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South Consulting - 11th Review Report

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THE KENYA NATIONAL DIALOGUE AND RECONCILIATION (KNDR) MONITORING PROJECT¹

**Progress in Implementation of
the Constitution and other reforms**

Review Report

October 2011



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

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ABBREVIATIONS

AG	-	The Attorney General
AU	-	African Union
CIC	-	Commission for the Implementation of the Constitution
CIPEV	-	Commission of Inquiry into the Post-Election Violence
COIC	-	Parliamentary Constitutional Implementation Oversight Committee
CRA	-	The Commission for Revenue Allocation
ECK	-	Electoral Commission of Kenya
FIDA	-	Kenya- Federation of Women Lawyers
IBRC	-	Independent Boundaries Review Commission
ICC	-	International Criminal Court
IDP	-	Internally Displaced Person
IEBC	-	Independent Electoral and Boundaries Commission
IIEC	-	Interim Independent Electoral Commission
IPOA	-	Independent Police Oversight Authority
IREC	-	Independent Review Commission
KACC	-	Kenya Anti-Corruption Commission
KBC	-	Kenya Broadcasting Corporation
KNCHR	-	Kenya National Commission on Human Rights
KNDR	-	The Kenya National Dialogue and Reconciliation
KNHREC	-	Kenya National Human Rights and Equality Commission
LDP	-	Liberal Democratic Party
MoSSP	-	Ministry of State for Special Programmes
MP	-	Member of Parliament
NARC	-	National Rainbow Coalition
NCIC	-	National Cohesion and Integration Commission
NGO	-	Non Governmental Organization
NHRI	-	National Human Rights Institution
ODM	-	Orange Democratic Party
PEV	-	Post Election Violence
PNU	-	Party of National Unity
PRIC	-	Police Reforms Implementation Committee
RPP	-	Registrar of Political Parties
TJRC	-	Truth, Justice and Reconciliation Commission

EXECUTIVE SUMMARY

1. The adoption of a Constitution in August 2010 is a major milestone in Kenya's tortuous reform journey. The Constitution is an important achievement for the coalition government and a significant step in the process of addressing the longstanding issues that triggered the post-2007 election violence. Under the Kenya National Dialogue and Reconciliation agreement, the parties committed to finding lasting solutions to many problems by fast tracking constitutional and institutional reforms and taking measures to address long standing issues to prevent a recurrence of violence.
2. South Consulting has been monitoring implementation of the reforms from 2008. This is the third review report for the year 2011. It is also the third review report under the new Constitution. Previous reports covering the period between December 2008 and June 2011 can be found at www.dialoguekenya.org.
3. This report covers the July to September 2011 period. It focuses on three broad and interrelated areas: progress in implementation of the Constitution; electoral reforms and preparedness for the next General Election; and the legacy of post-election violence:, notably, continuation of the ICC intervention in the Kenyan situation, and the problem of Internally Displaced Persons (IDPs).
4. The report has utilised both quantitative and qualitative data. Quantitative data derives from a national survey conducted in August and September 2011. Qualitative data is drawn from interviews with key informants from government ministries, humanitarian organisations, civil society organisations, the media and the public. Secondary sources have also been reviewed for additional information.

FINDINGS

Implementation of the New Constitution

5. The process of implementation of the constitution is on track. The necessary legal and institutional framework for implementation is in place. But there are no specific policies to anchor the laws that have been enacted. Similarly, the findings show that new institutions have capacity challenges particularly because some of them are being established afresh. Thus, building the capacity for these institutions and formulating coherent policies to guide implementation of laws remains an important and urgent task. Without a supportive policy framework, hurdles can emerge to constrain enforcement of these laws. Gaps in the law can be exploited to reverse the gains and achievements made so far.
6. Parliament met the deadline to pass all Bills listed in Schedule 5 of the Constitution, which outlines the timelines within which laws to implement the Constitution should be passed. Similarly, all institutions that should have been put in place within the first year have been established and mandated to undertake actions to transit the country from the old order to a new one. Notwithstanding the fact that Parliament met a crucial deadline, the findings reveal a hurried process of passing the Bills. Parliament passed 15 Bills within the last month of the deadline, yet only 11 Bills had been passed within a period of 11 months. The Bills were hurriedly debated and rushed through Parliament with a view to meeting the deadline. The Bills should have been debated earlier but vested interests, lethargy, and poor coordination between and among various actors,

delayed the process of drafting.

7. The rushed manner in which the Bills were passed has raised concerns over quality and the extent to which various institutions are coordinating on their drafting. The extent and nature of public participation in the development of some of the Bills has also been raised as a concern. Another important finding is that even the Commission for the Implementation of the Constitution complained about the Executive by-passing it in drafting and publishing some of the Bills.
8. About half of Kenyans are happy with the progress in implementing the Constitution. The general view that the new Constitution presents an opportunity for change in the style of managing public affairs has sustained confidence in the implementation process. Indeed, there is no significant relationship between the regions/people who voted to reject the Constitution at the referendum and extent of satisfaction with progress in implementation.
9. The Constitution implementation process is experiencing a number of challenges. Not all ministries and departments from which some of the Bills originate have the capacity to develop quality laws. Those with capacity are overstretched, particularly because there are many Bills being drafted at the same time. Also, there are some actors that are not effectively coordinating with others in drafting Bills. Sometimes, differences have emerged at the finalisation stage. Some of these differences are attributable to narrow and short-term interests of some actors. Others are the result of extreme positions embedded in how some people are interpreting the Constitution. The divide in debates where some take radically conservative or extremist positions on a particular issue will continue to constrain implementation.
10. *The Judiciary has made the most significant progress in terms of transformative reforms thus far.* Reforms in the Judiciary are seen as the biggest change the country has seen after the promulgation of the new Constitution. The Judiciary has set high standards for institutional reforms and rejuvenated public confidence in the sector. The transparent process through which judicial officers were appointed and the high integrity standards demanded of applicants to the Judiciary are responsible for this shift in perceptions about the institution.
11. Many are confident that the Judiciary is taking the country in the right direction. This finding alone is enough evidence to underline the need to recruit for positions through transparent and competitive processes rather than horse-trading. Importantly, the improvement in perception of the Judiciary must be matched with visible results and achievements in line with people's expectations in order for the level of satisfaction to be sustained.

Electoral Reforms and Preparedness for Elections

12. Several laws have been enacted to improve the electoral process. A close review of the laws passed to support the electoral process reveals that, in some cases, short-term interests informed the decisions taken. For instance, the Political Parties Bill was introduced to streamline operations of political parties, instil political party discipline, provide guidelines on party loyalty and arrest the 'party hopping' that normally characterise election periods, when candidates switch to multiple parties in search of nomination. The Bill was amended to exclude strict control over, among others, party

hopping and formation of alliances. The enacted law, nonetheless, contains important provisions to streamline political party operations as provided for under Article 91 of the Constitution.

13. The process to establish an Independent Electoral and Boundaries Commission (IEBC) has begun in earnest. This is an important turning point in the journey from the post-election violence. Some political leaders have expressed dissatisfaction with the list of short-listed applicants implying that they had preferences or that they were keen to have certain people in the new body. But politicisation of the process of establishing this new body will lay a foundation for future conflicts over decisions on election issues.
14. An important aspect of preparations for the election is the institutional capacity of the body that will manage the elections. It is true that laws are important. But laws on their own without the agency to enforce and impose sanctions on those who breach them mean little, especially in a country where electoral violence, because of impunity, appears to have transformed into a culture. Giving the new body adequate powers to punish those who breach the law is important.
15. Important also with regard to preparedness is to recognise that it is possible to go for an election on a particular date only to realise that the country is not politically and institutionally – or even technically – prepared to conduct the election. Thus the debate on the date should be accompanied by a discussion on technical, legal, political and institutional preparedness.

The Legacy of Post-Election Violence

16. The ICC process with regard to the Kenyan case has entered a new phase: the six suspects have been to The Hague for confirmation of charges hearings. After diplomatic efforts to secure a deferral failed, the government lodged an unsuccessful admissibility challenge in April 2011, and appealed the decision of the court, when it was rejected at the first instance. However, the Appeals Chamber observed that the government had not demonstrated any evidence of local investigations. The two parties in the coalition appear not to have a coherent approach to the ICC; there are those in favour and those keen to defer or even halt the intervention.
17. Public opinion also shows that over half of the people believe the government lacks the will to investigate or prosecute suspected perpetrators of the post-election violence. At least 58 per cent believe the government cannot conduct local investigations. This suggests that public confidence in the government's ability to fight impunity remains low. It also suggests that impunity, as an underlying cause of the post-election violence, has not been addressed. Nonetheless, the continued lack of a coherent policy position on the ICC and impunity means sectarian interests continue to dominate and direct government actions. Overtures to protect political careers rather than articulate and pursue a coherent government policy on holding people accountable appear to dominate this legacy of post-election violence.
18. Public support for the ICC has remained high. Up to 65 per cent of Kenyans are happy that the ICC is pursuing the six suspects of post-election violence. A similarly high number of people, 64 per cent, trust that the ICC can effectively protect witnesses. This suggests that trust in public institutions and their ability to address PEV remains low.

There are very high expectations for the ICC to deliver justice to victims.

19. *Although the ICC is designed to prosecute those who bear the greatest responsibility, persisting impunity for low and middle-level perpetrators continues to pose a threat to future stability:* Past review reports have shown that a majority of Kenyans believe investigations by the ICC will not trigger violence. The perception that the ICC is for 'big people' may in fact harden impunity among the low-level perpetrators unless a local deterrent mechanism is put in place. However, the debate on domestic accountability for international crimes appears to have subsided with the continuing confirmation of hearings of charges at the ICC.

Conclusions

20. This review acknowledges that critical laws have been passed. A critical legal and institutional framework for implementation has been put in place. But some of these institutions lack the capacity to help consolidate gains and achievements thus far. Others are not anchored on a clear policy framework to guide implementation. There is thus need to begin building the capacity of institutions as well as developing clear and coherent policies to support their work.
21. Implementation of the Constitution is at a critical point; the next General Election will take the country through a democratic transition if the polls are well and effectively managed. But failure to manage the electoral process or failure to prevent partisan political considerations from influencing decisions about the electoral process – including the date when elections are held -- could fail the country yet again.
22. Although no themes have emerged to define the platform on which the campaigns for the next General Election will be contested, several questions are competing for attention. These include effective implementation of the Constitution; fighting impunity and seeking accountability; and establishment of a new morally driven leadership.
23. The absence of appropriate and responsive themes thus far is leading to a situation where the main theme and the platform for the next General Elections is likely to be the issue of the ICC and ethnicity. This will derail the implementation of the Constitution, reverse the gains made, and result in continued impunity and recurrence of electoral violence.
24. Thus the next election could emerge as a contest pitting reform forces against anti-reform actors. The election will determine whether or not the promise of the new Constitution becomes a reality. For this reason, it is important to begin building a platform of effective implementation of the Constitution.
25. The new electoral body could midwife a democratic dispensation or fail the country altogether. Failure to effectively and efficiently manage the electoral process would certainly fail the country. It is important, therefore, for attention to be paid to 'institutional preparedness'. It is possible to determine that an election should be held on a particular date only to realise that the country is not politically and institutionally – or even technically – prepared to conduct the election. Whatever date the country opts for, legal, political and institutional preparations must be finalised in advance.

26. The legacy of the post-election violence continues to manifest itself in two important ways: the ICC intervention and the IDPs problem. Although the ICC has intervened and the confirmation of charges hearings is going on, the country must begin thinking about domestic accountability. The country must establish mechanisms to hold lower and middle level and other perpetrators accountable. Public awareness on complementarity – awareness of domestic accountability for international crimes -- should be built in earnest and before the next elections.

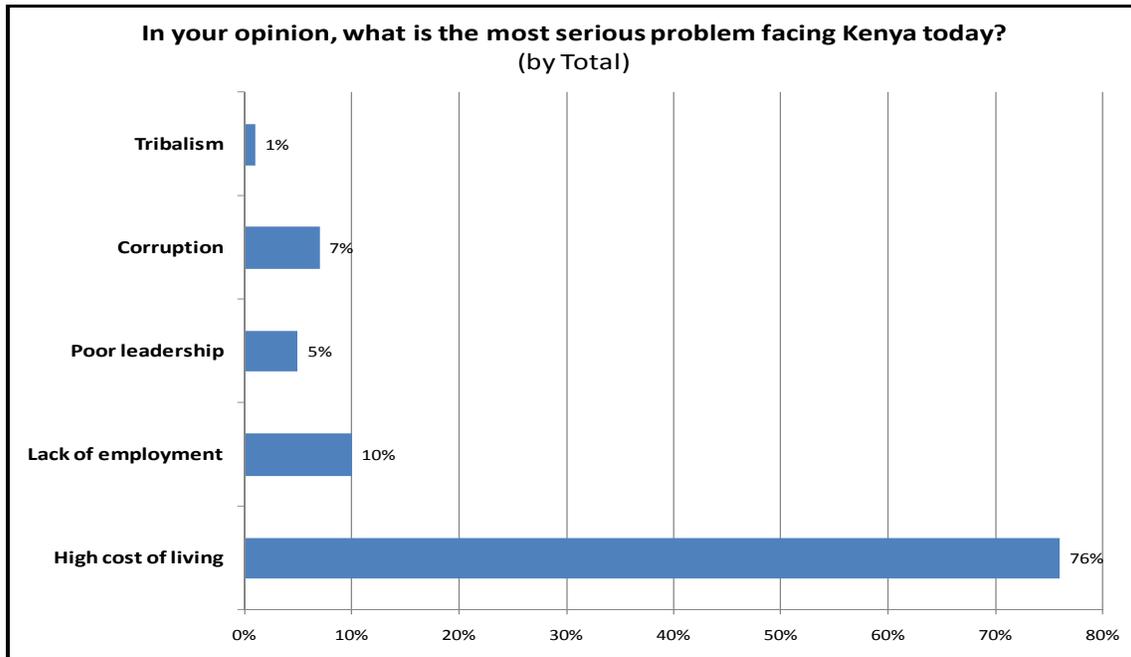
1. INTRODUCTION

1. This is the review report on implementation of reforms in Kenya for the third quarter of 2011. It focuses on implementation of the constitution and other reforms agreed during the Kenya National Dialogue and Reconciliation (KNDR) mediation process in 2008 under the African Union's (AU) Panel of Eminent African Personalities led by Mr Kofi Annan. Previous reports are found at www.dialoguekenya.org.
2. This report covers the July to September 2011 period and is based on both primary and secondary sources of data. Quantitative data was collected through a national survey comprising 2000 respondents selected through multi-stage cluster sampling using population proportionate to size, with the 2010 National Census data as the sampling frame. On the other hand, qualitative data was obtained through interviews with key informants drawn from government ministries, humanitarian organisations, civil society organisations, the media and the public. Secondary information was obtained by reviewing reports and documents by the government, development agencies, the media and non-governmental organisations
3. The report is in five main parts that examine the main political developments in Kenya during the period under review. The main emphasis in all the parts is the implementation of the new Constitution. Thus the report is organised as follows:
 - a. Part I: Introduction and socio-economic context
 - b. Part II: Progress toward implementing the new Constitution
 - c. Part III: Electoral reforms and preparedness for the next General Election
 - d. Part IV: The legacy of Post-Election Violence: the ICC and IDPs
 - e. Part V: Conclusion

The Social Economic Context

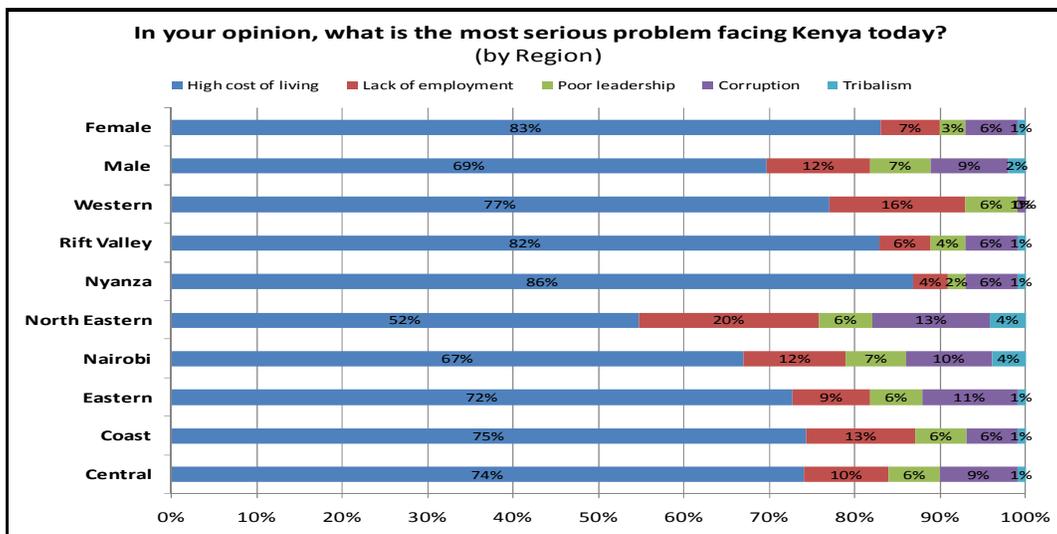
4. The 2011 second quarterly report noted that many Kenyans identified the high cost of living and inflation in general, as the single most serious problem facing the country. There were no significant changes in this perception during the period under review. When asked, 'in your opinion, what is the most serious problem facing Kenya today', as many as 76 per cent of survey respondents cited the high cost of living, while 10 per cent and seven per cent mentioned unemployment and corruption, respectively, as the most serious problems. Another five per cent cited poor leadership as a serious problem.

Figure 1: In your opinion, what is the most serious problem facing Kenya today?



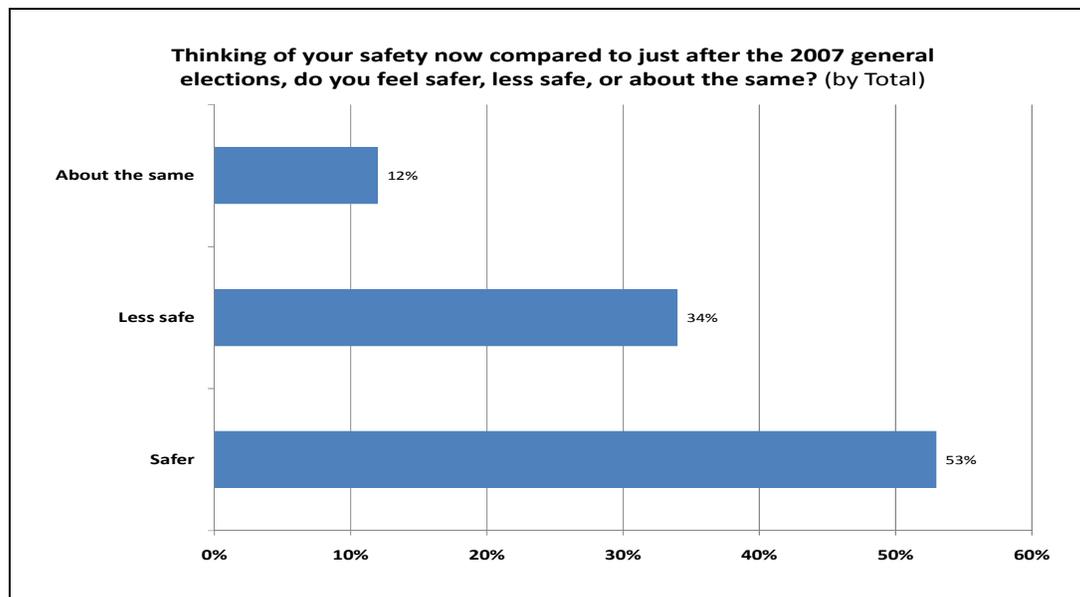
- There are variations in regional perceptions, however. In North Eastern region, only 52 per cent or about half of the respondents in the area said the high cost of living was the most serious problem. Another 20 per cent and 13 per cent identified unemployment and corruption, respectively, as the main challenges. In all the other regions, over 67 per cent identified the high cost of living as the main challenge. Importantly, more women (83 per cent) than men (69 per cent) think the cost of living is the main challenge.

