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South Consulting - 1st Review Report - Agenda 1: Immediate Action to Stop Violence and Restore Fundamental Rights and Liberties

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**THE KENYA NATIONAL DIALOGUE AND RECONCILIATION (KNDR)
MONITORING PROJECT***

**AGENDA ITEM 1
IMMEDIATE ACTION TO STOP VIOLENCE AND RESTORE
FUNDAMENTAL RIGHTS AND LIBERTIES**

**Report on Status of Implementation
January 2009**

SUMMARY OF KEY FINDINGS

1. This report assesses the progress made in implementing Agenda Item 1 of the Kenya National Dialogue and Reconciliation process (Immediate Action to Stop Violence and Restore Fundamental Rights and Liberties). Data on which this report is based was collected using a mix of methods. The baseline survey and field data are based on people's perceptions about implementation of the KNDR agenda points. The following are some of the highlights on findings.
2. *Demobilisation and disbandment of the militia:* From the outset, in February 2008, the mediation process emphasised the need to demobilise and disband illegal armed groups and militias. From March 2008, the police and the military began an operation to stop the activities of the Sabaot Land Defence Force (SLDF) and later the Mungiki and other groups that had been armed and mobilised for violence. Although the operation largely restored calm in the affected areas, sporadic activities by illegal armed groups have been noted. Ongoing acts of violence notwithstanding, results from a December 2008 national baseline survey show 60% of Kenyans feel that violence from local armed groups has decreased and 57% believe that this violence will decrease further in the next one year. However, there are grave concerns about the manner in which the police dealt with these groups. Human rights abuses in the course of police operations have undermined the confidence of Kenyans in the security apparatus.
3. More importantly, no formal process to demobilise and disband illegal armed groups has been put in place. The national baseline survey shows that 67% of Kenyans believe illegal armed groups have not been completely disbanded or demobilised. Although the various militia have not been active, they are alive and well in different parts of the country. Local militia, therefore, remain a security threat as dormant groups can be reactivated with ease should political circumstances so require.

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4. *Enhancing security and protection of the population:* Although police claim a six percentage reduction in the rate of crime from the previous year¹, insecurity persists in the flashpoints of violence. The government has established extra police stations, posts and patrol bases in areas prone to violence and in particular in areas from which the current internally displaced persons were evicted. This notwithstanding, attacks and threats against IDPs living close by continue. This suggests that ‘policing’ communities is not enough to guarantee their security. Other reforms that address the fundamental causes of the post-election violence must be undertaken to lay the basis for the security of the population. The baseline survey reveals that only 28% of the respondents feel safer now than just after the 2007 elections.

5. *Restoring fundamental rights and liberties of peaceful assembly:* In January 2009, the international NGO, Freedom House, reported Kenya’s democracy rating to have deteriorated from “free” to “partly free.” The fundamental rights, freedoms and liberties of Kenyans -- especially with regard to peaceful assembly -- continued to be curtailed throughout the year. The police violently dispersed public gatherings and demonstrations, including those of IDPs protesting over insecurity, citizens campaigning to have Members of Parliament pay tax on their allowances, and the media demanding a review of the Kenya Communications Amendment Act. Over 60% of the respondents in the baseline survey felt that the government did not respect basic human rights. On the whole, fundamental rights and freedoms are constrained; democracy is on recession compared to the period between 2003 and 2007.

6. *Implementation of the CIPEV report:* The coalition Government has made some progress in initiating implementation of the report by the Commission of Inquiry into Post-Election Violence. The coalition partners signed the agreement to set up the Special Tribunal for Kenya. Although the Cabinet and Parliament have adopted the report, Parliament failed to meet the deadline for passing laws to set up the Special Tribunal that would try those suspected to bear the greatest responsibility for the post-election violence. Commitment to the implementation of the report and to deal with impunity will depend on the political environment at the time that suspects are charged.

7. There are several challenges around implementation of the CIPEV recommendations. Firstly, both parties did not have internal consensus on how to implement the recommendations in the commission’s report. Divisions and disagreements on different aspects of the recommendations are likely to negatively affect implementation. Secondly, some of the prosecution witnesses have reportedly received threats to dissuade them from giving evidence at the Special Tribunal. It is likely that some witnesses may decline to give evidence if their protection is not guaranteed.

