

**THE KENYA NATIONAL DIALOGUE AND RECONCILIATION
(KNDR) MONITORING PROJECT¹**

Review Report

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ACRONYMS

AU	African Union
CIC	Commission on the Implementation of the Constitution
CIOC	Constitution Implementation Oversight Committee
CIPEV	Commission of Inquiry into Post-Election Violence
COE	Committee of Experts
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
KACC	Kenya Anti-Corruption Commission
KHRC	Kenya Human Rights Commission
KNCHR	Kenya National Commission on Human Rights
KNDR	Kenya National Dialogue and Reconciliation
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
PTC	Pre-Trial Court
SLDF	Sabaot Land Defence Force
SMS	Short-text Message Service
TJRC	Truth Justice and Reconciliation Commission
TV	Television
UNDP	United Nations Development Programme
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
VR	Voter registration
VT	Voter turnout

EXECUTIVE SUMMARY

1. On 28 February 2008 the Government/Party of National Unity (PNU) and the Orange Democratic Party (ODM), under the Kenya National Dialogue and Reconciliation (KNDR) signed an agreement to end the political violence that followed the disputed 2007 December general elections. Through the mediation by the African Union's (AU) Panel of Eminent African Personalities under the chairmanship of Mr Kofi Annan, the parties signed the KNDR agreement and formed a Coalition government.
2. South Consulting has been monitoring implementation of the KNDR agreements from 2008. This is the third review report for the year 2010. Previous reports covering the period between December 2008 and July 2010 can be found at www.dialoguekenya.org.
3. This report covers the July to September 2010 period. The report focuses on two issues that have gained prominence and attention during this period: the International Criminal Court investigation of the Kenya situation; and the implementation of the new Constitution, passed at the referendum held on 4 August 2010 and promulgated on 27 August 2010.
4. The report has predominantly utilized qualitative data. The research team carried out interviews in various regions affected by the 2007 post-election violence. Key informants were drawn from government ministries, humanitarian organisations, civil society organisations, the media and members of the public. Secondary sources have also been reviewed for additional information.

FINDINGS

The ICC and the post-election violence

5. The findings show that there is no common position among the main parties on the issue of the ICC intervention; indeed there are senior leaders who would prefer to terminate or delay it. Divisions in the Grand Coalition have created an opportunity for impunity to re-organise and undermine progressive reforms and interventions aimed at ending impunity. Impunity is re-organising through mobilisation of ethnic constituencies for support against or in favour of the ICC intervention. Significant also is that there is an absence of leadership and ownership of the ICC intervention as a means of ending impunity: there is no local political ownership of this issue given its potential to terminate political careers.
6. This notwithstanding, the intervention of the ICC is important in one respect. *It will impact on Kenya's political culture of tolerating and celebrating impunity especially when senior and influential politicians are involved.* The main challenge, however, is that in spite of the post-election violence, and about two years to the next general election, Kenya's political culture has not changed. There are very clear signs that it is 'business-as-usual'. Some senior leaders show little genuine commitment to the ICC investigation of the Kenya situation or are seeking to politicise it to promote personal political interests. While this is happening, leaders appear to pay scant attention to the problem of IDPs many of who have remained without secure livelihood for more than two years.
7. *All communities should contend with the possibility that one of "their own" could be indicted and tried for the post-election violence.* They should understand that the ICC is not targeting a community. And all communities should recognise that communities as a group do not commit crimes. Nor do they pay criminals to perpetrate violence. Individual politicians and other influential people pay for the perpetration of violence. And because they have never been put on trial, impunity has continued to triumph and to threaten the life of the very communities they claim to represent. The ICC is an avenue for justice for

many people who suffered during the post-election violence.