Figure 2: In your opinion, what is the most serious problem facing Kenya today? (By region and gender)



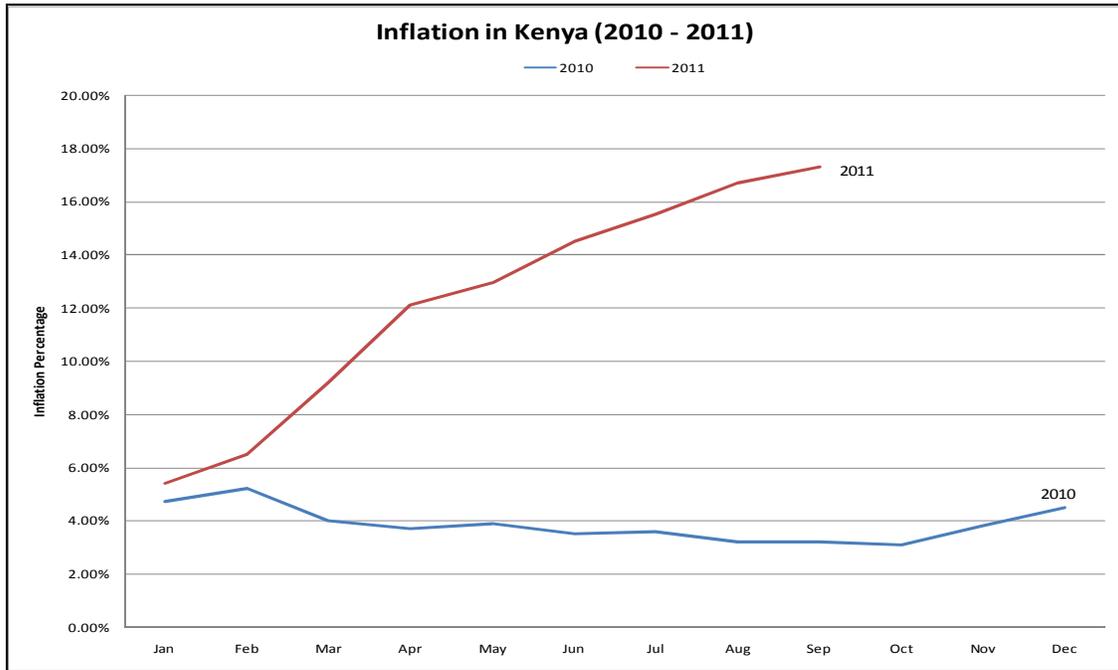
6. The high cost of living, combined with high unemployment rates, especially among the youth, have the potential to roll back the political, social and economic gains that the country has made since the early 2008 post-election period.
7. There are no significant changes in how people feel about safety. When asked about safety now compared to just after the 2007 General Election, 53 per cent reported that they felt safer while 34 per cent said they felt less safe.

Figure 3: Thinking of your safety now compared to just after the 2007 General Election, do you feel safer, less safe, or about the same?



8. The June 2011 report noted that the high cost of living and unemployment would compound Kenya’s socio-political fault lines or converge with other fault lines to exacerbate conflicts. As shown later in this report, there is public anxiety over the next General Election and the outcome of the ICC confirmation of charges hearings. These two issues are creating new fault lines. The most likely outcome of these dynamics is slowed economic growth and, most importantly, reforms will suffer. There will be slow and incomplete implementation of critical reforms.
9. The economy has shown growth since the post-election violence in early 2008. Although economic growth suddenly slumped from about seven per cent in 2007 to about 1.5 per cent in 2008 due to post-election violence, it had showed remarkable recovery by end of 2010 when it grew by 5.6 per cent. However, from mid-2011, there is notable stress from a high inflation rate and the depreciation of the Kenya Shilling against international currencies. This is negatively impacting on the economy. The consequences of high inflation can feed into existing fault lines and trigger new challenges, especially during an election year.

Figure 4: Inflation in Kenya (2010 to 2011)



10. Economic growth in Kenya is not stable. The growth rapidly drops during an election period. Important sectors, such as agriculture, on which many people depend, tend to under-perform during the elections period particularly because of political anxieties in the Rift Valley, one of the major agricultural regions of the country.

Figure 5: Kenya's electoral cycle and trends in economic growth

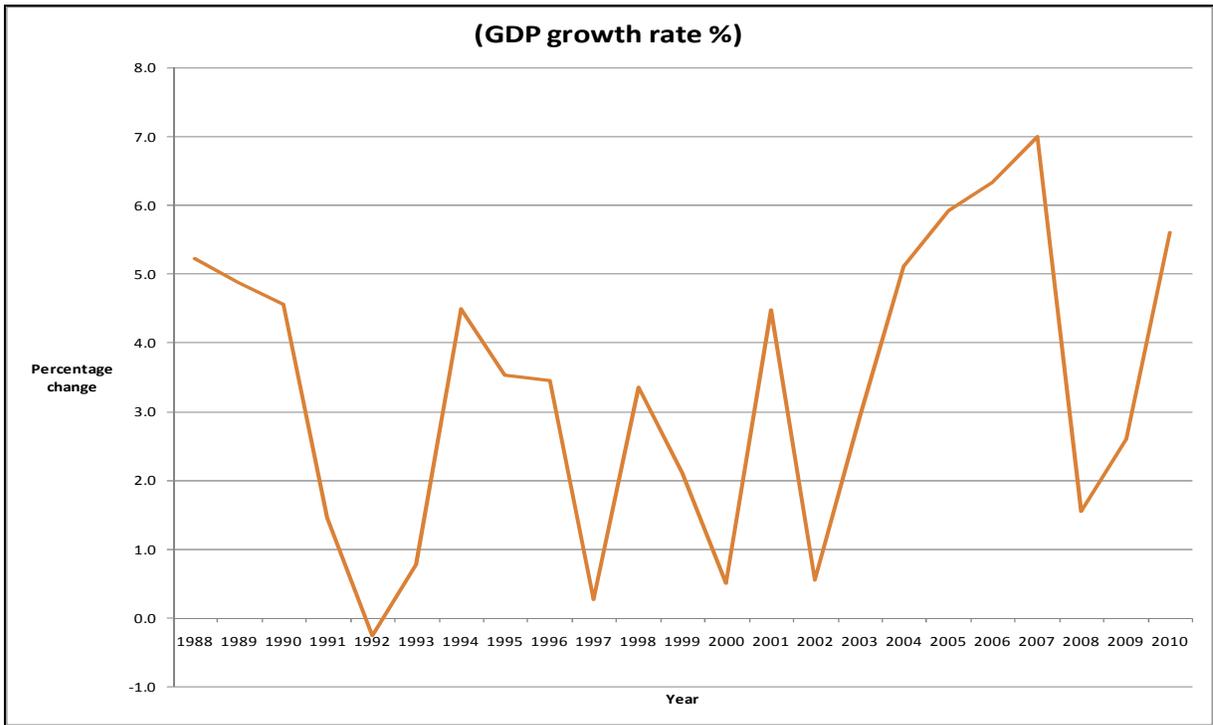
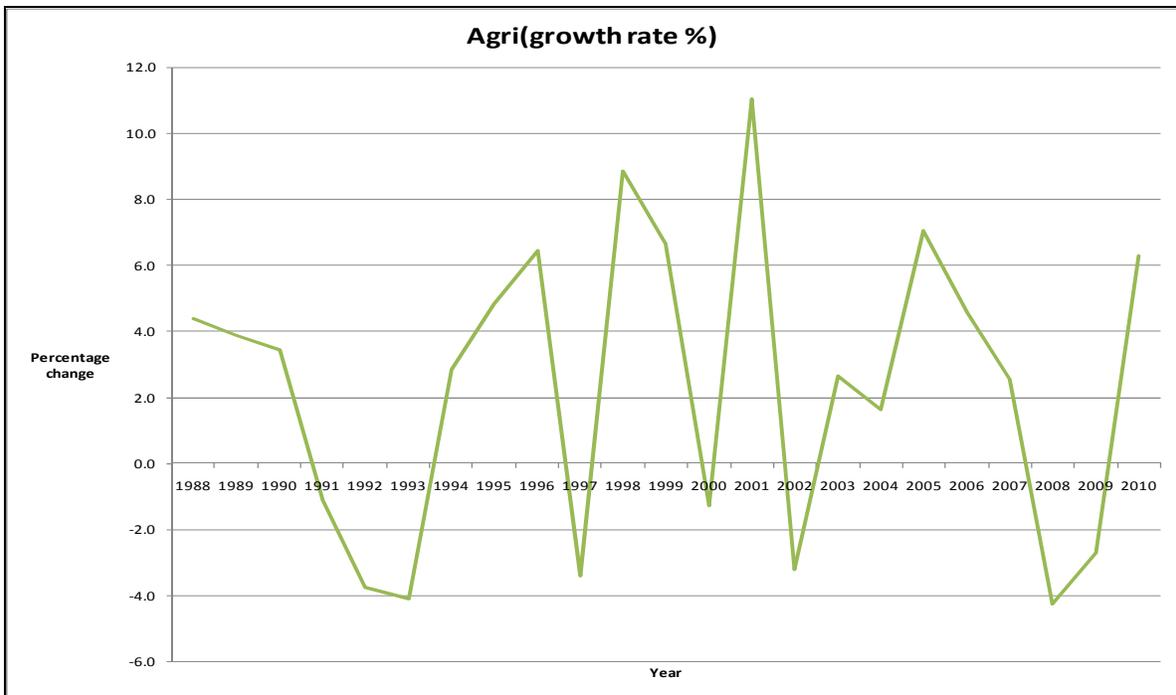
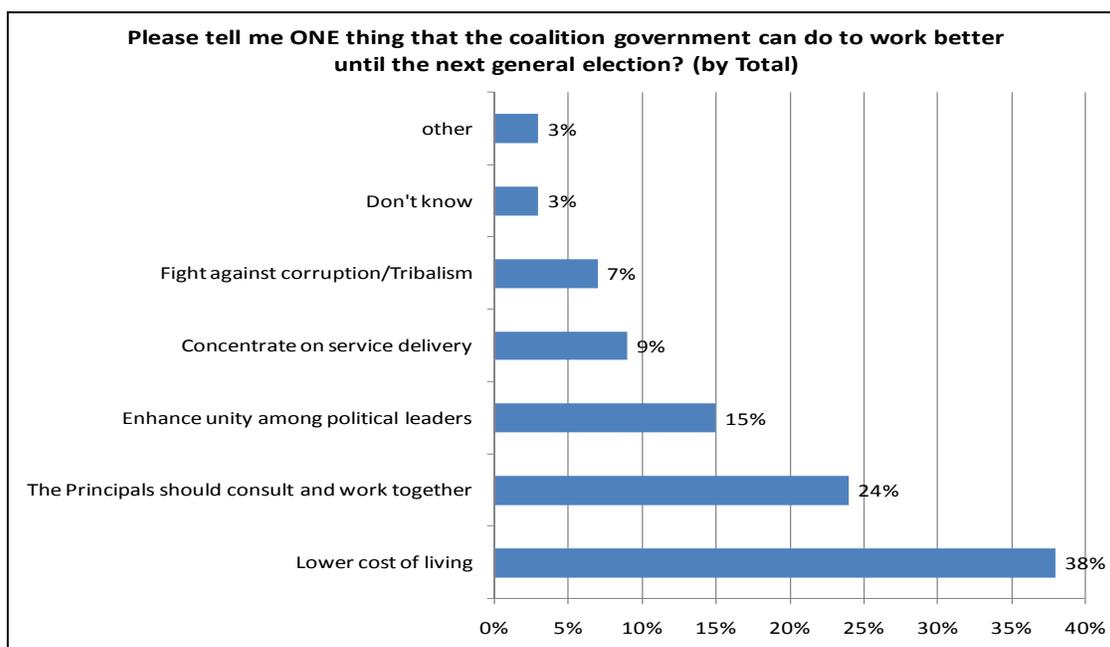


Figure 6: Kenya's electoral cycle and trends in agricultural growth



11. The two figures clearly show that growth in agriculture and the economy in general slumps to their lowest during an election year. Recovery begins almost immediately after an election but is not sustained for long before campaigns for another electoral cycle begin. This has been the trend for the past two decades – all election years are marked by a rapid decline in agricultural production and the economy in general. There are currently no signs that the next General Election will be different.
12. The country is undergoing a transition from the old order to a new one with the change in the Constitution. People are anxious about this transition because the post-election violence remains an important political issue in Kenya today. Related to this are anxieties around youth unemployment and how it is expressing itself. Recent times have witnessed youth fascination with illicit activities, their restive nature, and admiration of individuals with little respect for the rule of law. Whatever the case, youth unemployment and cost of living are likely to remain high as the country approaches the next general election. Engagement with these two problems is critical before the campaigns for the next general election intensify.
13. *Kenyans want the coalition government to tackle the high cost of living.* When asked what the coalition can do to work as one government, 38 per cent of the respondents said they wanted it to concentrate on lowering the cost of living. Another 24 per cent said they want the Principals to consult and work together. Kenyans are concerned about the lack of unity among leaders and want the government to pay more attention to social service delivery.

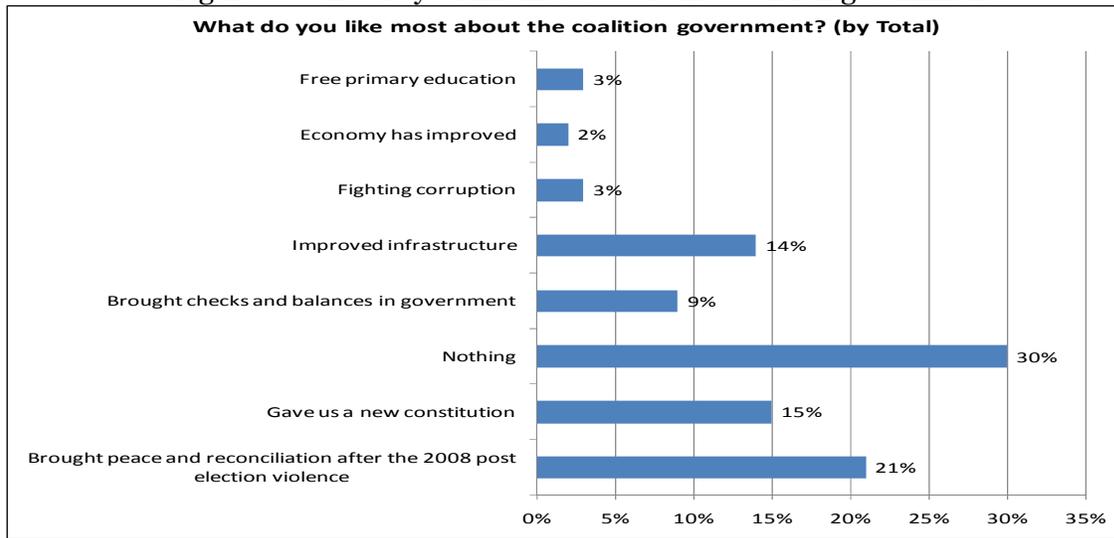
Figure 7: What one thing can the coalition government do to work better?



14. *Most people like 'nothing' about the coalition government:* There is disillusionment with the coalition, with 30 per cent of the respondents saying they like 'nothing' about the coalition government. Another 21 per cent said they like the fact that the coalition

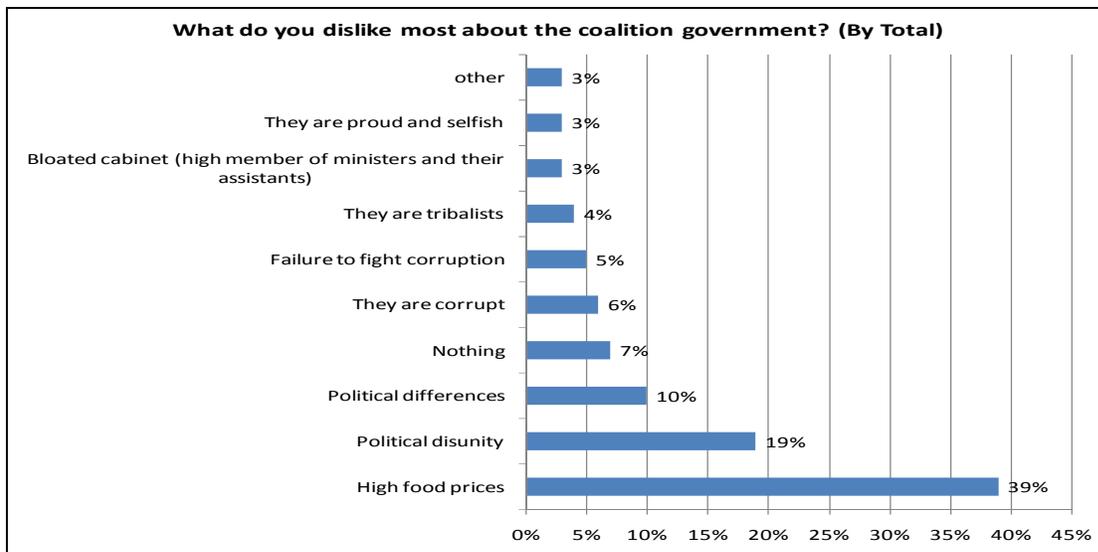
brought peace and reconciliation after the 2008 violence.

Figure 8: What do you like most about the coalition government?



15. *High cost of living is a source of concern:* Up to 39 per cent of respondents said they dislike the coalition government because of the high cost of living. They think the government is disconnected from the concerns of ordinary citizens. For instance, there is a palpable disenchantment that it has not done enough to lower food prices.

Figure 9: What do you dislike most about the coalition government?



Conclusion

16. Rising inflation and the depreciation of the shilling constitute major economic challenges during the period under review. These problems will negatively impact on

implementation of reforms and may slow down growth not only in agriculture but also in other important sectors of the economy. Early campaigns for the next General Election will no doubt exacerbate this trend. Strong electoral laws and a strong culture of enforcement must be underlined as critical measures to address this enormous challenge.

17. These problems will add to the fault lines around which conflict in Kenya build. Indeed, a slow economic growth, combined with a rising unemployment and generally huge income inequalities constitute a combustible mix that can explode if there is no strong commitment to cushion the poor, adhere to the rule of law and demonstrate political resolve to end impunity in all its forms and at all levels of the society.

2. PROGRESS TOWARDS IMPLEMENTATION OF THE NEW CONSTITUTION

Introduction

18. The promulgation of the new Constitution in August 2010 was the biggest milestone in Kenya's reform journey of over 20 years. Indeed, it is the most important achievement of the coalition government. The new Constitution raised public optimism for a new political culture by introducing national values and principles of governance to guide state-society relations and public service. It has filled a major lacuna that had long prevented the realisation of fundamental legal and institutional reforms. The governance architecture has also changed. There are new centres of power at the local level away from the centre.
19. The Constitution has attempted to cure the problem of how power is exercised by firming up checks and balances on presidential powers but has not cured the shortcomings of Kenya's 'First-Past-The-Post' electoral system. The politics of the 'winner-take-all' is still embedded in the electoral system and its consequences are likely radiate through the newly established institutions of governance.
20. This notwithstanding, the Constitution has provided the much-needed environment for implementing reforms envisaged under Agenda 4 of the National Accord, seen as critical for preventing the recurrence of violence. This section of the report discusses progress in implementing the Constitution. It focuses on Bills that had to be passed, institutional reforms, and challenges that the implementation process has encountered over the past three months.

The Constitution Implementation Process

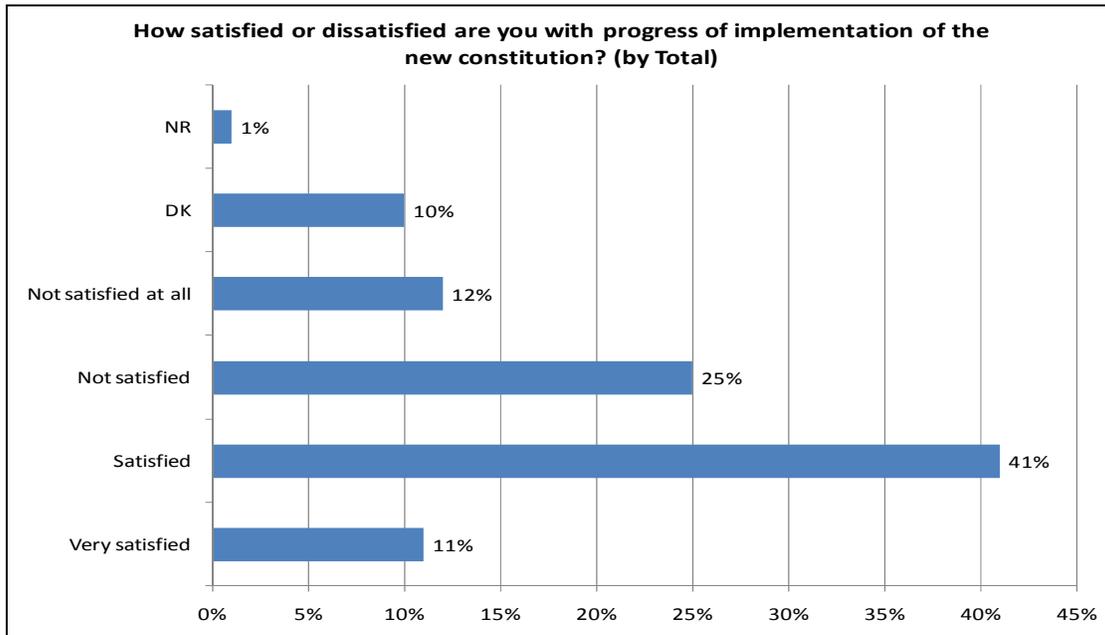
21. *Constitutional implementation is on course:* Considerable progress has been made in passing laws and setting up new institutions in accordance with the Constitution. By the end of August 2011, one year after the promulgation of the Constitution, Parliament had passed all the critical Bills in line with the deadline in Schedule 5 –the Constitution implementation timeline -- within a year of the promulgation. The period under review also witnessed initiation of several reforms. Transformation of the Judiciary began in earnest: a new Chief Justice, a deputy Chief Justice and Registrar of High Court were competitively hired. The Supreme Court was also established after the swearing in of Judges appointed to sit in it. Judges of the High Court were also recruited.
22. Other important appointments during the period include that of a new Attorney General, the Auditor-General, and Controller of Budget. The process of setting up the Independent Electoral and Boundaries Commission is under way, and the vetting of Judges and Magistrates is due to commence soon.
23. *Hurrying the passage of Bills and fencing off public scrutiny attenuated the confidence in progress made:* While it is commendable that Parliament met the 27 August deadline for the passage of certain laws, it is also important to pause and reflect

on the journey towards their implementation. Within a period of about one week, Parliament passed 15 Bills. Before that, and for close to 11 months, Parliament had passed only 11 Bills since the promulgation of the Constitution.

