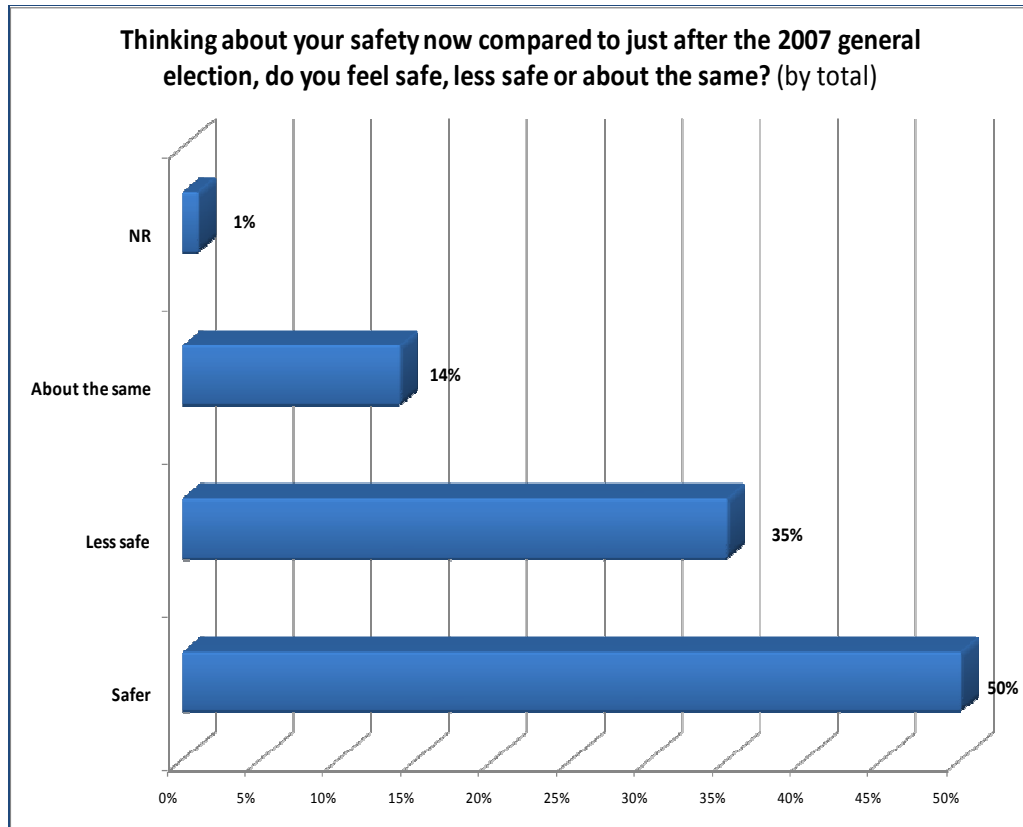
27. By the end of 2010 and in the first quarter of 2011, survey findings showed the socio-political and economic situation in Kenya had considerably improved compared to the period just after the post-election violence in early 2008. Although incidents of violence and crime were reported in some areas of the country, they did not result from political disputes. From the surveys, many people felt safer than they did in early 2008.
28. By the end of June 2011, only half of the respondents (50%) reported that they felt safer, almost the equivalent of people who reported feeling safer in August 2009, one-and-a-half years after the post-election violence. Public anxieties over the outcome of the ICC intervention, the cultivation of ethno-political alliances, shifting ethnic coalitions, and intensified competition for the 2012 General Election are causing concern because it is not certain how the future will evolve. Moreover, these are the main fault lines that might converge to cause conflict.

³ So named after Justice Philip Waki, who chaired the Commission

⁴ Republic of Kenya, *Report of the Commission of Inquiry into the Post-Election Violence* (Nairobi: Government Printer, 2008)

⁵ *Ibid*, p. 444

Figure 1: Thinking about your safety now compared to just after the 2007 General Election, do you feel safe, less safe or about the same?



29. The high cost of living is the most serious problem facing Kenya today. Up to 68 per cent of respondents feel that the high cost of living is the most serious problem, while 15 per cent and 7 per cent think unemployment and corruption, respectively, are the main challenges facing the country. People are also concerned about poor leadership. These are certainly important challenges that must be confronted as the country moves towards another General Election.

Table 1: What is the most serious problem facing Kenya today?

In your opinion, what is the most serious problem facing Kenya today?	
High cost of living	68%
Lack of employment/ Jobs	15%
Tribalism	2%
Corruption	7%
Poor leadership	5%
Insecurity	1%
Infrastructure	1%

30. Unemployment remains a significant problem in all parts of Kenya: up to 78 per cent of respondents in the survey said availability of jobs had become worse than it was one year before. High commodity prices in a context of unemployment, and increased food insecurity particularly in poor urban households, contribute to public anxiety. Combined with uncertainties resulting from limited progress in addressing the long-standing issues

that cause violence, these dynamics can converge to create political difficulties for the country.

Table 2: How would you compare life today and one year ago regarding the following?

	Much worse	Somewhat worse	About the same	Somewhat better	Much better	DK/NR
Availability of jobs	55%	23%	10%	8%	2%	1%
Ability to buy food	75%	18%	3%	2%	0%	1%
Ability to get medical care	31%	21%	20%	22%	4%	1%
Ability to pay for education	37%	21%	18%	17%	5%	2%
Cost of living in general	81%	12%	3%	2%	1%	1%

31. Concern over the high cost of living is reflected in the proportion of the population that is able to access basic needs without difficulty: 93 per cent of respondents said their ability to buy food had taken a turn for the worse over the past year. The data shows that only about one quarter of respondents were happy with service delivery in the education and health sectors, where 23 per cent and 26 per cent respectively said their ability to pay for these services had improved.
32. The data presented here show that the social-economic situation in the country had considerably improved but that it is now beginning to decline. The escalating food prices and rising inflation are issues that require urgent measures because their social consequences could converge with other dynamics to prevent the undertaking of critical reforms to support a peaceful and clean election.

Political Will to Fight Impunity: The Gap

33. *Lack of political will to fight impunity.* After the signing of the National Accord and formation of the Grand Coalition Government, there arose a debate on how to address the post-election violence. Between March and April 2008, there was a debate on whether to prosecute perpetrators of the post-election violence or to grant them amnesty. The ‘amnesty debate’ was the first point of dissonance in the Grand Coalition Government on the matter of impunity. In general, PNU favoured prosecution of suspects while ODM favoured amnesty. This issue continued to divide the coalition and prevented the development of a common position on how to deliver accountability for the post-election violence. The parties did not reconcile their positions or develop a common approach on how to close the chapter on Kenya’s post-2007 election violence. *This failure to take a decisive position on post-election violence has transformed this conflict into a major fulcrum around which politics and other events are revolving.*
34. *PEV cases are poorly prosecuted or lack adequate evidence.* The lack of commitment to a common position on PEV has resulted in failure to hold suspected perpetrators of the violence accountable. Of the 92 low-level suspects arrested in 2008, 19 were charged in May 2009 in Eldoret. They were later acquitted for lack of evidence. The court argued that the police had failed to establish a *prima facie* case against the accused, which would require them to be put on trial. Similarly, in November 2009, a Nakuru court acquitted three suspects for lack of evidence. These cases generally point to poor investigative and prosecutorial capacity on matters around the post-election violence.
35. *Scepticism over the fight against impunity has increased:* The failure to hold post-election violence perpetrators to account has increased public scepticism on commitment to fight impunity for ordinary crime. For instance, some extortion gangs operate in urban areas because low-level perpetrators were not arrested or made to account for their role

in the post-election violence. Over half (54%) of those interviewed agree that police officers know members of illegally armed groups but do not take any action against them.

Table 3: Thinking of illegal armed groups, do you agree or disagree with these statements?

	Agree	Disagree	Don't know	NR
Illegal armed groups will re-emerge during the 2012 general election	42%	35%	22%	1%
Politicians finance illegal armed groups	64%	19%	16%	1%
There are no illegal armed groups in this area	48%	39%	12%	1%
The police know members of illegal groups	54%	22%	23%	1%
The illegal armed groups provide security to the local people	22%	61%	16%	2%

36. *Illegal groups could become part of competitive politics:* Previous reports have mentioned that illegal armed groups are associated with politicians. Interviews also revealed that senior politicians depend on these groups to fight off opponents. During the period under review, many of those surveyed (64%) agreed that politicians finance illegal armed groups. Yet, 42 per cent were convinced that these groups will re-emerge during the 2012 General Election. This is a significant finding: it appears that illegal armed groups are gradually becoming part of the culture of elections in Kenya, principally because no gang members and leaders have been arrested or prosecuted. Their rapport with senior political leaders has enabled some groups to operate with ease.
37. *Illegal groups are a threat to the security of communities:* Although most extortion gangs emerge by providing social services and protection in urban neighbourhoods, they ultimately pose a security threat to community members by demanding protection fees. In places such as Kibera in Nairobi, these groups have illegally occupied rental houses belonging to persons displaced during the post-election violence or collect rent dues on them. The groups control the security of affected parts of the informal settlement and have thus entrenched themselves.⁶ Although community members may resort to illegal groups when in need of protection in urban neighbourhoods, previous survey reports show that many people prefer to receive security services from the police rather than these groups. The failure to arrest and prosecute those involved in post-election violence is likely to embolden the leaders of these groups, and especially those allied to senior politicians.

Public perception of the International Criminal Court

38. *The government has made little progress in holding high-level perpetrators accountable, thus disillusioning the public:* While the courts have dismissed several cases involving low-level perpetrators of the violence for lack of evidence, three years on, the government has made little progress in holding high level perpetrators to account. In 2009, and on two occasions, Parliament failed to pass a Motion to establish a Special Tribunal for Kenya as recommended by the Commission of Inquiry into the Post-Election Violence (CIPEV). Despite having expressed unanimous support for implementing the CIPEV report's recommendations, MPs voted against the tribunal: some considered it fatally flawed because of loopholes that allowed for presidential pardons, while others

⁶ Interview with a member of the District Peace Committee, 12 May 2011

opposed it believing it might be effective and thus result in their prosecution or those of their allies. The International Criminal Court appeared less threatening to them as it was seen as likely to pursue only a handful of people in a process that could drag on for years.⁷ The failure to set-up the tribunal invited the ICC intervention as recommended by CIPEV.

39. *The ICC intervention in Kenya has aroused anxieties with political implications:* The identification of senior and influential politicians from the two main parties as the main suspects in the ICC investigation into the violence has aroused political anxieties all round. In December 2010 when the ICC Prosecutor named the six suspects, political leaders quickly shifted their positions on the ICC and began to mobilise against its intervention. This development hamstrung the reform agenda as political attention shifted to strategies for securing political careers. On the whole, the intervention of the ICC has continued to weaken the functioning of the Grand Coalition Government.
40. *The public is concerned that not all perpetrators are held accountable:* The previous review report noted that support for the ICC intervention was high. The public is nonetheless concerned that not all perpetrators have been held accountable. Some would have preferred to see low and middle level perpetrators arrested and successfully prosecuted.
41. *Some people are unhappy about the ICC intervention; complacency is gradually building:* The length of time it is taking to resolve the issue of how to deal with post-election violence is generating public fatigue. Up to 38 per cent of respondents said they are now unhappy about the ICC intervention. Some argue that not all perpetrators are being held to account and that the low level perpetrators are yet to be arrested and prosecuted. Others argue that it is taking long to bring justice to the victims. Still, there are others who are unhappy because they think the ICC intervention has been politicised, or that the local courts should try the suspects. Indeed, prior to honouring the April 2011 summons by the ICC, some of the suspects conducted rallies particularly in Rift Valley Province, in which they pleaded their innocence. There were public claims that they had been set up by their rivals to jettison their political careers ahead of 2012 General Election.

Table 4: How happy/unhappy are you that the ICC is pursuing the six suspects?

	Total	Nairobi	Coast	North Eastern	Eastern	Central	Rift valley	Western	Nyanza
Happy	51%	59%	75%	55%	50%	29%	36%	67%	69%
Unhappy	38%	37%	14%	21%	38%	60%	55%	23%	19%
Not sure	5%	2%	5%	5%	7%	7%	5%	5%	5%
DK	4%	1%	7%	11%	5%	4%	3%	4%	6%
RTA	1%	1%	0%	7%	1%	0%	1%	1%	1%

42. *People in the regions that are home to some of the six suspects are unhappy with the ICC; they appear more complacent:* An analysis shows that regions from which the suspects are drawn are more unhappy with the ICC compared to those where no one is being called to account: in Central Province, 60 per cent are not unhappy with the ICC while Rift Valley has 55 per cent expressing similar sentiments. Those outside these regions are happy with the ICC. The regional pattern of approval and disapproval suggests that the process of accountability is being politicised and ethnicised: *criminal*

⁷ Sriram, Chandra Lekha and Stephen Brown, 'The ICC, Kenya and Complementarity' (forthcoming)

accountability is viewed through ethnic lenses. The culture of impunity and the general politicisation of the ICC intervention are responsible for this trend.

43. *Younger people are happy with the ICC:* More young people (57%) below 24 years are happy with the ICC compared to people aged over 45 years (47%). Similarly, more urban dwellers (59%) are happy with the ICC compared to 47 per cent in rural areas. That is, there are relatively more people in urban areas who are happy with the ICC than in rural areas. This is an important observation: it suggests that people in rural and urban areas have different perspectives on how people should be held to account.
44. *People want justice:* Up to 36 per cent of those who are happy with the ICC think it is a mechanism through which justice can be delivered to victims. Another 7 per cent think it will end impunity and 4 per cent think it will help to reveal the truth about the post-election violence. Further, 71 per cent of respondents agree that 'those supporting The Hague/ ICC action are mainly concerned with getting justice for victims of the PEV'. Only 23 per cent disagree. These findings reveal that people still want the ICC intervention to offer opportunities for delivering justice for the victims.
45. *Perceptions of unfair distribution of criminal responsibility are entrenched:* Those who are unhappy with the ICC intervention in Kenya allege that the list of suspects is not complete and that the process has been politicised. The view by some people that the list is incomplete is based on arguments that the violence occurred in several areas and, therefore, suspects should be drawn from all the affected regions. Others observe that the majority of the suspects are from one ethnic group, thus betraying a lack of ethnic balance. Some people at the local level also argue that low-level perpetrators who carried out the attacks bear the greatest responsibility. They do not perceive the influential people as having been involved in these attacks. People do not see them as criminals; they are their leaders. This aspect imbues the suspects with heroism. Perceptions of unfair distribution of criminal responsibility continue to inform discourses of grievance at the community level.
46. *Succession politics is shifting attention away from how to hold people to account:* The claims that the ICC 'is being used' to curtail the political ambitions of some of the suspects has raised public anxiety about the possibility of future violence. Public anxiety has been stoked by the ease with which rallies were mobilised before and after the visit to The Hague, and the tone of the speeches made. The rallies revealed that Kenya's political culture has not changed since 2008. Divisions around the ICC are emerging as new fault lines around which conflict could occur. Thus a trader in Eldoret noted: '*I realise we Kenyans as a people and our institutions have not learnt any lessons from 2008. We are still entertaining thoughts of violence, because that is what we do during the election year. This time my fear is worse because of the ICC.*'⁸ Indeed, the fear of violence during the election year has been aggravated by local discourses of political exclusion and victimisation of some communities. In particular, discourses linking the ICC to 2012 succession politics have shifted attention away from individual criminal responsibility.
47. *Not everyone thinks the ICC is politicised; many agree the ICC is about justice for victims:* The allegation that the ICC intervention has been captured by Kenyan politics is having some impact in changing people's perception about the ICC intervention as a tool for delivering justice to the victims. Up to 53 per cent of the respondents agree that the fight against impunity has political undertones: they agree that politicians supporting

⁸ Interview with a trader in Eldoret, 14 June 2011

The Hague/the ICC action are mainly concerned with eliminating political opponents. However, the majority believe that the ICC is about getting justice for the victims:

Table 5: Do you agree or disagree with the following statements?

