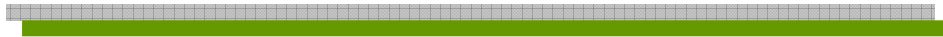


THE KENYA NATIONAL DIALOGUE AND RECONCILIATION (KNDR) MONITORING PROJECT¹

Draft Review Report

April 2011



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ACRONYMS

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

EXECUTIVE SUMMARY

1. On 28 February 2008, the Government/Party of National Unity (PNU) and the Orange Democratic Movement (ODM), under the mediation of the Kenya National Dialogue and Reconciliation (KNDR), signed an agreement to end the political violence that followed the disputed December 2007 elections. Through mediation by the African Union's (AU) Panel of Eminent African Personalities under the chairmanship of Mr Kofi Annan, the parties agreed to form a coalition government and thereafter undertake far-reaching reforms to secure sustainable peace, stability, and justice in Kenya through the rule of law and respect for human rights.
2. South Consulting has been monitoring the implementation of the KNDR agreements from 2008. This report focuses on two issues that have risen in prominence and drawn attention since the last quarter of 2010: the International Criminal Court investigation of the Kenya situation, and the implementation of the New Constitution. Previous reports can be found at www.dialoguekenya.org.
3. The report has utilized both quantitative and qualitative data. A baseline survey of 9,200 respondents was carried out in the 47 counties in December 2010 and a follow-up survey of 2000 respondents was conducted in March 2011 in the same counties. Qualitative interviews were conducted in all parts of the country with key informants drawn from government ministries, humanitarian organisations, civil society organisations, the media and the general public. Secondary sources have also been reviewed for additional information.

FINDINGS

4. The socio-political and security situation in Kenya has improved considerably, compared to what it was in 2008 and 2009. There is peace and calm in the country. Public perception of personal safety has increased, with as large a proportion of the population as 72 per cent saying they feel safer now than they did in 2008. Life is also much better for many people. However, people in northern Kenya feel less safe than those in the rest of the country. It is possible that endemic conflicts over resources and food insecurity are responsible for these feelings of insecurity.
5. Political violence ended with the signing of the National Accord and Reconciliation Agreement. However, sustaining the peace and calm that was secured depends on only one major factor: how political leaders reconcile their differences as the country moves towards the next General Election, and specifically how they organise their politics for presidential contests. National level political dynamics will influence local level issues; conflicts will trickle to the local level and disrupt inter-ethnic relations. There is thus need to manage national level political divisions to prevent a recurrence of violence.

The ICC and Post-election Violence

6. Findings show that divisions within the Grand Coalition Government have created an opportunity for impunity to re-organise and undermine progressive reforms and interventions aimed at ending impunity. In this review period, the fight against impunity has been personalised, politicised and ethnicised. This has polarised the fight against impunity and the need to find justice for victims. The polarisation has specifically obscured the objectives of the fight against injustice and created an amnesia around the question of justice

for victims such as IDPs. Further, new political alliances are emerging not based on the need to deepen reforms that would prevent recurrence of another violent conflict but rather on the need to use ethnic platforms to promote and protect the political careers of particular individuals considered to be regional leaders. A tone for divisive ethno-political mobilisation reminiscent of the eve of 2007 general election is very much evident. This tone has jettisoned the debate on real reforms that the country should urgently pursue before the next general elections. The debate for reforms is being abandoned rapidly and replaced with a debate on succession politics.

7. Many Kenyans are supportive of the ICC process and are happy that the ICC has finally embarked on the process to hold accountable those suspected to be most responsible. Over 70 per cent of respondents in a national survey confident that the ICC will prosecute those suspected of perpetrating violence. These hopes sprout in place of widespread public disillusionment with the failure to complete investigations required to prosecute cases arising out of the post-election violence and the failure to establish a local Special Tribunal to investigate and prosecute high-level perpetrators. Nonetheless, 81% of Kenyans want other perpetrators of violence tried. They do not want them forgiven. In fact only 7% want them forgiven. This high number of Kenyans, 81%, who want perpetrators of violence tried is a pointer that many Kenyans want to address the past. They would want to see a Kenya free of impunity and injustice; they do not want people to be forgiven.
8. The ICC Prosecutor's naming of six suspects in relation to the post-election violence, has evolved new political dynamics. In addition to consolidation of new political alliances, this triggered high-level demands for Kenya to withdraw from the Rome Statute, the convention that established the ICC. Later, there were demands for deferral with Kenya seeking support from the African Union and the United Nations Security Council to support this course to defer the cases at ICC. This quest to defer the cases contrasts sharply with high public demand for prosecution of all perpetrators and high confidence in the ICC intervention. There is, thus, a disconnect between the political elite and ordinary citizens in terms of how to deal with post-election violence cases.
9. Generally, the public is not in sync with the political elite, who appear to have a common interest in opposing accountability and other measures to end impunity. The behaviour of politicians demonstrates a business-as-usual political culture and preference for status quo. On the other hand, there is a strong public mood against impunity.
10. The naming of suspects has evolved discourses in which some communities claim to be under siege. There are new discourses of victimisation and isolation among some political elites. They are also mobilising their ethnic constituencies along these discourses. This has created a new impetus for ethno-political alignments. Politicians allied to the six suspects named by the ICC Prosecutor have since begun consolidating or forming new ethno-political alliances in preparation for the 2012 elections. The politicisation of ICC indictments has obscured the need for dialogue on reforms that would prevent future violence and how to hold perpetrators accountable. Generally, there is limited amount of debate on reforms and how to move forward in line with reforms agreed upon during the signing of the Kenya National Dialogue and Reconciliation agreements (popularly referred to as the National Accord).

Resettlement of IDPs

11. Measures to resolve the humanitarian crisis remain tenuous as Internally Displaced Persons (IDPs) remain in camps, urban informal settlements and other settings. Landlessness,

corruption and lack of social cohesion remain the main challenges to finding lasting solutions to IDPs. Some local communities have resisted the resettlement of IDPs on land they perceive as belonging to them only.

12. Although the government and humanitarian agencies provided funds for start-ups, reconstruction of homes and even the purchase of land to resettle some IDPs, the crisis of displacement is yet to be conclusively resolved. The issue has become a source of political capital for national level political leaders as well as for leaders in areas where IDPs were displaced from, and among ethnic communities whose members are IDPs. As argued in the previous reports, IDPs' problems tended to receive very little attention. Its one problem that lacks leadership in terms of how it should be resolved. Its only mentioned when politicians wish to generate political capital out of it. Three years after the signing of the National Accord is a long time to have IDPs unsettled and/or in camps. This problem of IDPs thus remains a pointer to extent of reconciliation and extent of commitment to reforms in general.
13. Inter-communal relations in areas where IDPs live have improved. Many reported that people relate well. 30 per cent of Kenyans say a lot of reconciliation has taken place among Kenyans. Another 53 per cent say just a little reconciliation has taken place. These responses imply that reconciliation is gradually occurring, but it has not been sufficient to ensure the safe return of IDPs in a sustainable manner. This suggests a need for more elaborate approaches to social reconciliation.

Cohesion in Government

14. The Coalition Government continues to face cohesion challenges. Suspicions and lack of trust continue to characterise relations between the two parties in the Grand Coalition Government. Although initial differences were between the two parties, parochial and narrow short-term interests have gradually factionalised them thereby increasing incoherence within government.
15. The state of flux in the factionalised parties is likely to increase as the 2012 General Election approaches. Again this has the potential to threaten implementation of key reforms, including implementation of the New Constitution. Fault lines within the Cabinet continue to recur and the image of a divided government —especially that of 'two-governments-in-one' - has not been effectively addressed because these differences continue to be reflected in key decisions. There are generally no drivers of coherence in government. New dynamics such as the politics of ICC and succession politics appear to suggest that these divisions will continue to hold until the next general elections. In fact as many as 58 per cent Kenyans feel the Coalition has a hard time working together to implement the new Constitution. However, Kenyans generally would like the Coalition Government to remain in office until the next general election
16. But Kenyans are not dismissive of the Coalition Government. They are happy with the Coalition because it secured peace and has gone on to deliver a New Constitution. They are happy that the situation has normalised but have worried about the infighting. They also want the Coalition to remain until the next general election. But power sharing is not something many people would like to see in the future, with 75 per cent of Kenyans saying they would not recommend power sharing between political parties in government after another election. However, they are unhappy with the Coalition Government because it has failed to, among other things, fight corruption, promote unity within the government, and

tackle tribalism. They also think that power sharing between PNU and ODM is still relevant.

Implementation of the New Constitution

17. The New Constitution has revived optimism for an improved governance culture and hopes for the well being for the people of Kenya. The Constitution introduced a wide range of changes in government, the legislature, judiciary and all sectors of society. Up to 54 per cent of respondents believe their lives will be better. Many want the government to use the New Constitution to provide security, jobs, and tackle corruption. In this regard, there is need to adhere to the implementation schedule and avail needed financial resources.
18. But there are challenges to implementation. There is no public debate or dialogue on major policy issues. There is absence of civic education and not many people are involved in discussing its implementation. Citizens also cite political interests, corruption and lack of cohesion in Government as the main threats to implementation. They note that vested interests, especially in Parliament, will continue to threaten the passing of laws. It is notable that because of vested interests, establishing critical bodies such as the Constitution Implementation Commission (CIC) and the Commission on Revenue Allocation (CRA) was delayed for about a month. It is also notable that several bills have been drafted and are awaiting final debate before enactment. Speed is of essence at this stage. Any delay in enactment of the fundamental laws will slow the high speed required in implementation of critical reforms before the next general election.
19. The New Constitution is an omnibus carrying the hope of resolving issues that, if not completely resolved, would potentially lead to another conflict. It carries a collection of issues lumped together under the mediation's Agenda 4, which included, among others institutional and legal reforms, land reforms, poverty, inequity and regional imbalances, youth unemployment, ethnicity or national cohesion and unity, as well as entrenching accountability and ending impunity. Hiccups in implementing the New Constitution sound a death knell for these long-term issues, signalled as the underlying causes of the post-2007 election crisis and which must be resolved for the future stability of Kenya.
20. The challenges to implementation place the country on a perilous path as it hurtles towards another election without establishing and securing critical institutions necessary to manage political transitions. These include the new electoral management body, resolution of the delineation of boundaries, and the establishment of a fully functioning judiciary as envisaged in the New Constitution.
21. How these institutions are established will determine the level of confidence and trust that people will have in them. They must be established in a manner that is transparent and credible, and most importantly, in line with the values and principles of the New Constitution of Kenya. Appointing people on basis of party and/or ethnic consideration will undermine the credibility of these institutions. On the whole, people's involvement in oversight of the process is crucial to sustain momentum for implementation of the constitution, and delivery on the balance of Agenda 4 reforms.

Conclusion

22. The New Constitution has revived optimism for a different, more responsive governance culture. The Constitution carries the hope of resolving all issues identified under Agenda Item 4 and in particular the underlying factors that contributed to the post-2007 election

violence. But there are fresh challenges to the implementation of the New Constitution. Vested interests and an old political culture, as well as short-term and narrow interests, are threatening the full implementation of the constitution. If not effectively managed, short term focus and interests, combined with the lack of cohesion within Government, and lack of leadership to manage political divisions, could fail the country again.

23. The framework for reforms is very much in place. Several institutions have already been established and relevant legislation formulated. However, speed is required to pass the remaining bills to build a strong foundation for implementation of the constitution.
24. The majority of voters supported the New Constitution. They gave it legitimacy by approving it in large numbers. They aspired to see a new Kenya and a fresh start. They voted for new values and principles of governance. They elected to have ethical leadership and responsible leaders. Failing to live by the spirit and the values embraced by the new constitution will disillusion the public, with adverse consequences. There is a need for strong vigilance by everyone on the implementation process because this an important opportunity to build a new society.
25. Civic education on the New Constitution is required as a matter of urgency to build both demands by citizens and awaken the government to what its institutions are required to supply. The demand for civic education is huge and therefore will require joint provision by the government, the CIC, civil society and other actors. The Cabinet has supported provision of civic education in this regard. Institutions, materials and strategies for delivery should be rolled out fast to deepen the momentum to pursue the principles and values of the New Constitution.
26. Although the ICC process has introduced certain challenges, it presents an important opportunity for reforms. The process is laying the groundwork for fighting impunity and ensuring that people account for their actions. Although some political leaders are unified in their efforts to oppose the ICC process, the ordinary people are not with them. They perceive the ICC process as the last resort in fighting impunity and getting justice for victims.
27. Kenyans want a local judicial process to try middle and lower level perpetrators. They want justice for victims and they want people to account for their actions. There is a need then to begin establishing a framework to try other perpetrators because the ICC will not deal with everyone identified as a perpetrator.

1. INTRODUCTION

1. This is a periodic report on the progress of implementing reforms under the Kenya National Dialogue and Reconciliation (KNDR) agreement of 2008, signed between the Government/Party of National Unity (PNU) and the Orange Democratic Movement (ODM) following the dispute over the December 2007 presidential election result and the subsequent violence. Through mediation by the African Union's (AU) Panel of Eminent African Personalities led by Mr Kofi Annan, the parties committed to achieve the KNDR goal of *'sustainable peace, stability, and justice in Kenya through the rule of law and respect for human rights'*.
 2. The two parties agreed to tackle four main issues expressed as Agenda items 1-4: These were²:
 - a. Agenda Item 1: Immediate action to stop violence and restore fundamental rights and liberties;
 - b. Agenda Item 2: Immediate measures to address the humanitarian crisis and promote healing and reconciliation;
 - c. Agenda Item 3: How to overcome the political crisis; and
 - d. Agenda Item 4: Addressing long-term issues, including constitutional and institutional reforms, land reforms, poverty and inequalities, youth unemployment, national cohesion, and transparency and accountability.
 3. South Consulting has been monitoring implementation of the KNDR agreements from 2008. Previous reports are found at www.dialoguekenya.org. This report covers the last quarter of 2010.
 4. This report is the first report to track reforms after the promulgation of the New Constitution of Kenya in August 2010. It covers the period between November 2010 and March 2011. The report has utilised both quantitative and qualitative data. In December 2010, quantitative data was collected through a national survey comprising 9,200 respondents drawn from across all the 47 counties established under the New Constitution. A smaller survey of 2000 respondents was conducted in March 2011 in the same number of counties. This presentation focuses, therefore, on the county as well as the national level.
 5. Qualitative data was obtained through interviews with key informants drawn from Government ministries, humanitarian organisations, civil society organisations, the media and the general public. Secondary information was obtained by reviewing reports and documents by the Government, development agencies, the media and non-governmental bodies.
 6. The review is based on data and recognises too well that political interests and realities are sensitive to analyses of implementation of reforms. In writing the report, therefore, we have taken care to remain objective and let the data to speak.
 7. The report is organised into four main parts corresponding to the respective agenda items.
-
1. The Annotated Agenda and Timetable for KNDR signed on 1 February 2008 viewed Agendas 1, 2 and 3 as 'short term' actionable problems to be addressed within a period of 7-15 days from the date of commencement of the dialogue, and Agenda 4 as a long term programme to be resolved within a period of one year.

However, the main emphasis in all the parts is the issue of implications of the International Criminal Court (ICC) investigation of the Kenya situation; and implementation of the New Constitution. The report also contains two annexes. Annex 1 – National Baseline Survey conducted in December 2010; and Annex 2 – National Baseline Survey (select findings) by county. The report is organised as follows:

- e. Part II: The ICC and the Post-election Violence
- f. Part III: The ICC and Implication for IDPs
- g. Part IV: The ICC and Implications for Political Cohesion
- h. Part V: Challenges to the New Constitution
- i. Part VI: Conclusion

2. THE ICC AND POST-ELECTION VIOLENCE

Introduction

8. The KNDR agreement outlined measures the Government, the police, the media and the public needed to undertake to halt the violence, guarantee security for all Kenyans and restore fundamental rights and liberties. A Commission of Inquiry into the Post-Election Violence (CIPEV or the Waki Commission³) was established. It recommended the setting up of a Special Tribunal for Kenya to investigate and try those responsible for the most serious criminal acts during the crisis period.
9. The Waki Commission also recommended handing over suspects to the International Criminal Court (ICC) if the government failed to set up the Special Tribunal. After several unsuccessful attempts to set up this mechanism within the specified timeframes, the matter was handed over to the ICC in July 2009. On 15 December 2010, the ICC Chief Prosecutor announced that he was seeking summons for six persons suspected to bear the greatest responsibility for crimes committed during the post-election violence (PEV). The summonses were issued for the suspects to appear before the ICC on 7-8 April 2011.
10. This section of the report looks at the effect of ICC investigation on the Kenya situation thus far. The report also examines its implications for peace and security. The problem of illegal armed groups is also discussed.

Key Findings

Summary of findings

- Naming of six suspects draws mixed reactions and deepens divisions within the Coalition Government
- Politicisation of the ICC intervention increases impetus for ethno-political alliances ahead of 2012 elections
- There is a disconnect between the political elite and ordinary citizens with regard to the fight against impunity
- The ICC intervention continues to enjoy high public confidence
- In addition to the ICC intervention, Kenyans want a local mechanism to prosecute low-level perpetrators of violence

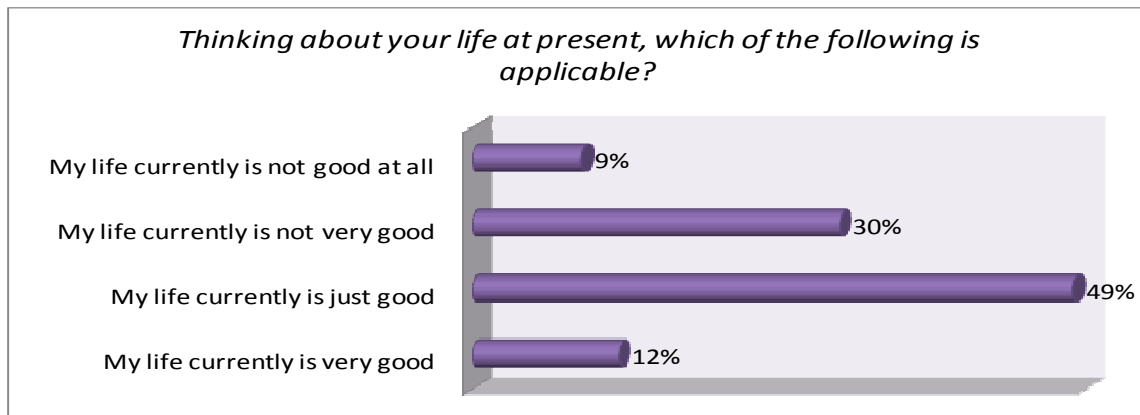
The State of Peace and Security

11. By the end of 2010 and early 2011, there was consensus in all counties of Kenya that the socio-political situation had improved and was far better than it was in the post-election violence period. Political violence ended after the signing of the National Accord. Although 2009 witnessed increased insecurity in some areas, these incidents did not escalate and did not result from political conflicts relating to the 2007 General Election.
12. In many counties, respondents observed that there was peace and calm. Many also said they felt much safer than in 2008 and 2009. For instance, when asked what they felt about their

³ so named after Justice Philip Waki, who chaired the Commission.

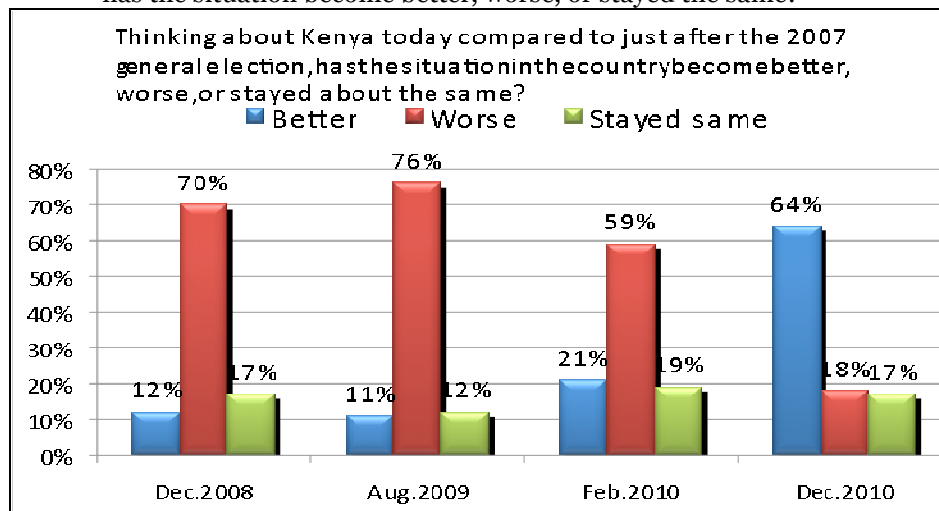
lives, only 9 per cent of the respondents said life was not good at all. Another 30 per cent said life was not very good. However, close to 50 per cent said life was just good and another 12 per cent said life was very good.

Figure 1: Thinking about your life at present, which of the following is applicable? (December 2010)



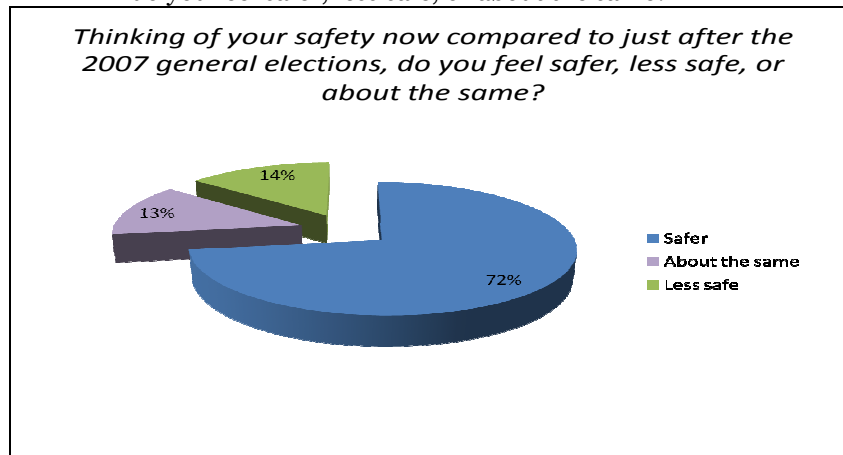
13. A trend analysis from 2008 to Dec. 2010 also shows that many people believe the situation in the country is better today. Up to 64 per cent of Kenyans believe that life is far better now than was it was in 2008 and 2009. The number of people who feel the situation is worse decreased from 76 per cent in August 2009 to 59 per cent in February 2010. Only 18 per cent held this view by the end of 2010.

