

# **THE KENYA NATIONAL DIALOGUE AND RECONCILIATION (KNDR) MONITORING PROJECT<sup>1</sup>**

**Status of Implementation of Agenda Items 1-4**

**Third Review Report**

**July 2009**

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## EXECUTIVE SUMMARY

1. This is the third progress review on implementation of the Kenya National Dialogue and Reconciliation (KNDR) agreement. The first review report was presented in January 2009 and the second review report was presented in the first week of July 2009.
2. This review covers the period between May and June 2009. The findings on each of the agenda items are not significantly different from what was reported in the second review report. The period between the first week of July, when the second review was released, and now has not witnessed major changes in progress of implementation of the main agenda items.
3. With regard to Agenda Item 1, findings show that political violence has ended in all areas. This is a positive development. However, the security situation is deteriorating, as is evident in the rise of other forms of crime, including carjacking and 'kidnapping for ransom'. In rural areas, villagers have formed vigilante groups to fight illegal armed groups, which have been committing crimes and extorting money from the public with impunity. The rise of vigilante groups and their increased use of violence against suspected members of illegal armed groups, such as the Mungiki, is disrupting social harmony and dividing communities due to mutual quest for vengeance.
4. Findings on Agenda Item 2 show that IDP camps have closed down. The Government has also disbursed 'start-up funds' to a significant number of IDPs who are resettling. Funds for reconstruction of homes have also been disbursed to a significant number of households. These are important and positive developments.
5. However, some IDPs have failed to return to their homes partly because of insecurity and partly because of the slow pace of healing and reconciliation efforts at the local level. They have settled in 'transit camps' and 'relocation sites' where they have no access to basic services, including those usually by the Government and humanitarian agencies. The implication of this finding is that IDP problems are far from being securely settled. In the meantime, the IDP problem, though an important barometer of how the country is rebuilding, has fallen off the national agenda. As emphasised in previous reports, the IDP problem could transform into major social-economic and security challenges in the near future if left unattended. A policy to guide how to resolve the IDP problem is long overdue.
6. The Government has spent over Ksh6.5 million on peace-building efforts in areas affected by the post-election violence. Peace Committees have been formed from the provincial to the village level. The period between May and June 2009 witnessed increased involvement of the two principals and senior political leaders in efforts to urge Kenyans to reconcile and live in harmony. Civil society including religious groups have also been supporting reconciliation within communities. While these are important developments, the approach to healing and reconciliation remains ad hoc. It is not systematic and lacks a clear policy direction. The outcome of peace initiatives is also uncertain because in some of the areas where peace-building work is being done, hate speech and threats of violence continue to be reported. Local communities also are balkanised along ethnic lines and are sometimes unwilling to share public utilities such as schools and transport.
7. Relations between the two principals have greatly improved in this period. The period did not witness cases of disagreements between the two parties. Improved relations between the two principals had the effect of reducing tension and conflict within the Coalition. Disagreements and conflict over the meaning of 'real power sharing' and 'portfolio balance'

have also declined, but this has translated into some ministers transforming their portfolios into sources of patronage resources to reward their allies. The politics of patronage thus seem to be driving the Coalition and deflecting energy away from reforms.

8. Reforms under Agenda Item 4 are progressing rather slowly. It is important to note that there is movement in each of the main components that constitute Agenda Item 4. Of great concern, however, is the potential for political conflicts within the Coalition spilling into the constitution making process. Since most reforms under Agenda Item 4 are predicated on having a new Constitution, failure to complete the review process would end or slow down the pace of reforms or even lead to the country having administrative interventions rather than comprehensive reforms. Insulating the review process from political conflicts at this stage is critical.

## I. INTRODUCTION

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9. Following the political violence that engulfed Kenya after the disputed December 2007 General Election, mediation by the African Union (AU) Panel of Eminent African Personalities under the Chairmanship of Mr Kofi Annan resulted in the two main parties – the Party of National Unity (PNU) and the Orange Democratic Party (ODM) – agreeing on a series of steps to address the crisis. The mediation team established the Kenya National Dialogue and Reconciliation (KNDR) as the forum for dialogue and reconciliation.
10. On February 28, 2008, the parties signed the ‘Agreement on the Principles of Partnership of the Coalition Government’, following which the National Accord and Reconciliation Act of 2008 was enacted. The Accord laid out a framework for ending violence and addressing the causes of the crisis.
11. The parties committed to undertake a set of actions under four main agenda items. These were:
  - (i) Agenda Item 1: Immediate action to stop violence and restore fundamental rights and liberties;
  - (ii) Agenda Item 2: Immediate measures to address the humanitarian crisis, and promote healing and reconciliation;
  - (iii) Agenda Item 3: How to overcome the political crisis; and
  - (iv) 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.
12. This report is the third review of progress in implementing the KNDR agreement. The first report was presented in January 2009 and covered the last quarter of 2008. The second review, presented at the beginning of July 2009, covered the period between January and April 2009.
13. This review, the third so far, covers the months of May and June 2009. A point of caution to bear in mind while reading this review is that the period between the release of the second report (early July 2009) and the presentation of this review is short and there were no major changes in the progress of implementing the KNDR agreement. Thus, we present this report cognisant of the fact that there has not been sufficient time between the two reporting periods to demonstrate major changes in the progress of implementation. This report is, thus, not a robust analysis of major trends and dynamics in each agenda item. Instead, the report presents key trends and observable events, as well as facts and figures on some of the important aspects relating to each agenda item.
14. This report has utilised a mix of methods to collect data. The research team interviewed various respondents with knowledge on the various agenda items. These included key informants in Government ministries, humanitarian agencies, civil society organisations and the media. The report has also relied on secondary sources of information, including reports by the government, humanitarian agencies as well as the media. Secondary sources, however, have been integrated with caution: corroboration through primary data sources has informed the extent to which some of the findings are integrated into the review. Once again, the review has taken care to remain objective and to let the data speak for itself, knowing too well that analysis of progress is sensitive to political interests and

realities.

15. The report is divided into sections corresponding to the agenda items under the KNDR agreement. Section II discusses Agenda Item 1 on actions to stop violence and restore fundamental rights and liberties. Section III discusses Agenda Item 2 on addressing the humanitarian crisis and promoting healing and reconciliation. Section IV discusses Agenda Item 3 on power sharing, which was agreed upon as a means of ending the political crisis, while Section V discusses Agenda Item 4 on addressing long-standing issues, which underpinned the crisis and should be addressed to ensure sustainable peace and security for all. The last part discusses some of the conclusions, based on the main findings from each agenda item.

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

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### Introduction

16. Agenda Item 1 of the KNDR agreement required the parties to take certain actions to immediately stop violence and restore fundamental rights and liberties. Concerns over the security situation in the country and the need to ensure that dialogue and reconciliation was carried out in a sustained manner underlay the emphasis to take immediate steps to end violence. This agenda item also identified measures to be taken by the police and the general public, including political leaders and the media, to end violence.
17. This review discusses progress in addressing security issues and the extent to which rights have been restored. The discussion also highlights the challenges faced in addressing these issues.

### Key findings

#### *Summary of findings*

- Vigilante groups have emerged to counter the influence of militia or illegal armed groups.
- The role played by the vigilante groups in stopping activities by illegal armed groups has created divisions within communities, especially in Central Kenya.
- A 15-member taskforce to spearhead comprehensive police reforms was constituted.
- High-level government meetings were convened to address insecurity arising from activities of illegal armed groups in Central Kenya.
- External threats from the Al Shabaab militia in Somalia impact on Kenya's security sector.
- New forms of crime comprising 'kidnapping for ransom' have emerged, especially in poor urban areas.
- The international community has increased pressure on the government to address concerns about intimidation of human rights defenders.