	Agree	Disagree	NR
Those opposing The Hague/the ICC action are mainly trying to protect those who organised the PEV	62%	38%	1%
Those supporting The Hague/the ICC action in Kenya are mainly concerned with getting justice for victims of the PEV	71%	29%	1%
Politicians supporting the Hague/the ICC action are mainly concerned with eliminating political opponents	53%	46%	1%
If the six people named by The Hague/ICC prosecutor Ocampo are tried, political violence in the next General Election will be less likely	64%	34%	2%

48. *Some people in regions that are home to the six suspects are not concerned with getting justice for victims:* Respondents in regions where the six suspects hail from are more inclined to feel that the ICC is designed to eliminate political foes and rivals ahead of 2012 rather than to fight impunity. Up to 70 per cent of respondents in Central, 62 per cent in Rift Valley, and 63 per cent in Eastern agree that the ICC is about eliminating political opponents. This contrasts with places such as Coast and Nyanza, where only 28 per cent and 36 per cent, respectively, agree with this statement. Significant, however, is that well over half of the respondents across all ages and all ethnic groups agree that the ICC is intended to get justice for victims.

Table 6: Do you agree or disagree with each of the following statements?

... agreed with each of the following statements									
Statements:	Total	Nairobi	Coast	North Eastern	Eastern	Central	Rift valley	Western	Nyanza
Those opposing The Hague/the ICC action are mainly trying to protect those who organised the PEV	62%	69%	82%	73%	66%	47%	44%	66%	78%
Those supporting The Hague/the ICC action in Kenya are mainly concerned with getting justice for victims of the PEV	71%	78%	94%	64%	70%	55%	58%	79%	85%
Politicians supporting The Hague/the ICC action are mainly concerned with eliminating political opponents	53%	57%	28%	42%	63%	70%	62%	38%	36%
If the six people named by The Hague/ICC prosecutor Ocampo are tried, political violence in the next General Election will be less likely	64%	78%	78%	56%	59%	57%	50%	64%	84%

49. Many people in Coast Province (82%) feel that those opposed to the ICC are seeking to protect those who organised the post-election violence. Still, Coast has relatively more people (94%) than other regions who are concerned about getting justice for victims of the post-election violence. Eastern, Rift Valley and Central have fewer people who agree

that the ICC is about justice for victims. In the Rift Valley, this perception is tied to claims that local people also suffered during the post-election violence but have not received any humanitarian assistance.⁹

Table 7: Choose one statement that is closest to your view.

Please choose one statement that is closest to your view?									
Statements:	Total	Nairobi	Coast	North Eastern	Eastern	Central	Rift valley	Western	Nyanza
The six suspects named by the ICC prosecutor should be tried by ICC in The Hague	55%	60%	79%	75%	55%	29%	33%	74%	78%
The six suspects named by the ICC prosecutor should be tried by local tribunal in Kenya	35%	35%	16%	19%	40%	58%	46%	22%	18%
The six suspects named by the ICC prosecutor should NOT be tried at all	9%	5%	5%	6%	4%	13%	20%	3%	5%

50. Up to 90 per cent of respondents want those responsible for the post-election violence to be prosecuted -- either by the ICC or through a local tribunal in Kenya. This suggests that there is high public support for accountability to end the culture of impunity. Nonetheless, more people prefer the ICC to a local process, which means that public trust in institutions such as the Judiciary and investigating bodies is still lacking. This also implies that reforms undertaken in these institutions since the end of post-2007 election violence have not been deep enough; they have been cosmetic..
51. Support for a local tribunal is highest in areas where the ICC suspects come from -- Central (58%), Rift Valley (46%) and Eastern (40%). More people in the suspects' home areas support the view by some politicians that suspects should not be tried at all, that Kenyans need to forgive and forget or address the matter through non-punitive processes such as the Truth, Justice and Reconciliation Commission (TJRC).
52. Past reports have indicated that national level political conflicts trickle to the local level. In this regard, political support for the ICC at the national level is reflected in regions associated with the leaders. For instance, public support for the ICC intervention is strong in Nyanza, Eastern and Coast, where the Prime Minister has a strong following. North Eastern Province supports an external process due to lack of confidence in local institutions, given its long history of marginalisation and human rights abuses by state security agents that have included massacres.

⁹ Interviews in Burnt Forest, June 2011

ICC and peace and security ahead of 2012

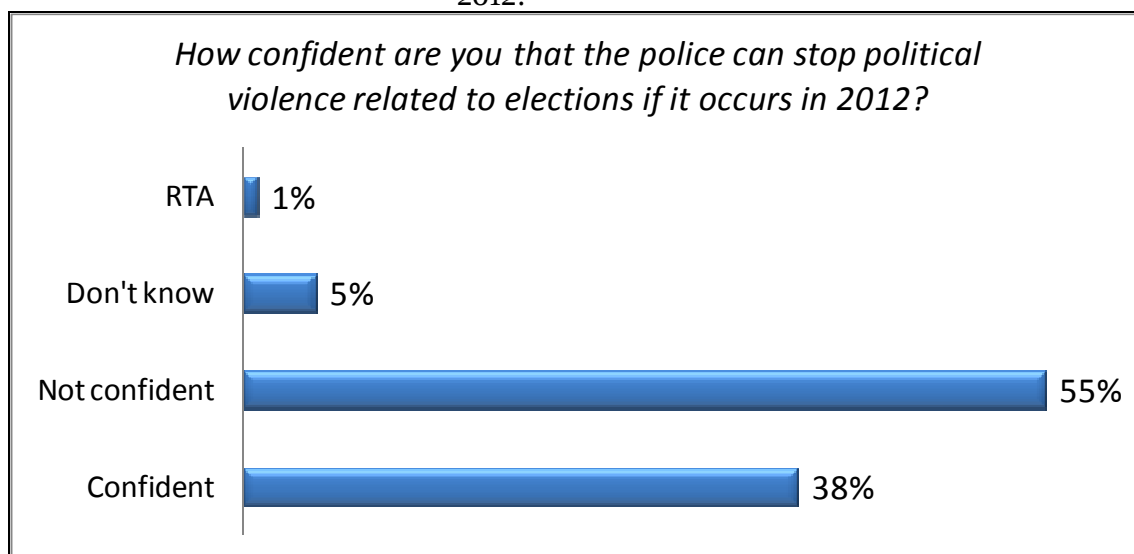
53. *Many people are of the view that violence will not occur if the ICC trials take place:* Past reports have shown that the ICC intervention does not pose a serious threat to peace and stability in any part of Kenya. This view is still relevant. Up to 60 per cent of respondents think violence will not occur if the ICC trials take place. Only 18 per cent think violence will very likely occur.

Table 8: If the ICC trials take place, how likely do you think it is there will be violence?

	Total	Nairobi	Coast	North Eastern	Eastern	Central	Rift valley	Western	Nyanza
Very likely	18%	11%	13%	10%	14%	33%	24%	14%	17%
Not likely	60%	73%	63%	44%	59%	43%	58%	75%	65%
Not sure	16%	14%	16%	23%	21%	19%	14%	8%	13%
DK	5%	2%	8%	19%	6%	5%	4%	3%	5%

54. While the view that the ICC trials may not trigger violence is still widespread, public perceptions appear to be changing as mobilisation for the 2012 General Election begins. The naming of ethnic leaders as suspects may have negatively impacted on support for prosecutions because local discourses have ethnicised the ICC intervention. Some people in regions where the six suspects come from are not supportive of the trials; they are in solidarity with their leaders.
55. *More than half of Kenyans are not confident that the police can to stop violence if it occurs in 2012:* The realisation that no substantive steps have been taken to fight impunity for crimes committed in 2008 has increased fear that as 2012 approaches, existing deterrent mechanisms and the police may not be adequate to stop the violence. As many as 55 per cent of respondents are not confident that the police can stop violence related to elections if it occurs.

Figure 2: How confident are you that the police can stop electoral violence if it occurs in 2012?



56. *Regions differ in terms of confidence in the police:* Western, Coast, Nyanza and Nairobi have the least confidence in the ability of the police to stop violence if it occurs in 2012. The construction of new police stations and patrol bases in the Rift Valley seems to have only marginally increased public confidence in the ability of the police to stop violence. These findings have implications for the police -- capacity must be improved to address violence if it occurs.

Table 9: How confident are you that the police can stop political violence related to elections if it occurs in 2012?

	Total	Nairobi	Coast	North Eastern	Eastern	Central	Rift valley	Western	Nyanza
Confident	38%	35%	50%	26%	43%	37%	41%	34%	31%
Not confident	55%	59%	41%	52%	51%	59%	53%	63%	64%
Don't know	5%	6%	8%	18%	5%	4%	4%	3%	5%
RTA	1%	0%	1%	4%	0%	1%	2%	0%	1%

57. *Protection of witnesses and their families is still important:* After the naming of the suspects, there have emerged local political discourses of victimisation in some communities. Allegations of direct and veiled threats to witnesses to help protect one of their own have increased. Human Rights institutions working with witnesses have reported a resurgence of intimidation to those perceived to be witnesses, or their close relatives.¹⁰ The arbitrary disappearance of suspected witnesses has caused fear among human rights defenders.
58. *Negative social consequences such as ostracisation of families perceived to have witnesses are evident:* Some argue that there is covert intimidation of the families of witnesses. Sometimes relatives of those perceived to be witnesses put pressure on the families by warning them against bringing the wrath of the community upon their households. They are perceived as 'traitors'. Individual members of households are under pressure from communities to demonstrate loyalty 'to the community' by not providing information lest they be construed as betraying their cause.¹¹ That is, families associated with witnesses do not want to be viewed as enemies of the community; they are warning their members against going against the community.¹² In addition, there are simple, everyday measures to discredit those viewed as witnesses. They are painted as incorrigibly dishonest and out to extort money from the suspects. Such people and their families are threatened with 'a curse' for attempting to give 'false witness' about events that occurred during the 2007/ 2008 violence. It is said the curse will befall the witness in question as well as members of their household for generations.¹³
59. *The suspects' political supporters are mobilising community solidarity:* The efforts above appear to be attempts to mobilise local ethnic support and loyalty for some of the suspects. Because of such efforts, some people at the local level are rethinking afresh issues around the post-election violence. Some now believe that the atrocities committed during the crisis were justified in the circumstances. Thus, they argue, nobody should be punished for the role they played in defending the community. In Nakuru, a respondent said: 'We were being finished; something had to be done to control the situation.' And in Uasin Gishu, a respondent observed: 'Why should the 'suspect' suffer, yet it is the people

¹⁰ Interview with human rights official in Uasin Gishu County, 11 June 2011

¹¹ Interview with a youth leader, Uasin Gishu County, 11 June 2011

¹² Interview with a young man in Uasin Gishu County, 14 June 2011

¹³ FGD in Uasin Gishu County, 13 June 2011

and the community who were attacking? It is wrong and against our culture to isolate one person and hold him criminally responsible.’¹⁴

60. *Early preparation to prevent violence is critical:* Early warning and preparedness measures can prevent the recurrence of violence. For instance, the heavy deployment of security forces during the 2010 referendum deterred violence because people were afraid the police would use excessive force. Ethnic minorities temporarily migrated to safer areas during the voting period. Interviews in much of the Rift Valley region indicate that migration might be a common coping strategy during the ICC hearings as well as ahead of 2012.

Conclusions

61. *Lack of progress in addressing impunity is causing anxiety:* National political discourses linking succession politics to the ICC intervention in the Kenya situation have increased public anxiety around uncertainties regarding the ICC outcome and the 2012 General Election. These fears are fanned by the lack of progress in addressing impunity and undertaking reforms envisaged in 2008 to prevent the recurrence of violence. The number of Kenyans feeling uncertain about future peace and stability has increased over the past six months, and is bound to rise further as 2012 approaches. The more the cleavages over succession politics at the national level and the ICC intervention, the more the divisions at the local level, especially in multi-ethnic areas.
62. *The legacy of post-election violence will dominate Kenya’s political agenda in the campaigns for 2012:* The failure to fight impunity and the little progress made in arresting and prosecuting middle and lower level perpetrators have made Kenyans sceptical about political commitment to reforms in general. They also feel that very little can be done between now and 2012, because the window for reforms has closed and debate has shifted to the outcome of the ICC trials, as well as political positioning and consolidation of ethnic alliances for 2012.
63. *Reform of the police force and institutional reforms in general are critical:* Police and institutional reforms were prioritised under the KNDR process but no comprehensive policy and administrative changes have occurred in the police and the public service. The changes effected in the police have not had a significant impact at the community level. People are not confident that the police have the capacity to stop violence if it occurred in 2012. They believe the police will employ force as witnessed during the post-election violence: attitudes and behaviour remain the same. Undertaking real and comprehensive reforms within the police is imperative, and the need is urgent especially because the period for the next election is around the corner.

¹⁴ Interview with a university student, Uasin Gishu County, 15 June 2011

3. THE CHALLENGE OF RESETTLING IDPs

Introduction

64. The post-election violence spawned an unprecedented humanitarian crisis. The National Accord thus required the parties to resolve the crisis and promote reconciliation. To achieve this, the government established the Department of Mitigation and Resettlement in the Ministry of State for Special Programmes (MOSSP) and also set up the Humanitarian Fund for Mitigation of Effects and Resettlement of Victims of post 2007 Election Violence (Humanitarian Fund) to finance assistance and resettlement activities. In May 2008, the government launched *Operation Rudi Nyumbani* (Return Home) to facilitate durable solutions for IDPs.
65. Through Operation Rudi Nyumbani, about half of the displaced persons have been able to go back to their homes and 384 refugee households have returned to Kenya from Uganda. The government has disbursed Ksh7.977 billion to pay relief and assistance funds to help IDPs start up their lives, reconstruct their damaged homes, and re-establish their livelihoods.
66. In March 2010, the Ministry of Special Programmes formulated a national policy for IDPs, the 'National Policy on the Prevention of Internal Displacement and the Protection and Assistance to IDPs in Kenya'. The draft, which provides guidelines for the protection and assistance to all categories of IDPs and persons forcibly displaced by various causes, has been awaiting Cabinet debate and approval for more than a year.
67. Previous review reports have showed that the resettlement programme has faced many challenges, notably ineffective inter-ministerial coordination and allegations of embezzlement of funds meant for IDPs. Thus, despite allocating large sums of money to the resettlement programme, some IDPs continue to live in camps and other settings. The number of those waiting for funds, shelter or land allocation does not seem to diminish.
68. This report provides a brief analysis of the problem of securing durable solutions for IDPs. It is noted here that lack of a policy framework, infiltration of non-IDPs into camps, landlessness and perceived favouritism of IDPs from one community confound efforts to find durable solutions.

Operation Rudi Nyumbani

69. *The government has facilitated the return of refugees from Uganda and the return of IDPs; but 256 families are still refugees in Uganda:* According to records from the Ministry of Special Programmes, 350,000 IDPs left their temporary shelters and returned to their homes.¹⁵ Those who felt insecure settled in transit camps near their homes, from where they commuted by day to cultivate their farms. The government has facilitated the return of 384 households from Uganda; each returning household is given Ksh37,000 for logistical support. Another 256 families are still in Uganda and are expected to return to Kenya by the end of 2011.¹⁶

¹⁵ Data provided by the Ministry of Special Programmes; see also presentation by the Permanent Secretary at the forum with members of the Parliamentary Select Committee on Resettlement of IDPs, 23 May 2010

¹⁶ Interview with senior official at the Ministry of Special Programmes, 23 May 2011

70. *There are reporting procedures to ensure transparency in the way administrators disburse funds:* By the end of May 2011, the government had disbursed ex-gratia support of Ksh2, 262,290,000 to District Commissioners to pay IDPs. The money has been sourced from the government exchequer, grants, donations and a loan from the African Development Bank. To address the problem of corruption in the disbursement of funds, District Commissioners are required to account for the money. They file returns for monies they have received and disbursed.¹⁷ The Ministry of Special Programmes also supports the restoration of farm infrastructure and the rural livelihoods project, through which IDPs receive seeds, fertilisers and farm inputs.