8. *Lower and middle level perpetrators should be prosecuted – attention should focus on them too:* Although the ICC will prosecute those who bear the greatest responsibility, and probably politically and economically influential people, it is the duty of the government and the society in general to ensure that lower and middle level perpetrators do not get away with impunity. The criminal who destroyed property, raped, killed or injured other people are yet to be arrested and successfully prosecuted. The fact that the ICC will target only senior politicians may perpetuate impunity amongst lower level perpetrators who carried out actual attacks because they may believe there is no mechanism to hold them accountable. Moreover, there is little media and public attention on them at present.
9. This development suggests a need for the government as a whole to commit itself to cooperate with the ICC as it is obliged to do under the Rome Statute. The government has stated its commitment to this obligation but some within government, including senior and influential people, may be subject to investigation. It is the allies of such people that could be pushing for an ethnic agenda by insisting that the ICC is targeting certain ethnic communities. To ensure victims get justice and in the spirit of cooperation with the ICC, the government must allow such people to be tried if the ICC indicted them. Politicising the ICC intervention is of little effect. It does not give justice to the victims. Only the Pre-Trial Chamber (PTC) can stop the ICC from investigating the Kenyan situation. The Pre-Trial Chamber can decide to terminate the case or send the prosecutor back to find more evidence. Kenyan politicians cannot stop the process.
10. The National Cohesion and Integration Commission (NCIC) has filled an important gap in the understanding and countering some of the factors that cause violence during elections. The Commission successfully stigmatised hate speech during the referendum by ensuring arrest of senior politicians and monitoring speeches during the campaigns. These measures should provide lessons to guide approaches to prevent violence in the future. It is important that the Commission does not relent on monitoring speeches by senior politicians after the referendum; monitoring hate speech should be continuous.

Implementation of the new Constitution

11. *The passing of a new Constitution in a peaceful referendum marks a major turning point in Kenya's history.* The new constitution is of monumental historical significance to Kenya and even to Africa in general. It is commendable that a process that had taken decades without completion was finalised within a period of about two years from the time the Committee of Experts was appointed. The new Constitution enjoys wide popular support and legitimacy. The voter turnout itself was unprecedented; at 72 percent, the referendum turnout is the highest in Kenya's multi-party electoral history. And at a 67 percent approval rating, the legitimacy of the new constitution is uncontestable. This is also significant in indicating renewed confidence in the ballot after the post-election violence.
12. *The new Constitution has given Kenyans a sense of optimism and opened opportunities for far-reaching reforms.* It has rightly raised public hopes for the emergence of a new culture of governance. However, the process of delivering it demonstrated certain challenges. Some of these result from the factors that shape regional and constituency voting patterns. Other challenges stem from areas that were not satisfactorily addressed during the negotiations among the political elites. These areas will become an arena where more politics will be played out.
13. *The endorsement and promulgation of the new Constitution should not mask the fact that it faced considerable opposition from some key groups and influential actors in the Kenyan society.* One should also not gloss over the fact that there were many 'water melons' or influential leaders on the "Yes" side who did not welcome the new

Constitution but nonetheless pretended to be endorsing it. The support of others was secured through political coercion. These remain and may cause setbacks throughout the implementation process.

14. *Some of those who voted No feared local domination in the new Counties.* They wanted their own Counties. This is an issue the implementation process must acknowledge and recognise as central to implementation. To assuage the fears of the numerically small groups in the Counties, legislations on County governments must underline the principle of 'inclusive government' and ensure that all groups are adequately represented. The laws governing their operations must also seek to protect the minorities. Article 10 on 'National Values and Principles of Governance' as well as Chapter Six on Leadership and Integrity should be established as the corner posts for the County governments.
15. *Civic education, on both demand and supply side of the new Constitution - should be intensified:* The referendum campaigns did not provide adequate opportunity for civic education. There is need to carry out civic education on the provisions of the new constitution and how the implementation is to be rolled out in order to manage expectations. Civil society should focus attention the demand side by creating awareness on the type of demands citizens should make in line with the constitution. On the other hand, the government should focus attention on improving people's knowledge on what the government can supply or the type of services or facilitation the government should supply. Civic education on the new Constitution should be institutionalised including by embedding the constitution or the values and principles of the new Constitution in the school curriculum.