### *Halting political violence*

18. The first and second review reports pointed out that political violence in Kenya had generally ended, and that there was calm in various parts of the country, including in areas where post-election violence was intense. The survey findings also showed that many people did not expect violence to recur.
19. Findings during the period under review are not different from those contained in the previous reports. Violence has ended and there is calm in most areas that experienced post-election violence (PEV).
20. However, the end of post-election violence and return of calm has taken place in tandem with an increase in insecurity in various parts of the country, and in urban areas especially.

New forms of crime such as kidnapping for ransom and carjacking are emerging . There are threats posed by continued in-fighting between different militia groups in Somalia, while worsening drought and famine conditions in pastoralist areas is giving rise to resource-based conflicts. Inability of the security forces to contain crime is contributing to reduced public confidence in security sector institutions.

21. The government responded to these trends in several ways. A taskforce to drive police reforms was constituted. The taskforce will look at, *inter alia*, the merging of the Administration Police (AP) with the regular police, how to increase professionalism in the police, and how to improve the capacity of the police as an institution. At the same time, the Cabinet convened to discuss insecurity and external threats posed by the crisis in Somalia. Further, in the 2009/2010 budget, the Finance minister allocated money for community policing.<sup>2</sup>
22. In some cases, communities have formed vigilante groups to fight off illegal armed groups. But vigilante groups' engagement in violent acts against suspected members of illegal armed groups, such as Mungiki in Central Kenya, appears to be dividing communities. On the whole, the vigilantes appear to be threatening communal harmony at the local level.
23. Although violence has ended, the question of how to try individuals who perpetrated violence remains an issue of concern because it tends to prevent healing and reconciliation among communities. For instance, in May 2009, some 19 suspects who were arrested in the Rift Valley and charged with participating in the burning of the Kiambaa Church during the post-election violence were acquitted by a Kericho court for lack of evidence. A Nakuru court acquitted another four during the same period.<sup>3</sup> Their release from custody was met with jubilation by members of their community while relatives of the victims were angry that justice had not been served.<sup>4</sup> Jubilation by members of one community and anger by members of another community clearly indicate that the trials of perpetrators of post-election violence might not lead to reconciliation and healing among communities; it might even have the opposite effect in the short term – hampering healing and reconciliation.
24. At the national level, where to try senior politicians and others who planned and financed the post-election violence is also deepening divisions within the government. Political conflicts over whether to try the perpetrators of the post-election violence locally<sup>5</sup> or at the International Criminal Court<sup>6</sup> have divided the government and created new factions within the main political parties. As noted in previous reports, national level conflicts tend to percolate to the local level. In this regard, IDPs reported rising tension and the presence of leaflets in Molo during this debate.<sup>7</sup>

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<sup>2</sup> *The Standard*, June 18, 2009, p.11, 'Leaders, police fault Uhuru lifeline to vigilantes.' Interview with an official in the Ministry of Justice, National Cohesion and Constitutional Affairs, July 10, 2009.

<sup>3</sup> *The People*, May 20, 2009, 'Post-poll chaos suspects acquitted'.

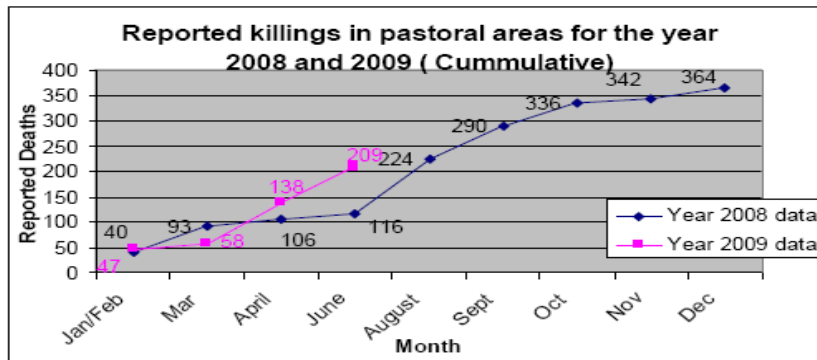
<sup>4</sup> *Daily Nation*, May 18, 2009, 'Why Court had to free four charged in Kiambaa Church killings'; Ibid; telephone interviews with representatives of IDP Network, June 7, 2009.

<sup>5</sup> *Daily Nation*, April 24, 2009, 'Try violence suspects locally, says Marende'.

<sup>6</sup> *The Standard*, July 12, 2009, 'ICC to open Waki Envelope', p.1.

<sup>7</sup> Interview with IDP Network representatives in Molo, July 15, 2009.

25. Drought and widespread hunger continued to worsen during the period under review. Worsening drought in turn led to increased cases of resource-based conflicts, particularly in pastoralist areas. Inter-clan conflicts have been reported in at least 10 districts: Baringo, Kuria, Isiolo, Laikipia, West Pokot, Samburu, Narok, Marsabit, Baringo and Marakwet.<sup>8</sup> Some 181 people were reported killed in June 2009 alone:



Source: OCHA Kenya, *Humanitarian Update Vol. 50, p.2*

26. Provincial administration reforms have also resulted in new conflicts. The drawing of new district boundaries has sparked tension in several parts of the country and shifted the nature of conflicts. For instance, Nyabasi and Bwirege clans in Kuria East District, which have traditionally fought over cattle, began fighting over the location of the new district headquarters. The ensuing violence has led to the killing of seven people and the displacement of about 7,000 others, some to Tanzania.<sup>9</sup>

### Demobilisation and disbandment of illegal armed groups

27. Previous reports noted that illegal armed groups are very much in place and that they have not been completely demobilised because of how they formed and/or the informal manner in which they operate. Findings during this period show emergence of vigilantes for the purpose of community protection against groups such as Mungiki. This has increased insecurity and caused communal divisions in Central Province. The gangs that have emerged in the name of community protection include 'The Hague' and 'Kenda Kenda', all organised to fight Mungiki. Rivalry between the groups and Mungiki has tended to increase insecurity in several parts of Central Kenya. In April, for instance, over 40 people were killed in Nyeri and Kirinyaga during attacks by vigilantes and counter-attacks by Mungiki.<sup>10</sup>

28. The government lacks a decisive strategy to deal with the proliferation of violent groups. It often resorts to knee-jerk measures such as the formation of 'Special Squads' and 'Security Operations'. After the Nyeri-Kirinyaga inter-gang violence, for instance, the police formed a new squad, code-named 'Eagle', to crack down on the Mungiki. Establishment of these

<sup>8</sup> OCHA-Kenya, *Humanitarian Update Vol. 50, p.1*.

<sup>9</sup> Interview with Kenya Human Rights Commission after Rapid Assessment mission; also interview with Kenya Red Cross representative, June 18, 2009.

<sup>10</sup> Initial estimates by the government placed the number at 38, but at a funeral of 14 other victims, a former Justice Minister said the victims were more. *The Standard*, May 8, 2009.

special units stirs memories of similar past squads widely associated with extra-judicial killings.

29. The activities and visibility of these groups indicate a gradual mutation of the forms of violence and a transformation of the motivation for their continued existence. In Central and Nairobi, for instance, there is a gradual change in the form of violence from pure political 'personal armies' or 'ethnic militia' are mutating into autonomous criminal and extortion gangs with characteristics of organised crime.