The IDPs in camps and where they come from

71. *Some IDPs are still in camps because they were landless or were small traders before the violence:* At the start of *Operation Rudi Nyumbani* in 2008, IDPs moved into 110 transit camps, mostly in the Rift Valley. Those in the transit camps will benefit from the shelter reconstruction and livelihoods projects. By the end of May 2011, government records showed that there were only eight camps remaining in Kuresoi District. Some IDPs are in camps awaiting reconstruction of their homes while others were landless and have no farms to go to. Still, there are those who ran small businesses before the violence but are unable to re-start them.

Table 10: Transit camps

	<i>Transit camp</i>	<i>No. of HH¹⁸</i>	<i>Remarks / observations¹⁹</i>
1	Kamara DO's camp	34	Original camps, formed Jan 2008
2	Casino/Mosque Total	36	Landless IDPs; traders before displacement
3	<i>Kamara Centre</i>	10	No camp; one tent left
4	<i>Kamuri</i>	3	No camp; one tent remaining
5	Langwenda	16	Waiting home reconstruction, some landless
6	Karirikania	6	Waiting shelter construction, some squatters
7	Keringet DO's office	41	Mostly single mothers; traders
8	Moto	13	No camp; live in donated houses

72. The ministry does not recognise all transit camps. In Uasin Gishu County, there are four such camps: Kamuingi, Sakasaka, Naka and Maili Nne. IDPs in these camps do not own land. Most were squatters in Keiyo and Nandi districts. By the time they registered their self-help groups, the deadline for recognition of such groups by the MoSSP had lapsed.²⁰ Similar groups are in Naivasha and Nyandarua districts and include New Canaan, Maua, Tumaini, Neema and Huruma.²¹
73. *Categories of IDPs:* At the end of the emergency around 2008, the Early Recovery Cluster categorised IDPs according to livelihoods they pursued before displacement in order to expedite the search for durable solutions. The Cluster recognised that majority of the IDPs were *farmers*. However, not all farmers owned land; some were *squatters or leased farms* while living in *urban areas*. Farmers could be helped to return to their land, and most did return during *Operation Rudi Nyumbani*. Farmers who have not

¹⁷ Interview with senior official in the Ministry of Special Programmes, 23 May 2011

¹⁸ No of Households; Source: MOSSP records

¹⁹ Conducted during an assessment mission in June 2011

²⁰ Interview at MoSSP, 8 May 2011; interviews in Naivasha and Naka camp in Eldoret. Most IDPs in self-help groups that have not been formally recognised by the ministry complain that the failure to assist them because it delayed disbursing funds that they needed to purchase land.

²¹ Fieldwork conducted in June 2011

returned to their farms, such as in Kondoo 1-3 Farm, or Kamuyu or Nyakinyua farms, have leased out their land or hired labourers to cultivate the land. Majority of landowners returned to their farms or have access to the farm from nearby urban centres. Those who were too traumatised to return have either sold or exchanged their land and bought new parcels or integrate in areas of refuge.

74. *Displaced landless people without any means to lease land are still in camps:* Landless farmers who could return to lease land in pre-displacement areas did so in 2008. However, there are landless farmers who lost the chance to lease land due to ethnic tensions or landlords leasing to other people during the period of encampment. These farmers have relocated to new areas where they continue to lease land. Some pooled their share of Ksh10,000 and bought land in central Rift Valley, notably in Naivasha and Nakuru. Those who did not have any means constitute the IDPs still in camps
75. *There are IDPs who were traders:* There are displaced business people or traders who lost all their stock during the violence. Some of the traders did not own land or houses. They lived in leased business premises, from which they were ejected or their stocks looted. Those among them who had capital have since re-established their businesses elsewhere. Those who lost everything or were unable to recover are still in the camps. Examples are those who ran businesses in towns where shops were razed such as Mau Summit. Others can be found at the Keringet DC's office. Artisans such as mechanics and tailors also lost their work tools and have not re-established their livelihoods. Most business people are yet to receive support because the government's livelihood recovery programme, through a UNDP grant, is tailored for farmers. The government does not compensate IDPs who were traders.
76. *Other IDPs included the squatters displaced in the previous waves of displacement.* Unemployed people and the urban poor, including the homeless, were displaced during the violence. When Operation Rudi Nyumbani was launched and camps were dismantled, IDPs who had somewhere to go left the camps. A large number of IDPs were urban dwellers who had lived in rented housing. Some of these IDPs formed cooperative societies, or 'self-help groups' and collectively purchased large parcels of land, which they then subdivided into small plots. Concerned that this could create 'slums in rural areas', the Department of Mitigation and Resettlement at the Ministry of Special Programmes decided to support their efforts by buying for them economically viable pieces of land, on which social services could also be planned. ²² Thus, steps to allocate land to 6,802 households in 19 'self-help groups' was mooted in 2009.
77. The government has found land for 1,337 households, at the following farms:

²² Interview with senior official MoSSP, 23 May 2011

Table 11: Settled self-help groups

Where settled	No. of Houses constructed	No. of families settled
Giwa Farm	444	441
Managu Farm	56	56
Mau Summit Block	141	141
Rwangondu /66	-	
Rwangondu/67	-	
Rwangondu/69	31	37
Nyandarua/Kiambaga/2	49	49
Asanyo Farm	-	91
Marmanet/ Melwa/1497 & Marmanet/ Melwa/1365	-	41
Kenjoketty/4		30
Endebbes/Kapkoi	-	225
Total households settled		1,337

78. *The government did not explain the allocation criteria; squatters and others who did not have land moved to camps awaiting their share:* The land allocation policy was not explained to all stakeholders, including government officials in other ministries.²³ The fact that the government was allocating land to landless IDPs aroused interest from other IDPs, as every other landless IDP demanded similar consideration. At the same time, squatters who were not displaced demanded land. Ultimately, majority poor land-hungry people claimed to be IDPs in order to access land from the government. This caused a sudden increase in new camps – two years after the formal closure of PEV camps. It also occasioned an increase in the registration of ‘self-help groups’ by landless IDPs and others eager to benefit from the land allocation. Camps such as Ngeteti in Nyandarua and Wanaruona in Naivasha were formed in 2011. The apparent attempt to benefit from displacement has caused claims that some IDPs are not genuine.
79. *Land allocation to IDPs has had several other negative consequences.* IDPs in self-help groups who had not received any assistance from the government began to agitate for expedient resettlement. They complained that those in the 19 self-help groups had received more than their share of assistance – they already had the humanitarian fund (both the Ksh10,000 start-up fund and Ksh25,000 re-housing fund), continued food distribution, access to fertilisers and seed every season since 2008, their houses had been built for them and they have received land. This focus on one group of IDPs is perceived as unfair considering thousands of IDPs are still waiting to receive part of the money.²⁴ Similarly, those living with relatives and friends or invisibly in urban areas have not been systematically assisted.²⁵

²³Some raise concern that the policy was not explained, including how the decision was reached: Interview with senior government official in the Ministry of State for Internal Security and Provincial Administration, 6 June 2011

²⁴ FGDs in Kiambi, Tumaini, Neema, Amani Ndogo camps in Naivasha District, 3-5 June 2011

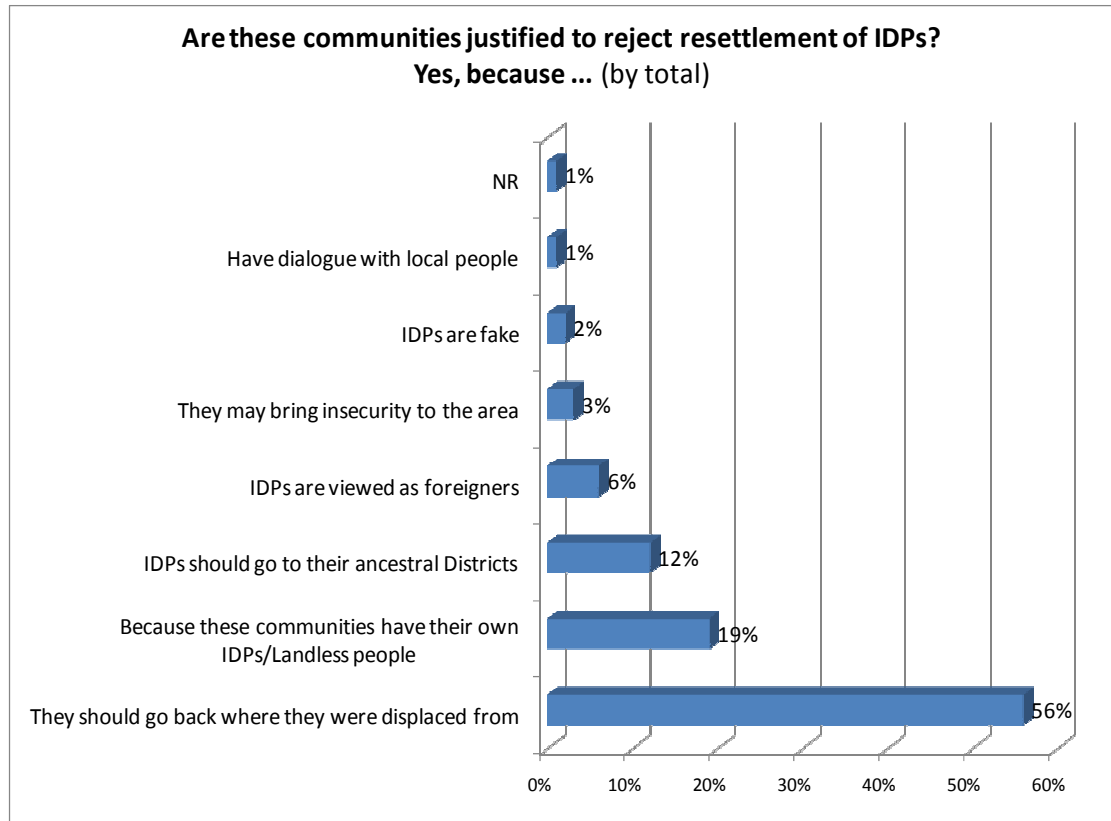
²⁵ Discussion at a forum with members of the Parliamentary Select Committee on Resettlement of IDPs, 23 May 2011

80. *There is concern that the government is biased in favour of IDPs from some communities:* Concern that most of the beneficiaries of the land allocation programme are from one ethnic group has generated resistance against it. In the Rift Valley, resentment is rife over the fact that members of one community whose homes were burnt or who were injured have not been assisted. This has undermined peace efforts, particularly in areas such as Kamuyu where houses have been reconstructed. Some people in the area observe: *'Our problem is not that they (IDPs) have been given houses... we feel bad because we also suffered, our houses were burnt, but nobody has assisted us.'*²⁶ These claims of biases on ethnic lines could be the result of deep mistrusts and common discourses of exclusion that deepen animosity between communities. The discourses firm up especially when people are not given facts or explanations on how the reconstruction exercise is undertaken.
81. *Those evicted by the government are also demanding land before IDPs are resettled:* Persons evicted from forests in order to conserve the environment and who are living in informal settlements around Mau, Embobut and other forests are demanding land before IDPs 'from outside' can be resettled on parcels considered to be their ancestral land. The Ministry of Special Programmes and the Lands ministry intend to settle 7,500 forest evictees. Some Ksh1.4b has been set aside for their resettlement. However, the focus on Mau Forest has provoked fears of exclusion among those evicted in earlier efforts to evict squatters from forest reserves such as Nabkoi Forest in Uasin Gishu and other locations in Nandi District. Similarly, evictees from Kipkurere, Ngatikong, Kasabei, Sengalu and others are seeking resettlement and have compiled registers of affected households.²⁷
82. *Communities are resisting IDPs' resettlement in areas they consider their ancestral land:* Allocating land to IDPs has triggered interest regarding the criteria used to determine which landless people are settled. Because of this, there are those who argue that the government is using displacement as a smokescreen to give land to members of one community at the expense of deserving local landless people, including forest evictees. In effect, communities have risen up to resist the resettlement of IDPs on 'their' ancestral land. They claim that there are IDPs and landless people in areas where the government has procured land. Belated consultations with community leaders and members of IDP communities before resettlement have not resolved these concerns. In places such as Chemusian in Eldoret, Endeibes in Trans-Nzoia and Tippis in Mau Narok, local people threatened to seize and occupy the land allocated to IDPs.

²⁶ FGD in Kamuyu area, Burnt Forest, 11 June 2011

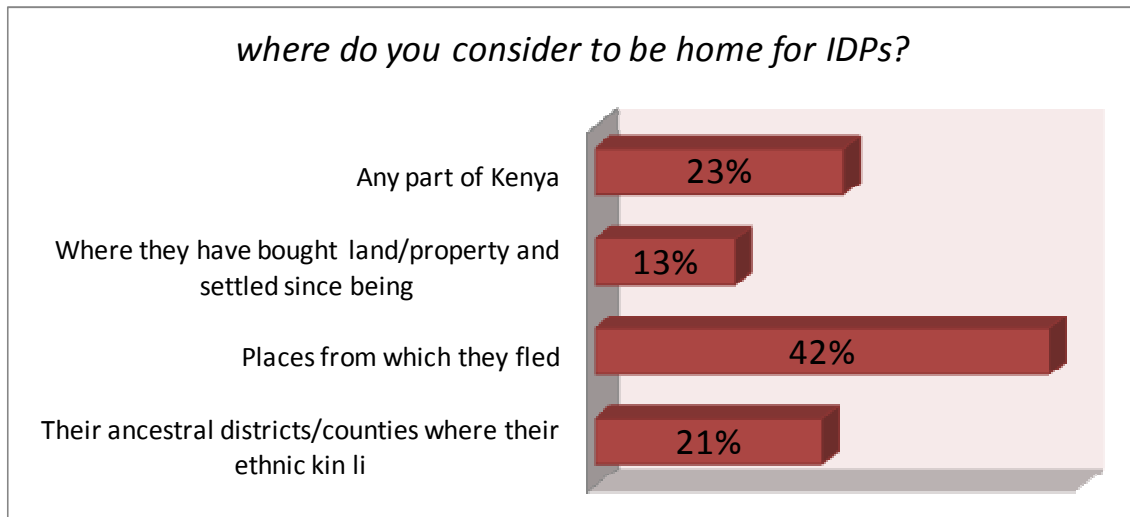
²⁷ Interviews and FGDs in North Rift, June 2011

Figure 3: Are communities justified to reject IDPs? Yes, because ...



83. *Not all Kenyans support rejection of IDPs resettlement in what is considered as other people's area.* Up to 42 per cent of respondents said they were aware of IDPs being rejected. Over half those who are aware feel those who reject resettlement of IDPs in their area are not justified to do so. One point to stress here then is that rejection of IDPs is linked to identities and demand to control resources on the basis of exclusive identities. It generally reflects concerns about access to resources, particularly land. As Kenya transitions into the new constitution with a devolved government expected at the local level and the 2012 elections approach, IDPs are being perceived as voters whose political support can change political balance at the local level. But of concern are the growing trends to exclude communities on the basis of ethnicity. This is more pronounced on matters of politics and therefore access to resources at the local level. This trend has the consequence of creating super minorities at the county level.
84. *Many people would like IDPs to be resettled in the places where they were displaced from:* As many as 42 per cent of respondents consider the place where IDPs were evicted from to be their home. Another 23 per cent believe the home of IDPs is anywhere in Kenya while 13 per cent think it is where they have bought land and settled. Only a small group – 21 per cent -- believe the home of IDPs is in their ancestral districts. These findings suggest that local leaders who mobilise communities to reject IDPs are the main obstacle to resettlement efforts and even reconciliation. Kenyans generally do not mind IDPs being resettled where they were displaced from or anywhere else in the country.