24. The manner in which the bulk of pending Bills were rushed through debate and approved in Parliament has raised public concern over their quality, the reasons behind the delay, and the sudden haste with which they were processed. As of 20 August 2011, Parliament had passed only six of the 24 Bills required in the first one year after the promulgation. Notwithstanding the blame game on who was responsible for the delays, it is important to underline that old habits and vested interests combined to undermine the momentum of developing and passing Bills at different stages. This resulted in a situation where ‘everyone was blaming everyone’ for failing to fast-track the Bills. Some observers are even suspicious that the delays were a strategy to avoid public scrutiny of the Bills, allowing vested interests to sneak weak or controversial legislation through.²
25. In the end, even the Commission for the Implementation of the Constitution (CIC) complained about being bypassed in the process of reviewing some of the laws. To the CIC, some of the Bills touching on devolution, including the Contingencies and County Emergencies Funds Bill and the National Government Loans Guarantee Bill, were passed without requisite scrutiny by the CIC or the public. Consequently, the CIC has gone to court to obtain orders preventing their debate and enactment. Such legal challenges, which could have been avoided, are a significant reminder of the resilience of vested interests and resistance to change, and this calls for public vigilance.
26. *Nearly a half of Kenyans are satisfied with the progress of constitution implementation:* The perception that the new Constitution indeed presents an opportunity for changing the style in which public affairs are managed has sustained public confidence in the implementation process. More people are satisfied with the progress in implementation than in the last quarter. When asked, ‘How satisfied or dissatisfied are you with the progress of implementation of the new Constitution?’ 52 per cent of respondents said they are satisfied. Only 12 per cent said they are not satisfied at all.

²Interview with a former member of the Committee of Experts

Figure 10: How satisfied or dissatisfied are you with the progress of implementation of new Constitution? (Total)

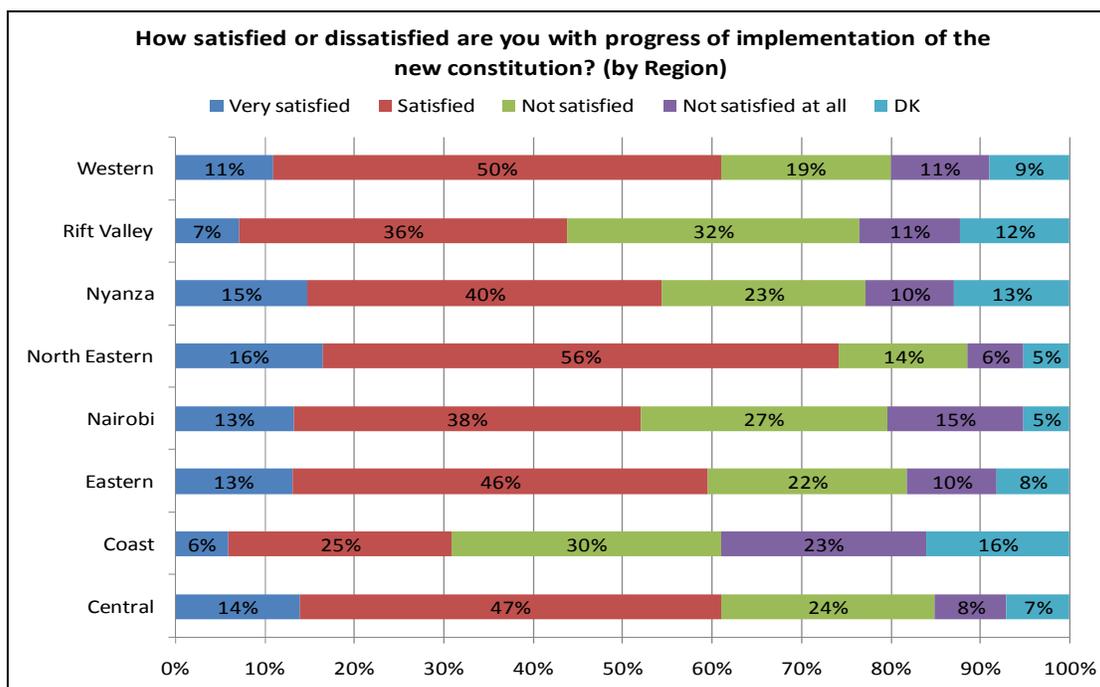


27. *People in some regions are relatively more satisfied with progress in implementing the Constitution than others:* A regional analysis of the data shows that some regions, including some of those that supported the passing of the Constitution, are dissatisfied with progress in implementation. For instance, 53 per cent of respondents in Coast region, 43 per cent in the Rift Valley and 42 per cent in Nairobi are not satisfied.

Table 1: Regional variations in satisfaction with progress in Constitution implementation

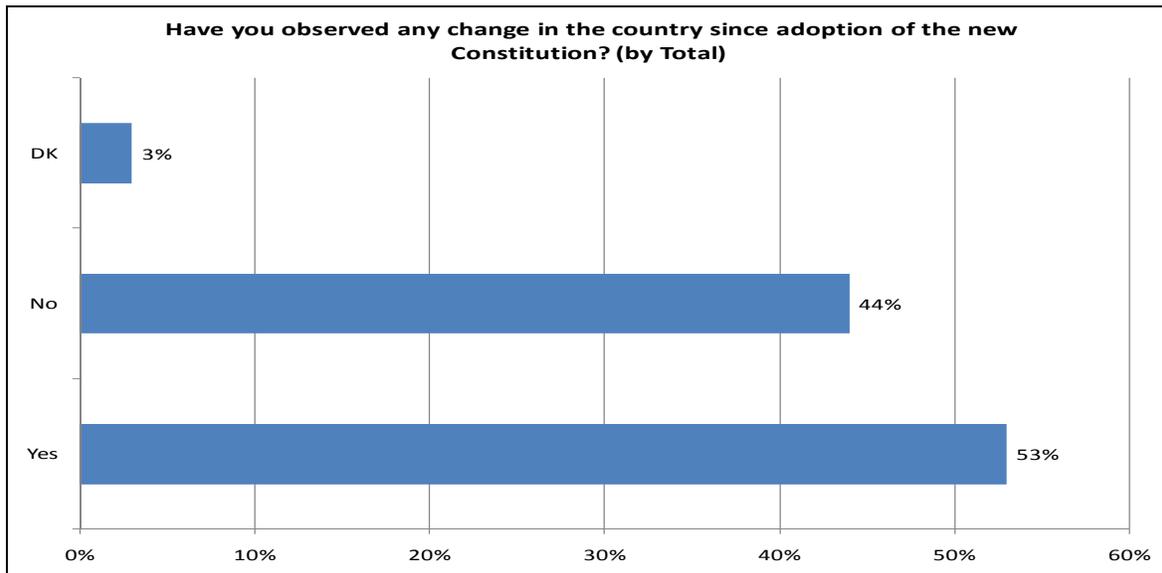
	Central	Coast	Eastern	Nairobi	North Eastern	Nyanza	Rift Valley	Western
Satisfied	61%	31%	59%	51%	72%	55%	43%	61%
Not Satisfied	32%	53%	32%	42%	20%	33%	43%	30%
DK/RTA	7%	16%	8%	6%	8%	13%	13%	9%

Figure 11: How satisfied or dissatisfied are you with the progress of implementation of new Constitution? (By region)



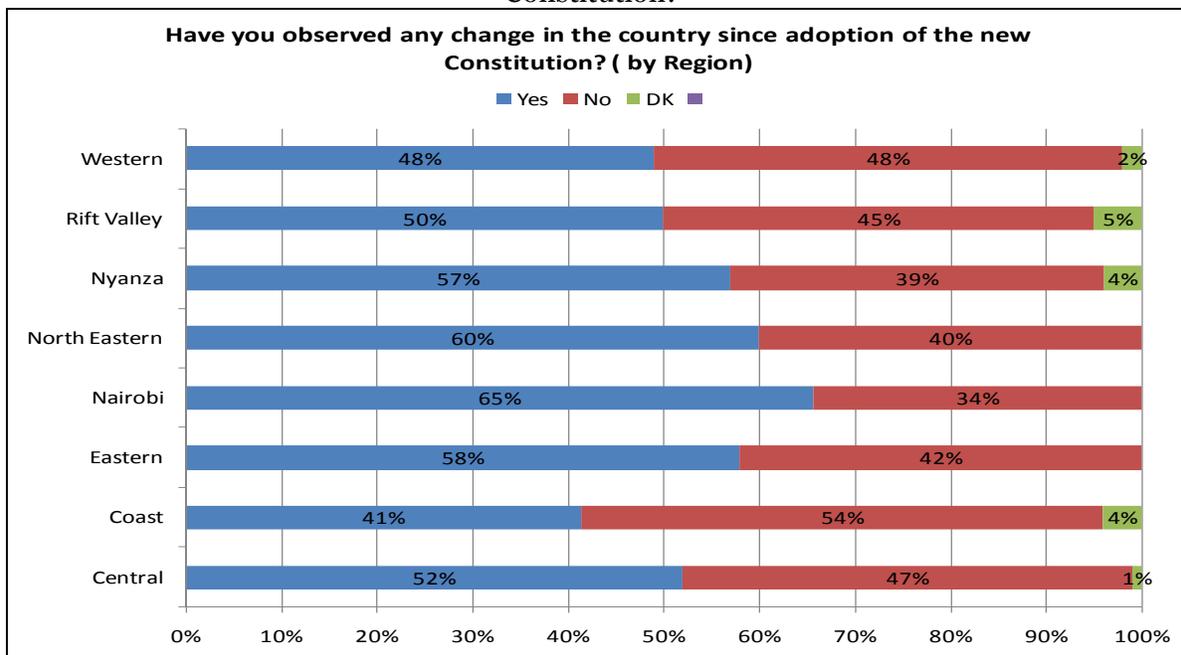
28. *There is no relationship between how people in various regions voted at the referendum and their satisfaction with the progress of Constitution implementation:* Satisfaction with progress in implementation is high even in areas that voted against the document at the referendum in August 2010. Up to 43 per cent of respondents in Rift Valley, for instance, are satisfied with implementation (only 34 per cent voted against the draft at the referendum). Important is that regions that approved the Constitution in large numbers at the referendum are also the same ones that are satisfied with its implementation. For instance, 72 per cent of respondents in North Eastern Kenya are satisfied with progress: 96 per cent of voters in the region supported the document at referendum. Generally, there is no significant relationship between how people voted and how they are judging implementation.
29. *People are satisfied with progress on the Constitution because they see important changes:* The unprecedentedly transparent method of recruiting public officers, the high integrity and accountability standards required of applicants, the consideration of marginalised groups, and opening up of the process to the public have combined to inspire confidence in the implementation process. To some, there is a departure from the old culture of recruitment into the public service. Asked whether they have observed any changes since the adoption of the new Constitution, 53 per cent of survey respondents answered in the affirmative.

Figure 12: Have you observed any change in the country since the adoption of the new Constitution?



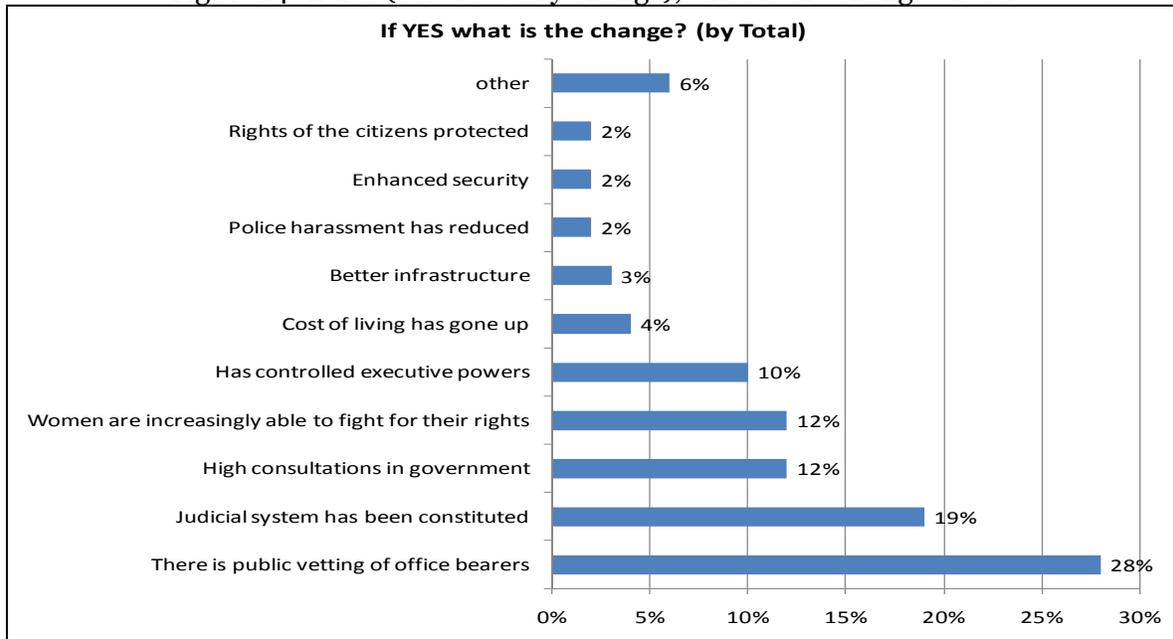
30. People across all the regions have noticed changes brought by the Constitution. Nairobi, with 65 per cent affirmative answers among respondents, leads in affirming these of changes. North Eastern follows at 60 per cent.

Figure 13: Have you observed any change in the country since the adoption of the new Constitution?



31. *The process of vetting state officials is the most notable change after the adoption of the new Constitution:* When asked the specific changes they have seen, 28 per cent of respondents cited public vetting of officials; 19 per cent say they have seen changes in the Judiciary. The judicial and prosecution office holders were the first to be vetted and recruited under the new Constitution.

Figure 14: If Yes (observed any change), what is the change? Total



32. *The process of vetting and recruiting public officers governed by the values of the new Constitution has set high standards for institutional reforms and earned public approval.* Institutions that have not recruited using open and transparent procedures, such as the police, continue to receive public criticism. The Judiciary has experienced the most far-reaching reforms in this respect. And in line with this transformation, the Judiciary has received Ksh11 billion to support reforms. This is possibly the largest amount of money ever to have been allocated to the Judiciary.
33. *The changes have helped spur public confidence in the Judiciary:* The manner of hiring Judges, together with other changes in the Judiciary has been competitive, transparent and open to public scrutiny. Because of this, reforms in the Judiciary have been the most visible within government organs. The Judiciary demonstrates the most enduring signs of change. The changes have helped to spur public confidence in the Judiciary. Thus, when asked about satisfaction with the performance of public institutions, 54 per cent of respondents said they were satisfied with the Judiciary while only 36 per cent said they were satisfied with the performance of the police. This is an important finding given that people have perceived the Judiciary poorly: in September 2009, only 28 per cent said they were satisfied with the performance of the Judiciary. This is, therefore, a remarkable improvement in the people's confidence in the Judiciary.

34. *There is no policy on public participation:* Some observers have noted that the vetting of those applying for jobs in the government sector has the potential for improving confidence in these institutions if there were a policy to guide public participation. They are concerned that there is no information on how the short-listing of candidates for interviews is carried out. They fear that ‘this can be an avenue for horse trading since the interviewing panel does not disclose how the candidates were judged; the transparency is incomplete.’³
35. *There is no coherent framework to guide the vetting of public appointments but Chapter Six stands out as the main framework:* Indeed, the process of vetting public appointments is not anchored on any policy or legal framework. Each interviewing body sets its own operating rules. Aggrieved applicants have no avenue for complaint or redress. Ensuring greater transparency through the selection process will enhance public trust and confidence and assure applicants that merit rather than political influence is the determining criterion.
36. *People think that not everyone is being consulted in making of laws:* During the survey, respondents were asked about how much they had participated in the making of the new laws or whether they knew anyone who had been consulted. A whopping 87 per cent of respondents said they had not attended any meeting to discuss the making of new laws while 75 per cent said they did not know anyone who had attended any discussion on the making of laws. However, people believe the government is consulting people – at least 37 per cent think so. Another 43 per cent think that people’s opinions are reflected in these laws. Clearly, people have good faith in the process of Constitutional implementation. They are circumspect about the values of the new law.

Table 2: How much do you agree or disagree with the following statements regarding the making of laws under the new Constitution?

How much do you agree or disagree with the following statements regarding the making of laws under the new constitution?				
	Agree	Disagree	DK	NR/RTA
I have attended discussions/meeting on making new laws	12%	87%	1%	0%
I know someone who has attended discussions/meeting on making some of the new laws	21%	75%	3%	1%
The government is consulting people in making new laws	37%	47%	14%	1%
People’s opinions are reflected in the new laws	43%	42%	14%	1%

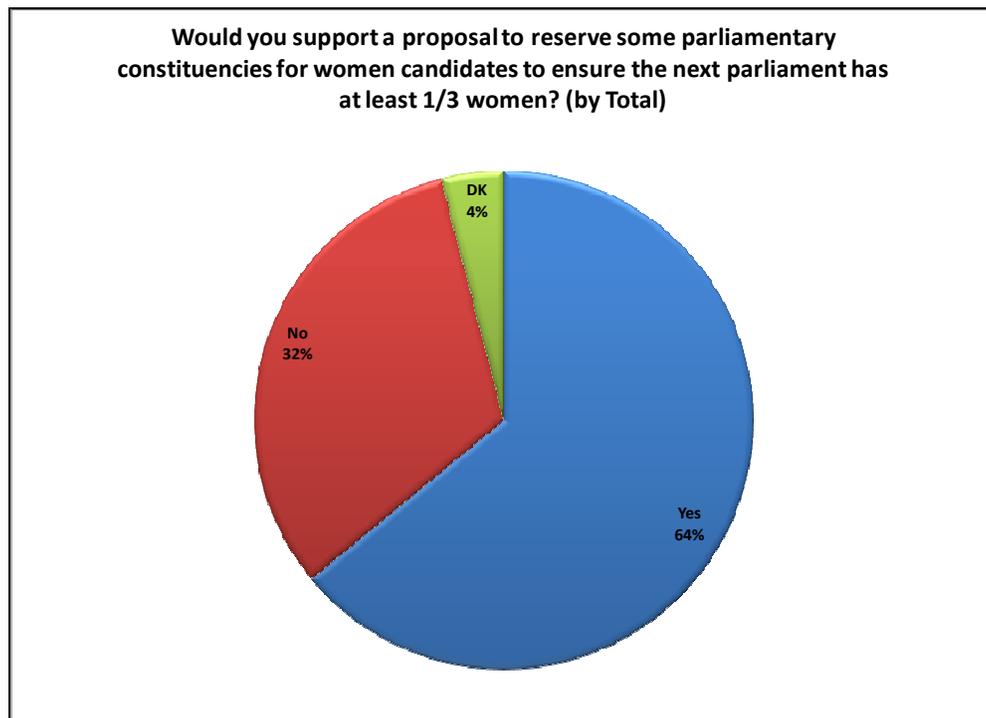
These findings clearly show a need for standards to determine when ‘public participation’ has taken place. Some processes mention ‘stakeholder review’ but it is not clear who stakeholders are, and if they adequately represent the public. Lack of clarity on ‘when

³ Interview with a lawyer, 29 August 2011

public participation starts or ends⁴ and the discretion of individual within institutions to involve the public can create elitism and lead to the public's exclusion. A framework on public participation in the making of laws and in the implementation of the Constitution in general should be formulated urgently.

37. *The Constitution is influencing people to be progressive: there are many people supportive of additional seats to address gender equity:* Asked whether they would support efforts to reserve some seats for women, as many as 64 per cent of respondents answered in the affirmative. Nyanza, Central and Eastern regions have the highest approval of this proposal.

Figure 15: Would you support a proposal to reserve some parliamentary constituencies for women candidates to ensure the next Parliament has at least 1/3 women?