¹ Kenya Police, December 2008

General conclusion

8. Findings show that there was no systematic approach to disbandment of the illegal armed groups. The informal nature of illegally armed groups and the failure to establish the members or their sponsors has made it difficult to arrest and prosecute them. These groups remain dormant; they can be reactivated with ease for purpose of political violence. Many of those involved in violence used ordinary tools – the tools they use during peace times. It is unlikely that these groups will not be prepared and armed with sophisticated weapons in future political violence.
9. Fundamental rights and freedoms are constrained. Democracy is on recession compared to the period between 2003 and 2007. There is urgent need to promote and safeguard freedoms and fundamental rights. There is need for the coalition partners to publicly mobilise support for respect of freedoms and fundamental rights at all times. It is important for KNDR members to provide leadership in this regard.
10. Comprehensive reforms and promotion of democratic governance is a must. Failure to reform would mean another violent conflict – the illegal armed groups will not be poorly equipped for any conflict in future.

MAIN FINDINGS

INTRODUCTION

11. The report covers the period between February 2008 and January 2009. It is based on primary data, including data from field and key informant interviews as well as analysis of secondary data (media and other reports). The report also incorporates findings from the national baseline survey. The survey is based on perceptions or people's opinions with regard to the four agenda points of the KNDR process.
12. The report covers the following key issues:
 - a. Stopping the wave of violence that had gripped the country.
 - b. Enhancing the security and protection of the population and its property
 - c. Ensuring that freedom of expression, press freedom and the right to peaceful assembly are upheld.
 - d. Progress in the implementation of the Report of the Commission of Inquiry into the Post Election Violence (CIPEV).
13. In February 2008, the Party of National Unity (PNU) and the Orange Democratic Movement (ODM) agreed to take action to stop the wave of violence that had gripped the country.² This agreement required the police to act in accordance with the Constitution and the law. They were required to perform their duties and carry out their responsibilities with "complete impartiality and without regard to ethnicity, political persuasion, or other partisan consideration."³
14. The agreement emphasised the need for leaders to embrace and preach peaceful coexistence of all communities as well as to refrain from irresponsible and provocative statements. Local community, religious, political, business and civil society leaders were expected to hold joint meetings to promote peace and tranquility and to stand up for justice and fairness.
15. All illegal armed groups and militias were to be demobilised and disbanded while all youth throughout the country were to desist from participating in acts of lawlessness, particularly those leading to harm or loss of human life and destruction of property. Further, the victims and those affected by violence were asked to exercise restraint and avoid any acts of revenge or retaliation.
16. Fundamental rights and civil liberties had to be restored; the Government was to ensure that freedom of expression, press freedom and the right to peaceful assembly were upheld. Hate and threatening messages, leaflets, short text messages, or any other broadcasts of that nature were to cease forthwith.

² 'Agreed statement on Security issues,' signed on 1 February 2008

³ Ibid

17. The Government was to enforce law and order to protect life and property. The Government was required to protect all Internally Displaced Persons (IDPs) and assist them to return safely to their homes and places of work. Their rights to reside anywhere in the country were to be upheld.
18. This report looks at the progress made in implementing the various aspects of Agenda Item 1. It also assesses the challenges faced and draws some conclusions.

STATUS OF IMPLEMENTATION

Stopping Violence, Demobilisation and Disbanding of the Militia

19. After signing the National Accord, the Coalition Government began to curb the operations of the Mungiki and SLDF – the most prominent illegally armed groups in the country at the time.
20. A military operation dubbed ‘*Okoa Maisha*,⁴ which began on March 10, 2008 in Mt. Elgon District sought to disband and disarm SLDF and curtail its operations in the area. The military operation recovered 100 guns, and almost 2,000 rounds of ammunition. Over 1,000 suspected SLDF members were arrested.⁵ The operation was heavy handed and generated numerous claims of torture of civilians by the military.⁶
21. From April 2008, the police sought to disband Mungiki after members of the group held huge demonstrations seeking the release of their leader from prison. Several Mungiki leaders were subsequently killed. Some human rights organisations observed that the police were targeting the group’s leaders for elimination as the war against Mungiki intensified. Mutilated bodies of abducted victims were allegedly found in forests and morgues around Nairobi. The Kenya Police denied claims that they deliberately targeted the members but human rights organisations insisted that the police are responsible for torture, killings and dumping the suspects’ bodies.⁷
22. Interviews at the local level throw up the names of illegal armed groups or vigilante groups, suggesting their continued existence:

