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THE KENYA NATIONAL DIALOGUE AND RECONCILIATION (KNDR) MONITORING PROJECT¹

Status of Implementation of Agenda Items 1-4

Draft Report

May 2009



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TABLE OF CONTENTS

EXECUTIVE SUMMARY	iv
INTRODUCTION	1
Methodology	2
Structure of the Report	3
AGENDA ITEM 1: IMMEDIATE ACTION TO STOP VIOLENCE AND RESTORE FUNDAMENTAL RIGHTS AND LIBERTIES.....	4
Background.....	4
Halting Political Violence.....	5
Demobilisation of Illegal Armed Groups.....	7
Challenges in Demobilising Illegal Armed Groups	8
Trends in (Dis)armament	11
Enhancing Security and Protection of the Population.....	12
Restoring the Sanctity of Human Life	14
Restoration of Freedoms and Rights.....	15
AGENDA ITEM 2: ADDRESSING THE HUMANITARIAN CRISIS, PROMOTING NATIONAL HEALING AND RECONCILIATION	19
Background.....	19
Status of Implementation	20
Resettlement Programme: Number and Situation of IDPs.....	20
Problem of Resettlement.....	22
Access to Relief and Assistance Funds	24
Trends in Healing and Reconciliation.....	25
Peace-Building Activities	26
Kenyan Refugees in Uganda	28
AGENDA ITEM 3: RESOLVING THE POLITICAL CRISIS (POWER SHARING)	30
Background.....	30
Status of Implementation	30
The Context of Coalition Governments and Power Sharing.....	31
Distribution of Power and Sharing of Public Sector Positions	31
Sharing of Public Sector Positions.....	34
Level of Political Cohesion	35
Coherence in Decision-Making.....	37
Conflict Management within the Coalition	37
Level of Satisfaction with the Coalition Government	38
AGENDA ITEM 4: LONG-STANDING ISSUES AND SOLUTIONS.....	40
Undertaking Constitutional, Legal and Institutional Reforms.....	41
Undertaking land reforms.....	47
Tackling Poverty and Inequality	50
Tackling Unemployment, Particularly among the Youth	51

Consolidating National Cohesion and Unity	53
Truth, Justice and Reconciliation Commission	54
Addressing Transparency, Accountability and Impunity	55
IMPLEMENTING RECOMMENDATIONS BY COMMISSIONS OF INQUIRY.....	59
Background.....	59
Status of Implementation	59
The Independent Review Commission on the General Elections held in Kenya on December 27, 2007	59
Commission of Inquiry into the Post-Election Violence.....	62

List of Figures

Figure 1: Why do you think these groups have not been disbanded or demobilised in your area?.....	8
Figure 2: Do you think the government’s response to public demonstrations today is likely to be forceful/violent or not likely to be forceful/violent?.....	16
Figure 3: What are the most important reasons IDPs remain in camps?	23
Figure 4: How successful are the efforts at promoting healing and reconciliation among communities in your area?.....	27
Figure 5: Challenge towards making a new constitution.....	43
Figure 6: <i>What are the main issues that the youth in this area complain about?</i> <i>(aggregate responses)</i>	52
Figure 7: In your opinion, will a new electoral body be capable of holding free and fair elections?	61
Figure 8 : Should those individuals responsible for the post-election violence be tried through a local tribunal in Kenya or should they be tried by the International Criminal Court in the Hague?	63
Figure 9: If a senior politician from your community is put on trial for inciting post- election violence, how do you think people in your community will react?	65

List of Tables

Table 1: New figures on distribution of IDPs by regions	21
Table 2: Why do you think Prime Minister Odinga is/is not exercising his powers of office?	33
Table 3 : What is the most important thing that the Coalition government can do to work well together	36
Table 4: Things that the coalition government must do to address land problems in your community.....	49
Table 5: most important way to fight corruption in Kenya	57

ABBREVIATIONS

CIPEV	Commission of Inquiry into the 2007 Post Election Violence
CSOs	Civil Society Organisations
DCs	District Commissioners
DO	District Officers
FGDs	Focus Group Discussions
IDPs	Internally Displaced Persons
IREC	Independent Review Commission
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
KNDR	Kenya National Dialogue and Reconciliation
MoSSP	Ministry of State for Special Programs
MP	Member of Parliament
NGOs	Non Government Organisations
OCHA	Office for the Coordination of Humanitarian Affairs
ODM	Orange Democratic Movement
PNU	Party of National Unity
RECSA	Regional Centre on Small Arms
TJRC	Truth, Justice and Reconciliation Commission
UNDP	United Nations Development Program
UNHCR	United Nations High Commissioner for Refugees
PNU	Party of National Unity
ODM	Orange Democratic Movement
KNDR	Kenya National Dialogue and Reconciliation
IIEC	Interim Independent Electoral Commission
IREC	Independent Review Committee on the 2007 General Elections and the Commission of Inquiry into Post-Election Violence
IIBC	Interim Independent Boundaries Commission
ICC	International Criminal Court
CIPEV	Commission of Inquiry into post election violence

EXECUTIVE SUMMARY

1. The political crisis and violent conflict that followed the disputed presidential election results in December 2007 threatened the very existence of Kenya as a nation-state. However, in January 2008, following the mediation by the African Union Panel of Eminent African Personalities (chaired by Mr. Kofi Annan), the parties to the dispute constituted the Kenya National Dialogue and Reconciliation (KNDR). On 28 February 2008, the parties - the Government/Party of National Unity (PNU), and the Orange Democratic Movement (ODM) - signed the Agreement on Principles of Partnership of the Coalition Government. The two parties working under the KNDR initiative agreed to tackle four main agenda items to end the political crisis and address its underlying causes.
2. South Consulting has been monitoring implementation of the agreements under each of the four agenda items. This summary presents key findings for the period between January and April 2009. Data upon which this report is based was collected using a mix of methods including interviews and review of secondary information. A survey on social-political situation in the post-election violence areas was also conducted during the period (see Annex I: 'Situation Assessment of Post-Election Violence Areas').

Summary of Findings

3. *Agenda Item 1: Immediate Action to Stop Violence and Restore Fundamental Rights.* One important achievement is that political violence has generally stopped. There is calm in the areas where political violence occurred. However, gang or criminal violence and resource-based conflicts have been on the increase. Illegal armed groups have been mutating and taking different forms. Although some groups formed as 'political militia', they have accumulated money through criminal activities such as extortion and increasingly become independent of politicians. Embedded in politics and crime, the groups now tend to hold hostage the same politicians who brought them up. The politicians can no longer control them but the groups' engagement with politicians gives them a sense of false legitimacy.
4. Individual members of these groups may have infiltrated the public security sector through the ongoing recruitment processes. This would broaden their network of operation and make it difficult to deal with them. Well-known and most feared groups are now routinely providing a brand name and franchise for upcoming militia.
5. How to address the problem of 'militia' at present poses a huge dilemma for everyone concerned with human rights. On the one hand, human rights defenders have been advocating respect for the sanctity of human life and on the other hand, citizens appear to publicly support extra-judicial killing of suspected militia members. Without a clear policy framework to deal with these groups, they will continue growing in number and expand their scope and coverage of operations.
6. With regard to restoring fundamental freedoms, the ban on live television and radio broadcasts was lifted and the enactment of the Kenya Communications (Amendment) Act, 2008, suspended to allow further consultations between the Government and the media. However, the country continued to suffer significant drawbacks on fundamental rights and freedoms. These challenges around the enjoyment of rights and freedoms imply a constrained democratic space and impede not only political growth but also

economic development. Without rights, it will be difficult to make economic achievements.

7. *Agenda Item 2: Addressing the Humanitarian Crisis, and Promoting Healing and Reconciliation.* All officially-established Internally Displaced Persons (IDPs) camps have been closed down and emptied of IDPs. The government's resettlement programme assisted those who were willing to return and a humanitarian fund assisted them to re-establish their lives. Peace and Reconciliation Committees have been established in post-election areas. The government has deployed to post-election violence areas Special District Officers (DOs) trained in peace and conflict resolution. Healing and reconciliation have witnessed increased involvement of local and national politicians.
8. In spite of these achievements, the situation of IDPs has not improved. Many continue to live in deplorable 'transit' camps. In the new camps, they have no access to services. They also continue receiving threats of further eviction every time there are political conflicts at the national level. Public and media attention on IDPs has decreased and their vulnerability is on the increase.
9. Leaders are using the IDP problem as a political resource. They are using the IDPs to bargain their various political positions, including forming political alliances. At the same time, there are concerns that the concept of IDPs is used increasingly in reference to members of one ethnic community yet other communities suffered displacement and deaths during the crisis. This has and continues to undermine efforts to promote healing and reconciliation, and national cohesion in general.
10. Over 2000 Kenyan refugees are still in Uganda one year after the political violence. The refugees are yet to receive assistance from the government of Kenya. Many prefer to remain in Uganda because they have access to land there. There are those who fear that they will be prosecuted for participating in post-election violence if they returned.
11. *Agenda Item 3: How to Overcome the Political Crisis (power sharing).* Both parties shared Cabinet positions but the Coalition Government continues to lack cohesion and is still perceived as 'two-governments-in-one'. Unfortunately, divisions between the two coalition partners have continued to deepen and to be the main cause of disillusionment among the citizenry. Individual parties in the coalition also have internal divisions that continue to affect the coalition itself. New alliances and loyalties form and fragment on the basis of many divisions. For this reason, party leaders have no effective control of their own members within and outside Parliament. To resolve the disputes within the coalition, the partners established a Permanent Committee on Management of Coalition Affairs. This is a good attempt at resolving disputes but the Committee has not been used effectively.
12. The greatest threat to reforms and to future political stability is the lack of unity in the coalition. Individual leaders are yet to transcend their differences and demonstrate unity of purpose. Political elites are apparently much more concerned about defending and/or acquiring more power than creating conditions to deliver reforms. Disagreement over distribution of power and patronage is likely to spill over into the constitutional review process and complicate the delivery of a new Constitution.
13. *Agenda Item 4: Tackling Long-term Issues.* Establishment of the Committee of Experts on the Constitutional Review marks an important step towards achieving many

of the reforms identified in Agenda Item 4. Nominees of members to the Truth, Justice and Reconciliation Commission were identified during the period. Providing a new Constitution is critical to solving the causes of post-election violence. However, the Committee has experienced delays in accessing government-allocated funds. A slow start will certainly affect the committee's work plan and possibly delay completion of the review process. However, the public is eagerly awaiting a new Constitution and failure to deliver it on time will result in increased disillusionment and feed the growing anger against political leaders at all levels.

14. The slow pace of activities in other reform components, including land reforms, is worrying. The Cabinet had not discussed the National Land Policy by the end of April 2009. The document has been the subject of debate for several years and the continued delays in effecting land reforms – even as the country awaits a new Constitution – will create space for the landed elite to defeat the very purpose of the National Land Policy. As history and experience have shown everywhere, the landed elite are the most vicious opponents of land reforms. Given space and opportunity, they can gang up to fight land reforms and to deny the land-poor their rights to land.
15. Considering Agenda Item 4's critical importance to the future of Kenya, the slow pace of reforms outlined in Agenda 4 is a cause for concern. Mobilising various constituencies to speed up reforms in all respects is critical. But conflicts within the Grand Coalition will certainly undermine not only the speed but also the nature of reforms to be realised.
16. *Implementing Recommendations by Commissions of Inquiry.* Although there is visible progress in implementing some of the recommendations by Commissions of Inquiry, there is also a marked tendency to renege on some of the principles that shaped these recommendations. In this regard, the process of recruiting members of IIEC was highly politicised and members selected on ethno-regional basis. Thus the new electoral body has had a negative beginning. Also, the attempt to establish a Special Tribunal to try perpetrators of post-election violence witnessed highly politicised debate, much of which had ethnic overtones. Ethnic interests and considerations tend to inform composition of various bodies constituted to facilitate reforms. This is against the principles that shaped recommendations by IREC and CIPEV.
17. The country, and the political leaders in particular, seem to quickly forget the principles that shaped these recommendations; the principles sought to fight impunity and erode the basis of ethnicity as drivers of politics. Objective delivery of responsibility by the new bodies is required for restoration of public confidence.

Conclusion

18. The progress towards implementing crucial actions under each of the agenda items has been slow. How some of the issues are undertaken is also undermining the quest for healing and reconciliation. Furthermore, divisions in the coalition are leading to the perception of a 'two-governments-in-one' and feeding public disillusionment and dissatisfaction with the Coalition Government's commitment to deliver on its goal: achievement of sustainable peace, stability and justice in Kenya.
19. It is apparent that the momentum for radical reforms has been lost. The speed towards another General Election is increasing whereas addressing some of the proximate and structural factors that led to unprecedented political violence is on a slow start. Political cohesion in the Coalition Government and reforms in general are very critical for the stability and prosperity of the country. Without undertaking fundamental reforms, another violent civil conflict may occur. In order to prevent the recurrence of violent conflict, it is imperative that the country addresses the problem of poverty, land reforms, and causes of impunity, and fast-track the constitutional review process. It is also imperative for the Committee of Experts to deliver a democratic constitution rather than what the politicians desire – a Constitution that satisfies their quest for power and satisfaction of personal interests.

1. INTRODUCTION

1. On 27 December 2007, Kenya held its fourth General Election after the re-introduction of multi-party democracy in 1991. Although the electoral process was generally peaceful, the presidential election result provoked a dispute between the Party of National Unity (PNU) and the main opposition, Orange Democratic Movement (ODM). Following the dispute, an unprecedented wave of violence erupted in several regions of the country. Over 1,000 people were killed while over 600,000 were displaced from their homes. What began as a dispute over the results of the presidential election rapidly transformed into a civil conflict that threatened the existence of Kenya as a nation-state.
2. The political conflict brought to the surface issues dividing Kenyans and undermining national cohesion. It was clear that the country was rapidly going down a familiar road trodden by other African countries where parties dispute election results -- signs of civil war were becoming apparent. It was evident that the country was getting divided into ethno-regional blocs, along the lines that the different groups had voted.
3. International mediation began in early January 2008. Under the auspices of the African Union, the Panel of Eminent African Personalities, chaired by Mr. Kofi Annan, succeeded in persuading the parties to agree to mediation. The Kenya National Dialogue and Reconciliation was the forum for dialogue and mediation. By the beginning of February 2008, the parties had agreed on a series of steps to address the crisis. They agreed on actions to immediately halt the violence and restore fundamental rights, as well as to address the humanitarian crisis that was deepening as violence spread to various regions. Finally, on 28 February 2008, the parties signed the 'Agreement on the Principles of Partnership of the Coalition Government.'
4. Following the signing of the 'Agreement on the Principles of Partnership of the Coalition Government' the National Accord and Reconciliation Act of 2008 was enacted. The Accord established a framework for power sharing so as to resolve the political crisis. The framework was based on the overall goal of the National Accord: *Achievement of sustainable peace, stability, and justice in Kenya through the rule of law and respect for human rights.*
5. The mediation framework identified four central agenda points for this purpose. These were:
 - (a) Agenda Item 1: Immediate action to stop violence and restore fundamental rights and liberties;
 - (b) Agenda Item 2: Immediate measures to address the humanitarian crisis, and promote healing and reconciliation;
 - (c) Agenda Item 3: How to overcome the political crisis; and
 - (d) 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.
6. The KNDR process prioritised constitutional review and undertaking institutional reforms. The framework also established several institutional arrangements to address various aspects of the political crisis. These included:

- (a) An Independent Review Commission on the General Elections held in Kenya on December 27, 2007(IREC);
 - (b) A Commission of Inquiry into the Post-Election Violence (CIPEV); and
 - (c) Establishing a Truth, Justice and Reconciliation Commission (TJRC)
 - (d) Initiating a mechanism for the constitutional review process
7. The Coalition Government was responsible for implementing the recommendations from the findings of these inquiries. Both IREC and CIPEV completed their work and handed in their reports. The process of establishing a Truth, Justice and Reconciliation Commission (TJRC) is already under way.
 8. This report is the second review of progress in the implementation of the Kenya National Dialogue and Reconciliation agreements. The report covers the period between January and April 2009.

Methodology

9. A mix of methods was employed to gather data and generate findings for this report. A team of researchers interviewed various respondents on different agenda items. The respondents included government officials in relevant ministries and/or institutions; experts/specialists in different fields and with knowledge on specific agenda items; individuals with key knowledge on certain issues; and ordinary citizens. The research team also held Focus Group Discussions (FGDs) with different people in areas that experienced violence in the aftermath of the elections.
10. Secondary data was obtained by reviewing existing data and reports from the government and other agencies. Data from media reports, reports by non-governmental organisations, United Nations agencies and other studies have been integrated in the analysis.
11. Finally, South Consulting commissioned a study in areas affected by post-election violence. These include 28 administrative districts spread across five provinces of Kenya. At the same time, some 200 Internally Displaced Persons (IDPs) were interviewed in the camps where they were living. The aim of the IDP-specific study was to obtain data on IDPs' observations of their own situation. This complemented findings from the survey conducted in regions that experienced post-election violence. The findings of this survey are integrated in this report. The findings are presented separately in full as an annex to this report.
12. This report first outlines the key issues as identified by the mediation agreements. This is followed by what studies have found out and the implications of these findings for the National Accord. The conclusions and recommendations are based on these analyses. In many instances, however, the data has been left to speak for itself.
13. This report takes care to remain objective and, as far as possible, to let the data speak for itself. The starting point for this analysis is that implementation of the key agenda items remains critical to the future of the Kenyan nation. We are aware that information collected on the implementation of the National Accord is sensitive to personal vested interests and political realities – we live in a divided society. Because of this, people may want to interpret the findings selectively from their own points of view and in a manner that suits their personal and/or group interests. A subjective interpretation of the data and/or the use of the report's findings to suit narrow

interests, will harm, rather than build the nation.

Structure of the Report

14. The report has been organised into sections corresponding to each of the KNDR's agenda items.
 - (i) Section 2 – Agenda Item 1
 - (ii) Section 3 – Agenda Item 2
 - (iii) Section 4 – Agenda Item 3
 - (iv) Section 5 – Agenda Item 4
 - (v) Section 6 – Commissions of Inquiry
 - (vi) Section 7 – Conclusions
15. In addition, there are three annexes. Annex I tabulates the findings, Annex II contains survey findings on Situation analysis of Post-Election Violence Areas (PEV): Survey Findings. Annex III contains survey findings in power-point format.

2. AGENDA ITEM 1: IMMEDIATE ACTION TO STOP VIOLENCE AND RESTORE FUNDAMENTAL RIGHTS AND LIBERTIES

Background

16. The mediation process identified certain steps that both parties would undertake to end violence. On February 1, 2008, the mediation team outlined measures the police and the public, political leaders and the media would undertake to end violence. The police were required to act in accordance with the constitution and the law and, in particular, the Police Act and the Forces Standing Orders. Security forces were required to carry out their duties and responsibilities with complete impartiality and without regard to ethnicity, political persuasion or other partisan consideration. The mediation team required that deployment of security agents should at all times aim to promote and reflect national integration and harmony. It required Kenyan citizens to stop all acts of violence. Illegal armed groups and militias were to be disbanded.
17. With regard to the restoration of fundamental rights and liberties, the mediation team called for the development of a suitable code of conduct to regulate live broadcasts in consultation with the Media Council of Kenya. The code of conduct was to elaborate on provisions for punitive measures in case of abuse.
18. The mediation team also called for facilitation and protection of peaceful assembly, as well as impartial and expeditious investigation of all cases of crime and police brutality and/or excessive use of force. Hate and threatening messages, leaflets, short message texts (sms), or any other broadcast of that nature had to stop forthwith, and prosecutions against criminal activities undertaken immediately.
19. In this section of the report, we examine the extent to which the various aspects of this agenda item have been implemented. In doing so, we note that the previous report pointed out that there was no systematic approach to disarmament and demobilisation of illegal armed groups. The manner in which these groups operated during the post-election violence made it difficult to demobilise and disband them but after the violence, they simply disappeared.² The report noted that these groups were only dormant and politically inactive at the time but could be re-activated with ease. Secondly, the report noted that the groups were likely to be better prepared, organised and armed with sophisticated weapons were another wave of political violence to come. The youth bulge in the population and the attendant unemployment, we argued, has complicated the issues around illegal armed groups.
20. With regard to restoration of fundamental rights, the previous report observed that democracy was clearly in recession. The space for freedoms had rapidly contracted compared to the period before the 2007 elections. The police in several parts of the country, in particular, forcibly and violently disrupted demonstrations by IDPs.
21. Progress in implementing key aspects of this agenda item during the period between January and April 2009 is an issue we now turn to. The focus is on the following:

² The CIPEV report did indicate that where the violence was spontaneous, the groups fizzled out but where it was organized, the groups are still in place though inactive.

- (a) Stopping violence;
- (b) Enhancing the security and protection of the population and its property; and
- (c) Ensuring that freedom of expression, press freedom and the right to peaceful assembly are upheld.

Status of Implementation

Summary of findings

- ❖ Post-election violence has stopped in all affected areas
- ❖ Illegal groups are still in place but their character has changed
- ❖ Illegal groups are beholden to politicians, which makes it difficult to disband them
- ❖ 92 suspects were arrested in connection with the post-election violence in four provinces and charged in court
- ❖ Police compiled a list of 2,600 suspects based on victims and witness testimonies
- ❖ 35 new police stations have been constructed in areas affected by post-election violence
- ❖ 94 police officers have been prosecuted, 344 interdicted, and 7,849 transferred
- ❖ 4,500 new police officers were recruited and deployed
- ❖ 40 District Commissioners and 38 Special District Officers were deployed in post-election violence areas
- ❖ Police launched crackdown on illegal/criminal groups
- ❖ Government is implementing National Action Plan on Small Arms
- ❖ 2,800 firearms have been collected from civilians and destroyed
- ❖ Marking of small firearms is ongoing

Halting Political Violence

22. Post-Election Violence (PEV) has generally stopped. The forms of violence experienced during the period of this report and the last quarter of 2008 are not directly related to the disputed December 2007 election results. Calm has also returned in most areas that experienced violence in the aftermath of the elections. Residents in these areas are also generally regaining confidence. In the survey conducted in the post-election violence areas, as many as 62 per cent believe that violence will not recur in their areas in the next one year. About 40 per cent of those who think that violence will not recur argue that there is peace in the area, while another 17 per cent believe that people have learnt from the past.
23. All the same, about 26 per cent of the respondents in these areas think that violence

will recur. In their view, divisions in the Grand Coalition tend to affect relations at the local level. They also feel that 'tribalism' and incitement by politicians will re-ignite violence. They also cited inter-communal tension, mistrust and suspicion among local communities, and political differences as some of the factors that could lead to more violence. They are also certain about who is likely to promote violence in their areas: politicians, their supporters, and 'rival' ethnic groups.