### **Enhancing security and protection of the population**

30. The government is developing a national policy on the protection of human rights. The document will elaborate on broad human rights principles and an implementation plan that will guide the government and other actors on matters pertaining to human rights, as well as address historical marginalisation of some communities based on their economic, social and cultural practices.<sup>11</sup>

31. During the period, Heads of Missions from the European Union member countries urged the Coalition government to take action on the report of the UN Special Rapporteur on Extra-Judicial Killings. They called on the government to condemn, investigate, and punish all unlawful killings, and set up improved mechanisms for accountability to ensure such killings are not repeated. They urged donors to support the Rapporteur's recommendation for independent inquiries into police death squads and human rights abuses in Mt Elgon District.<sup>12</sup>

32. However, Government's consensus on the report is lacking. Prior to the Human Rights Council meeting in Geneva in June 2009, the two Coalition partners expressed divergent views on the report. The Orange Democratic Movement (ODM) supported the report while the Party of National Unity (PNU) rejected it on allegations that the Rapporteur relied on information provided by local NGOs and that he held a press conference before sharing the report with the government. This, PNU argued, breached the UN Code of Conduct. The recommendation that government officials be sacked was also seen to be beyond the mandate of the UN Special Rapporteur. A joint statement was ultimately arrived at, by the mixed Government delegation in Geneva. However, some PNU members subsequently demanded that the Rapporteur be censured.<sup>13</sup>

### **Restoring fundamental rights and freedoms**

33. Intimidation of human rights' defenders has continued. The Kenya National Commission on Human Rights (KNCHR) has continued to receive complaints of intimidation of human rights defenders. Threats of assassination are conveyed mostly via mobile phone messages, while others have been followed in unmarked cars or warned by strangers to 'be careful.' Such intimidation is likely to cultivate a culture of silence.

34. The Statute Law (Miscellaneous Amendments) Bill, which, among other things, sought to rectify the contentious section 88 of the Communication Act (2008) was published and passed in Parliament in June 2009,<sup>14</sup> after earlier resistance (to State control) by the media fraternity. The Bill received the President's assent after deletion of the contentious clause.

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<sup>11</sup> *The Standard*, June 28, 2009, p.10, 'Policy under way to protect human rights'.

<sup>12</sup> EU Press Statement, June 3, 2009.

<sup>13</sup> *Daily Nation*, June 17, 2009, p.17, 'UN moves to censure Alston over conduct'.

<sup>14</sup> Bill Tracker, Parliamentary Sessions, June 25, 2009.

35. During the period, there were no incidents reported on forceful disruption of public demonstrations. Human rights groups, for instance, held a demonstration in Nairobi in the last week of June to mark the UN Day against Torture. Police did not disrupt the procession.

### **Commission of Inquiry into the Post-Election Violence**

36. The KNDR mediation team expressed a commitment to prosecute the perpetrators of the post-election violence. They agreed to the establishment of a Commission of Inquiry into the Post-Election Violence (CIPEV). The Commission finalised and submitted its report to the Government in October 2008.

37. The CIPEV report recommended that a Special Tribunal to try PEV suspects be established by January 30, 2009. In February 2009, Parliament failed to entrench the Special Tribunal in the constitution. The Government's efforts to establish the Special Tribunal continued to be frustrated by partisan politics and the individual as well as ethnic interests of certain leaders. The Panel of Eminent African Personalities handed over the confidential envelope to the International Criminal Court (ICC).

38. At the same time, the Government has not successfully prosecuted PEV suspects. During this period, a total of 23 people suspected to have participated in the post-election violence were released for lack of evidence. The release of the suspects puts more emphasis on the need for establishing a Special Tribunal as recommended by the CIPEV. If no trials of PEV suspects take place, there is high potential for the next General Election or any other major political event, such as a constitutional referendum, to be violent since the perpetrators know they will not be punished. In addition, how the Government handles the formation of the local Special Tribunal will influence how the newly constituted Truth, Justice and Reconciliation Commission (TJRC) will be publicly received.

## **CONCLUSIONS**

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39. New forms of crime and increasing insecurity in both rural and urban areas. While post-election political violence has ended and calm returned to affected areas, the new forms of crime and general insecurity are a matter of great concern. The emergence of vigilante groups has also caused divisions among communities. The existence of informal agents of violence and apparent paralysis of security forces implies that new forms of crime and insecurity will increase if urgent measures are not taken.

40. Disarmament and demobilisation of illegal groups remains a challenge due to the secrecy surrounding their organisation and activities. A more critical examination of the nature and motivation of the existence of groups is needed to mitigate the escalation of militarised ethnic militia ahead of the 2012 General Election.

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

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#### Introduction

41. Agenda Item 2 of the KNDR agreement focused on addressing the humanitarian crisis and promoting national healing and reconciliation. The agreement, in particular, underlined the need for the parties to assist and encourage displaced persons to return to their homes or to new areas, and to have safe passage and security. This section discusses progress in the resettlement of the Internally Displaced Persons (IDPs) and how healing and reconciliation are evolving.
42. A point to emphasise is that previous reports highlighted challenges experienced in the resettlement of IDPs. The reports noted the difficulties that IDPs were experiencing and identified the factors that make it difficult for them to securely settle in their homes. At the same time, the reports noted that healing and reconciliation are affected increasingly by trends in national level politics. Conflicts between national elites tend to spill over to the local level in the form of inter-communal tension.
43. This review highlights key trends emerging during the months of May and June 2009. The review specifically discusses progress in the resettlement of IDPs and trends in healing and reconciliation.

#### Key findings

##### *Summary of findings*

- One IDP camp at the Eldoret Showground is still in place and contains 2,200 people.
- Inter-clan fighting in Kuria displaced over 6,000 people and sent refugees to Tanzania.
- The Government allocated Sh2.2 billion in the 2009/2010 annual budget to the IDP resettlement programme.
- Over 2,000 Kenyan refugees in Uganda are unwilling to return due to insecurity and landlessness in Kenya.
- Peace and reconciliation initiatives are not producing the desired outcomes.

#### Resettlement of IDPs

44. From May 2008, the Government, with support from humanitarian agencies, began a programme to resettle IDPs. The programme ended in December 2008 with the resettlement of about 350,000 IDPs. In addition, the Government gave financial support to households. This acted as a 'start-up fund' to support IDPs in buying basic items for restarting their lives in return areas. The Government also promised to reconstruct 40,000 houses destroyed during the post-election violence.
45. The latest statistics from the Ministry of State for Special Programmes indicate that IDP

camps have closed down. There is only one camp, Eldoret Showground, which is still in place and having about 2,200 IDPs.<sup>15</sup> As argued in the previous reports, closure of camps does not mean the end of the humanitarian crisis. IDPs continue to face new challenges and, therefore, many are yet to return to their homes in a sustainable and secure manner. Some IDPs fear insecurity while others have insufficient funds to reconstruct their homes.

46. Significant is that insecurity has led to IDPs establishing 'transit' camps from where they regularly farm their holdings. The transit camps tend to give them a sense of security because they live in large numbers. Records from the Ministry of Special Programmes show that there are about 43 'transit' camps holding about 7,200 households. These include 22 in Uasin Gishu, 13 in Molo and 8 in Trans Nzoia. Those in Uasin Gishu host the largest number of IDPs -- 6,000 households. The camps lack basic amenities.
47. There are also few humanitarian agencies giving support to these households. Furthermore, some of the agencies that have been supporting IDPs are also exiting the field. In June 2009, Save the Children (UK) and Catholic Relief Services closed their operations. This is likely to aggravate the problem of low or no access to basic services for IDPs.
48. One important finding is that the Government has allocated about Sh2.2 billion in the 2009/2010 annual budget to support the IDP resettlement programme and another Sh0.5 billion to support the rebuilding of homes. Although these funds have been allocated in the budget, there is need to mention that in April 2009, the Government had indicated that it would not spend more funds in reconstructing shelter for IDPs because some of the IDPs had not used the funds for shelter construction. These findings suggest absence of a clear Government policy and strategy on how to address the problem of IDPs and the challenges that IDPs continue to face.
49. The IDPs' settlement pattern, and in particular establishment of transit camps, has an important social consequence. It is balkanising local communities along ethnic identities. Groups are zoning areas where they can settle as a homogenous ethnic group, with limited interaction with other communities. In places such as Mauche in Molo, there are two ethnic groups living in separate and distinct territories with minimal or no interaction. Many of those we talked to noted that schools, churches, *matatus* (public transport) and markets have become ethnically segregated; ethnic groups in the area view each other as rivals and, therefore, do not like sharing public facilities. Different groups have their children attending different schools irrespective of the distance that the children are supposed to cover.<sup>16</sup>
50. This discussion suggests that the IDP problems are yet to be fully addressed. Indeed, these problems have prevented Kenyans who fled to Uganda in the wake of the post-election violence from returning Kenya. A visit to Uganda in April and early May 2009 showed that there are over 2,000 Kenyans who are refugees in Uganda and hosted in Kiryandongo refugee camp in Masindi District. These refugees fled to Uganda during the violence in January 2008 while others ran away from the militia violence in the Mt Elgon region. A majority of the post-election violence refugees are from one ethnic community and were living in the western region of Kenya before the crisis. In general, many of the refugees are

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<sup>15</sup> Ministry of State for Special Programmes, The IDP Status Brief as at July 7, 2009.