⁴ Save lives

⁵ “Army withdraws from Mt Elgon amid torture claims”-*The Standard*, September 2, 2008

⁶ See *Mountain of Terror*, Kenya National Commission on Human Rights, 2008; *All the Men Have Gone: War Crimes in Kenya’s Mt Elgon Conflict*, Human Rights Watch, July 2008; Robert Romborah Simiyu, *Militianisation of resource conflicts: The case of land-based conflict in the Mount Elgon Region of Western Kenya*, Institute of Security Studies, Monograph 152, October 2008

⁷ Interview with an official of Kenya National Commission on Human Rights, January 2009

ILLEGALLY ARMED GROUP	ETHNIC GROUP ASSOCIATED WITH IT	AREA OF OPERATION
Balarget Land Defence Force	Kalenjin	Molo/Mau area
Kalenjin Land Defenders	Kalenjin	Molo/Mau area
Kalenjin Youths	Kalenjin	Molo
Mungiki	Mostly Kikuyu	Pockets countrywide
Baghdad boys	Luo	Kibera
Siafu	Luo	Kibera (Gatwekera area)
Mayouth or Maboys	Mixed ethnic groups but defined by criminal nature, age and social status	Most parts of the country
Bukhungu boys	Luhya	Kibera
Labour youth	Nubi	Kibera
Kamjesh	Mixed ethnic groups but defined by criminal nature, age and social status.	Most parts of the country
People's Liberation Army	Kalenjin	Rift valley
Group of 41	Kalenjin	Rift Valley
Sabaot Land Defence Force	Sabaot	Mt. Elgon
Chinkororo	Abagusii	Kisii
Mombasa Republican Council	Digo but including members from the wider Mijikenda tribes	Kwale (Mulungunipa Forest)
Taliban	Luo	Mathare, Huruma, Baba Dogo, Kariobangi North and Kariobangi South
Kosovo	Luo and Luhya	Kibera
Kebago	Kisii	Kisii
Sungu Sungu	Kisii	Nyanza Province

**Table showing illegally armed groups existing as at December 29, 2008. Data collected from field research.*

23. The proliferation of these armed groups can be attributed – at least in part – to the failure to arrest, prosecute and punish their members and/or sponsors.
24. Respondents repeatedly said that most of these groups were formed quickly to protect their respective communities and localities. According to some respondents, youth organised themselves along ethnic lines to fight rival communities. They had no names, no formal organisation, and no plans for self-perpetuation.⁸ In many instances, there was no use of conventional weapons; people were using the tools they use during peace times e.g. implements for tilling their land. After the post-election violence, the groups simply disappeared. Given the fact that these groups are dormant and that they existed along certain informal structures, it is possible – indeed likely – that they could be mobilised with ease if circumstances so require.

⁸ Interview with an Imam based in Nakuru, December 2008

25. Disarmament of these groups: Throughout the last quarter of 2008, there were reported instances of mopping up guns especially in North Rift Valley. Police records show that by the end of 2008, some 664 guns, 7,138 ammunition rounds and 174 explosive devices had been recovered. The government has ratified the Nairobi Protocol for the prevention, control and reduction of small arms and light weapons in the Great Lakes and the Horn of Africa but a domestic policy is yet to be put in place.
26. The disarmament approach has been largely indistinguishable from the approach to dealing with ordinary problems of insecurity. This is notwithstanding the fact that these illegally armed groups represent a different (and more sophisticated) form of security threat.
27. Three main challenges face the police in disbanding the illegal armed groups such as Mungiki. First is the difficulty of identifying members, especially because the groups have fluid organisational structures. For example, in Mungiki, informants said “most of them no longer keep dreadlocks which used to be their identification mark.”⁹ Furthermore, so many other people who are not members of the group wear dreadlocks.
28. Secondly, the public does not cooperate with law enforcement agents in identifying suspected members of such groups for arrest and prosecution¹⁰ because of fear of reprisals from the militia, often witnessed when they suspect someone has reported them to the police.
29. Third, is the difficulty posed by politicisation of violence. Some politicians mobilise youth to act against their rivals for political gain. Respondents said “some politicians have been using Mungiki as their personal armies”¹¹. When there are no politicians to finance their operations, illegal groups turn to extortion. They “extort money just to provide an income to their members.”¹²
30. It is disturbing that the UN Monitoring Group for Somalia reported in February/March 2008 that two containers loaded with illegal arms had been smuggled into the country during the post-election violence. The UN group identified the buyer as “a militia group in Kenya”.¹³ Even though this was reported early in the year, no follow up action has been reported. It is likely that the illegal arms that the youth used during the post-election violence are still in the hands of these groups. This underscores the need for speed in addressing the factors that precipitated the crisis so that the social basis for the existence of these groups is effectively weakened.