24. Asked what are the most important ways of preventing future violence in Kenya, about 20 per cent of respondents identified fighting 'tribalism' and another 12 per cent prosecution of those responsible for violence as important approaches. Holding free and fair elections (15 per cent) and promoting healing and reconciliation (12 per cent) were also identified as important. On the whole, this implies that people are more aware about the potential causes of violence. Thus, democratic governance with specific emphasis on equal treatment for all ethnic groups and transparent electoral processes as well as outcomes are important.
25. The return of calm in the areas that suffered post-election violence, the cessation of political violence, and the general public confidence that violence will not recur are a good and positive development.
26. The absence of overt violence does not, however, mean the presence of sustainable peace. A disturbing finding is that political conflicts among national elites and in fighting within the Grand Coalition are translating into tension, animosity and uncertainty at the local level. These outcomes erode people's confidence in social cohesion at the local level. Some feel that violence will recur as a result of these conflicts. Interviews with respondents in areas affected by the post-election violence reveal that every time elites disagree over important national issues, hate leaflets are circulated in certain parts of Rift Valley warning one community to prepare to leave the area.³ Residents cited debates about eviction of settlers from the Mau Forest, the Special Tribunal to try perpetrators of the post-2007 election violence and the debates on the management of maize stocks as examples of national issues that evoke emotions and breed animosity in the Rift Valley Province.
27. An important consequence of this linkage between the 'national and the local forms of conflict' is failure to heal and reconcile communities. There are subterranean hatreds and some levels of intolerance among communities in multi-ethnic areas. These are manifest in some IDPs' inability to return to their farms and/or former areas of residence in a sustainable way. It also explains why some IDPs prefer to buy land for settlement in new areas rather than return to their former homes.
28. These findings suggest that debates on national issues should be carried out objectively and with caution. Mobilising ethnic sentiments in defence or promotion of certain positions breeds tension and animosity among communities in the Rift Valley. This tension seems to rise and fall with the intensity of disagreements among and between national political leaders. The more they disagree, the more the tension rises at the local level. Political leaders have a responsibility to steer their constituencies towards national thinking, cohesion and unity. This issue is dealt with in the findings on Agenda

³ In many instances, only members of one community tend to experience threats. However, other communities are also threatened depending on how their leaders relate to the political leadership in Rift Valley.

Item 3 on power sharing.

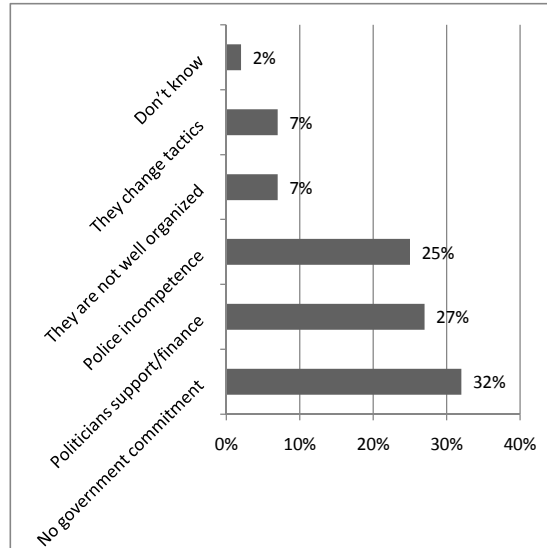
Demobilisation of Illegal Armed Groups

29. The mediation statement of commitment to end political violence issued on February 1, 2008 called for demobilisation of illegal armed groups and appealed to the youth throughout the country to desist from acts of lawlessness. Investigations by the Commission of Inquiry into the Post-Election Violence (the Waki Commission) revealed that where violence was a 'spontaneous angry reaction by citizens', the groups of youths involved quickly fizzled out.
30. The previous report noted that there was no systematic effort to disband these groups. We argued that these groups are dormant. This report notes, yet again, that these groups are very much alive and, as argued later, have taken different forms both in composition and focus. Secondly, people in the areas affected by post-election violence feel that these groups were not organised. But even if they were informal, people have no evidence that the groups have ceased to exist.
31. These observations notwithstanding, police records show that in March 2008, police arrested about 90 post-election violence suspects in Rift Valley, Nyanza, Central and Nairobi provinces. These suspects were part of 2,600 people whom police had listed as suspects based on victims' and witnesses' accounts.⁴ The fact that the suspects have not been tried one year after arrest has undermined the victims' confidence in the legal process. It has also entrenched a sense of impunity on the part of the suspects because no action is taken against them and those who committed various crimes. This sense is usually reinforced by a celebrative mood among some members of one community every time a suspect among them is released from custody due to lack of evidence.
32. How to punish financiers and perpetrators of violence is acrimonious. Secondly, the question of whether or not to give amnesty to perpetrators of the violence has grown with time and become enmeshed with the politics of the Grand Coalition. Decisions on how to deal with post-election violence perpetrators, therefore, risk being lost in the thick canopy of issues that have continually provided cover for those who commit political crimes.
33. Dealing with political violence requires making hard choices. How issues of political violence are dealt with has important implications for the future stability and unity of any nation. True to this, there are those of the view that members of an illegal group that took part in revenge attacks in Nakuru and Naivasha have not been arrested.⁵ Such perceptions about the administration of justice may undermine the general spirit of dealing with post-election violence. If not addressed, these perceptions can frustrate healing and reconciliation efforts and diminish the impact and deterrence capacity of the measures taken to deal with impunity.
34. But why are these groups still in existence? And what are the challenges experienced in demobilising and disbanding them? These are issues we now turn to.

⁴ Interview with a senior police officer, Ministry of State for Provincial Administration and Internal Security, February 26, 2009.

⁵ Interview with NGO official in Nairobi, March 14, 2009.

Figure 1: Why do you think these groups have not been disbanded or demobilised in your area?



Challenges in Demobilising Illegal Armed Groups

35. *Mutation, Changing Forms and Branding of Groups:* The activities and visibility of illegal armed groups indicate a gradual mutation and shifting of their reasons for existence. Some groups have mutated from religio-cultural sects to 'personal' or ethnic militia and to criminal extortion gangs. For this reason, there are at least three main types of groups in operation in different parts of the country. One is criminal and extortion gang. Two is political or ethnic militia some of which are tied to politicians or tend to act like 'personal' gangs. The third are groups that overlap the other two. It is worth recognising that some groups emerged for the purpose of supporting certain politicians on ethnic considerations, but they have become relatively autonomous from the politicians. Accumulation of money through criminal activities such as extortion has made groups increasingly independent of politicians. 'They now control a lot of money and can do without godfathers'.⁶
36. *Group names used as a Brand Name:* Importantly, new gangs that come up tend to use the tactics and names of those already known and most feared (e.g. Mungiki and

⁶ Interview with a senior police officer.

Taliban) in order to cause fear, which has become a means for extortion. For this reason, Mungiki is now used like a franchise; it is a brand name. Media reports show instances where new gangs use the name Mungiki in order to announce their presence and have impact.

37. *Factionalism within Groups:* Accumulation of wealth and autonomy from politicians have created new problems for some of the illegal armed groups. The struggle to control wealth has resulted in intra-group factionalism and rivalry. Some groups tend to split into different and competing factions, with each of them keen to control funds obtained through extortion. Factionalism has had another effect -- it has clouded lines of communication and eliminated central command and control.
38. With groups forming and mutating regularly, and others such as Mungiki being franchised, the scope and coverage of their illegal activities has widened. In the slums, for instance, the groups provide security and other services.⁷ Interestingly, there are instances where people value their services because they argue that they are efficient and effective in providing services compared to formal institutions. A disturbing trend, however, is the tension between the politicians' personal gangs and the extortion gangs. Competition between these two groups presents a dangerous recipe for gang violence in urban slums.⁸
39. *Embedded in Politics:* There are groups that are still tied to politicians. Because of their significance to the political careers of many politicians, those tied to these groups are held hostage. They have trapped politicians into paying 'allowances' to secure the groups' allegiance and 'protection'.⁹ Arguably, their engagement with politicians and tacit recognition of the informal power they wield as well as politicians' calls for official negotiations with them provide false legitimacy for the militias and complicates efforts to disband them.
40. People also feel that it is difficult to disband these groups because politicians support them. Those allied to politicians 'tend to become untouchable'.¹⁰ In the survey conducted in the areas that experienced post-election violence, about 50 per cent of the people interviewed identified politicians and political parties as the main financiers of these groups. Again, because of this, the groups tend to enjoy political protection. Combined with the false legitimacy that they enjoy because of political cover, the groups operate without let or hindrance. At the same time, there have been allegations of police complicity and liaison with criminal gangs. Because of this, some people fear reporting criminal gangs to the police - information may leak out to the gangs.
41. *Lack of Evidence for Prosecution:* The citizens' reluctance to provide information about illegal armed groups compounds the lack of forensic evidence to secure prosecution of and conviction of suspects.¹¹ Those arrested are released for lack of evidence. Once suspects are back in the society, citizens realise the futility of reporting to the police. Given people's reluctance to provide information to the police, it becomes extremely

⁷ Interviews in Nairobi's Mlango Kubwa in Eastlands and Mathare Mabatini.

⁸ Interviews in Kibera and Kayole, February 2009. See also ongoing research by NPI-Africa and CSVN on the changing forms of violence in Southern Africa and the Great Lakes Region.

⁹ Interview with senior police officer, Ministry of Provincial Administration and Internal Security, February 26, 2009.

¹⁰ Interview with a senior police officer, March 2009.

¹¹ Ibid; also key informant interviews in 32 districts affected by PEV, February-March 2009.

difficult to gather intelligence about the groups' activities or planned crimes.¹²

42. *Infiltration into Public Service Institutions, including Law and Order:* Members of these groups may also have infiltrated law and order institutions, including the police service and other security organs through the process of regular recruitment into the public service. A respondent pointed out that 'politicians who pay these groups to campaign for them have been forced to pay by getting them jobs in the public sector or anywhere else where there is an opportunity for employment'.¹³ Members of these groups, therefore, are likely to be found everywhere.¹⁴
43. Finally, several police officers have lost their lives at the hands of these gangs. In the period between January and February 2009 alone, 11 police officers were killed in the line of duty. Some of these officers could be victims of illegal armed gangs. In March 2009, gangs killed three officers in a week.¹⁵ Targeting the individual officers may be adding to the challenge of dealing with these groups. This could be contributing to the feeling that the police are unable to protect citizens. However, the police are concerned that human rights groups are not as vocal when criminals kill law enforcement officers as they are when the reverse is the case. One officer said, 'Any encounter with armed criminals implies life or death; either they get you or you get them first. Yet no one talks about human rights when these criminals kill police officers.'¹⁶ On the whole, a hostile public has had the effect of forcing police officers to adopt a cavalier attitude, thereby leaving these gangs to flourish.
44. Journalists have also faced similar threats, especially when they write stories about illegal gangs. To them, it has become very dangerous to write anything about these groups because 'they threaten you as an individual'.¹⁷ These individualised threats can undermine access to information on these groups and reduce the effectiveness of strategies to deal with them.
45. The police statistics below show the number of police officers killed in the line of duty:



Source: Ministry of Internal Security, February 28, 2009

¹² Interview with a senior government officer in Naivasha, February 27, 2009.

¹³ Interview with a senior police officer, *op cit*.

¹⁴ Focus Group Discussion with grassroots organisations working in informal settlements in Nairobi, February 21, 2009.

¹⁵ *Daily Nation*, March 19, 2009.

¹⁶ Interview with a police officer, February 6, 2009.

¹⁷ *Ibid*

46. A discussion of these challenges points to the need to reform the criminal justice system and also punish politicians who support armed groups. Insufficient evidence to prosecute criminals, together with the growing culture of lynching suspects, and increasing forms of extortion by criminals suggest that urgent measures are needed to rout these groups. According to a senior government officer, reforms should be comprehensive and cut across all institutions of the criminal justice system, and not only the police force. In his view, efforts to change attitudes towards the police should be enhanced:

'Kenyans hate the police, so the police are really on their own. We arrest a criminal, but get a call from a senior politician or a government official telling us to release him. If we don't, they call the media and NGOs, who come and attack the police. When we arrest suspects, people complain that gangs will harass them, and the courts release them for lack of evidence. People cry there is no security. How are we supposed to protect Kenyans? Kenyans need to understand our problems.'¹⁸

Trends in (Dis) armament

47. *Arms Recovered from Civilians:* Between February 2008 and January 2009, the government had recovered 2,800 firearms from civilians.¹⁹ These recoveries included guns voluntarily surrendered by civilians or forcibly retrieved from criminals and cattle rustlers. These arms were set on fire on March 17, 2009 during the annual anniversary of the signing of the Nairobi Protocol on Disarmament. However, Parliament is yet to make amendments to the present law on illegal arms. The amendments provide for stiff penalties for possession, trading, conveying and dealing in illegal firearms.²⁰
48. *Fears of Armament for Future Violence:* In February 2009, police intercepted five caches of arms in Nandi District. This could be an indication of the possibility of arms flows into the country.²¹ The Kenya Police Crime Report and Data for 2008 shows that armed crime, including stock theft, increased by 37 per cent, and criminal damage by 33 per cent. These trends show a rise in increasing illegal firearms that could be used in situations of political violence. Interviews at the local level also show that discourses on threats and violence include frequent reference to guns.²² The porous borders with some countries in conflict could be making it easy for arms to cross into Kenya. Illegal groups could access such guns with relative ease.
49. *National Action Plan on Small Arms under Implementation:* The government has been implementing the National Action Plan for Arms Control and Management in line with the 2004 Nairobi Protocol on Disarmament.²³ Some of the ongoing activities to control arms flows include an assessment of small arms (with UNDP), marking of small arms with support from the Regional Centre for Small Arms (RECSA), non-violent

¹⁸ Interview with senior police officer, *op cit*.

¹⁹ Interview with senior police officer, Ministry of State for Provincial Administration and Internal Security, February 26, 2009.

²⁰ Interview with Kenya National Focal Point on Small Arms, 23 January 2009; see also *Daily Nation*, March 18, 2009: 'Death Row Beckons for Gun Owners'.

²¹ *Ibid*

²² Interviews in Nakuru, February 27, 2009.

²³ Interview with Kenya National Focal Point on Small Arms, January 13, 2009.

disarmament through amnesty for those who surrender firearms, and themed research and investigation on the whereabouts, movement patterns and use of arms that have fallen silent in South Sudan.²⁴

50. In response to concerns about arms flows and allegations of increased secret armament of illegal groups, the Government, in collaboration with UNDP and the Regional Centre for Small Arms, is undertaking a number of initiatives to determine the level of proliferation. These include:
 - (a) Small arms assessment in the North Rift Valley region to be followed by a national assessment;
 - (b) Marking of small arms with support from the Regional Centre for Small Arms (RECSA);
 - (c) Ongoing non-violent disarmament in cattle-rustling areas; and
 - (d) Research by RECSA, the government and UNDP on movement of arms and use to which they are put.
51. In spite of these measures, there is no strategy in place yet for disarming illegal groups. The findings from these investigations and small arms assessments will be used to develop a concise small arms strategy.²⁵ Further, there is no information or follow up on illegal arms that had been imported into the country in the period between February and March 2008. Since the arms were allegedly meant for militia operations, it is important to establish their final destination.

Enhancing Security and Protection of the Population

52. The mediation agreement emphasised the need to enhance security and protect the population. This was critical for the restoration of peace, especially in the areas where post-election violence was intensifying. In the previous report, we noted that some of the measures taken to enhance security of the population included building new police stations and increasing the number of officers to improve security in these areas.
53. Findings show that the government has completed construction of 35 new police stations in areas affected by post-election violence. However, in some areas, the new stations do not have sufficient staff. Also, the police posts are constructed in 'return areas' or close to transit camps where IDPs are camping as they tend their farms. Establishing police posts adjacent to IDP areas, unfortunately, has created an impression that the police posts are meant to protect IDPs rather than all communities. In some areas, the police posts are viewed with resentment. Because of this, peace-building initiatives in such areas tend to have more IDPs than anyone else.
54. This finding undermines the mediation agreement on security measures, which emphasised the need for security forces to carry out their activities without reference to ethnicity or political and partisan considerations. Security forces are required to promote national integration and cohesion. Although there are no findings showing biases in favour of IDPs, the fact that other local communities have the impression that

²⁴ Interview with Kenya National Focal Point on Small Arms, *op cit*.

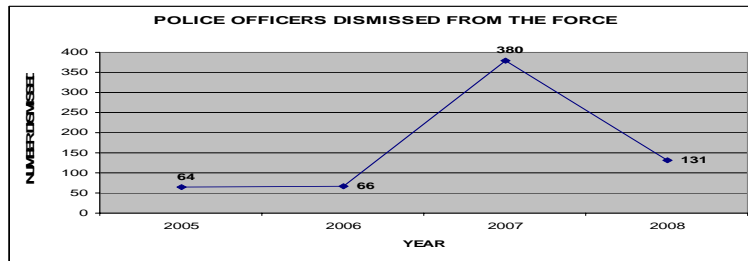
²⁵ Interview with Kenya National Focal Point on Small Arms, *op cit*.

security is meant for IDPs does not augur well for healing and reconciliation. The government must urgently erode the basis for this impression. Failure to do so will make the work of security agents very difficult because some people may want to simply disobey them since, in their view, their work is protecting IDPs.

55. *Additional Personnel:* 40 new District Commissioners have been deployed to new districts and post-election violence areas. Another 38 'Special District Officers' trained on peace-building have also been deployed in these areas. The DOs are charged with the responsibility of fast tracking healing and reconciliation and returning the regions into normalcy. Gender desks have been established in all police stations. Shortage of female police officers has prevented the full operationalisation of gender desks.²⁶ Further, in general, a total of 4,500 new police officers have been recruited in an endeavour to meet the international standards on police-citizen ratio and to raise the number of police officers available to serve Kenyans.²⁷
56. The government has also completed the rehabilitation of 110 schools in Rift Valley, Nyanza and Western provinces at a cost of Ksh124 million. The Kenya military and partners such as the Kenya Red Cross and Mabati Rolling Mills have supported the rehabilitation and expansion of schools hosting IDPs.
57. These are important initiatives by the government. However, the impact of these initiatives is not sustainable without a comprehensive policy on healing and reconciliation. These initiatives, on their own, may not lead to sustainable peace if national leaders continue mobilising against each other on an ethnic basis. As already noted, national level political conflicts tend to trickle to the local level where they heighten animosity between groups. Since a comprehensive constitutional review can provide a basis for addressing these differences and provide opportunities for embedding 'inclusive politics', it is important that the reform processes be completed with speed and in a manner that satisfies Kenyans.
58. In the meantime, training of male police officers on gender issues is important. Gender desks should not be managed by female officers only. Men should also be sensitised on issues affecting women at all times so that they can respond to gender issues during times of conflict.
59. *Integrity and Discipline of the Police:* The mediation agreement underlined the importance of police undertaking their duties with objectivity and impartiality. On account of this, police have taken measures to restore discipline and integrity in the force. Disciplinary measures have been taken against errant police officers to 'ensure professional service delivery and protection of the population by security officers.' Between January 2008 and February 2009, about 437 officers had been dismissed from the police force for unprofessional behaviour.

²⁶ Focus on only women officers has been criticized as gender insensitive and unresponsive to the needs of vulnerable men. Interview with NGO worker, April 8, 2009

²⁷ Interview with senior government officer in the Ministry of Internal Security, February 12, 2009.



Source: Ministry of Provincial Administration and Internal Security, February 28, 2009

60. Police officers found guilty of offences such as aiding a prisoner to escape, manslaughter, corruption, misuse of firearm, and other crimes have been duly disciplined. For instance, between January 2008 and February 2009, 344 police officers of different ranks were interdicted. Another 206 police officers were prosecuted for conspiracy, forgery, rape, losing or misuse of firearm, murder and corruption or other offences. Of those prosecuted, 94 have been convicted, including five in the first two months of 2009.
61. Again, while these are important measures, some respondents have observed that the police officers sacked from the police force are likely to end up joining criminal gangs.²⁸ Furthermore, in spite of these measures, gang and vigilante violence is on the rise, IDPs continue to face threats, including malicious grazing on their crops,²⁹ and threats of repeat displacement. Signs of violence continue in some parts of Rift Valley and in line with conflicts among the national level elites. For instance, hate leaflets were circulated in Northern Rift Valley in the second week of February 2009 warning certain communities to leave the area because leaders from those communities had supported a motion in Parliament to censure a Minister from the Rift Valley over allegations of corruption.³⁰ Such developments indicate that the country is still prone to identity politics and threats of violence may impede the fight against impunity.