Figure 2: Thinking about Kenya today compared to just after the 2007 general election, has the situation become better, worse, or stayed the same?



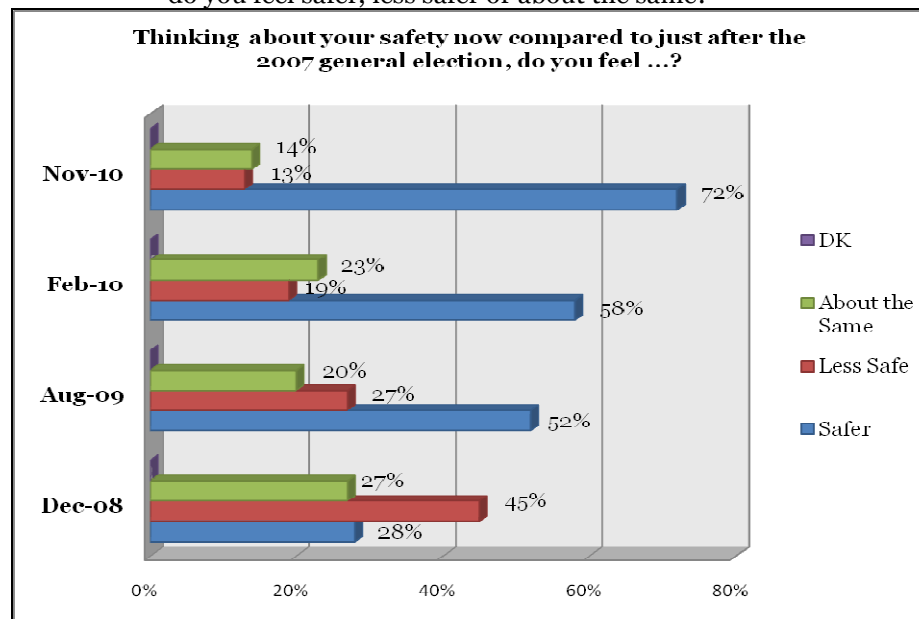
14. The feelings of a better life and the situation in the country are again reflected in how people feel about safety. Asked what they think about safety now compared to just after the 2007 elections, 72 per cent of respondents said they felt safer. The people who feel that life is the same are almost equal in number to those who feel it is less safe, at 14 and 13 per cent, respectively.

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



15. The number of people feeling safer has been increasing since 2008. This corroborates the findings on feelings about improvement of life and security in general.

Figure 4: Thinking about your safety now compared to just after the 2007 elections, do you feel safer, less safer or about the same?



16. Although 64 per cent of Kenyans feel the situation is better now, the Coast region has more people who feel less safe: 41 per cent of the respondents. Less than half the population in Lamu and Tana River counties do not feel safer than they did after the 2007 elections.

17. Counties in northern Kenya feel less safe compared to other areas of the country. Banditry, resource conflicts, food insecurity and external incursions by foreign militia contribute to this feeling in these counties. Counties affected by the post-election violence, however, have many people feeling safer and thinking that life is better than it was after the 2007 elections.

Table 1: Thinking about Kenya today compared to the time of the 2007 General Election, has the situation become better, worse, or stayed the same? (by county)

County	Better	Worse	Stayed about the same	County	Better	Worse	Stayed about the same
KIRINYAGA	69%	18%	9%	KISUMU	60%	19%	21%
MURANG'A	74%	17%	10%	MIGORI	56%	31%	12%
NYANDARUA	73%	14%	12%	SIAYA	65%	15%	19%
NYERI	78%	12%	11%	KISII	53%	30%	15%
KIAMBU	70%	8%	21%	NYAMIRA	62%	23%	15%
KILIFI	35%	30%	32%	BARINGO	69%	17%	13%
MOMBASA	45%	30%	25%	BOMET	54%	26%	20%
KWALE	41%	30%	27%	KAJIADO	72%	14%	14%
LAMU	36%	22%	42%	KERICHO	61%	20%	17%
TAITA TAVETA	40%	23%	33%	NANDI	59%	32%	9%
TANA RIVER	54%	23%	21%	NAROK	63%	22%	14%
EMBU	51%	32%	17%	TRANS NZOIA	48%	31%	21%
MAKUENI	68%	7%	26%	TURKANA	85%	11%	5%
KITUI	73%	17%	8%	UASIN GISHU	61%	21%	18%
MACHAKOS	73%	10%	17%	WEST POKOT	45%	30%	24%
MERU	81%	10%	9%	NAKURU	75%	16%	9%
ISIOLO	80%	6%	13%	ELGEYO/MARAKWET	56%	26%	18%
MARSABIT	46%	9%	44%	LAIKIPIA	75%	12%	14%
THARAKA	77%	12%	11%	SAMBURU	70%	8%	22%
NAIROBI	66%	17%	17%	BUSIA	60%	20%	18%
GARISSA	72%	6%	21%	VIHIGA	73%	17%	8%
WAJIR	43%	16%	40%	BUNGOMA	72%	12%	15%
MANDERA	66%	13%	21%	KAKAMEGA	70%	10%	19%
HOMA BAY	68%	20%	11%				

18. These findings corroborate what previous surveys revealed regarding fear of violence recurring: many Kenyans are confident violence is not likely to recur. In December 2010, 64 per cent of the population did not think there would be violence around the next General Election. Only a small number – 12 per cent – thought there would be violence while 23 per cent were not certain.

19. Kenyans feel that rising crime and youth unemployment, rather than political violence relating to the ICC process, presents the greatest threat to security. The Annual Crime Report, 2010, shows a 5 per cent decrease in all categories of crime. However, it also shows a relatively high increase of crime in places such as Nairobi and North Eastern. This could be

attributed to the high unemployment rates, inequitable distribution of resources, organised crime, drug and substance abuse, high illiteracy and access to sophisticated technology.⁴ The survey carried out in the 47 counties shows that 34 per cent and 27 per cent, respectively, regard youth unemployment and crime as the greatest threat to security.

Table 2: What in your view is the greatest threat to security in the area where you live?

What in your view is the greatest threat to security in the area where you live?	
Lack of police presence	9%
Youth unemployment	34%
Crime, e.g., robbery	27%
Tribalism	6%
There are no threats	21%
Drug abuse	1%

20. All the regions of the country identify youth unemployment and crime as the greatest threats to security. Tribalism is significant as a factor in Northern Kenya.

Table 3: What in your view is the greatest threat to security in the area where you live – Analysis by region

What in your view is the greatest threat to security in the area where you live?								
	Central	Coast	Eastern	Nairobi	North Eastern	Nyanza	R/Valley	Western
Lack of police presence	9%	6%	17%	8%	10%	10%	7%	5%
Youth unemployment	38%	32%	40%	32%	37%	38%	28%	37%
Crime e.g. robbery	29%	25%	21%	37%	9%	34%	27%	29%
Tribalism	2%	6%	5%	5%	19%	4%	8%	5%
There are no threats	19%	26%	16%	17%	24%	13%	28%	23%

21. The findings show that the political situation has normalised and that peace obtains in the country. Whether this is sustainable and, specifically, can be secured in the longer term is dependent on how politicians will begin organising campaigns for the next presidential election because violence often accompanies competition for the presidency. Sustainability of peace will also depend on the nature of national level political dynamics because conflicts between leaders tend to trickle down to the local level and ultimately affect inter-communal relations. It will also depend on whether action against impunity is taken and sustained. Furthermore, Agenda Item 4 reforms have not been comprehensively addressed yet the window for radical decisions will shut as the country moves towards the next General Election.

⁴ Government of Kenya, *Annual Crime Report for the Year 2010*, p.1

The ICC and the Kenya Situation

22. The previous review report noted that since March 2010 when the Pre-Trial Chamber II of the International Criminal Court approved the Chief Prosecutor's request to investigate the Kenya situation, political anxiety heightened threats against potential witnesses and institutions that have investigated the post election violence, including the Kenyan National Commission of Human Rights (KNCHR).⁵
23. Secondly, political realignments emerged with a view to securing the interests and political careers of senior politicians. Thirdly, the reality of ICC intervention caused anxiety among influential leaders because this is the first time powerful individuals are publicly being held accountable through mechanisms that they have no control over. Since December 2010 when the ICC Prosecutor named the six suspects, the political terrain has changed. Some leaders have used public spaces including the media and public rallies to claim that the ICC intervention is part of political calculations to eliminate their candidacy in the 2012 general elections.
24. Acrimonious public spats between those supporting the ICC trials and those against it have roused ethnic sentiments, particularly because some say they were the real victims of the violence while others say their community is being targeted. Some have expressed concern about the omission of some leaders from areas such as Kisumu, where violence also occurred.⁶ Allegations that the ICC cases are politically-motivated has cast the debate in the light of 2012 politics and obscured the fight against impunity. A respondent in Nairobi remarked *'The fear of exclusion from power in 2012 makes people anxious; it is introducing ethnic dimensions to the debate. If this political and ethnic discussion is allowed to continue, it will obliterate the real issues and present a real danger in 2012'*⁷
25. There had been fears that naming the suspects would lead to violence, especially in areas that witnessed intense violent conflicts. This did not materialise. People were not surprised by some of the names; the announcement confirmed public speculations honed over months especially because some politicians had begun engaging the ICC on suspicion that they were targets of investigations. Furthermore, after their naming, these leaders implored their respective communities to be calm. Community elders, youth leaders and NGOs also called on people to be peaceful. However, continued ethnicization of the ICC debate is causing fear of violence among people at the local level.⁸

Kenyans are supportive of the ICC

26. The surveys reveal that Kenyans are very supportive of the ICC investigations. Interviews with key informants and ordinary people corroborate this finding. To some, the ICC action represents the only concrete action to hold powerful people accountable for post-election violence.⁹ Still, others are happy that the ICC has acted fast and argue that it is an important lesson to influential and powerful people who always perpetuate impunity by failing to

⁵ Interview with an official of KNCHR, 10 Nov 2010; also *Daily Nation*, 'Ruto accuses rights body of coaching witnesses' 9 Nov 2010, Press statement by KNCHR, 12 Nov 2010.

⁶ FGD in Kericho County, 20 Dec 2010

⁷ Interview with a university lecturer in Nairobi, 31 March 2011; also 'ICC cases politically motivated: Interview with lawyer Kithure Kindiki' reported in *The Star*, 4 April 2011, p. 24

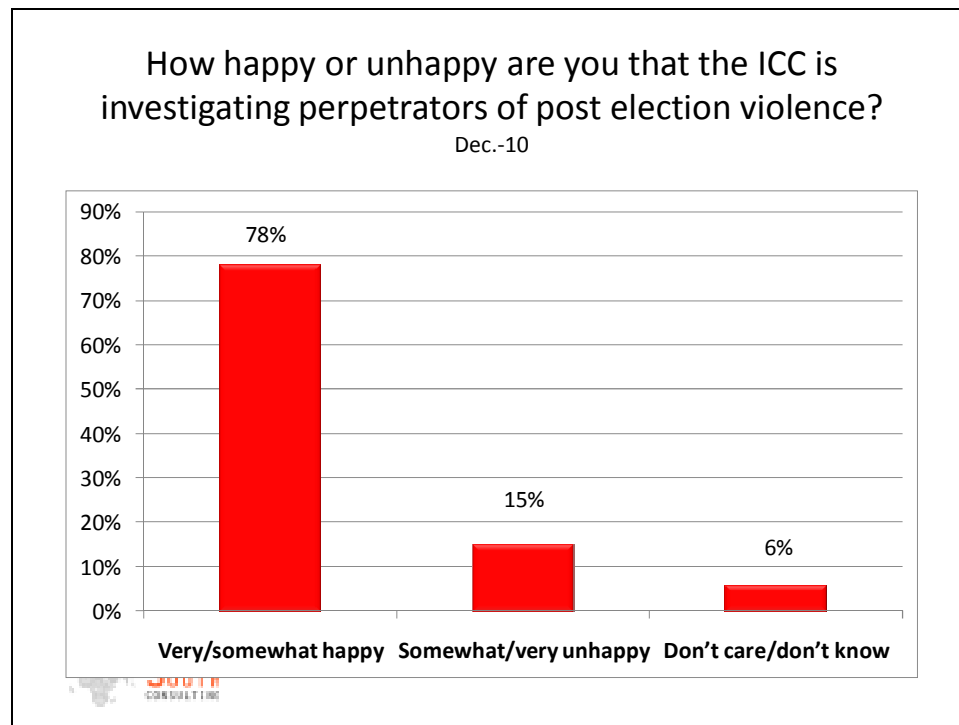
⁸ Wanyeki, M., 'Back to the Future: Prepare for the worst in 2011' *The East African*, 4-10 April, 2011, p. 16

⁹ Interview with a government official, 17 Dec 2010

account for their actions.¹⁰

27. Although some political elite have espoused solidarity with those named, ordinary citizens are happy that at last those suspected to bear the greatest responsibility and in particular senior people are being called to account. In December, as many as 78 per cent Kenyans were happy that ICC was conducting investigations. Figure 5 shows that only 15 per cent were somewhat/very unhappy with this development.

Figure 5: How happy or unhappy are you that ICC is investigating – National level



28. However, counties in the Rift Valley region are the least happy with the ICC action. Up to 54 per cent of respondents in Bomet County, 45 per cent in Kericho, and 32 per cent in Uasin Gishu County are unhappy that the ICC is investigating perpetrators of post-election violence. Earlier reports have shown that people in these regions prefer the Truth, Justice and Reconciliation Commission to take action.

¹⁰ Interview with a human rights advocate in Uasin Gishu County, 24 Dec 2010

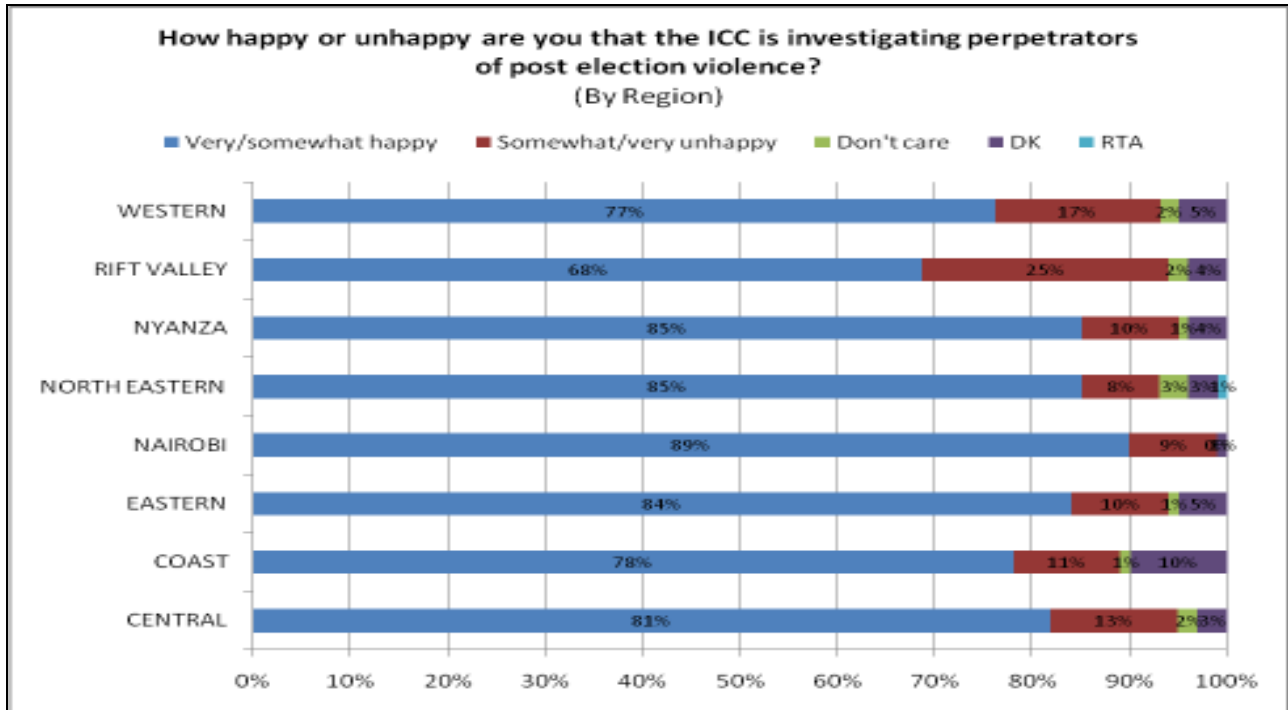
Table 4: How happy or unhappy with ICC – by county

How happy or unhappy are you that the ICC is investigating perpetrators of post election violence?										
County	Happy	Not Happy	Don't care	DK		County	Happy	Not Happy	Don't care	DK
KIRINYAGA	78%	13%	5%	3%		KISUMU	89%	8%	1%	2%
MURANG'A	78%	13%	0%	8%		MIGORI	88%	9%	1%	2%
NYANDARUA	85%	12%	0%	2%		SIAYA	87%	10%	1%	2%
NYERI	78%	12%	6%	4%		KISII	75%	17%	0%	7%
KIAMBU	83%	15%	1%	0%		NYAMIRA	89%	6%	0%	6%
KILIFI	77%	7%	1%	15%		BARINGO	62%	31%	1%	4%
MOMBASA	81%	16%	0%	2%		BOMET	35%	54%	3%	6%
KWALE	79%	9%	2%	9%		KAJIADO	77%	18%	0%	6%
LAMU	92%	7%	1%	0%		KERICHO	48%	45%	3%	4%
TAITA TAVETA	75%	8%	1%	16%		NANDI	65%	28%	3%	3%
TANA RIVER	72%	12%	0%	16%		NAROK	71%	24%	0%	6%
EMBU	87%	7%	2%	3%		TRANS NZOIA	74%	20%	2%	4%
MAKUENI	88%	8%	0%	2%		TURKANA	88%	12%	0%	0%
KITUI	89%	3%	0%	9%		UASIN GISHU	66%	32%	2%	1%
MACHAKOS	83%	12%	1%	4%		WEST POKOT	50%	29%	5%	14%
MERU	84%	10%	0%	6%		NAKURU	84%	10%	3%	2%
ISIOLO	73%	2%	8%	17%		ELGEYO/MARAKWET	68%	31%	1%	0%
MARSABIT	63%	29%	3%	5%		LAIKIPIA	78%	18%	4%	0%
THARAKA	77%	21%	0%	2%		SAMBURU	56%	11%	1%	33%
NAIROBI	89%	9%	0%	1%		BUSIA	74%	16%	2%	7%
GARISSA	87%	4%	2%	6%		VIHIGA	87%	6%	1%	7%
WAJIR	73%	14%	9%	4%		BUNGOMA	67%	25%	1%	7%
MANDERA	90%	8%	0%	0%		KAKAMEGA	83%	12%	3%	2%
HOMA BAY	86%	9%	1%	4%						11

29. Overall, one quarter of the people in Rift Valley is somewhat/very unhappy with the ICC investigations. People in other regions – and counties – are very/somewhat happy with the investigations. Nairobi is leading at 89 per cent, followed by North Eastern and Nyanza at 85 per cent each.

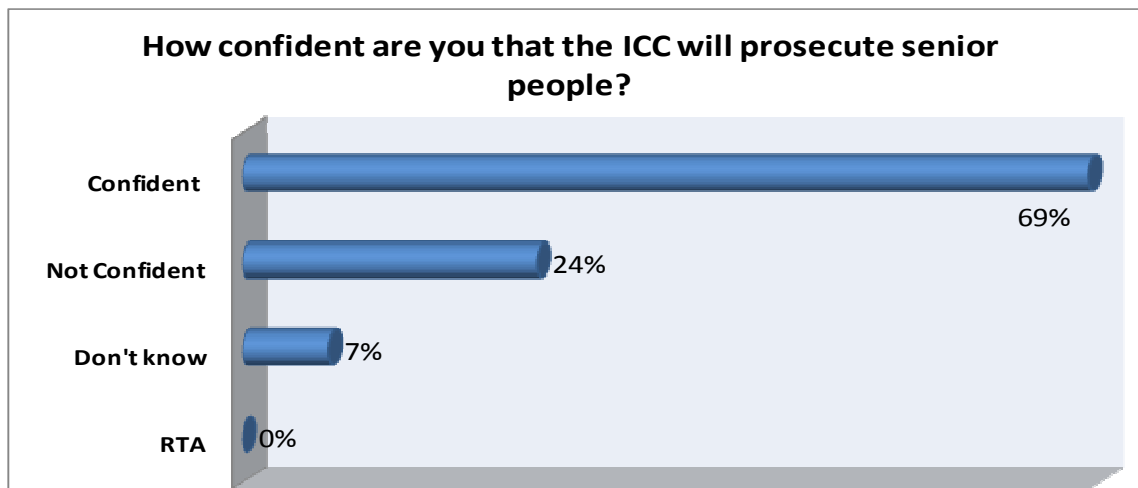
¹¹ RTA has been excluded

Figure 6: How happy or unhappy are you that the ICC is investigating perpetrators of post election violence (by region)



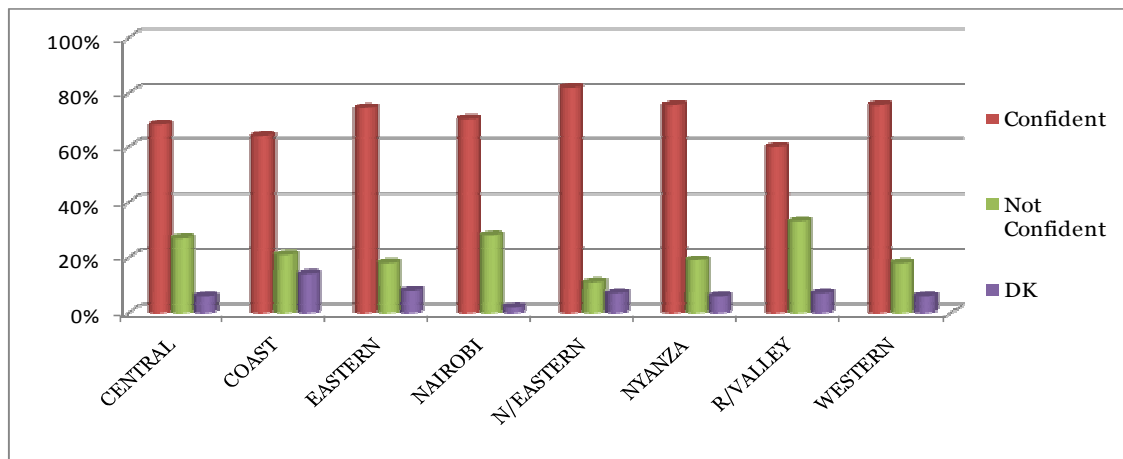
30. People are also confident that the ICC will eventually prosecute those named as perpetrators of violence. Up to 69 per cent of respondents said they were confident that the ICC will do so -- 39 per cent being very confident and 33 per cent just confident. 24 per cent were not confident on prosecutions.