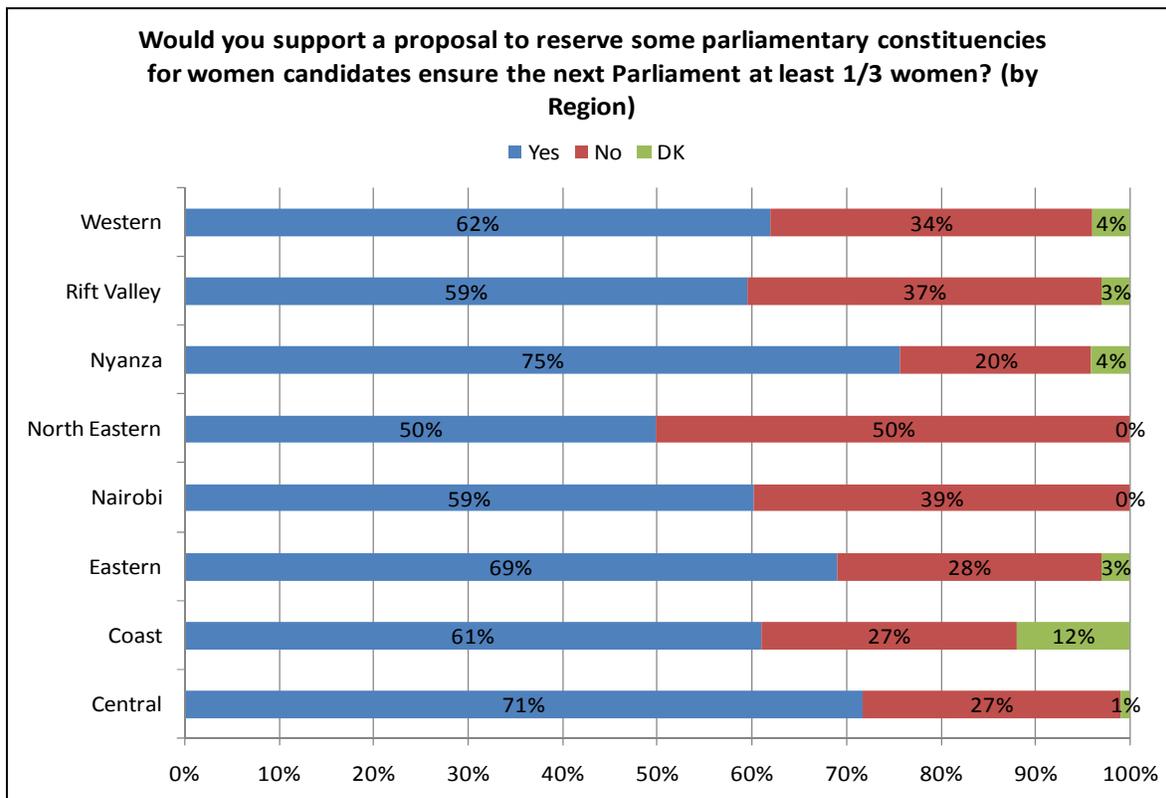


⁴ Interview with a member of the CIOC, August 2011

Table 3: Would you support a proposal to reserve some parliamentary constituencies for women candidates to ensure the next Parliament has at least 1/3 women?

	Total	Central	Coast	Eastern	Nairobi	North Eastern	Nyanza	Rift Valley	Western
Yes	64%	71%	61%	69%	59%	50%	75%	59%	62%
No	32%	27%	27%	28%	39%	50%	20%	37%	34%
RTA	0%	0%	0%	0%	0%	0%	0%	0%	0%
DK	4%	1%	12%	3%	0%	0%	4%	3%	4%
NR	0%	0%	0%	0%	1%	0%	0%	0%	1%

Figure 16: Would you support a proposal to reserve some parliamentary constituencies for women to ensure 1/3 of women in next Parliament? (By region)



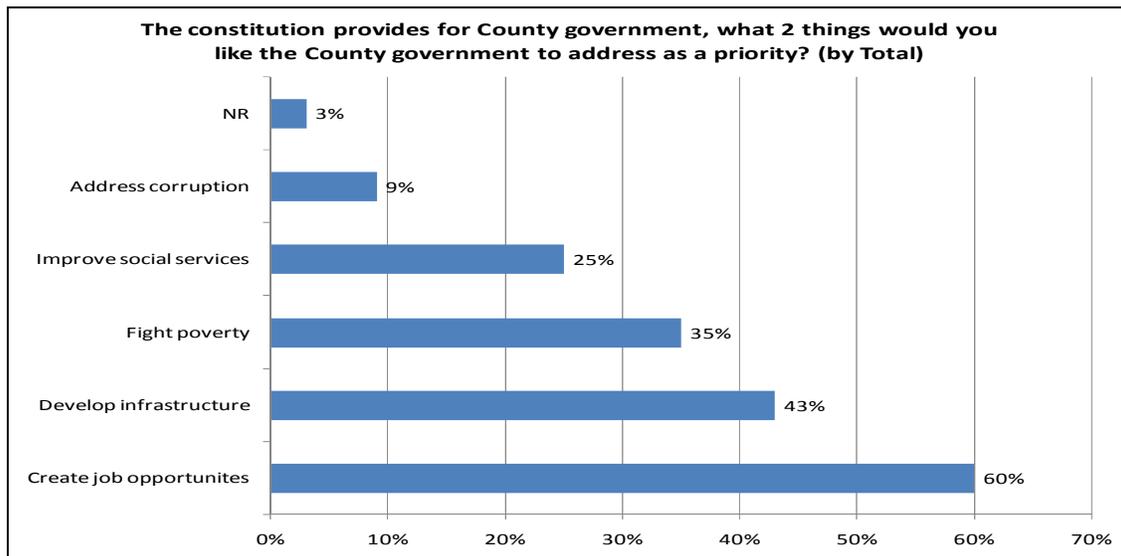
38. These responses generally suggest that people are supportive of attempts to address the problem of equity. Of course, these regional variations require deeper analysis to distil both the fears of gender equity and the aspirations of different communities. The point to note, however, is that people are evolving progressive attitudes in line with the spirit of the Constitution.
39. However, there is also a need for greater vigilance on the social-cultural hurdles that undermine gender equity in elective posts. The grip of patriarchy on many societies is yet to weaken. Up to 50 per cent of the respondents in North Eastern, 39 per cent in

Nairobi, 37 per cent in the Rift Valley and 34 per cent in Western said they would not support measures to secure constituencies for women to achieve the constitutional threshold of representation. While this may reflect gendered perceptions of political leadership, it could also be a signal of the absence of strong women leaders offering themselves for such positions in these regions.

Devolution

40. *Taskforce on devolved government has concluded its work:* The taskforce on devolved government handed over its final report on 6 September 2011. The report contained recommendations and a draft Sessional Paper to guide the implementation of the devolved system of government. Parliament has passed three laws touching on devolved government -- the National Government Loans Guarantee Act, the Contingencies and County Emergency Funds Act and the Urban Areas and Cities Act. The Public Finance Bill and Transition to Devolved Government Bill are yet to be debated and passed. The legislative framework for founding and entrenching devolution is in place. But building capacities at the county level in preparation for the actual operation of the devolved governments is an issue that should be given priority consideration because failure to prepare for this could collapse the model on which an important pillar of the Constitution is based.
41. *Kenyans have very high expectations of the devolved government.* As the last review report noted, a majority of Kenyans expect the devolved government to bring public services and resources closer to them and guarantee access to national resources through the devolved funds, thus cushioning them from marginalisation. Once in place, 60 per cent of the respondents said they would want the counties to prioritise job creation.

Figure 17: What two things would you like the county government to prioritise?



42. Notwithstanding the high expectations that people have of devolution, it is worth noting that the Ministry of Local Government/Taskforce on Devolution and the Ministry of Finance have been embroiled in controversies over issues of public finances

under the devolution governance structure. The disagreement has resulted in two parallel Public Finance Bills, one by each organ. These two institutions have failed to reach an agreement to present joint Bills for debate in Parliament.

43. *Conflict over the Devolution Bill signifies competing interests:* Conflict over the Financial Management Bill signals a wider tension between viewpoints on devolution. They are part of the tension that was not concluded at the time of negotiation between the two main parties to the coalition government and before the referendum.⁵ The tension appears to demonstrate reluctance to give up centralised control of power and resource. This is causing fear of the unknown, uncertainty and personal insecurity on the part of those who have been serving under the centralised system.⁶ It is important to ensure that valid concerns are examined through the prism of the Constitution in order to arrive at solutions that address these concerns in line with the spirit and letter of the Constitution. Most importantly, resisting the basic tenets of devolution or adopting extreme positions not in consonance with the constitutional aspirations of the people undermine and negate the historic gains that the Constitution has provided.
44. *Commission for Revenue Allocation is not visible:* The Commission for Revenue Allocation (CRA) has a critical role to play in the devolution process. Since its appointment in 2010, the activities of the CRA have remained largely unknown and invisible to the public. It has been argued that the Commission was formed without a legislative framework; that it was simply ‘carved out’ of the Constitution.⁷ In this respect, it lacks a law to guide its work. Nonetheless, the CRA Act was enacted in the period under review, on 28 August 2011. It is the Act that will operationalise and invigorate the Commission and make its activities more visible, particularly its critical role in the creation of counties and overall participation in the implementation of the Constitution.

Police Reforms

45. During this quarter, two police Bills were passed by Parliament and enacted – the National Police Service Act and the National Police Service Commission Act. The National Police Service Act is a critical law because it addresses many important elements of policing identified in both report by the Philip Ransley-led Taskforce on Police Reforms and the new Constitution. These include internal discipline, capacity, community policing, and the creation of the Kenya Police Service. It will also guide the recruitment of the Inspector General of Police, vetting of all police officers to determine whether they are going to continue serving.⁸ In addition, a policy on community policing has been finalised, and is expected to be devolved to the counties.
46. Other reforms that have been effected include the implementation of a new training curriculum for the police, which emphasises, among others, the Bill of Rights and change of attitude of the police.⁹ It is expected that the curriculum will transform the

⁵ Interview with an official of the Taskforce on Devolution, 18 August 2011; remarks corroborated by an interview with an analyst from the civil society, 8 September 2011

⁶ Interview with a former member of the Committee of Experts, 6 September 2011

⁷ ‘How new laws were broken 18 times’ *The Standard*, 10 August 2011

⁸ Interview with a civil society informant, 16 September 2011

⁹ Remarks by a senior government official in a public meeting to discuss crime prevention strategies held on 12

work ethic in the police force. The length of police training has also been changed in line with the new curriculum -- professional/graduate police officers are now being trained for 21 months while lower cadre non-professional police will be trained for 15 months. Initially, all police officers were trained for six months.

47. The police service is also in the process of strengthening internal accountability systems, which will be boosted by the formation of an Independent Police Oversight Authority (IPOA).¹⁰ The oversight authority will ensure complaints against the police are handled efficiently. Bills on policing are being drafted by the Police Reforms Implementation Committee (PRIC), pending the establishment of the National Police Service Commission, which should facilitate the merging of the Regular and Administration Police into one National Police Service. The recruitment of the Inspector General is the function of the National Police Service Commission, which is yet to be established. The two Principals are yet to set up a selection panel to recruit Commissioners to the National Police Service Commission. An Inspector General will head the National Police Service once it is put in place.
48. Most of the changes taking place within the police service are administrative. They are yet to address the *capacity* of the police to carry out its everyday policing work. As a senior official noted, 'there is no point of training graduates if you will not give them the resources they need to do their job; a graduate will not walk to a crime scene because there is no vehicle; he/she will rarely get into a gun battle with criminals without a bullet-proof jacket.'¹¹ There is a need thus for meaningful changes to build police capacity and renew public confidence in the institution. In fact, citizens have continuously said they are dissatisfied with the work of the police. Asked how satisfied they were with the performance of the police, 60 per cent of respondents said they were dissatisfied. At the same time, only 54 per cent said they were confident that the police could stop violence related to elections if it were to recur.

Challenges to Implementation of the Constitution

49. There are a number of challenges facing the implementation of the Constitution. Some of these are internal to the process of implementation while others are the result of the external political environment. This section identifies and discusses the factors that are of critical importance in challenging effective implementation.
50. *Drafting capacity:* The Constitution has created opportunities for drafting of many laws, almost simultaneously. All government departments are in the process of originating crucial Bills. However, there are few agencies with the requisite capacity to draft quality Bills in good time. Because of this, there has been a tendency towards the late submission of Bills whose quality is, sometimes, wanting. This has overburdened some of the drafting departments and even turned the CIC into a drafting body. At the same time, it has resulted in drastic revision of some Bills so that the initial meaning and spirit is lost. Indeed, there have been instances where several versions of the same Bill are submitted without clarity on which of the drafts is the final version for review.

August 2011

¹⁰ *ibid*

¹¹ Interview with senior government official, Ministry of Internal Security, July 2011

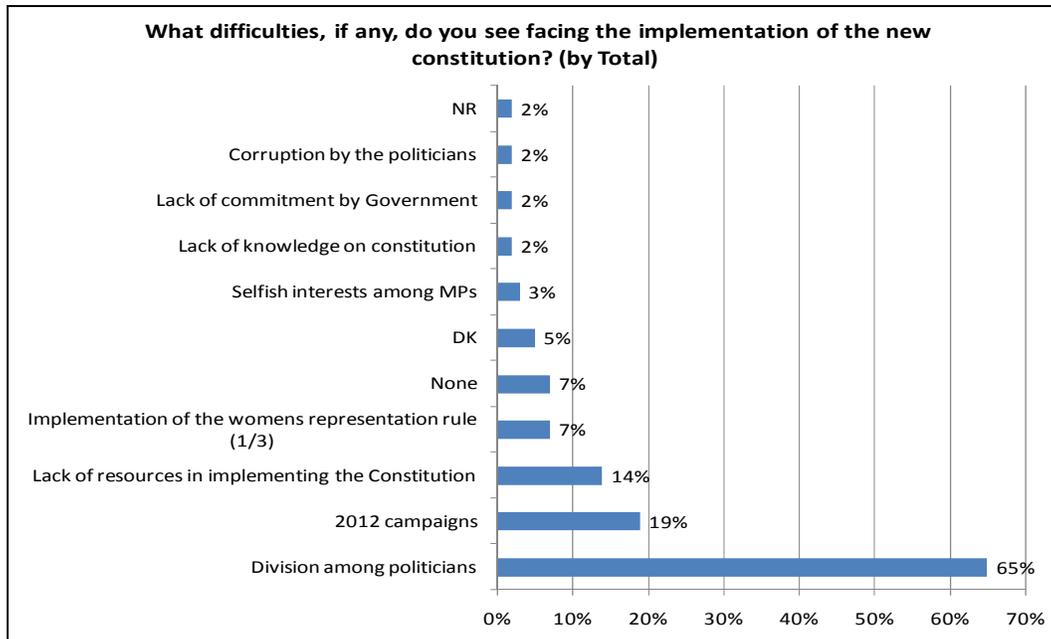
51. *Limited consultations, vested interests and competing viewpoints among stakeholders delayed finalisation of Bills:* Differences between ministries and departments have shown up at the finalisation stage of some Bills. Some stakeholders also complain of limited or little involvement of the public by originating ministries. There are still those who argue that ministries were not coordinating work among themselves in drafting the Bills. Some of these differences emanate from self-interest, partisan considerations, and generally restrictive viewpoints. In fact, there is a tendency to have extreme positions on a single issue: there are those who tend to take extremely conservative positions and those who adopt equally radical views on the same issue. Bridging this divide is difficult and ends up causing delays in processing the Bills.
52. Some of these differences – and extreme positions -- result from the grey areas and the contentious issues that remained unresolved at the time of negotiations before the referendum. How the numerically large groups will coexist and share resources with minorities under the devolved government was one such issue. The sticking points have returned to strain relations between and among stakeholders. It is possible that these consequences will be litigated: people who are unhappy with the Bills/Acts or feel that some amendments are not in line with the Constitution are likely to seek the intervention of the courts. This will further delay the process of implementation.
53. Already some Acts of Parliament have been challenged in court. The Judges and Magistrates Vetting Board, which was formed after the passage of the Vetting and Magistrates Act 2011, has been stopped from starting work until a case in court is heard and determined.¹² The applicant in the case argues that there are conflicts between the Vetting Act and the Constitution. The CIC has also gone to court to obtain orders preventing the debate and enactment of the National Government Loans Guarantee Bill and the Contingencies and County Emergency Funds Bill arguing that Cabinet, by passing the Bills without consulting the CIC, undermined the commission's role as stipulated under the Constitution.¹³ The Independent Ethics and Anti-Corruption Commission Act, 2011, has also been challenged in court, with the applicant arguing that Parliament had acted in a discriminatory manner by passing a Bill that effectively sacked Kenya Anti-Corruption Commission members. Legal challenges, while likely to delay the process, are in this regard a positive indicator of public vigilance.
54. *Citizens are aware that divisions among politicians are delaying the implementation of the Constitution:* Kenyans are sensitive to these challenges. They are also concerned about how political considerations influence voting patterns in Parliament when a Bill is debated. Indeed, pressure within Parliament has emerged as a significant challenge to policy implementation. Strategies to lobby votes to support or defeat Bills -- often driven by *who* has sponsored the Bill rather than its content and merit -- have tended to alienate Parliament from the people. Asked what difficulties they see in the implementation process, many respondents, 65 percent, cited divisions among politicians the single most important difficulty. Another 19 per cent observed that the

¹² 'Suit against top judges dismissed' *Daily Nation*, 25 August 2011

¹³ Article 261(4) of the Constitution and Section 14 of the 6th Schedule; see also 'CIC, House to Lock Horns Over Bills', *The Standard*, 26 August 2011

campaigns for an earlier election are a challenge.

Figure 18: What difficulties, if any, do you see in the implementation of the new Constitution?



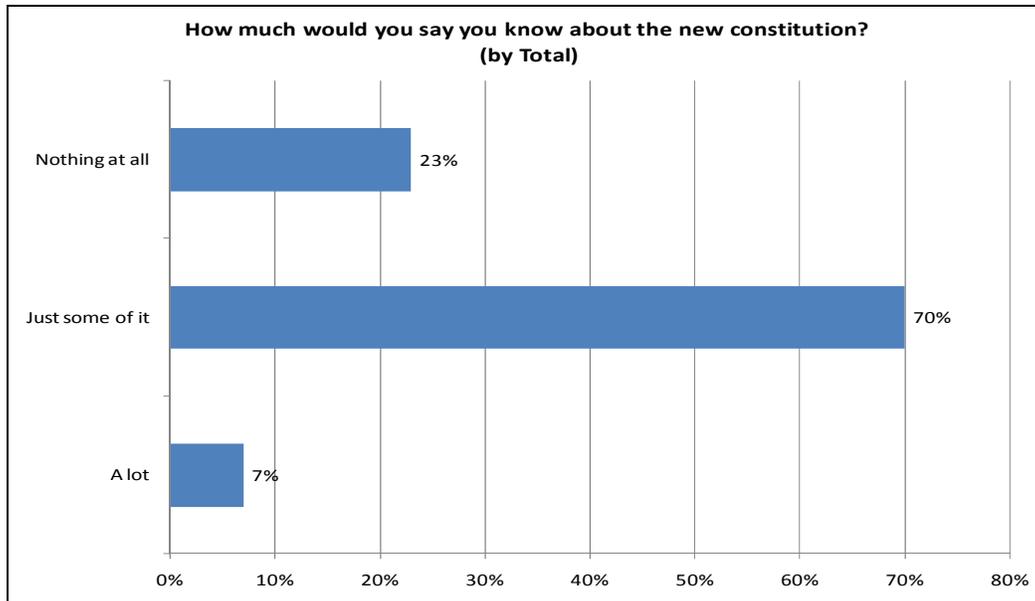
55. *There is no coherent leadership of the Constitution implementation process.* Implementing agencies including the CIC, CIOC and the Ministry of Justice, National Cohesion and Constitutional Affairs as well as other ministries and stakeholders have been involved in a blame game over delays encountered in the development of the Bills. The apparent lack of clarity about their respective roles, working relationships or coordination arrangements has created the impression that competing centres of decision-making are constraining the implementation process. These divisions portray the constitution implementing agencies as divided and lacking a clear overall strategy for operationalising the Constitution. Lack of clear leadership and ownership of the implementation process is likely to create oversight gaps, allowing non-reformers to sneak into law claw-back clauses to undermine the letter and spirit of the Constitution.¹⁴
56. *Lack of conflict mediation structures:* Lack of synergy and coherence between the implementing institutions and differences of opinion on the implementation process has been played out in the media, highlighting the absence of an arbitration mechanism. The conflicts escalate because there is no mechanism to arbitrate when disagreements occur. While the CIOC and the Principals have tried to mediate -- for example, between the Taskforce on Devolved Government and Treasury -- their efforts were *ad hoc* and came at a time when extremists had entrenched their positions. This

¹⁴ Remarks in a public forum to mark one year since the passage of the Constitution, 4 August 2011

certainly raises a need for deliberate efforts to create synergy between the Constitution implementation organs so as to reduce conflicts of this nature.

57. *Civic education is lacking:* Civic education does not appear to have intensified after the referendum. This is unfortunate, considering 93 per cent of respondents said they know very little or nothing at all about the Constitution. It appears as though the pre-referendum campaigns focused on contentious issues. The messages were often politically-laden.

Figure 19: How much would you say you know about the new Constitution?