Restoring the Sanctity of Human Life

62. The mediation statement on security measures was emphatic about the sanctity of human life. Among other measures, the statement called upon the police to refrain from using live bullets on unarmed civilians. However, findings show that there have been cases of extra-judicial killings. For instance, in February 2009, the UN Special Rapporteur on Extra-judicial, Arbitrary or Summary Executions noted that extra-judicial executions by the police are 'systematic, widespread and well planned'.³¹ The police denied taking part in extra-judicial killings and charged that some human rights defenders were receiving payment from some of these groups. At the same time, human rights organisations also complained of police involvement in extra-

²⁸ Interview with a civil society organisation official in Nairobi, January 30, 2009.

²⁹ OCHA, *Humanitarian Update*, Vol. 44, p6.

³⁰ In addition, the media reported that leaders from the Minister's community had met at the time the censure motion was proposed; see the *Sunday Standard*, February 8, 2009, 'Corruption Claims Trigger Hidden Wars Inside ODM'.

³¹ See Alston Report at *The Standard Website*, <http://www.eastandard.net>

judicial killings, observing that this was a phenomenon that had been going on for a while. Parliament held a special session to discuss extra-judicial killings.

63. The release of the UN Special Rapporteur's preliminary report and corroboration of its findings by human rights groups precipitated demonstrations by some of the illegal armed groups. Ordinary citizens in some parts of Central Kenya reacted by violently disrupting these demonstrations and killing those suspected to be members of these groups.³² Fear of retaliation by members of these groups has led to displacement of people, and in particular business people in several urban centres in parts of Central Kenya.³³ In tandem with the release of the report, two human rights defenders working with a human rights organisation – Oscar Foundation– that campaigned against extra-judicial killings were shot dead and many other human rights defenders threatened with execution.³⁴
64. How to address the problem of 'militia', vigilante groups and other organisations poses a dilemma for everyone concerned with human rights. On the one hand, human rights defenders have been advocating respect for the sanctity of human life, including for members of illegal groups. On the other hand, citizens appear to publicly support extra-judicial killing of suspected militia members. In several parts of central Kenya, ordinary citizens have established vigilante groups to not only defend themselves against the illegal groups but also to hunt down and exterminate them. The rapid spread of village defence groups is likely to degenerate into a chaotic situation in which groups will be fighting each other. This will make both rural and urban areas ungovernable.
65. These findings indicate that a culture of impunity is solidifying at all levels. Hate leaflets, visibility of activities by illegal groups, the killing of human rights defenders, and continuing threats against IDPs every time the national elite disagree is indicative of a situation that can explode if political violence were to recur. In fact, popular support for death is a signal of a society that has become violent and one where there is little trust in institutions that promote law and order. These pointers signify the urgent need to urgently finalise constitutional reforms in order to create room for re-invigoration of all institutions.
66. Urgency in undertaking reforms is critical for another reason. There are emerging signs of a class conflict in some parts of the country. The poor and the landless are the core of the illegal groups whether in rural or urban areas; whether in Central or Rift Valley provinces. Given that some of the groups have origins in the 'ethnic land clashes' of the early 1990s, it is possible that some of these groups focus on the rich and the landed. With deepening poverty and unemployment among the youth, this possibility is not far fetched if there are no adequate reforms to meet current challenges.

Restoration of Freedoms and Rights

67. The previous report noted regression with respect to freedoms, and freedom of assembly in particular. Some progress has been made with regard to restoring

³² *The Standard*, March 23, 2009, p8, 'Two Men Beheaded in Suspected Mungiki Attacks'.

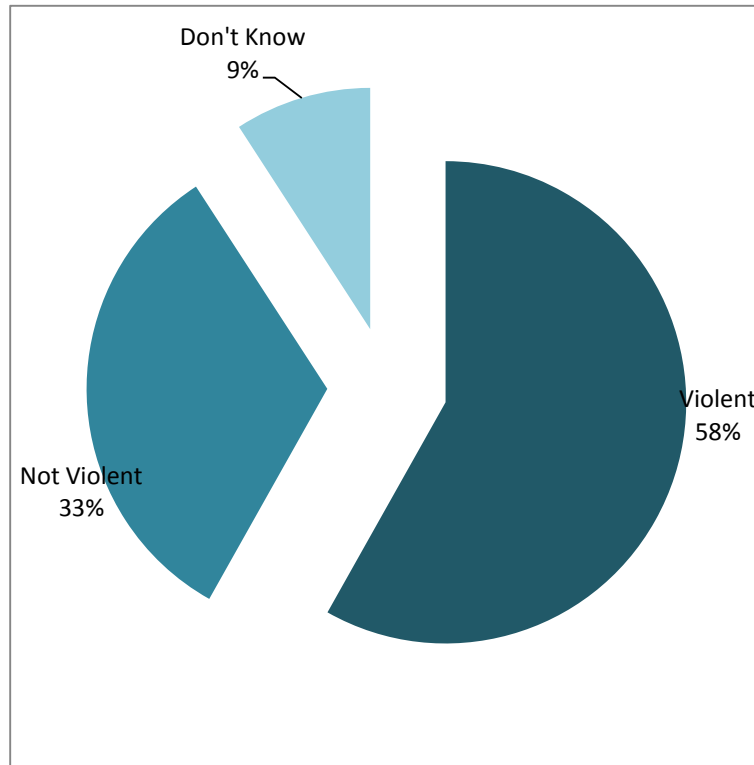
³³ Field-based interviews in Murang'a and Thika; see also *Daily Nation*, January 3, 2009, 'Mungiki Issues Payment Notices to Business Community in Central Province Towns'.

³⁴ civil society letter to the President and the Prime Minister, March 2009.

fundamental rights after the signing of the mediation agreement.

68. *Freedoms:* The government has increasingly constrained citizens' enjoyment of fundamental freedoms. To some analysts, the government is afraid that the country has not sufficiently stabilised to allow for the enjoyment of unlimited freedoms as before the violence.³⁵ The period under review witnessed violent and forcible eviction of IDPs from some of the remaining camps. Citizens demanding that MPs pay taxes on their allowances were also violently dispersed during the period under review. Demonstrations by teachers who were demanding better terms of service were also violently dispersed. These are significant drawbacks to the country's democratisation process. Challenges around enjoyment of rights imply a constrained democratic space. The gains in the enjoyment of freedoms and rights made in the period between 2003 and 2007 should be effectively guarded because they laid a firm foundation for the development of the country.

Figure 2: Do you think the government's response to public demonstrations today is likely to be forceful/violent or not likely to be forceful/violent?



69. *Press Freedom:* In January 2008, the government established a Media Monitoring Unit to examine discussions on radio and television stations. Following the findings by this Unit, the government suspended live broadcasting so as to stop 'dangerous reporting'. The government lifted the ban on live television and radio broadcasts in March 2008 and presented offensive materials to the Media Council of Kenya for action. The council has not taken action.

³⁵ Focus Group Discussion with a grassroots advocacy organisation, Nairobi, February 24, 2009.

70. From this development, one can discern a clear disconnect between the media and the government. While both claim to be acting in the public interest, their actions are at variance. To some officials in government, the media is irresponsible. The media failed to censor broadcast information in accordance with the interests of stability and to protect the image of the nation. To them, the 'journalists only report bad stories because that is what sells ... success stories are not reported ... This is the only country in the world where they show you dead bodies on their screens ... It is because of this irresponsibility that the government must exert control'.³⁶
71. The media, on the other hand, observe that the space for press freedom has been getting constrained from the time of the political violence. Some see passage of the Kenya Communications (Amendment) Act of 2009 – which seeks to regulate media content among other things -- in this context. Although the law was passed and received presidential assent, the period preceding these events witnessed protests and fervent appeals by the media, who argued that the Act was an affront to freedom of expression. Negotiations between the media and the Government have yielded consensus where some of the offensive clauses are due to be amended.
72. The media play an important watchdog role in any transition. Freedom of the media is required today more than ever before, particularly because the country is slowly emerging from a major crisis. It is important to watch over this space to ensure that the country does not roll back past gains and consolidate them for the future. Furthermore, in the absence of an official opposition, the country must build formidable institutions to keep vigilance on the Grand Coalition and the transition to political stability. A free and responsible media can play an important role in this respect.

CONCLUSIONS

73. The findings show that post-election violence has generally stopped. There is no overt conflict directly related to the disputed elections. However, tensions remain high in affected areas of the Rift Valley, where the uneasy calm has made it difficult for IDPs to return and resettle in their homes in a sustainable manner. The subterranean tensions between the different communities come into the open every time the political elite conflict at the national level. National level conflicts among politicians thus are an obstacle to healing and reconciliation at the local level.
74. Illegal armed groups are still in place. However, they are not currently engaged in political violence. The scope of their activities is broadening and their boldness growing. The resolve with which they are committing crimes is an issue of concern. They have also transformed into 'criminal groups,' which are autonomous of politicians who brought them up. Because of this autonomy, they seem to hold politicians hostage. There are groups allied to politicians: politicians depend on these groups to fend off opponents at a fee. Rapid mutation of groups, franchise of dreaded names, and cover by politicians make it difficult to disband the groups. Very few residents are keen to report them to the police for fear of reprisals. To some residents, 'it is easier to avoid

³⁶ Interview, Ministry of Information and Communications, March 23, 2009.

trouble -- just pay and keep quiet'.³⁷ Of concern is that the growing gang culture is a serious threat to national security.

75. From these findings, it is also clear that human rights defenders are under serious threat. For this reason, there is an urgent need to address concerns over extrajudicial killings and threats to human rights defenders, and to mobilise support for the restoration of fundamental rights and liberties. Up to 20 human rights defenders are in hiding fearing for their lives.
76. A systematic strategy to disband illegal armed groups is long overdue. Such a strategy must balance between the right to life for any individual, the due process that must be followed, and popular demands by ordinary citizens to end the lives of such group members. Extra-judicial killings, unfortunately, breed rather than reduce criminals because they deal with the symptoms of a deeper problem.

³⁷ Interview with business woman in Kibera, February 16, 2009.

3. AGENDA ITEM 2: ADDRESSING THE HUMANITARIAN CRISIS, PROMOTING NATIONAL HEALING AND RECONCILIATION

Background

77. On February 4, 2008, the mediation team outlined measures to address the humanitarian crisis and promote healing and reconciliation. Among these measures were steps to assist and encourage displaced persons to return to their homes or to new areas and to have safe passage and security. The parties were required to provide adequate security and protection, particularly for vulnerable groups in the camps, and provide basic services for the Internally Displaced Persons (IDPs). The coalition partners were also required to provide information centres where the affected could obtain information about the kind of assistance available to them and how to access it.
78. The mediation team called for the operationalisation of the Humanitarian Fund for Mitigation of Effects and Resettlement of Victims of Post-2007 Election Violence (Humanitarian Fund) by establishing a bipartisan, multi-sectoral board, with streamlined procedures to disburse the funds. The mediation team also required that victims of violence in urban areas not be neglected, and that food security be prioritised by assisting displaced farmers to return to their farms to resume farming activities.
79. With regard to promoting reconciliation, healing and reconstruction, all party leaders were required to convene joint rallies and ensure that freedom of expression, press freedom and peaceful assembly were upheld as guaranteed in the Constitution. All-inclusive reconciliation and peace-building committees were to be established at the grassroots level, counselling support provided, and a resettlement programme developed. The parties were also to welcome a UN High Commissioner for Human Rights investigatory team, and establish a Truth, Justice and Reconciliation Commission.
80. This section of the report discusses progress made with respect to this agenda item. The discussion examines:
 - (a) The resettlement programme;
 - (b) The nature of humanitarian assistance; and
 - (c) The measures to promote reconciliation and healing.

Status of Implementation

Summary of findings

- ❖ Resettlement programme ended in December 2008 with 347,418 IDPs resettled
- ❖ Delivery of assistance to all official camps enabled through involvement of the government, UN agencies, Kenya Red Cross, and NGOs as well as by use of a cluster approach³⁸
- ❖ All official camps have closed and been emptied of IDPs
- ❖ The UNHCR in collaboration with the Kenya National Bureau of Statistics completed the IDP profiling exercise in July 2008. The result showed that there were 663,921 post-election IDPs
- ❖ 108,000 IDPs have each received Ksh10,000 start-up funds from the Humanitarian Fund
- ❖ 23,110 have each received Ksh25,000 from the Humanitarian Fund for shelter reconstruction.
- ❖ The government and partners in the Shelter Cluster have constructed 47,253 houses for returning IDPs, mostly in Rift Valley, Western and Nyanza provinces
- ❖ The government and partners in the Early Recovery Cluster are supporting livelihoods recovery projects, including revitalisation of agriculture and businesses through cash voucher schemes, tools and building materials
- ❖ Newly registered IDPs mean new funds required. The Ministry of Special Programmes has obtained a loan of Ksh1.7 billion from the African Development Bank and another Ksh1.7 billion due to be released from Treasury in May 2009
- ❖ District Peace Committees established in all districts across Kenya; most of them are functional
- ❖ Local level peace-building initiatives have started, supported by civil society organisations and UN agencies
- ❖ Cluster coordination handed over from UN 'lead' agencies to pertinent government ministries
- ❖ Revised Emergency Humanitarian Response Plan 2009 launched in March 2009

Resettlement Programme: Number and Situation of IDPs

81. From the outset, humanitarian agencies identified a Cluster Approach as the method for responding to the crisis. The Cluster Approach aimed at synergising competencies and capacities of the various agencies and providing leadership in different areas of competence among the agencies. The approach emphasised partnership between the UN agencies, the International Red Cross and Red Crescent Movement, international development partners and local NGOs. The sectors/clusters included: camp coordination; early recovery and food security; protection; nutrition; food aid; shelter; water and sanitation. This approach suggests that some activities were of a short term nature while others were of a medium and long-term nature.
82. *IDPs Are Neglected:* Almost all official camps have closed, sometimes through use of force. However, closure of camps has not translated into an end to displacement.

³⁸ Cluster approach evolved as the *modus operandi* for the emergency response; it is a concept that emphasised partnership between UN agencies, international NGOs and development partners, and the government and local NGOs. Several sectors were established and lead agencies identified to provide leadership and coordination in each 'cluster'.

Some IDPs remain in transit camps, or are integrated in communities. Others are at other relocation sites without access to basic services or coordinated assistance. The assumption that the problem of IDPs has ended simply because camps were closed is erroneous; IDPs continue to face more challenges that are rarely brought to public attention. The danger, however, lies in forgetting IDPs and failing to treat their concerns with urgency. Given that the first wave of post-election violence in the early 1990s led to the breeding of groups such as Mungiki, it is important that IDPs' problems be addressed satisfactorily.

83. There are other problems around the IDP issue. One is that the actual number of IDPs assisted through *Operation Rudi Nyumbani* is much lower than initial estimates. Assistance was planned on the basis of an estimated figure of 350,000 IDPs in 296 camps.³⁹ New figures based on an IDP profiling exercise by the Ministry of Special Programmes, UNHCR and Kenya National Bureau of Statistics in June/July 2008 showed a national tally of 663,921 IDPs, distributed as shown below. These new figure suggest that the proportion of IDPs who received humanitarian assistance, and on which planning was based, is less than what initial figures showed.

Table 1: New figures on distribution of IDPs by regions

	Province	Households	No. of individuals
1	Nyanza	24,981	118,547
2	Western	12,385	58,677
3	Rift Valley	84,947	408,631
4	Central	10,092	46,959
5	Eastern	1,438	6,769
6	Coast	1,241	4,774
7	North Eastern	26	148
8	Nairobi	5,349	19,416
	Total	140,459	663,921

Source: Ministry of Special Programmes, March 2009

84. The second problem is that there are IDPs settled in other regions and in transit camps who did not and do not receive coordinated support.⁴⁰ There are many IDPs settled in transit camps who have no access to assistance.⁴¹ Thirdly, there are integrated IDPs who are rarely captured by conventional interventions. Findings show that there are about 160,473 integrated IDPs. Assistance to this category of persons was discontinued in March 2008 in readiness for the launch of the Resettlement Programme in May 2008. Such a high number of IDPs has the effect of creating social tension because of 'compassion fatigue' experienced by those hosting them.
85. Fourthly, the new IDPs are adding to the old caseloads of IDPs coming from the 1992/1993 and 1997/1998 political violence, and internal conflicts such as in the Mt Elgon region. Old caseloads have not been attended to satisfactorily and, therefore, are also compounding the IDP problem.
86. These problems suggest that the measures taken to assist the IDPs are simply

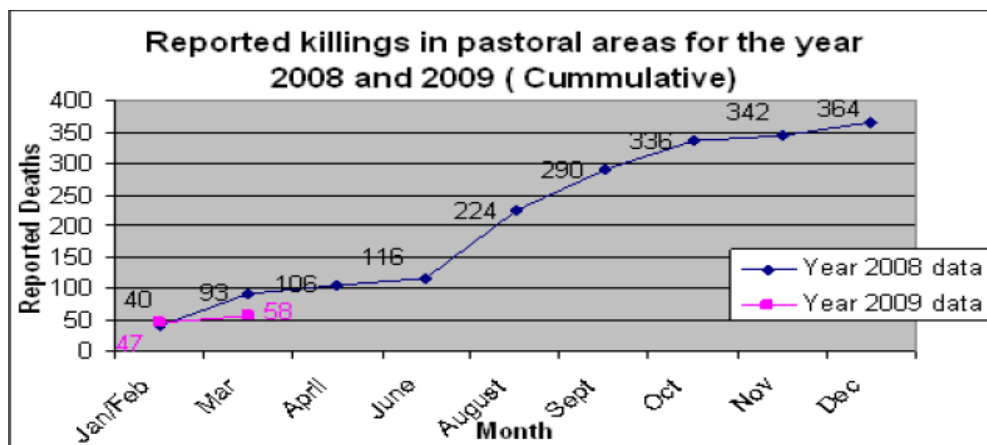
³⁹ United Nations, *Kenya Humanitarian Response Plan* (Revision), p1.

⁴⁰ The humanitarian intervention concentrated in 25 districts in five provinces: Nairobi, Central, Rift Valley, Western and Nyanza.

⁴¹ The Ministry of Special Programmes showed that by March 2009, there were 61 transit camps with over 40,000 IDPs in the Rift Valley. However, figures by CSOs showed that in Molo alone, there were 48 transit camps with over 38,000 people.

scratching the surface of the problem. The numbers are huge and their problems continue to deepen. This raises a need for a comprehensive national response framework on IDPs. These problems also demand that a policy addressing IDPs be put in place as a matter of urgency but that it also be contextualised. The IDP crisis is anchored on a broad social-political context. Sustainable solutions to the IDP problem require attending to broader social-political reforms as elaborated in Agenda Item 4, in particular.

87. Besides displacements caused by the post-election violence, information from the Office for the Coordination of Humanitarian Affairs, Kenya office (OCHA-Kenya), shows new forms of displacement emanating from resource conflicts in Northern Kenya. In January and February 2009, 47 people were killed in pastoralist areas of Northern Kenya. In January 2009, 44 per cent of deaths reported have resulted from cattle-rustling. The other 56 per cent are from resource-based conflicts related to land, pasture and water points. This is a 50 per cent increase from cases reported in December 2008.⁴²



Source: OCHA Humanitarian Update, Vol. 45 March 2009

88. These new forms of conflict require immediate attention because they are not mainstreamed in the IDP assistance programme. They are bound to increase with worsening drought and poor pasture for livestock keepers. Cross-border cattle raiding will also deepen the situation if past events are anything to go by.

Problem of Resettlement

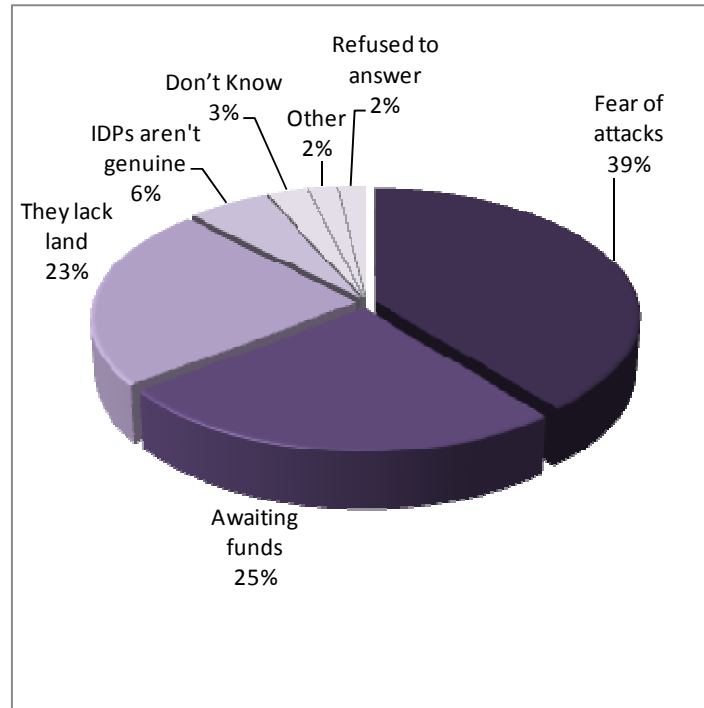
89. All the official camps except two have closed. There are no IDPs in camps that were established during the post-election violence. Many IDPs have also been facilitated to return to their farms and/or to build their homes. The closure of IDP camps appears to have been done without adequate consultation with those affected. There are several instances where IDPs complained about use of force by the government. As recently as 16 April 2009, a group of IDPs camped at the Eldoret Show Ground was forcibly evicted. Another group camped at Molo Saw Mill was forcibly dispersed

⁴² OCHA Kenya, *Humanitarian Update*, Vol. 43, p3.

in March 2009. This implies that success in resettlement is sometimes judged on the extent to which the camps are closed and IDPs cleared from the area.

90. There are several reasons why some IDPs are in camps – including transit camps. The survey shows that some fear being attacked while others are waiting for funds. There are still some who do not have land and hope to get land for settlement. Interestingly, only 9 per cent of the respondents believe increasing security will promote returns. Also, only 10 per cent think promoting peace and reconciliation will address the problem of displacement.

Figure 3: What are the most important reasons IDPs remain in camps?