Figure 7: Level of confidence in the ICC



31. The number of those who are confident about ICC prosecuting the perpetrators varies across the regions. North Eastern region has more people (82%) who are confident about the ICC. Western and Nyanza regions follow at 75 per cent. In Eastern Province, there are 74 per cent who are confident. Rift Valley has the least number of people – 60 per cent – who are confident that the ICC will prosecute those suspected to be responsible.
32. In the Rift Valley and Central regions, where some of the people named by the ICC prosecutor come from, 33 per cent and 27 per cent respectively say they are not confident that ICC will prosecute these people.

Figure 8: Confidence in the ICC (by region)



33. In many counties people are very confident that the ICC will prosecute the suspects. However, less than half the population in some counties in Rift Valley are confident in this regard. For instance, only 32 per cent in Bomet and 40 per cent in Kericho are confident that the ICC will prosecute these people.
34. The level of confidence in the ICC remained high even after the naming of suspects. In March 2011, 72 per cent of the respondents expressed confidence that the ICC will prosecute the suspects:

Figure 9: Level of confidence in the ICC, March 2011

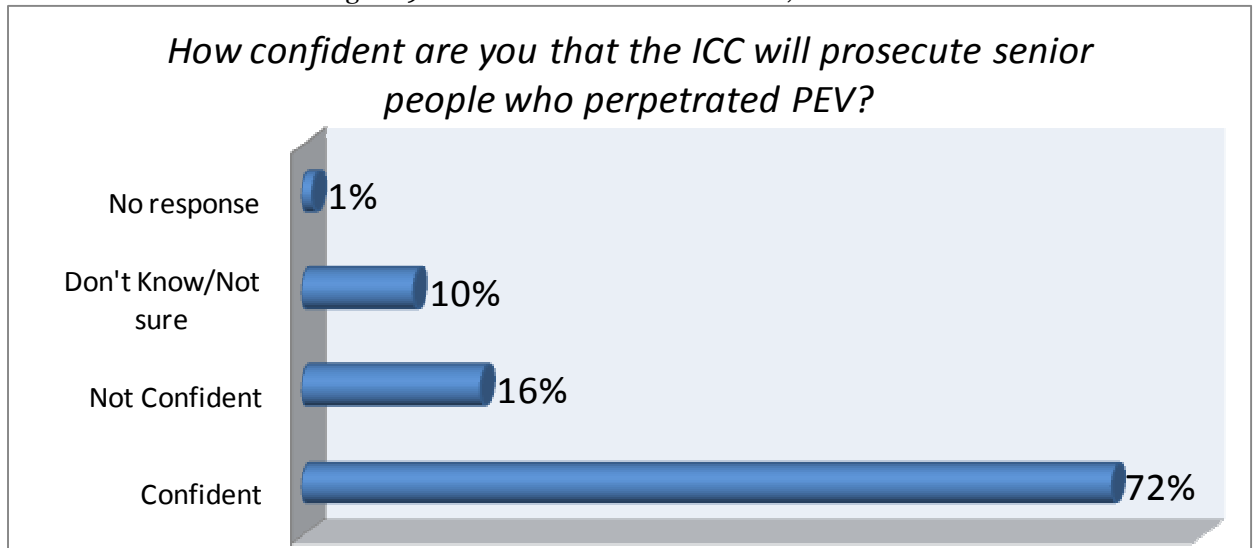


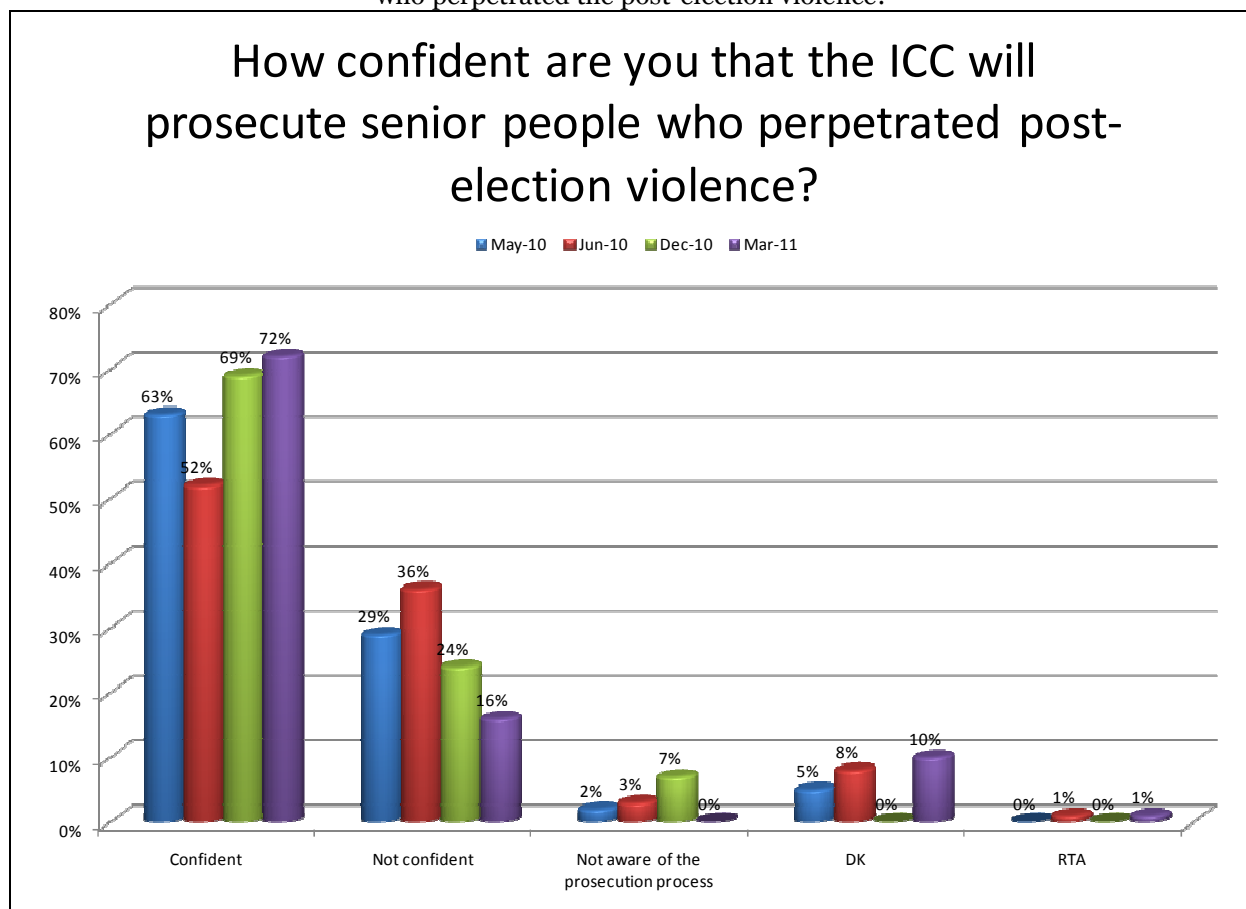
Table 5: Following the ICC chief prosecutor's investigations in Kenya, how confident are you that the ICC or The Hague will prosecute senior people who perpetrated post-election violence?¹²

County	Confident	Not Confident	DK	County	Confident	Not Confident	DK
KIRINYAGA	66%	23%	10%	KISUMU	80%	15%	5%
MURANG'A	66%	25%	9%	MIGORI	78%	20%	2%
NYANDARUA	76%	21%	3%	SIAYA	80%	15%	5%
NYERI	69%	24%	7%	KISII	61%	27%	11%
KIAMBU	65%	32%	3%	NYAMIRA	84%	14%	3%
KILIFI	63%	16%	20%	BARINGO	59%	31%	8%
MOMBASA	65%	31%	4%	BOMET	32%	56%	12%
KWALE	67%	20%	14%	KAJIADO	72%	21%	6%
LAMU	77%	15%	7%	KERICHO	40%	50%	10%
TAITA TAVETA	55%	24%	21%	NANDI	62%	29%	10%
TANA RIVER	69%	13%	18%	NAROK	61%	31%	7%
EMBU	60%	24%	16%	TRANS NZOIA	61%	33%	6%
MAKUENI	80%	14%	5%	TURKANA	89%	11%	0%
KITUI	82%	8%	10%	UASIN GISHU	58%	39%	3%
MACHAKOS	76%	18%	5%	WEST POKOT	46%	38%	16%
MERU	76%	16%	7%	NAKURU	65%	29%	6%
ISIOLO	69%	13%	18%	ELGEYO/MAR AKWET	66%	31%	3%
MARSABIT	51%	37%	11%	LAIKIPIA	63%	36%	1%
THARAKA	64%	33%	3%	SAMBURU	43%	20%	37%
NAIROBI	70%	28%	2%	BUSIA	73%	19%	8%
GARISSA	85%	5%	9%	VIHIGA	86%	7%	7%
WAJIR	73%	16%	11%	BUNGOMA	67%	26%	7%
MANDERA	85%	12%	3%	KAKAMEGA	82%	15%	4%
HOMA BAY	76%	18%	6%				

35. Confidence in the ICC has been increasing. Those who were confident increased from 52 per cent in May 2010 to 69 per cent in December 2010. As shown above, this number increased to 72 per cent at the end of March 2011.

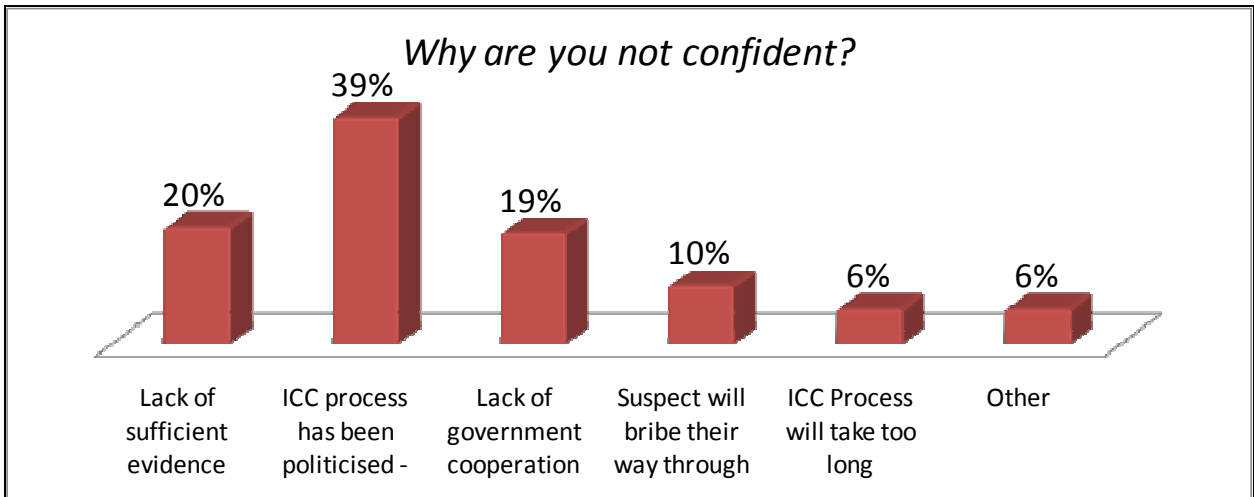
¹² RTA has been excluded

Figure 10: How confident are you that the ICC will prosecute senior people who perpetrated the post-election violence?



36. Although the majority said they are confident, 16 per cent of those who said they are not confident expressed concern that the ICC may fail to gather sufficient evidence to obtain convictions. Others thought the ICC process has been politicised and therefore unlikely to meet the objectives that resonate with the people of Kenya regarding the fight against impunity. Some raised concern about possible bribery of witnesses and other actors as the trials progress.

Figure 11: Not confident in the ICC



37. The majority of the people will support the trials or do nothing if a senior politician from their community is held accountable for the post-election violence. with regard to them. A small percentage – around 4 per cent – will violently attack members of another community. In fact, the number of people who will support the trial has increased from around 52 per cent in May 2010 when people were not very confident that ICC would name suspects who bear the greatest responsibility to 69 per cent in December 2010 when people were certain that the ICC decision was firm.

38. The survey also sought to find out how people and their communities would react in the event that senior people from their community would eventually be put on trial. Up to 64 per cent of respondents said they would support the trials and another 51 per cent thought members of their community would also support the trials.

Figure 11: If a senior politician from your community is put on trial for inciting post-election violence, how are you personally likely to react?

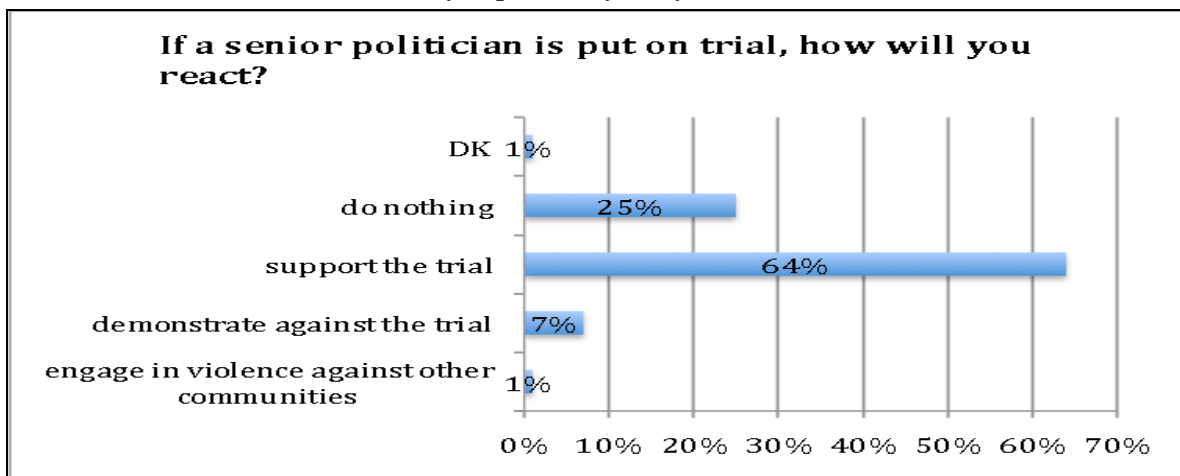


Figure 12: If a senior politician from your ethnic group (community) is put on trial, how are members of your community likely to react?

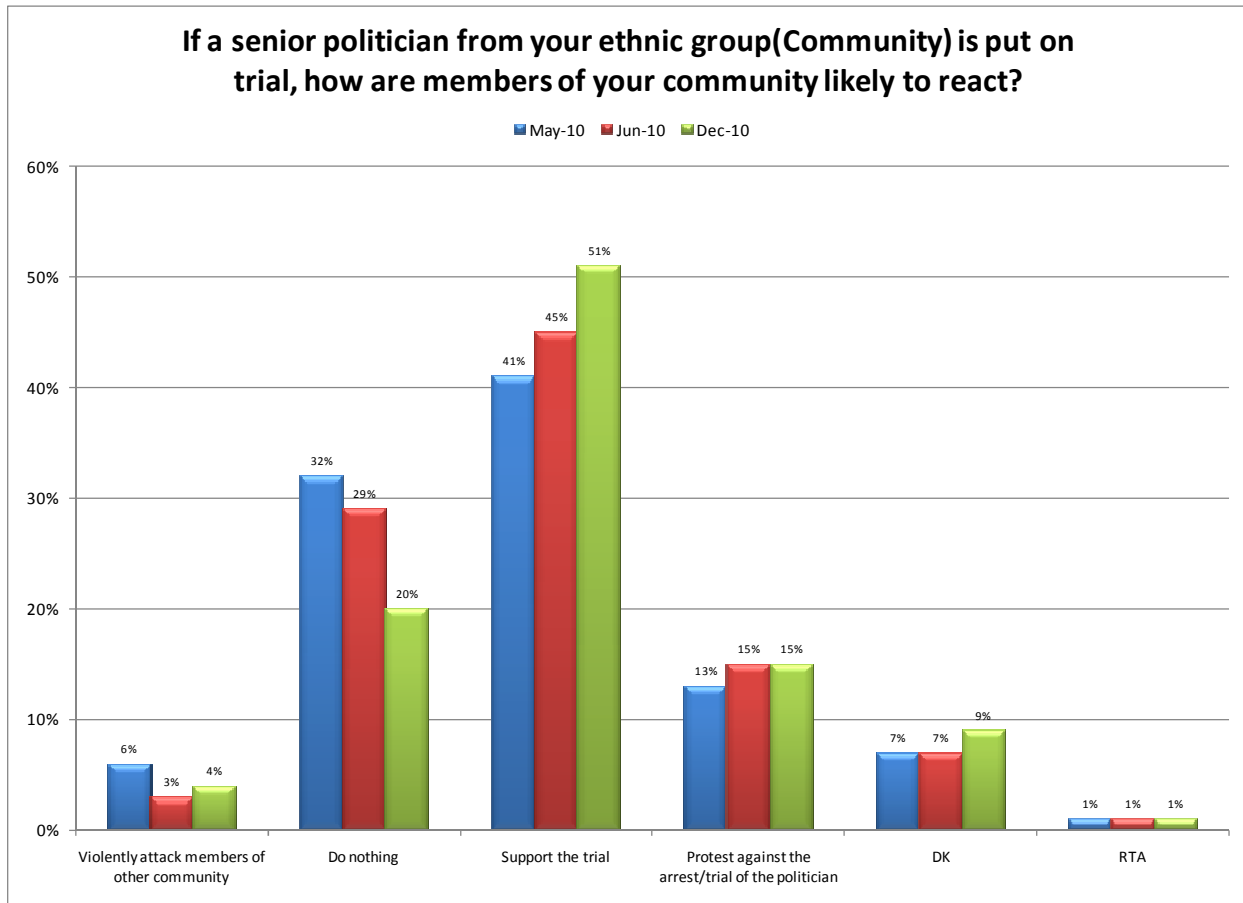


Table 6: If a senior politician from your community is put on trial for inciting post-election violence, how would you react? (by county)

	I would engage in acts of violence against other communities	I would demonstrate against the trial	I would support the trial	I would do nothing		I would engage in acts of violence against other communities	I would demonstrate against the trial	I would support the trial	I would do nothing
KIRINYAGA	0%	6%	77%	17%	KISUMU	0%	4%	39%	56%
MURANG'A	0%	14%	69%	16%	MIGORI	3%	4%	71%	22%
NYANDARUA	0%	4%	77%	18%	SIAYA	0%	10%	59%	30%
NYERI	0%	3%	72%	25%	KISII	2%	5%	63%	27%
KIAMBU	3%	14%	70%	12%	NYAMIRA	0%	5%	74%	21%
KILIFI	0%	4%	70%	24%	BARINGO	0%	9%	54%	31%
MOMBASA	1%	5%	68%	26%	BOMET	8%	12%	32%	44%
KWALE	0%	2%	60%	38%	KAJIADO	1%	10%	66%	21%
LAMU	0%	0%	69%	28%	KERICHO	3%	14%	34%	47%
TAITA TAVETA	1%	1%	78%	16%	NANDI	4%	6%	37%	51%
TANA RIVER	0%	3%	74%	22%	NAROK	2%	6%	60%	28%
EMBU	0%	2%	79%	17%	TRANS NZOIA	0%	9%	59%	30%
MAKUENI	0%	3%	84%	12%	TURKANA	10%	20%	65%	5%
KITUI	1%	4%	63%	31%	UASIN GISHU	1%	7%	43%	49%
MACHAKOS	0%	5%	76%	19%	WEST POKOT	3%	11%	53%	32%
MERU	0%	2%	80%	15%	NAKURU	1%	4%	58%	34%
ISIOLO	1%	5%	49%	35%	ELGEYO/MARAKWET	1%	19%	35%	42%
MARSABIT	0%	11%	47%	21%	LAIKIPIA	2%	6%	71%	20%
THARAKA	0%	9%	69%	16%	SAMBURU	2%	3%	55%	35%
NAIROBI	0%	5%	76%	19%	BUSIA	0%	14%	57%	25%
GARISSA	2%	6%	81%	11%	VIHIGA	1%	5%	68%	25%
WAJIR	4%	14%	65%	14%	BUNGOMA	2%	9%	65%	20%
MANDERA	1%	7%	77%	14%	KAKAMEGA	4%	12%	56%	28%
HOMA BAY	0%	8%	55%	36%					

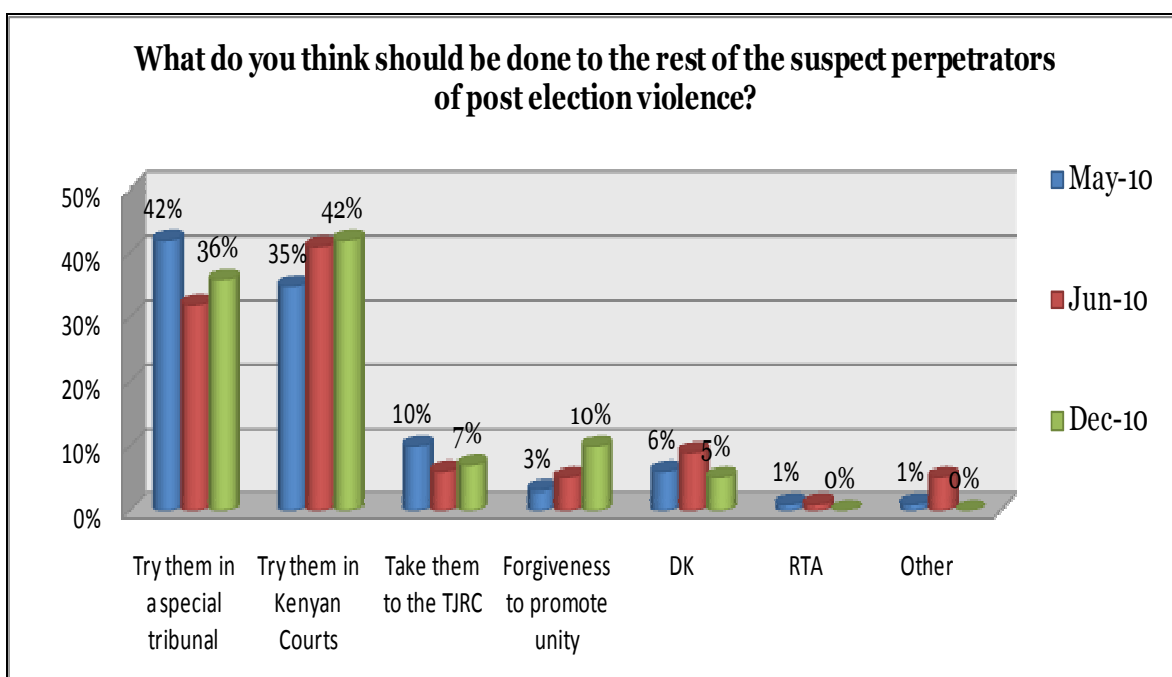
39. It appears that many people would like the prosecution to take place. Many people would also like other perpetrators – the middle and lower level – to be tried. They want them tried in a Special Tribunal and in Kenyan courts. Only a small number – under 10 per cent – would like them to be forgiven.