<sup>16</sup> Interviews in Karirikania, Seguton, Mauche and Baruti areas, South Rift, May 2009; telephone interviews in July 2009 with representatives of the National IDP Network.

unwilling to return, citing insecurity and lack of land. Unfortunately, the refugees feel neglected by the Kenyan Government. They argue that no Government official has visited them or sought to know their plight.

51. The IDPs and the refugee situation imply a need for a national official position on how to address their plight as a matter of policy. Without a coherent policy to address these issues, ad hoc approaches will continue to apply to IDPs. A policy to address the plight of IDPs is clearly long overdue.

#### **Access to relief and assistance funds**

52. We have already noted that in the 2009/2010 financial year, the Government set aside Sh2.2 billion for IDP resettlement and Sh500 million for shelter reconstruction. This is in addition to Sh200 million allocated in the Supplementary Budget in April 2009. The Sh1.96 billion raised through the Humanitarian Fund was exhausted in November 2008 after about Sh1.6 billion was spent on supporting the Resettlement Programme (*Operation Rudi Nyumbani*) and to pay start-up funds and reconstruction of destroyed and vandalised schools.<sup>17</sup> Rift Valley received the largest share of these funds because it is home to a majority of IDPs. However, a focus on this region, as well as Nyanza and Western provinces, resulted in glossing over IDPs settled in other regions, such the coast and central Kenya.

53. New concerns have arisen over the management of IDP funds. There is apparent lack of clarity on which Ministry between Special Programmes and Finance will manage the IDP funds. Some argue that Treasury is now responsible for the management of the funds allocated in the 2009/2010 budget. If, indeed, there is a shift from the Ministry of Special Programmes, then it is a pointer again to absence of a clear and coherent policy on how to address the IDP question. As noted in the previous reports, the IDP question and how it is being addressed is slowly becoming a political issue, with politicians seeking to make capital out of it. It is for this reason that a coherent policy is required to guide the search for solutions.

#### **New threats adding to numbers of IDPs**

54. In May 2009, a violent conflict erupted in Kuria East District over the creation of new district boundaries and district headquarters. The violence has displaced an estimated 6,290 people, who have moved to IDP camps and safer places such as schools and churches. Over 765 houses were burnt and 28 schools closed, displacing 7,292 school children and 171 teachers. An unknown number of people have become refugees in Tanzania.<sup>18</sup>
55. We have also noted that political conflicts over the modality of implementing recommendations on accountability by the Commission of Inquiry into the Post-election Violence (CIPEV/Waki Commission) have triggered threats against IDPs. Divisions over whether to establish a Special Tribunal locally or take perpetrators to the International Criminal Court have triggered conflicts at the grassroots. Most people believe trying the perpetrators will spark new violence. Already, leaflets have been circulated in Molo and Uasin Gishu.

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<sup>17</sup> Permanent Secretary, Ministry for Special Programmes, addressing a forum of Great Lakes Region MPs on IDPs, June 16, 2009.

<sup>18</sup> OCHA-Kenya, *Kuria inter-clan clashes, Situation Report No. 1*, June 26, 2009, pp.1-3.

56. The taskforce appointed to investigate the settlements in Mau Forest released its report in June 2009. The Government has indicated that persons with genuine title deeds will be compensated at the rate of Sh250,000 per acre.<sup>19</sup> This has sparked sharp criticism from IDP advocates, who ask why those dispossessed of their land and property received only Sh10,000. The differential criteria of compensation and ethnic politics of who will be evicted present new risks of violence. Threats continue circulate warning IDPs to leave their land to those who will be evicted from Mau Forest.

#### **Nature of humanitarian assistance**

57. The Government, donors and NGOs<sup>20</sup> are supporting shelter projects in the Rift Valley to construct over 78,254 houses. This has facilitated the return of IDPs in many parts, notably Lugari, Bungoma and other parts of Western Province. In other parts such as Molo, IDPs are not able to occupy houses built for them due to insecurity and lack of social cohesion. Only about 20 per cent of those who received money for shelter used it to reconstruct houses.<sup>21</sup> The Government suspended the funds and plans to distribute building materials, but IDPs say they want money so that they can decide where to settle.<sup>22</sup>

58. Records by the Ministry of Special Programmes show that several humanitarian agencies are going on with shelter reconstruction. The various agencies have pledged to construct over 39,000 units by the end of 2009. About 16,000 units had been constructed by end of March 2009. The Government has also disbursed funds (Sh25,000 per household) to support reconstruction of houses to about 23,000 households, or 30 per cent of 78,000 households earmarked for this support. Records from the Ministry also show that about half of IDPs' households that received funds for home reconstruction did not use them for this purpose. In some instances, some used the money to purchase land and/or buy farm inputs.

59. The Shelter Project has been fraught with controversy. There are those who argue that the shelter project is aimed at benefiting IDPs from one ethnic community, whereas there are IDPs from other ethnic groups. On the other hand, the alleged beneficiaries claim that fears of insecurity make it difficult for them to return and reconstruct homes. Still, there are those who argue that the criterion for selecting beneficiaries was not clear, since there were many more people who were affected.<sup>23</sup> There are also allegations of corruption, presence of non-IDPs with shares at self-help sites, double registration of households and false claims.<sup>24</sup>

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<sup>19</sup> Interview with an official in the Ministry of Forestry, June 16, 2009.

<sup>20</sup> Main partners working with UN agencies and donors include GOAL, Kenya Red Cross, HAMI, DRC, Habitat for Humanity, and the Catholic Diocese of Kitale and of Nakuru.

<sup>21</sup> Interview with Ministry of Special Programmes, July 7, 2009.

<sup>22</sup> Interview with IDP representatives at Jikaze Transit site, June 9, 2009.

<sup>23</sup> UNICEF Kenya *Review Mission Report*, July 2008.

<sup>24</sup> OCHA Nakuru Sub-Office, *Weekly Report*, June 8-12, 2009.