91. Resettlement means one thing to the government (closing or absence of camps) and another to the IDPs (sustainable return or integration). Further, both the government and IDPs have different perspectives on the best approaches to resettlement. The government is concerned about structural and material issues – about success in disbursement of resettlement and reconstruction funds, regardless of whether or not beneficiaries are able to find physical and material safety. On the other hand, IDPs are concerned about their physical security and their well being. IDPs are concerned about prospects for co-existence at the personal and community level.
92. The fragmented perception on the resettlement programme has resulted in the government arguing that the IDPs are ‘undermining’ the resettlement programme by misusing the funds they receive. They are seen as ‘dishonest’ because they have refused to comply with the instruction to rebuild houses after receiving funds. Others have refused to occupy the houses built for them by the government.⁴³ However, according to them, the government and other aid agencies:

⁴³ *The Standard*, March 12, 2009, ‘Government Says IDPs Undermining Resettlement’.

'didn't ask what we wanted; personally I would have preferred financial assistance to resettle wherever I wanted. We told some NGOs we didn't want houses, but the government insisted on houses. They also didn't ask our neighbours if it is alright for us to come back ... they are just forcing us to go back ... But going back is not just about having a house, it is not that simple'.⁴⁴

93. The neighbours to IDPs have their views, too. In their view, the IDPs are being pushed back without consultation with their erstwhile neighbours. In Molo, for instance, a respondent from the non-displaced community remarked:

'We fought, they went to the camp. We didn't talk about anything after that. These NGOs pass here on their way to the camp ... But the other day we saw people building houses for them and giving them money to plough their farms. Then they call us for peace meetings. We are waiting to see if they will occupy those houses.'⁴⁵

94. The remark above exposes a need for deeper dialogue between different communities. No one should fault the strategy used to resettle the IDPs at this stage. The critical point is what should be done to ensure tolerance, accommodation, healing and reconciliation.

95. *Allegations of Non-Genuine IDPs in Camps*: From the survey data, only 6 per cent of the respondents said that those in camps are not genuine IDPs. However, local narratives also indicate that there is a possibility that some people could be capitalising on the IDP problem to obtain assistance. Those with this view believe it is convenient to be in the camps because they avoid paying rent and other bills, and benefit from food and non-food assistance from organisations and well-wishers. In many return areas of the Rift Valley, for instance, those not displaced think IDPs are 'pretending' in order to continue receiving 'free things'.⁴⁶ According to a government official in Naivasha, for instance:

'Even after making sure all IDPs in the camps are resettled, we are amazed to find new IDPs in the camp the following day. We wonder where they come from!'⁴⁷

96. Factors that lead people into IDP camps – when they are not *bona fide* IDPs – should concern policy makers. Poverty, unemployment and lack of livelihood alternatives combine to create an environment not conducive to recovery and economic stability for many poor people. Unless this environment is improved, pushing IDPs out of sight will remain problematic.

Access to Relief and Assistance Funds

97. By March 2009, the Ministry of Special Programmes had used about Ksh1.96 billion of the resettlement kitty to resettle some 347,418 people through *Operation Rudi Nyumbani*. According to data released in March 2009, a total of 108,000 IDPs had received Ksh10,000 as start-up funds. Over 23,110 had received the Ksh25,000 shelter reconstruction funds. This resettlement fund is inadequate because of the figure of estimated IDP population and the need to scale up planned operations.⁴⁸

⁴⁴ Interview with IDPs, Molo, March 2009

⁴⁵ Interview, Molo, February 26, 2009.

⁴⁶ Interview with a government official in Nairobi, March 2009.

⁴⁷ Interview with Provincial Administration officer in Naivasha, March 3, 2009.

⁴⁸ Interview with Resettlement Officer, Ministry of Special Programmes, March 18, 2009.

In this regard, there are pledges of more funds to support IDPs.

98. An important achievement is that IDPs in camps have received the start-up funds, and a few others have received funds for shelter reconstruction. A survey of about 200 IDPs in a camp in Eldoret and in transit camps in Nakuru shows that as many as 84 per cent received the start-up money. The survey of IDPs shows that the Kenya Red Cross is the most likely source of assistance for those already in camps. That is, if they have received assistance, it is most likely to have come from the Kenya Red Cross (75 per cent), religious organisations (56 per cent), individuals (47 per cent) or the government (24 per cent).
99. Assistance to IDPs has suffered several setbacks. Allegations of corruption in the disbursement of funds, including money being given to non-IDPs as well as complaints about forged lists of beneficiaries, genuine IDPs missing from lists, and 'neglect' of those not in camps are some of the most common problems. The Kenya Anti Corruption Commission has begun investigations into these allegations. In the survey of IDPs, 34 per cent pointed out 'names missing from the lists' as one problem around disbursement. Other challenges include incorrect government records (17 per cent), money given to non-IDPs (16 per cent), IDPs asked to pay bribes (13 per cent) and missing documents (11 per cent), among other problems.
100. Interviews at the district level revealed that the high mobility of IDPs has been a major challenge to the disbursement of funds. Some IDPs claim not to have received information on time because they had gone to see families or had gone to seek employment. They also did not have information on how to make follow-ups. Indeed, by March 2009, the Ministry of Special Programmes could not trace beneficiaries of a total of Ksh37 million.
101. These findings expose ineffective coordination between the various departments supporting assistance efforts at the district level, and with the head offices in Nairobi. They point at bottlenecks in communication and administration in the programme.
102. Findings also show that there are instances when non-IDPs have received funds with the knowledge of officials. Such issues are not raised because the broad goal is to promote peace and reconciliation, and officers at the local level feel that they should not create an impression that only one community is receiving support.⁴⁹ While this may indeed promote reconciliation, the exclusion of genuine beneficiaries might protract displacement and diminish the immediate positive effects of the funds. In the survey, respondents were asked how disbursement could be improved. Many IDPs pointed out the need to have transparent records (23 per cent) while 16 per cent emphasised giving money to genuine IDPs. These issues point to the need to ensure that transparent procedures are developed at the outset. Again, a policy on how to deal with the resettlement of IDPs ought to address these issues.

Trends in Healing and Reconciliation

103. Post-election violence has ended, which is a positive sign. In many areas of the Rift Valley, relations between IDPs and other people in the area are slowly normalising. From the survey results, 43 per cent said that they are getting along well with other communities while 16 per cent pointed at tensions but said there is no fighting.

⁴⁹ Interviews in Burnt Forest in March 2009.

However, IDPs face new threats although there are no major violent attacks directed at them. As already mentioned, findings from field interviews show that tension between IDPs and other communities tend to increase in consonance with national level conflicts.

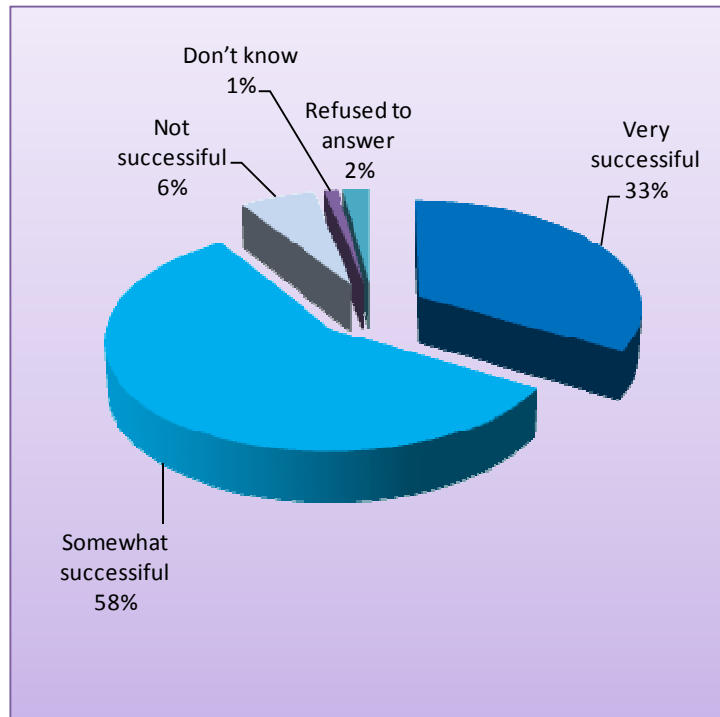
104. The mediation agreement required the President and the Prime Minister, as well as other political leaders, to promote healing and reconciliation by, among other things, holding joint rallies, developing a national resettlement programme, de-emphasising ethnicity, and establishing all-inclusive peace and reconciliation committees. The agreement underlined the importance of establishing a Truth, Justice and Reconciliation Commission.
105. Progress has been made in passing relevant Bills in Parliament. The National Cohesion and Integration Act, 2008 became operational on March 9, 2009 following a *Kenya Gazette* Notice of March 2, 2009. The Truth, Justice and Reconciliation Commission Act also became operational in the same period.
106. Interviews with different respondents reveal a disconnect between what people at the local level and national elites expect from the various pieces of legislation and policies following from the KNDR process. Ordinary citizens focus on improvement of social-economic and security conditions while elites at the national level are concerned about how these instruments can address issues of rights.⁵⁰ This disconnect, therefore, is about prioritization of measures rather than differences of what should or should not be done.

Peace-Building Activities

107. The government and NGOs are undertaking peace-building activities. A majority of Kenyans living in post-election violence areas report that there have been activities aimed at promoting healing and reconciliation. In the survey, 37 per cent of the respondents said these activities were peace meetings and workshops while another 14 per cent said the activities included religious crusades, sports and games (7 per cent) and counselling (6 per cent). There are others who cited awareness creation (8 per cent) and women initiatives (4 per cent). About 21 per cent reported that no activities had taken place in these areas. This last response is a point of concern as it indicates that peace building is not widely spread or that a significant number of people are not aware of such initiatives. This demands a strengthening of strategies to build peace and reconcile communities.

⁵⁰ Wachira, George and Kamungi, Prisca (2008), *The TRC As Transitional Justice Model in Africa: Emerging Lessons and Implications for Post-Accord Societies*. Nairobi: NPI-Africa.

Figure 4: How successful are the efforts at promoting healing and reconciliation among communities in your area?



108. In addition to initiatives by various agencies, the findings show that senior politicians are now increasingly involved in peace initiatives more so than in the last quarter of 2008. Senior politicians have been holding joint rallies where they emphasise reconciliation and healing. For instance, in March 2009, the Minister for Agriculture and several MPs from Rift Valley launched '*Operation Karibu Nyumbani*' (Welcome Back Home) to receive returning IDPs.⁵¹ Before this period, the Vice President had launched '*Operation Ujirani Mwema*' (Good Neighbourliness) while the Ministry of Special Programmes had launched '*Operation Tujenge Pamoja*' (Lets Build together). Reconstruction of destroyed homes, however, had begun to cause resentment among the local communities. In some areas, the local communities began talking about '*Operation Zuia Madoadoa*' (Prevent the Return of the Stained), which halted the pace of healing and reconciliation.
109. During the period under review, a peace building initiative in Burnt-Forest proposed to change the name of the town to 'Tarakwa' to symbolise a departure from a culture of intolerance and arson. In general, the period between February and March 2009 has witnessed more peace-building meetings than was the case in the previous year. Former President Daniel Moi has been leading some of these initiatives.⁵²
110. Politicians and religious leaders are not viewed equally in terms of influencing healing and reconciliation. Asked which people have the greatest influence in promoting healing and reconciliation, 51 per cent of the respondents said religious

⁵¹ *Daily Nation*, February 22, 2009, 'Close Camps, Say Rift Valley MPs'

⁵² *Daily Nation*, February 17, 2009, 'Moi in Bid to Reunite Groups'

leaders while 31 per cent cited politicians. As few as 8 per cent identified, separately, NGOs and the provincial administration. This points to a need to increase the use of religious leaders and – to some extent – politicians in peace-building initiatives rather than relying on the provincial administration. The poor response on the provincial administration testifies to possible lack of moral authority on their part to lead healing and reconciliation. It is possible that people think that NGOs lack a proper grasp of local dynamics that drive inter-group tensions, hence few believe that they can influence change.

111. These responses notwithstanding, the findings show that people are certain about which measures to adopt to promote healing and reconciliation. Of those interviewed, 22 per cent said ending tribalism is one important way to do so, while another 15 per cent think that more jobs for the poor will lead to reconciliation. A further 14 per cent want those responsible for violence to be tried, 12 per cent want a TJRC while 11 per cent want a new land policy.
112. On the basis of these findings, therefore, it is argued here that nothing short of comprehensive reforms will heal and reconcile various communities. Eradicating 'tribalism', addressing inequalities, promulgating a new land policy, and prosecuting perpetrators of violence are issues that require not a single measure but a comprehensive reform of institutions and structures that drive the economy and politics in Kenya.

Kenyan Refugees in Uganda

113. In April 2008, the UN Office for the Coordination of Humanitarian Affairs (UN-OCHA) reported that 12,000 Kenyans had fled the post-election violence in January 2008⁵³ and gone to Uganda. The Government of Uganda (GoU) and UNHCR received about 2500 Kenyans at Mulanda Transit Centre, about 20km from Tororo.⁵⁴ They were given refugee status in Uganda. In May 2008 and following a verification exercise by the government of Uganda and UNHCR, the government relocated them to Kiryadongo Refugee Settlement site in Masindi district, about 230km Northwest of Kampala. At present the refugees are in about six different settlement sites in Uganda. The Kiryadong site is the largest, with 1800 Kenyan refugees.
114. The majority of these refugees are from the Kikuyu ethnic community evicted from Western Kenya but there are few others from other ethnic communities. The poor conditions in which IDPs in Kenya live in and use of force in closing IDP camps deter them from returning to Kenya. They feel their security and human dignity is not guaranteed.
115. The Kenyan refugees were issued with about half an acre of land to put up their shelter. They were also put on 100% food ration. Those who demonstrated ability to cultivate more were given additional land. Some have expanded their plots to about five acres. Refugees have formed a farmers' cooperative society and plan to diversify their activities.
116. Social relations amongst Kenyans are cordial. However, relations with refugees from Southern Sudan are strained. Although source of this tension is not clear,

⁵³ OCHA Kenya, Emergency Humanitarian Response Plan (CAP), April 2008, p. 4

⁵⁴ Interview with Legal Officer, Directorate of Refugees at the Office of the Prime Minister, May 5, 2009

there are those who observe that tension began when Kenyans did not receive their food ration at the time they arrived. The Sudanese began accusing them of stealing their food crops and fruits. But Kenyans are seen as relatively more aware of the Uganda Refugee Act and tend to demand their rights from humanitarian agencies. Other people see them as difficult and as having a 'know-it-all' attitude.

117. Interviews with the refugees reveal that many prefer to stay in Uganda. There is peace; land is plenty; and there is no dispute over the land they have been given. They can farm and engage in livelihood activities without fear of disruption or loss of property. There are also some who fear that they will be prosecuted for taking part in post-election violence.
118. The refugees in Uganda feel that the government of Kenya has neglected them. They are worried that the government has forgotten them because they are not aware of any effort to assist them to return back to Kenya and no one ever visits them. They are worried that the rapid repatriation of Southern Sudanese refugees will lead to the exit of NGOs from the camp and to eventual neglect of Kenyans.

CONCLUSIONS

119. Through Operation Rudi Nyumbani, the government facilitated the return of IDPs who had land. Many others have received financial assistance from the Humanitarian Fund to start up their lives and reconstruct their homes. Nonetheless, the humanitarian crisis facing IDPs is not yet over. IDPs are living in transit camps where they have no access to basic services. Furthermore, many continue to face threats of eviction every time national elites are in conflict or disagree. The fundamental causes of conflict and inter-ethnic mistrust remain unaddressed and continue to hinder the achievement of sustainable peace in return areas.
120. Peace committees have been established from provincial to the village level and NGOs are supporting peace initiatives. In spite of this, IDPs continue to receive threats of eviction. This suggests that the problem is intertwined with broader national social-economic and political problems. The IDP question cannot be addressed successfully in the absence of comprehensive reforms envisaged under Agenda Item 4 of the KNDR.
121. Healing and reconciliation are also intertwined with national political processes. During the period under review, there was more visibility for politicians in healing and reconciliation meetings. Their presence in many events adds a voice to calls for cohesion and unity among local communities. However, their approach is *ad hoc*; it is not part of a policy framework. There is a need for a broad policy framework that establishes linkages between high level or national and local level healing and reconciliation strategies.
122. Healing and reconciliation requires political leadership and cannot be left to faith-based and other civil society organisations at the grassroots level. And to provide national direction, it is critical that the two principals form groups to mobilise people at the national and grassroots level towards reconciliation. Healing and reconciliation should be treated as a national political priority. Policies may be required to spell out this urgency.

4. AGENDA ITEM 3: RESOLVING THE POLITICAL CRISIS (POWER SHARING)

Background

123. Both parties in the mediation, Government/PNU and ODM, signed the Agreement on the Principles of Partnership of the Coalition Government on February 28, 2008. Both parties agreed that neither side could effectively govern the country without the other. They thus agreed to 'real power sharing' to move the country forward and begin the healing and reconciliation process. This Agreement led to the enactment of the National Accord and Reconciliation Act of 2008, which effectively established a Grand Coalition Government.
124. The mediation team and the parties involved recognised that the crisis revolved around issues of power and the functioning of State institutions.⁵⁵ It also noted that resolving the crisis required adjustments to the law, and in particular amendment of the constitution to provide for formation of a coalition government including a Prime Minister with powers to supervise and coordinate government affairs.
125. This section of the report discusses the performance of the Grand Coalition Government. The discussion focuses on the following indicators, which are used to track progress on this agenda item:
 - (a) Distribution of public sector positions;
 - (b) Political cohesion in the coalition;
 - (c) Coherence in decision making; and
 - (d) Conflict management within the coalition government.

Status of Implementation

Summary of findings

- ❖ Signing of the agreement restored calm but every time there are conflicts in the coalition, animosity grows among communities at the local level
- ❖ Grand Coalition comprises equitable sharing of Cabinet positions
- ❖ How to share other public sector positions has caused divisions in the Grand Coalition
- ❖ Continuing disagreements among Cabinet Ministers creates an impression of a 'two-governments-in-one' situation
- ❖ A Permanent Committee to manage affairs of the coalition is in place
- ❖ How to manage 'power sharing' has implications for all the agenda items; conflicts have potential to threaten implementation of Agenda 4, including putting the constitution review off the rails
- ❖ Commissions of inquiry have been established and undertaken tasks as outlined in the KNDR

⁵⁵ Agenda Item 3: How to resolve the political crisis, annotated agenda prepared by Kenya National Dialogue and Reconciliation Committee.

The Context of Coalition Governments and Power Sharing

126. The formation of coalitions and sharing of political power has provoked endless debate not only in Africa but also in the developed world. The main question addressed in this debate is how to bring about political stability, especially in post-conflict situations and/or in culturally fragmented societies. Part of this debate stresses the importance of 'consociational' arrangements in which power is shared among the various groups in the society. However, leading authorities on this subject emphasise that power sharing is undertaken simultaneously with the practice of proportional representation in the electoral system.⁵⁶ Devolution is also introduced to give various groups a sense of autonomy.
127. There are other conditions required for power sharing to bring about sustainable stability: elites must be prepared to accommodate opposition view-points. They must be prepared to transcend ethnic differences in order to work together. More often than not, power sharing is introduced because neither of the elites can govern without the other. Unity of purpose is critical in this regard. This purpose is usually focused on implementation of policies essential for the stability of the country.
128. Kenya's Coalition Government was, therefore, established not as an end in itself but as a means to an end. It was established to allow for reforms, including those that would address the fundamental causes of the crisis. The Coalition Government was meant to create conditions for political stability to allow for broad reforms in order to avert a recurrence of violence.
129. One important achievement of establishing the Coalition Government has been restoration of calm in places that experienced post-election violence. Immediately after the signing of the agreement on the establishment of the Coalition Government, there was calm in all parts of the country. One disturbing finding, however, is that internal conflicts in the coalition are finding their way to the local level.
130. The previous report pointed out that parties in the coalition are interpreting the National Accord and Reconciliation Act from their own points of view. There are multiple interpretations of various provisions. The different interpretations of the National Accord are leading to conflicts, which could spill over to the constitutional review process and prevent the promulgation of a new constitution. Furthermore, negative ethnicity, the fulcrum on which Kenya's politics revolves, will feed into the reform process and complicate the realisation of comprehensive reforms.

Distribution of Power and Sharing of Public Sector Positions

131. From the outset, controversies about payoffs beset power-sharing discussions. Although Cabinet positions were shared equally, the discussion about which party would get which ministry denigrated the goal of power-sharing and the National Accord. In many ways, the discussion about ministries showed that both parties were concerned about payoffs; they were keen on accessing opportunities. Nothing demonstrates this more than the symbols used to articulate their positions. Some

⁵⁶ Lijphart, Arend (1969), 'Consociational Democracy'. *World Politics*, 21, 2: 207-225; Lijphart, Arend (2004), 'Constitutional Design for Divided Societies' in *Journal of Democracy* Volume 15:2: 96-108; Reynolds, Andrew, Ed. (2002). *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*. London: Oxford University Press.

argue that they got a half a loaf of bread, which was not enough to share. Others argue that they shared equally their share of the bread, and so on. This on its own tends to deepen the culture of political patronage and may transform into obstacles for undertaking reforms.

132. *A problematic start:* The point here is not to belittle either argument or position by either of the two parties. The general focus of this debate is more on access to patronage resources than on laying a foundation to inform comprehensive reforms. An issue of concern is that sharing power in the coalition is being analysed through the prism of ethnic and sub-ethnic groups -- some are keen to see which group won or lost, and so on.⁵⁷ Appointments to the public service are being seen and contextualised in this manner.⁵⁸
133. These arguments are generally straining the reform endeavours. They have the effect of ethnicising the process to undertake reforms. Already, discussions about staffing of various Commissions that have been established under the KNDR show a tendency towards ethnic considerations. Regional representation, a factor that has informed appointment to some Commissions, is one exemplification of this trend. Good or bad, ethnic representation and consideration in appointments to these Commissions is, simply put, a problematic beginning for a country seeking cohesion and unity. It has the effect of slowing the pace of re-establishing sound governance structures.