Conclusions

16. The new Constitution has set up a new framework; it aims at creating a new Kenya complete with new institutions and new values. Rights and freedoms are the cornerstone of this new Kenya. It is demolishing old institutions that were based on colonial rule. The new institutions are also better shielded against political patronage. There is a new sense of optimism and hope – the constitution has created opportunities for recovery.
17. The challenges facing the birth of a new Kenya, however, are many. The new society is yet to show; there are signs that old habits have not died. Firstly, the political culture is yet to change; the culture of bad governance is deeply embedded in all institutions and sectors but there is no debate on how to end it. The trend is to promote self-interest rather than the public good. Secondly, there is no public dialogue on what this new society is about and how it should be achieved. Thirdly there is resistance to change by those who stand to lose from change. They opposed the constitution because of self-interest rather than ideological position. Some will continue opposing the constitution and resisting it as long as it threatens the status quo and their chances to benefit from bad governance. Fourthly, expectations are high. Some are unrealistic and yet they must be addressed. The public will be disillusioned once they see the culture of 'business-as-usual' slipping back in.
18. There are several ways to mitigate some of these challenges. One, Policies and legislations around the new constitution must draw from extensive consultations. They must borrow from discourses around the envisaged 'new Kenya'. The legislations must set high standards; the benchmarks must be so high that even those wishing to bring the standards down will find it difficult to do so. Two, policy dialogue or debates must begin. And this is not the work of the government alone. This is the responsibility of all actors and in particular civil society, the private sector and the media. The hard task has begun and people must make decisions from an informed point of view. Three, religious intolerance witnessed during the referendum must be addressed. The divisions witnessed during the period are now an additional cleavage to a society already divided along ethnic and income lines. These can be addressed only by promoting a clear understanding of the principles around which the constitution is built: the principles of an open society.

19. Institutional and electoral reforms must be undertaken and completed with urgency. Another election is due in about two years from now. The high number of rejected votes (spoilt votes) in the referendum is clear evidence of the need to undertake comprehensive voter education. The Interim Independent Electoral Commission must also contend with the fact that the investment required to have a free and fair election in the next general election is huge. Establishing the electoral body in line with the requirements of the new constitution must begin in earnest to be ready for these reforms. Electoral rules must be known early, accepted early, and institutionalised before the next general election. Similarly, institutional reforms and in particular the police and judicial reforms must be completed with urgency in preparation of the next general election. The reforms themselves must demonstrate that there is a new culture of doing things – one of accountability to the public.

1. INTRODUCTION

1. On 28 February 2008 following the political violence that engulfed Kenya after the disputed December 2007 General Election, the two main parties – the Party of National Unity (PNU) and the Orange Democratic Party (ODM) – signed an agreement to undertake several steps to end the crisis. Through mediation by the African Union’s (AU) Panel of Eminent African Personalities under the chairmanship of Mr Kofi Annan, the parties committed to undertake actions under four main agenda items agreed at the Kenya National Dialogue and Reconciliation (KNDR) process. These were:
 - a. Agenda Item 1: Immediate action to stop violence and restore fundamental rights and liberties;
 - b. Agenda Item 2: Immediate measures to address the humanitarian crisis, and promote healing and reconciliation;
 - c. Agenda Item 3: How to overcome the political crisis; and
 - d. Agenda Item 4: Addressing long-term issues, including constitutional and institutional reforms, land reforms, poverty and inequalities, youth unemployment, national cohesion, and transparency and accountability.
2. South Consulting has been monitoring implementation of the KNDR agreements from 2008. This is the third review report for year 2010. Previous reports covering the period between December 2008 and July 2010 can be found at www.dialoguekenya.org.
3. This report covers the July to September 2010 period. The previous reports have tracked progress on implementation of each of the four agenda items 1-4. The July 2010 report focused on the progress towards a new constitution. This report, however, examines two issues that are important at this point in time: the International Criminal Court investigation of the Kenya situation; and the implementation of the New Constitution, passed at 4 August 2010 referendum.
4. The report has mainly utilized qualitative data. The research team interviewed various respondents in different regions affected by the 2007 post-election violence. Key informants were drawn from government ministries, humanitarian organisations, civil society organisations, the media and members of the public at large. Secondary sources have also been reviewed for additional information.