Figure 4: Where do you consider to be home for IDPs?



Conclusion

85. *Resettlement efforts have not considered all categories of IDPs:* The government has allocated resources for the resettlement of IDPs. However, the number of camps and displaced households does not seem to reduce. This is due to lack of a comprehensive policy to address the needs of all categories of IDPs, a challenge made more complex by the lack of comprehensive and disaggregated data on IDPs. The decision by the Ministry of Special Programmes to allocate land to landless IDPs has opened a Pandora's Box, as other landless people including squatters have also demanded land. Resentment over perceived favouritism of IDPs from one community and inadequate consultation with communities in regions where the government has purchased land for resettlement have triggered rejection of IDPs, hence protracting displacement and encampment. But local leaders are responsible for these trends in the rejection of IDPs resettlement. Ordinary Kenyans do not mind IDPs being resettled.
86. *There are land-hungry imposters seeking to cash in on government support for IDPs:* As 2012 elections approach, the government needs to take immediate measures to unravel the identity and origin of all the IDPs in camps. A number of land-hungry imposters seeking to benefit from government assistance programmes have infiltrated camps, while original households have multiplied because adult children register individual households. The government should also profile the IDPs according to livelihoods or land ownership in order to assess recovery needs and provide support towards achieving appropriate durable solutions.

4. THE COALITION GOVERNMENT AND REFORMS

Introduction

87. The agreement on the principles of partnership of the Coalition Government signed by the two parties – PNU and ODM -- stipulated that power sharing was not an end in itself but a means to achieving reforms that would prevent future violence. It was *'not about creating positions that reward individuals.'*²⁸ It was about *'enabling leaders to look beyond partisan considerations with a view to promoting the greater interests of the nation as whole.'* In addition, the agreement committed the parties *'to work together as true partners, through constant consultations and willingness to compromise,'* in order to undertake fundamental and critical reforms.
88. With power sharing and no formal opposition party in Parliament, it was expected that the government would be in a position to make hard decisions and undertake important reforms expeditiously. Political will, consultations and willingness to compromise were underlined as necessary for the passage of critical laws.
89. Since its formation, the government has not been able to cultivate adequate consensus and cohesion. As previous review reports have shown, this has slowed the pace of reforms and entrenched the public perception of 'two-governments-in-one'. Ethnic, sectarian and political interests have overridden the reform agenda. Combined, narrow partisan interests are informing implementation of reforms, thereby slowing their pace.
90. This section of the report examines the status of the coalition government. It looks at coherence within the Coalition Government, how critical reforms have been undertaken and how lack of cohesion and consensus has impacted on the implementation of reforms. It examines the main achievements and challenges of the Coalition Government.

Power sharing government and implementation of reforms

91. *Failure to compromise is a threat to reforms:* In coalition governments, the elites' political will to compromise, consult and negotiate is critical for moving forward with the reform agenda. Unity of purpose is central in this respect. Elites are required to transcend ethnic and personal differences to further reforms. Failure to compromise and overcome parochial differences weakens not only the coalition, but also threatens implementation.
92. *The two Principals have projected an image of 'a unified executive':* Since its formation three years ago, the Grand Coalition has faced challenges of cohesion that have slowed the implementation of reforms. Lack of cohesion between the two partners and even within the parties that form the government, as well as in Parliament have tended to constrain implementation of reforms, including those in the new constitution. However, in recent times, both the President and Prime Minister have projected an image of 'a unified executive' or centre of power; they have avoided open acrimony. They have publicly pledged to support implementation of the constitution and acted together over the staffing of senior positions in the Judiciary by endorsing recommendations of the Judicial Service Commission (JSC). The image of 'one executive' has created conducive conditions for speeding up implementation of the new constitution. Unfortunately, the image of partnership that they have demonstrated is not evident among their key supporters within Parliament.

²⁸Agreement on the Principles of Partnership of the Coalition Government, available at www.dialoguekenya.org

93. *The public rates the two factions differently:* The public is generally sensitive to the acrimonious debates between the two coalition partners. In the past, the public has generally viewed the coalition as ‘two-governments-in-one’ – a largely divided one without a common purpose. This is usually reflected in the ratings the government receives with regard to performance in a number of areas. People tend to rate the two sides of the coalition differently.

Table 12: How satisfied or dissatisfied are you with with Kibaki-PNU and Raila-ODM with regard to the following issues

	PNU			ODM		
	Dissatisfied	Satisfied	DK	Dissatisfied	Satisfied	DK
Prosecution of PEV perpetrators	58%	36%	6%	47%	48%	5%
Fighting corruption	63%	33%	3%	54%	43%	3%
Lowering the price of essential commodities	78%	18%	3%	72%	25%	3%
Fighting tribalism	65%	29%	4%	58%	38%	4%

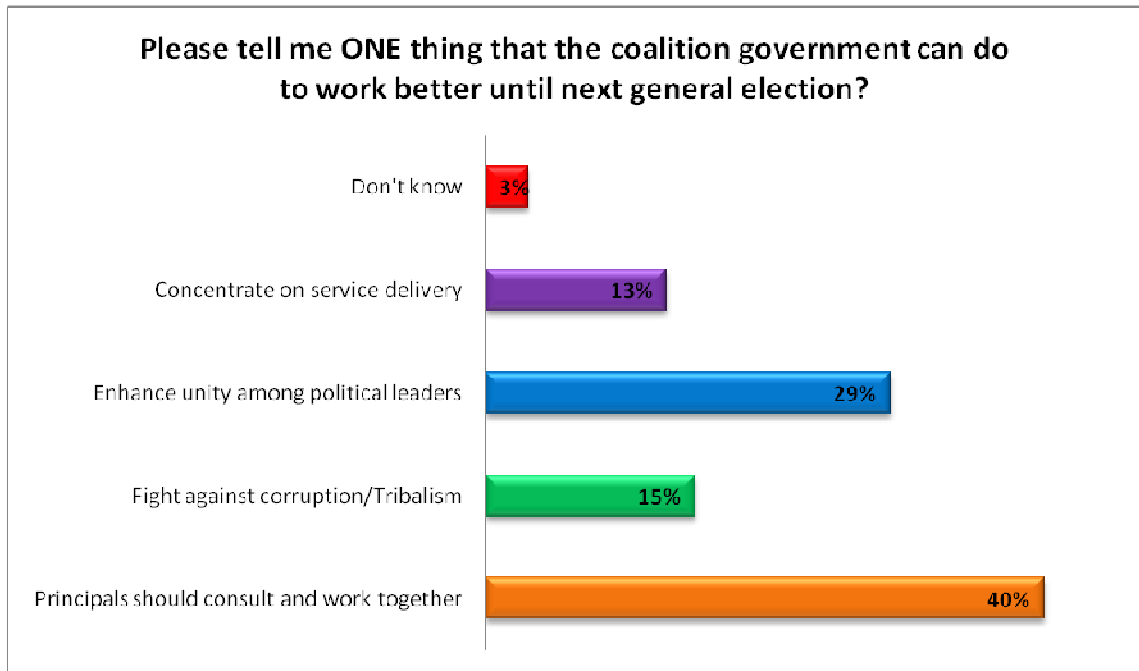
94. *People are most dissatisfied with the two partners with regard to their failure to lower the prices of essential commodities:* The respondents rated the government poorly on its ability to lower the prices of essential commodities. People are also dissatisfied with the two partners’ commitment to fight corruption and impunity. In other words, there is a high sense of dissatisfaction with the government’s commitment to important political reforms: corruption, impunity or post-election violence, and tribalism. These are the major fault lines of conflict that require managing as the country moves towards the 2012 elections.
95. *Lack of common positions on critical national issues such as corruption and the ICC intervention has deepened the fault lines:* The partners in the coalition have not taken a collective stand on how to manage the ICC process or fight against corruption. From December 2010 when the ICC identified six suspects for prosecution, the Principals and their parties have issued contradictory and opposing views on the position of the Coalition Government. While those in PNU have argued for deferral of the Kenyan case and even lobbied the African Union and United Nations Security Council to assist in attaining this goal, ODM declined to support the initiative, arguing that the Cabinet did not resolve to do so. They dismissed the effort as a partisan and personal agenda. The government had also challenged the admissibility of the six ICC cases but ODM has said it is not party to these efforts.
96. *Divisions within government are reflecting on critical decisions:* Lack of consensus on important issues exposes reforms to politics. Individual leaders tend to drive reforms on narrow considerations – the reforms are identified with the party or individuals in the coalition, thereby reducing their significance. Success or failure of reforms is thus attributed to individuals rather than the Coalition Government: ‘whenever a taskforce is formed within a ministry, it is labelled either PNU or ODM depending on the minister’s party... bureaucratic support to the taskforces is also dependent on the agenda of the task force or even the minister driving it’.²⁹ For this reason, some MPs support or oppose parliamentary Bills on the basis of parochial considerations, including the minister’s party. This has undermined the parties’ capacity to make hard decisions on important

²⁹ Interview with a policy analyst and academic, 7 June 2011

national issues.

97. *Divisions delay decisions and lead to horse trading:* Government operations are also suffering from these divisions and conflicts in the coalition. Divisions in the government tend to delay decision-making: ‘*Divisions delay making of decisions and implementation of key activities ... Decisions tend to be influenced by succession politics and horse trading among partners*’.³⁰ Some of the officials interviewed also noted that ‘*there is absence of good faith, which is necessary for true and genuine bi-partisanship ... absence of good faith has contributed to unnecessary suspicions.*’³¹
98. *There is no institutionalised mechanism for resolving disputes within the coalition:* Lack of structures to build consensus and cohesion within the coalition has led to the conflicts escalating and affecting reforms. The Permanent Committee on the Management of Coalition Affairs has not been effective. This body, comprising Cabinet ministers from both parties, would have created an enabling environment for the formulation and implementation of important reforms and for resolving disputes.
99. *Kenyans want the two principals to work together:* Generally, Kenyans want the coalition to work as one government. They want to see a sense of togetherness in order to prevent conflict. Indeed, when asked what the coalition government can do to work better until the next elections, 40 per cent of Kenyans say the Principals should consult and work together. 29 per cent want the political leaders to be united.

Figure 5: Please tell me ONE thing that the coalition government can do to work better until next General Election?



100. *The inability to have a common position on key governance reforms is dividing the government yet again:* Conflicts over power sharing have resurfaced, especially with appointments to the new offices created under the 2010 constitution. Some of the politicians in PNU argue that the two Principals are not legally equal and that the President has the final word on key decisions. In addition, they argue that the

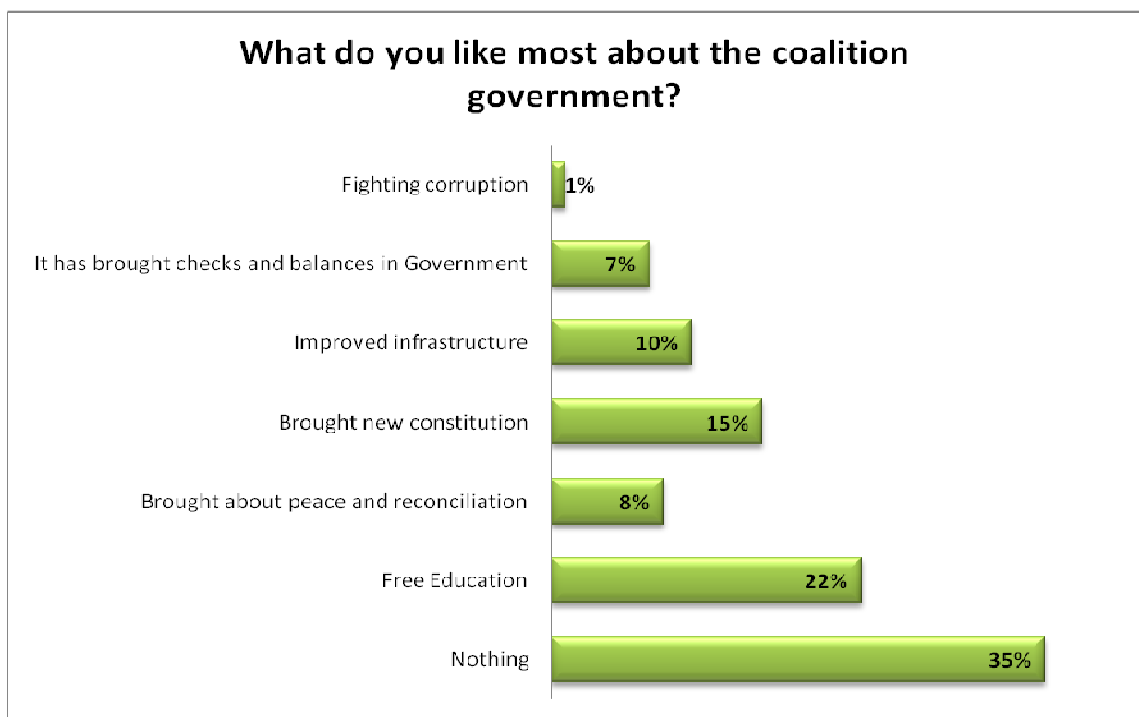
³⁰ Interview with a government official, 16 June 2011

³¹ Interview with a senior government official, 3 June 2011

requirement for consultations does not imply consensus, something they say is difficult to achieve. However, ODM argue that the spirit of the National Accord, as well as the transitional clauses in the constitution state that the Prime Minister and President should consult and agree on key decisions. To them, the spirit of the new constitution is far more critical and ought to be respected. Polarisation resulting from these disputes has rapidly shifted the focus of the debate away from reforms to consolidation of political power and ethnic interests.

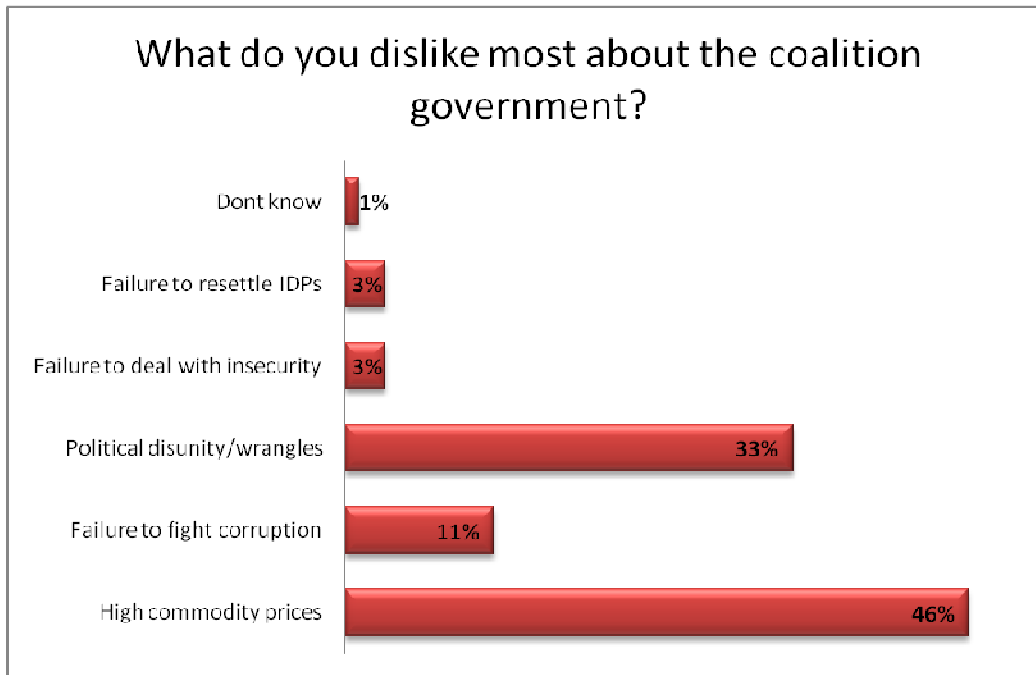
- 101. *People’s confidence in government has reduced; some feel they like nothing about the Coalition Government:* These arguments over power sharing have obstructed implementation of reforms and the fight against impunity, impacting on people’s confidence in the Coalition Government in service delivery. When asked about what they perceived as the main achievements of the Coalition Government, 35 per cent of respondents said ‘nothing.’