⁹ Interview with police officer, January 2009

¹⁰ *ibid*

¹¹ *Ibid*

¹² Interview with a member conducted in Kibera, December 2008

¹³ “Where are the guns?” *Saturday Standard* July 19 2008

Improving security

31. The Government has built several police stations, police posts and patrol bases in areas affected by post-election violence, and in particular in those areas that witnessed the eviction of people who became IDPs. The government also plans to double police recruitment to increase the police to population ratio. In addition, there has been ongoing capacity building through provision of training for the provincial administration on Peace Building and Conflict Management, among other efforts.
32. In spite of these developments, many informants as well as respondents in the baseline survey point at insecurity as an issue of concern. In Nairobi, for instance, some landlords in the informal settlements of Kibera, Mathare and Huruma have not returned to their houses. Some were forcibly evicted and their houses taken up. An ethnic-based settlement pattern has evolved in some areas, making it difficult for landlords to collect rents, especially if their houses are located in areas predominantly settled by tenants from an ethnic group different from theirs.

Non-partiality of security agencies

33. Even though calm has returned to some of the areas from which IDPs were evicted, perceptions of police partiality in providing security for residents persist. For instance, some Mau residents feel police still favour one community over another.¹⁴ Some respondents in Uasin Gishu District expressed similar feelings. They observed that police stations are set up in areas inhabited by the one ethnic community and that officers from this community also man the stations.¹⁵
34. Perceptions of partiality in how the police tackle insecurity in some of the areas that witnessed violence in the aftermath of the election require clear strategies to diminish their basis.

Retaliatory violence

35. Cases of retaliatory violence against IDPs continue to be reported. Leaflets warning families displaced by the post-election violence to leave Molo, Elburgon, Keringet, Kuresoi and Kamwaura divisions in the Rift Valley were circulated and found in November and December 2008. In late November 2008, unknown persons attacked the IDP camp at Githiriga in Molo at night, damaged property and then re-displaced the IDPs to another camp at Mungetho.

¹⁴ Mau residents views in a focus group discussion, December 2008

¹⁵ Uasin Gishu residents views in a focus group discussion, December 2008

36. These events suggest that the problem of insecurity is yet to be fully addressed. Lack of a coherent strategy in dealing with illegal armed groups, coupled with failure to promote reconciliation at the local level, undermines the people's sense of security. Continued attacks on IDPs, no matter how sporadic or few, is a pointer to unresolved hostility, low inter-communal trust and the Government's inability to guarantee its citizens' safety.

ENSURING THAT THE FREEDOM OF EXPRESSION, PRESS FREEDOM AND THE RIGHT TO PEACEFUL ASSEMBLY ARE UPHELD

37. During the post-election violence, as in any conflict situation, fundamental rights and freedoms were grossly violated. Agenda Item 1 emphasised the restoration and upholding of freedom of expression, press freedom, and the right to peaceful assembly as critical to ending the political crisis.

38. Some progress was made in restoring some of these rights in the first quarter of 2008 after the signing of the National Accord. For instance, the Government lifted the ban on live television and radio broadcasts. A Freedom of Information policy, which anchors media freedom and repeals the Official Secrets Act, which has been in the pipeline since 2007, is due for debate in Parliament, as is a Freedom of Information bill.

39. However, the freedom of media has been constrained throughout the period. Some have even argued that Kenya's democracy has been in recession following erosion of these rights. Freedom House in particular dropped Kenya's classification from "free" to "partly free" in its ranking of countries and their respect for fundamental freedoms.¹⁶

40. Freedom of assembly has been severely constrained. Citizens' right to petition the Government has been challenged whenever it has been exercised. The police have violently dispersed protesting citizens in several urban areas. IDPs protesting against delays in the provision of assistance for resettlement and growing insecurity have been violently dispersed. Similarly, protests by civil society groups as well as the media were violently dispersed by the police. These incidences, on their own, are a pointer to slow or limited progress in restoring fundamental rights, and in particular, freedom of assembly.