58. Lack of awareness about provisions of the Constitution suggests the public cannot engage meaningfully with the Constitution implementation process. Civic education is, therefore, urgently needed -- especially on issues around devolution and voter education in readiness for the next General Election. It is encouraging that the Taskforce on Devolved Government has drafted a civic education programme on devolution aimed at mitigating this concern. But civic education need not wait till the demarcation of county wards and constituencies or the campaign period; it needs to start early.
59. *Need to build constitutionalism:* The Constitution is a living document that needs to evolve through generations. However, the implementation process has been made to appear like a project with timed deliverables: 'It has not been made into a new way of life. But the culture of constitutionalism can be galvanised by enforcement of the laws and respect for the values and principles and spirit of the Constitution, not just ticking off new Bills passed.'¹⁵ Making it a living document requires changing the way people

¹⁵ Interview with a policy analyst, 4 August 2011

relate, their social attitudes and moving towards social justice. It means placing an emphasis on implementation should transcend discussion on the number of laws passed to focus on the new values brought about by the Constitution. Passing Bills solely to fulfill the stipulated guidelines presents the risk of having a constitution without constitutionalism.

60. *Self-preservation motives present a great challenge to change under the new Constitution.* Persons or groups likely to be adversely affected by change under the new Constitution are resisting change. The Political Parties and Elections Bills provided good examples in this respect. MPs introduced amendments that serve to promote their personal interests. Similar self-preservation efforts manifest in government bureaucracy where the formulation of some of Bills appears aimed at retaining the status quo. Legislative manouvres to create laws skewed in favour of sectarian interests could continue to weaken institutions and erode the gains made under the Constitution.
61. Political and ethnic divisions within parties tend to be reflected in the coalition government. In effect, there is a thin line between political party positions and the position of the party's leadership on a government policy. The result is continued weak government institutions because politicians in government protect and advance their party interests rather than articulate and protect government policy. The lack of cohesion within the government, and the image of 'two-governments-in-one' often spill over into the implementation process, especially at the time of passing Bills in Parliament.¹⁶ Absence of an effective conflict resolution mechanism within the coalition is certainly responsible for this. The Permanent Committee on the Management of the Affairs of the Coalition is ineffective and rarely meets.
62. *Lack of cohesion in the coalition is not necessarily bad – after all:* Kenyans are unhappy about the recurrent political wrangles in the coalition government, but at the same time, some recognise such wrangling as having had positive results. They note that lack of cohesion compelled the Executive to desist from making unilateral decisions without due regard for the law. Appointments are negotiated and agreed upon; they are not made by one party alone. To some, 'the variation of opinion is a good thing if it is done in good faith.'¹⁷ The challenge, however, is how to manage differences and channel them to the greater good of the nation.
63. *Lack of reform champions in Parliament:* Parliament does not seem to have any champions who are driving the Constitution implementation agenda. There is no solid block of parliamentarians who seem committed to working together.¹⁸ The implementation process has been left to individual ministers to push the several pieces of legislation. Emphasis is not on the content of the new laws. Rather, it is on simply getting them passed. Once Bills are brought to Parliament, politicians support or amend them on the basis of personal, parochial, and ethnic considerations, which may significantly water down the value and weight of such laws.¹⁹
64. *Government actions tend to contradict the spirit of the law:* During the period under

¹⁶ Interview with a member of the CIOC, August 2011

¹⁷ Interview with a former member of the Committee of Experts, 6 September 2011

¹⁸ Interview with a former member of the Committee of Experts, 6 September 2011

¹⁹ Interview with an MP, August 2011

review, the two Principals undertook a Cabinet shuffle that saw some of the people who had been suspended from office over corruption allegations reinstated without making public information on whether they had been cleared by the Kenya Anti-Corruption Commission (KACC). A few weeks later, MPs voted to disband KACC, thus compromising continuity in the operations of KACC and blocking an effective transition to the new Ethics and Anti-Corruption Commission. These are contradictory actions, given that the Constitution seeks to build a strong culture of fighting corruption and all forms of impunity.

65. *Ethnic undertones threatening the image of new institutions:* While the Constitution outlines modalities for hiring State officers – including public participation -- applicants are still seen through ethnic lenses. There are intense discussions on the ethnic identity of applicants rather than on their quality and merit. While this is meant to ensure respect for ‘diversity’, the debates on ethnicity have the potential to denigrate the aspirations of the Constitution. This risks undermining the credibility of the new institutions. It also shows that Kenyans are yet to embrace the spirit of nationhood. Some tend to view appointments as motivated by ethnic considerations.²⁰ Interestingly, this argument of tribalism is usually raised whenever a nominee is from the President’s or Prime Minister’s ethnic community. While this is an important form of vigilance, the manner in which the debate is presented can derail the appointments process.
66. Polarisation resulting from these disputes has rapidly shifted the focus of debate away from constitutionalism to consolidation of ethnic interests. Notably, there is limited or no public debate on how appointments will improve service delivery. This debate has glossed over these issues, yet they are very critical for laying the foundation for radical reforms envisaged under the new Constitution.
67. *Competing interpretations of the Constitution:* The process leading to the passage of Bills for the establishment of the Gender Commission, the Human Rights Commission and the Office of the Ombudsman was fraught with controversy. Contestation stemmed from multiple interpretations of Article 59 and Article 59(4) of the Constitution, on whether to have one robust national human rights institution (NHRI) or several. Some favoured a ‘one-stop shop’ for all human rights issues. On the other hand, there were those in favour of an independent Gender Commission. The CIOC initially agreed to merge the Commission on Administration of Justice (Ombudsman) and the Kenya National Commission on Human Rights Bills while keeping the National Gender and Equality Commission Bill separate. However, this proposition failed because the Bills were withdrawn to allow MPs to understand the rationale of having all the three Bills passed separately.²¹
68. *The proposal to amend the Constitution is raising concern that could threaten the implementation process:* The decision by the Executive to start proposing amendments to the Constitution has drawn criticism. Some argue that it is too early and inconsistent with public expectations to begin to amend the Constitution. They point out that the Cabinet should have waited for the Supreme Court to interpret the Constitution and give direction on unclear provisions.²² At the same time, there is fear that it sets a

²⁰ ‘MPs protest nominations to key posts’ *Daily Nation*, 24 August 2011

²¹ See ‘CIOC Agrees to Merge Bills in Deadline Rush’, *Daily Nation*, 9 August 2011

²² Interview with a policy analyst, 14 September 2011

negative precedent that could invite those opposed to the Constitution to start proposing amendments through Parliament to suit sectarian interests. These are new challenges that require circumspect approach.

Conclusion

69. There is progress in the implementation of the Constitution. Critical laws have been passed and the Parliament met the constitutional deadline to pass the mandatory Bills. But the process leading to the passage of these Bills was hurried; there was insufficient time for the public to scrutinise them. Furthermore, the Executive bypassed the CIC in processing some of the Bills, even though the commission is meant to play a watchdog role in the implementation process. Vested interests and limited attention to the implementation process by everyone involved caused enormous delays in passing some of the Bills. Lack of adequate public scrutiny resulting from the speed with which the Bills were debated and passed has raised fears that the draft were faulty and that some unconstitutional provisions could have been sneaked into the laws through Parliament.
70. The Constitution is a negotiated document. It is the result of a settlement negotiated by the two parties before the referendum. During the negotiations before the referendum, issues that were not clearly resolved are gradually resurfacing to slow down implementation. There is need for caution about the whole process to prevent a deepening of a crisis of where competing expectations cannot be practicably reconciled.

3. REFORMS AND PREPAREDNESS FOR ELECTIONS

Introduction

71. Failure to effectively manage the 2007 elections triggered the post-election violence, which had devastating consequences for Kenya. Investigations by the Independent Review Commission on the General Elections held in Kenya on 27 December 2007 (IREC/ Kriegler Commission) found, inter alia, that the country's constitutional and legal framework relating to elections contained weaknesses and inconsistencies that limited the effectiveness of Kenya's electoral system. The Commission underlined the need to thoroughly overhaul the electoral management process and the institutions on which it was anchored. The inquiry also found that the defunct Electoral Commission of Kenya lacked the necessary independence, capacity and functionality resulting from its organizational structure, composition and management systems. The investigation further indicted the political parties and the media, while noting 'serious anomalies' in the delimitation of constituencies.
72. IREC recommended radical reforms in the electoral body. It also called for urgent executive, legislative and political measures to enable a newly reconstituted electoral body to perform its essential functions. Among such functions would be to initiate, popularise and sustain a national commitment to electoral integrity in Kenya. This would entail the adoption of a new voter registration system and relevant legal reforms.
73. Following IREC's recommendations, the Electoral Commission of Kenya (ECK) was disbanded in 2008 and an Interim Independent Electoral Commission (IIEC) formed, with a fully functional secretariat and regional coordinators. The IIEC conducted new manual and electronic voter registration in 2010 and oversaw successful by-elections and the August 2010 referendum. These achievements and pertinent legal reforms began to restore public trust in the electoral management process in Kenya.
74. This section of the report examines some of the reforms initiated to support the electoral process. The discussion generally centres on how prepared the country is for another General Election.

Electoral Reforms in the New Constitutional Dispensation

75. Since the promulgation of the Constitution, several laws have been passed to support the electoral process. A close review of the process of passing these laws reveals that short-term interests informed the drafting of the laws and how political leaders amended them. For instance, the Political Parties Bill was introduced to streamline the operations of political parties, instil political party discipline, provide guidelines on party loyalty and arrest the 'party hopping' that characterises pre-election periods, when candidates switch to multiple parties in search of nomination. The Bill was amended to exclude strict control over, among others, party hopping and the formation of alliances.
76. The enacted law, nonetheless, contains important provisions to streamline political party operations as provided for under Article 91 of the Constitution. Although the spirit of the law centred around strengthening political parties as institutions, the

debate in Parliament focused on party coalitions, particularly the question of whether to allow parties to form coalitions and mergers before or after the elections. The Bill was eventually amended to allow for alliances/coalitions before and after elections.

77. *Independent Electoral and Boundaries Commission Act: Controversy over the composition and control of the Independent Electoral and Boundaries Commission is probably the main challenge that has so far confronted the discussions on electoral reforms. The issue of control of a new electoral Commission has been cited as a significant explanation for delays in enacting the requisite legislation.²³ The law setting up the Commission, a successor to the Interim Independent Electoral Commission and the Interim Independent Boundaries Review Commission should have been enacted soon after the promulgation of the Constitution in August 2010.²⁴ Politicians are particularly interested in how the delimitation of boundaries and distribution of 80 new constituencies will be done. The boundaries issue needs to be flagged early as one of the main potential triggers of violence.*
78. The Bill setting up the Independent Electoral and Boundaries Commission (IEBC) was passed on 31 May 2011 and the President assented to it on 5 July 2011. The IEBC, established under Article 88 of the Constitution, is responsible for conducting or supervising referenda and elections and is charged with determining the boundaries of 80 new constituencies. This is a contentious issue because the Interim Independent Boundaries Review Commission (the Ligale Commission) wound up without concluding its assignment.²⁵ The tension this issue is likely to generate in future was apparent when the Bill was brought to the House for debate. Even though the Bill was passed, it was not before a record 70 amendments were made to it.
79. The short-listing of candidates to serve as IEBC commissioners has led to a controversy around the criteria used to select them. Some politicians have expressed concern with the criteria, claiming that it locked out some commissioners serving in the Interim Independent Electoral Commission (IIEC). Some political leaders argue that these IIEC Commissioners had proved their worth by conducting a free and fair referendum in 2011 and several by-elections. But those who support the short-listed applicants are of the view that the Selection Panel should be left alone to finish its work.
80. The amendments and the emergent issues are a sign of suspicions between the coalition partners. Some legislators wanted the new Commission to adopt the report of the Interim Independent Boundaries Review Commission (IIBRC) as the reference document for delimiting 80 constituencies. Others preferred the report – that was rejected. These polarities point to the sensitivity of the process of creating new constituencies and therefore the need for caution and objectivity in delimiting new boundaries.

²³ See 'CIOC Wants Government Printer Punished', *The Standard*, 21 July 2011

²⁴ See 'Wako accused of stalling new laws', *The Standard*, 29 June 2011

²⁵ The CIC had written the protest letters on two different dates, i.e on 28 May 2011 and 24 June 2011 according to 'Wako accused of stalling new laws', *The Standard*, 29 June 2011. The protest letter was copied to the Justice Minister, Kenya Law Reform Commission and the Parliamentary CIOC. See article on KBC online website at <http://www.kbc.co.ke/news.asp?nid=71152>.

81. These vested interests could taint the IEBC even before it is formed. Politicisation of the process of establishing a new IEBC will certainly undermine its autonomy as well as the legitimacy of the commissioners. In turn, this will make it difficult for the Commission to perform its functions especially complicate the demarcation of the 80 new constituencies. In other words, the establishment of a new IEBC is the most important point of the journey away from the post-election violence legacy thus far. Furthermore, the conduct of elections under the new Constitution and by a newly created independent elections body is a major turning point in Kenya after the post-election violence. The elections, if conducted well, could deliver a new dawn and transit Kenya to a democracy. But if poorly conducted and politicised through interference and influence in composing the electoral body, then the country risks losing the investments made in ensuring sustainable peace and political stability.

The New Constitution and Preparedness for the Next General Election

82. As the date for the next General Election approaches, there should be recognition of the preparations that must be put in place to ensure a smooth electoral process and proactively manage possible triggers of violence. There is an urgent need to examine preparedness of the logistical and institutional framework to conduct successful elections in the 47 counties and to check whether measures are in place to manage elections competently and in a manner that inspires public confidence in the electoral process. With the memories of 2007 still fresh in the minds of Kenyans, an effective and efficient electoral disputes resolution mechanism must be established. Moreover, uncertainties about the date of the next General Election – whether August or December 2012 or even on any other date – point to the need for adequate preparation in advance.
83. With a legal framework that is still taking shape, issues around violence during elections are of concern. Besides, in the past Kenyans have elected only three representatives (President, Member of Parliament, and Councillor) at every General Election. Under the new law, they will be required to elect candidates for at least six positions. In addition to other factors such as the weather conditions, the next election has the potential of turning into a logistical nightmare, with serious implications for the entire electoral process.
84. Since it was constituted in 2008, the IIEC has conducted elections with success and enjoyed widespread public approval. However, there is concern that these achievements do not match up to the organisational demands and public intolerance for error that the next General Election will entail. Besides, concerns about the composition of the independent electoral body, particularly the integrity of the process of recruitment of commissioners, is a significant hurdle that must be overcome to restore public confidence not only in the electoral commission, but the entire electoral process, including the integrity of the results.
85. To succeed in meeting the high standards of efficiency and transparency that Kenyans now expect of the electoral body, the country needs to surmount three challenges related to past elections: (i) establish a conducive environment for a successful electoral process; (ii) manage the next General Election reliably, competently and in a manner that inspires public trust in the electoral process; and (iii) proactively manage

pre-election violence triggers and settle election disputes in a fair manner and expeditiously.

Setting a Conducive Environment for a Successful Electoral Process

86. With the legacy of 2007 disputed elections fresh in the memory of many, it is important to determine the extent to which Kenya has addressed the institutional and legal challenges that precipitated the crisis. Thus, there is a need to examine the measures to put in place to ensure that the next General Election is a peaceful, free and fair. In this regard, the existing legal framework and behaviour of various actors should be seen to establish a pre-election environment in which it is possible to prepare for and conduct genuine elections.
87. Free expression of suffrage by voters and candidates should be manifest in whether or not the electoral system establishes a fair basis for electoral competition. Laws and practices should also effectively regulate the media and guarantee equitable access to state and non-state media. More vigilance is needed to ensure that electoral laws and practices guarantee freedoms of assembly, organisation and association, electoral participation, and that they ensure citizens receive adequate civic and voter education. In addition, measures must be in place to monitor the conduct of political parties as responsible actors in the electoral process, and to ensure early warning and early response mechanisms to mitigate election-related violence. Consultative mechanism between the IEBC and the political parties should be established quite early.
88. A careful look at the period between 2008 and the reporting period indicates that the context for holding elections in Kenya presents mixed signals. Despite a successful constitutional reform process, continuing legal reforms and the prospect of a new electoral Commission, there are several gaps in this journey to a free and fair election. Table 4 below contains the key challenges that are still outstanding and possible solutions.

Table 4: Towards a more conducive electoral environment

Challenges	Recommendations
1. Continuing uncertainty over gender quotas	<ul style="list-style-type: none"> • Speedily resolve the doubts over the system through a suitable constitutional amendment.
2. FPTP system raises the possibility of a close zero-sum electoral contest with distortion effects	<ul style="list-style-type: none"> • Strengthen early response mechanisms • Conduct civic education on the electoral system
3. Incomplete legal reforms	<ul style="list-style-type: none"> • Hasten the promulgation of regulations under the relevant laws.
4. Ineffective media regulation and inequitable access to the media	<ul style="list-style-type: none"> • Conduct an audit of media ownership in Kenya. • Promulgate equitable access regulations under the Elections Act, 2011 and enforce them
5. Continuing violations of basic political freedoms	<ul style="list-style-type: none"> • Speed up police reforms and judicial reforms

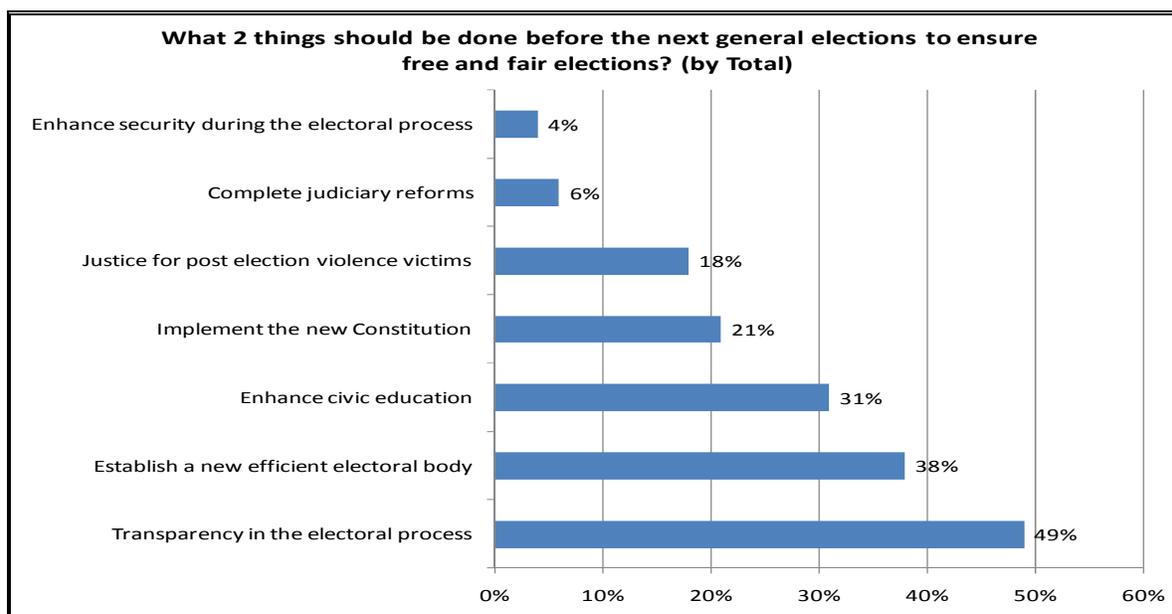
Challenges	Recommendations
6. Uncoordinated, under-funded, unstructured and unfocussed civic education	<ul style="list-style-type: none"> • Agree on the minimum content for an election-centred voter education programme within the context of an inclusive national civic education programme
7. Weak political parties and ineffective political party regulation	<ul style="list-style-type: none"> • Promulgate comprehensive regulations under the Political Parties Act, 2011
8. Weak early response mechanisms	<ul style="list-style-type: none"> • Speed up police reforms • Strengthen peace committees
9. Inadequate facilitation of electoral observation	<ul style="list-style-type: none"> • Develop a Code of Conduct for Election Observers that includes adequate facilitation for electoral observation

Manage Elections Competently and Inspire Public Trust in the Electoral Process

89. The failure of the 2007 General Election seriously eroded public trust in elections in Kenya. Hence, the process of appointment of Commissioners for the Independent Electoral and Boundaries Commission and their stewardship of the electoral process from the date of appointment has serious implications for the restoration of public confidence.²⁶ The country needs to establish an independent electoral Commission that commands the respect, faith and confidence of Kenyans to avoid a crisis of confidence such as that which triggered the 2007 crisis.
90. When asked during the survey what two things should be done before the next General Election to ensure free and fair elections, 49 per cent of the respondents said there should be transparency in the electoral process while 38 per cent would like to see an efficient electoral management body established.

²⁶ 'Kenya polls team list sparks heated debate,' *Daily Nation*, 18 September 2011

Figure 20: What two things should be done before the next General Election to ensure they are free and fair?



91. Given the public expectations of high standards, it is important to ensure, from the outset, that the Independent Electoral and Boundaries Commission is perceived as independent fair, competent and impartial. In addition, the legal and institutional framework for the Electoral Commission should be adequate, and the electoral commission should demonstrate its capacity to exercise effective control of the electoral process, including a comprehensive, accurate and current register of voters. The demarcation of constituencies should be transparent and fair, particularly with the introduction of 80 new units. Oversight measures must be put in place early enough to ensure that during the elections, the counting, transmission, collation and announcement of election results is perceived to be free of fraud and manipulation.
92. A new legal and institutional framework for an Independent Electoral Commission is being put in place amidst concerns about the results of reconstituting it, especially the preservation of institutional memory. Table 5 below contains the continuing challenges that will need further attention.