## Promoting healing and reconciliation

60. The period under review witnessed several initiatives to promote healing and reconciliation. The President's speech during the opening of Parliament in the last week of April urged leaders to preach peace and reconciliation. The Prime Minister also visited Central Kenya in May and emphasised the importance of peaceful coexistence among Kenyans. Other political leaders also toured different parts of the country urging Kenyans to unite and live as one community. This period has witnessed increased involvement of senior leaders in urging Kenyans to reconcile and live as one. While this is an important development, the approach to healing and reconciliation remains *ad hoc*; it is not systematic and lacks a clear policy. It is dependent on individual politicians and other leaders. As argued in previous reports, national healing and reconciliation requires a clear policy direction, complete with a national strategy under the leadership of the two Principals and/or leaders with influence in the various parts of the country.
61. Peace Committees have been formed from the provincial to the village level to promote peace and reconciliation. However, lack of genuine engagement by politicians with these processes has led to low community participation and disenchantment with their mandate and objectives. Some feel the meetings have no effect on the ground and, in some cases, perpetrators pretend to be peacemakers in order to access the allowances paid.<sup>25</sup> Some Peace Committees are also dormant due to lack of funds.
62. Continued intimidation and distribution of leaflets despite the robust peace-building efforts raise questions about the effectiveness of these committees. Some critics suggest that peace training and other NGO efforts are *'a waste of time - because they fail to capture current dynamics in order to produce desired peace and social cohesion'*.<sup>26</sup> Indeed, some efforts to promote reconciliation have had the reverse effect. For instance, an attempt to establish a monument at the site of the Kiambaa Church arson attack in Eldoret elicited strong anti-IDP sentiments. The local community boycotted the funeral service and threatened violence if such a monument was erected.
63. Politicians have, collectively and individually, continued to call for reconciliation. However, the same politicians are responsible for hate speech and provocative statements over such issues as Mau Forest, Special Tribunal and corruption scandals. The double-speak erodes public confidence and fans apathy. The lack of moral-political leadership on reconciliation has bolstered the role of religious institutions and the civil society in promoting reconciliation. At the same time, measures that respond to access to basic services and livelihoods are more likely to resonate with the people's quest for reconciliation than laws and awareness creation. This suggests that broad reforms as outlined in Agenda 4 are prerequisites for reconciliation.

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<sup>25</sup> Interview with NGO official working on peace-building, July 15, 2009.

<sup>26</sup> Interview with NGO official in Nairobi, July 15, 2009.

## CONCLUSION

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64. The continued presence of IDPs is the clearest indicator that normalcy has not been fully restored. The use of IDPs as a bargaining chip to advance or defeat political interests indicates that the reasons hindering return are political; they are not necessarily structural. Indeed, the perception of the IDP crisis as a problem relating to only one community rather than a national issue elucidates the slow progress in ensuring that IDPs are sustainably settled. It also explains the incoherency and inconsistency around official responses. The failure to address the IDP situation squarely presents not only a current humanitarian and human rights concern, but also a risk to future peace and stability for the whole country.
65. IDPs' movement patterns and creation of ethnically homogenous regions in rural areas and urban slums points to gradual ethnic balkanisation of the country. The deepening ethnic consciousness and deliberate separation of persons of 'rival' ethnic groups in most flashpoints of violence needs to be acknowledged and arrested, particularly given the rapid increase in the use of figurative language and enemy images to refer to certain identity groups.
66. The Government needs to develop a national policy on IDPs. Although the National Recovery Strategy outlined a framework response to IDPs, the emergence of transit camps and inability to return implies Government failure to address the IDP problem. IDPs are not going to disappear neither are they a short-term 'project'. There is an urgent need to examine and respond to the IDP crisis in a holistic manner for the stability and economic recovery of the country.
67. Healing and reconciliation requires political leadership: the two principals must be seen to lead this process. Measures to end impunity and curtail hate speech must enjoy high level support for effective implementation. Perceived leniency has opened discussion and speculation on political interference on all processes and frameworks instituted to deal with the effects of the post-election violence.

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

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### Introduction

68. Agenda Item 3 sought to resolve the political crisis through power sharing between the two parties. It required adjustments to the constitutional, legal and institutional frameworks to provide for Coalition Government and ensure functioning of State institutions.
69. The last two reports showed lack of cohesion in the Coalition Government. The reviews found out that the public generally viewed the Coalition as ‘two-Governments-in-one’. The survey findings showed that many people were of the view that power is not equally shared between the two partners in the Coalition. Protocol wars between the Prime Minister’s office and other offices such as that of the Head of the Civil Service and the Vice President aggravated incoherence within the Coalition.
70. In this third review, findings show improved relations between the two principals – the President and the Prime Minister. There were many instances where both principals appeared together in public forums and where they complemented one another. Below is a discussion of the key findings of progress in implementation of Agenda Item 3.

### Key findings

#### ***Summary of findings***

- Improved relations between the two principals
- Increased political factionalism and realignments
- The Coalition continues to hold together
- Disagreement on how to deal with impunity and how to address post-election violence destabilising the Coalition and individual parties

### Distribution of political power

71. The National Accord did not envision power sharing as an end in itself; it was a means to undertake comprehensive and far reaching reforms, including addressing factors that caused the crisis. Furthermore, power sharing was meant to create conditions that would lead to sustainable peace and stability through the rule of law and respect for human rights. Notwithstanding this important goal, the partners in the Coalition tend to give competing interpretations of the various provisions in the National Accord. For instance, issues of portfolio balance and the meaning of ‘real power sharing’ continue to evince different and competing interpretations from the two parties. Each party has sought to interpret the National Accord in a manner that is advantageous to its position and interests.
72. The previous reports pointed out that power sharing and, in particular, formation of grand coalition Governments is undertaken to promote political stability in societies characterised by huge social-cultural and political divisions. Power sharing is prescribed to create ‘unity of purpose’ and to ensure ‘wide inclusion’ of diverse views. In such arrangements, those with power often cede power to those who do not have it. Power

sharing is prescribed on recognition that those with power cannot fully enjoy what they have when significant segments of the society are excluded from power and the centre of decision making. The principle of 'inclusive Government', therefore, ought to guide debates on the arrangement of power sharing.

73. In the first quarter of 2009, it was reported that lack of cordial relations between the two principals affected the functioning of the Coalition Government. The review noted that the Prime Minister and his party were concerned about the failure of their coalition partner, PNU, to consult them while making important Government decisions. This translated into conflicts between the two parties and threatened the working of the Coalition.
74. During the period under review, there have been no open disagreements between the two Principals. Their relations appear to have considerably improved, if judged by the absence of public disagreements and by the numerous occasions when they have made joint and complementing public statements. However, the good working relations between the President and the Prime Minister are not replicated among members of their parties. It is important to observe that the good working relationship between the President and the Prime Minister has had the effect of portraying a sense of stability within the Coalition and the nation itself. It is this perception of stability or unity of purpose that is required to facilitate reforms. It should be pointed out that the two are yet to settle a number of issues, including agreeing on the Leader of Government Business in Parliament.
75. The National Accord established the office of the Prime Minister and two Deputy Prime Ministers. Roles and responsibilities attached to the two deputies are not clear. The Deputy Prime Ministers do not seem to have any responsibilities outside their respective ministerial dockets.<sup>27</sup> The Prime Minister appears to delegate only the answering of parliamentary questions to his deputies. The two have not been visibly engaged in coordinating and supervising Government affairs.
76. The weak internal institutional capacity of the Prime Minister's office is one issue that some people have continually mentioned as hampering its effective operation. As a relatively new office, staffing and equipping it with requisite resources certainly takes enormous resources. Without the required administrative and technical capacity, this office will not be effective in coordinating and supervising Government affairs. It may not deliver on its responsibilities. And failure to deliver on this may draw political interpretations which will in turn spill into the politics of the Coalition Government.
77. The principle of power sharing in the Coalition has resulted in conflicts based on partisan interpretation of the National Accord. There is a perception that the National Accord created constitutional positions for 'specific individuals', their party and communities. The National Accord, therefore, is seen as providing an opportunity for individual politicians to accede to power. This perception in turn is obscuring the very purpose of the National Accord: to promote sustainable peace and stability through the rule of law and respect for human rights.

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<sup>27</sup> Interview with a senior official, Ministry of Justice, July 2009.