40. 4 per cent of respondents expected community members to attack people from other communities if their political leaders were held accountable. This suggests that there are still

pockets of people who can be mobilised for political violence in future.¹³ Once again, counties in the Rift Valley region have relatively fewer people who say they would support the trials because a significant population would hold demonstrate against such trials. Other counties have relatively more people who say they would support trials. Because of the threat this small group presents, people support a local mechanism to deal with low- and middle-level perpetrators.

41. The survey asked what people thought should be done to the rest of the suspected perpetrators. As many as 42 per cent suggested that middle and lower level perpetrators should be tried in Kenyan courts while 36 per cent wanted them tried by a special tribunal. Only 10 per cent of the respondents wanted them forgiven while 7 per cent thought the Truth, Justice and Reconciliation Commission should handle the matter.

Figure 13: What do you think should be done to the rest of the suspected perpetrators of post-election violence?¹⁴

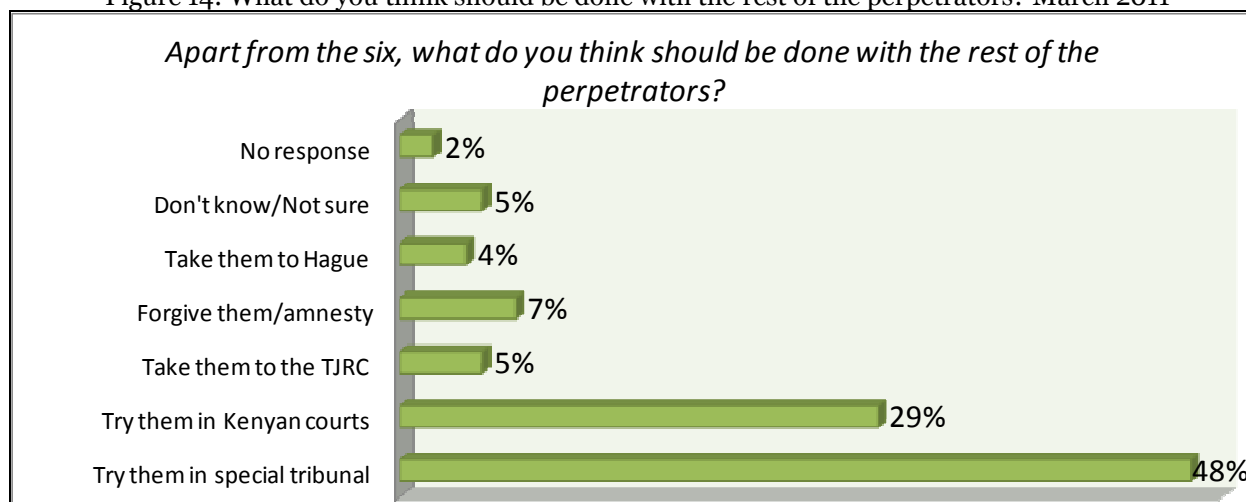


41. These findings suggest widespread public support for ICC and the trial of those prosecuted. Although the population in Rift Valley is less inclined than everybody else to support the trial, it is not necessarily likely to engage in violence. In Rift Valley, 52 per cent of respondents said they would support the trials, 10 per cent would demonstrate against them, 34 per cent would do nothing while only 3 per cent said they were likely to react violently against other communities.
42. Public support for a local tribunal has remained high. The March 2011 survey shows that 77 per cent of would like to see the rest of the perpetrators tried through a local mechanism. Of

¹³ Interviews in Londiani, Kericho County, 27 Dec 2010
¹⁴ Only data for May 2010 and December 2010 included

these, 48 per cent prefer a Special Tribunal as recommended by the Commission on the Post Election Violence 9 (CIPEV) while 29 per cent would like them tried by existing local courts. These views resonate strongly with the government’s renewed commitment to reform the judiciary and the police, as articulated in its application for deferral at the ICC Pre-Trial Chamber.¹⁵

Figure 14: What do you think should be done with the rest of the perpetrators? March 2011



The ICC and Political Alliances against Accountability

43. The ICC Chief Prosecutor’s naming of suspects has aroused general anxiety among some politicians, who have resorted to politicising the investigation of the Kenya situation. From questioning at political rallies the objectivity of these investigations to alleging mischief intended to lock out some influential people from the 2012 presidential election, the discourses have sought to generate public anxiety about some ethnic exclusion in the country’s next political dispensation.¹⁶ To them, those named by the prosecutor are victims of political rivalry¹⁷ and that *‘the ICC is being used to eliminate political rivals for the presidential race.’*¹⁸ There are also those who have raised concerns about three of the people named coming from one community in the Rift Valley, arguing that their community is being targeted. These discourses have reinforced a siege mentality among those in Rift Valley. Mention of the three suspects is consistent with local level discourses about one community being systematically targeted, isolated and excluded from the country’s power arrangements.¹⁹
44. These discourses have shifted public focus and debate away from the criminal nature of the post-election violence to the politics of the presidential election. They have prevented public debate on how to address impunity and hold political leaders accountable. The political

¹⁵ ICC Pre-Trial Chamber II, ‘Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute’ Public Document No. ICC-01/09-01/00 and ICC-01/09-02/11, 31 March 2011

¹⁶ Interviews in Uasin Gishu, Kericho and Nairobi counties, 19 – 24 Dec 2010; also Githongo J, ‘Now that Ocampo has Dropped his Bombshell, We Must Watch our Step’ *The East African*, 20-26 Dec 2010, p. 19

¹⁷ Interview with a human rights activist in Uasin Gishu County, 20 Dec 2010; see also *Hansard Report* of the Prime Minister’s Statement, ‘Government Statement on the ICC Process’, 16 Dec 2010

¹⁸ Interview with a community elder in Eldoret, Uasin Gishu County, 20 Dec 2010

¹⁹ FGD with youth leaders in Uasin Gishu County, 12 Oct 2010; also Salim Lone, ‘Feeling of Isolation among Kalenjin Could again Divide Kenya’, *Daily Nation*, 6 Jan 2010

attention that the matter has received has meant little focus on how to foster accountability and secure justice for victims.

45. While some allege their community is being targeted, others argue that they were the real victims of the post-election crisis and all they did was respond to the cries of distress from victims. These discourses have roused ethnic sympathies, which have in turn been whipped up to rationalise the formation of ethno-political alliances as a platform to wage their fight against prosecution and by extension, package their political ambitions. New ethno-regional alliances have formed especially comprising the main protagonists during the post-election violence in Rift Valley. Thus, the ICC action has inadvertently created opportunities for rapprochement between those who fought during the violence, in spite of the deep mistrust between them at the local level. But to some respondents, personal interests among these politicians are responsible for this; they are uniting against accountability and to perpetuate impunity: *'They are uniting now because they did not have their way. If the list had ruined the political careers of their rivals, there would be no calls to repeal the International Crimes Act.'*²⁰
46. These discourses have put the country in a premature election campaign mode and are constraining effective implementation of the New Constitution. The ethnic polarisation that is emerging due to resurgence of hate speech and emotive remarks at political rallies against the ICC and political rivals suggests that the country's political leadership must not allow debate on fighting impunity to be overshadowed by political discourses.
47. Political interests must not override the reform agenda or be allowed to mobilise violence ahead of 2012. They must not be allowed to obscure the urge for reforms. Although the voices of politicians are most audible, members of the public are supportive of prosecutions and would not like a repeat of 2007. Ordinary citizens are keen to see senior people and other suspects prosecuted. However, political supporters are likely to support a call to violence. In the March 2011 survey, 65 per cent think violence is unlikely to recur in 2012. However, 17 per cent violence may occur; and of 21 per cent of these believe supporters will cause violence if senior politicians are held accountable.

Failure to investigate and prosecute

48. There are concerns about failure to investigate and prosecute. Of all the crimes committed during the crisis period, only one person has been successfully prosecuted and convicted.²¹ Suspects charged with the infamous arson attack on the Kiambaa church in Eldoret were acquitted in April 2009 for lack of evidence. A police officer caught on camera shooting protesters to death was also acquitted in June 2010 for want of proper investigation and prosecution. The fate of the cases that have gone to court, and the numerous others that have not, is a sufficient pointer to lack of political will and adequate capacity to conduct investigations to support successful prosecutions. The manner in which some of the country's political leaders have reacted to and treated the ICC process has also added to the pessimism about political commitment to hold perpetrators accountable. One respondent in particular posed: *"Has anything changed to make anyone think the country is now committed to stamping out impunity?"*²² And one MP, while commenting about the

²⁰ Interview with a Businessman in Eldoret, Uasin Gishu County, 17 Dec 2010

²¹ *The Standard*, 16 December 2010

²² Evans-Pritchard Blake, 'Kenya's tribunal pledges questioned' *Questioned* Jan 2010

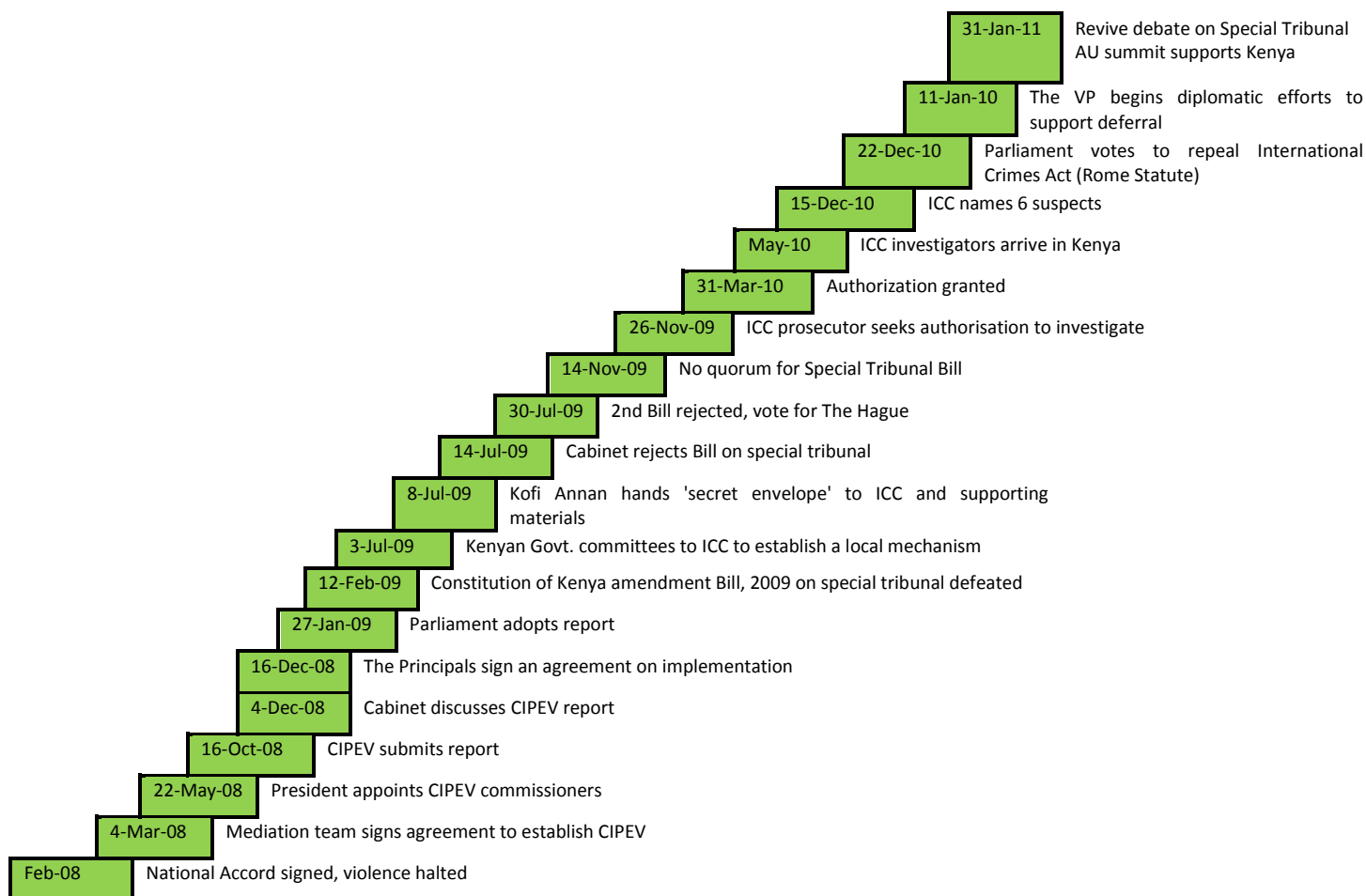
discussion to withdraw Kenya from the Rome Statute noted: *'I am wondering about this sudden change of heart. Is it sincere? Why did it not come before Ocampo disclosed his list? This is not genuine; are we saying we are untouchable, we cannot even be investigated?'*²³

49. The government's application to the ICC challenging admissibility of the two cases cites the progress the country has made to restore public confidence in the judiciary and the police. The application notes that the enactment of the new constitution and the provisions on the Bill of Rights will ensure fair trials and procedural guarantees within the criminal justice system. It argues that national courts will now be capable of trying crimes from the post-election violence, including the ICC cases without the need for legislation to create a special tribunal. It also outlines a six-month time-table for carrying out the reforms and trials.²⁴
50. This application notwithstanding, there is need to note that Parliament failed to establish a Special Tribunal. Many MPs supported trials at The Hague because they feared that the local judicial process would be interfered with. They only turned around to demand for a local mechanism once they knew who was on the list. Some of the political leaders also rejected the idea of a Special Tribunal arguing that the local judiciary was corrupt and beholden to special interests. These are clear signs that some of the political leaders would want to thwart the ICC process so as to evade accountability.
51. Some Kenyans are generally sceptical about the sincerity of the government to fulfil its pledge to fight impunity because of the above contradictory positions by some leaders including some in government. Also this scepticism springs largely from the fact that there have been attempts to influence appointments to key institutions of governance. They are also sceptical that three years after the signing of the National Accord and Reconciliation Agreement, there has been little progress in prosecuting post-election violence cases, as Table 7 shows.

²³ 'Repeal of International Crimes Act' *The Hansard*, 22 Dec 2010

²⁴ ICC Pre-Trial Chamber II, 'Application on behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute' *ICC Public Document No. ICC-01/0-01/11 and ICC-01/09-02/11*, 31 March 2011

Table 7: Steps in the fight against impunity



52. The table also shows that the government failed to set up a Special Tribunal in spite of extension of agreed deadlines. A statute for the establishment of the Special Tribunal should have been enacted by 1 February 2009, after the Waki report was adopted by Parliament on 27 January 2009. Notwithstanding the delay between the date set for a Special Tribunal and the adoption of the Waki report by Parliament, the Bill to establish the Tribunal was defeated in Parliament on 12 February 2009. Another time limit was set for August 2009. Again the government failed to set the Special Tribunal by this date. The government had also begun consultations with the ICC on the subject. Consequently, as required by CIPEV, the Panel handed to the ICC the sealed envelope containing the Commission's recommendations for further investigations. Even after the matter had been handed over, Parliament again failed to pass the Bill for the Special Tribunal.

Cooperating with ICC

53. As mentioned above, the contradictory behaviour by MPs has led the public to question whether or not the Government will fully cooperate with the ICC. Cooperation with the ICC

has two elements. First, States are required to put in place domestic legislation that enables them to assist the court as and when requested. Secondly, States have a general obligation to cooperate with the ICC in the investigation and collection of evidence, arrest and surrender of suspects, extension of privileges and immunities to officers of the court, protection of victims and witnesses and the enforcement of ICC orders for fines and forfeiture.²⁵

54. Until the recent efforts to withdraw Kenya from the Rome Statute and to defer the Kenya case, the Government had taken steps to cooperate with the ICC. In December 2008 Kenya enacted the International Crimes Act to domesticate the Rome Statute. In September 2010 the Government signed the Agreement on the Privileges and Immunities of the International Criminal Court, which enabled ICC officials to conduct investigations in Kenya.
55. Secondly, a Kenyan judge was appointed to support the investigations by being present as investigators took statements from senior security officials. Dialogue has been going on regarding the production of relevant official documents and the protection of witnesses and victims of the post-election violence. More cooperation would be expected in the event that the arrest or surrender of suspects is required. Cooperation is also expected in the event that there is a need for enforcement of orders, forfeiture of proceeds, seizure of property or assets that any accused person may have acquired as a result of the crime and in case there is a need to give effect to awards of reparations to victims.²⁶ Kenya is also obligated to extend its criminal laws to penalize offences against the court's administration of justice and to submit cases of such offences to the prosecutor.
56. The Government has all along pledged to cooperate with the ICC but recent developments suggest that full and effective cooperation may be constrained by differences between the two parties in the coalition. These signs include the demand by some MPs that Kenya withdraws from ICC. Related to this is also the quest to defer the Kenyan case, as well as the argument that a New Constitution provides an opportunity to reconstitute the judicial mechanisms in a manner that would enable the country to try the suspects.
57. This argument attempts to sidestep the real reasons why the Waki Commission recommended establishing a Special Tribunal for Kenya or, in the alternative, passing the post-election violence cases to the ICC. The first was that investigations on PEV are weak and prosecutions half-hearted. The problems in Kenya's judiciary are only part of the poor infrastructure that has nurtured impunity. Out of the hundreds of homicides committed during the post-election period, only a few headline cases have gone to court, and all of them been dismissed because the investigations were poor or insufficient and the prosecution unconvincing. Three years since the commission made its recommendations, no concrete action has been taken to effect its recommendations to overhaul the police service, set up an independent prosecutorial service, and bring those officers within its ranks who were responsible for specific crimes during the post-election violence to justice.
58. It is important to also note that the Coalition Government lacks cohesion and presents different and opposed views on the ICC matter. Lack of cohesion within the coalition and the absence of a common position on the ICC will result in possibly one party of the Government

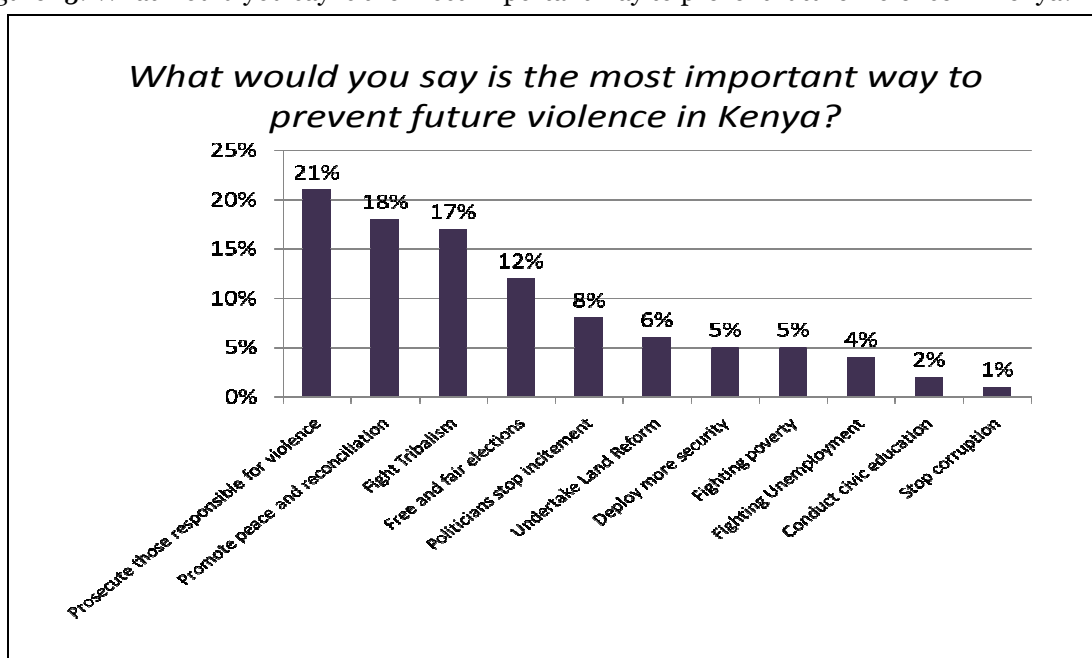
²⁵ Jackson N Maogoto, "A Giant without Limbs: The International Criminal Court's State-Centric Cooperation Regime". University of New Castle, 2006

²⁶ Article 93 of the Rome Statute

seeking to cooperate and the other party opposing ICC investigations. The differences in the perceptions of the two parties have deepened internal party divisions. These divisions have widened further after failing to agree on whether or not to lobby the African Union to support Kenya's quest for deferral of its case at the ICC through the United Nations Security Council. Given these developments, cooperation with the ICC is highly politicised, difficult to obtain and if obtained it is possible that the ICC will be subjected to political intricacies.