Table 5: Towards better Election Management Body readiness and competence

Challenges	Recommendations
1. Uncertainty over the election date for the next elections	<ul style="list-style-type: none"> • Set down the case filed by the CIC and determine it in good time to clarify election date issue.
2. Continuing weakness of enforcement action in respect to electoral offences	<ul style="list-style-type: none"> • Speed up fundamental police reforms • Coordinate with the Director of Public Prosecutions to pay adequate attention to electoral offences • Firmly use enforcement powers under the Elections

Challenges	Recommendations
	Act, 2011
3. Continuing bottlenecks against the maintenance of an accurate and current register	<ul style="list-style-type: none"> Integrate voter registration with the Integrated Population Registration System (IPRS) in a way that allows the sharing of registration data while protecting the integrity of the register.
4. Incomplete constituency delimitation process in a charged electoral environment	<ul style="list-style-type: none"> Speed up constituency delimitation after the constitution of IEBC.
5. Uncertainty over the appointment of the Chairperson and members of the IEBC	<ul style="list-style-type: none"> Monitor the appointment process for IEBC for compliance with the requirements of the Constitution.
6. Uncertainty over the ability of the EMB to put in place a fool-proof system for counting of votes and results transmission	<ul style="list-style-type: none"> Establish a computer-based system for transmission of results. Choose electronic voting solution carefully to ensure the availability of an audit trail in the event of system failure. EMB should provide full transparency on a web-based platform for elections results up to polling station level.

Settle Electoral Disputes Efficiently and Effectively

93. It is widely believed that the 2007 General Election would probably not have ended the way it did had the electoral commission and the Judiciary enjoyed public trust and had there been an effective electoral dispute resolution mechanism. It is therefore important to also ensure that the electoral management body has an effective and impartial mechanism to manage pre- and post-election disputes. Apparent lack of clarity about the respective roles of the Political Parties Dispute Tribunal, the IEBC and the High Court with regard to the management of disputes touching on political parties and electoral disputes needs to be addressed early to streamline mandates for timely and clear institutional responses.
94. Although election petition determination after 2007 has inspired confidence in the courts and judicial reforms will further bolster this confidence, there are still concerns relating to case flow management and the fruits of the vetting process that is yet to commence. Table 6 below contains the key outstanding challenges and recommended solutions.

Table 6: Towards improved electoral dispute resolution

Challenges	Recommendations
1. Incomplete legal reforms on electoral dispute resolution.	<ul style="list-style-type: none"> Finalise the making of rules under the applicable laws.
2. Uncertainty over the ability of the EMB	<ul style="list-style-type: none"> Courts should defer to the Political Parties Disputes

Challenges	Recommendations
to effectively and efficiently handle pre-election disputes.	<p>Tribunal and the IEBC dispute settlement system in the first instance and only interfere in cases of manifest injustice.</p> <ul style="list-style-type: none"> • Provide technical assistance to the new EMB on the settlement of pre-election disputes.
3. Uncertainty over the ability of the judiciary to hear and determine election disputes efficiently and fairly.	<ul style="list-style-type: none"> • Speed up on-going judicial reforms. • Consider appointing a special bench of judges to hear and determine election-related disputes from the nominations period to a year after the elections in order to accord election petitions the priority that the law requires.

Conclusion

95. Several laws have been enacted to improve the electoral process. Be that as it may, the establishment of an independent electoral Commission will be an important milestone in Kenya's reform agenda. Politicisation of the process of establishing this new body will lay a foundation for future conflicts over the decision on important election issues by this body. It is imperative to insulate the recruitment process from partisan and narrow interests.
96. An important aspect of preparations for the election is the institutional capacity of the body that will manage the elections. It is true that laws are important. But laws on their own without the agency to enforce and impose sanctions on those who breach them mean little, especially in a country where electoral violence, because of impunity, appears to have transformed into a culture. Giving the new body adequate powers to punish those who breach the law is important.
97. The new electoral body can midwife the country to a democratic dispensation or fail it altogether. Failure to effectively and efficiently manage the electoral process would certainly fail the country. It is important, therefore, for much more attention to be paid to 'institutional preparedness' rather than the date of elections. It is possible to go for an election on a particular date only to realise that the country is not politically and institutionally – or even technically – prepared to conduct the election. Whatever date the country opts for, legal, political and institutional preparations must be finalised in advance.

4. THE LEGACY OF POST-ELECTION VIOLENCE: THE ICC ADD IDPs

Introduction

98. The KNDR agreement recommended the establishment of a commission of inquiry to investigate the causes of the post-election violence. The Commission of Inquiry into the Post-Election Violence (CIPEV/Waki Commission) was established in line with this recommendation. CIPEV recommended, inter alia, the setting up of a Special Tribunal for Kenya within a given time frame to investigate and prosecute suspected perpetrators of crimes committed during the crisis period. It also recommended handing over the matter to the International Criminal Court (ICC) if the government failed to set up the Tribunal.
99. On two occasions in 2009, the government failed to obtain enough support in Parliament for passing laws to set up the Tribunal. Some political leaders preferred the matter to be handed over to the ICC, if not ignored altogether. There was limited support for a local Tribunal. Following this development, and in line with CIPEV recommendations, in March 2010, the ICC Chief Prosecutor sought permission from the Pre-Trial Chamber II to open an investigation into the situation in Kenya. The Chamber granted permission.²⁷ On 15 December 2010, the ICC Prosecutor named six persons suspected to bear the greatest responsibility for crimes committed during the post-election violence (PEV). On 8 March 2011, the ICC issued summonses for the suspects to appear before the court. On 7 and 8 April 2011, the six suspects made their initial appearance before the ICC.
100. This section of the report looks at the progress of the ICC investigation of the Kenya situation this far. It also looks at public perceptions of the role of the court in fighting impunity in Kenya.

Summary of findings

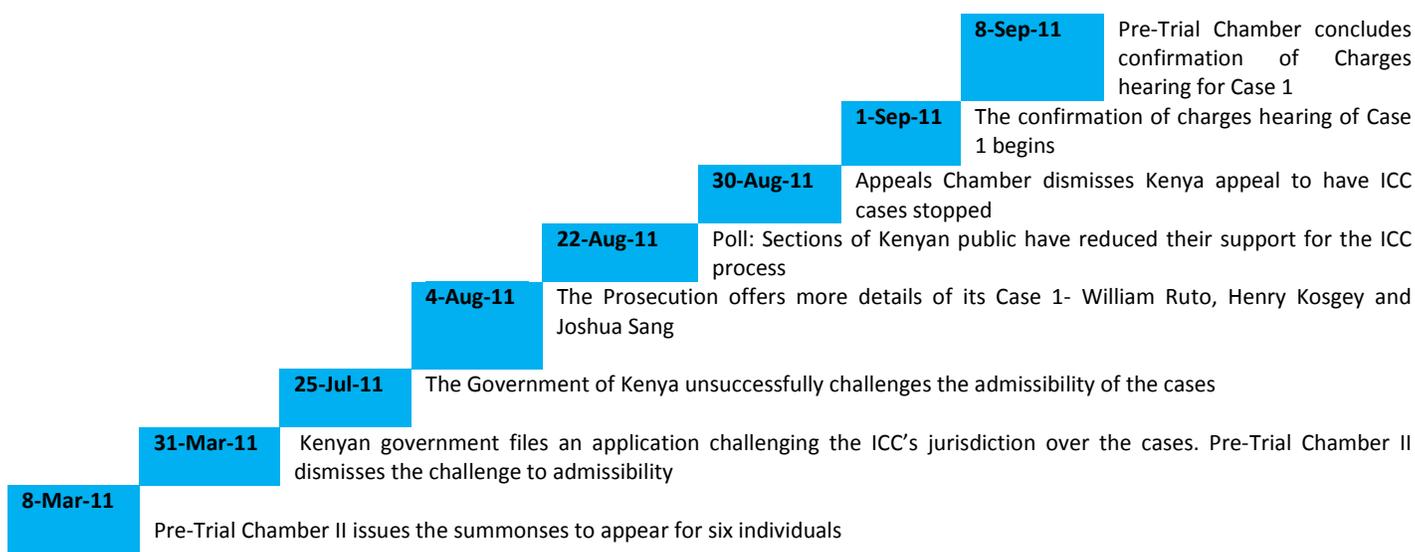
- Government unsuccessfully challenges admissibility of the case before the ICC
- The issue of political responsibility dominates confirmation of charges hearings
- Covert discourses continue to politicise the ICC process in Kenya
- Public support for the ICC remains high, but lower than before naming of suspects
- Concern that the ICC Chief Prosecutor may fail to adduce adequate evidence due to lack of government cooperation
- Covert intimidation of witnesses characterised by ostracism of ‘suspected’ witnesses and the language of ‘betrayal of the community’
- Majority believe the ICC investigations are unlikely to trigger violence

²⁷ See previous South reports at www.south.co.ke and www.dialoguekenya.org

Progress of the Investigation

101. Since the Pre-Trial Chamber II issued summonses to appear on 8 March, 2011, a number of events have taken place. By the end of September 2011, the ICC had started the confirmation of charges hearings against three of the suspects from ODM side while hearings for the three from the PNU side were expected to end on 5 October 2011. The figure below shows the progress made in this respect:

Table 7: Milestones in the ICC investigation



Reactions to the ICC Investigations

102. *Government efforts to withdraw from the ICC:* From the time the Pre-Trial Chamber II granted the Prosecutor permission to investigate the Kenya situation, the government began to make diplomatic attempts to defer the Kenya case. In March 2011, the government hired lawyers and filed an application challenging the ICC's jurisdiction over the cases. The government argued that with a new Constitution and reformed Judiciary, it was now able and willing to conduct trials against the six suspects locally.²⁸ However, in May 2011 the judges of the Pre-Trial Chamber II unanimously dismissed the application with a ruling that 'in the absence of information which substantiates the Government of Kenya's challenge that there are ongoing investigations against the suspects, the cases are admissible'.²⁹ By the time the ICC investigation was started, there was no evidence found that the police had been investigating any of the six individuals mentioned by the Prosecutor. In June, the

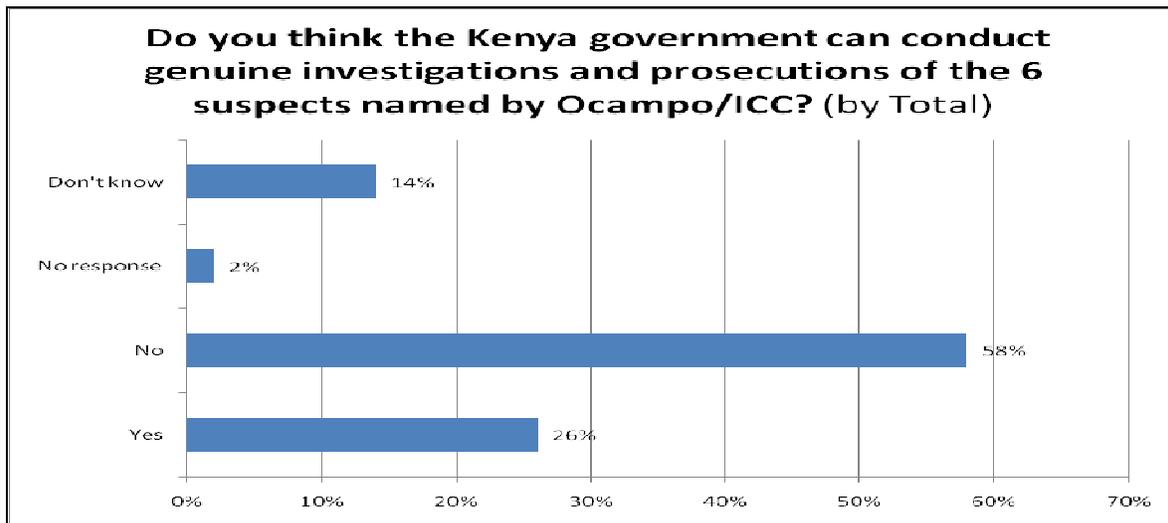
²⁸ Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute, No. ICC-01/09-01/11 and ICC-01/09-02/11, 31 March 2011

²⁹ Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, CC-01/09-01/11-101, 30 May 2011

Government appealed against that decision, arguing that the judges had erred in their ruling.³⁰ On 30 August, the Appeals Chamber dismissed the appeal by a majority.³¹

103. The ICC ruling that the Kenya government failed to demonstrate any evidence that investigations on any of the six suspects were ongoing or that a Kenyan prosecutor had opened any cases against the suspects resonated strongly with public perceptions in favour of the ICC intervention. When asked whether they believed the government could conduct genuine investigations and prosecutions of the six suspects, 58 per cent of respondents did not believe so. Only 26 per cent said that they thought the government can do conduct investigations and prosecute the six suspects.

Figure 21: Do you think the government can conduct genuine investigations and prosecutions of the six suspects?



104. A regional analysis shows that the perception of government's inability to carry out genuine investigations is widely shared in all regions, even in those regions where suspects hail from. However, more people in the former Central Province than any other area express faith in government willingness to conduct investigations and trials. Similarly, regions in favour of the ICC investigation, such as North Eastern and Nyanza, show high levels of disbelief.

³⁰ Appeal of the Government of Kenya against the 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2) (b) of the Statute, ICC-01/09-02/11-104.

³¹ Decision on the Presiding Judge of the Appeals Chamber in the appeal of the Government of Kenya against the decision of Pre-Trial Chamber II entitled 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence'

Table 8: Do you think the Kenya government can conduct genuine investigations against the 6 ICC suspects?

Do you think the Kenya government can conduct genuine investigations and prosecutions of the 6 suspects named by Ocampo/ICC? (by region)				
	Yes	No	No response	Don't know
Central	38%	52%	3%	7%
Coast	11%	62%	2%	26%
Eastern	31%	55%	3%	11%
Nairobi	31%	64%	0%	5%
North Eastern	18%	73%	2%	7%
Nyanza	17%	67%	1%	15%
Rift Valley	27%	53%	3%	17%
Western	18%	57%	3%	21%

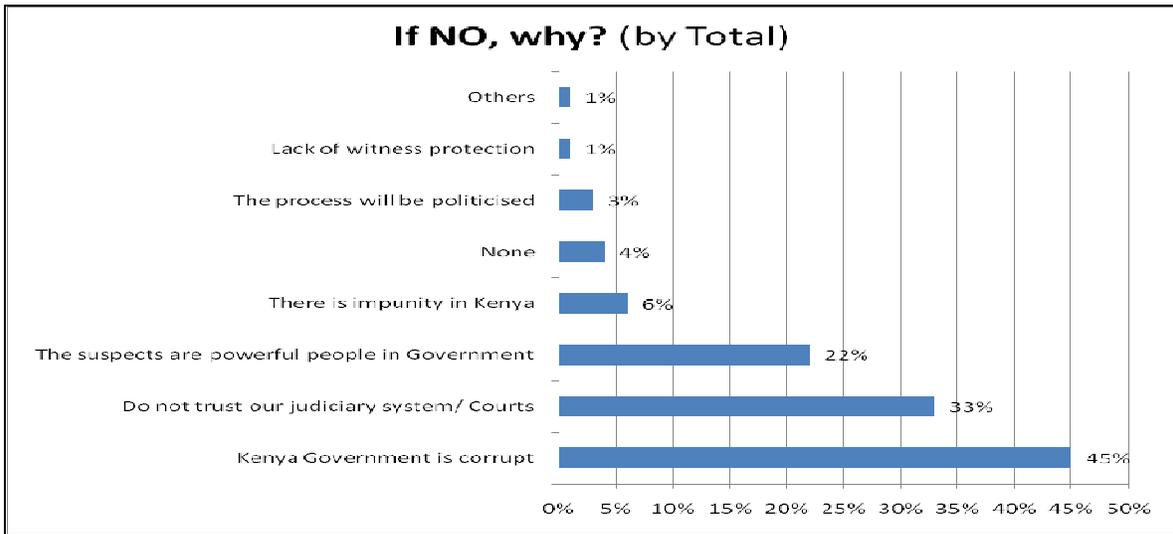
105. *The ICC intervention tends to deepen divisions within government.* The proceedings at the confirmation of charges hearings at the ICC and debate on the matter of political responsibility for violence have deepened fissures within the coalition government. The hearings have re-established the cold relations that characterised the early days of the coalition government; they have introduced new perspectives about levels of culpability of the suspects and reinforced the view that the list of suspects by the ICC was ‘incomplete’ because it does not comprise leaders from some of the ethnic communities.³² These discourses have continued to imbue the investigation with political undertones, which overshadow debate about the question of impunity. In effect, focus on ‘who else should be investigated’ obscures the question of why investigations are taking place and reinforces notions of victimisation for political ends.³³
106. *The government is perceived as being complicit in impunity:* The low public confidence in the ability of government to conduct investigations suggests that people are still hesitant to trust new institutions, including those created under the new Constitution.³⁴ Indeed, 33 per cent of the respondents said they did not believe the government can effectively prosecute the ICC suspects because they cannot trust the Judiciary. Another 22 per cent said they believe that some of the suspects are so powerful in government that they would mire investigations. The largest number (45%) of sceptics thinks the government is corrupt and therefore likely to be compromised. These findings suggest that efforts taken to address the underlying causes of violence have not had meaningful impact to change perceptions about the government and its institutions.

³² ‘Cabinet meets over ICC hearings’, *The Standard* 4 Sept 2011

³³ <http://www.icckenya.org/2011/09/icc-case-not-viewed-as-against-ruto-kosgey-and-sang-but-against-the-kalenjin/>

³⁴ Interview with a university lecturer, 2 September 2011

Figure 22: If No (government cannot conduct genuine investigations), why?



107. *People are generally happy with the ICC interventions: Perceptions of lack of government commitment to fight impunity sustains public support for the ICC. A significant majority, 65 per cent of the respondents, are happy that the ICC is pursuing the six suspects.*

Figure 23: Are you happy or unhappy that the ICC is pursuing the six suspects? (By total)

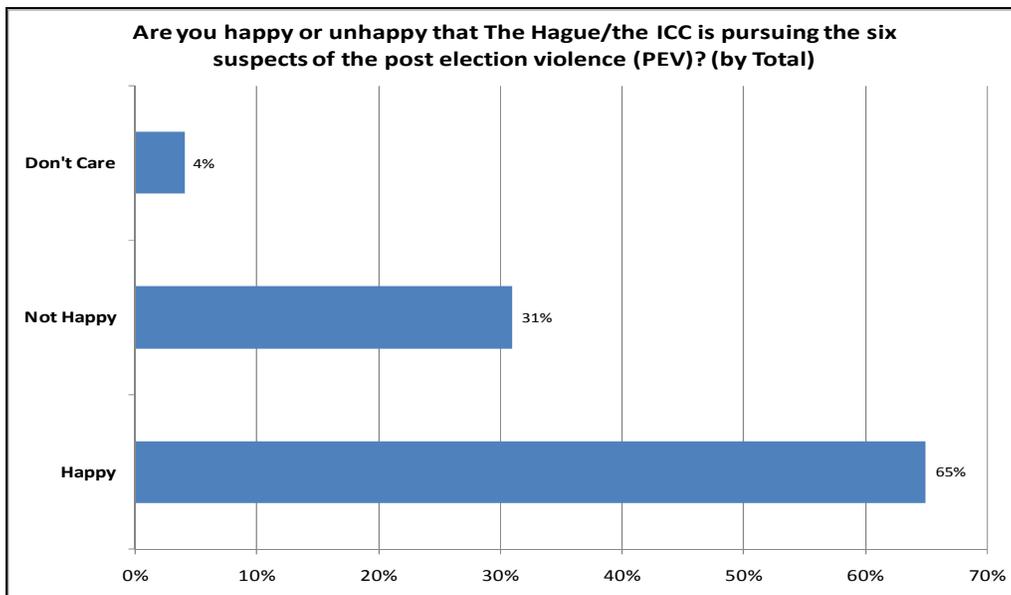


Table 9: Are you happy or unhappy that the ICC is pursuing the six ICC suspects (by region)

Are you happy or unhappy that The Hague/the ICC is pursuing the six suspects of the post election violence (PEV)? (by region)					
	Very happy	Somewhat happy	Not very happy	Not happy at all	Don't care
Central	47%	17%	9%	24%	3%
Coast	57%	12%	11%	9%	12%
Eastern	44%	18%	13%	22%	3%
Nairobi	52%	12%	14%	21%	2%
North Eastern	55%	17%	5%	19%	4%
Nyanza	73%	10%	7%	6%	4%
Rift Valley	39%	15%	15%	28%	3%
Western	60%	11%	7%	19%	4%

108. Those who are happy with the ICC perceive it as the only means to get justice for victims of the post-election violence and end impunity in Kenya. Lack of movement in prosecuting powerful persons as well as low-level perpetrators since the post-election violence suggests that the ICC continues to capture the public imagination about what should be done to fight impunity at all levels:

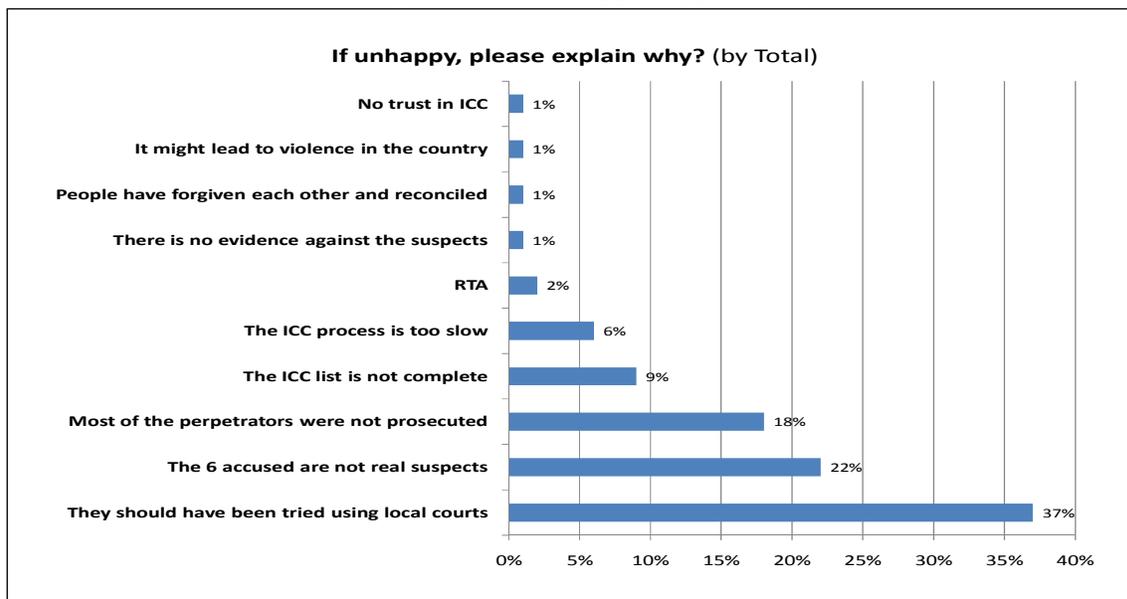
Table 10: If happy; why?