Figure 6: What do you like most about the Coalition Government?



- 102. The constant wrangles within government have diverted energies from service delivery, leading to disillusionment with the public. Indeed, 33 per cent of respondents cite political wrangles within the coalition as one of the failures of the government. Another 46 per cent cite failure to arrest high food prices as its main failure.

Figure 7: What do you dislike most about the Coalition Government?



103. *People dislike the Coalition Government because of the high cost of living:* Across the regions, all the respondents named high food prices as the main failure of the coalition. It is important for the coalition to urgently address the concern of high food prices since, as it has been seen elsewhere, it is a source of civil tension and instability.

Table 13: What do you dislike most about the Coalition Government? (Across the regions)

	Nairobi	Coast	North Eastern	Eastern	Central	Rift valley	Western	Nyanza
High commodity prices	27%	51%	39%	49%	49%	45%	53%	53%
Failure to fight corruption	9%	9%	30%	13%	13%	8%	10%	8%
Political wrangles	53%	33%	20%	27%	28%	37%	28%	32%
Failure to deal with insecurity	3%	1%	10%	2%	4%	5%	3%	2%
Failure to resettle IDPs	5%	2%	2%	3%	5%	2%	3%	1%
Dont know	1%	1%	0%	1%	0%	2%	3%	1%

104. *Disagreements among leaders stemming from personal and ethnic interests undermine public considerations.* The partners and the various factions appear to compete on what

reforms to support and how to implement them.³² This is affecting objective implementation of the constitution. This was evident during the parliamentary debate on the vetting of nominees for the positions of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions. While the names for the Chief Justice and his Deputy were widely accepted, individuals and Civil Society Organisations (CSOs) raised integrity questions with regard to the nominee for the post of DPP. The allegations against the DPP were debated in and out of Parliament in ethnic and political tones.³³ Some were oblivious to the fact that the new institutions are pillars of the nation and that public officials occupying them are trustees of the Kenyan public.

105. *Ethnic and partisan considerations are besmirching new institutions of governance:* The new institutions created by the constitution risk losing public support when parochial and ethnic considerations shape how they are established. Again, the nomination of the DPP and how MPs debated it clearly shows that politics has the potential of undermining the reputation of these institutions. In Parliament, MPs vilified those who had brought the allegations against the nominee for the post of DPP.³⁴ In addition, a section of MPs threatened to decline supporting nominees for the Judiciary if the nominee for DPP was not approved.³⁵ In the end, debate over the DPP appointment polarised the political elite along personal and ethnic lines. These disputes shifted the focus of the debate away from reforms to the consolidation of power. It also revealed that Kenya is yet to transcend from the older order to a new one.
106. *The process of vetting state officials is highly approved:* The judicial and prosecution office holders were the first to be vetted and hired under the new constitution. The exercise offered important lessons for the future as the constitution implementation process continues. Most of the political elites are yet to embrace the spirit of the constitution.³⁶ Ethnicity and party loyalties are still driving their decision making. To effectively insulate the country from ethnicity and political considerations, the vetting bodies will be required to build capacity, including in areas such as interviewing of candidates, among others.
107. *The bureaucracy is not neutral:* Within the government, the bureaucracy is exerting its influence through divisions within the coalition.³⁷ There are turf wars among bureaucrats in various ministries. Their aim is to influence the drafting of legislation that touches on their ministries.³⁸ Because of this competition and general absence of coherence in government, it is possible that they will draft weak legislation mostly because they want the status quo to remain.³⁹
108. *Interest in how legislation is drafted is fuelling conflicts:* Some argue that interest in drafting legislation is the main factor informing the internal conflicts in the parliamentary Committee on Legal Affairs and the Administration of Justice. The MPs would want to chair the committee or have a majority number to protect personal interests that may be threatened by the new constitution. The committee became dysfunctional owing to internal conflicts among members who were divided along party lines. The divisions prevented the committee from performing its tasks. The Speaker of the National Assembly had to pass some of the responsibilities to the Constitutional Implementation Oversight Committee (CIOC).

³² Interview with a Senior Counsel, 8 June 2011

³³ 'Ntimama now asks Parliament to approve Tobiko,' *The Star*, 14 June 2011

³⁴ 'Baraza and Tobiko get house nod', *Daily Nation*, 15 June 2011

³⁵ 'Nominees: Tobiko's approval divides MPs,' *The Standard*, 14 June 2011

³⁶ Interview with a Senior Counsel, 8 June 2011

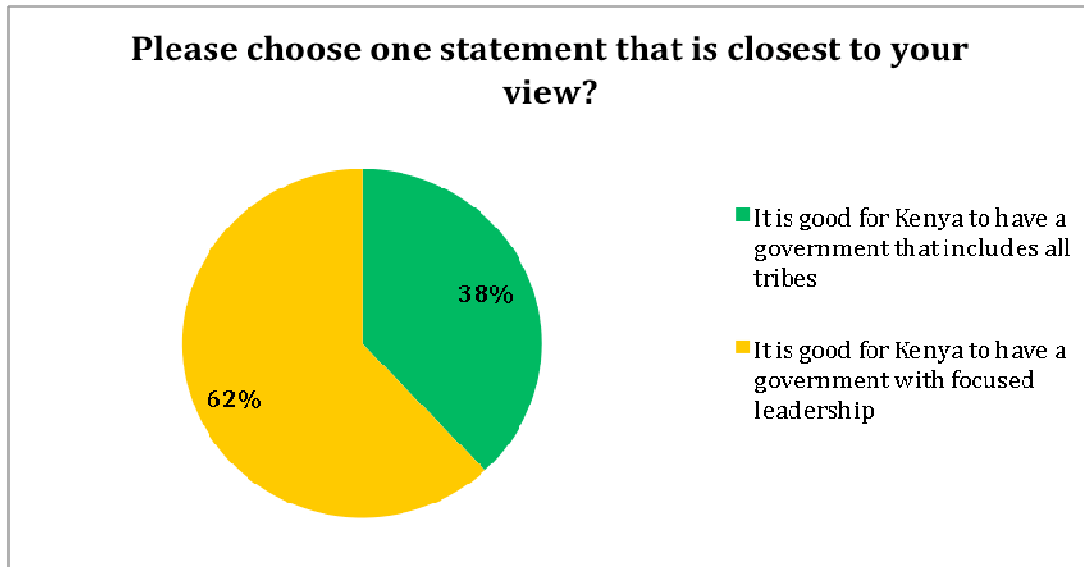
³⁷ Interview with a policy analyst, 2 June 2011

³⁸ Interview with a government official, 16 June 2011

³⁹ Interview with a committee member of the devolution taskforce, 2 June 2011

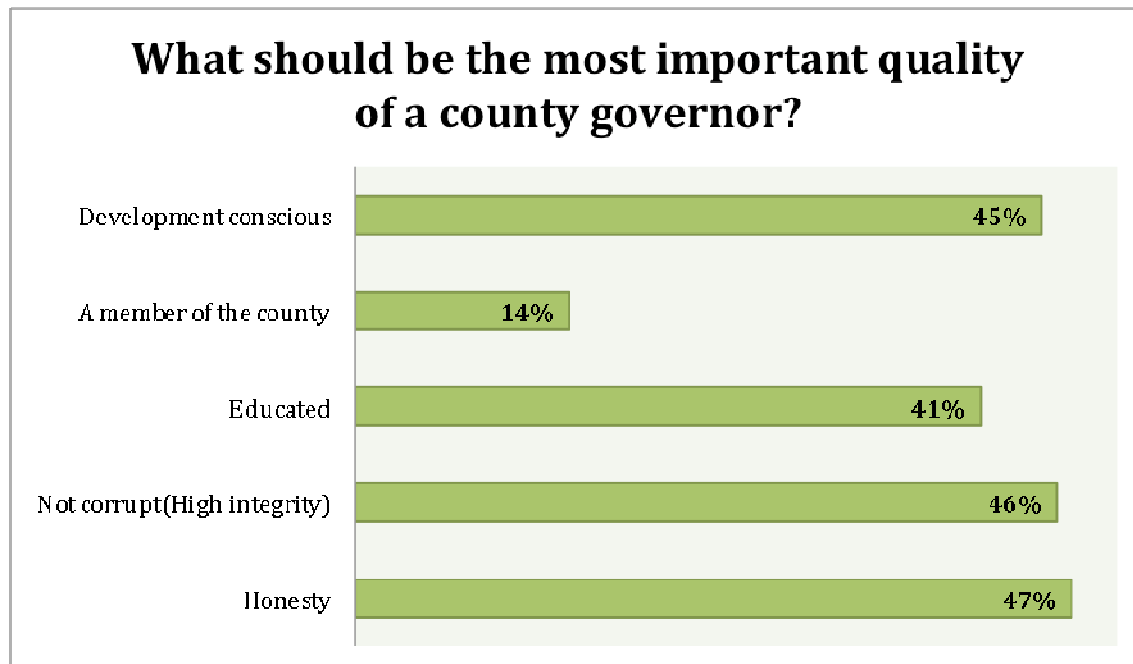
109. *Kenyans want focused leadership:* Perhaps because of these divisions, many Kenyans prefer focused leadership to ‘ethnic’-based political alliances. Asked what kind of leadership they wanted, 62 per cent of respondents said they wanted a focused leadership in power rather than an ethnic-based alliance.

Figure 8: Please choose one statement that is closest to your view.



110. *Honesty and integrity – or Chapter Six of the Constitution – are highly regarded as values for leadership of the county government.* Most people rank integrity and transparency high on the qualities of the person they would choose as a Governor in the next elections.

Figure 9: What should be the most important quality of a county governor?



Conclusion

111. *Conflicts within the coalition will slow reforms; but the new Constitution will outlive them:* Conflicts within the Coalition Government will continue slowing down decision making. But the new constitution has mechanisms to insulate itself from the consequences of these conflicts. Public litigation measures and oversight on the government are important in this respect.
112. *Compromise and consultation between the two Principals is critical at this stage:* The solution to the main problems of implementing reforms lies in consultations between the two Principals. Divisions between them and a perception that they are not 'together' is creating opportunities for entrenching the status quo or drafting weak legislation because of the fear of change.
113. *Ethnic-based interests have resurfaced:* The constitutional reforms were intended to eliminate the salience of ethnicity in politics. The constitution does this by defining the nature and functions of the state, aiming at an inclusive nation in which members of all communities are represented and play a part. In addition, the constitution emphasises on a Kenyan identity and nation building, in which ethnicity will be respected but only as part of the cultural richness of the country. Hence, in the debate on the appointment of office holders, emphasis should be on Kenyan citizenship, national unity and service to the nation. Aspects of integrity, transparency and impartiality are critical for the current implementation process and must take precedence over ethnicity.
114. *Unity of purpose in Parliament is critical for passing important Bills:* Parliament's unity of purpose is urgently needed especially at this time when it is supposed to pass critical Bills that will ensure the country has free and fair elections devoid of any violence. Politicians need to recall the underlying foundations of the coalition, that no party could govern without the other -- hence progress in the reform agenda will not be realised if they refuse to accommodate each other. The future stability of the country is tied to the full implementation of the new constitution. Hence, all efforts need to be geared towards this agenda.
115. *The clock is ticking fast towards the next General Election.* Hard decisions have to be made. Institutional deficiencies that led to the 2007/8 violence are supposed to be addressed with the constitution, which was passed by a majority vote. If they are not addressed, the country risks being plunged into chaos once again. Key among these reforms is the transforming the judiciary and police, as well as delivering on the entire Agenda 4 framework that identified the root causes of the violence. It is thus important that all players exhibit sobriety so that the process can be steered to fruition. It is important that all stakeholders stay faithful to the process.

5. THE NEW CONSTITUTION: LONG TERM ISSUES AND SOLUTIONS

Introduction

116. It is now widely acknowledged that institutional failure and the divisions emanating from Kenya's constitutional review process in 2005 contributed to the post-2007 election violence. The KNDR agreement underscored the importance of undertaking far-reaching reforms in order to move the country forward.
117. In particular, Agenda Item 4 recognised the importance of fast-tracking constitutional and institutional reforms as well as other issues around which Kenyans were divided. Land reforms, tackling unemployment and addressing regional development imbalances were identified as critical aspects of the reform agenda for the Coalition Government. Important also, in this respect, was the need to consolidate national cohesion and unity, and attack the cause of impunity by embedding reforms that would promote a culture of accountability and transparency in public affairs.
118. In line with Agenda Item 4, a new constitution was promulgated in August 2010. The new constitution has fundamentally altered the structure of government and governance, especially by providing for national and county governments. There are new legislative bodies and an electoral system to address the problem of representation of groups that have traditionally been marginalised and are vulnerable. The constitution had self-imposed deadlines on drafting of key legislation. It also imposes certain sanctions on various state officers and institutions if they fail to meet these deadlines.
119. August 2011 will mark one year after the promulgation of the constitution. It is important, therefore, to examine the progress of implementation of the constitution as well as other reforms that would prevent another crisis. This section of the report thus discusses progress in implementing the constitution and institutional reforms in general.

Constitution implementation process

120. A number of independent institutions to undertake and oversee the implementation of the new constitution have been established. The government is in the process of developing various policy and legislative frameworks for the comprehensive implementation of the constitution. The government established the Constitutional Implementation Commission (CIC) on 30 December 2010 with a mandate to oversee, monitor and facilitate the implementation of the new constitution.⁴⁰ The commission has set up its secretariat and established networks with various stakeholders engaged in implementing the constitution.⁴¹
121. Schedule 5 of the constitution lists 16 laws that must be enacted by 27 August 2011. However, by early June 2011, only three Bills have been passed into law: the Judicial Service Act; the Vetting of Judges and Magistrates Act; and the Supreme Court Act. The CIC has further identified priority laws that should be passed by August 2011.⁴²

⁴⁰ Commission for the Implementation of the Constitution Act

⁴¹ <http://cickenya.org>.

⁴² CIC. Agreed timelines for the development of priority Bills for the period ending 30 August 2011. <http://cickenya.org>

Table 14: Name, timeline and status of Schedule 5 Bills

	Bill	Constitutional (Schedule5) Deadlines	New (CIC) deadlines	Status
1.	Independent Electoral and Boundaries Commission	26 August 2011	15 May 2011	Awaiting presidential assent
2.	Kenya National Human Rights and Equality Commission	26 August 2011	03 July 2011	3 Bills under review ⁴³
3.	Legislation on Citizenship	26 August 2011	25 August 2011	Undergoing internal review & stakeholder consultations
4.	Ethics and Anti-Corruption	26 August 2011	17 July 2011	Undergoing internal review & stakeholder consultations
5.	Legislation on Elections	26 August 2011	08 July 2011	Undergoing internal review & stakeholder consultations
6.	Electoral Disputes	26 August 2011		Merged into the Elections Bill
7.	Legislation on Political Parties	26 August 2011	26 June 2011	Awaiting approval by Cabinet
8.	Vacation of Office of Member of Parliament Bill	26 August 2011		
9.	Power of Mercy	26 August 2011	30 May 2011	
10.	System of Courts	26 August 2011	28 August 2011	Supreme Court Act enacted 22 June 2011
11.	Removal from Office			
12.	Legislation on Vetting of Judges and Magistrates Schedule	26 August 2011		Vetting of Judges and Magistrates Act passed, 21 March 2011
13.	Speaker of County Assembly Bill	26 August 2011		
14.	Urban areas and Cities Bill	26 August 2011	14 August 2011	
15.	Contingencies Fund	26 August 2011		
16.	Loan Guarantees by National Government	26 August 2011		

⁴³ Article 59 of the constitution provides for the merger of the Kenya National Human Rights Commission (KNCHR), the National Gender Commission and the Office of the Ombudsman. These are the three commissions expected to form the Kenya National Human Rights and Equality Commission. The KNCHR and Ombudsman Bill are awaiting approval by Cabinet while the National Gender Commission Bill is undergoing review and stakeholder consultations.