## **Sharing of public sector positions**

78. A shift has occurred with regard to the disagreements over portfolio balance. While in the past attention was focused on the share of positions between the two parties, the period under review witnessed accusations against several ministers over rewarding of public sector jobs on the basis of patronage.<sup>28</sup> Several ministers are alleged to have appointed their political allies to senior positions in departments/agencies under their ministries on the basis of political patronage rather than merit. Some people were recruited to these positions without going through a competitive process and against the advice of management boards.<sup>29</sup> This shows that the ministers have turned to interpreting the meaning of portfolio balance in a manner that gives them an opportunity to reward friends and political allies. As noted in the previous reports, the politics of patronage are driving divisions in the Coalition and are responsible for deflecting attention from the reform agenda. With ministries increasingly becoming the source of patronage materials, the focus on reforms will eventually disappear.
79. This finding is evidence that ministers are taking their focus off the big picture: reforms. It implies that the country is reverting to old habits and missing an opportunity to put things right. Evidently, politicians in positions of power want to use their influence to firm their political support bases rather than initiate reforms in the spirit of the National Accord. Accumulating political power thus appears to be the main quest of the political elites.

## **Cohesion in the coalition**

80. The level of political cohesion within and between the political parties has remained low. The two parties have continued to take different positions on important policy matters. The Coalition and individual politicians are generally divided over whether to set up a Special Tribunal to try the perpetrators of post-election violence or to take the suspects to the ICC. Partisan political interests tied to the next General Election are also increasingly informing politicians' views on the constitution review process. It is possible that their differences will spill into the review and thereby produce a document to end the power sharing conflict between the two parties and not one that will serve the needs of Kenyans.<sup>30</sup>
81. Some Members of Parliament (MPs) claim that they did not participate in drafting the National Accord and, therefore, are not part of it. This limits the extent to which they own the document.<sup>31</sup> This view is again evidence of the extent to which the purpose and goal of the National Accord appear to be lost on policy makers and leaders in general. As noted earlier, the national level goal of sustainable peace and stability is not effectively secured and this has the effect of slowing the pace of reforms.
82. Parties also lack internal cohesion. New alignments and factions are rapidly emerging based on new dynamics and issues. Because of this, the two Principals are losing command of their membership. They do not have absolute control of individual leaders in their political parties. Within ODM, there are divisions along ethno-regional lines. Some of these divisions are the result of disagreements over power sharing within the party as well as divisions over the party's position on important policy matters. PNU is also divided along

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<sup>28</sup> "Ministers flout rules over State jobs," *Daily Nation*, May 18, 2009.

<sup>29</sup> "Ministers flout the rules over State jobs," *Daily Nation*, May 18, 2009.

<sup>30</sup> Interview with Constitution of Kenya Review Commission official, May 5, 2009.

<sup>31</sup> Interview with an MP from North Rift, May 5, 2009.

different lines. The parties in the Coalition show no coherence. Individual leaders owe allegiance to their respective parties rather than PNU as a Coalition.<sup>32</sup>

83. Failure to institutionalise political parties is partly responsible for lack of cohesion within the Coalition. The parties do not have an effective governance structure. They also do not have mechanisms for resolving disputes before they spill into the Coalition.<sup>33</sup> This clearly points to the need to effectively implement the Political Parties Act.
84. We have noted that there have been no overt disagreements between the two Principals during the period under review. They have projected a good measure of unity of purpose and complemented one another in public forums. They have generally acted in line with the spirit of the National Accord, in which they agreed to 'work together in good faith as true partners, through constant consultation and willingness to compromise'.<sup>34</sup>
85. Working together has resulted in several positive developments. Firstly, the parties adopted a common position at the UN Human Rights Council in response to the presentation of the Report of the UN Special Rapporteur on Extra-Judicial Killings. Although the two parties were initially divided over the position to adopt, they compromised and presented a joint position.<sup>35</sup> Secondly, the two Principals have jointly stressed that the Government is committed to implementing comprehensive reforms. Thirdly, and even though their parties gave divergent views on the constitution review, the Principals have held joint meetings with the Committee of Experts on Constitution Review and assured the team of the Government's support to complete the process.<sup>36</sup> Also, both appear to favour a Special Tribunal for Kenya to try perpetrators of post-election violence.<sup>37</sup> Finally, foreign trips during the period had delegations that comprised members from both parties.
86. Although these are positive developments, the perception of a 'two-Governments-in-one' is yet to disappear. In the view of some people, some senior civil servants tend to reinforce this perception in the manner in which they make and implement decisions. There are those who demonstrate allegiance to the PNU 'part' of the Government and others who tend to be more answerable to the ODM 'part' of the Government.
87. One factor contributing to this division is the absence of a national vision on reforms. Lack of a national vision to guide Government operations has evolved a disconnected approach to policy making and implementation. The drive for policies is dependent on individual ministers. Thus, there is no homogenous Government agenda -- everything is dependent on individual ministers' ability to mobilise support for a particular policy direction.
88. In the absence of a critical mass of reformers, the pace for decision making and implementation is slow. This raises the need to develop a framework for joint policy positions on important national issues. Formulating and enacting a coalition's management agreement is long overdue.

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<sup>32</sup> PNU is a coalition of parties.

<sup>33</sup> Interview with an official Centre for Multi-party Democracy, April 22, 2009.

<sup>34</sup> "Agreement on the Principles of Partnership of the Coalition Government", signed on February 28, 2008.

<sup>35</sup> "Geneva: Kenya backs down on police killings," *Daily Nation*, June 4, 2009.

<sup>36</sup> "Kibaki, Raila meet over Annan's deadline," *The Standard*, June 24, 2009 p.4.

<sup>37</sup> Kibaki and PM push for tribunal," *Daily Nation* Wednesday, June 24, 2009, p.72.

## **Independent Review Commission on the General Election held in Kenya on 27 December 2007**

89. Resolving the political crisis also required the two parties to commit themselves to the establishment of an independent process to review the 2007 elections from various perspectives. An Independent Review Commission (IREC) on the General Election held in Kenya on 27 December 2007 was established for the purpose. It completed its work and submitted the report of its findings to the Coalition Government and the Panel in October 2008.
90. The Government has been implementing the commission's recommendations. During the period under review, the Government has proposed to publish two new Bills in the light of the commission's recommendations. These two the proposed bills are: the Electoral Commission Bill (2009) and the Elections Bill (2009) as part of the broader electoral reforms.<sup>38</sup> The Bills will seek to enhance the independence of the electoral commission and its capacity to hold free and fair elections. During the period, the Interim Independent Electoral Commission (IIEC) has been planning for by-elections. For the first time, transparent ballot boxes will be used at polling stations.
91. The IREC report recommended the setting up of an Interim Independent Boundary Review Commission (IIBRC) to demarcate new district and constituency boundaries. On May 12, 2009, President Kibaki appointed members of the Commission. The boundaries review commission was allocated Sh351 million for its work in the 2009/10 budget.<sup>39</sup>
92. While these are important achievements, there is the challenge of overlap between the work of IIEC, IIBRC and Constitutional Review in demarcating of boundaries. As it stands, the IIEC and IBRC have the mandate of creating new district and constituency boundaries. Since the three constitutional bodies are independent and autonomous, it is possible that they will develop their outputs without consulting each other. Furthermore, the President has created new districts without reference to these bodies.

### **CONCLUSION**

93. Between May and June 2009, the Coalition Government did not experience major conflicts regarding power sharing. The period witnessed improved working relations between the two principals, unlike in the previous period where tension characterised their relations. This has helped create a perception of a stable Coalition and to move a few things forward.
94. There has evolved new political realignments based on new political considerations. These developments have important implications for internal party discipline. Unfortunately, consolidation of new and concrete political factions is making the principals lose control of their individual political parties. New alliances and factions mean that the Principals are no longer effectively commanding their parties; they are losing strategic members in their respective political parties.
95. The Coalition has continued to hold together in spite of lack of cohesion within the political parties. New alliances and factionalism within individual political parties has played a part in ensuring that the Coalition holds together. However, these factors are also slowing down the pace of reforms. They have eroded the basis for a national vision on reforms.