	Total	Central	Coast	Eastern	Nairobi	North Eastern	Nyanza	Rift Valley	Western
It will end impunity	29%	13%	19%	35%	30%	22%	38%	30%	34%
We do not trust Kenya courts	10%	11%	4%	9%	9%	10%	4%	11%	22%
To get justice for the PEV victims	44%	46%	52%	36%	48%	53%	43%	47%	35%
It will prevent future violence	16%	27%	24%	18%	11%	14%	14%	12%	10%
To know the truth about the PEV	0%	2%	0%	1%	1%	0%	0%	0%	0%
RTA	1%	1%	1%	1%	1%	0%	0%	0%	0%

109. As noted above, 31 per cent of respondents across Kenya are not happy with the ICC is trying the six suspects. Of these, 37 per cent agree with the government position that they should be tried by local courts. Over 20 per cent of those unhappy with the ICC think those charged are not the real suspects. One respondent, for instance, noted that

‘those being charged are not the ones who killed people or burnt houses; the real suspects are with us here.’³⁵ Of a similar opinion are those who think that the suspects are not the ones who hold the greatest responsibility for crimes committed during the post-election violence. There are those who think the suspects are ‘being sacrificed’ to protect others.³⁶ The latter observation further informs the view by 9 per cent of the respondents that the ICC list is not complete.

Figure 24: If unhappy, explain why

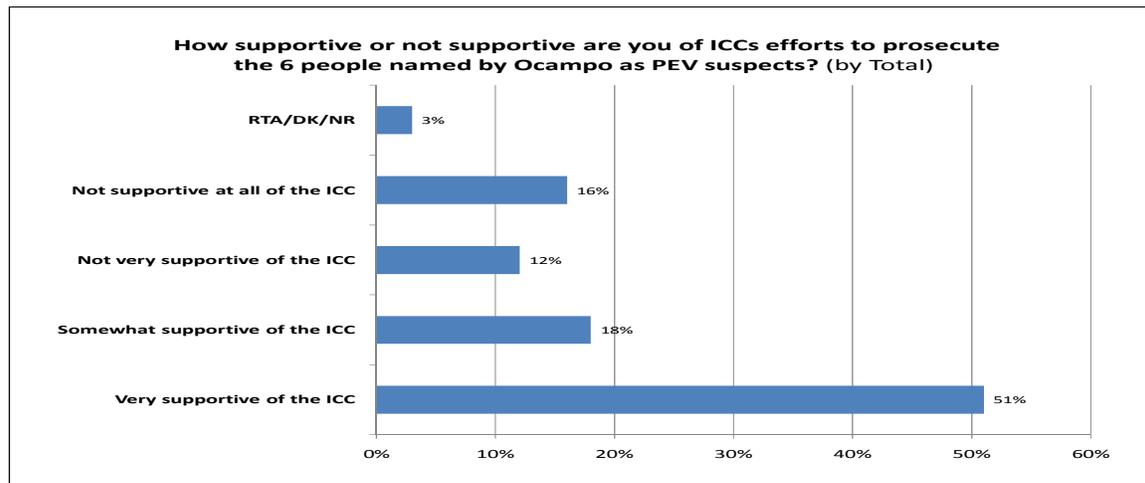


110. Continued support for the ICC derives from public perceptions that the government is unlikely to conduct genuine investigations and prosecution of the suspects. About four years on, the public has not seen a major movement by the government to do so. As a result, a majority of respondents across the country are supportive of the prosecution of the six suspects at the ICC. However, some respondents, mostly from the Rift Valley, feel that the ICC has ‘targeted’ the suspects and their respective communities.³⁷

³⁵ Interview with a displaced person in Eldoret, 9 July 2011

³⁶ Interview with an elderly man in Eldoret, 10 July 2011

Figure 25: How supportive or not supportive are you of the ICC efforts to prosecute the six ICC suspects?



111. A regional analysis shows that majority of respondents in all regions are supportive of the ICC investigation. Support is lowest in the Rift Valley and Central regions, where most of the suspects come from.

Table 11: How supportive or not supportive are you of the ICC (by region)

How supportive or not supportive are you of ICCs efforts to prosecute the six people named by Ocampo as PEV suspects? (by region)								
	Central	Coast	Eastern	Nairobi	N/Eastern	Nyanza	R/Valley	Western
Supportive of the ICC	65%	77%	66%	67%	76%	85%	59%	77%
Not supportive of the ICC	33%	16%	32%	30%	23%	11%	39%	22%
RTA/DK/NR	3%	7%	2%	3%	2%	3%	2%	1%

112. *ICC is not politically manipulated:* Allegations that the ICC process has been used to eliminate political rivals ahead of the next elections do not seem to enjoy widespread public support: a majority of respondents across the country are of the view that those supporting the ICC are doing so to get justice for the victims of violence or to protect some of the suspects rather than to eliminate political rivals.

Table 12: Do you agree or disagree with each of the following statements?

Do you agree or disagree with each of the following statements?		
	Agree	Disagree
Those opposing The Hague/the ICC action are mainly trying to protect those who organised the PEV	60%	40%
Those supporting The Hague/ the ICC action are mainly concerned with getting justice for victims of the PEV	74%	26%
Politicians supporting the Hague/the ICC action are mainly concerned with eliminating political opponents	47%	53%

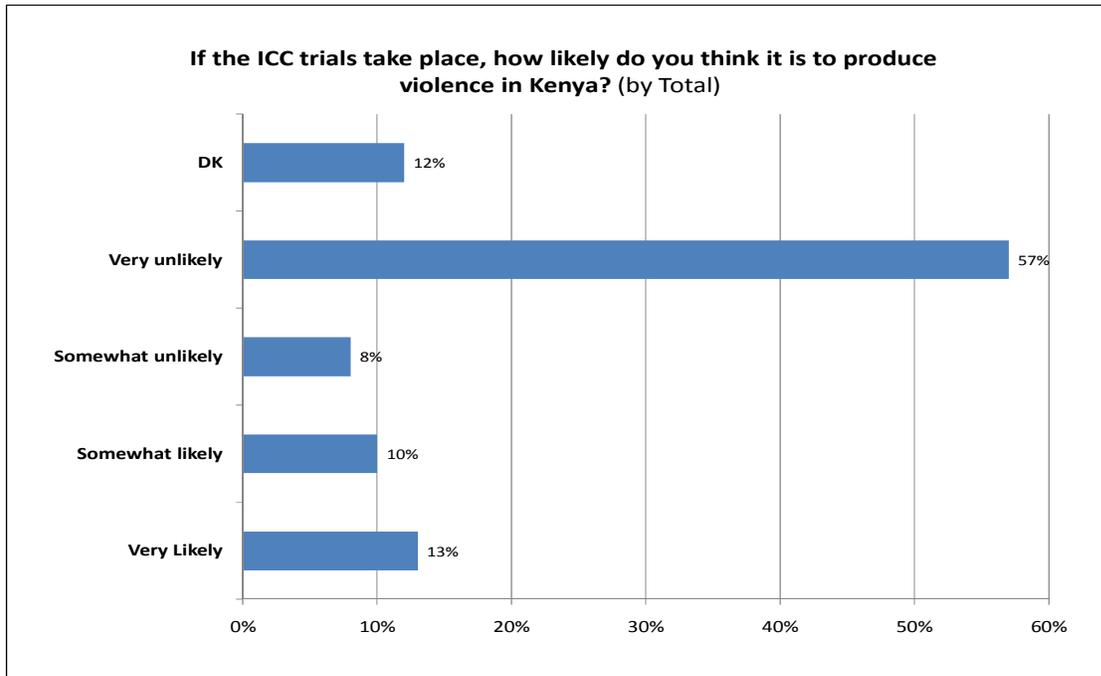
113. *Public support and confidence in the ICC process remains high, albeit lower than it was before the naming of suspects.* As noted in previous reports, public support for the ICC has remained high since CIPEV completed its report, but the support reduced dramatically after the naming of the suspects. The reduction may be attributed to the perception that the court failed to include all the perpetrators from regions which experienced violence, which implies failure to include leaders of other ethnic groups.³⁸ The claim that four of the six suspects hail from the Rift Valley³⁹ has reinforced the perception of a political vendetta against the people of the region.⁴⁰
114. *Majority of respondents remain confident that investigations and prosecution by the ICC will not trigger violence.* Up to 65 per cent of the respondents believe violence is highly unlikely to occur as a result of any outcome at the ICC. This is an encouraging finding. However, unlike in previous reviews, more people are concerned that isolated incidents of violence are likely to occur if certain politicians are indicted. Only 23 per cent of respondents said they think violence is likely. This percentage is the highest recorded over the past three years. This suggests that something is going on at the community level, away from the glare of the media and the public eye.

³⁸ Interview with a university lecturer in Moi University, 5 July 2011

³⁹ Interview with an elderly woman in Eldoret, 9 July 2011

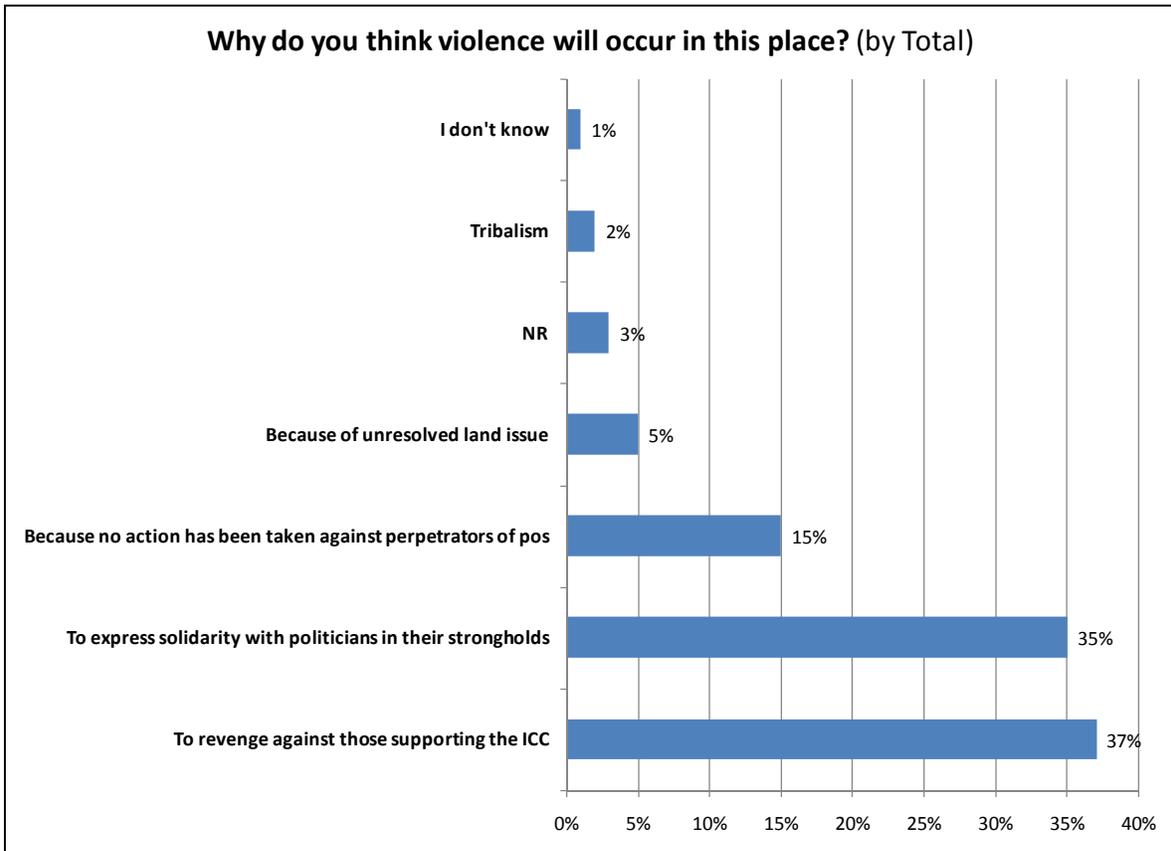
⁴⁰ Interview with a young man in Eldoret, 4 July 2011

Figure 26: How likely do you think it is that ICC trials will produce violence?



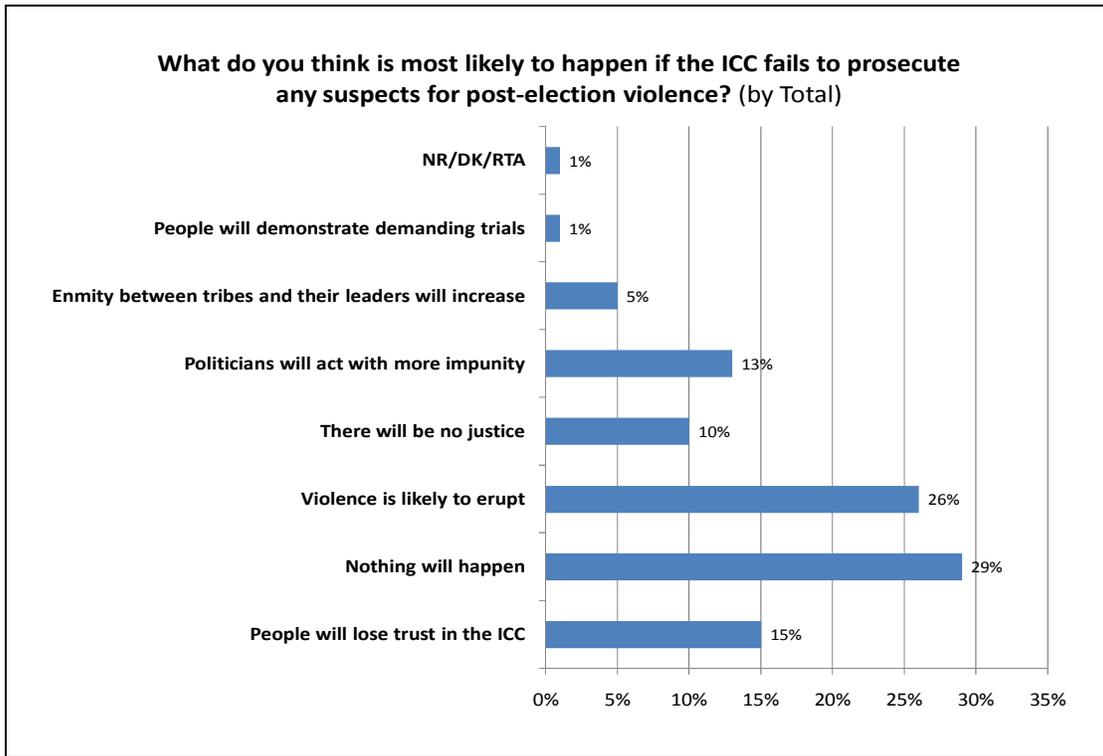
115. The very few (13%) who think violence is likely to occur think the most likely site of such violence is the Rift Valley. They attribute their concern to a number of reasons: to express anger against those supporting the ICC, to show solidarity with the suspects, and impunity for lower level perpetrators. As noted in a previous review report, the prosecution of only high level perpetrators without any mechanism for the those who carried out the actual attacks risks reinforcing impunity among those who believe they are out of reach of the ICC. Other places deemed to be possible scenes of violence are those that experienced violence during the 2007 political crisis, including Nakuru, Naivasha, and Nairobi including Kibera, Kisumu and Kiambu.

Figure 27: If yes, why do you think violence will occur in this place?



116. Although only a small percentage of Kenyans think violence is likely to erupt as result of the ICC, these concerns should not be ignored because the conditions that caused the violence have not been addressed. In particular, the problem of illegal armed groups has not been resolved.

Figure 27: What is likely to happen if the ICC fails to prosecute any suspect for PEV?



117. The continued presence of illegal groups and their relationship with politicians as well as their self-sustaining strategies continue to create fear in some regions that these groups could re-emerge during the next elections. Of greater concern is the public perception that the police know who the members of these illegal groups are but have failed to deal with them.

Table 13: Thinking of illegal groups, do you agree or disagree with the following statements?

Thinking of illegal armed groups, do you agree or disagree with the following statements?

	Agree	Disagree	Don't know	NR
Illegal armed groups will re-emerge during the next general election	35%	43%	20%	1%
Politicians finance illegal armed groups	67%	18%	14%	2%
There are no illegal armed groups in this area	39%	45%	15%	1%
The police know members of illegal armed groups	54%	23%	22%	1%
The illegal armed groups provide security to the local people	19%	65%	15%	1%

Witness Protection

118. Since the start of investigations by the ICC, civil society organisations working directly with victims, or through human rights defenders, have expressed grave concerns about the security of witnesses. In response to these concerns, in 2010 the government made amendments to the Witness Protection Act of 2006 to create an independent and autonomous Witness Protection Unit. As noted in the July 2010 review report, the witness protection programme enjoyed little public trust and support because it was under the office of the Attorney General. Few Kenyans wanted to become witnesses.
119. To address these concerns, in August 2011, the Witness Protection Agency was launched as an autonomous institution, with its own staffing and power to mobilise and disburse its funding independently.⁴¹ Despite these positive steps to improve witness protection, human rights defenders are concerned that the potential of the new agency could be undermined by lack of adequate funding. At its inception, it requested Ksh1.2 billion to support its operations but was only allocated Ksh300 million. A lot will need to be done to build public confidence in the programme.
120. In contrast to this situation, a majority of respondents have confidence in the Witness Protection Programme run by the International Criminal Court. At least 65 per cent believe the ICC will protect witnesses who give evidence against the six suspects in the Kenya cases. Conversely, 64 per cent think the government will not be able to protect its witnesses who give evidence.

⁴¹ Interview with officer working on witness protection in Nairobi, 17 September 2011

Table 14: Do you believe the ICC can protect its witnesses?