Table 15: Timelines and status of CIC priority Bills⁴⁴

	Bill	Constitutional (Schedule 5) Deadlines	New (CIC) deadlines	Status
1.	Public Service Commission		30 July 2011	Undergoing internal review & stakeholder consultations
2.	Independent Offices		30 May 2011	Before Parliament for debate
3.	Auditor-General and Controller of Budget		03 August 2011	Undergoing internal review & stakeholder consultations
4.	Public Financial Management	26 August 2012	03 August 2011	Undergoing internal review & stakeholder consultations
5.	Salaries and Remuneration Commission		15 May 2011	Awaiting presidential assent
6.	Ethics and Leadership	26 August 2012	16 August 2011	
7.	Ratification of Treaties		21 August 2011	Undergoing internal review & stakeholder consultations
8.	Independent Police Oversight Authority		18 August 2011	Undergoing internal review & stakeholder consultations
9.	Nations Police Service	26 August 2012	14 September 2011	Undergoing internal review & stakeholder consultations
10.	NSIS	26 August 2012	16 September 2011	Undergoing internal review & stakeholder consultations
11.	National Police Service Commission	26 August 2012	7 July 2011	Undergoing internal review & stakeholder consultations
12.	National Land Commission	26 March 2012	03 August 2011	

Challenges to the implementation of the constitution

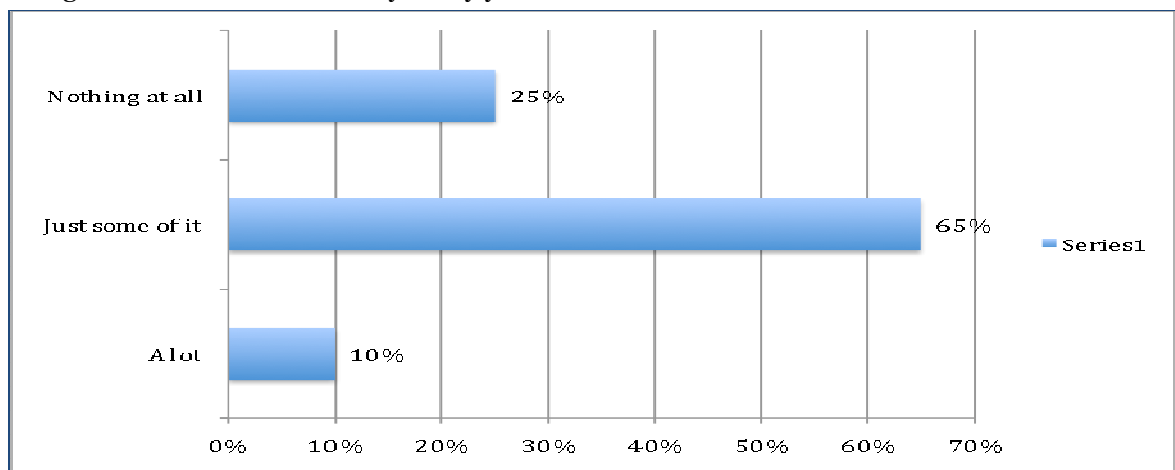
122. *Critical Bills on elections are yet to be passed:* With just over a year to the next scheduled elections, the laws to ensure a free, fair and credible election are still not in place. The lack of a legal and institutional infrastructure to manage elections undermines confidence in the electoral and democratic processes. It also implies that electoral management systems will likely not have sufficient time to make the preparations necessary to secure and assure the integrity of the vote.
123. *A conservative political culture and the old order threaten implementation:* The reforms in the new constitution generally challenge the entrenched power structures, old values and habits, as well attitudes. But these are so entrenched that it will take time to build a

⁴⁴ This table outlines additional Bills the CIC considers to be a priority to the implementation of the constitution. While some are not explicitly provided for under Schedule 5 of the constitution, majority have had their timelines brought forward with the aim of fast-tracking the implementation process.

base for new values. Indeed, the recent appointments to the Judiciary, applicants were questioned on matters of faith, yet the constitution is built on the aspiration to build a new and open society. It appears as if there are new fears, among some, about the radical repositioning of the Kenyan society.

- 124. *The constitution was negotiated; it contains ambiguities that will require further legal clarification:* The constitution contains language ambiguities that may lead Parliament to debate the meaning of some of the provisions. Already there are several cases in court seeking judicial interpretation of some of the provisions. Those who opposed the constitution at the referendum are increasingly using this language ambiguity to force interpretations that favour them. Further, even those who supported the document do not agree about the interpretation of some of the provisions. This will remain a challenge throughout the constitution implementation process.
- 125. *Civic education is lacking.* Important also is that civic education appears to have stopped with the referendum. For instance, the survey asked how much people knew about the new constitution. Only 10 per cent of respondents said they knew ‘a lot’ while 65 per cent said they knew ‘nothing’. Important, however, is the finding that 65 per cent know ‘just some of it’.

Figure 10: How much would you say you know about the new constitution?



- 126. *Popular forums for public education such as the Internet, chiefs baraza, and schools are not providing civic education on the constitution.* The media remain the main source of knowledge about the new constitution. Up to 82 per cent of respondents identified the media as their main source of information on the new constitution while only 42 per cent said they had read the document. Only 6 per cent built their knowledge through civic education delivery groups such as professional associations and civil society organisations. The main forums of public education do not give any knowledge on the constitution: in the survey, schools, chiefs baraza, e-learning were not cited as sources of information and knowledge about the constitution.

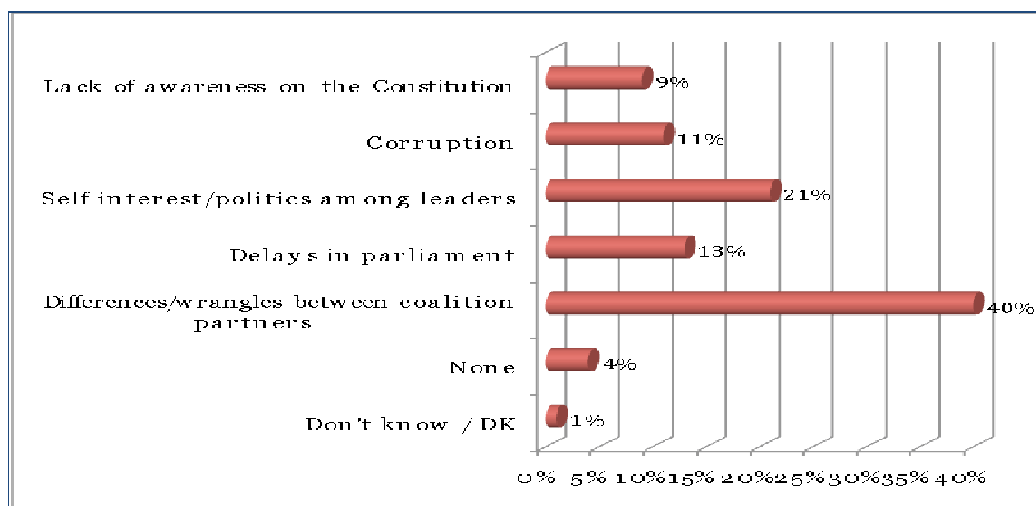
Table 15: What are the sources of what you know about the constitution?

Media	82%
Friends/Relatives	42%
Personally read the constitution	48%
Politicians/Political parties	11%
Religious leaders	9%
Employer	0%
Professional associations	2%
NGOs workshops/forums	4%
Internet	0%
Taught in School by Teachers	0%
Chiefs in barazas	0%
Civic education	0%
Government offices	0%
NR/RTA DK	2%

127. Many people are not aware about elective posts under the new constitution. Besides the seats of the President and Member of Parliament (MP), only 11 per cent of Kenyans are aware that they will be required to vote for women representatives in the next General Election. Just 16 per cent of the respondents know that they will to vote for youth representatives.
128. *Lack of cohesion in both Parliament and within the Coalition Government is slowing the pace of constitution implementation.* The discussion above cited lack of cohesion in government as delaying decision-making and implementation of reforms in general. This applies to implementation of the constitution as well. The new constitution has restructured the state and its institutions. It therefore faces the challenge of resistance from those who support the status quo as well as the old political culture. Divisions along party lines within Parliament's departmental committee on Justice, Legal Affairs and Administration of Justice considerably slowed the process of making judicial appointments.⁴⁵
129. The disagreements within the Coalition Government are also reflected in what people perceive to be major threats to implementing the constitution. In the June 2011 survey, 40 per cent of the respondents cited political wrangles between coalition partners as the greatest challenge to the implementation of the constitution. Another 21 per cent said self-interest among political leaders was an impediment to the implementation process while 13 per cent felt that delays in Parliament were hindering the implementation of the constitution.

⁴⁵ Daily Nation, 'MPs Reject Namwamba as ODM quits', Friday, 6 May 2011. Pg72

Figure 11: What ONE difficulty, if any, do you see facing the implementation of the constitution?



130. The implementation challenges are undermining public confidence in the constitution. Up to 47 per cent of respondents said they are not satisfied with the progress of implementation. This is a significantly high level of dissatisfaction and could be the result of disillusionment with the growing tendency by some leaders to undermine the provisions of the new constitution. There are several public litigation cases in court seeking to prevent this tendency.

Tabl16: How satisfied or dissatisfied are you with progress in implementing the new constitution?

Very satisfied	5%
Satisfied	35%
Not satisfied	33%
Not satisfied at all	14%
DK	11%
NR	1%

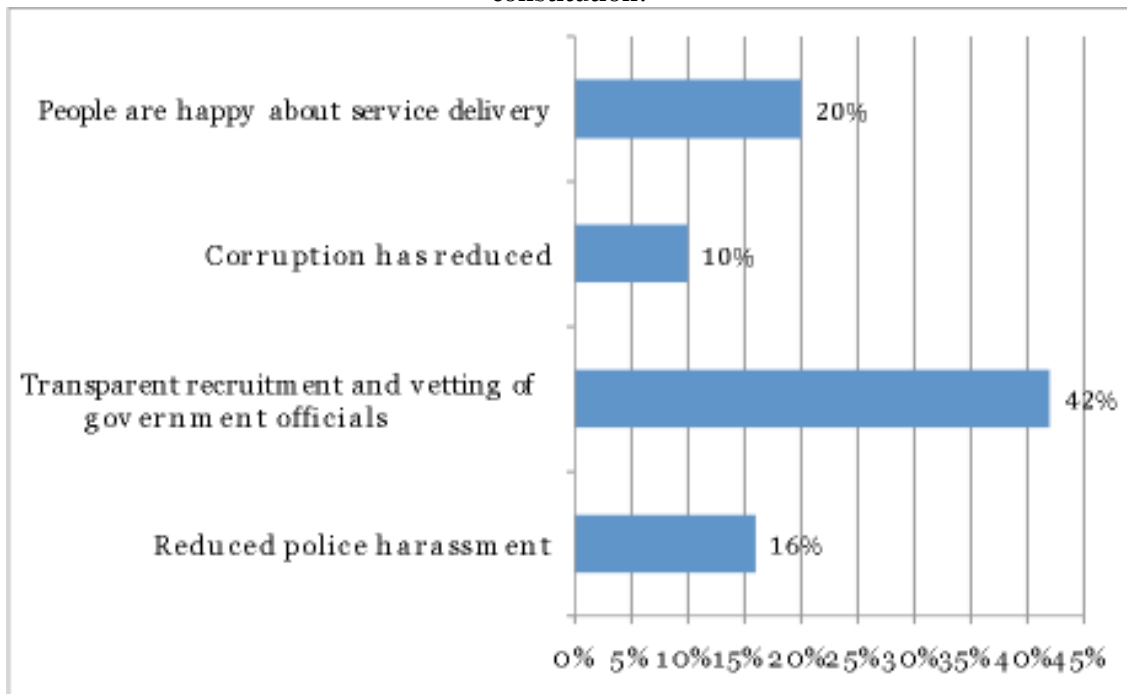
131. The media are viewed as having increased people’s knowledge on several other issues. Up to 85 per cent of the respondents said that media coverage had increased their knowledge of the ICC. Another 85 per cent and 81 per cent said media coverage has improved their knowledge of provisions of the constitution and the problem of IDPs, respectively.

Table 17: Has media coverage increased your knowledge of the following issues?

	Yes	No	DK	NR
How the ICC operates	85%	13%	1%	1%
Provisions of the new constitution	81%	16%	2%	1%
The problem of IDPs in Kenya	84%	13%	2%	1%

132. People have also noticed changes after the adoption of the new constitution. Of those surveyed, 42 per cent said that there is transparent recruitment and vetting of government officials, while 15 per cent said there is reduced harassment by police.

Figure 12: What change have you observed in the county since the adoption of the new constitution?

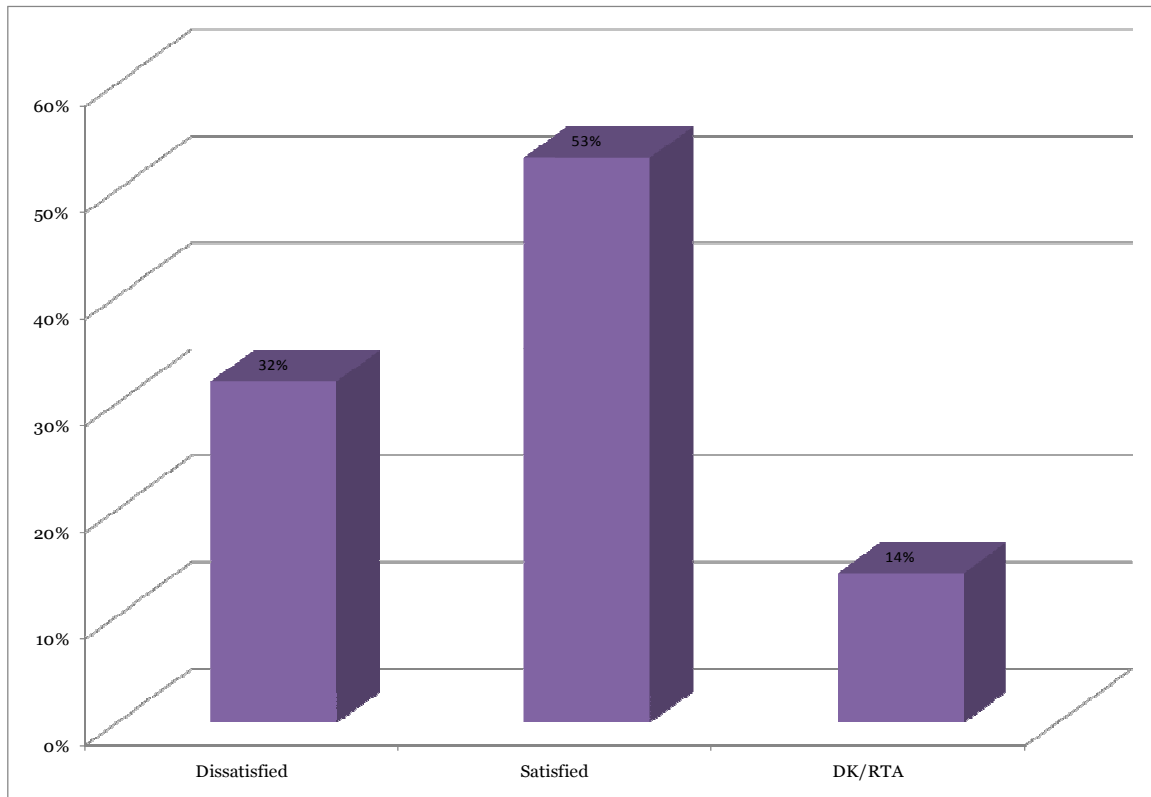


Judicial reforms

133. In adherence to the constitution, the Judicial Service Commission has interviewed and recommended to Parliament candidates for judicial appointments. The interviews were conducted in public. This is a clear break with the past. It is a radical opening of the doors to the Judiciary.⁴⁶ The extent of public participation in the process has improved public confidence in judicial reforms, which have not been fully implemented, even though KNDR prioritised them.