Working Together?

134. A successful Coalition Government requires that elites work together and appreciate the importance of transcending their differences. It requires that they build trust among themselves and consult each other in making decisions. The last report noted that the relationship between the President and the Prime Minister was reported to be cordial; they were reportedly consulting regularly on many issues.
135. In the period between March and April 2009, however, media reports showed strained relations between not only the two Principals but also between the politicians in both parties. In March, for instance, ODM raised a need for re-negotiation of the National Accord, arguing that power was not equally shared. In April, the Prime Minister pointed out that he was not being consulted in making key decisions.⁵⁹ Both parties sought to address these challenges through the Permanent Committee on the Management of the Coalition. The Committee's attempt to jointly discuss the affairs of the coalition failed when both parties disagreed on the agenda for a meeting convened in early April 2009. With the failure of the meeting, divisions widened following accusations and counter-accusations on who was responsible for the failed meeting. Both parties began taking extreme positions in defence of their arguments.
136. These conflicts have affected how the public views the performance of the government. In the survey conducted in post-election violence areas, 21 per cent of the respondents said that the Coalition Government works together while 77 per cent thought it does not work together. Also only 39 per cent are satisfied about the working relationship between the President and the Prime Minister; 59 per cent are

⁵⁷ 'Intrigues in Grand Coalition Have More to Do with Future than Past,' *The Standard* March 15, 2009.

⁵⁸ *ibid*

⁵⁹ "Raila: Kibaki Tells My Juniors to Disrespect Me," *East African Standard*, April 4, 2009.

dissatisfied. This political tension has impacted negatively on perceptions of power sharing within the coalition, with 54 per cent of respondents in our survey believing that the Prime Minister is not exercising his powers of office.

137. These findings must be read against the tensions in the Coalition Government and demands and counter-demands for power or even demands for clarification of various roles and responsibilities in the new structure of political power. It is difficult to articulate any recommendation or give a final word on how these differences can be resolved. However, borrowing from the growing literature on power sharing, it is important that the elites recognise the perils of their not working together. It is important that they transcend their ethnic and other cleavages and project to the nation an image of a united government rather than 'two-governments-in-one'. If unchecked, the political rhetoric between and among the coalition parties threatens to plunge the country back into chaos. It is important for political leaders – and not the two principals only – to develop a culture of tolerance and guide the country through the constitutional review process, the main hope for a new beginning.
138. Similar to the last quarter of 2008, conflict between the Office of the Prime Minister and the Office of the Head of the Civil Service and Secretary to the Cabinet continued to generate internal tension within the coalition. The ODM continued demanding that the office of Head of Civil Service be placed under the Prime Minister's office in order to fully recognise the premier's role of coordinating and supervising government ministries.⁶⁰ PNU on the other hand asserts that the role of Head of Civil Service is clearly spelt out in the Constitution and there is no conflict with the Office of the Prime Minister.
139. The survey in the post-election violence areas sought to see how this has affected popular perceptions on the effectiveness of the Prime Minister. Specifically, asked whether the Prime Minister was exercising his powers of office, 54 per cent said 'No' while 34 per cent said 'Yes'. Among those who said 'No', some (10 per cent) said he had not fulfilled his pledges and another 9 per cent said he had no powers.

Table 2: Why do you think Prime Minister Odinga is/is not exercising his powers of office?

He has not fulfilled pledges	10%
He has brought development	10%
He has no powers	9%
There are other influential people in the government	8%
Kibaki is still very powerful	8%
He is uniting Kenyans	4%
He supervises government ministries	3%
Reduced Corruption	3%
Other	34%
Don't know	11%

⁶⁰ 'Make Muthaura Work Under Raila, Says ODM', *Daily Nation*, January 6, 2009, p1.⁶¹ See Principles of Partnership of the Coalition Government signed on February 28, 2008.

140. These figures and the general findings from the survey reveal that conflicts in the coalition are entrenching perceptions that are not supportive of reform efforts. Recognising that perceptions are critical in post-violence situations, the main challenge is how to undo these perceptions and create an enabling environment for reforms. Creating the correct perception requires doing the 'right things right' when opportunities present themselves. Legal and political interpretations of the National Accord are responsible for the tensions in the coalition. The law was changed to end the political crisis; the political crisis itself led to restructuring of the constitution. There is bound, therefore, to be differences in interpreting what should supersede the other. Lessons learnt from these debates and tension in the coalition must inform the drafting of the new constitution and other reforms that are under way.
141. In general, disagreements on power sharing have been a source of instability in the Coalition government. This has been due to the fact that both parties want to interpret the National Accord to their advantage. But both parties should appreciate that power sharing and the coalition itself were crafted as temporary measures. To move forward, both parties should begin emphasizing fast-tracking of the constitution review where some of these issues can be effectively addressed.

Sharing of Public Sector Positions

142. Establishing a grand coalition is often followed by discussions about payoffs or sharing of positions. Power sharing in coalition arrangements thus sometimes leads to political parties adopting different strategies to maximise their gains in the coalition government. In Kenya, so far, emphasis has been on how the benefits (mostly positions) would be shared among the coalition partners. Disagreements over payoffs have assumed greater importance over policy issues and have themselves slowed the pace of reforms.
143. The provision from which the multiple interpretations follow is that 'the composition of the coalition government shall at all times reflect the relative parliamentary strength of the respective parties and shall at all times take into account the principle of portfolio balance.'⁶¹ Some argue that the public service, parastatal and diplomatic jobs were to be shared among the coalition partners. Others argue that these (civil service) posts cannot be distributed on the basis of political affiliation because "this will not only politicise the civil service but also cause divisions in the bureaucracy."⁶²
144. This debate must be settled to allow for cohesion in the coalition. Both parties and elites leading these debates must realise that power sharing is about relinquishing some control by those who have it to those who do not have it. Power sharing is about recognising that you cannot enjoy total power if those in conflict decide to put their differences aside to pull the nation together. Since the key principle in power sharing arrangements is consensus and unity of purpose, the two principals should consult and provide a solution to end this debate. If left to the many interpretations currently obtaining, disagreements over sharing of public sector positions are likely to continue and further undermine the coalition.

⁶¹ See Principles of Partnership of the Coalition Government signed on February 28, 2008.

⁶²

145. The disagreement about power sharing within the coalition appears to be spreading into government ministries. Notably, on January 15, 2009, the government announced diplomatic and parastatal appointments⁶³ but an Assistant Minister in the Ministry of Foreign Affairs dismissed the appointments as a “sham,” arguing that they were “political and not diplomatic” and did not consider gender or party equity, and neither was the Prime Minister consulted on them.⁶⁴ Appointments to the parastatals during the same period also raised concern over consultation.⁶⁵
146. Patrimonial politics seem to drive both parties. The more they discuss how they are losing or gaining, the more they forget that the National Accord had the goal of facilitating far reaching reforms. While the National Accord is meant to provide conditions for addressing national cohesion, it is producing contradictions that run counter to this objective.

Level of Political Cohesion

147. A Coalition Government whose mandate is to facilitate reforms to prevent political instability requires a greater degree of political and administrative cohesion. Inter and intra-party cohesion and coordination are critical for agreeing on policies to guide the government.
148. There is lack of political cohesion at different levels of the government. Disagreements and demands for power have spilled into policy making and spawned policy and political immobility. Parliament was recalled on 20 January 2009 to enact laws to establish the Special Tribunal to try perpetrators of post-election violence and to appoint Commissioners to the Interim Independent Electoral Commission (IIEC), among others. But Parliament failed on both counts.
149. While several factors contributed to the failure of Parliament to pass the Constitutional Amendment Bill to pave way for the establishment of the Tribunal, it is important to observe that inter- and intra-party divisions – sometimes along ethnic lines – contributed to the manner in which MPs voted. PNU comprised the majority of those who supported initial nominees to the IIEC, while ODM had the majority against ratifying the nominees. Inter- and intra-party divisions again played out during voting for the establishment of the Special Tribunal. Within PNU, 50 voted ‘for’ and another 42 voted ‘against’. A similar pattern of voting emerged within ODM: 51 voted ‘for’ and 49 voted ‘against’. The Constitutional Amendment Bill could not be passed. And when time came to pick the members to the IIEC, ‘different political contestations in Parliament took precedence over formation of the IIEC.’⁶⁶ The list of initial nominees had to be taken back to the nominating committee.
150. Inter- and intra-party divisions, therefore, have the consequence of delaying formulation of policies to steer reforms. They can cause both political and policy immobility and if not addressed, they can easily lead to a policy gridlock. While the Political Parties Act can play some role in institutionalising the political parties and, therefore, foster internal coherence, the Coalition Government will have to develop

⁶³ ‘Former MPs Named in New Diplomatic Line-up’, *Daily Nation* January 16, 2009 pg 5

⁶⁴ “ODM cries foul over appointments,” *Standard* January 25 2009 pg 28

⁶⁵ ‘ODM cries fouls over appointments,’ *Standard* January 25 2009 pg 28

⁶⁶ Remarks by a Cabinet Minister during a public forum on power sharing in ethnically divided societies, February 2009.

a legally binding framework to manage its internal affairs. This issue has been covered in the previous report as well.

151. The continued disagreement between PNU and ODM only reinforces the perception of an incoherent government and is undermining the reform process. In post-election violence areas, 77 per cent of the respondents interviewed believe the Coalition Government does not work well together. And to achieve required harmony, 20 per cent think the partners need to have unity within political parties while 11 per cent suggest the coalition parties should resolve their differences.
152. Asked about what is the most important thing that the Coalition Government can do to work well together, about 20 per cent of the respondents said unity within political parties would facilitate this.

Table 3 : What is the most important thing that the Coalition government can do to work well together

Unity within political parties	20%
Solve differences	11%
Fight corruption	7%
Focus on the interests of the public	6%
Create more jobs	5%
Renegotiate power-sharing	4%
Reconciliation	4%
Reduce the price of goods	4%
Other	34%
No response	5%

153. Another reason slowing the pace in undertaking reforms is politicians' interest in preparing for their 2012 General Election campaigns. To some of the people interviewed, political elites have ignored reforms in favour of their 2012 election campaigns".⁶⁷ For this reason, those with presidential ambitions and/or those supporting particular candidates tend to scrutinise reforms to find the implications for their political ambitions. Thus, reforms and political ambitions of individual politicians are competing; and reform has to give way. In the view of a former Cabinet minister, how to resolve this competition is a major challenge because it has slowed the reform momentum present in February 2008 when the Accord was signed.⁶⁸
154. A point to emphasise here is that the divisions witnessed within the parties and within the Coalition Government have a basis in how power is shared. They are also the result of absence of other institutional arrangements to support the power

⁶⁷ Interview with a civil society key informant, February 2009.

⁶⁸ Remarks by a Cabinet minister during a public forum on power sharing in ethnically divided societies, February 2009.

sharing agreement that came into place to end the political crisis. The First-Past-the-Post majoritarian electoral system practised in Kenya – and one that provides for a winner-take-all system – has shaped or contributed to these divisions. In this regard, the country has to rethink its electoral system.

155. Ethnicity and ethnic constituencies drive these divisions, too. There is need to carefully design a framework to address issues around ethnic inequalities and their implications for political stability. While legislative approaches have already been undertaken in this regard, political reforms will be required to change behaviour and practice in this area.

Coherence in Decision-Making

156. In order to enhance coherence and stability, a coalition needs to develop and maintain unity and trust among the different partners. There is need for cohesion at both the level of policy and administration. Political cohesion must be reflected in administrative actions. However, in the period between January and April 2009, ministers tended to issue contradictory statements. At other times, their statements reinforced the perception that the Grand Coalition is a 'two-governments-in-one'. For instance, the government gave uncoordinated responses to the report by the UN Special Rapporteur on Extra-Judicial Executions. The Justice Minister said parts of the report would be implemented while the Foreign Affairs Minister said the government was not taking a formal position until it had read and scrutinised the report.⁶⁹ Speaking ahead of the release of the report, the Prime Minister had expressed the government's commitment to implement the report in full. On the other hand, the Government spokesperson issued a statement saying that the government was totally rejecting the report.
157. Other instances have reinforced the perception of a 'two-governments-in-one'. The Minister for Medical Services and the Minister for Public Health and Sanitation have been involved in a struggle for control of key departments, which has affected service delivery.⁷⁰ This struggle is compromising service provision.⁷¹ Efforts to harmonise operations between the two ministries have been hampered by technical challenges, since both ministries were closely linked and sometimes had overlapping duties.⁷²
158. The contradictory statements from members of the same government not only create confusion among the public but also perpetuate the perception of two governments in one. We acknowledge that there will always be differences of opinion within a coalition of this nature, but this should be all the more reason why there must be consultation at every turn.

Conflict Management within the Coalition

159. Rivalries and differences among politicians have also generated friction within the coalition, which has tended to impair service delivery and efficiency of dispute resolution mechanisms put in place. This is especially so when members of the conflict resolution mechanisms are the ones fighting.

⁶⁹ "Ministers Split over Police Death Squads," *Daily Nation*, February 27, 2009, p9.

⁷⁰ 'Split of Ministry Behind Poor Service Delivery,' *The Standard*, April 3, 2009.

⁷¹ Ibid.

⁷² Telephone interview with a Senior Director at the Ministry of Medical Services.

160. On January 15, 2009, the coalition partners established a Permanent Committee on management of the Coalition Government, with each party having seven representatives.⁷³ The key pointer from this dispute-resolution committee is how determined the principals are for the coalition to work. However, the Permanent Committee also faces a challenge of resolving open disagreements among its members. Attempts to resolve disputes have not been very successful.
161. Four elements have been attributed to be the source of constant conflict in the Coalition Government.⁷⁴ One is lack of discipline in the coalition “since there are no rules to govern the players”. Secondly, and related to this, according to one minister, is due to weak structures to govern the coalition. A third source of conflict is lack of transparency and accountability of the political class, and finally the challenge of resolving competing political interests within the coalition.
162. While it is just one step towards stabilising the coalition, the committee needs to be made effective by having a written framework of engagement signed by its members. There have been some positive comments on the contents of the initial draft prepared in May 2008, which need to be taken into account. In the absence of an agreement, conflict will intensify and spill into the reform process.
163. So far, the Permanent Committee to manage the affairs of the coalition has not given guidelines on resolving constant conflict within it. It is vital that the committee is re-energised to give parliamentarians a platform to thrash out their differences ahead of important policy debates. Lack of such an avenue for building consensus could be partly responsible for the problems that the Coalition Government is encountering within and outside Parliament.

Level of Satisfaction with the Coalition Government

164. Public satisfaction and support for the Grand Coalition has fallen to very low levels one year after its formation. The low scores result from Kenyans feeling that their immediate needs are not being addressed. The feeling is that the Coalition Government has moved ahead with its agenda, leaving the citizenry behind and thus creating public resentment. The citizenry see the government “as a mechanism for covering up mega-corruption among the political elite.”⁷⁵
165. Among the people we surveyed, 33 per cent thought members of their community would support the dissolution of the Coalition Government while 25 per cent said they would demonstrate against such dissolution. Everyday problems of high inflation, hunger, high oil prices, among others affect people of all ethnic communities regardless of their political affiliation. Therefore, the perception that the Coalition Government is doing nothing to mitigate people’s problems could be attributed to the high percentage of respondents who would support its break-up.
166. Reluctance to carry out comprehensive reforms, demobilisation of illegal armed groups and national healing and reconciliation is a ticking bomb. If the Coalition Government were to break up, 22 per cent of respondents said they would commit acts of violence against other communities. However, due to the feeling that only the political elite are benefiting from the Coalition Government, this might turn out

⁷³ Initial composition overlooked gender representation. The Committee was expanded probably to take account of this.

⁷⁴ Observations by a Cabinet minister at a public forum to discuss power sharing in ethnically divided societies, February 2009.

⁷⁵ Interview with a resident of Uasin Gishu District, January 2009.

to be a class conflict. As one key informant noted, “a Luo and Kikuyu both suffer the same hunger pangs; they lack the same amount of money to buy *unga* (flour) and they both know who is stealing from their coffers. Next time they will not look at their ethnic identity because they know the hunger is due to poor leadership and corruption, and not drought.”⁷⁶

167. As far as the coalition partners are concerned, ODM seems not to be completely happy in the government. On a number of occasions, in the last quarter, ODM leaders have spoken of their frustrations in the Grand Coalition and how it had slowed down their party’s agenda.⁷⁷ The party has also raised concerns over being treated as “junior partners” by their PNU counterparts but says it will not leave the coalition.⁷⁸ PNU rarely complains of similar issues but dares ODM to leave government if they are not satisfied.⁷⁹
168. Feelings of discontent by ODM and allegations of being treated like “junior partners” is a key threat to the reform process and passage of Bills in Parliament. Once one coalition partner is unhappy with the operation and the effectiveness of power sharing, its members individually or collectively may be tempted to start informal negotiations with another party in order to seek a better deal, even if it is in office with its coalition partner. With this, the government is not guaranteed total support for its legislation.

CONCLUSION

169. The power sharing agreement appears to have acted as a ceasefire. Although it is a necessary arrangement for ending political violence, it is not sufficient for ending Kenya’s political difficulties. It is creating political conflicts among the elites. These conflicts, in turn, affect people’s views on the government. One lesson learnt is that power sharing requires some other arrangements, such as devolved system of government and proportional representation, to stabilise political institutions and politics. Otherwise, the winner-takes-all approach could ignite another cycle of violence.
170. Lack of internal coherence and continuing conflicts in the coalition are reinforcing the image of the government as a ‘two-governments-in-one’. Confidence in government and general satisfaction with the performance of the government is continually declining because of these perceptions. Furthermore, these conflicts are an obstacle to healing and reconciliation at the local level.

⁷⁶ Interview with Retired PCEA leader and NCK council member, March 2009.

⁷⁷ “All Is Not Lost, ODM Tells Supporters,” *The Standard*, February 17, 2009; “Party Not to Blame for Poor Performance, Rails Claims,” *The Standard*, February 17, 2009.

⁷⁸ “ODM: We Are Unhappy with the Coalition Partner’s Conduct,” *The Standard* January 5, 2009.

⁷⁹ “PNU Rejects Demands on Coalition,” *Daily Nation*, March 5, 2009, pg 40

5. AGENDA ITEM 4: LONG-STANDING ISSUES AND SOLUTIONS

BACKGROUND

171. The parties to the mediation process and the Panel of Eminent African Personalities recognised several underlying issues that had caused the crisis in Kenya. If left unaddressed, these issues pose a threat to the very existence of Kenya as a unified country. The mediation process formulated Agenda Item 4 as a framework for undertaking coherent and far-reaching reforms to specifically address the root causes of recurrent conflict and create a better, more secure and prosperous Kenya for all.
172. The long-standing issues identified under Agenda Item 4 were:
- (a) undertaking constitutional, legal and institutional reforms;
 - (b) undertaking land reforms;
 - (c) tackling poverty and inequality, and combating regional development imbalances;
 - (d) tackling unemployment, especially among the youth;
 - (e) consolidating national cohesion and unity; and
 - (f) addressing transparency, accountability and impunity.
173. This section discusses progress made in implementing each of these components in the period between January and April 2009.

STATUS OF IMPLEMENTATION

Summary of findings

a) Constitutional, Legal and Institutional Reforms

Constitutional

- Legislation to jumpstart the constitutional review process has been enacted. A Committee of Experts has been appointed to spearhead the review process under the new law. The Committee has taken office and is scheduled to roll out its work plan

Institutional

- The Judiciary has finalised and launched its 2009-2012 Strategic Plan to address the institution's image and restore public confidence in it. New Civil Procedure rules to simplify court processes and enhance case management are expected to be adopted
- Recommendations to set up a gender taskforce within the police force and streamline recruitment and training of officers are being implemented
- A new public service superannuation contributory pension scheme has been launched. Retirement age for civil servants raised from 55 to 60 years

- Parliament has adopted new Standing Orders and is implementing them.

b) Land Reforms

- The government is recovering illegally or irregularly allocated tracts of land and compiling a draft National Land Use Management policy

c) Poverty, Inequality and Regional Imbalances

- Progress is being made to implement Vision 2030. Rules for public-private partnership have been gazetted.

d) Unemployment Particularly among the Youth

- The government has launched the *Kazi Kwa Vijana* programme and developed a Marshall Plan for equipping youth with skills

e) Consolidating National Cohesion and Unity

- The National Cohesion and Integration Act, 2008 has come into force
- Process to establish TJRC initiated and list of nominees presented to the Parliament

f) Transparency, Accountability and Impunity

- Investigations of corruption allegations have resulted in the suspension and/or dismissal of some government officials

Undertaking Constitutional, Legal and Institutional Reforms

a) Constitutional Reforms

174. The mediation agreement outlined essential steps for the attainment of a new constitution. The Constitution of Kenya (Amendment) Act, 2008 and the Constitutional Review Act, 2008 also reinforced these steps:
- (a) Parliament to enact a Review Statute, including a timetable;
 - (b) Parliament to enact a referendum law;
 - (c) A Draft Constitution to be prepared in a consultative process with expert assistance;
 - (d) Parliament to approve the Draft Constitution; and
 - (e) Kenyans to enact a new Constitution through a referendum.