Do you believe the ICC can/will protect its witnesses that will give evidence against the Ocampo 6?									
	Total	Central	Coast	Eastern	Nairobi	North Eastern	Nyanza	Rift Valley	Western
Yes	65%	64%	71%	66%	64%	73%	70%	55%	71%
No	20%	26%	10%	19%	25%	26%	10%	25%	11%
No response	1%	1%	2%	1%	1%	1%	2%	0%	0%
Don't know	15%	8%	17%	14%	9%	0%	18%	19%	18%

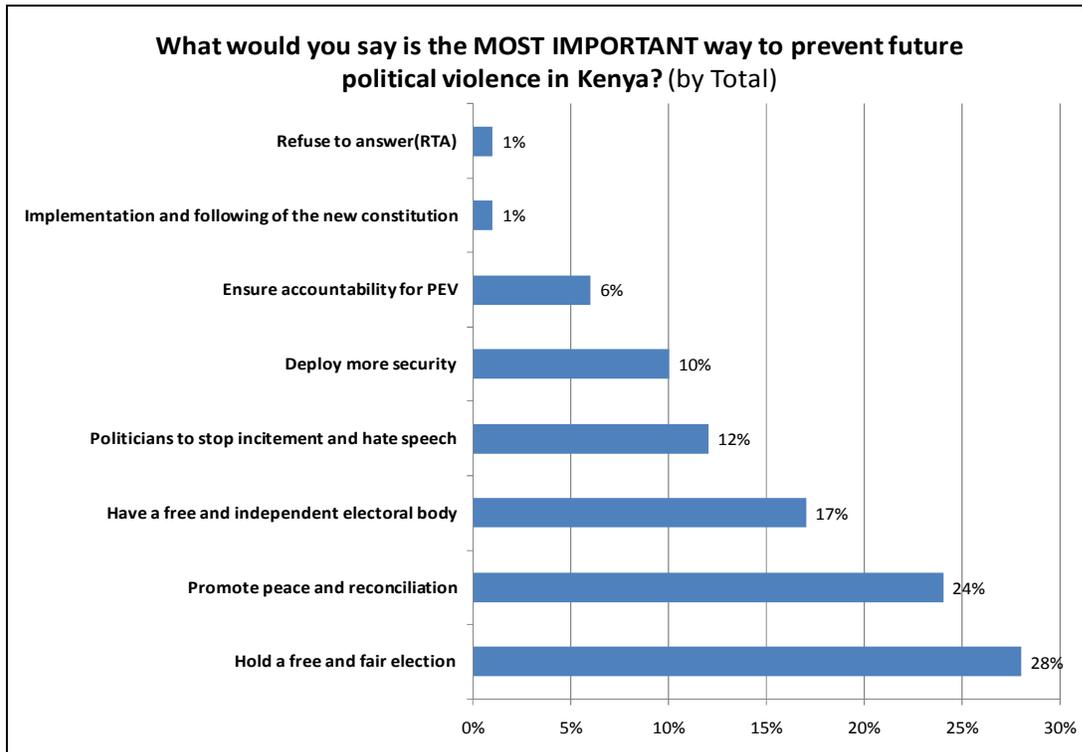
Table 15: Do you believe the government will be able to protect its witnesses giving evidence?

Do you believe the government will be able to protect its witnesses giving evidence?									
	Total	Central	Coast	Eastern	Nairobi	North Eastern	Nyanza	Rift Valley	Western
Yes	24%	40%	13%	31%	25%	14%	11%	24%	19%
No	64%	55%	73%	55%	70%	83%	71%	63%	64%
No response	1%	0%	2%	1%	1%	2%	1%	1%	0%
Don't know	11%	5%	12%	12%	4%	1%	16%	12%	18%

121. The low level of confidence in the government programme may be attributed to the fact that some of the accused are senior government officials. The apparent determination by the government to save the six creates the impression that it is most unlikely to cooperate with the ICC or any other programme that could lead to prosecutions. Besides, reports on extra-judicial killings have shown that police hit squads have been able to trace and kill persons under civil society witness protection programmes.⁴² The fact that police officers are suspected perpetrators of the post-election violence means victims or their families might find it difficult to seek protection from the police. A regional analysis shows that respondents in the Rift Valley have the least level of confidence in witness protection programmes.
122. Interestingly, only six per cent of the respondents think prosecution or other forms of accountability are the best way to stop future violence in Kenya. Majority recommend measures to ensure free and fair elections and to promote peace and reconciliation.

⁴² Alston Report

Figure 28: What is the most important way to prevent future violence in Kenya?



123. This is a significant departure from earlier surveys, which showed a clear preference for prosecution. The sudden divergence of opinion calls for a careful investigation of what is going on that is making people fear prosecutions. In the past, the review reports observed that when people felt secure, they demanded prosecution; when they felt threatened, they preferred peaceful means of managing the threat. This data suggests that people are no longer so sure of their safety. Reports of covert intimidation of witnesses and ostracism of those perceived to betray their community could be indicative of deeper problems. Indeed, recent concerns about hacking of personal emails and leaking of the identity of witnesses suggest that people have reason to be afraid.

The Challenge of Resettling IDPS

124. The past review reports have outlined government efforts to deliver on the resettlement of IDPs. Through Operation Rudi Nyumbani, the government has closed nearly all IDP camps and facilitated the movement of displaced households to their former homes. With the help of humanitarian agencies, damaged homes and infrastructure have been reconstructed and many peace efforts initiated to restore harmonious relations.
125. Despite these efforts, a number of displaced persons continue to live in camps. Most of the camps, however, were formed in new areas rather than places from which IDPs were displaced. Those in these camps are mostly the landless, whom the government has been helping to secure land because a majority of them pursue farming as a livelihood.

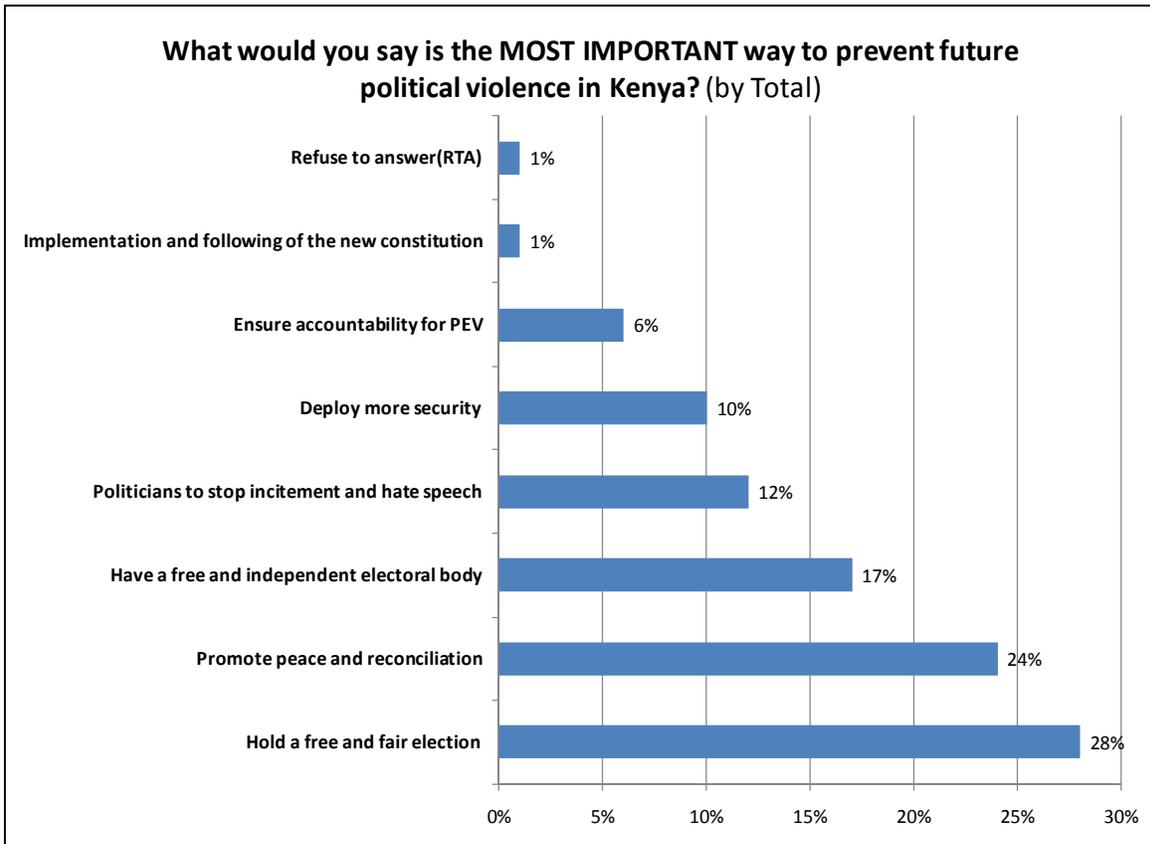
126. This section of the report discusses progress made towards finding lasting solutions to all IDPs. It observes that although KNDR envisaged the IDP problem would be resolved in the short term, it is a question that has become one of the most challenging for the coalition government.
127. To begin, the Ministry of State for Special Programmes in collaboration with the Ministry of Lands have continued to look for land to resettle about 6,978 displaced households.⁴³ According to the latest available update from the Ministry of Special Programmes, 5,396 acres of land have so far been acquired to settle 1,898 IDP families. This is the same number reported in the last review period. In early September, both ministries announced that they had set aside funds to resettle another 1,000 IDP households and were in the process of identifying land to purchase in different parts of the country.⁴⁴ The ministries are also trying to identify land to settle forest evictees.
128. *There are perceptions of territorial owners and newcomers which have destabilised efforts to resettle IDPs:* Communities which claim ‘outsiders’ should not be given land while local landless people remain landless have complicated the process of finding land to resettle IDPs. The claim that available land should revert to members of the community, which originally owned the land has created long delays and new dilemmas for government efforts to secure land. For instance, protests by the Maasai in Mau Narok have blocked the resettlement of IDPs on 2,264 acres of contested land, which has now been converted to an agricultural research station.⁴⁵
129. In the survey, majority of respondents do not support the policy of buying land for IDPs. Rather, they urge the government to facilitate their return to places from which they were displaced. The failure to return where they were displaced from has increased public concern about the legitimacy of claims of displacement. Many people think such IDPs are impostors, or ‘fake IDPs’ who claim to be displaced in order to benefit from assistance programmes.

⁴³ Initially 6,802; more self-help groups considered for inclusion; interview with leader of IDPs, September 2011

⁴⁴ ‘State to Settle 1000 IDPs’, *The Standard*, 5 September 2011

⁴⁵ Ministry of Special Programmes, Progress Report on IDP Resettlement as at 18 July 2011

Figure 29: What can the government do to address the problem of IDPs?



130. Others argue that purchasing land for IDPs only is discriminatory of other landless Kenyans because it suggests that one has to be displaced to be given land. The fact that a majority of the displaced are from one community has bred resentment among other communities and is fuelling resistance to their resettlement. To address this perception, the Ministry of Special Programmes allocated land to mixed groups of people in Trans Nzoia. Similarly, the contested land in Mau Narok could have settled people from mixed groups. Respondents were of the view that IDPs should be given funds to decide independently and subjectively where to settle.
131. The MoSSP has continued to disburse ex-gratia payments to IDPs as follows:

Table 16: Disbursement of Ksh10,000 and Ksh25,000

S/NO.	PROVINCE	START-UP FUNDS (10,000/= PER HOUSEHOLD)	SUPPORT FOR RECONSTRUCTION OF HOUSES (25,000/= PER HOUSEHOLD)
1	Rift Valley	1,100,570,000.00	623,375,000.00
2	Coast	11,580,000.00	4,100,000.00
3	Eastern	2,880,000.00	-
4	Central	102,850,000.00	79,150,000.00
5	Nairobi	38,650,000.00	10,575,000.00
6	Western	134,370,000.00	186,450,000.00
7	Nyanza	226,690,000.00	41,050,000.00
TOTAL		1,617,590,000.00	944,700,000.00

Source: Ministry of Special Programmes, 18 July 2011

132. The data on disbursements, like most available data on IDPs, is disaggregated only by administrative units, not by other factors such as gender, ethnicity, age, etc. It is, therefore, difficult to know who the beneficiaries are. Allegations of corruption and embezzlement of funds largely stem from lack of reliable data.

Access to Relief and Assistance Funds

133. *Continued assistance is promoting dependency among IDPs:* The MoSSP has continued to give food relief for those still living in camps. According to a government official in Nakuru, the continued assistance of IDPs has caused them to develop a dependency syndrome. “Some of them don’t want to work any more. They just want to be assisted by the government. They have learnt to paint a very desperate picture of their lives to attract help.”⁴⁶ There are also concerns that IDPs are reluctant to find solutions because life in the camp is easy. They are reluctant to reinsert themselves into the harsh economic conditions characterised by high food and commodity prices.
134. *Difficulty to target integrated IDPs because of their invisibility:* It is difficult to target and access displaced persons who are integrated within rural communities and urban areas because they are not as visible as those in camps. In some parts of the Rift Valley, failure to assist those integrated in the community has bred resentment against those who went to camps and received assistance. Focus on only those in camps, who happen to be from one ethnic community, has created a perception of government bias, and neglect of those who did not go to camps. For instance, the perception that Kalenjin victims of violence were not adequately assisted because all members of that community were stigmatised as perpetrators has created deep resentment against the government assistance programme.⁴⁷ The perception of neglect of genuine victims has undermined the impact of peace-building efforts in many parts of the Rift Valley.
135. The problem of exclusion of genuine IDPs from other communities is complex because

⁴⁶ Interview with a government official in Nakuru, 2 July 2011

⁴⁷ FGD with 6 women in Burnt Forest, July 2011

a majority of those who are integrated did not register during the profiling exercises in 2008. It is, therefore, important for the government, in collaboration with non-governmental organisations, to seek ways to identify and target all IDPs to prevent the festering of resentment, which may feed into existing discourses of grievance and generate new fault lines of violence. There is need to have clear and feasible guidelines for identifying genuine IDPs.

The National Policy on IDPs

136. The Draft National Policy on IDPs, completed in early 2010, has been awaiting Cabinet approval for more than a year. The previous review report noted that the draft had been approved by a Cabinet sub-committee, with a few changes. The draft has not been brought before Parliament for debate. There is need for stakeholders working on IDP-related issues to think of more robust and effective strategies to draw legislators' interest to it in order to push it through the legislative process.
137. The Parliamentary Select Committee on Resettlement of IDPs is in the process of completing its report, which should include a draft Bill on IDPs. The anticipated Bill will be based on the National Policy, itself derived from the Great Lakes Protocol on the Protection and Assistance to IDPs, and the African Union Convention on the Protection and Assistance of IDPs.
138. The UN Special Rapporteur on the Human Rights of IDPs visited Kenya for an eight-day mission in September 2011 to familiarise himself with the humanitarian situation of IDPs as well as efforts by the government and civil society organisations to address their concerns. He also visited IDP camps. At the end of his mission, he noted the lack of reliable data as a significant challenge to addressing the problem of IDPs. He also called for a consideration of more effective durable solutions, in consultation with IDPs.

Promoting Healing and Reconciliation

139. Agenda 2 of the KNDR required the Principals to lead measures to promote reconciliation in regions affected by the violence. The government established the Truth, Justice and Reconciliation Commission (TJRC) and the National Cohesion and Integration Commission (NCIC) to spearhead peace and reconciliation efforts in the country. The government also initiated several initiatives such as Operation Ujirani Mwema and the revitalisation of District Peace Committees. Individual politicians, NGOs and religious organisations have also supported peace and reconciliation efforts.
140. While the first two years of KNDR witnessed robust engagement with peace work, the perception of increasing stability gradually eroded the urgency of reconciliation. Funding also dwindled, compelling District Peace Committees to reduce the number of their activities.
141. As has been noted in previous reports, the TJRC has lacked gravitas from its inception and has therefore not had much impact as hoped. It collected over 20,000 statements and held public hearings in all the provinces. In this review period, the TJRC got a six months extension of its term to finalise its report.⁴⁸ The TJRC Commissioners and staff

⁴⁸ Interview senior staff at the TJRC Secretariat, Sept 2011

have worked hard, considering the financial and capacity constraints that encumbered the commission from the start. However, persistent lack of support from civil society, discomfort with its methodology⁴⁹ and inadequate media coverage of the hearings means the commission has continued to perform below its optimum potential..

142. In the survey, a majority of the respondents said lack of witness protection was the most important hindrance to participation in the truth commission. Interestingly, 23 per cent had no reason at all for not participating. Similarly lack of awareness about the functioning of the TJRC prevented participation.

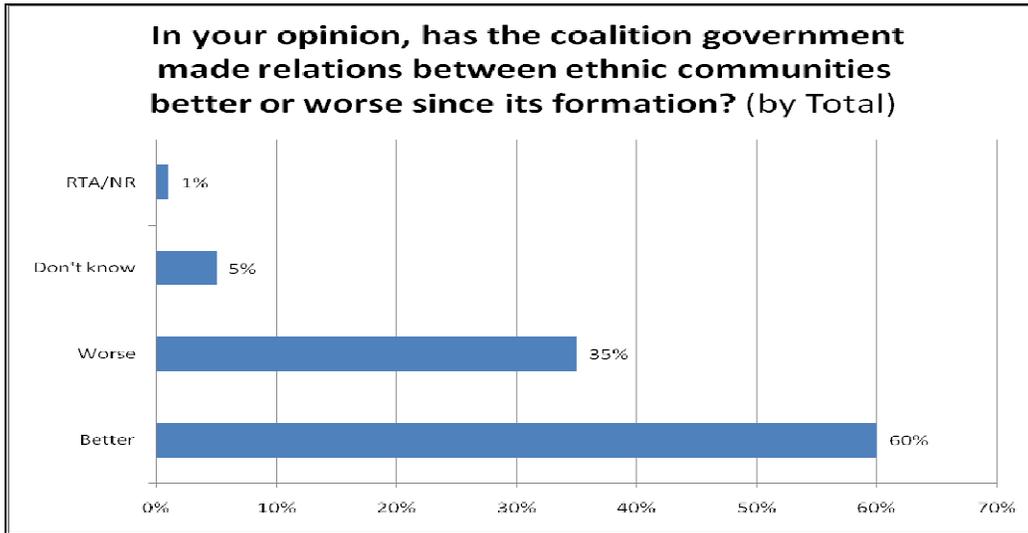
Table 17: What do you think might prevent people from your community from giving their views?

Lack of witness protection	34%	They do not trust the TJRC	7%
Nothing	23%	Language barrier	1%
Don't Know	10%	TJRC is not accessible	1%
Lack of awareness on TJRC	10%	RTA	1%
No response	7%	Language barrier	1%
Fear that TJRC recommendations may not be implemented	6%	TJRC is not accessible	1%
They do not trust the TJRC	7%		

143. While public apathy on the issue of commissions, fears of reprisal or victimisation may hinder people from giving their views about social ills, it is notable that a majority of people feel that the coalition government has made relations between people better.

⁴⁹For instance, victims were hired as statement takers; interview with member of civil society

Figure 30: Has the coalition government made relations between communities better or worse?



Conclusion

144. The ICC Chief Prosecutor has made progress in efforts to address the legacy of the post-election violence. However, there is no movement on holding the lower and middle level perpetrators accountable. Demand for domestic accountability for these crimes has been reducing in terms of attention. This raises the need to raise public awareness, particularly because the government's commitment to hold people accountable for the post-election violence is an issue of concern. Attempts to delay, postpone or withdraw from the ICC investigation on legal grounds are a demonstration of absence of this commitment.
145. Failure to fight impunity, by establishing complementarity mechanisms for domestic accountability for international crimes, and lack of trust in government programmes, suggests that the causes of the post-election violence have not been addressed. Nonetheless, it is important to note that a majority of Kenyans believe there will be no violence as result of the ICC investigation or during the next elections.
146. Internally displaced persons have continued to be a sore reminder of the post-election violence, yet their existence in a state of homelessness evokes fundamental questions about the reasons they are unable to go back to places from which they were displaced. The presence of IDPs is also a reminder that reconciliation is taking a while to consolidate. A lot of efforts have been put into restoring peace and reconciliation in violence affected areas. However, it appears that such peace has not been deeply rooted, as fear of reprisal and mistrust pervade the society. Ethnic divisions may be compounded by the outcome of the ICC investigation, and implementation of devolution ahead of next. Public vigilance is therefore important to ensure peaceful co-existence.

5. GENERAL CONCLUSION

147. Various conclusions have been raised in the preceding sections. This section reiterates some of these conclusions and recommendations. The discussion has noted that rising inflation and the depreciation of the Kenya Shilling constitute major economic challenges during the period under review. These problems will negatively impact on implementation of reforms and may slow growth not only in agriculture but in other important sectors of the economy as well. Indeed, slow economic growth, combined with rising unemployment and generally huge income inequalities constitute a combustible mix that can explode if there is no strong commitment to cushion the poor, adhere to the rule of law and demonstrate political resolve to stop impunity in all its forms and at all levels of the society.
148. With regard to progress in implementation of the constitution, the findings show that critical laws have been passed. But the process used to pass these laws was hurried and lacked sufficient time for consultations with the public. In some instances, the Executive by-passed the CIC and published important laws. The findings also show that there is a tendency in which the older order and vested interests are reorganising to frustrate the making of laws. There is need for continued vigilance over the Constitution implementation process.
149. Critical legal and institutional framework for implementing the Constitution have been put in place. But some of these institutions lack the capacity to help consolidate gains and achievements thus far. There is need thus to begin building capacity of these institutions as well as developing clear and coherent policy to support their work. Implementation of the Constitution is at a critical point; the next General Election will move the country through a democratic transition if the poll is well and effectively managed. But failure to manage the electoral process or to prevent partisan political considerations from influencing decisions about the elections can fail the country yet again. On the whole, the electoral process should aim at moving the country to a democratic order. Kenyans should demand good laws, credible institutions and critical reforms even before concluding the debate on the election date.
150. The legacy of the post-election violence continues to manifest itself in two important ways: the ICC intervention and the IDP problem. Although the ICC has intervened and the confirmation of charges hearings are going on, the country must begin thinking about domestic accountability. The country must establish mechanisms to hold lower and middle level and other perpetrators accountable. Public awareness on complementarity must be built in earnest and before the next elections.