59. Some Kenyans believe that prosecution or other measures to fight against impunity are crucial to preventing future violence. More people want action against suspected perpetrators because this will prevent future violence. A displaced person observed that *'The ICC is the only option left to fight impunity in Kenya because the institutions and the politicians have failed. Ocampo cannot fail. He must not fail. If he does, that will be the end of Kenya because there will be nothing left to fear anymore.'*²⁷

Figure 13: What would you say is the most important way to prevent future violence in Kenya?



60. Many Kenyans see the ICC investigation as an opportunity to fight impunity. It is not a threat to peace and security. Some Kenyans also want accountability over the post-election violence; they want justice through prosecutions. There is thus a clear disconnect between ordinary Kenyans and some politicians, particularly MPs.

Illegally Armed Groups in the Society

61. The KNDR agreement required illegally armed groups to be demobilised. The previous three review reports have shown that illegally armed groups are no longer conspicuous or visible as was the case in 2008 and 2009. Some transformed from informal agents of political violence to organised criminal gangs. The reports also noted that organised

²⁷ Displaced person in Uasin Gishu, December 2010

criminal gangs had grown wealthy and powerful from extortion, kidnapping for ransom and collecting illegal taxes in urban informal settlements. It was found that in some parts of the country, they had taken over control of the transport industry, which they were running through extortion cartels. They were additionally found to have control of security in urban informal settlements, where they collect 'protection fees' from tenants, landlords and businesses.

62. The visibility of these groups and their activities has reduced significantly. The absence of major overt political competitions that would have required these groups is responsible for their low visibility. Campaigns for the referendum would have provided this opportunity but parties in the Coalition Government were generally not opposed to each other. Secondly, the Government enacted the Prevention of Organized Crimes Act and proscribed 33 groups. Within the framework of this law, the Government revived efforts to 'crack down' on suspected members of these groups, notably in Nairobi, Central and Rift Valley provinces. The Government has also been keen to secure watertight evidence against gangs for prosecution purposes and to protect witnesses who testify against them.²⁸
63. Many respondents across the counties do not cite awareness of the existence of such groups any more. However, the survey reveals that some groups still operate in Central, Nairobi, Coast and Nyanza regions. Interestingly, whether 'good' or 'bad' groups, they are all involved in 'security' activities, of which some community members are appreciative.
64. Although these groups are not as active as they were in the past, the failure to prosecute leaders of older groups has led to those in place – including older groups -- becoming bolder in their operations. In Nairobi, Kirinyaga, Murang'a and Kisii counties, respondents revealed that 'vigilantes' comprise criminals yet work 'in partnership' with the police to 'fight crime'. In Mombasa, the Republican Council has challenged the declaration that it is an illegal group.²⁹ Apparently, some members of the society tend to tolerate these groups because they fill a gap in the provision of security. This tolerance is gradually contributing to a culture that encourages unemployed youth to aspire to illicit behaviour. A growing number of unemployed youth tends to look at these activities as a source of income. Failure to act on these groups and to address youth unemployment therefore will lead to their becoming rooted at the local level in a manner that would make it difficult to reverse their growth.
65. The national survey reveals that whereas Mungiki is the most known illegal group, with members in 25 counties, there is a large concentration of old and new illegal groups in Nairobi, Kisii, Kilifi and Mombasa counties. The groups emerge out of a need to address security concerns in a neighbourhood. However, in poor areas of Nairobi, such as in Kibera, they have been used to protect illegal tenants in houses whose owners were displaced during the post-election violence. The groups are so organised that in some poor areas of Nairobi, the police find it difficult to conduct operations: *'A police man cannot just walk into these places alone; they come in a group. And even then, the group of police officers needs protection from the residents.'*³⁰

²⁸ Interview with a senior government official, 29 Oct 2010; also 'Security Chiefs Plot War against Gangs under New Law', *Daily Nation*, 6 Oct 2010

²⁹ Interviews in Mombasa with members of the group, 15-18 Dec 2010; also 'Mombasa Republican Council to Sue the State', *The Star*, 3 Jan 2010

³⁰ Interview with a Community Policing member in Kibera, 29 Dec 2010

66. The following are the most common groups mentioned in the 47 counties:

Table 8: Illegal groups³¹

If yes, name the most common groups	
Name	County where respondents knew members
Mungiki	Kirinyaga, Murang'a, Nyandarua, Nyeri, Kiambu, Kilifi, Tana River, Embu, Machakos, Isiolo, Tharaka, Nairobi, Mandera, Homa Bay, Kisumu, Migori, Kisii, Kajiado, Narok, Uasin Gishu, Nakuru, Laikipia, Busia, Bungoma
Sungu Sungu	Kilifi, Mombasa, Kwale, Homa Bay, Migori, Kisii, Nyamira, Trans Nzoia, Turkana
Taliban	Mombasa, Nairobi, Homa Bay, Uasin Gishu, Nakuru
Pamba 40	Kisii, Nairobi
Flying Squad	Kisii, Nairobi
Sabaot Land Defence Force	Trans Nzoia, Vihiga, Bungoma
Kamjesh	Nairobi
Jambazi	Nyamira, Bungoma
Somali Vigilante	Nairobi, Turkana
40 Brothers	Kilifi, Mombasa, Kwale, Vihiga
Community Policing	Mombasa, Kisumu, Siaya, Nyamira
Congo by Force	Mombasa
Omaris	Nairobi
Baghdad Boys	Kilifi, Garissa, Mandera, Nairobi
The Al-Shabaab Militia	Kilifi, Garissa, Wajir, Mandera

67. Focus groups and interviews in Kibera identified other groups such as 12 Disciples, 14 Flamingoes, Yes We Can, Siafu, Gendarmes, Bunker, Tuffgong, Gogo Boys, Labour, Kamukunji Pressure Group, Force 10 and Olympic Youth. Others include The Rebels, Base 10, Al Aqsa, Rutanga, and Bunchers.
68. A similar trend has been observed in other informal settlements in the east of Nairobi. The new groups are said to form as a result of internal disagreements in existing groups, particularly over sharing money or other spoils of crime.
69. People have little confidence in these groups. Compared to 2008 immediately after the violence, there are many people who now prefer protection by the police than by these groups. It was also observed that although these groups demand protection fees, the people pay because the police also ask for money to buy fuel for their vehicles or mobile phone airtime to call their superiors. Some even argue that illegal groups while not acceptable to society, have some advantages over the police. For example, they mete out 'instant justice' and are available at all times. They also 'arrange' for access to water, services, and negotiate for employment or other opportunities.

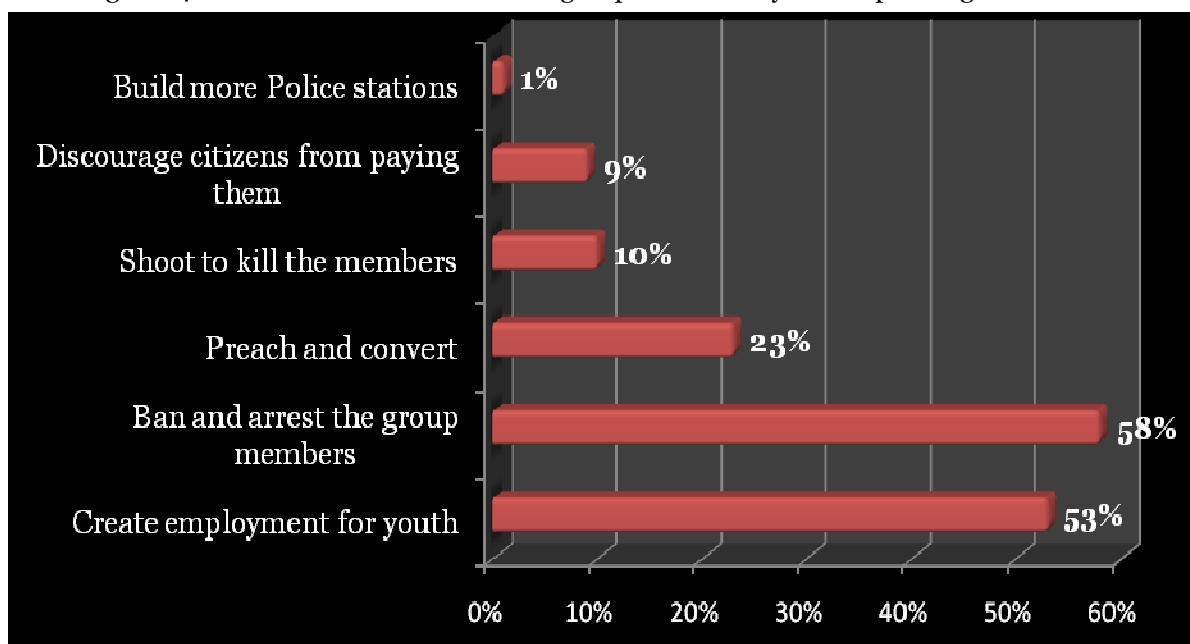
³¹ See names of other groups in May 2009 and March 2010 review reports

Table 9: Police versus local armed groups: Which is closest to your own view?

Which of the following is closest to your own view?	
It is more important for local armed groups to protect their communities than the police	5%
It is more important for the police to protect communities than local armed groups	74%
It is more important for both the police and local armed groups to protect communities	20%
DK	1%

70. Asked what should be done to shut down the operations of these groups, 58 per cent of Kenyans said that banning them and arresting their members would suffice. A worrying 10 per cent of the respondents supported extra-judicial executions, suggesting the despondency the public feel have with regard to illegal groups as a threat to society.

Figure 14: What should be done to these groups so that they cease operating?



71. Illegal groups thrive because of impunity, political support and structural factors such as poverty and unemployment. Efforts to eradicate them must, therefore, focus on these structural factors through implementation of Agenda 4 reforms, including ending the culture of impunity. Special operations and ‘crackdowns’ have not been effective in dealing with illegal groups. An assessment of Mt Elgon area by the Kenya Red Cross society in November 2010 found that remnants of the Sabaot Land Defence Force, ostensibly crushed

through a joint police-military operation (Operation Okoa Maisha) in March 2008 have begun to reorganise and to terrorise citizens.³²

Conclusion

72. The ICC investigation of the Kenya situation has reached a critical point. However, some political leaders have a common interest in thwarting the work of the ICC Chief Prosecutor because indictment would negatively impact on political careers. They are collectively contributing to the formation of ethno-regional alliances that would shield them from the ICC process as well as promote their political interests. Some leaders in these new alliances have an interest in opposing accountability, particularly if measures to do so undermine their quest for national political power. These new dynamics imply that the ICC is likely to face difficulties in obtaining full and effective cooperation from the political parties in the coalition. Self interest rather than national good tends to be the driving force in attempts to thwart the ICC process.
73. Kenyans are supportive of the ICC and want to see senior people prosecuted and held accountable for their role in the post-election violence. They want change. Politicians are nonetheless unified in their efforts to oppose measures that run contrary to their quest to consolidate power. They want the status quo to remain, and to sustain the old order. These efforts show a major fault line between the aspirations of ordinary Kenyans and some political leaders. There is need for the Government to support the people's desires in order to begin creating a new beginning.
74. During this review period, there has been no known report of politicians activating any illegal group for political purposes, such as organising violence. However, as the ICC investigations get under way, and political strategies begin to be laid in preparation for the 2012 General Election, it is highly likely that such overtures could re-emerge. As noted above, a culture that admires wealth from illicit activities will encourage more candidates from the ranks of criminal organisations and gangs to seek political office. The likelihood of using resources acquired from criminal activities to support violent campaign strategies is not remote; it presents a real threat to peace and stability during the election year.

³² OCHA Kenya, Humanitarian Update Vol. 66, 15 Nov - 15 Dec 2010, p. 3.

3. RESETTLEMENT OF IDPS AND RECONCILIATION AMONG COMMUNITIES

Introduction

75. The KNDR agreement required the two parties to address the humanitarian crisis and promote healing and reconciliation. The two parties were required to resettle Internally Displaced Persons (IDPs) and address the problems that IDPs faced. The previous review reports have tracked progress in resettlement efforts and the challenges therein. The findings generally suggested that the Government's Operation Rudi Nyumbani enabled many IDPs to return to their farms and to reconstruct their lives and livelihoods.
76. This review again examines progress and challenges experienced in resettlement and reconciliation among communities. It is noted here that allegations of corruption in the resettlement programme, lack of social cohesion in return areas, landlessness and hate speech over Mau Forest evictions and politicisation of the IDP problem generally combined to create unsafe conditions for the sustainable return of IDPs.

Resettlement of IDPs

77. The presence of IDPs in 'transit camps' continues to attract political attention and to raise concern among the public. Many are concerned that the Government disbursed funds for resettlement, reconstruction of houses and purchase of land, yet the IDP problems are still far from over.³³ In the past three years, the Government reported spending Ksh7.977 billion to support IDPs.³⁴

Table 10: Government disbursement in support of IDPs

Financial Year	2007/2008	2008/2009	2009/2010	2010/2011
Amount (Ksh)	1.25 billion	1.035 billion	3.005 billion	2.687 billion

78. In spite of this support and interventions to assist the IDPs, the number of displaced persons in transit camps does not seem to have been reduced. This limited impact is attributable to several factors. These include corruption in the resettlement programme involving especially some Government officials and some IDP leaders. Some people were arrested and charged in court but the cases are yet to be concluded.³⁵
79. Secondly, the IDPs problem has been politicised by leaders from the areas where people were displaced, as well as those who share an ethnic identity with the IDPs. IDPs have become a source of political capital for some politicians. The May 2010 review report showed that some politicians were making promises of land and scholarships to some IDPs to influence them against giving incriminating evidence in investigations into the post-election

³³ Interview with an official from the Ministry of State for Special Programmes, 31 Jan 2010, who said plans were under way to construct houses for those in Ya Mumbi camp and then close it

³⁴ 'Statement on Government Support for IDPs', Press statement from the Office of the Deputy Prime Minister and Ministry of Finance, *The Star*, 7 January, 2011

³⁵ Interview with an official at the Ministry of State for Special Programmes (MoSSP), 31 Jan 2011; also 'State Admits to Presence of Fraudsters in IDP Camps', *The Standard*, 25 Jan 2010; 'Imposters, Corrupt Officials Cash in on Displaced Persons' Plight', *The Standard*, 26 Jan 2010

violence. Other leaders have raised funds publicly on behalf of displaced persons, claiming that the Government had neglected them.

80. Politicisation of the IDPs problem continues to recur regularly. Some politicians are mobilising their ethnic communities to prevent the resettlement of IDPs in what they consider their ancestral territory. They reject IDPs using the argument that the latter should be returned to their ancestral districts since there are landless people among 'indigenous' communities who would like to be settled, too. Ethnicisation of resettlement efforts implies continued problems for IDPs. These sentiments and ethnic claims to land are slowly deepening the IDPs crisis. The IDPs problem is increasingly instrumentalised to assist in political competition.
81. These factors have undermined the potential impact of the IDP resettlement programme. But there are a number of initiatives under way that are likely to improve on this and offer a sustainable solution. Important among these is the Bill of Rights in the New Constitution. If effectively enforced, it could guarantee protection of lives and property for people in any part of the country.
82. Second is the draft National Policy on Internal Displacement. The Protection Working Group on Internal Displacement, comprising officials from the Government, human rights and humanitarian organisations, is aligning the policy with the New Constitution to facilitate its adoption and implementation.³⁶ The Ministry of Special Programmes said it hoped to finalise resettlement by the end of December 2011.
83. Finally, there is a 'Parliamentary Select Committee on Resettlement of IDPs'.³⁷ The committee will look into how the Government has addressed the plight of current IDPs in terms of basic food rations, shelter and compensation. It will also review existing institutions and organs for addressing forced displacements, examine policies and laws governing all forms of forced displacement with the aim of promoting protection and improving the well-being of forced migrants. The committee, whose mandate ends in May 2011, will make recommendations on how to effectively address the IDP problem. .
84. These policy initiatives do not, however, reflect the complex dynamics of the IDPs crisis. A complex land problem, entrenched ethnic mistrust and failed peace-building efforts have made it difficult for IDPs to return in a sustainable manner. These are the challenges to be tackled to enable IDPs to find durable solutions. These challenges are also anchored on the broader democratic governance agenda and, therefore, interlinked with reforms in the broader socio-political context. Thus only by undertaking reforms to stabilize the national political context will the IDP problem be fully settled.
85. In the meantime, it is now well recognised that part of the solution to the IDPs problem is to resettle some of them elsewhere. Over a quarter of respondents in successive surveys say that resettling IDPs elsewhere is one important step the Government can take to address the problem. A significant number also underline the need to resettle IDPs where they were displaced from and give them land. While these are important strategies for addressing the IDPs problem, they must be anchored on broader democratic governance reforms for better

³⁶ OCHA Kenya, *Humanitarian Update* Vol. 66, p. 2

³⁷ 'Parliamentary Select Committee on Resettlement of IDPs' *The Hansard*, 3 Nov 2010

impact.

Table 11: Best ways to resolve the IDPs crisis

What is the most important thing the Government can do to address the problem of IDPs in Kenya?			
	Aug-09	Feb-10	Nov-10
Resettle them elsewhere	33%	34%	28%
Resettle them in areas where they were displaced from	25%	18%	24%
Give them financial assistance	12%	13%	28%
Promote peace and reconciliation	12%	12%	10%
Take them back to their ancestral districts	7%	12%	6%
Increase security	6%	9%	6%
Give them land			35%
Resettle them where they are			11%
DK	3%	1%	
Other	2%	1%	1%

Shelter Reconstruction

86. The Government, development partners and humanitarian organisations have put significant efforts into reconciling communities through peace meetings, training workshops, counselling, sports and games, agriculture and livelihoods recovery programmes as well as shelter reconstruction. Over 20,000 houses have been constructed by the Government and humanitarian agencies with support from the African Development Bank (ADB), the United Nations Central Emergency Response Fund (UN CERF) and development partners. Other agencies that have supported IDPs shelter reconstruction include Habitat for Humanity, International Organisation for Migration (IOM), Goal Ireland, Kenya Red Cross Society, Danish Refugee Council and the Catholic Church. Many others have supported livelihoods recovery programmes such as provision of seed, fertilisers and other farm inputs.
87. IOM has been involved in the reconstruction programme since 2008. The organisation has constructed over 11,000 houses for IDPs in various parts of Uasin Gishu, Trans Nzoia, and Molo, among others. Table 12 tracks the progress IOM reconstruction efforts have yielded in the area.

Table 12: IOM shelter reconstruction programme

Area of operation	2008		2009		2010		2011		Totals constructed
	Funding source	Totals	Funding source	Totals	Funding source	Totals	Funding Source	Totals	
Molo District	UN Central Emergency Response Fund (UN CERF)	210	GOVT of JAPAN	0	ADB/MoSSP	0	African Development Bank (ADB) and MOSSP (ADB/MoSSP)	0	210
Iugari District		200		1540		0		1740	
Wareng District		50		1457		1790		5081	
Eldoret East district		240		480		478		2594	
Eldoret West district		0		659		0		659	
T.East District		0		2131		0		2131	
T.west District		0		2206		0		2206	
GRAND TOTALS				700				8473	

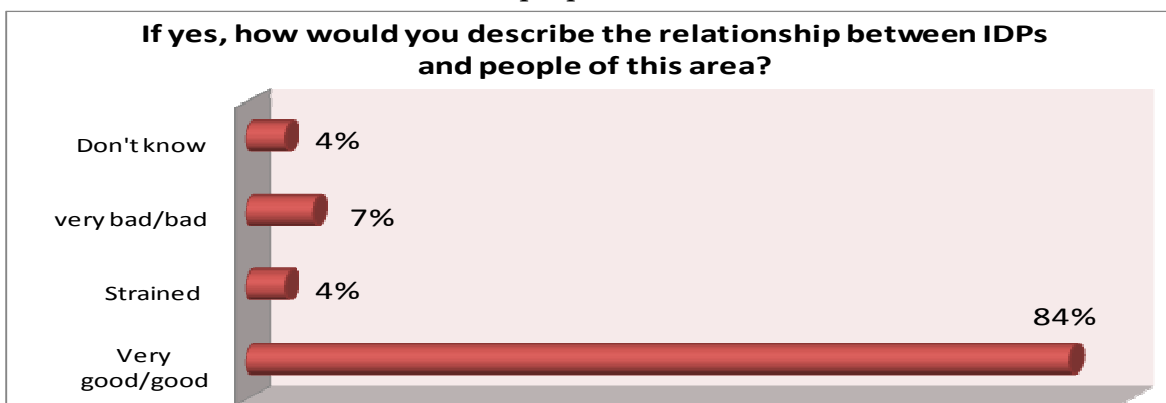
Source: IOM Eldoret Sub-Office, March 2011

88. Despite efforts to support shelter reconstruction, some IDPs have not been able to occupy their reconstructed homes. For instance, in Kamuyu and Lorien, some IDPs have not occupied their newly constructed houses. Some of those interviewed cite ethnic tension and sporadic attacks. However, insecurity or fear is not the only problem. Some respondents suggested that IDPs have houses elsewhere. There are also claims that some IDPs only wanted to be allocated land because they were landless. Yet others claim not to have furniture and other personal goods. This kind of reasoning betrays the dependency syndrome that has characterised the lives of many IDPs, who have got used to receiving handouts. It is this category of the displaced that many accuse of refusing to reconstruct their lives because they 'benefit' from claiming to be IDPs. Nonetheless, the IDP problem is continuing to become a complex issue that requires both administrative and policy solutions; it should be attended to urgently.