Progress towards constitutional reform

175. *Constitutional Review Laws*: In December 2008, the constitutional review process kicked off with the enactment of the Constitution of Kenya (Amendment) Act, 2008 and the Constitutional Review Act, 2008. The laws were enacted about three months later than anticipated, implying that the review process is already behind schedule.
176. The laws have gaps and discrepancies that could invite unnecessary litigation. For instance, the Constitution of Kenya (Amendment) Act, 2008 provides for the Interim Independent Electoral commission (IIEC) as the body to supervise the referendum while the Constitution of Kenya Review Act refers to the Electoral Commission of Kenya. The Review Act, 2008 refers to the High Court and not the Interim Independent Constitutional Dispute Resolution Court envisaged by the Constitution of Kenya Amendment Act, 2008. The deletion of the Fourth Schedule

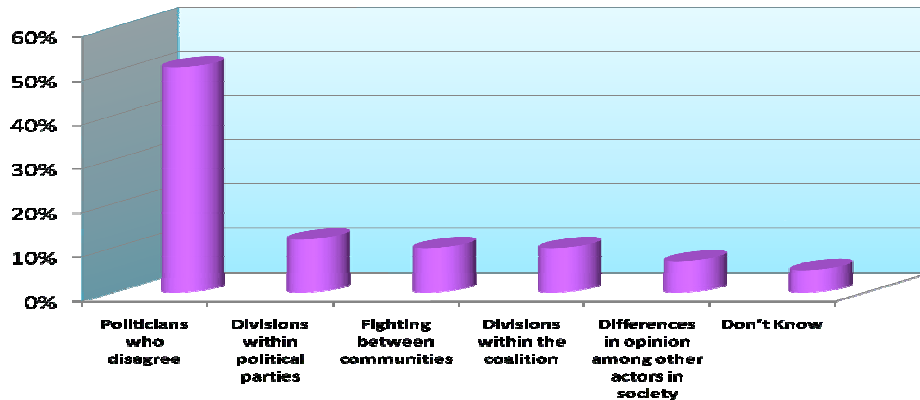
of this law, which contains the list of interest groups as provided for in section 31 of the Constitution of Kenya Review Act, 2008 is another sticking point. Litigation or contestations around some of these issues could delay the process. These anomalies should be corrected with speed.

177. *Committee of Experts:* On February 10, 2009, Parliament endorsed the names of nine experts as well as that of a Director nominated by the Parliamentary Select Committee on Constitutional Review to spearhead the review process. The Committee is expected to complete its task and deliver a new constitution within a year. However, it is not clear when the countdown begins - whether from the date of commencement of the Act or from the date the Committee was constituted.
178. There is a three-month gap between the two points. It is important for the government to clarify – by law – the actual time when a new constitution will be in place. The public is expectant about a new constitution because it would unlock other reforms and solutions to long-standing issues. Lack of clarity on these dates in the face of public anxiety only generates unnecessary tension.
179. It is commendable that the Kenyan experts to the Committee do not represent ethnic regions. Past representation on the constitution making body took into account ethno-regional interests and, therefore, fomented political divisions at the outset. Appointing members on the basis of skills and expertise is a measure against such interests. However, the delays in equipping the Committee's offices are regrettable and affect its work plan. Bureaucratic challenges in procuring resources must be addressed with speed. Internal cohesion for the Committee is also critical to enable it to make up for lost time. Political divisions in the review process usually emerge when experts represent partisan interests. For this reason, the Committee should account to the public through structured and timely media briefings, citing both progress made and challenges experienced. This should create demand for cohesion and action.
180. *Consultations with Stakeholders:* The Ministry of Justice, National Cohesion and Constitutional Affairs has consulted with various stakeholders, including religious leaders, the media, professional bodies, civil society and trade unions on the review process. The Committee of Experts has also called for memoranda from groups and individuals on areas that are contentious in the new constitution.
181. Some politicians (national political elite) appear to place a low premium on the constitution review process. Between January and April 2009, few politicians publicly discussed the importance of speeding up the process, yet they have extensively discussed new elections and renegotiation of the National Accord. It is possible that politicians will have little interest in the process at the beginning only to cause disruptions and unnecessary delays much later. In fact, the survey conducted in the post-election violence areas shows that disagreements among politicians are the main threat to the completion of the review process.
182. These challenges notwithstanding, the public is sceptical about getting a constitution that reflects their aspirations. In the post-election violence areas, about 51 per cent of the respondents thought the new constitution would be unsatisfactory. Only 34 per cent of the respondents felt confident that it would address the needs of Kenyans. Asked what they thought a new constitution should cover to make it relevant to the needs of Kenyans, respondents identified jobs for the youth (20 per cent), more rights (19 per cent), and the redistribution of resources (18 per cent). They also mentioned institutional reforms, including reducing presidential power (11 per cent), strengthening Parliament (7 per cent), Majimbo or decentralisation (6 per cent), and the creation of the post of a Prime

Minister (4 per cent). This suggests that people are conscious of having constitutional reform that addresses the core of development problems in Kenya and which is at the core of its political issues. Thus, Kenyans are conscious about what they want in a new constitution.

Figure 5: Challenge towards making a new constitution

Challenge towards making a new constitution



b) Judiciary

183. The mediation process envisaged the following reforms in the Judiciary:
- Constitutional review to anchor judicial reform measures.
 - Enactment of a Judicial Service Commission Act.
 - Streamlining the functioning of legal and judicial institutions by adopting a sector-wide approach to recruitment, training, planning, management, and implementation of programmes and activities in the justice sector.

Progress on judicial reforms

184. Some of the judicial reforms envisaged in the mediation process depend on the enactment of a new constitution. A new constitution is expected to provide for greater judicial independence as well as enhance transparency in the management, appointment and discipline of Judges. Further, it lays the basis for the enactment of the Judicial Service Act, expected to be in place within three months of a new constitution coming into force.
185. *Judicial Service Bill*: The aim of this Bill is to evolve an independent, efficient and effective Judiciary. The mediation process envisaged that the Bill would be enacted following the adoption of a new constitution because some of its provisions require amendments to or enactment of a new constitution. However, to evolve an efficient and effective Judiciary does not require a new constitution. The Judiciary must take proactive lead steps to address the causes of its inefficiency. Nevertheless, there are other broader factors that administrative approaches alone cannot tackle. For example, the growing perception of political influence and patronage requires more elaborate approaches than administrative actions. Judicial reforms, therefore, need

to be seen in the context of broader social-political reforms, which only a new and democratic constitution can deliver. Nonetheless, the Judiciary has launched a new strategic plan to address some of its internal challenges.

186. *Judiciary's Strategic Plan*: The Judiciary finalised and launched its 2009-2012 Strategic Plan on March 20, 2009. The plan identifies the enactment of the Judicial Service Bill, improving human resource capacity within the Judiciary and establishing a communication department as important objectives.⁸⁰ The Judiciary also organised an Open Day on March 20, 2009 under the theme: "To Provide Expeditious Administration of Justice". The Open Day enabled the public to interact with Judiciary staff. Further, the Judiciary is also starting digital audio recording of court proceedings and developing a computer-based case tracking and management system. In addition, the Rules Committee has adopted new Civil Procedure rules. One of its aims is to simplify court processes and put the management of cases on the shoulders of the judicial officers rather than the litigants.
187. While these administrative and technical steps are important, they are not sufficient to address the problems in the Judiciary. Issues such as failure to expedite the fight against corruption, claims of political influence and patronage in the appointment of Judges and in the constitution of the Judicial Service Commission, as well as the general lack of independence of the Judiciary from the Executive cannot be addressed administratively. Only a radical transformation of the relations between the Judiciary and the Executive can. A new constitution provides an opportunity to revise this relationship. In spite of these observations, there is no public debate on what the new constitution should provide with respect to addressing the weaknesses of the Judiciary.

c) Police reforms

188. The mediation process outlined these steps to reform the Police:
- (a) Constitutional review to establish an independent Police Commission.
 - (b) A review and definition of the role of the Administration Police.
 - (c) A review of laws and issues related to security and policing (including setting up an Independent Complaints Commission, citizen oversight of police services, enhanced information disclosure, human resource management and capacity building) to bring the police in line with modern democratic norms.
 - (d) Finalisation and rollout of the National Security Policy to enable relevant sectors to develop their specific sectoral policies.
 - (e) Recruiting and training more police officers to raise the police-to-population ratio to UN standards.

Progress on police reforms

189. *Independent Police Commission*: The completion of the constitution review process will provide the springboard for far-reaching reforms in the police force, including the establishment of an independent Police Service Commission. However, some reforms within the police force cannot await the adoption of a new constitution and should be undertaken immediately. Focused interventions to change the behaviour

⁸⁰ Interview with a Senior official, the Judiciary, March 2009.

of the police in how they handle violence, investigate crimes, and make arrests are required long before thorough constitutional reforms. Complaints about recruitment not being merit-based and the general demand to make the police more professional in their relations with the public should also be addressed.

190. The Police Oversight Board would have addressed some of these issues; but it is yet to commence work seven months after its formation in September 2008.⁸¹ Furthermore, the Board has been criticised for lacking independence, powers, funding and staffing. It suffers a credibility crisis. It is commendable, however, that the police are aware of some of the problems within the force. For instance, the police force has prioritised training of staff to address some of these issues and has also taken measures to discipline errant officers.⁸² Without legislative measures to facilitate police reforms and without an institutional overhaul, it will be difficult to achieve administrative reforms.
191. *Role of the Administration Police:* Not much progress was recorded in reviewing and defining the role of the Administration Police. Further, the review of laws and issues related to security policing has not been undertaken, and the National Security Policy has also not been finalised.
192. Overall, progress to radically transform the police force was not visible by end of April 2009. For any impact to be felt, police reforms should be seen in tandem with reform of the security sector in general. Thus, there is need to begin fast-tracking reforms in the sector even as the country awaits a new constitution on which comprehensive reforms will be anchored. A critical transformation is needed in this sector even before the country goes to the next General Election, or even to the referendum.

d) Civil Service

193. The mediation process outlined these steps as pertinent to reforming the civil service:
 - (a) Parliament should pass a Bill incorporating civil service reform measures from past proposed draft constitutions.
 - (b) Ongoing administrative and financial reforms should continue.
 - (c) Results-based management and performance contracting should cover all persons paid by public funds.
 - (d) Parliament should review the Anti-corruption and Economic Crimes Act, 2003, and Public Officer Ethics Act, 2003 on incomes, assets and liabilities. This will establish an efficient institutional framework that devolves authority to the lower levels administratively, is compliance-driven and open to analysis.
 - (e) Constitutional and legal reforms to facilitate parliamentary vetting of appointments to senior public positions.
 - (f) New legislation on whistle-blower protection, freedom of information and operationalisation of the Witness Protection Act, 2006.
 - (g) Review of recruitment legislation to institutionalise the national character in the public service.

⁸¹ *Daily Nation*, February 27, 2009, "Watchdog Yet to Start Work".

⁸² Interview with a senior official, the Kenya Police, March 2009.

Progress on implementation

194. Various civil service reforms are ongoing. The mediation process envisaged performance contracting for all persons paid by public funds. In this regard, Results-based Management and Performance Contracting have been embraced at various levels of the public service.⁸³ In the period under review, the results of the performance of ministries and government departments were released amid controversy over assessment tools.
195. Other features of civil service reform include the new public service superannuation contributory pension scheme and the increase in the retirement age of civil servants from 55 years to 60. Teachers have opposed the pension scheme, saying the government should outline a distinct retirement plan for them.⁸⁴ The youth have also protested against raising the retirement age of civil servants as it locks them out of employment. However, many civil servants are still productive at the age of 55. The government also trains officers until the age of 47. With the retirement age at 55, the government tends to lose people before it has effectively utilised them.
196. *Parliamentary Vetting of Senior Public Appointments*: The mediation process envisaged Parliament vetting in appointments to public positions established under the National Accord. Parliament has nominated and vetted appointments to the Committee of Experts on the constitution review as well as the members of the Interim Independent Electoral Commission (IIEC). Although this is a positive move, it has also unnecessarily politicised commission positions. Political interests around these positions have the potential to erode public confidence in institutions.
197. At the same time, vetting has delayed appointments as partisan interests for control of important institutions, thus creating tension between the Executive and the Legislature. This tension revolves around whether Parliament should both nominate and vet appointees or restrict itself to vetting the Executive's choices. Constitutional and legal reforms can clearly define and anchor the role of these two arms of government in the making of public appointments.

e) Parliament

198. Parliament has continued with its reform process as envisaged under the mediation agreements. The targets are as follows:
 - (a) Comprehensively review parliamentary Standing Orders and procedures to enrich the quality and output of debates and strengthen multiparty democracy.
 - (b) Strengthen Parliament's research centre.
 - (c) Introduce live coverage of parliamentary proceedings and electronic voting;
 - (d) Enhance Parliament's oversight role in the national budget;
 - (e) Review Standing Orders to create a monitoring and implementation committee.
 - (f) Introduce stricter and timelier deliberations on reports by institutions such as the Kenya Anti-Corruption Commission, the Kenya National Audit Office, the State Law Office, and the Kenya National Commission on Human Rights.

⁸³ Interview with senior officials, the Ministry of State for Public Service, March 23, 2009.

⁸⁴ *Daily Nation*, March 13, 2009, "Teachers Reject Pension Plan".

- (g) Strengthen organs of Parliament, such as the Parliamentary Investment Committee to promote transparency, accountability in the utilisation of public resources;
- (h) Improve transparency of MPs by creating a register of interests and opening up parliamentary committee work to the public.
- (i) Review parliamentary Standing Orders to ensure that membership of oversight committees is based on competence and integrity.

Progress towards reforming Parliament

- 199. *Review of Parliamentary Standing Orders:* Parliament has adopted new Standing Orders aimed at increasing transparency and accountability to the public. Sensitisation meetings for parliamentary staff, Members of Parliament and civil servants handling parliamentary questions have been undertaken in readiness for the Standing Orders coming into force.
- 200. *Parliament's Research Centre:* The mediation process prioritised strengthening of the Research Centre to offer services to Parliament and other users. In February 2009, three new researchers were recruited to staff the Research Centre.
- 201. *Live Coverage and Electronic Voting:* Live broadcast of proceedings through the Kenya Broadcasting Corporation has contributed to enhanced public interest in parliamentary debates. The public can follow deliberations on the floor of Parliament. Parliament is also acquiring its own broadcast equipment to ensure greater access and success of the live broadcasting project.
- 202. *Parliament's Oversight Role in the National Budget:* The Standing Orders are also aimed at increasing Parliament's oversight role. Order 143 expressly provides for the Minister responsible for Finance to lay before the House a Budget Policy Statement by March 21 of each year. This provision gives Parliament a longer period to scrutinise the Budget. This new provision's impact will only come into effect once Parliament undertakes its oversight role. This oversight role was to be enhanced through enactment of the Fiscal Management Bill at the end of 2008. The President returned the Bill to Parliament, however, with a memorandum outlining his objections to it. By end of April, Parliament had yet to debate the memorandum but it has rekindled discussions on the appropriate balance of power between the Executive and the Legislature.
- 203. *Improving Transparency of MPs:* There is no apparent progress made in opening up the work of parliamentary committees to the public. MPs have been repeatedly criticised for not paying tax on their allowances. In response to these criticisms, the Speaker appointed a taskforce to receive views from the public on remuneration and taxation of MPs.

Undertaking land reforms

- 204. The mediation team prioritised the following steps to address land issues in Kenya:
 - (a) Constitutional review to address fundamental issues of land tenure and land use.
 - (b) Development and implementation of land policies, taking into account the linkages between land use, environmental conservation, forestry and water resources.

- (c) Finalisation of the draft National Land Policy and enactment of attendant legislation.
- (d) Establishment of transparent, decentralised, affordable and efficient GIS-based Land Information Management System and GIS land registry at the Ministry of Lands, and in local authorities.
- (e) Replacement of land ownership documents lost in the post-election violence.
- (f) Development of a National Land Use Master Plan, taking into account environmental considerations.
- (g) Establishment of a Land Reform Transformation Unit in the Ministry of Lands to facilitate the implementation of the land reform programmes as outlined in the National Land Policy.
- (h) Strengthening local level mechanisms for sustainable land rights administration and management.
- (i) Finalising the Land Dispute Tribunal Act.

Progress towards land reforms

205. Land remains the single most important cause of friction in Kenya. It is a threat to security and peaceful co-existence, especially in multi-ethnic areas. Interviews at the local level reveal that in many areas where residents derive their livelihood from land, the lack of alternative means of subsistence has raised intense demand for land. Further, the cultural significance of land in certain regions has in certain cases overshadowed its use as a factor of economic production. Combined with population pressure on arable land, these factors have sustained access to land as a source of tension in these areas.
206. *Draft National Land Policy:* There was no significant movement towards the adoption of the National Land Policy in the period under review. However, adoption of the National Land Policy is critical for the stability of the country as well as for enhancing the land rights of many people in different parts of the country.
207. While no legislative reforms were effected, public pressure has pushed the Ministry of Lands into repossessing illegally acquired property. Media reports show the Government had recovered large tracts of land and cancelled allotment letters for 102 plots and 17 title deeds that had been irregularly issued to individuals.⁸⁵ The delay in adopting the draft National Land Policy, submitted to the Cabinet in February 2009, has aroused campaigns by civil society and other professionals to push for its adoption. There has also been pressure against adopting the policy, underlined by fears that it could provoke a political conflict.
208. *Addressing the Mau Problem:* The continued degradation of Mau Forest, an important water catchment area, and its negative environmental consequences, remains an issue of concern. In the period under review, the taskforce appointed by the Prime Minister to investigate ownership of land within the Mau Forest finalised its work and presented its report. Some members of the task force, however, disowned the report. Nonetheless, the government's inability to act decisively to address these issues betrays the nexus between land and political patronage.
209. Despite the widespread acknowledgement of the existence of an unjust land distribution system in Kenya, only 11 per cent of the respondents interviewed in our

⁸⁵ *Daily Nation*, January 21, 2009, "Wako to Publish New Bill on Ndung'u Land Report".

survey called for the prioritisation of land allocation to the local community. A further 5 per cent of respondents recommended that communities should own land in their ancestral lands. This could suggest that healing and reconciliation measures in the areas that were most affected by the post-election violence are inspiring community reconciliation.

Table 4: Things that the coalition government must do to address land problems in your community

Things that the Coalition government must do to address land problems in your community

Enact laws to assist in settling disputes	24%
Distribute land to the landless	23%
Ensure land grabbers have surrendered illegally owned land	20%
Prioritize land allocation to the local community	11%
Allow for both men and women to inherit land	7%
Allow communities only to own land in their ancestral homes	5%
Issue title deeds	4%
Other	4%
Don't know	2%

210. *Land Use Policy and Land Reform Transformation Unit:* The Ministry of Lands drafted the National Land Use Policy, which aims to “promote sustainable use of land in order to ensure maximise economic and socio-political benefits for the people while minimising environmental and cultural negative effects”⁸⁶. Further, subject to the recommendations in the draft National Land Policy, the Land Reform Transformation Unit continued to put together an implementation framework that will review legislation to harmonise and/or repeal contradictory laws and bodies dealing with land issues.
211. *GIS-based Land Information Management System:* The government has undertaken to enhance computerisation of ministry transactions, including the land surveying system by scanning surveyed land images and file tracking in land adjudication, hence minimising loss of files.⁸⁷
212. These findings show little progress in adopting a National Land Policy. The progress towards Cabinet adoption of this policy has been slow. Significant in the failure to adopt the National Land Policy is inability to give political direction to the resolution of the national land question. Because land and power are interconnected in countries that depend on agriculture, continued procrastination on the adoption of the draft National Land Policy will create room for the politicians and other influential people who own huge tracts of land to design strategies to undermine the policy. Democratic land reforms are, therefore, difficult without a

⁸⁶ Ministry of Lands, Draft Concept Paper on the National Land Use Policy dated March 2009.

⁸⁷ Meeting with a senior officer, Ministry of Lands, March 2009.

democratic constitution. A new constitution would give impetus to radical land reforms.

Tackling Poverty and Inequality

213. The mediation process identified some key steps to address this phenomenon, which are echoed in Kenya's Vision 2030 and the first Medium-Term Plan, 2008-2012. These include:
- (a) Ensuring equity and balance are attained in development across all regions, including job creation, poverty reduction, improved income distribution and gender equity.
 - (b) Increasing community empowerment through devolved public funds for both social and income programmes, and developing local capacity to manage devolved funds.
 - (c) Implementing policies and programmes that minimise the differences in income opportunities and access to social services across Kenya, with special attention to the most disadvantaged communities in the arid and semi-arid districts, urban informal settlements and pockets of poverty in high potential areas.
 - (d) Improving opportunities for disadvantaged groups and regions to create wealth through increased infrastructure spending on roads, water, sewerage, communications and electricity that targets poor communities and regions.
 - (e) Increasing availability of affordable and accessible credit, savings programmes and appropriate technologies to create an enabling environment for poor communities to take part in wealth creation.
 - (f) Developing an affirmative action policy and enhancing the Women's Enterprise Fund.
 - (g) Improving health infrastructure in under-served areas through construction or rehabilitation of community health centres.

Status of implementation

214. *Famine and the Rising Cost of Food Prices:* The period under review witnessed continued increase in the cost of commodities on the back of a severe famine. Some leaders at the same time expressed doubts about the government's ability to realise Vision 2030. The government, on March 20, 2009, gazetted the private-public-partnership rules expected to enhance the involvement of private actors in funding some of the activities in Vision 2030. Further, strategic plans and performance contracts in the public service are being reviewed to ensure consistency with the goals set out in Vision 2030 and the Medium Term Plan 2008-2012.⁸⁸
215. Interventions to tackle poverty, inequality and regional imbalances may not show impact immediately, but it is important that a clear policy framework to guide development strategies towards the achievement of set goals is in place. One challenge in tracking this component is the paucity of current data. For example, the last Kenya Integrated Household Budget Survey was in 2007. Thus, to

⁸⁸ Interview with Secretary, National Economic and Social Council, April 2009.

determine the actual poverty levels since the signing of the National Accord would be difficult.