2. THE POST-ELECTION VIOLENCE, THE ICC AND IMPLICATION FOR PEACE AND SECURITY

Introduction

5. The KNDR agreements underlined the need for peace and security for all Kenyans. A Commission of Inquiry into the Post-Election Violence (CIPEV) was established and recommended the setting up of a Special Tribunal for Kenya to investigate and try those responsible for various criminal acts during the crisis period. Following the subsequent failure of Parliament to pass a law establishing a Special Tribunal for Kenya, the matter was handed over to the International Criminal Court (ICC). In March 2010, the ICC's Pre-Trial Chamber II approved investigations into the Kenya situation. In May 2010, investigators from the ICC arrived in Kenya. Reports of intimidation of potential witnesses escalated, resulting in the matching increase in the number of those seeking protection from human rights organisations.
6. This section of the report looks at reactions to the ICC investigation of the Kenyan situation as well as its linkages to the IDPs who are still in camps for the displaced.

Key Findings

Summary of findings

- A 4 per cent reduction in crime rate nationally and a 25 per cent increase in Nairobi
- Organised Crimes Bill enacted and comes into force amid a resurgence in extra-judicial killings
- There is continuing public confidence in the ICC
- New Constitution presents opportunity for fundamental reforms

The ICC, the Grand Coalition, and the Kenya Situation

7. The April-June report of 2010 noted that the ICC efforts and political anxiety over who might be on the list of suspected perpetrators of violence continued to weaken the Grand Coalition. From March 2010 when the ICC Pre-Trial Chamber II approved investigations into the Kenya situation, anxiety has continued to grow over who might be indicted. This anxiety and the possibility that senior and influential politicians could be the focus of these investigations have had several consequences. First, it has reinforced political realignments that began to emerge in 2009 when it became clear that the ICC would intervene in the Kenya situation. These realignments coalesced into political factions focused on safeguarding the interests of senior politicians who felt threatened by these developments.
8. Secondly, the emergent and evolving political factions weakened the Grand Coalition Government because those central to these factions came from both parties in the Grand Coalition. Thirdly, factionalism prevented the establishment of a Special Tribunal for Kenya and effectively undermined political commitment to the prosecution of anyone involved in the post-election violence. Thus to date, there has been no successful prosecution of any incident related to the post-election violence. Almost all the cases prosecuted in the courts have failed to yield a conviction due to

poor investigations or lack of sufficient evidence to sustain prosecution. Generally, ineptitude in the criminal justice system and lack of a coherent official position on whether or not to punish perpetrators has persuaded victims that local mechanisms are not likely to deliver justice for them.