Reconciliation among Communities

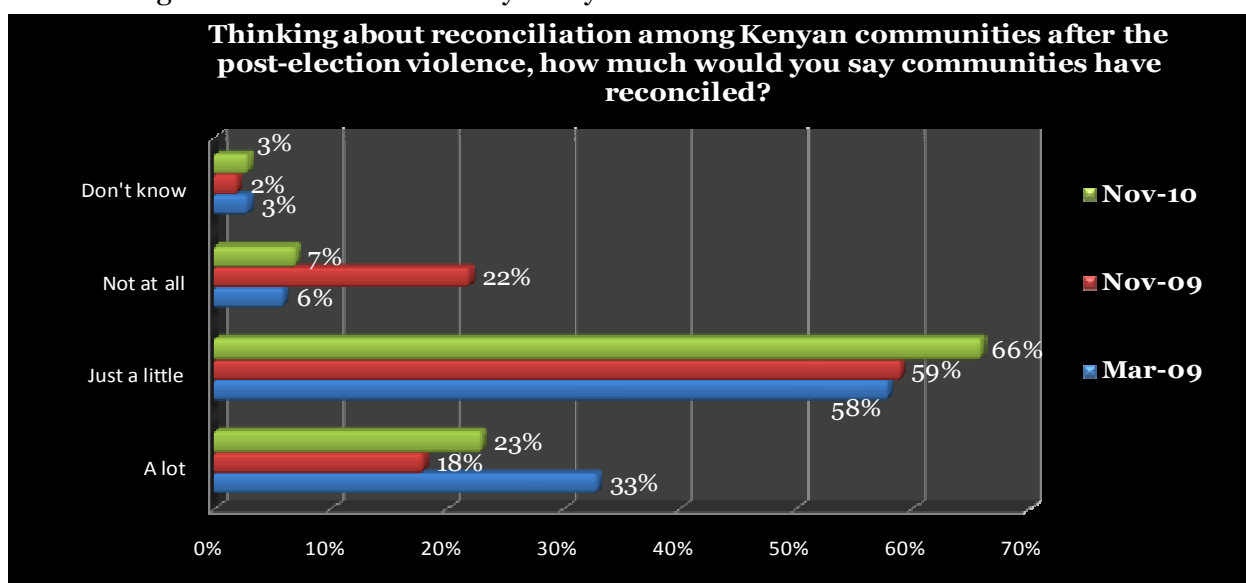
89. Respondents in areas where IDPs have settled note that their relationship is good and they are relating with IDPs well. Indeed, attacks against IDPs are few and isolated. Asked how people related to the IDPs who lived in their areas (if any), 84 per cent said they related with the respondents very well. Only a small proportion (5%) said they related badly, while 4 per cent said they had a strained relationship. These observations point to improving relations at the local level.

Figure 15: If there are IDPs in your area, how would you describe the relationship between IDPs and the people of this area?



90. Reconciliation among Kenyan communities is taking place, though gradually. There are many people who feel that reconciliation is taking place but the responses do not suggest that a lot has been achieved in this respect. In December 2010, only about 23 per cent said that a lot of reconciliation had taken place. This is a drop from 33 per cent of the responses obtained in the March 2009 survey.

Figure 16: How much would you say communities have reconciled?



91. Across the country, Rift Valley has slightly more people (24 per cent) who feel that a lot of reconciliation has taken place. Few people feel that reconciliation has not taken place at all.

Table 13: How much would you say communities have reconciled? (by region)

	CENTRAL	COAST	NAIROBI	NYANZA	RIFT VALLEY	WESTERN
A lot	25%	13%	13%	23%	24%	20%
Just a little	58%	67%	77%	69%	68%	72%
Not at all	11%	13%	8%	6%	5%	5%
DK	4%	7%	2%	2%	2%	1%
RTA	1%	0%	0%	0%	1%	1%

92. Most Kenyans have a strong sense of citizenship and express a high level of national cohesion. Over 80 per cent have no problems relating with members of other communities, and they would readily work and invest in regions settled by people from other tribes. However, respondents expressed hesitation about the likelihood of building a house, buying land or settling in an area dominated by members of another tribe.

Table 14: How likely or unlikely are you to co-exist with other tribes

<i>How likely / unlikely are you able to do the following in an area where members of another community live? (Those who said 'very/somewhat likely')</i>	
Buy land	70%
Set up a business	78%
Settle there	70%
Send your children to school	81%
Get employment	84%
Build a house	64%

93. Many people recognise that ethnicity and political utterances are a major challenge to peace and reconciliation efforts in the country. Matters such as access to land, which are sometimes cited as the cause of conflicts between communities, are not identified as major challenges. This implies that democratic governance reforms are central to consolidating peace and reconciliation efforts. Promoting reconciliation and unity in Kenya cannot, therefore, be divorced from the fight against all forms of impunity and measures to entrench political accountability, as well as delivering on all necessary reforms.

Table 15: What is the most important challenge to peace and reconciliation efforts in your area?

What is the most important challenge to peace and reconciliation in your area?	
Tribalism	27%
Political utterances	25%
Mistrust between ethnic groups	16%
Land disputes	9%
People who committed crimes are still free	8%
Lack of involvement by community members	6%
No response	6%
People are too hurt and traumatised	2%
Poverty	1%

Conclusions

94. The Government has provided resources to address the problems that IDPs face. It has assisted some IDPs to buy land, and disbursed funds for start-up and reconstruction of homes. In spite of these efforts, the problems facing the IDPs are far from over because they are anchored on the broader socio-political context. Although resettlement is an important intervention, sustainable solutions cannot be divorced from broader democratic governance reforms.
95. The IDPs problem is increasingly politicised. IDPs have been used to advance the political objectives of some leaders. Some politicians have opposed the resettlement of IDPs on land perceived to be the preserve of their ethnic communities. This has not only ethnicised the IDPs problem, but also created new dilemmas in the search for durable solutions. However, provisions in the New Constitution, if enforced, present new opportunities for the protection of the lives and property of IDPs in any county in Kenya.
96. Different leaders have conflicting political interests on the IDPs question. This undermines the search for a durable solution. Those from the areas where the Government intends to settle IDPs are opposed to resettlement because their own constituents demand that their landlessness problems be addressed. Those from the same ethnic community as the IDPs are also keen to see the unconditional resettlement of the displaced.
97. The IDPs problem appears to be the result of failure to deepen democratic governance. Only by correcting the practice of politics and use of political power for national good will this problem be resolved in a sustainable manner.

4. THE ICC AND COHESION IN THE COALITION GOVERNMENT

Introduction

98. The KNDR agreement recognised that the post-election crisis revolved around issues of power and the functioning of state institutions.³⁸ The two parties agreed to share power and to establish a Coalition Government to allow for undertaking of fundamental reforms. The Constitution was amended to provide for the coalition in this respect.
99. Power sharing under the National Accord was not an end in itself but a means for achieving reforms that would prevent future violence. It was *'not about creating positions that reward individuals'*³⁹. It was about *'enabling leaders to look beyond partisan considerations with a view to promoting the greater interests of the nation as whole'*. The Agreement on the Principles of Partnership of the Coalition Government noted that the two parties were setting the country forward on a new path. They committed themselves *'to work together as true partners, through constant consultations and willingness to compromise'*. The agreement required the new Government to pass and implement fundamental reforms, including concluding a review of the constitution, to prevent future violence.
100. This section of the report examines coherence within the Coalition Government, how critical reforms have been undertaken and the manner in which these reforms compromise unity within the coalition. The issue of how the ICC process is affecting cohesion within the Government is also addressed.

Key Findings

Summary of findings

- Power sharing conflicts continue to inform relations between the parties
- Most Kenyans think power sharing has benefitted the country
- Public satisfied with the working relationship between the President and Prime Minister
- Political interests and lack of Government cohesion slow down the implementation of the constitution
- Political Parties Disputes Tribunal formed to arbitrate inter- and intra-party wrangles

The Kenya Grand Coalition Government: Hiccups from the Start

101. Political parties get into power sharing arrangements when it is realised that no individual party can govern without the other. But for power sharing to work, political elites have to accommodate each other's views, transcend ethnic and party differences, and compromise to create a unity of purpose. These initiatives are critical for the purpose of implementing policies and enhancing the stability of the country. Failure to compromise and transcend parochial differences usually weakens not only the coalitions, but also threatens the stability of the society. To promote cohesion, political elites in power are usually required to commit themselves to the spirit of dialogue and consultations, as well as the pursuit of the national

³⁸ Agenda Item 3: How to resolve the political crisis, from the annotated agenda prepared by Kenya National Dialogue and Reconciliation team

³⁹ Agreement on the Principles of Partnership of the Coalition Government, available at www.dialoguekenya.org.

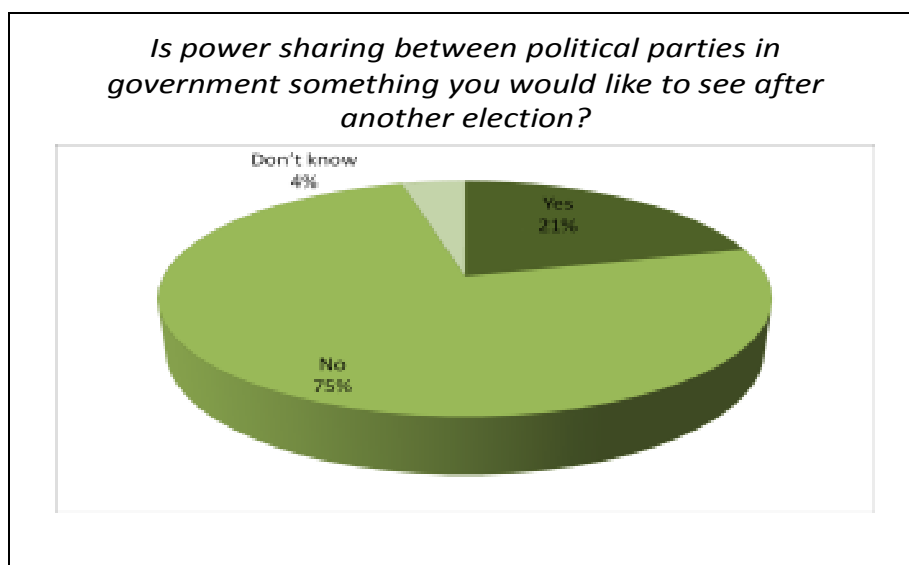
interest.

102. The National Accord and Reconciliation Act, which established the Coalition Government, clearly underlined the importance of these principles. The National Accord established a framework that sought to promote the interests of the nation rather than narrow political ones. Its goal was to *achieve sustainable peace, stability and justice through the rule of law and respect for human rights*.
103. Kenya's Coalition Government has had little cohesion from inception. Political factionalism and divisions within the main parties have posed the greatest hurdles to consolidation of a unity of purpose. Divisions along ethno-political lines continue to weaken the Government. Personal political and ethnic interests have increasingly undermined unity. Indeed, rarely does national or public interest override these narrow interests. In the recent past, and since the ICC process entered high gear, the partner parties in the Coalition Government have had difficulties forging a common position on how to undertake essential reforms.
104. But it is not the ICC process alone that is undermining unity in Government. The failure to recognise that the Grand Coalition was not an end in itself but a means to undertaking far-reaching reforms has seen the Government mired in endless conflicts. Additionally, the failure to adhere to the principles outlined in the National Accord has deepened these conflicts. Several factors stand out in this context. One is rewarding individuals rather than looking beyond partisan considerations so as to promote national interests. This underlies the nature of conflicts within the coalition because there aren't enough resources to satisfy everyone. Furthermore, each party would prefer to have more to reward its followers. Second is the absence of a framework to resolve disputes. Thirdly, and finally, is the low level of trust among political elites. The need to promote self interest contributes to mistrust and suspicion. These factors have generally combined to intensify internal incoherence within Government.
105. Most of the challenges facing the coalition have their origins in how individual elites in the Government perceived power sharing. The parties went into power sharing arrangements as different entities with varied agendas. While initial disputes centred on the meaning of 'real power sharing' and how this would be operationalised, the instrumentalisation of power sharing has perpetuated these early divisions. Political elites interpreted power sharing from a point that gave them advantage rather than from a national interest point of view. Thus, from the start, the Coalition Government faced challenges of cohesion.
106. The first divisions occurred over the composition of the Cabinet and how to share power. The two principals nonetheless transcended their party divisions and formed a new Cabinet based on the principal of 50-50 portfolio balance. Formation of the coalition Cabinet did not end the initial differences and suspicions. Disputes emerged over which partner would control which ministry. ODM was getting into power sharing when PNU had already appointed Cabinet ministers before the mediation process had officially began. This certainly constrained the consultations over which party would get what ministries. PNU allegedly did not want to share power beyond cabinet positions, while ODM wanted senior public sector positions included.
107. The next conflict was on protocol and government hierarchy. Again, self-serving interests informed interpretations on the hierarchy of power. Some argued that the Vice President was second in hierarchy and that the Head of Civil Service had duties similar to those of the

Prime Minister. This saw multiple interpretations of the duties of the two offices, according to party lines, thus increasing suspicions and mistrust.

108. The import of these challenges is that they created within the public psyche an image of 'two-governments-in-one.' In the surveys conducted in 2008 and 2009, the public generally viewed the Government as comprising two factions, with one of having more power than the other. In 2008, 49 per cent of respondents said power was not shared equally between PNU and ODM. This increased to 58 per cent in August 2009.⁴⁰ Lack of consensus over key decisions and having different and opposed positions on major issues gave credence to this view.
109. These conflicts keep recurring. The problem of power sharing has remained constant. In addition, the two parties have not formed an effective conflict resolution mechanism that could guide how to resolve the main sticking points. A coalition agreement that had been drafted in 2008 after the signing of the National Accord was not signed. The closest the parties have come to establishing such a mechanism is the setting up of the Permanent Committee on the Management of the Affairs of the Coalition, which was stillborn and ineffective, rarely meets and is yet to be effectively used.
110. These difficulties have impacted on people's confidence in the Coalition Government. Asked whether power sharing is anything they would like to see after another election, 75 per cent of respondents answered in the negative, while 21 per cent said they would not mind it.

Figure 17: Is power sharing between parties in government something you would like to see after another election?

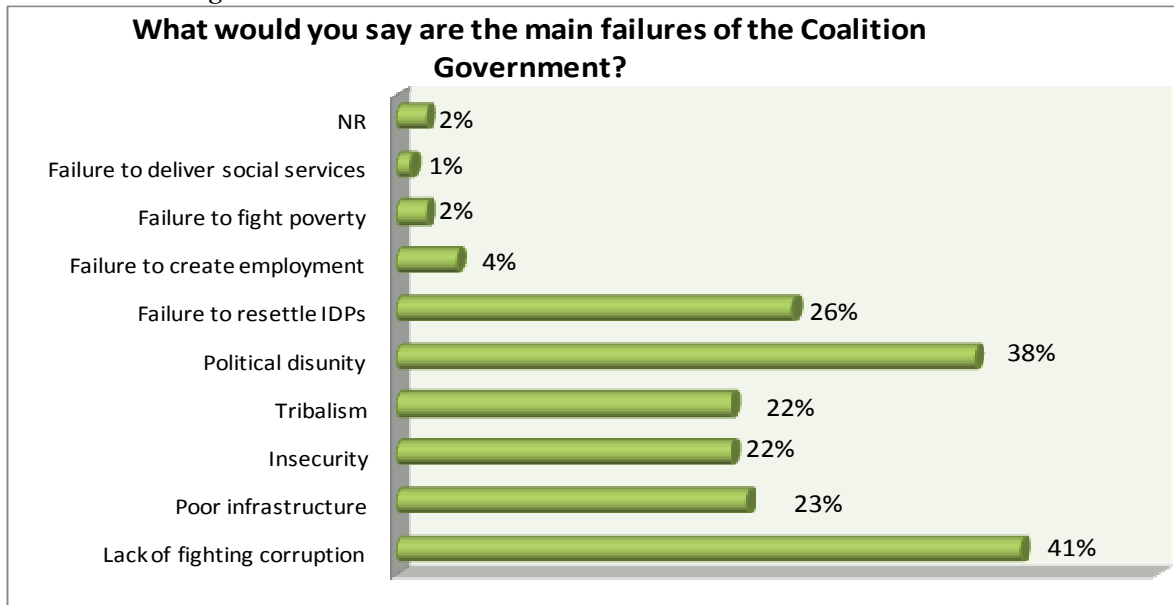


111. When asked about what they perceived as the main failures of the Coalition Government, 41 per cent of respondents cited the failure to fight corruption while another 38 per cent said it was lack of political cohesion or unity within the coalition. It is significant that people pay

⁴⁰ See South Consulting reports, January 2009; at www.dialoguekenya.org

attention to key governance issues rather than development ones, in judging the success of the Government. This is an important point to bear in mind – that governance is critical to how people perceive the Government. In fact, the legitimacy of the Government is based not only on the extent to which it delivers development, but also the extent to which it undertakes democratic governance reforms. Thus, the fight against corruption, tribalism, and political disunity appear as the main factors that people are unhappy about.

Figure 18: What are the main failures of the Coalition Government?



112. Yet, Kenyans are not necessarily dismissive of the current power sharing arrangement. There are many people who see the current power sharing arrangement as beneficial because it pulled the country out of a crisis that threatened the future of Kenya. When asked how power sharing has helped the country, 47 per cent said the enactment of a New Constitution is the greatest benefit of the power sharing government. Another 45 per cent said it has brought peace and stability, while 27 per cent cited improved ethnic relations.

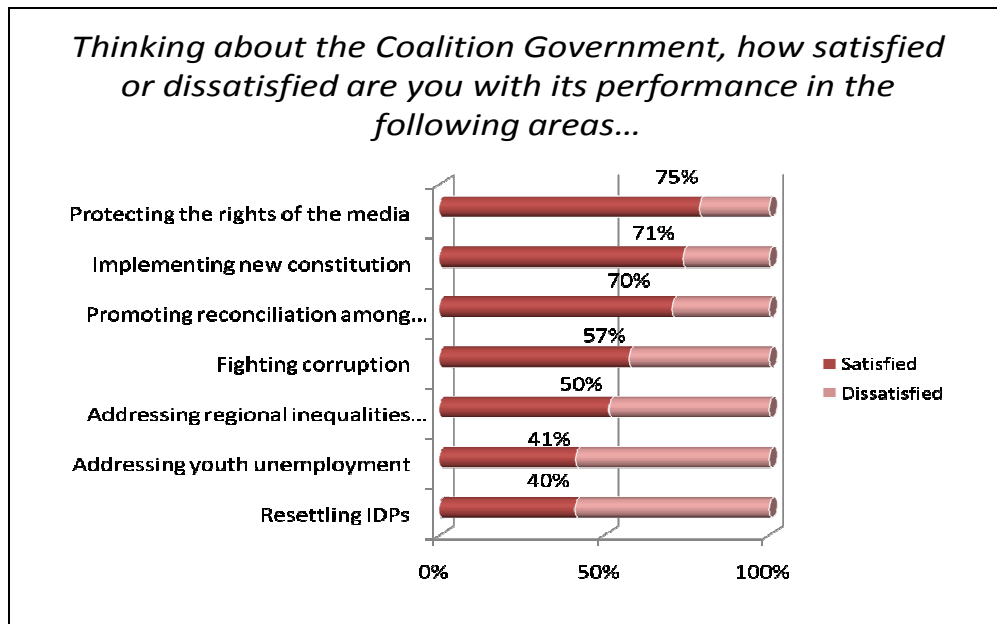
Table 16: In what ways, if any, has power sharing benefitted the country?

In what ways, if any, has power-sharing benefitted the country? (multiple responses)

Brought new constitution	47%
Brought peace and stability	45%
Improved ethnic relations	27%
Improved economic development	16%
Helped in fighting corruption	15%
Nothing	12%
Others	3%

113. Many people are also satisfied with the Coalition Government in respect of promoting media freedom, implementing the Constitution, and promoting reconciliation among communities. They are dissatisfied about how the Government has addressed youth unemployment and how it is resettling the IDPs. These are the main issues that constituted the agreement on Agenda 4 of the Kenya National Dialogue and Reconciliation (KNDR) Agreement. They require urgent attention.

Figure 19: Thinking about the Coalition Government, how satisfied or dissatisfied are you with its performance in the following areas?



114. Close to half of the population in the counties most affected by violence acknowledge that the Government has restored peace: 66 per cent of respondents in Trans Nzoia, 44 per cent in Uasin Gishu, 43 per cent in Nakuru, and 46 per cent in Nandi counties, which were all affected by the PEV, say the Government has restored peace and stability. Table 18 provides an overview of responses in these counties. The new constitution and peace and stability are identified generally as the main achievements.