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<sup>38</sup> "New laws to seal poll loopholes," *Daily Nation*, June 17, 2009, p.2. also interview with Kenya Law Reform Commission, July 2009.

<sup>39</sup> "Money allocated to commissions," *Nairobi Star*, June 12, 2009, p.2.

## V. AGENDA ITEM 4: LONG-STANDING ISSUES AND SOLUTIONS

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### Introduction

96. Agenda Item 4 identified what was considered as the underlying issues that had caused the crisis in Kenya, and which needed to be addressed because they threaten the existence of Kenya as a nation-state. Agenda Item 4 was, therefore, designed to provide the framework for undertaking comprehensive constitutional and institutional reforms to address the root causes of recurrent conflict and create a better, more secure and prosperous nation.
97. In the previous two reviews, we pointed out that progress had been made with respect to certain aspects of Agenda Item 4 but the pace of reforms was generally too slow to have an impact. We underlined the need to speed up reforms because the slow pace had disillusioned the public. Below is a discussion on progress made during the period under review.
98. The long-standing issues identified under Agenda Item 4 were:
- Undertaking constitutional, legal and institutional reforms;
  - Undertaking land reforms;
  - Tackling poverty and inequality, and combating regional development imbalances;
  - Tackling unemployment, especially among the youth;
  - Consolidating national cohesion and unity; and
  - Addressing transparency, accountability and impunity.

### Key Findings

#### ***Summary of findings***

- Constitutional, institutional and legal reforms:
  - List of contentious (constitutional) issues has been published
  - A national taskforce on police reforms was constituted
  - A high flier scheme for promotion of civil servants was launched
  - A judicial reform taskforce was formed
- The Cabinet approved the National Land Policy
- The national budget improved funding for constituency development projects
- The Youth Enterprise Development Fund launched new products for young entrepreneurs
- The Mutual Legal Assistance Bill to facilitate the fight against corruption was drafted

## **Constitutional and institutional reforms**

99. During the period under review, the Committee of Experts on the review of the constitution identified issues that are considered contentious and invited public comments. The Committee identified the following: (i) the system of Government (whether presidential, parliamentary or a hybrid of the two); (ii) devolution of power (that is the levels at which power would be devolved); and, (iii) when the new constitution would be put into force (the transitional clauses).<sup>40</sup>
100. The Committee has also developed a work plan showing that a new constitution might be in place by early 2010. The Committee has also been conducting consultations with stakeholders. The Statute Law (Miscellaneous Amendments) Bill 2009 was published in June and provides for the Committee of Experts to identify 30 members from the civil society to constitute reference groups.
101. We note here that the review process is behind schedule by about six months. The Constitutional (Amendment) Act 2008 and the Constitutional Review Act 2008 had envisioned the review process to begin from around August 2008. The Committee would have presented a draft constitution to the Parliamentary Select Committee by May 2009 for discussion and consensus building before presenting it to the Parliament. The Attorney General would have published the draft (without alterations) by the end of June 2009. The country would be holding a referendum by end of August 2009 and a new constitution promulgated by the middle of September 2009.
102. Although the Committee is behind schedule, it must complete its work by the first quarter of 2010 or one year from the time it was appointed. Having a new Constitution is one issue requiring repeated and strong emphasis because many people have been pointing out that a new Constitution will create conditions and momentum for other reforms. The mood for radical reforms has waned and only a new constitution will provide such an opportunity once more. Piecemeal reforms will not create the right conditions for the total transformation of the society; they will only address administrative challenges among Government institutions and gloss over the broader context within which reforms ought to occur.
103. Another finding is that the Interim Independent Constitutional Dispute Resolution Court (IICDRC), which was envisaged in the Constitution Amendment Bill, 2008, has not been established. The Parliamentary Select Committee has not finalised the selection of Judges who will seat on the Court. The Court, to be composed of six Kenyans and three non-Kenyans, will hear and determine disputes arising from the Constitutional review process itself. On 22 May 2009, the Panel of Eminent African Personalities submitted a list of five non-Kenyan Judges, from which the Parliamentary Select Committee will recommend three for appointment to the Court. There is a need to fast track the process of nominating the Kenyan judges given that the review process is on going.

## **Judicial Reforms**

104. A number of important developments have taken place in the Judiciary. The Government constituted a team to recommend reforms in the Judiciary. The Government has also increased the remuneration of magistrates and paralegal staff in the Judiciary. At the end

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<sup>40</sup> *Daily Nation*, June 19, 2009, Invitation by the committee of experts on contentious issues, p.16.

of June, the Judicial Reform Taskforce presented proposals to the Ministry of Justice, National Cohesion and Constitutional Affairs.

### **Police reforms**

105. On May 7, 2009, the President launched a National Taskforce on Police Reforms. At the same time, the Minister for Justice emphasised the need to deal with impunity. He said that he would further initiate review of Section 71 of the Police Act to spell out when law enforcers can use live bullets and alternative force when quelling mass protests.<sup>41</sup>
106. A number of challenges have hindered the drive towards police reforms. The biggest challenge pertains to conflict between the Administration Police (AP) and the regular police. There was significant tension and conflict between the two police arms. The two disagree on policy issues, and in particular the merging of the two police units as recommended by the CIPEV.

### **Civil service**

107. The Government is implementing a programme to fast track promotions for the best performers in the civil service. The programme, also known as the high flier scheme, would replace the old career progression process where civil servants had to complete a minimum of three years on a given job group to qualify for promotion. This move would eliminate unnecessary stagnation and sift non-performers.<sup>42</sup>

### **Parliamentary reform**

108. Parliament has undertaken several reforms. Standing Orders were substantively revised and adopted in April 2009. Parliament is also running its own broadcasting unit in line with the need to build capacity to provide live coverage. Standing Orders have also been revised to enable Parliament to play an oversight role in budget formulation. The Standing Orders now provide for parliamentary committees to scrutinise the estimates and report back to the House. Some of the work by parliamentary committees is now open to the public.

### **Land reform**

109. A key milestone for the land sector reforms is the Cabinet's approval of the new land policy on June 25, 2009. The National Land Policy formulation process began in February 2004 and the policy was finalised in May 2007. The Cabinet approved it in June 2009, about two years later.<sup>43</sup>
110. The draft policy contains measures that could drastically change land ownership laws in Kenya, a move which the Chairman of the Kenya Land Owners Association confirmed to be greatly opposed by some politically influential people, for fear of losing their land.<sup>44</sup> The policy was also greatly opposed by some high ranking donors as well as immigrants who seek to own land on a freehold basis. The policy provides that foreigners will only own land on a leasehold basis for a period of 99 years, and not as currently held for a leasehold period of 999 years.<sup>45</sup>

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<sup>41</sup> *The Standard*, June 10, 2009, State agrees to act on Alston report, p.13.

<sup>42</sup> *Sunday Nation*, June 14, 2009, State workers to earn instant promotions, p.2.

<sup>43</sup> Remarks by an official of the Kenya Land Alliance made at a public forum on land on July 14, 2007.

<sup>44</sup> *Sunday Nation*, May 24, 2009, Powerful forces conspiring to block quest for radical land reforms, p.8-9.

<sup>45</sup> A senior officer, the National Land Transformation Unit.