9. *Divisions in the Grand Coalition Government continue to undermine political commitment to support the ICC.* Parties in the Grand Coalition Government lack a coherent position on how to address the post-election violence and how to support the ICC investigation into the Kenya situation. Senior leaders continue to issue contradictory statements that stir controversy on whether to support the ICC or establish a local Special Tribunal – or have both – or even sometimes asking whether ICC should stop handling PEV cases altogether because there is a new constitution.² The general incoherence in the coalition reflects lack of leadership on the PEV cases and the ICC investigation of the Kenyan situation. It also demonstrates inadequate commitment and preparedness to address impunity for political violence.
10. *Impunity is fighting back:* Combined, incoherence and lack of commitment have given impunity room to fight back. Senior politicians pronouncements on the ICC investigations suggest that it is now business-as-usual. Some leaders have been organising ethnic constituencies to promote positions that favour them. This on its own suggests that some senior leaders would prefer to terminate the investigation or even stop prosecution of post-election violence cases. Indeed, some human rights groups view recurrent overtures to terminate ICC's involvement as the work of protectionist networks eager to safeguard their political interests by delaying or avoiding investigative processes.³
11. *The ICC investigation implications for the 2012 General Elections and its attendant power struggle:* The work of the ICC is viewed as relevant to political strategies leading up to 2012. The perception has been gaining prominence that some leaders are seeking ways to leverage the ICC's pursuit of justice, which may entail the indictment of political rivals.⁴ In particular, local discourses in the Rift Valley and Central provinces regarding the matter of 'who bears the greatest responsibility' regard the possible indictment of some leaders from the area as unjustified and motivated by the need to eliminate political rivals.
12. *Witness Protection Agency established and approves the protection of 20 witnesses.* The prospect of prosecution by the ICC triggered the disappearance and intimidation of potential witnesses, giving rise to the need for an effective witness protection programme. In June 2010 the President assented to the Witness Protection (Amendment) Act, which paved the way for the establishment of an independent and autonomous Witness Protection Agency. A Witness Protection Advisory Board, chaired by the Attorney General was appointed amid concerns by the civil society that it is not neutral, considering state organs have been accused of perpetrating violations during the post-election violence. In June 2010 the Government signed commitments to

² Barasa, L., 'Mutula to Ocampo: Quit Kenya probe' *Sunday Nation*, 19 September, 2010

³ Discussions at the forum of civil society and the implementation of the New Constitution, 23 Sept 2010

⁴ Interview with a political analyst in Nairobi, 25 Aug 2010

protect all witnesses identified by the Chief Prosecutor⁵. In its first meeting in September 2010, the Witness Protection Advisory Board approved the protection of 20 witnesses who have applied for cover, and the recruitment of directors and staff.

13. In the meantime, about 70 witnesses are being protected by human rights NGOs within and outside the country.⁶ The ICC is protecting its own witnesses and does not depend on the Government or other witness protection programmes.⁷ Nonetheless, it has taken the Government inordinately long time to set up a credible witness protection unit. Because of this, some witnesses may have lost confidence and interest in witness protection. Some of those who left the country early, are allegedly losing interest in the prosecution citing fatigue and lack of commitment to address PEV cases.
14. *Allegations that witnesses have been compromised, coached or intimidated to tailor their testimony in a particular way presents a new threat to the quest for justice:* Both victims and alleged perpetrators agreed that the ICC needs to devise a way of carrying out its own investigations independently without relying on reports by other actors. Some argue that reports compiled by human rights NGOs and the Commission of Inquiry into the Post Election Violence (CIPEV/Waki Commission) relied on 'filtered evidence'.⁸ There are allegations that some of the reports are not objective and that some individuals within some organisations released important and confidential data to alleged perpetrators to enable the latter prepare their defence or identify key witnesses for harassment and intimidation or even elimination. Some potential witnesses, within and outside the country, have allegedly been approached and may have been compromised.
15. *A narrative of victimhood is growing within two communities:* The mutual distrust between ethnic communities in Rift Valley has given rise to allegations that witnesses from two large communities are being coached to reinforce a narrative of victimhood. This observation is in line with the previous findings that revealed that some politicians were allegedly reaching out to victim groups such as the Internally Displaced Persons (IDPs) to persuade them not to participate in the investigative processes. They were enticed with promises of land, money and scholarships.
16. *Competing claims about what happened is preventing healing and reconciliation:* A disturbing finding is that communities are generating narratives for defence in the event of any prosecution. There is a template of narratives that has developed in the recent past. A respondent in Rift Valley, for instance, observed that the two communities that fought fiercest during the post election violence have their separate narratives; each with its version of the story.⁹ Still there are others who fear that truth will not come out because some people who are not victims have falsified claims to

⁵ Draft Report of the Inter-Ministerial Committee preparing for the first review conference of the Rome Statute held in Kampala between 31 May and 11 June 2010, dated 21 April 2010