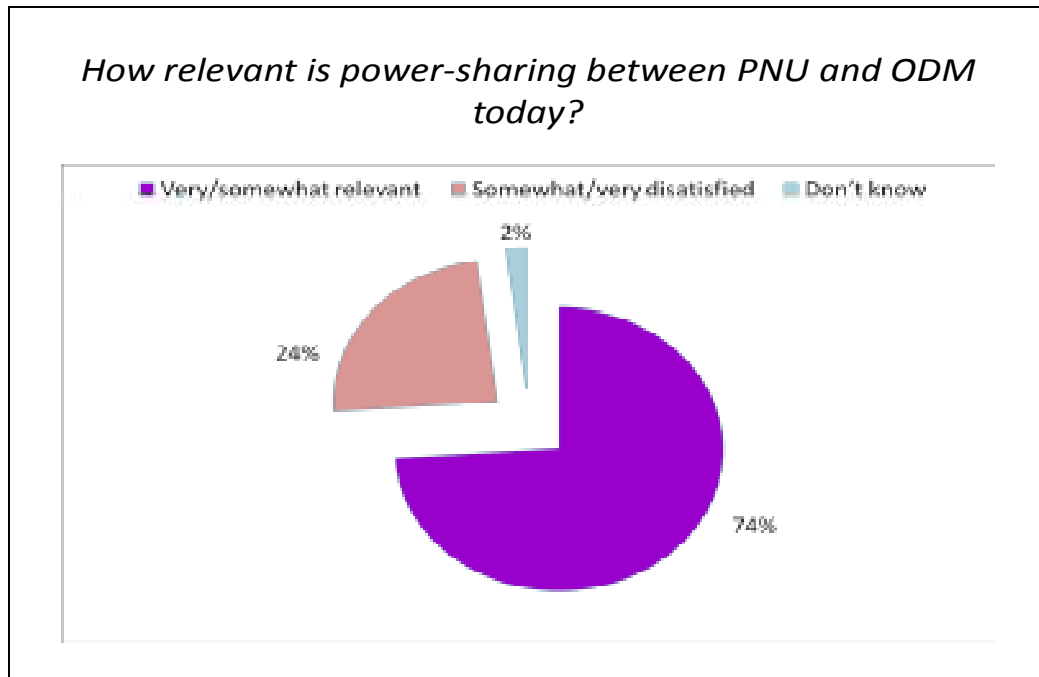
Table 17: In what ways, if any, has power sharing benefitted the country? (Selected counties)

	Kisumu	Kisii	Kiambu	Kericho	Nandi	Trans Nzoia	Turkana	Uasin Gishu	Nakuru	Mombasa
Improved ethnic relations	26%	21%	18%	18%	19%	31%	36%	30%	36%	20%
Brought new constitution	58%	62%	54%	37%	50%	24%	68%	45%	47%	39%
Brought peace and stability	57%	34%	41%	39%	46%	62%	47%	44%	43%	40%
Helped in fighting corruption	11%	29%	27%	15%	8%	13%	22%	10%	29%	18%
Improved economic development	23%	13%	14%	19%	15%	21%	9%	19%	21%	16%
Others	8%	8%	3%	2%	0%	1%	0%	3%	2%	6%
Nothing	7%	10%	5%	22%	14%	15%	2%	14%	6%	18%

115. To many Kenyans, power sharing is still relevant three years after the signing of the National Accord. As many as 74 per cent of the respondents noted that the power sharing agreement between PNU and ODM is still relevant since the coalition is expected to implement the new laws. Further to some respondents, the coalition ‘is the only government we have now to ensure future stability by implementing the New Constitution.’⁴¹

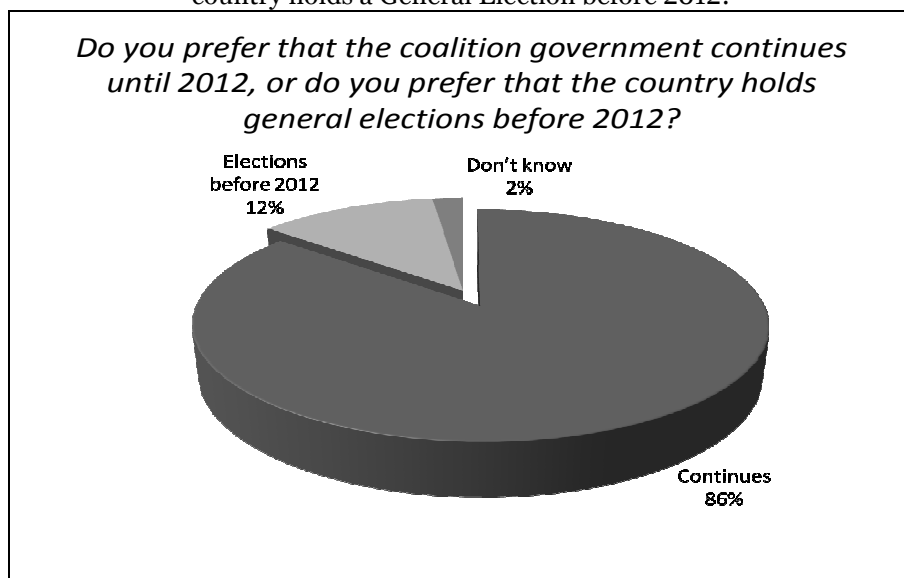
⁴¹ Interview with a teacher from Kiambu County, 29 January 2011

Figure 20: How relevant is power sharing between PNU and ODM today?



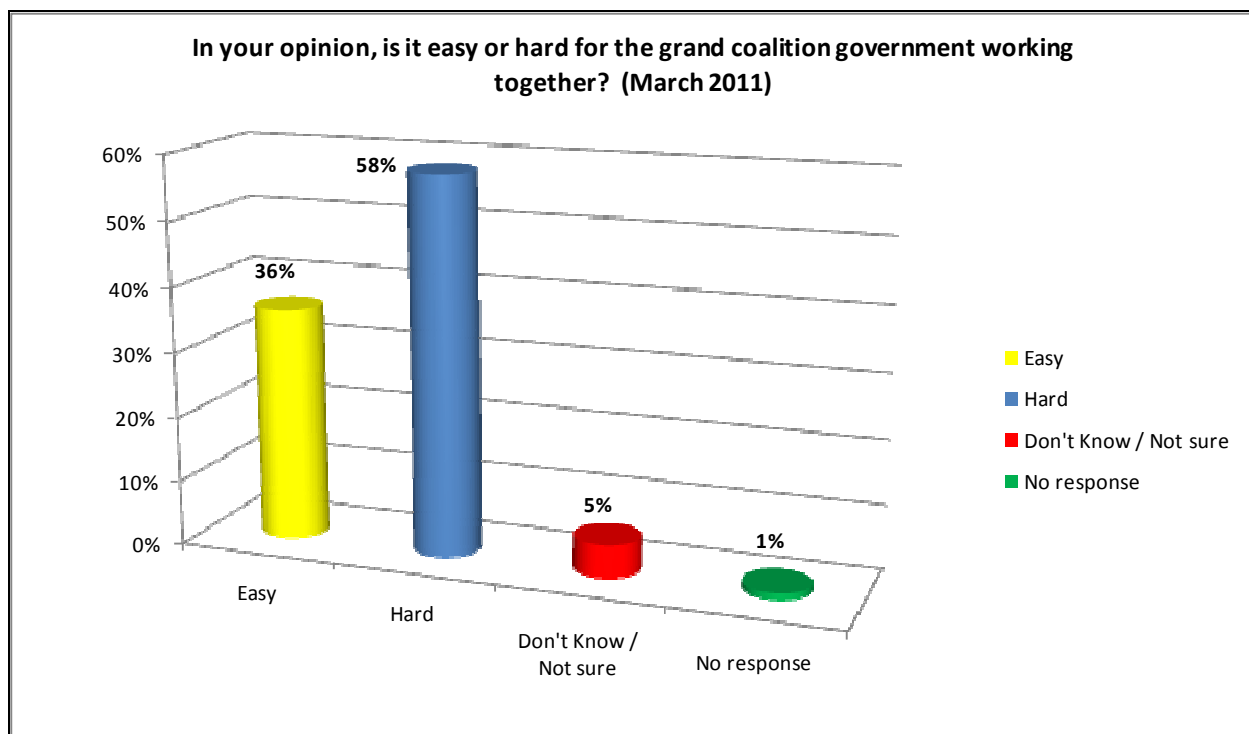
116. As many as 86% of Kenyans would prefer the Coalition Government to remain in office until 2012. They want the coalition to facilitate the implementation of the New Constitution by remaining in office instead of conducting new elections.

Figure 21: Do you prefer that the Coalition Government continues until 2012, or do you prefer that the country holds a General Election before 2012?



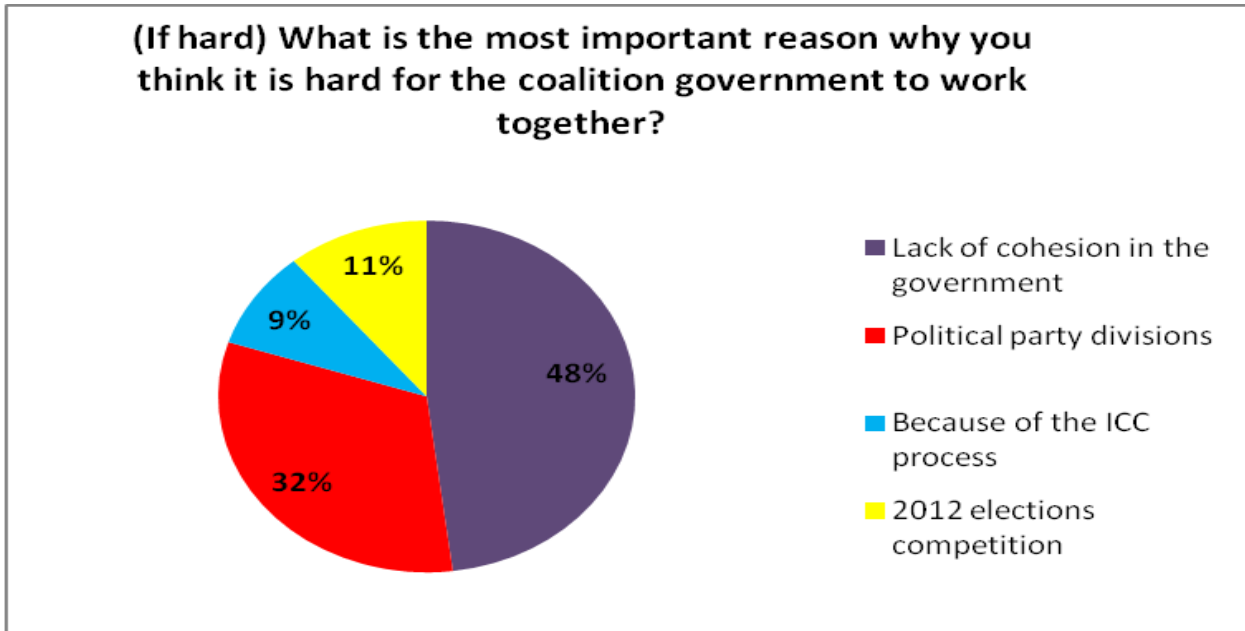
117. Although people would like the coalition to remain in power to implement reforms, the manner in which these reforms are implemented is impacting on unity within the Government and especially between the two parties. It is also weakening the main parties. Over half of the population generally feel that the Government is having a hard time working in unison to implement the Constitution. This was a 7% increase from December 2010 and reflects the escalated divisions within the coalition.

Figure 22: In your opinion, does the Coalition Government have an easy or hard time working together in the Constitution implementation process? (March 2011)



118. People are clear that disunity within the coalition is preventing key reforms. It is making it hard for the Government to implement the New Constitution.

Figure 23: What is the most important reason why it is hard for the Coalition Government to work together? (March 2011)



119. Lack of cohesion within the Government and political party divisions continue to entrench the public perception of divisions within it. Even on matters relating to major reforms, the image of ‘two-governments-in-one,’ is reinforced because there are always likely to be ‘two different voices’ or even ‘two versions of the story’ on each issue. This is attested by how the two partners in government continue to react to the ICC process, tackling corruption, and even to the appointments under the New Constitution.
120. From December 2010 when the ICC Chief Prosecutor identified six people for prosecution, the two partners in Government have issued contradictory and opposing views on the position of the Government. While those in PNU and their new allies in ODM argued for deferral of the Kenyan case and even lobbied the African Union and United Nations Security Council to assist in attaining this goal, ODM refused to support the initiative, arguing that the Cabinet did not resolve to do so and dismissed the effort as a partisan and personal agenda. The government has also challenged the admissibility of the six ICC cases but ODM said it is not party to these efforts. This has continued to portray the government as ‘two-governments-in-one’.
121. The ICC prosecutions have further split ODM with the party MPs sharply divided on what support to offer their colleagues who were named by the ICC. This has witnessed the party leaders and members giving contradictory statements on the party position. These disputes and politicization of the ICC process has led to slow implementation of the new constitution with energies being diverted to strategising and formation of political alliances on the ICC process. The ethnic mobilisation taking place in these rallies is similar to what accompanied the companies for the 2007 elections and the violence thereafter.
122. Making appointments under the New Constitution have polarised the government even further because the framework on which the two parties can agree on these appointments is

fairly weak. Specifically, on 28 January 2011, the President announced names of nominees to the offices of the Attorney General, Chief Justice, Director of Public Prosecutions and Director of Budget, saying he had consulted with the Prime Minister. However, the Prime Minister argued that full consultations and consensus had not taken place and, therefore, the nominees had not been agreed upon.

123. While the President later rescinded the appointments and asked the JSC and Public Service Commission to assist in filling the positions, political debate over the appointments had already deeply polarised the elite along party and ethnic lines. It also led to discussions on relevance of the Coalition Government with some politicians calling for the dissolution of parliament and holding of elections. Polarisation resulting from these disputes has rapidly shifted the focus of the debate away from reforms to consolidation of political power and even of ethnic interests.
124. The issue of ‘real power sharing’ and how it should be implemented continues to antagonise relations between the two parties in a manner that affects how reforms are carried out.⁴² The old debate about the powers of both the President and the Prime Minister under the National Accord has resurfaced in the implementation of key reforms. Some of those in PNU still argue that the two Principals are not legally equal and that the President has the final word on key decisions.⁴³ In addition, they argue that the requirement for consultations does not imply consensus, something they say is difficult to achieve. However, ODM argues that the spirit of the National Accord, as well as the transitional clauses in the Constitution state that the Prime Minister and President should consult and agree on key decisions.⁴⁴ They argue that the spirit of the New Constitution is far more critical and ought to be respected.
125. These conflicts have once again brought to the fore the need to form active conflict mediation organs within the coalition to facilitate consultations and consensus building. The coalition partners will, most of the time, have differences on matters of policy and tactics. That is why the National Accord set out the principles of partnership in the coalition and identified consultations and willingness to compromise as important for the stability of the Government. The constitution further provided for consultations between the two principals on major decisions to promote national harmony and avoid unnecessary friction.
126. Parliament reacted to the ICC Chief Prosecutor’s action of naming six people as suspects by introducing and debating a motion seeking to make Kenya pull out of the Rome Statute. Yet, the Government ratified the treaty in 2005 and domesticated it in December 2008 by enacting the International Crimes Act 2008. The parliamentary debate was stormy. Political passions that had been evident in the aftermath of the PEV returned, raising tensions in the country. In the heat of the moment the language of ‘*our people are targeted*’ resurfaced and obscured the notion that it was individual accountability being sought over the post-election violence and not communities. These sentiments will continue to ethnicise the reform agenda, even though the New Constitution seeks to move people away from ethnic to civic based politics.
127. MPs passed the motion urging the Government to withdraw from the ICC treaty. Political interests related to the 2012 elections, inter- and intra-party divisions and alliances – sometimes along ethnic lines – contributed to the manner in which MPs voted. The main

⁴² Interview with an ODM MP, January 2011

⁴³ Interview with PNU MP, January 2011

⁴⁴ ODM MP, Ibid

motivation behind these political alliances is purely political self-preservation.⁴⁵ Some politicians want to remain relevant by using the ICC process to appear as “martyrs” and making Kenyans believe that they have been sacrificed to protect some leaders. In addition, the alliances are being used as a buffer from the ICC process by raising emotions and threat of violence if the trials take place. The alliances are not based on any idea or ideology. It is a marriage of convenience.⁴⁶

128. These alliances and divisions have made it difficult to systematically implement reforms yet the window of opportunity to pass critical bills is fast closing. There are at least 25 bills that need to be passed to prepare the ground for the 2012 general elections. Of urgency is the need to establish the Independent Boundaries and Electoral Review Commission and pass new election laws. It is also important to note that the 2012 elections will be held under an entirely new structure of devolved government. Country governments, Assemblies and the Senate are all provided for in the new constitution, but the specific acts of parliament outlining their establishment and functions are not yet in place. With this kind of work ahead, a politically charged atmosphere poisoned by ethnic tension is the last thing Kenya needs.
129. Party factionalism points to lack of institutionalisation despite the enactment of the Political Parties Act. Passed in 2007, and coming into effect a year later, the law provides a framework for the registration, regulation and funding of political parties. However, its enforcement has been weak. It is hoped that the recently formed Political Parties Dispute Tribunal will assist the parties to solve disputes expeditiously and amicably before they spill over into the coalition.
130. The political parties need to also re-engineer themselves using the New Constitution. Chapter 6 on leadership and integrity should guide parties on how to elect office bearers and leaders in general. Enforcement of the provisions of Chapter 6 will help in instituting a mature political culture.⁴⁷ The values and principles contained in the Constitution must be embedded in a new political culture; a new way of doing things, which unities all Kenyans around a strong national identity.

Conclusion

131. The Coalition Government was established for the purpose of implementing reforms. The passage of the New Constitution brings new opportunities -- it lays the basis for establishing a strong foundation for governance and leadership. However, implementing the New Constitution continues to face key challenges due to lack of cohesion within the coalition parties and the Government.
132. The ICC process has brought new challenges. Some actors, who have a common interest in perpetuating impunity, have re-grouped to stall the ICC process as well as oppose any demands for criminal and political accountability. But the ICC is important in one respect: it is proving that the most powerful and influential people can also be held to account. Indeed, this is the first time that powerful people are being called to account. The success of the process will undoubtedly assist in creating a new culture promised under the New Constitution.

⁴⁵ Interview with a policy analyst, 25 March 2011

⁴⁶ Interview with a civil society key informant, 23 March 2011

⁴⁷ Remarks by a Cabinet minister during the Kenya National Dialogue Conference: Two Years on, Where are We? Held on 2-3 December 2010

133. The Coalition Government is still divided over many issues. These divisions will deepen as the country moves close to the campaigns for 2012 elections. Urgently needed are coalition management structures to encourage cohesion and bipartisan support for the implementation of the New Constitution. Mechanisms to resolve disputes especially between the two principals should be carefully designed and effected to ensure that the disputes do not derail the New Constitution. National interests should supersede individual political interests.
134. The two parties have to recognise that a New Constitution is an opportunity to do things differently. It does not give them an opportunity to entrench a culture of patronage. Appointments to new institutions, therefore, should be made on the basis of the values and principles of the New Constitution. Ethnic, political and party considerations that have in the past informed composition of public sector institutions should be done away with.

5. THE NEW CONSTITUTION AND INSTITUTIONAL REFORMS

Introduction

135. Agenda Item 4 of KNDR identified what was considered the long term issues and solutions. Addressing the ‘underlying causes of violence’ would prevent recurrence in future and lead to a better, more secure and prosperous nation. Under the framework of Agenda 4, the Coalition Government was to undertake a broad range of reforms, including constitutional, legal and institutional reforms.
136. This section of the report examines progress in implementing the Constitution because it lays a firm foundation for other reforms

Key Findings

Summary of findings

Constitutional, legal and institutional reforms

- Government appoints members to key institutions for the implementation of the Constitution
- Political interests and inadequate civic education threaten to derail the implementation process
- President appoints members of the Judicial Service Commission
- Police Reforms Implementation Committee drafts Bills to facilitate reforms
- Ministry of Lands drafts the National Land Commission Bill, 2010
- Government appoints a National Task Force on Devolved Governments
- Government establishes institutions to promote national cohesion and unity
- Some progress made in the fight against corruption

Constitution Implementation Process

137. A New Constitution was promulgated on 27 August 2010 following an affirmative referendum vote on 4 August. It enjoys high legitimacy, having been passed by close to 70 per cent of the voters. Its framework comprises tight schedules on implementation. There is a five-year implementation timeframe, during which relevant institutions will be established and legislation passed.
138. The New Constitution espouses important national values and principles of governance. New institutions and practices are supposed to operate within a context of new values and principles of governance. Integrity, transparency, democracy and people’s participation are some of the values underpinning the new style of governance.
139. The New Constitution has restructured institutions of governance and established mechanisms for holding state officers accountable. It has also identified the obligations and responsibilities of citizens. On the whole, the New Constitution seeks to create a new political culture by introducing new values in how the state and its institutions relate to the society, as well as how citizens attend to the state.
140. The time frame for implementing the New Constitution requires that the various organs of Government move with speed to set up new institutions and pass the required laws. It

provides for the establishment of three key institutions to spearhead the implementation of the New Constitution: the Constitution Implementation Oversight Committee (CIOC), the Commission on the Implementation of the Constitution (CIC), and the Commission on Revenue Allocation (CRA). The Constitution Implementation Oversight Committee was established on 9 October 2010. The chairpersons and members to the CIC and the CRA were appointed on 30 December 2010. These appointments were behind schedule by over a month. And because of the delay in establishing them, the drafting of relevant laws and establishing of other institutions is also behind schedule. The main challenges responsible for this are examined below.

141. The CIC has the mandate to monitor, facilitate and oversee the implementation of the constitution. In fulfilling the above the CIC has, since its establishment, developed a draft work plan and held consultative and thematic based meetings to spearhead the constitutional implementation process. It has also reviewed and handed over to the Attorney General, five Bills amongst them the Independent Electoral & Boundaries Commission (IEBC) Bill, the Independent Offices Bill and the Salaries and Remuneration Commission Bill. Further, the CIC has made an application to the Court of Appeal seeking interpretation of contentious provisions in the constitution.⁴⁸ These measures are intended to lay the foundation for the comprehensive and timely implementation of the constitution within the stipulated five year time frame.
142. The sixth schedule of the constitution espouses the various legislation that need to be enacted for the comprehensive implementation of the constitution. To date, two pieces of legislation have been enacted under the new constitution. These are the Judicial Service Act and the Vetting of Judges and Magistrates Act which are intended to foster reforms within the judicial system.⁴⁹ By this April, parliament was debating several other bills including the Independent Electoral and Boundaries Review Commission Bill, Salaries and Remunerations Bill, Supreme Court Bill, and the Independent Commissions Bill.
143. These are important steps in the implementation process. But the process is behind schedule and it may difficult to pass the required number by 27 August 2011 which Article 261 (1) of the constitution has set as the date for enacting 16 pieces of legislation (one year after the constitution came into effect). It is therefore necessary that parliament moves with speed to enact the relevant laws to oversee the process.