⁴⁶ Interview with an official of KHRC, June 2011

Figure 13: How satisfied or dissatisfied are you with the government in addressing judicial reforms?



134. A new Chief Justice, Deputy Chief Justice and Director for Public Prosecutions have been appointed. The three were sworn in on 16 June 2011, setting the stage for reforms in the country's justice system.⁴⁷ Some of the priority areas for both the Chief Justice and Deputy Chief Justice will include vetting of serving judicial officers, improving public access to justice and clearing the case backlog in the superior and subordinate courts.⁴⁸
135. The Supreme Court Bill has been passed into law. The Act is intended to provide the legal and institutional framework for offsetting up the Supreme Court. The court, once established, will hear presidential election disputes and interpret the constitution when called upon to do so.⁴⁹ This is an important step towards improving service delivery within the judiciary. It also serves as a final stop where citizens will be able to seek redress on sensitive national issues, including on disputed presidential elections.

Land reforms

136. The Ministry of Lands and stakeholders have developed the National Land Commission Bill and the Harmonised Draft Eviction and Resettlement Guidelines.⁵⁰ The National Land Commission Bill is intended to provide for the establishment and development of institutional and administrative frameworks for the management of land in Kenya. If passed, the Bill will establish the National Land Commission to co-ordinate and oversee

⁴⁷ Gazette Notice No. 6653, 6654 and 6655. Dated 16 June 2011. See also <http://www.kenyalaw.org/klr/index.php?id=771>

⁴⁸ Interview with an official of the International Commission of Jurists (ICJ)- Kenya Chapter- May 2011

⁴⁹ Supreme Court Act, 2011.

⁵⁰ Meeting of Reform Agenda Partners Roundtable held on 12-13 May 2011. See also the National Land Commission Bill, 2011

land reforms in Kenya. The Harmonized Draft Eviction and Resettlement Guidelines are intended to prevent undignified evictions and afford the country equitable resettlement policies.⁵¹

137. There are concerns, however, that public involvement in the land reforms process has not been satisfactory. Some argue that the ministry is yet to fully open the process of developing the various laws to the public. There are also concerns that other ministries drafting legislation relevant to land issues are not consulting with the stakeholders and the Ministry of Lands. There are, therefore, several initiatives in different places that are not effectively coordinated -- ministries and government departments are not effectively coordinated in drafting legislation under the new constitution.

Poverty, inequality and regional imbalances

138. Chapter Eleven of the constitution establishes devolved governments. The Ministry of Local Government has established a Task Force on Devolved Government to advise on policy in this regard.⁵² The Task Force has consulted extensively and provided proposals on, among other things, the restructuring of the Provincial Administration, Operationalisation of the county governments and the financial management system of the counties. The report has also identified various legislative, policy and administrative frameworks that need to be put in place for the effective and efficient establishment of county governments.⁵³ Three Bills on the implementation of devolved governments are currently undergoing stakeholder review. These include the Independent Electoral and Boundaries Commission Bill, 2011, the Vetting of Public Appointments by Parliament Bill, 2011, the Political Parties Bill, 2011 and the Elections Bill, 2011. If enacted, these Bills shall provide the institutional and legislative frameworks for county governments in Kenya.⁵⁴
139. Despite the above, various challenges can be anticipated in the establishment of county governments. Devolution of power and resources across the country will challenge the existing political and social structures. Resistance to the process of devolution is expected.⁵⁵ Consequently, there will be confusion around the lines of authority and accountability; it is possible that in the initial phase, there will be resistance by entrenched groups at the centre as well as outright refusal to delegate administrative responsibilities because devolution will be undermine such interests. Devolution itself will test the commitment to reform on the part of the government.

Youth unemployment

140. Previous reports have outlined the various initiatives set up to tackle unemployment among the youth. These include the Kazi kwa Vijana (KKV) and the Youth Enterprise Development Fund. These initiatives have, however, had a limited impact in tackling youth unemployment in the country. KKV, in particular, remains untenable in the long term.⁵⁶ Up to 28 per cent of survey respondents would like the government to build/revive industries in order to create more jobs for the youth. Up to 22 per cent of respondents feel that the government should allocate more funds to youth projects while 14 per cent think that the government should give equal opportunity for jobs in each

⁵¹ Ibid. See also <http://www.lands.go.ke>

⁵² Interim Report of the Task Force on Devolved Government. A report on the Implementation of Devolved Government in Kenya, 20 April 2011.

⁵³ Ibid

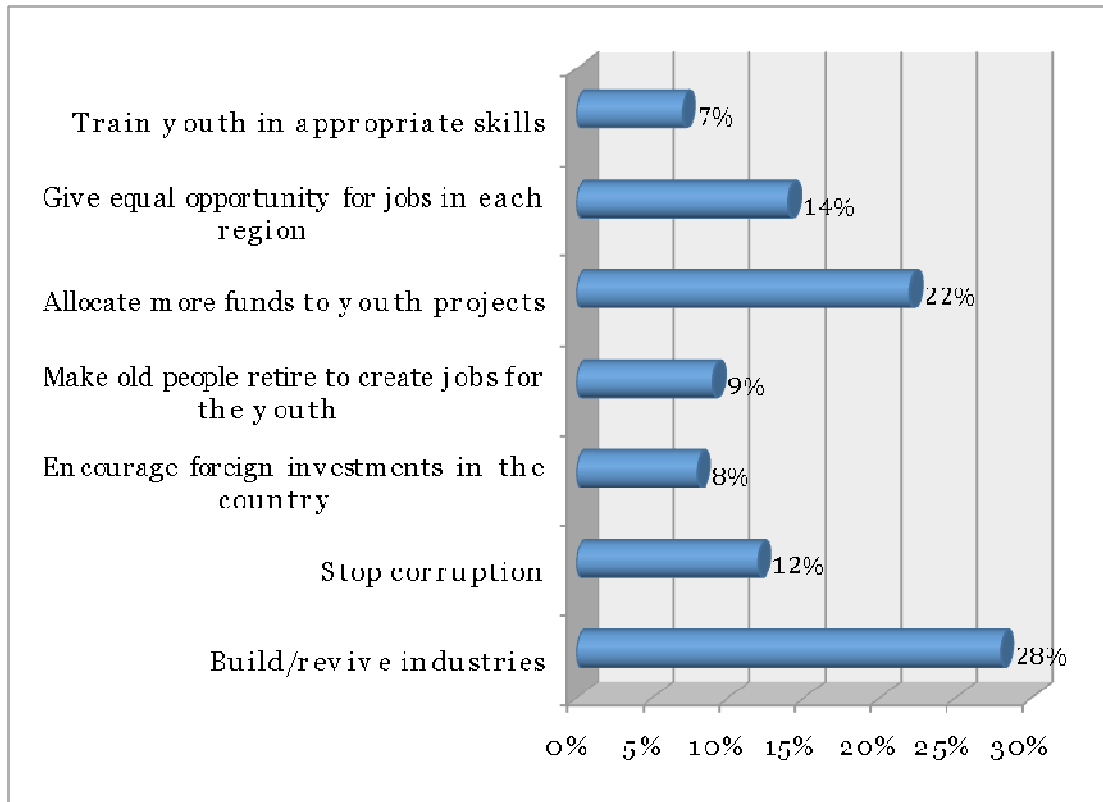
⁵⁴ http://cickenya.org/bill_tracker

⁵⁵ Interview with a member of the Task Force on Devolved Government, June 2011

⁵⁶ Interview with official from the Ministry of Youth Affairs and Sports. See also *The Standard*, 'Tuju calls for youth jobs to counter chaos', Wednesday, 22 June 2011.

region.

Figure 14: What can the government do to create more jobs for the youth?



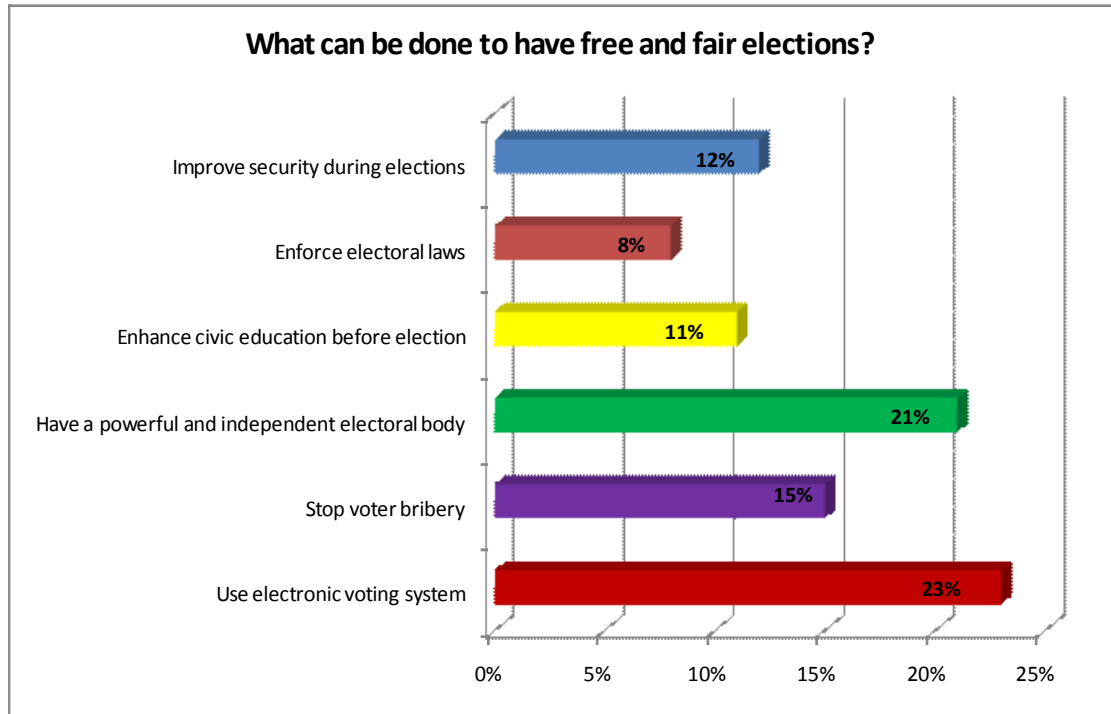
Electoral reforms

141. The new constitution has overhauled the electoral system, providing for a new electoral body – the Independent Electoral and Boundaries Commission (IEBC). Parliament has passed the Independent Electoral and Boundaries Commission Act, which sets up the new electoral body. It has adopted report of the Interim Independent Boundaries Review Commission, which gave guidelines on how to delineate the new constituency boundaries. A new Commission, however, is not in place. Further, there is some lack of clarity on the date of the next general election: the constitution provides for elections to be held second Tuesday in August in every fifth year but there are those who argue that the term of the current parliament will end in December 2012.
142. The Elections Bill (2011) has been drafted but awaits conclusion of the work of the national taskforce on devolution, so that the CIC can incorporate the proposals for County Governments in the Bill.⁵⁷ The Bill provides for stiff penalties for electoral officials who subvert a free and fair election. It insulates the commission from political manipulation by specifying timeliness, for which Parliament is required to dispense with the final boundary report, failure to which the commission can by-pass it and forward its report for publication.
143. Most Kenyans think using electronic voting and having a powerful independent body will ensure free and fair elections. Kenyans want a Commission that will enhance

⁵⁷ “Elections Bill put on hold,” Daily Nation 14 June 2011

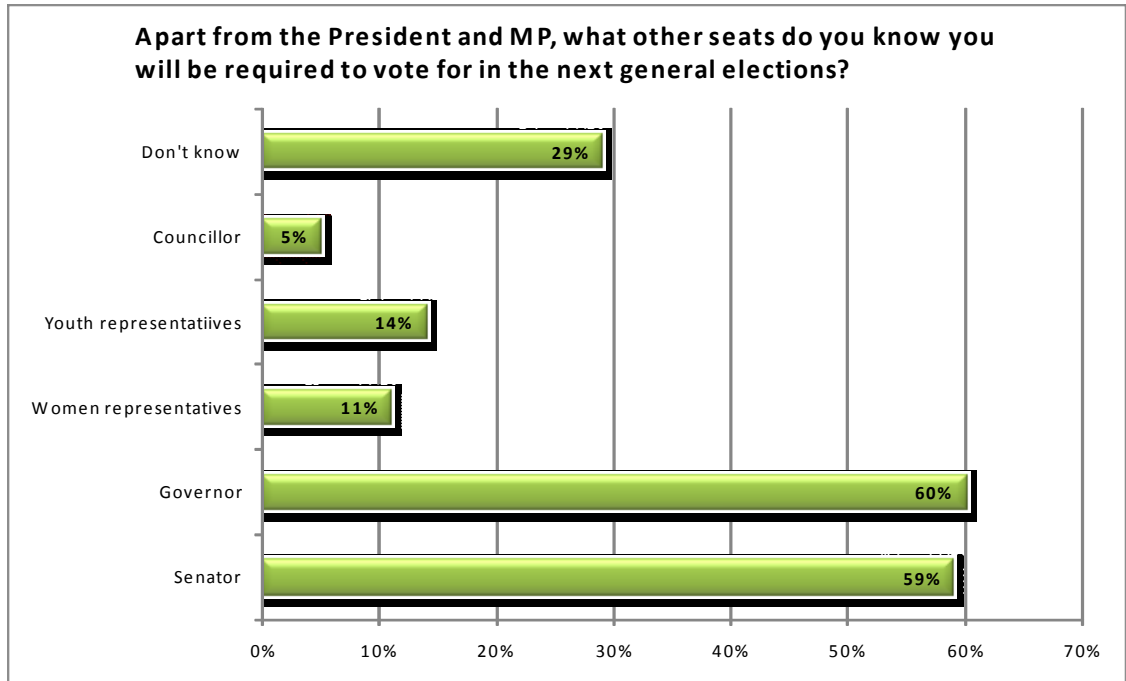
compliance with the law in order to have a clean election. They want improved security and a stop to voter bribery.

Figure 15: What can be done to have free and fair elections?



144. Provision of civic education and voter education appears lacking. The next election will comprise several layers of elective posts but not many respondents are aware about these posts; many are able to identify only the post of the governor and senator. They are not aware, for example, about the women representatives. When asked which other seats apart from the President and MP they will be required to vote in the next general election, 29 per cent of the respondents were not aware of them. 41 per cent are not aware about the post senator and governor. Interestingly, close to 90 per cent are not aware about the post of women representative. . Importantly, 29 per cent were not aware of any.

Figure 16: Apart from the President and MP, what other seats do you know you will be required to vote for in the next elections?



145. The passage of the IEBC Bill marks a new chapter in the management of elections in the country. It is hoped that when the new body is set up, political horse-trading and ethnic considerations will not take precedence over the national values. It is important for the IEBC to be unencumbered by any perceptions of bias. The trust of most Kenyans in having free and fair elections rests with the formation of a new powerful electoral body.