216. *Effects of the Economic Crisis on Implementation of Vision 2030:* The effects of the economic crunch that followed the global financial crisis are gradually showing in Kenya. The government, through the Ministry of Finance, announced fiscal austerity measures, including cuts in public spending. Some government programmes slowed down project implementation. Moreover, the Nairobi Stock Exchange continued to suffer from a crisis of confidence. These developments pose a threat to the goals of Vision 2030 and the intermediate development programmes addressing poverty and inequality.
217. Pro-poor projects in the Budget have been ring-fenced, meaning that even when the government reduces its expenditure, these items will not be affected. Commendable progress has been made in improving the management and operations of the Constituency Development Fund. Following amendments to the Constituency Development Act in 2008, a CDF Board was appointed in place of the CDF National Management Committee. In March 2009, a Chief Executive Officer was hired. However, only half of the total Constituency Development Fund allocations have been disbursed this financial year, apparently because the government is strained financially.⁸⁹
218. One area that still poses a challenge is the prudent utilisation of resources at the community level and the monitoring of progress. In the last quarter of 2008, a group of civil society organisations under the umbrella of the National Taxpayers Association released a report detailing mismanagement of some devolved funds. The report raised controversy, with several Members of Parliament accusing the authors of sensationalism and not conducting a scientific study. However, the report's release highlighted the need to ensure a systematic and periodic audit of the use and management of decentralised funds.
219. *Creation of New Districts:* New administrative districts were created during the period under review; about 55 of them were scheduled for gazetting during the month of May. Interviews in some areas show that the new districts have provided employment opportunities to the youth, among other things.⁹⁰ The creation of new districts brought to the fore debate on community empowerment *vis-à-vis* politics. Concerns, for example, were raised regarding the speed with which the districts were created while a law has been passed to draw boundaries and review them. There is need for clear objectives that guide the creation of districts because of the important role that any decentralisation unit plays in national development. There is need to create districts based on well defined criteria and, in particular, those that seek to establish them as units for promoting participatory development and enhancing community empowerment and political accountability.

Tackling Unemployment, Particularly among the Youth

220. The youth, and mainly those unemployed, played a key role in perpetrating violence in the aftermath of the 2007 election dispute. In recognition of this, the mediation process recommended the following reforms to enhance employment among the youth.

⁸⁹ Interview with Economic Secretary, Ministry of Planning, National Development and Vision 2030, held on April 19, 2009.

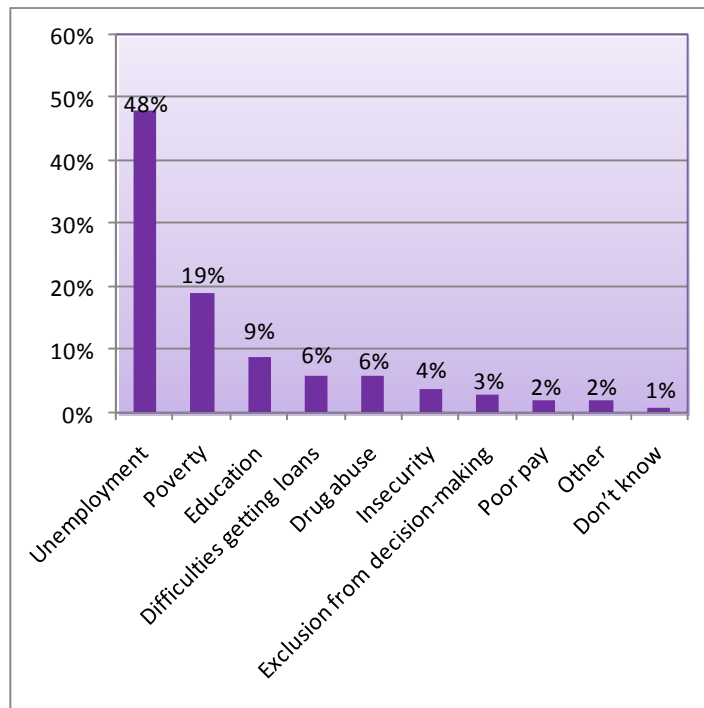
⁹⁰ Investigations at the District Steering Groups.

- (a) Generating an average of 740,000 new jobs each year from 2008 to 2012.
- (b) Revitalising and expanding youth polytechnics in all districts to facilitate training of young people in technical, vocational and entrepreneurial skills to enable them to participate fully in productive activities.
- (c) Rehabilitating youth empowerment centres and establish three new ones.
- (d) Developing and enacting the National Youth Council Bill.
- (e) Establishing youth enterprise and employment programmes to promote small and medium-scale enterprises as well as self-employment among the youth.
- (f) Increasing youth enterprises and development funds and putting in place mechanisms for easier access to credit and collateral.

Progress on implementation

221. *Job Creation:* For the Coalition Government to satisfy the youth in the country, it must create many jobs rapidly. Respondents in a survey in the post-election violence areas pointed out that the youth mostly complain about lack of employment opportunities. Unemployment yields poverty and leaves youth open to the temptation to engage in activities detrimental to their wellbeing such as drug abuse and crime. Unemployment makes the youth a target for misuse by political leaders.

Figure 6: What are the main issues that the youth in this area complain about? (aggregate responses)



222. Based on these findings, it is clear that unemployment among the youth is an urgent challenge. The government has undertaken various reforms in an effort to enhance employment among the youth. These include acquisition of a Ksh2.9 billion loan from the African Development Bank (ADB) to finance a Technical, Industrial,

Vocational and Entrepreneurship Training (TIVET) project in response to the problem of huge numbers of unskilled and unemployed youth.

223. *Youth Enterprise and Employment Programme*: The government has instituted programmes to tackle poverty among the youth. One such programme is the “*Kazi kwa Vijana*”. The President and the Prime Minister launched the Ksh15 billion short-term programme on March 12, 2009 in Kajiado District in an effort to address hunger, taking note of the current famine in the country, while tackling unemployment.⁹¹ It will enable the youth to work on key infrastructure projects, creating 300,000 jobs. One of the criticisms of the programme, though, is that it focuses on youth with low-level skills. There is need to address the plight of the unemployed youth who are highly skilled.
224. The government has also put in place a long-term plan to promote employment among the youth through various programmes. While these measures are important, the huge number of dependent young people in the demographic profile is a cause for concern. Without adequate job opportunities to engage the youth effectively, the lure of recruitment into illegal groups or other illegal activity that provides an income is hard to resist.

Consolidating National Cohesion and Unity

225. The post-election violence resulted in deep divisions along ethnic lines. In order to attain a cohesive and peaceful society, the mediation process put forth the following action points pertinent to consolidating national cohesion and unity.
- (a) Finalising and supporting the enactment of the National Cohesion and Integration law.
 - (b) Parliament and the Executive initiating and sustaining advocacy on ethnic and racial harmony.
 - (c) Establishing and operationalising a policy and institutional framework for peace-building and conflict resolution, and early warning mechanisms on social conflict, as well as enactment of the Alternative Dispute Resolution Bill.
 - (d) Extending the District Peace Committee framework to the entire country and linking it to District Security Committees.
 - (e) Finalising the Hate Speech Bill and reviewing the Media Act to deal with incitement.
 - (f) Undertaking civic education on ethnic relations.
 - (g) Inculcating a civic culture that tolerates diversity and encourages inter-ethnic cooperation, through the school curriculum.
 - (h) Operationalisation of the TJRC

Progress towards implementation

226. The government has undertaken legislative measures to enhance national cohesion and integration. However, save for passage of the National Cohesion and Integration Act, both the Legislature and the Executive have not taken on a meaningful role in enhancing ethnic harmony. Instead, political conflicts over the past few months seem to have taken ethnic overtones reminiscent of the 2007

⁹¹ Interview with a Chief Economist at the Ministry of Youth, March 2009.

elections campaigns.⁹² In order to enhance national cohesion, it is imperative that the citizenry articulates national ethos that will result in public sensitivity to negative or criminal activities.⁹³

227. *National Cohesion and Integration Act, 2008*: In a gazette notice dated March 2, 2009, the Minister for Justice, National Cohesion and Constitutional Affairs operationalised the National Cohesion and Integration Act, 2008 and gave the commencement date as March 9, 2009. The Act outlaws discrimination on ethnic grounds and provides for the establishment of a National Cohesion and Integration Commission.”
228. *Hate Speech Bill and Media Act*: The National Cohesion and Integration Act 2008 makes it an offence under section 1 for any person to use threatening, abusive or insulting words in a bid to promote ethnic hatred. Secondly, the amendments to the Kenya Communications (Amendment) Act in December 2008 included provisions to curb hate speech.
229. Agenda Item 4 identified operationalisation of the Truth, Justice and Reconciliation Commission (TJRC) as one of the main actions to be undertaken by the government. TJRC was expected to complete its work by 2010. The section below discusses progress in establishing the TJRC.

Truth, Justice and Reconciliation Commission

230. The TJRC Bill was adopted and passed by Parliament on October 23, 2008 and became law following presidential assent on November 28, 2008. It came into operation on March 9, 2009. The Act established a Truth, Justice and Reconciliation Commission to promote peace, justice, national unity, healing and reconciliation among the people of Kenya. It is mandated to establish a record, among others, of all past historical human rights abuses, their cause, nature and extent as well as recommend prosecution for perpetrators of gross human rights violations. It is the mandate to facilitate the granting of amnesty to those who make full disclosure about their activities from 1963 to 2008. It will work for a period of two years.
231. In accordance with the Act, a selection panel to spearhead the nomination of six Kenyan Commissioners and also to consider the applications for removal of chairperson and Commissioners was inaugurated by the Minister for Justice, National Cohesion and Constitutional Affairs on 12 March 2009. On 20 March 2009, the selection team called for applications for posts of Commissioners. The team shortlisted 15 names from which Parliament will identify only six Commissioners. On 21 April, in accordance with the Act, the Panel of Eminent African Personalities nominated three non-Kenyan Commissioners for the TJRC. The President is to formally appoint all nine Commissioners.
232. The TJRC process has already suffered several challenges. Civil society raised important concerns on the TJRC Act, arguing that it is flawed in regard to amnesty, victim’s rights, reparations, gender parity and its constitutionality.⁹⁴ At the same time, the TJRC may be faced with lack of witnesses for sensitive cases “due to the

⁹² Interview with a Senior Officer, Ministry of Justice, National Cohesion and Constitutional Affairs, on 24 March 2009.

⁹³ Interview, senior researcher, Nairobi Peace Initiative (NPI), March 2009.

⁹⁴ See paper titled ‘Analysis and Concerns on the Truth, Justice and Reconciliation Commission Bill, 2008 Adopted by the National Assembly on 23 October 2008 and Assented into Law by President Yesterday’ by the Multi-sectoral Task Force on the Truth, Justice and Reconciliation Commission

context of fear currently prevailing in the country resulting from the seeming systematised killings of human rights activists.”⁹⁵ Provisions for witness protection need to be strengthened to enable every witness to take a stand. Studies of truth commissions note that in many cases, truth and justice are pre-conditions to dialogue and reconciliation. Hence, the commissions may end up having a difficult task since the needs of victims may be incompatible with the needs of society. Furthermore, some people may prefer revenge as a form of justice.”⁹⁶ Also TJRC is important for record purposes and for addressing long standing grievances.

233. In Kenya’s politically fragmented society, nominees to the TJRC should be people with a clear track record in advocating reform. The process of appointing commissioners should be insulated from patronage politics to prevent a situation where political parties will seek to have their own people in the Commission as a political pay-off. This will secure credibility for the process. Further, the TJRC will have to be autonomous and independent of the Executive once it begins its operations.
234. Civil society needs to continue agitating for an open and transparent process of setting up the TJRC. In addition, there may be need to inspire public confidence in the TJRC for it to be legitimate. TJRC is a complex process for any nation, therefore, the public must be inspired to hope for an effective process; they need not lose hope. Currently, as a key informant noted, Kenya does not have a leader with a unifying moral voice to do this like Nelson Mandela in South Africa.⁹⁷

Addressing Transparency, Accountability and Impunity

235. The mediation process envisaged various action points to advance increased transparency and accountability, including:
 - (a) Strengthening the policy, legal and institutional framework for increased public transparency and accountability, anti-corruption, ethics and integrity.
 - (b) Undertaking programmes to support improved prosecution and adjudication of corruption and economic crimes.
 - (c) Enhancing capacity and performance in investigations and asset tracing.
 - (d) Continuous monitoring of the Public Officer Ethics Act.
 - (e) Revitalising public financial management, including that of devolved funds.
 - (f) Expanding the capacity of District Anti-Corruption Civilian Oversight Committees to monitor management of devolved funds and stigmatise corruption.
 - (g) Reviewing the effectiveness of the Public Procurement Oversight Authority.
 - (h) Undertaking structural reforms that focus on prevention, investigation, recovery of corruptly acquired assets.
 - (i) Reviewing the effectiveness of the Privatisation Commission.
 - (j) Fully operationalising and building the capacity of the Public Complaints Standing Committee.

⁹⁵ Remarks a Commissioner, KNCHR, during a meeting to discuss the TJRC Act, March 2009

⁹⁶ Interview with retired cleric and former vice chair of a taskforce examining the viability of forming a TJRC

⁹⁷ Interview with a senior researcher, Nairobi Peace Initiative

- (k) Finalising and operationalising the Governance, Justice, Law and Order Sector (GJLOS) policy framework and establishing a comprehensive GJLOS policy.
- (l) Sustaining the African Peer Review Mechanism process by ensuring assessment of the government.

Progress towards implementation

236. In the period under review, there was evidence of the resurgence of high-level corruption, coupled with the failure to fight graft despite the existence of various anti-corruption institutions. The challenge in fighting corruption was occasioned by the absence of adequate legislative measures and the existence of a weak investigation and prosecution system that further restrained the implementation of reforms to curb the vice. A further challenge was the tendency, especially by Members of Parliament, to mobilise ethnicity as a tool in their defence against corruption investigations or queries.
237. The Coalition Government continued to be riddled with corruption scandals during the period under review. The allegations resulted, in certain instances, in the suspension and/or dismissal of government officials to pave way for investigations. Some of the highlight incidents included the following:
- a) Oil scandal: The Kenya Pipeline Company and Triton Petroleum Company Limited were at the centre of a scandal in which financiers risked losing up to Ksh7.6 billion.
 - b) Tourism: The Managing Director of the Kenya Tourism Board resigned in the wake of allegations of irregularly allocating Ksh43 million to private companies.
 - c) Maize scandal: The Minister for Agriculture, William Ruto, was at the centre of allegations that maize had been allocated to briefcase millers and companies, resulting in the loss of over Ksh800 million.⁹⁸
 - d) Anglo-Leasing: The Kenyan government was faulted by the UK government for its failure to cooperate with the British Serious Fraud Office (SFO) in the investigations over the US\$100 million (Ksh8 billion) Anglo-Leasing scandal on security contracts who were paid but did not supply anything. Further, media reports also noted that promissory notes released to pay for the Anglo-Leasing-related supplies would not be honoured, further to a public warning issued by the former Finance Minister. The promissory notes are reportedly still in force.⁹⁹
 - e) Goldenberg: A former Governor of Central Bank of Kenya was the third suspect to be acquitted from the Ksh5.8 billion Goldenberg case after a Cabinet minister and a former head of national intelligence.¹⁰⁰
238. Several factors have frustrated efforts to tackle corruption, including conducting investigations while those implicated are still in office. Kenyans have expressed pessimism over the government's ability to tackle corruption due to the difficulty inherent in establishing how widespread the problem is due to lack of data.¹⁰¹ Up to 46 per cent of the respondents in our survey noted that to fight corruption in Kenya, those responsible for corrupt actions should be sacked and prosecuted. They said

⁹⁸ *Daily Nation*, January 15, 2009, 'Land of Scandals'.

⁹⁹ *Daily Nation*, February 27, 2009, "Promissory Notes 'Will not Be Honoured'."

¹⁰⁰ *Daily Nation*, February 27, 2009, "Wako Pledges to Press on with Goldenberg".

¹⁰¹ *The Standard*, February 1, 2009, "Containing Graft Begins with Attitude Change".

that such an act would set a precedent for others seeking to engage in acts of corruption.

Table 5: most important way to fight corruption in Kenya

Sack and prosecute those responsible	46%
Educate the public on not paying bribes	15%
Make laws that can successfully fight corruption	12%
Address unemployment and poverty	7%
Create an independent and effective anti-corruption body	4%
RTA	4%
Other	12%

239. *Finalising and Operationalising the Governance, Justice, Law and Order Sector (GJLOS) Policy Framework:* The GJLOS Policy Framework has been developed and the first draft approved by the Technical Coordinating Committee. It has, however, not been formally adopted by Cabinet. The framework envisages, among other things, policy dialogues. While these have not started, they could provide useful avenues for developing consensus on requisite reforms and ensuring wide coordination within the sector.
240. The New Partnership for African Development's Secretariat in Kenya continues to assess government performance through the African Peer Review Mechanism and produces annual reports on performance of government ministries, together with progress reports every six months.

CONCLUSIONS

241. The constitutional reform process is central to addressing the long-term issues in Agenda 4 of the mediation process. A review of the matrix of implementation reveals that finalisation of the constitutional review process underpins progress in the majority of the areas in Agenda 4, including those where constitutional reform is not directly mentioned, such as consolidating national cohesion and unity, poverty, inequality and regional imbalances and unemployment, especially youth unemployment. The key role that a new constitution will play in the sustainable resolution of these areas is all too self-evident.
242. In the period under review, the principals did not appear to have full control and overall ownership of implementing reforms. This lack of direction exacerbated by accusations of corruption in the Grand Coalition, have undermined public confidence in the leadership's resolve to push through the envisaged reforms, especially those contained in Agenda Item 4.
243. There is reform inertia and public disillusionment with the entire institutional structure in the country. From the Executive and the Judiciary to the Legislature, citizens' confidence in institutions is at an all-time low. Institutions are not seen as being competent dispensers of their mandate, but avenues for personal aggrandisement, active participants in creating moral decay and practising ills such

as favouritism and ineptitude. It is critical that the reform process gets a fresh impetus to restore public confidence and entice their participation in the reform process.

244. While pursuing truth, justice and reconciliation, it is important to pay attention to how this is done so that the process is sensitive to ethnic politics and divisions. Any perceptions that a process or procedure appears to be in favour of a particular community will compromise the process and prevent it from achieving its goals. Further, credibility and integrity of people appointed to the Commission is critical if TJRC is to create conditions for healing, reconciliation and national cohesion.

6. IMPLEMENTING RECOMMENDATIONS BY COMMISSIONS OF INQUIRY

Background

245. The Kenya National Dialogue and Reconciliation Committee, together with the Panel of Eminent African Personalities, agreed to establish several Commissions of Inquiry including the Independent Review Committee on the 2007 General Elections (IREC) and the Commission of Inquiry into Post-Election Violence (CIPEV). IREC and CIPEV completed their tasks and submitted reports containing several recommendations by the last quarter of 2008.
246. This section of the report discusses the status of implementation of these Commissions of Inquiry and the challenges, if any, experienced in implementing recommendations. We note that Parliament was recalled on January 20, 2009 under special circumstances to deal with the establishment of a Special Tribunal to try suspects of the post-election violence and select members to the IIEC. It was also expected to select nominees to the Interim Independent Boundaries Review Commission (IIRBC) and the Independent Interim Constitutional Dispute Resolution Court (IICDRC).

Status of Implementation

The Independent Review Commission on the General Elections held in Kenya on December 27, 2007

247. Realising that the manner in which the December 2007 elections were held partly led to the January 2008 violence, the AU Panel of Eminent African Personalities proposed the formation of an Independent Review Commission on the General Elections held in Kenya on 27 December 2007 (IREC). The Commission was mandated to examine the 2007 elections from various perspectives. It completed its work and submitted a report of its findings to the Coalition Government and the Panel in September 2008.
248. IREC's conclusion was that Kenya's constitutional and legal framework relating to elections contained a number of weaknesses and inconsistencies that undermined its effectiveness. The Commission called for urgent and radical revision, including consolidation of Kenya's electoral laws. In addition, the commission recommended an overhaul of the electoral management body, including disbandment of the Electoral Commission of Kenya and creation of a new body to manage elections and a boundaries commission.
249. A number of steps have been taken to implement IREC's recommendations. They include:
- the passage of the Constitutional of Kenya (Amendment) Bill, 2008 in December 2008, which effectively disbanded the ECK and set the pace for the establishment of an Interim Independent Electoral Commission (IIEC) that would be in charge of supervising the elections for 24 months or until a new commission is entrenched in a new constitution. The law also proposes the creation of an Interim Independent Boundaries Review Commission, responsible for demarcating new constituencies and civic wards.
 - Disbanding of ECK: In January 2009, an inter-ministerial taskforce on the dissolution of the Electoral Commission of Kenya was constituted to determine how ECK would be disbanded and identify what measures would

be taken in the interim¹⁰². The Task Force presented a report to both the President and Prime Minister in January 2009. Arising from this report, some 466 former employees of ECK were redeployed to the civil service in various capacities, according to their qualifications and skills.¹⁰³ None of the former ECK commissioners were given another posting “but their terminal benefits will be duly settled.”¹⁰⁴

- Selection of the IIEC Commissioners: In January 2009, the Parliamentary Select Committee on the Constitution advertised posts for commissioners to the IIEC, the Interim Independent Boundaries Review Commission and Judges of the Independent Interim Constitutional Dispute Resolution Court (IICDRC). However, Parliament did not ratify the names of the nominated Commissioners to the IIEC. Some members raised issues of integrity and conflict of interest on some of the names. For this reason, some posts were re-advertised.¹⁰⁵ The Parliamentary Committee then conducted fresh interviews and identified several commissioners. In April, Parliament ratified these names, which were to later receive presidential approval.
250. These are important achievements. However, the process leading to these achievements had several weaknesses, which constitute a problematic start in the establishment of the IIEC. First, there were disagreements along political party lines while discussing nominees for the post of chair.¹⁰⁶ Some of the arguments in this disagreement had ethnic overtones, implying that the process was gradually getting ethnicised and politicised. In this context, one MP noted, “different political contestations in Parliament took precedence over the formation of the IIEC.”¹⁰⁷ An important observation is that some MPs rejected some of the nominees because they were concerned about integrity and conflict of interest.
251. The second problem concerned integrity and transparency in the recruitment process. Media reports alluded to instances where some of the candidates not shortlisted for the various positions were interviewed and nominated for consideration by Parliament. Applicants also cited cases where interviews took very few minutes against what one would expect in searches for executive positions.¹⁰⁸ Significantly, background checks had not been done on some of the candidates, yet they were interviewed and names passed for parliamentary approval.¹⁰⁹ Related to this were also media reports that some members of the parliamentary committee were opposed to some applicants being interviewed because the latter had a bad relationship with some ministries.¹¹⁰
252. Thirdly, nomination to the IIEC assumed an ‘ethno-regional’ character. Members were appointed as representatives of the regions where they come from. And since

¹⁰² Office of the President, Permanent Secretary, Secretary to the Cabinet and Head of the Public Service, *Advertiser*, January 21, 2009

¹⁰³ Interview with Permanent Secretary Ministry of Public Service, March 2009

¹⁰⁴ *ibid*

¹⁰⁵ Even if not all the names proposed were contested, the list is supposed to be confirmed as whole. Hence the rejection of one name results in the whole list being null and void.