Challenges to the Implementation Process

144. The March 2011 survey asked people the difficulties that they would associate with the implementation of the New Constitution. 27 per cent identified lack of cohesion within the coalition government as one of the main challenges most likely to undermine implementation. Also, 25 per cent of respondents identified political interests as a difficulty while 10 per cent said lack of political will could undermine the implementation process. Corruption and contentious issues within the constitution were also cited as come on the impediments to the process. The ICC process, in combination with the above mentioned factors are already impeding the implementation process.

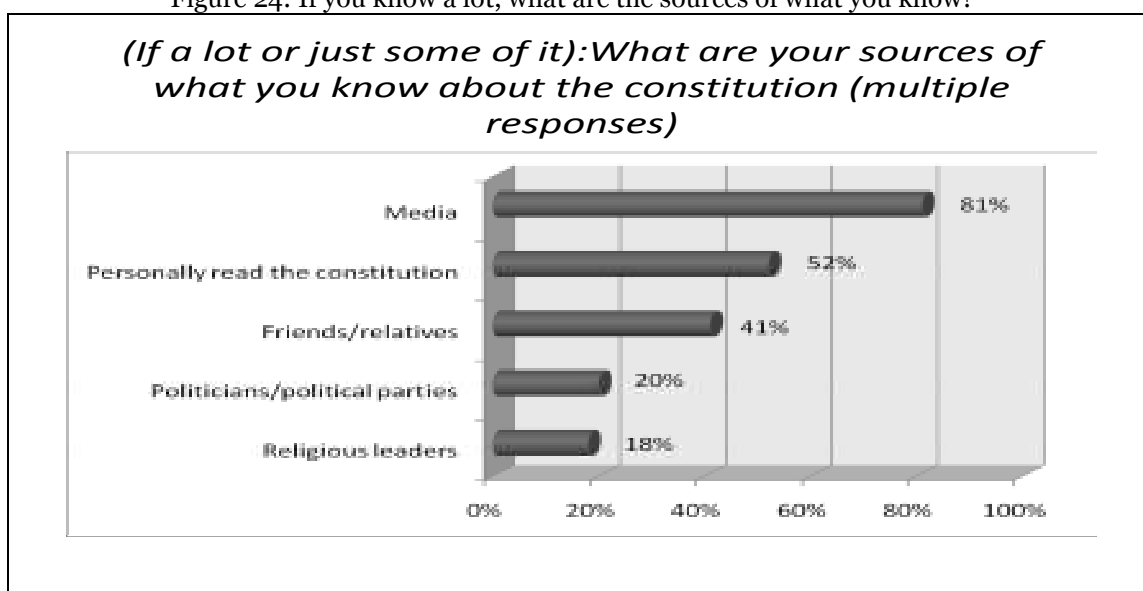
⁴⁸ Commission for the Implementation of the Constitution. Quarterly Report, January- March 2011. See also The Star, Monday, March 7, 2011. Pg 22

⁴⁹ <http://www.kenyalaw.org/klr>

145. It is worth emphasising that vested political interests are responsible for the delays in establishing the institutions and constituting new bodies as required by the New Constitution. The process of implementing the New Constitution is largely dependent on the legislature to pass Bills and policies to smooth the process along. However, Parliament's ability to enact these laws is threatened by vested interests within and outside the legislature. For instance, MPs declined to approve the names of the nominees to the CIC and CRA owing to disagreements over the delimitation of new constituencies as proposed by the Interim Independent Boundaries Review Commission (IIBRC).
146. Some MPs and commissioners within IIBRC questioned the validity of the commission's proposals on the new constituencies, thereby initiating a dispute over whether IIBRC was objective in its work. This dispute spilled to Parliament, where MPs threatened not to approve the names proposed for the CIC and CRA. Such were the political interests that delayed establishing these bodies. Ultimately, it was only after a political deal on how the IIBRC's report would be managed by a successor commission that nominees to the two constitution implementation commissions were approved.
147. The CIC and the CRA are not the only bodies that have suffered the consequence of vested interests. The appointment of state officers for other bodies such as the Chief Justice, the Attorney General, Director of Public Prosecutions and the Controller of Budget has provoked a dispute between the two parties in the coalition, culminating in revocation of the appointments. The dispute centred on whether there were consultations between the two Principals before the President forwarded nominations to parliament for vetting. The ensuing acrimonious debate over these appointments demonstrated that political interests have begun to challenge implementation of the Constitution. There are actors who would like to implement the Constitution in a manner that suits their political interests rather than the public good. It is these narrow political interests that are determining the pace and nature of implementation.
148. Implementation is also challenged by the presence of a critical group of influential people in both the bureaucracy and in Parliament who were not passionate about the New Constitution at the time of the referendum. They have a common interest in maintaining the status quo or implementing the New Constitution in a manner that does not threaten their interests. It is this group of non-passionate individuals that prefers a 'business-as-usual' approach.
149. Inadequate civic awareness around the Constitution is also affecting public participation in the implementation process. Despite their overwhelming support for the Constitution, many Kenyans are still relatively unaware of its provisions. The lack of structured debate on the content of the new laws means that the public is not sufficiently involved in the debates on the implementation process.
150. Inadequate civic education explains the low number of people who say they know much about the New Constitution. In the survey, only 12 per cent of Kenyans said they knew a lot about the New Constitution. Up to 70 per cent of respondents said they knew just some of it, while 11 per cent said they knew nothing. The main source of what the 12 per cent know about the Constitution came from the media. Of those who know a lot about the Constitution, 81 per cent obtained the information from the media, while another 52 per

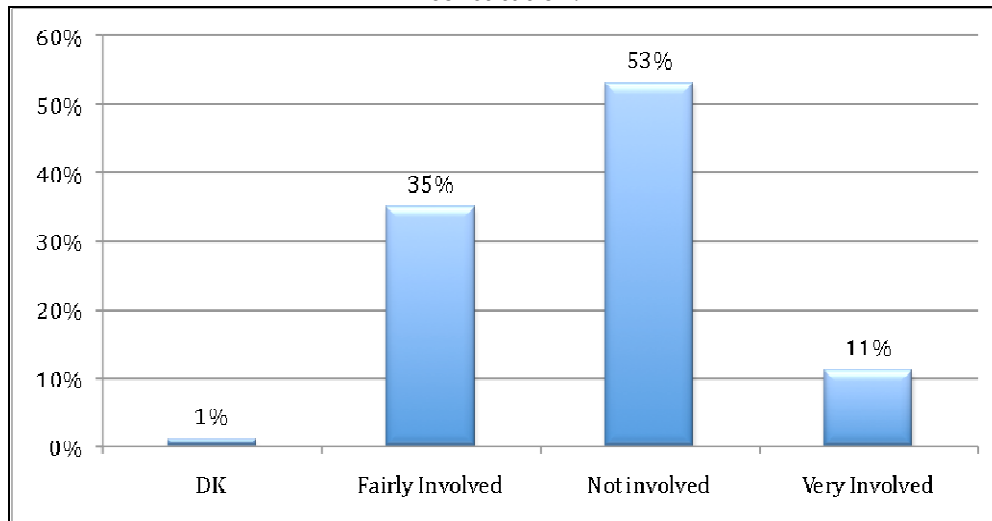
cent said they read the constitution. Political parties and civil society groups, except religious organisations, appear not to be effectively involved in civic education.

Figure 24: If you know a lot, what are the sources of what you know?



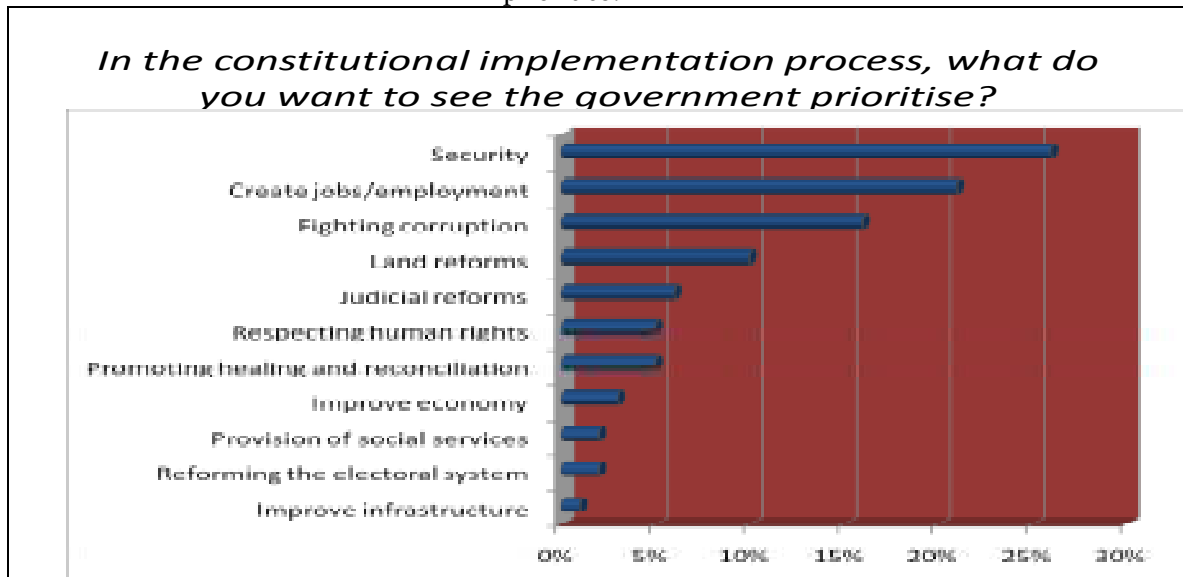
151. People are also not actively involved in debates about implementation. A middling 53 per cent of those interviewed said they were not involved in the discussions on constitutional implementation process. Only 11 per cent are very involved, meaning that they are aware about what is happening.
152. Lack of awareness or involvement in discussions on implementation can lead to poor oversight. It can also reduce or stifle the demand side of reforms. Increased civic awareness is, therefore, critical for building strong oversight bodies and increasing the capacity to demand reforms. The CIC and civil society organisations need to embark on an elaborate civic education programme to increase awareness of the provisions and guarantees in the New Constitution.

Figure 25: How actively are you involved in public discussions about implementation of the new constitution?



153. Up to 90 per cent of Kenyans say that the New Constitution is satisfactory in addressing their needs. In terms of the priorities for the Government, about 26 per cent want the New Constitution used to address the problem of security, 22 per cent want the Government to deliver jobs or employment, and 16 per cent want the Government to address corruption. These responses are captured in the Figure 26.

Figure 26: In the new constitutional implementation process, what do you want to see the Government prioritise?



Other institutional reforms

The Judiciary

154. The New Constitution has anchored judicial reforms: The review and promulgation of the New Constitution has enabled the commencement of legislative and administrative measures to introduce reforms within the judicial system. Chapter Ten of the Constitution lays the foundation for judicial reforms and independence by providing for the establishment of a Judicial Service Commission (JSC) and a Judiciary Fund. It also establishes a Supreme Court, mandated to, among other things, adjudicate over presidential election disputes. The Constitution also recognises traditional courts as alternative dispute resolution mechanisms. These measures are intended to promote a transparent, accountable and independent judicial service.
155. Judicial Service Commission (JSC) Appointed: A Judicial Service Commission mandated to oversee administrative, managerial and operational reform within the judiciary was established on 30 December 2010.⁵⁰ As provided in the Constitution, the establishment of the JSC involved public and legislative participation in the appointment of members. Public participation in the management and administration of the judiciary has been enhanced by the inclusion of public representatives in the commission.
156. Legislative and policy frameworks for judicial reforms enacted: The Judicial Service Act, 2011, and the Vetting of Judges and Magistrates Act, 2011, have been enacted. The Judicial Service Act will promote efficiency and effectiveness in judicial service delivery and provide a basis for merit-based recruitment, appointment, discipline and removal of judicial officers.⁵¹ The Vetting of Judges and Magistrates Act provides a legal framework through which serving and prospective judicial officers are vetted for their suitability to serve in the judiciary.⁵²
157. In order to improve the quality of service delivery, the judiciary is in the process of incorporating Information and Communication Technology (ICT) measures in the administration of justice. During this review period, it launched the Judiciary ICT Policy & Strategic Plan 2011-2013, which is intended to provide automated systems for the recording, preservation and retrieval of information, case and document management, SMS query service for information on the judiciary, and conducting virtual court sessions across the country.⁵³
158. The main challenge in undertaking comprehensive judicial reforms has been Executive dominance of the Judiciary. The lack of independence witnessed increased use of political considerations in appointments to key positions in the judiciary. This has tended to weaken delivery of services. It is hoped that the Judicial Service Commission and the ethos of the New Constitution will enhance service delivery, and particularly access to justice in the country. But as already mentioned, vested interests both within Parliament and outside it have begun to undermine the spirit to infuse new values in the governance of the society. Nomination of the Chief Justice by the President has already raised considerable concern.

⁵⁰ Kenya Gazette, Special Issue Vol, CXII-No. 136 Dated 31 December, 2010. Gazette Notice Number 16956

⁵¹ Judicial Service Act.

⁵² Vetting of Judge and Magistrate Act.

⁵³ The Judiciary, Launch of the Judiciary ICT Policy & Strategic Plan 2011-2013. *Daily Nation*, 14 October 2010, p. 31

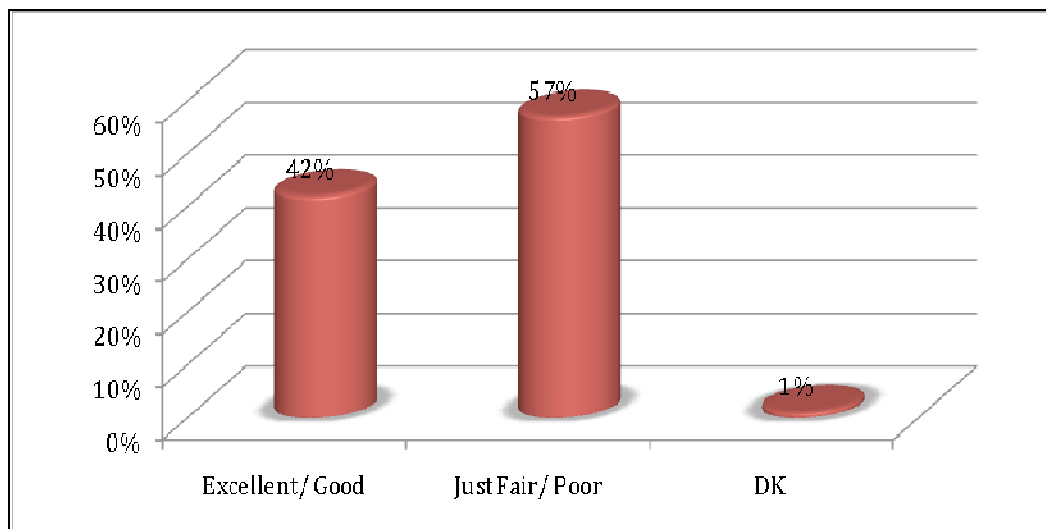
These concerns should be addressed in a manner that lends credence and legitimacy to the process of appointment. The process has already been politicised and the public is, therefore, likely to see the new office bearers as representing certain political interests rather than facilitating reforms.

Police Reforms

159. The New Constitution has prioritised police reforms. Previous reports have indicated public dissatisfaction with the performance of the police owing to claims of corruption, brutality and a culture of extra-judicial killings by some members of the force. In January 2010, the Government appointed the Police Reforms Implementation Committee (PRIC) to oversee the implementation of the recommendations made by the National Task Force on police reforms.
160. The Committee has drafted a number of Bills on police reforms which have been presented to stakeholders for discussion. These include the Independent Policing Oversight Authority Bill, 2010, which is intended to provide a civilian oversight mechanism over policing in the country; the National Police Service Bill, 2010, which places the Kenya Police Service and the Administration Police under one command structure and specifies the roles of the two security services; and the National Police Service Commission Bill -- meant to provide a legal framework for the administration of the National Police Service.⁵⁴
161. The New Constitution has emphasised the need for new values in future policing. The KNDR agreement itself underlined the need for comprehensive police reforms before the next General Election. No major reform has been undertaken in the force since then. However, the framework to guide such reforms is in place.
162. Attitudinal change and political commitment are required for comprehensive police reforms. Although people's confidence in police has been rising from 2008, still not many are satisfied with the work of the police. Up to 57 per cent of Kenyans are dissatisfied with the performance of the police, but 42 per cent are happy with their work. Although the committee has laid out the framework for reforms, there is need to emphasise the urgency of implementation before the next General Election.

⁵⁴ Independent Policing Oversight Authority Bill, 2010, the National Police Service Bill, 2010, the National Police Service Commission Bill, 2010.

Figure 27: Thinking about the performance of the police after the passage of the constitution, would you say the police have done an excellent, good, poor or very poor job in protecting the rights of Kenyans?



Conclusions

163. The New Constitution has renewed optimism for a new culture of governance. Many Kenyans believe their lives will be better under the New Constitution. There are new values and principles of governance to direct relations between the Government and the people. These new values have created an environment for a new beginning.
164. The main challenge to the implementation of the New Constitution is the vested political interests and divisions within the Coalition Government. Appointments are made on basis of ethno-political considerations and narrow interests. There is also limited public debate on policy implications of the New Constitution. Political disputes arising over appointments to new positions have deflected attention from how reforms could be carried out.
165. A New Constitution means a new beginning. It is not business as usual. It also requires a high sense of commitment to the new values and principles guiding the conduct of Government and relations with the people. There is need to break from the old ways of doing things and give the new values a chance to guide the future of Kenya. Continuous education of the public on the various provisions of the Constitution is required to generate adequate demand for reform.

SUMMARY OF FINDINGS AND CONCLUSIONS

166. This report has focused on several themes drawing from the KNDR agreement (the National Accord) as well as the New Constitution of Kenya, 2010. The review has again emphasised that the reforms undertaken both under the National Accord and the New Constitution of Kenya are critical for securing sustainable peace and democratic governance. The National Accord established the Coalition Government not as an end in itself, but a means to securing peace, security and justice. The coalition was formed not for the purpose of helping any individual but to promote the greater good of the nation. This value continues to guide the review of progress in the implementation of crucial reforms.
167. This concluding section reiterates some of the outstanding findings and conclusions. It also discusses some recommendations to facilitate reforms, especially now that the Constitution has laid out a framework for fundamental changes in the practice of governance and politics.

The Findings

168. Data from the survey and field interviews reveal that the security situation in the country has improved and life is better than it was in 2008 and 2009. The number of people who feel the situation is worse has decreased from 70 per cent in 2008 to 17 per cent in December 2010. There are also more people who feel safer today than in 2008. Only 28 per cent said they felt safer in 2008 compared to 72 per cent who expressed this feeling in 2010.
169. These findings show that political violence has not recurred since the time of signing the Accord. The situation has normalised and calm obtains. Whether this situation is sustainable depends on how politicians organise campaigns for the next General Election and, specifically, whether or not their differences will not result to conflicts among them. This observation is made in recognition that national level political conflicts rapidly and violently trickle down to the local level. Secondly, the underlying factors that contributed to the post-2007 election crisis have not been systematically addressed. A New Constitution is only a beginning. Management of national level political differences and conflicts should be prioritised as the country prepares for the campaigns season ahead of the next General Election.
170. The ICC process has begun in earnest after the Chief Prosecutor identified six people whose prosecution he will seek to pursue. This has heightened anxiety, which has in turn created political realignments for the purpose of securing the interests and political careers of senior politicians. But Kenyans are happy with the investigations. This is the first time influential and powerful people are being held to account. Kenyans are generally supportive of the ICC process and are confident that prosecutions will take place because prosecution is the only remaining option to hold people accountable. To many of them, senior and influential people have a common interest in perpetuating impunity and opposing measures for accountability. The ICC process, therefore, provides an opportunity to fight impunity.
171. The IDPs problem is yet to be fully addressed. Some IDPs are still in transit camps in spite of the efforts of the Government and humanitarian agencies in providing funds for resettlement. The IDPs problem is yet to be resolved because they have become a major political resource for politicians. The IDPs question is increasingly used to advance political

interests of individual leaders. They use the IDPs to advance their own interests. Thus the IDP problem has become so politicised that its solution cannot be divorced from the broad democratic governance reforms. The practice of inclusive politics and responsible leadership will help to obviate some of the causes of displacement.

172. Cohesion within the coalition remains elusive; the Government is still divided over many issues. The ICC process has brought with it new challenges. The parties are divided on how to approach the problem of impunity. Internal factionalism within the political parties has added to this complexity. The parties appear fragmented along many lines, including ethno-regional and personality fault lines. This factionalism is increasingly affecting implementation of the New Constitution. However, people view the Coalition Government as still relevant especially for the purpose of pushing the reform agenda forward. They want the Coalition to remain until 2012.

Conclusion

173. The New Constitution has renewed optimism for a new culture of governance. It carries the hope of resolving issues identified under Agenda Item 4 and specifically issues that contributed to the post-election violence. Many Kenyans believe their lives will be better under the New Constitution. But there are new challenges facing its implementation. Among these are the deeply vested interests and an old political culture. Short-term and narrow interests rather than the national ones appear to inform the process of implementation. Short-term foci, combined with lack of cohesion within the Government, and lack of leadership to manage political differences, mean that the country risks failing again.
174. The majority of voters supported the New Constitution. They gave it legitimacy by approving it in large numbers. They aspired for a new Kenya and a new beginning. They voted for new values and new principles of governance. They chose to have ethical leadership and responsible leaders. Failing to live by the spirit and the values embraced by the New Constitution will disillusion the public, with certain negative consequences.
175. Although the ICC process has introduced certain challenges, it is also an important opportunity for reforms. The process is laying the framework for fighting impunity and ensuring that leaders account for their actions. The ICC process is not aimed at communities but at fighting impunity and getting justice for the victims of the post-election violence.