National cohesion and unity

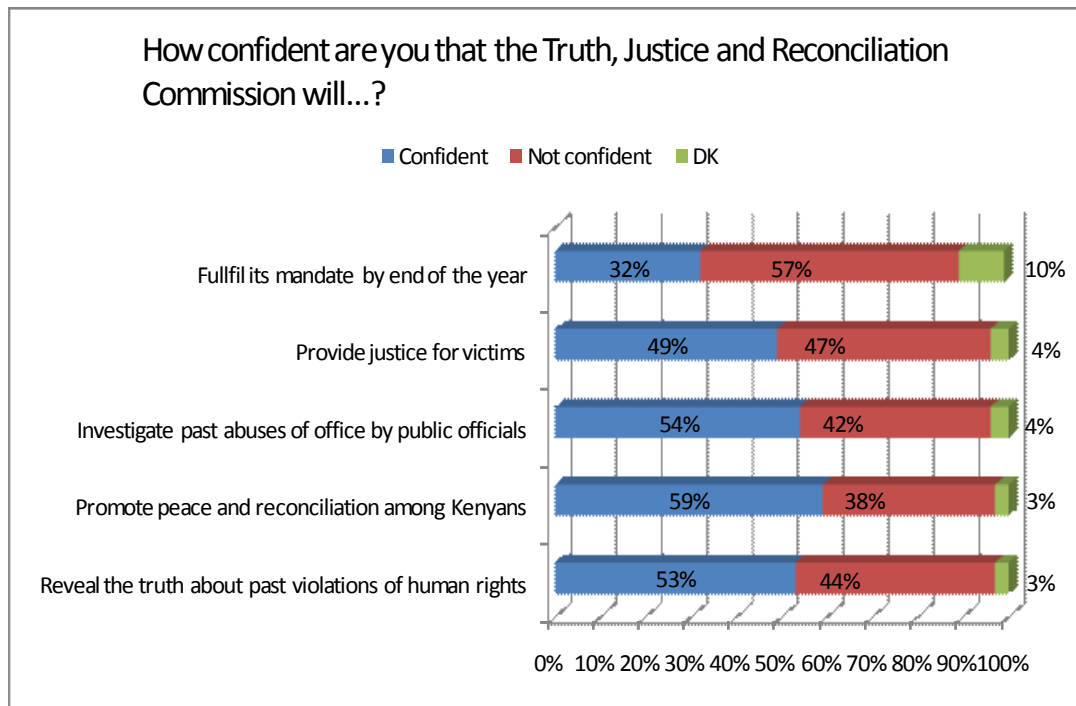
146. The KNDR agreement required the Coalition Government to foster national unity and reconciliation through high level meetings in areas affected by the violence. Three years on, data shows that communities in those areas have undertaken peace initiatives with support from faith-based and community organisations and humanitarian organisations. These initiatives, such as 'connector projects' by the Catholic Church and the shelter reconstruction one, have contributed to rebuilding trust among communities.
147. However, national level politics disrupt these efforts. Political statements and insinuations that reinforce ethnic division and mistrust undermine peace in regions that have previously experienced violence. Perceptions of discrimination or bias in the IDP resettlement programme and the fight against impunity through the International Criminal Court have undermined the progress made to reconcile communities. The continued presence of IDPs in camps, despite the nuances around this issue,⁵⁸ is an indicator of the failure of reconciliation among communities.
148. The government also established a Truth, Justice and Reconciliation Commission to investigate past human rights abuses and recommend measures to guarantee that such violations do not recur in future. The TJRC is mandated to establish a record, among others, of all past historical human rights abuses, their cause, nature and extent as well

⁵⁸ Concerns have been raised that the IDPs in camps are land-hungry individuals seeking to benefit from land allocation programmes rather than genuinely displaced persons unable to leave camps due to security reasons

as recommend prosecution for perpetrators of gross human rights violations. The TJRC Act required the commission to promote peace, justice, national unity, healing and reconciliation among the people of Kenya.

149. Since its inception, however, the TJRC has suffered several challenges. As previously reported, civil society raised concern about the credibility of the commission's chairperson . Public debate ensued and the Chief Justice was petitioned to set up a tribunal to investigate these allegations and rule on the suitability of the chair to head the TJRC. The chair stepped down in November 2010 after a tribunal was set up to investigate these allegations. However, Court cases challenging the mandate of the tribunal have prevented the tribunal from working.⁵⁹
150. Nevertheless, the TJRC began its work, engaging 304 statement takers across the country, with 16 out of these being deployed to the prisons across the country where they conducted interviews, ultimately collecting close to 30,000 statements during the official window that closed in January 2011.⁶⁰ In April 2011, it began public hearings in North Eastern Province where it concentrated on investigating the Wagalla massacre. Later, it held hearings in Western Province. The TJRC has asked for an extension of its mandate by six months after the expiry of its term in September 2011 to enable it reasonably complete its sittings and present its initial report.
151. Despite these challenges, most respondents said they were confident that the TJRC will reveal the truth about past violations, promote peace and reconciliation among Kenyans and investigate past abuses of office by public officials.

Figure 17: How confident are you that the Truth, Justice and Reconciliation Commission will ...?



152. However, the data shows that 32 per cent of the respondents are not confident the TJRC

⁵⁹ Pamela Chepkemei, 'Kiplagat Gets Reprieve in Fight Against Tribunal', *The Star*, 28 April 2011

⁶⁰ <http://www.tjrkenya.org/index.php/press-a-media/press-releases/244-qaa-press-conference-friday-13th-may-2011>

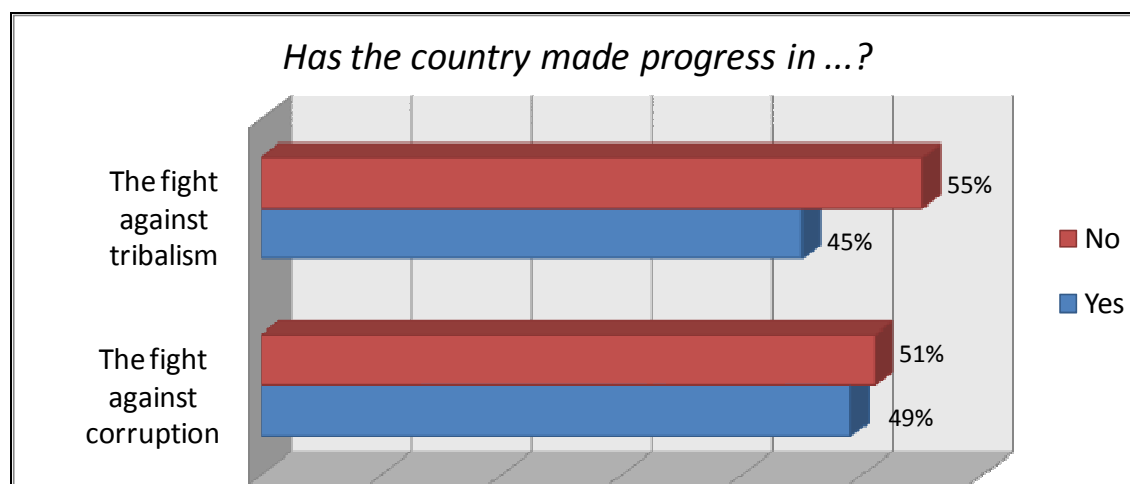
will fulfil its mandate by the end of the year. This could be due to several factors, main among them contestations over the suitability of its chairman, which delayed its work. Some vacant commission seats have not been filled, leaving the commission shorthanded. These and other factors have slowed the commission’s momentum and negatively impacted on its ability to fulfill its mandate.

- 153. The commission’s term expires in September this year, well before it covers a significant portion of its work. Ultimately, the TJRC might have to forego some regions as well as thematic hearings touching on areas such as torture, massacres, land security and internally displaced persons (IDPs). These are important regions for the the TJRC work. A report without insights from all areas of the country may not be received well by those from the regions where the TJRC did not cover.
- 154. National unity and reconciliation can be achieved only through governance reforms, notably the fight against tribalism and corruption. The concerns expressed by local communities in the Rift Valley underline their perception that corruption and tribalism has permeated the reconstruction effort, hence the failure to achieve the desired outcomes. For instance, the perception among residents of Burnt Forest that IDPs have unduly benefitted from the shelter reconstruction programme has stirred deep resentment and eroded the gains made in promoting reconciliation.

Transparency, accountability and impunity

- 155. The KNDR required the government to promote transparency and accountability in public institutions and to fight impunity for corruption. Over the past three years, public satisfaction with the government’s achievement of these objectives has been, at best, average. This was informed by the perceived inability or unwillingness by the Kenya Anti-Corruption Commission (KACC) to investigate high level corruption crimes. In this quarter, majority of respondents interviewed said the government had not made much progress in fighting corruption and tribalism:

Figure 18: Has the country made progress in fighting tribalism/corruption?

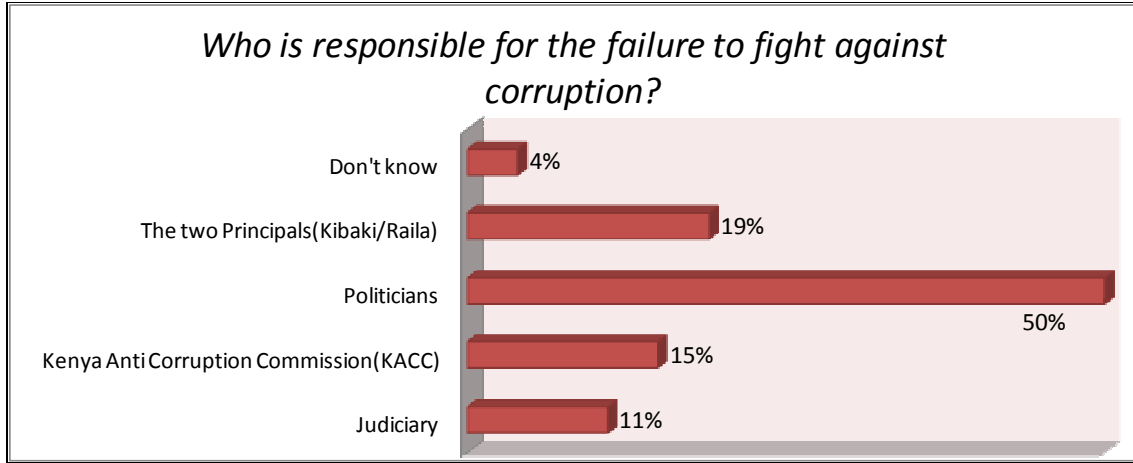


- 156. Up to 49 per cent and 45 per cent of respondents think Kenya is making progress in the fight against tribalism and corruption, respectively. This reflects increasing confidence in the Kenya Anti-Corruption Commission (KACC), which has summoned and questioned government officials over corruption allegations.⁶¹ However, 51 per cent of respondents think Kenya has not won the war on corruption mainly due to lack of human capacity to

⁶¹ At least 22 such cases have been filed against state officials in 2011

deal with all reported cases, as KACC has only three offices across the country. In addition, lack of political support to investigate high profile criminal and civil suits is the biggest challenge to the fight against corruption. Indeed, majority of the respondents are of the view that politicians are responsible for the failure to fight against corruption:

Figure 19: Who is responsible for the failure to fight against corruption?



Conclusions

157. The constitution provides a sound basis for a new Kenya. It anchors, firmly, all the Agenda 4 reforms. It comprises provisions that, if effectively implemented, will close the faults on which the post-2007 election violence was built. Unfortunately, its implementation has begun to show the patterns of behaviour reminiscent of the business-as-usual culture. Not everyone is recognising that the new constitution implies a break with the past.
158. Political challenges continue to hinder comprehensive implementation of the constitution. This, coupled with inadequate civic education, has reduced public confidence in the implementation process. Intensifying civic education and building capacity for public vigilance is an important undertaking if implementation is to remain on track.

6. SUMMARY OF FINDINGS AND CONCLUSION

159. This report covers the period between April and June 2011. The discussion has focussed on the key themes under the KNDR agreement, the progress and challenges facing implementation of the new constitution. Several conclusions have already been made in several sections of the report. The aim of this section is to summarise the key findings and conclusions.
160. The report has emphasised that the Agenda 4 reforms under the KNDR agreement were aimed at securing sustainable peace by addressing all the fault lines from which the post-election violence evolved. The discussion has also noted that the new constitution anchors all the Agenda 4 reforms. The spirit of constitutionalism – based on values and principles espoused by the new constitution – is required to move the country forward. The new constitution is not an end in itself; it is a means to achieving the goal of ‘sustainable peace, stability, and justice in Kenya’.
161. The report has noted that the socio-political and economic situation did improve after the signing of the National Accord and has been getting better since then. By the end of 2010, many survey respondents stated that life was better compared to 2008 and that they felt safer. By June 2010, however, people cited the increasing cost of living and inflation in general as the main challenges facing the country. Only half of the respondents feel safer and many are feeling that life is getting worse compared to what it was one year ago. The declining socio-economic situation requires urgent action because its negative social consequences could exacerbate political difficulties or even converge with other dynamics and destabilise the framework for reforms and the society in general.
162. The ICC intervention in the Kenyan situation is causing political anxieties. It has occasioned formation and fragmentation of ethnic coalitions. In this sense, the ICC has become the driver for the 2012 succession politics and is increasingly becoming another fault line in Kenyan politics. Nonetheless, many Kenyans still believe that prosecution of perpetrators of violence will prevent a recurrence of violence. They are disillusioned by lack of progress in arresting lower and middle level perpetrators or holding senior and influential people to account. This lack of progress and absence of political will is now generating disillusionment.
163. Another General Election is fast approaching even as progress in implementing institutional reforms in the police and the public service has been slow. Communities have not fully reconciled and IDPs are in camps. Political leaders are forming ‘ethnic coalitions’ rather than institutionalising political parties in readiness for the next election. Nonetheless, the new constitution also spells out the reform measures to be undertaken to improve the police. Change of attitude and behaviour, and adherence to modern democratic norms is an imperative for the police as the country moves towards another election. Thus, vetting of the police must be opened to the public in line with the standards set under the new constitution. This will improve public confidence in the police and begin creating a culture of transparency in the force.
164. The promulgation of the constitution in August 2010 marked a new beginning for Kenya. The country had a tortuous and protracted two-decade struggle for comprehensive constitutional reforms. The new constitution is an important milestone in Kenya’s history. The lack of reforms and socio-political divisions that resulted from poor governance culminated in the post-2007 election violence. The new constitution clearly marks a new beginning and a transition from the older order to the new. There is progress in making some of the laws prioritised under Schedule 5 of the constitution.

However, there are many laws to be finalised by 27 August 2011, the deadline imposed by the constitution. Parliament will have to increase pace to meet this deadline. Divisions in Parliament along party and other interests, however, will have to be resolved for it to effectively meet this challenge.

165. There is progress in reforming the Judiciary. The Chief Justice and the Deputy Chief Justice are in office through a public participation process. Nominees for other Judges of the Supreme Court were also recruited through a transparent process; a new standard entrenched by the constitution. There is also increased vigilance over recruitment processes for public offices. Public litigation efforts have increased in this respect. However, this new way of doing things is facing new challenges. The old order is fighting back.
166. A conservative political culture and the old order threaten the implementation of the constitution. Lack of bi-partisan leadership, internal conflicts in the coalition and the Parliament are slowing the pace of constitution implementation. Further, civic education providers have not been active, yet awareness on the new constitution is critical for building citizens' knowledge to create demand for reforms. However, the public is supportive of the new achievements, such as the public participation in the appointment of key state officers.
167. The findings show that the constitution is one major achievement thus far. It is opening a new window for reforms and providing space for a fresh start. It has set new standards in the appointment of public officers. But there has been limited progress in some areas such as the police, national cohesion and reconciliation, and the fight against impunity in general. As the country approaches the next General Election, there is need to fast-track police reforms and the enactment of electoral laws in order to make adequate preparations for a clean and peaceful election. Importantly, the date for the next general election must be clarified soonest possible in order to prepare everyone and put the logistical measures in place early enough.