41. The government is yet to enact laws that enhance freedom of information and legislate against hate speech. Fast-tracking these laws are critical. Urgent, however, is the need to fast track the constitutional review process, which will set the foundation for Kenya's rights culture.

¹⁶ *Freedom in the World Report (2008)*, accessible at www.freedomhouse.org

GENERAL CONCLUSIONS

42. Government's efforts to disband the Mungiki and SLDF groups were not structured along the internationally accepted practices of disarmament, demobilisation and reintegration. The informal nature of illegally armed groups and the failure to establish the members or their sponsors has made it difficult to arrest and prosecute them.
43. Some effort has gone into enhancing the security and protection of the population. However, the population is yet to feel the effects of these efforts as shown by respondents in the baseline survey as well as cases of retaliatory attacks by IDPs. Urgent measures to eliminate the perception of police bias in the performance of their duties are required, especially in areas affected by the post-election violence in order to restore the confidence of the public in law enforcement officers.
44. Fundamental rights and freedoms are constrained; there is continued erosion of rights and gains made with respect to enjoyment of freedoms. Democracy is on recession compared to the period between 2003 and 2007. In order to safeguard fundamental freedoms of the media, as well as the freedom of assembly and association, an improved policy environment, linked to a new constitution is critical. The repeal of retrogressive laws and re-orienting law enforcement agencies needs to get under way with haste.
45. Members of the KNDR mediation process will be required to demonstrate leadership in furthering these reforms. There is a need for them to publicly mobilise support for enjoyment of freedoms and rights at all times. It is critical that KNDR demand that others in government be held accountable when fundamental rights and freedoms are abused and/or neglected. Sensitising the two principals on the need to take leadership in giving directions on promotion and safeguarding of rights and freedoms is important.
46. In general comprehensive reforms and promotion of democratic governance is a must. Failure to reform would mean another violent conflict – the illegal armed groups will not be poorly equipped for a conflict in future.

The Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project

Agenda Item 1

Immediate Action to Stop Violence and Restore Fundamental Rights and Liberties

Draft report on Status of Implementation

(Draft Matrix on Progress)

Objective	Objectively Verifiable Indicators	Required action	Progress	Remarks
Violence halted	No. of incidents of political violence	Government to stop any incidents of political violence.	Hardly any reported cases of political violence	This is a positive sign. However, Kenya is yet to witness political competition that would make use of political violence attractive. The referendum on a new constitution and another election would provide opportunity for political violence if institutional reforms are not undertaken.
	No. of actions taken to stop political violence	Enforce ban on illegal groups; Government to carry out demobilisation and disbandment of militia and illegally armed groups; Policy enacted to mop up illegal guns	Police and Military launched a crackdown on the Mungiki and the Sabaot Land Defence Force; sporadic low-key mopping up of illegal arms carried out.	Informal illegal groups could re-emerge – some could be dormant; no policy on demobilisation of the militias There is need to operationalise the Nairobi Protocol for the prevention, control and reduction of small arms and light weapons in the Great Lakes and the Horn of Africa.

Fundamental rights restored	No. of incidents that violate the fundamental rights and freedom of expression	Government to guarantee and respect citizens fundamental rights and freedom of expression	There have been cases of police violently dispersing civilian demonstrations aimed at petitioning the Government	Respect of fundamental rights of association and freedom of expression is on decline.
	No. of incidents that violate press freedom.	Government to guarantee and respect press freedom	The President advised the Attorney General to look into the concerns raised (especially allegations that the law would curtail press freedom) by the stakeholders regarding the Communications of Kenya (Amendment) Act, 2008	The government should address the concerns raised regarding the law and put in place measures to promote independence and freedom of the media. Harmonious relationship needs to be cultivated between the media fraternity and government to fast-track the reform agenda
	No. of incidents that violate the freedom of peaceful assembly	Government to guarantee and respect freedom of peaceful assembly	The police have continued to violently disperse civilian demonstrations aimed to petition the Government and other duty bearers	The Government needs to put in place measures to guarantee the freedom of assembly.
	No. of enabling legislation enacted	Parliament to enact relevant laws to guarantee fundamental rights of expression and press	Communications Act (1998) is being reviewed	Relevant laws are not yet passed