## **Poverty, inequality and regional imbalances**

111. The 2009/2010 annual budget increased the amount of money to the Constituency Development Fund (CDF) by 120 per cent, with a view to stimulating growth and development in the rural areas. Specifically, the Government increased CDF money from Sh10.1 billion in 2008 to Sh22 billion in the 2009/2010 annual budget. This is equivalent to an average of Sh105 million per parliamentary constituency.<sup>46</sup> At the same time, the Minister for Planning observed that the Government would appoint experts to review the structure of CDF and seal corruption loopholes with a view to increasing accountability in the use of this fund.<sup>47</sup>
112. Increasing funds for rural development under the CDF decentralised effort has the potential to lead to development initiatives that are in line with people's aspirations. CDF projects are based on a participatory framework. People identify projects in line with their development needs. Projects initiated through this approach, therefore, have the potential to address poverty and inequalities in development.
113. Notwithstanding this important initiative, the country is experiencing a sluggish economic growth rate. From a high growth rate of about 7 per cent in 2007, the economy grew at under 2 per cent in 2008. With deepening drought and famine in the first half of 2009, growth is likely to slow down, thus negatively affecting both national and local level development.

## **Youth unemployment**

114. The Youth Enterprise Development Fund (YEDF) launched new products that make it easier for young entrepreneurs to access loans and to overcome market barriers. The Youth Fund launched the Public Procurement Access to Youth Enterprises (PPAYE) initiative to secure Government supply contracts for youth enterprises. To increase access by the youth to more funds, the YEDF has partnered with Family Bank to make more financial products available.
115. A review of the Economic Survey 2009 shows that the number of new jobs declined from 485,500 in 2007 to 467,300 in 2008. The informal sector contributed about 80 per cent of total new jobs. The creation of any more jobs will definitely be affected by the slow economic growth. There is another problem: lack of probity in the use of these funds. A report produced by the Controller and Auditor General shows that part of Sh1 billion the President launched the Youth Enterprise Development Fund (YEDF) with ended up in pockets of individuals and companies.<sup>48</sup>

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<sup>46</sup> The Kenya National Bureau of Statistics constituency report on well being in Kenya-based on the Kenya Integrated Household Budget Survey 2005/06. Report dated June 2008.

<sup>47</sup> *Saturday Standard*, June 18, 2009, 'Experts to streamline the operations of CDF,' p.24.

<sup>48</sup> *Saturday Nation*, June 24, 2009, 'Just what happened to youth fund millions?' p.6.

## **National cohesion and unity**

116. In April 2009, nominees to the National Cohesion and Integration Commission were short-listed.<sup>49</sup> The Commission is mandated to receive complaints from Kenyans who are discriminated on the basis of ethnicity. The Commission will also speed up and promote equality of opportunity, good relations, harmony and peaceful co-existence among persons of different ethnic and racial groups. Currently, a secretariat has been established at the Ministry of Justice, National Cohesion and Constitutional Affairs.

## **Truth, Justice and Reconciliation Commission**

117. Parliament forwarded a list of nine Kenyans to the President out of which the President will appoint six as commissioners of the Truth, Justice and Reconciliation Commission (TJRC). Those appointed would join three foreigners selected by the Panel of Eminent African Personalities. The President's delay in picking the names of the commissioners caused a further delay in establishing TJRC and, therefore, delays in terms of when actual work would begin.

118. In June 2009, Parliament passed amendments to the TJRC Act to remove provisions for amnesty for the perpetrators of post-election violence. According to the original proposed TJRC Act, amnesty was only prohibited for crimes against humanity but could be extended to other crimes. With the new amendment, the TJRC Act would operate in line with international law, which rules out pardon for those who commit international crimes.<sup>50</sup> A point to emphasis with regard to activities of TJRC is the need to effectively protect witnesses. As argued in the previous reports, some witnesses may not present themselves to the TJRC or even the trials of perpetrators of post-election violence if they are not effectively protected.

## **Transparency, accountability and impunity**

119. On 5 June 2009, the Government published a gazette notice indicating that the commencement date of the International Crimes Act, 2008, was 1 January 2009. The Act therefore does not apply to crimes committed before that date.

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<sup>49</sup> *Daily Nation*, Wednesday, April 22, 2009, p.8.

<sup>50</sup> See the Statute Law (Miscellaneous Amendment) Bill dated May 6, 2009 and the *Daily Nation*, June 16, 2009, 'AG proposes no amnesty for post poll chaos culprits,' Pg 14

## CONCLUSION

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120. The Government has made some progress in undertaking reforms under Agenda Item 4. However, as noted in previous reports, the pace of reforms remains slow. Institutional reforms are predicated on having a new Constitution, and a new Constitution is key to the success of all reforms under Agenda Item 4. Unfortunately, whether or not the country will have a new Constitution hinges on cohesion of the survival of the Coalition Government. Continuing disagreements among national elites over important policy positions may spill into the Constitution review process, and put it off-track.
121. The Government has begun several processes to establish a framework for institutional reforms, especially within the police and the Judiciary. Important as these steps are, it is important to caution that they may lead to only general administrative reforms of the police and the Judiciary. Without a new Constitution to firmly anchor these reforms, the Government may end up without real and significant changes in these institutions. Change of behaviour, institutional values and culture is critical in any reform endeavour. Promoting efficiency is one thing, while changing attitudes and behaviour is another. Both elements are an important aspect of any genuine reform endeavour.
122. Without clear synergies between the many initiatives that are taking place, reforms will be difficult to achieve. Moreover, moving reforms requires a critical number of reformers within the Government to continuously keep reforms on track and counter the influence of anti-reformers. But the number of reformers within Government – and champions of change within departments – has thinned drastically.

## VI. GENERAL CONCLUSION

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123. This review covers the period between May and June 2009. The findings on each of the agenda items are not significantly different from what the second review reported. We noted at the outset that this review reports on the main trends in each agenda item because the second report was presented in the first week of July. The period between then and now has not witnessed major changes in progress of implementation of the main agenda items.
124. With regard to Agenda Item 1, it is important to note that political violence has ended in all areas. There were no violent political conflicts reported during the period. This is a positive development. However, the security situation is deteriorating, with the rise in new forms of crime, including carjacking and 'kidnapping for ransom'. In rural areas, people have formed vigilantes to fight illegal armed groups which have been committing crimes and extorting money from the public with impunity. The rise of vigilantes and their increased use of violence against suspected members of illegal armed groups such as Mungiki has had disrupted social harmony and divided local communities. Those who have lost relatives through killings by the vigilantes tend to nurse grudges against those they perceive as responsible for the death of their kin. The vigilantes have become another source of insecurity in some areas.
125. Findings on Agenda Item 2 show that most IDP camps have closed down. The Government has also disbursed 'start-up funds' to a significant number of IDPs who are resettling. Funds for reconstruction of homes have also been disbursed to a significant number of households. These are commendable undertakings. However, some IDPs have failed to return to their farms partly because of insecurity and partly because of inadequate healing and reconciliation at the local level. They have settled in 'transit camps' where they have no access to basic services. This implies that IDP problems are far from over, yet IDPs have fallen off the national agenda. A policy to guide how to resolve the IDP problem is long overdue. Left unattended, the IDP problem might transform into a major social-economic problem in the near future.
126. This period has witnessed improved relations between the two Principals. There have not been cases of public disagreements between the two parties. Improved relations between the President and the Prime Minister reduced tension and conflict within the Coalition. Disagreements and conflict over the meaning of 'real power sharing' and 'portfolio balance' have also declined. Nevertheless, some ministers were alleged have appointed their allies to senior positions in parastatals under their ministries on basis of political patronage. This trend of rewarding allies with parastatal positions negates the principles of the National Accord, and in particular the goal to undertake reforms to promote transparency and accountability.
127. Reforms under Agenda Item 4 are moving rather slowly. It is commendable, however, that there is movement in each of the main components that constitute Agenda Item 4. Of great concern, however, is the potential of political conflicts within the Coalition spilling into the Constitution making process. Most reforms under Agenda Item 4 are predicated on having a new Constitution. Failure to complete the review process, therefore, would end or slow down reforms in other areas. Insulating the review process from political conflicts is, therefore, critical at this stage.