¹⁰⁶ “Deadlock over Miller,” *Kenya Times Online*,

<http://www.kenyatimesonline.com/content.asp?catid=2&articleId=2552>

¹⁰⁷ Remarks by Cabinet minister Martha Karua during a public forum on power sharing in ethnically divided societies, February 2009

¹⁰⁸ ‘New electoral team faulted’. *The Daily Nation*, 9 February 2009

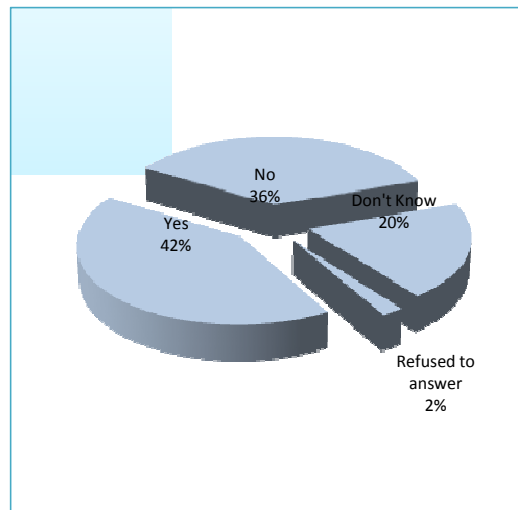
¹⁰⁹ “Sorry for Former ECK Nominee, Says House Team,” *The Standard*, February 23, 2009, pg 4

¹¹⁰ ‘Revealed: Intrigues that led to Miller’s appointment’. *The East African Standard*, 18 February 2009

regions in the country have ethnic characteristics, one may argue that the process to 'tribalise' the new electoral body has begun in earnest. The Independent Review Commission had already identified representation of regions by commissioners as having contributed to reduced integrity of the former ECK. Indeed, some people in government had also proposed a smaller number of commissioners – not exceeding five – to prevent politicians from using ethnic considerations in making appointments to these new bodies.

253. These three challenges imply that the establishment of a new elections body started on a wrong footing. This is problematic for a body that is seeking to re-establish and re-build people's faith and confidence in electoral procedures and processes. These weaknesses should have been avoided to allow people to re-build their confidence in elections and electoral processes. As pointed out by one respondent, 'the credibility and integrity of the body has already been questioned and may be seen as another avenue for politicians to put their people in readiness for 2012.'¹¹¹ Only the integrity and professional conduct of its new officials will vindicate the Commission and restore people's confidence in a new electoral body.
254. If Parliament establishes a new but questionable IIEC which does not have the trust and support of Kenyans, electoral violence is likely to recur. As the survey in areas that experienced post-election violence attests to, 42 per cent of respondents believe a new electoral body will be capable of holding free and fair elections. However, 36 per cent do not think it will.

Figure 7: In your opinion, will a new electoral body be capable of holding free and fair elections?



¹¹¹ Interview with, Civil Society key informant, March 2009

255. Cultivating political cohesion is important for the Coalition Government to pass its reform laws. The principals thus need to lead the reform agenda back on track. Further, insulation of the IIEC from politics by the principals to act for the good of the Kenyan people is key in ensuring the successful implementation of commissions of inquiry recommendations.

Commission of Inquiry into the Post-Election Violence

256. The parties to the mediation expressed a commitment to investigate circumstances related to acts of violence that followed the 2007 election and recommend measures to bring to justice those responsible for criminal acts. Thus, the parties agreed to form a Commission of Inquiry into the Post-Election Violence. The Commission was constituted on May 23, 2008 and tasked to:¹¹²
- (a) investigate the facts and surrounding circumstances related to acts of violence that followed the 2007 general elections;
 - (b) investigate the actions or omissions of State Security agencies during the course of violence;
 - (c) recommend measures of a legal, political or administrative nature, as appropriate including measures with regard to bringing to justice those persons responsible for criminal acts. The Commission was to prevent repeat of similar deeds and in general eradicate impunity and promote national reconciliation.
257. The Commission (popularly referred to as the 'Waki Commission' after the Chair, Justice Waki) submitted its report to the Government and the Panel of Eminent African Personalities in October 2008. It made far-reaching recommendations aimed at addressing the causes and impact of the post-election violence. It recommended institutional and legal reforms as well as the establishment of a Special Tribunal to deal with perpetrators of the post-election violence.
258. The government has taken a number of steps in implementing CIPEV recommendations. These include:
- In November 2008, the Cabinet adopted the CIPEV report and an eight-person Cabinet Committee headed by the President and the Prime Minister laid out the report's implementation framework.
 - On December 16, 2008, the two principals signed an agreement to establish a Special Tribunal to try prime suspects of the post-election violence.
 - On January 20, 2009, the Kenya National Dialogue and Reconciliation Committee finalised a draft statute establishing a Special Tribunal to try suspected perpetrators of the post-election violence and related violations.¹¹³
 - On January 28, 2009, Parliament adopted the CIPEV report paving the way for the introduction of the Statute for the Special Tribunal for debate.
 - In February 2009, Parliament debated and voted against the Constitutional Amendment Bill that would have paved way for the establishment of a Special Tribunal.
259. Besides these steps, in October 2008 the police set up a taskforce to investigate cases of sexual crimes against women during the post-election violence. The

¹¹² See 'Kenya National Dialogue and Reconciliation Statement on Commission of Inquiry into Post-Election Violence,' www.dialoguekenya.org

¹¹³ "Team Finalises Draft Statute on Tribunal," *The Standard* January 20, 2009 pg 25

taskforce completed its work and compiled an internal report. The findings were meant to help the police to prosecute suspects.¹¹⁴

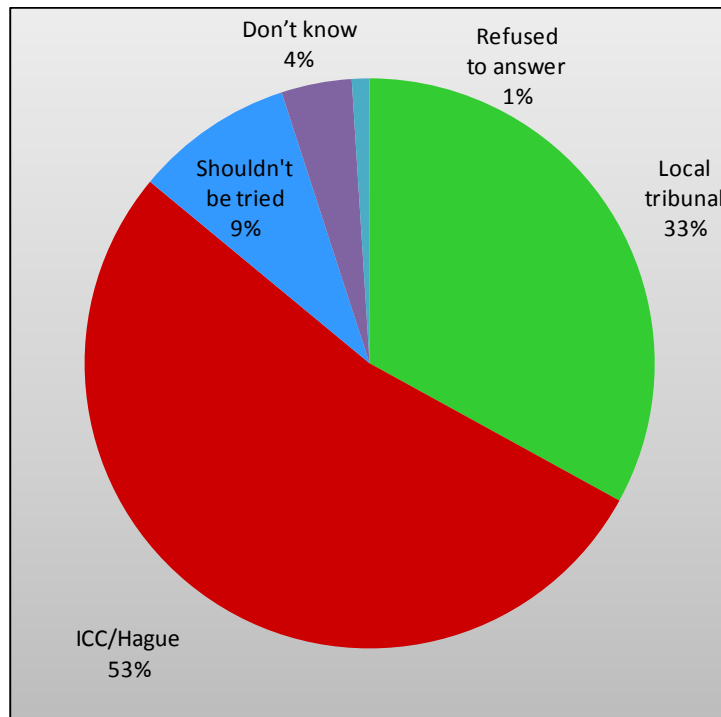
260. Again it is commendable that there has been action and movement with regard to establishment of a Special Tribunal to try those involved in the post-election violence. However, as noted in the discussion on Agenda Item 1 above, prosecution of suspects who may have committed crimes during the period has been slow and highly politicised. Although the police made some arrests early in 2008, there is little to show in terms of actual prosecution. Further delays will have the effect of reducing people's confidence in the process, particularly if the victims continue to see inaction on the part of the government. Significant, of course, is that the suspects will develop a sense of impunity and feeling of victory against the state for their violent behaviour. Without speedy prosecution and with firm evidence against the offenders, justice will be defeated.
261. As already stated in the discussion of Agenda Item 3, establishment of a Special Tribunal became increasingly politicised, with politicians considering the merits and demerits of establishing a local Tribunal or giving room for the suspects to be taken to the International Criminal Court at The Hague. The process is increasingly politicised because some politicians suspect their names or names of their rivals are contained in the list that the Commission handed to the Panel of Eminent African Personalities awaiting the decision to establish a Tribunal or forward the sealed envelope to the ICC.
262. Generally, there are many personal, political and even ethnic considerations surrounding the debate on the Special Tribunal. Politicians from both sides of the divide are 'for' or 'against' the Special Tribunal on the basis of these considerations. They are mobilising for or against the Tribunal depending on how they think the Tribunal will impact on their personal interests and political ambitions.
263. This politicisation of the process to establish a Special Tribunal may lead to people losing confidence in the Tribunal. For the Tribunal to work, therefore, it will require that it is independent and that this independence is guaranteed through a legal framework. Credibility, objectivity and impartiality should be the main principles and values guiding its operations.
264. Notwithstanding the above, some people are not in favour of establishing a local Special Tribunal. From the survey in post-election areas, about half of the respondents feel that the ICC (The Hague) is the best place to try post-election violence suspects. Only 33 per cent favour a local Tribunal. Most of the respondents believe the local Tribunal would be corrupted (15 per cent) while 12 per cent think they will find fair judgment in The Hague. These fears are due to the recognition of weaknesses in the national legal and judicial system.¹¹⁵ The fears are also because successive Kenyan governments have lacked political will to prosecute influential persons for serious offences, including political violence.

Figure 8 : Should those individuals responsible for the post-election violence be tried

¹¹⁴ Interview with a senior police officer, March 25, 2009

¹¹⁵ Government of Kenya, *Commission of Inquiry into the Post-Election Violence report*, 2008, pg 463

through a local tribunal in Kenya or should they be tried by the International Criminal Court in the Hague?



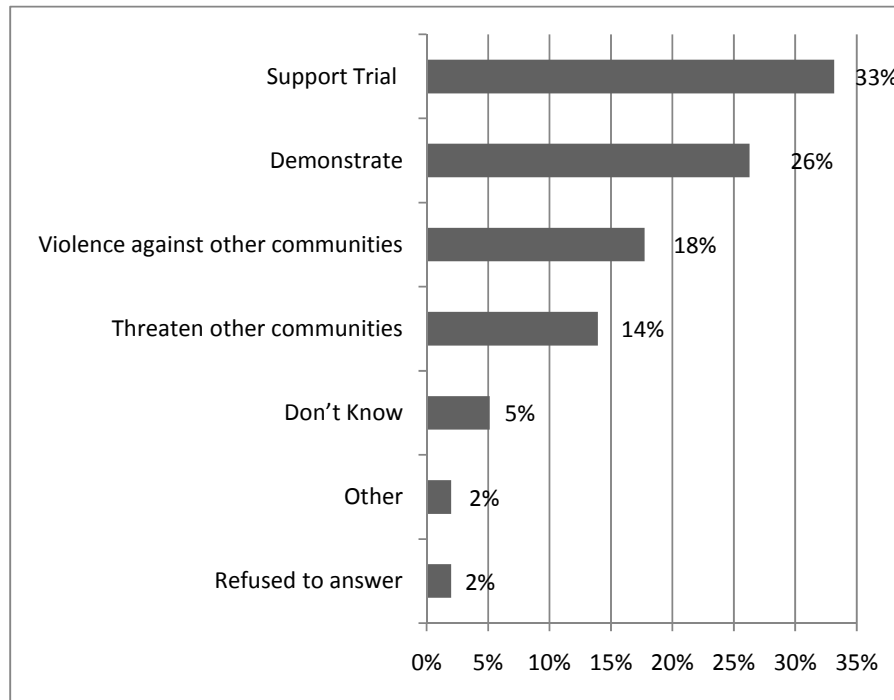
265. Other findings show that the politicians tend to interpret the report in a manner that suits their own interests. This has affected the way the communities they come from see implementation of the report.¹¹⁶ In some parts of the Rift Valley, during the debate on the Special Tribunal, leaflets did circulate warning that there would be violence if the court was established.¹¹⁷ The leaflets are said to have been written by an illegal group, Balarget Land Defence Force/Kalenjin Land Defenders.¹¹⁸
266. Findings of the survey done in the post-election areas reveal that 33 per cent of the respondents will support the prosecution of a senior member of their community for post-election violence while 26 per cent would demonstrate against it. A further 18 per cent would participate in violence against other communities and 14 per cent would threaten them. Thus, prosecutions may be seen as revenge against one community causing the other to retaliate. The finding that a high number of people (33 per cent) would support prosecution is an important one. Perhaps it is dawning on people that political elites are much more concerned with their individual interests than justice for all.

¹¹⁶ Interview with provincial administrator based in Eldoret, January 2009

¹¹⁷ Remarks by Uasin Gishu residents in an interview carried out in December 2008

¹¹⁸ Findings of field research undertaken in Molo and Kuresoi, January 2009

Figure 9: If a senior politician from your community is put on trial for inciting post-election violence, how do you think people in your community will react?



267. *Prosecution Versus Other Proposals:* Overemphasis on prosecution of perpetrators of the violence at the expense of other equally important recommendations is an issue of concern. Politicians appear reluctant to process some of the proposed reforms.¹¹⁹ Among these is the merging of the Administration Police and Kenya Police into a single entity. According to a key informant, politicians refused to take up this agenda since the Administration Police is a symbol of power and penetrate deep into the local level.¹²⁰
268. *Witness Protection:* The Witness Protection Act, 2006, has been faulted for failing to adequately guarantee protection to witnesses of post-election violence.¹²¹ It is likely that a number of key witnesses may stay away from giving crucial evidence due to threats on their lives. About 60 key witnesses who gave evidence at the Commission of Inquiry into the Post-Election Violence have sought refuge outside the country or in other parts away from their homes because of threats on their lives. Some of the reintegrated IDPs in the Rift Valley have negotiated to return to their farms with the promise that they will not give evidence about the post-election violence.¹²² Witness protection, therefore, is an issue that has not been given priority attention, yet witnesses will be critical in providing evidence. With politicisation of the Special Tribunal and increased threats on witnesses, the process to try post-election perpetrators is already in the balance.
269. Though some progress has been made in implementing the Commission's recommendations, there is a need to insulate the proposed reforms from divisive

¹¹⁹ Interview with civil society key informant, January 2009

¹²⁰ Interview with senior police officer March 2009

¹²¹ Interview with a civil society key informant, February 2009

¹²² Interview with a senior police officer, March 25 2009

politics that are now a characteristic of the coalition. Both parties should candidly discuss how to do so and preferably get input from representatives of civil society.

270. In addition, the Coalition Government needs to expeditiously strengthen the Witness Protection Act, which will offer genuine protection to the witnesses. Alternatively, the international community can step in and secure them – if the ICC is an option. They will then give evidence away from home.

GENERAL CONCLUSIONS

271. Progress has been made in implementing some recommendations of CIPEV and IREC. However, their full implementation is threatened by political divisions and politicisation through ethnic mobilisation of constituencies for or against some aspects of the reform agenda. It is paramount that mechanisms are put in place to manage the divisions and cultivate a consensus and build political will. Political leadership, especially by the two principals, is particularly important for this to be realised.
272. Failure by Parliament to pass the Statute to establish a Special Tribunal to try perpetrators of the post-election violence has however provided a negative precursor to the operationalisation of the TJRC Act. This is because the failure seems to give support to the culture of impunity even though the government says it is still committed to establishing a Tribunal.

OVERALL CONCLUSION

273. The discussion has highlighted several conclusions in the different sections. This section recapitulates some of the key issues highlighted so far. It discusses specific conclusions with regard to progress on each agenda item.
274. At the outset, it is important to emphasize some of the main achievements of the coalition government so far. First, political violence has generally stopped and there is calm in most areas that experienced post-election violence. Illegal armed groups are also not politically active, although failure to disband these groups remains an issue of concern. IDP camps have closed down and the resettlement programme has facilitated many to move out of camps. Humanitarian Fund has facilitated IDPs to begin their lives afresh. Healing and reconciliation has had a slow start but on the whole national and local politicians are increasingly involved in reconciling communities.
275. Recommendations by the various Commissions of Inquiry are also being implemented. The constitutional review process has begun and a new Electoral Commission is in place. The Truth, Justice, and Reconciliation Commission is also being established.
276. These are not simple achievements for a country that was heading towards civil war. But this does not by any means suggest that the country has addressed the fundamental factors that contributed to the crisis. Far from it. The progress towards implementing crucial reforms under each of the agenda items has been slow. The approach to some of the issues is also undermining the quest for healing and reconciliation. Furthermore, divisions in the coalition are entrenching the perception of a 'two-governments-in-one' and fomenting public disillusionment and dissatisfaction on this government's commitment to deliver on its goal: achievement of sustainable peace, stability and justice in Kenya.
277. Lack of cohesion in the Coalition Government and the political conflicts animating it are a considerable threat to reforms in the country. They have the potential to push the country back to another crisis and/or exacerbate animosity between communities. This suggests that nothing short of far-reaching social- economic and political reforms – including constitutional and institutional reforms – will end the cycle of violence the country continues to witness.
278. There is need for caution here, however. Not just any kind of reform will satisfy the majority of Kenyans. Reforms that tend to appease the political leaders will not address the root causes of the country's problems. The survey findings show that ordinary citizens prefer not only institutional reforms but also those that will improve their well-being. For this reason, it is important that reforms focus on a constitution that is desirable to the majority of the people.
279. The discussion on Agenda Item I on *Actions to Stop Violence* shows that the problem of militias appears to be growing. The illegal armed groups are growing in number owing to internal factionalism and general mutation. Some groups formed as 'political militia' have accumulated money through criminal activities such as extortion, and have increasingly become independent of politicians. Overall, there are groups around the country that could easily mobilise for political violence. Because of their criminal nature, there is a dilemma on how to deal with them.

280. Findings on Agenda Item 2 on *Addressing the Humanitarian Crisis and Promoting Healing and Reconciliation* show that the situation of Internally Displaced Persons (IDPs) has not improved. Some continue to live in deplorable 'transit' camps where they moved after the government forcibly evicted them from the various camps where they settled during and after the violence. IDPs are yet to get sustainable peace and secure means of livelihood. The handling of the IDP problem poses a threat to healing and reconciliation. This raises a need to develop a comprehensive policy on resettlement of IDPs. Such a policy should evolve in consultation with the IDPs and the local communities.
281. *Agenda Item 3: Resolving the Political Crisis.* Findings show that the Coalition Government is still conducting its affairs without unity of purpose. The image projected and activities support the perception of a 'two-governments-in-one'. There is no cohesion in decision-making and ministers continue to voice divided opinions on crucial issues. These divisions between the coalition parties and within each of the parties are a threat to the reform agenda. They consume time and energy that would better be expended on reforms. Simply put, lack of cohesion is the single most important threat to reforms and to Kenya's future political stability. Disagreement over distribution of power and patronage is likely to spill over into the constitutional review process and frustrate delivery of a new constitution.
282. *Agenda Item 4: Tackling Long-Standing Issues.* The process to jump-start the constitutional review has begun rather slowly. The Committee of Experts has had a slow start, a factor that will certainly affect the work plan and possibly delay completion of the review process. The slow pace of activities is witnessed in other reform imperatives, including land reform. Although Agenda 4 is critical to the future of the country, the slow pace of reforms is worrisome. Mobilising various constituencies to speed up reforms in all respects is critical. Conflicts within the Grand Coalition will, however, undermine not only the speed but also the nature of reforms to be realised.
283. *Implementing Recommendations by Commissions of Inquiry.* Although there is visible movement in implementing some of the recommendations by Commissions of Inquiry, there is also a marked tendency to renege on some of the principles that shaped those recommendations. In this regard, the process of recruiting members of IIEC was highly politicised, with members selected on ethno-regional considerations. Also, the attempt to establish a Special Tribunal to try the perpetrators of post-election violence witnessed highly politicised debate, much of which had ethnic overtones.
284. It appears that various political leaders have forgotten the principles that shaped these recommendations -- the desire to fight impunity and de-ethnicise the political landscape. Objective delivery on these commissions' recommendations is vital if similar ones are to enjoy public support in future.
285. The final observation is that the momentum for radical reforms has reduced. The speed towards another General Election is increasing; yet attempts to address some of the proximate and structural factors that led to unprecedented political violence are not evident. Political cohesion in the Coalition Government and reforms in general are very critical for the stability and prosperity of the country. Without undertaking fundamental reforms, another violent civil conflict could recur. In order to prevent the recurrence of violence, it is critical to fast-track the constitutional review process and provide a democratic constitution rather than what the political elites desire – a Constitution that satisfies their quest for power and satisfaction of personal interests.