⁶ Interview with a human rights NGO working on witness protection issues, 12 Sept 2010; see also *Daily Nation*, 'Witness safety agency gets nod to hire' 13 Sept 2010

⁷ '400 Poll chaos victims apply to join Hague trials' *Daily Nation*, 4 Sept 2010; also 'Poll chaos witnesses flown out' *Daily Nation*, 20 July 2010

⁸ Interview with a government investigator, 20 September 2010

⁹ Interviews in the Rift Valley, July and September 2010.

secure witness protection. *'No truth will come out. I hear members of one community say they are not guilty because they were fighting on behalf of and for somebody else. I hear the other side has also agreed on a common narrative. It is difficult to know if all these allegations are true because NGOs working with victims are not politically impartial and some are doing it for money. Ocampo should see through these layers of deception before drawing any conclusions.'*¹⁰

17. These new discourses have emerged because of the length of time it has take to begin investigations. No prosecutions have taken place. Failure to prosecute has given room for claims and counter claims about the violence and revising who the victims and perpetrators are. Competing claims and narratives may consolidate into competing 'truths' and that may not only prevent people from not only learning from the past but also undermining healing and reconciliation.
18. *Public confidence in the ICC intervention remains high despite it making a slow start:* The previous three review reports have shown that *Kenyans* overwhelmingly prefer the ICC to any local mechanism because they lack confidence in local judicial institutions. Confidence in the ICC has continued to remain high across the country before and after investigations into Kenya were approved. In June 2010, 52 per cent of respondents interviewed in the national survey were confident that the ICC would prosecute senior people who perpetrated the violence. In the survey, over 50 per cent of the respondents in Central, Eastern and the Coast provinces would support ICC trials. In Rift Valley, North Eastern and Western provinces, slightly more than 30 per cent would support the trial. Significantly, only a very small number, less than 5 per cent in all provinces, think that their people would violently attack members of other communities. Recent interviews on which this report is also based seem to corroborate these findings. In particular, concern that indictments by the ICC might trigger violence in the Rift Valley does not seem to align with local discourses.
19. *There will be no violence if ICC intervenes and indicts senior politicians from the involved communities.* Several scenarios may be drawn regarding the ICC intervention.
 - a. First there will be no violence at all, particularly if the indictment is seen to be sensitive to the country's ethno-regional political dynamics and contests. According to some respondents, arrests will be deemed fair if senior politicians from other communities are also arrested, preferably simultaneously or within short order. If one community perceives itself as a target for victimisation, it might reinforce prevailing discourses of persecution, with consequences for peaceful co-existence in future.
 - b. The second scenario is one in which one of the communities will attack others, but the attacks will be quickly managed through internal policing mechanisms. Elders will guide the community response, most probably by advising everybody to remain calm, 'until an appropriate time'.¹¹ Furthermore, the government security forces will be alert and quickly neutralise any outbreak of violence. A show of force similar to that displayed during the referendum may deter an outbreak of violence.

¹⁰ Interview with a victim who is also a peace worker in Eldoret, 16 September 2010

¹¹ FGD with a group of youth leaders, Eldoret, 15 September 2010

- c. The third scenario is one in which communities will be preoccupied with local level power politics and react with ambivalence to ICC indictments of community leaders. Those indicted will find it difficult to mobilise ethnic constituencies for support. In particular, local preoccupation with the implementation of the New Constitution, particularly local level political power struggles within the County, could diminish the relevance of a ‘community’ leader, hence limit the capacity to mobilise sustainable support.
20. There is a need to pay attention on the middle and lower level perpetrators: Although the indictment of senior politicians may not trigger violence, there is need to address impunity by also prosecuting middle and lower level perpetrator. The focus on those who bear the greatest responsibility may fail to deter those who carried out the actual arson, killing, rape and other attacks because they may feel that they will not be held accountable. For instance, although investigators from the ICC had already visited the country in May with a view to holding those responsible for the post-election violence responsible, the spectre of indictments did not deter political supporters from engaging in local level conflicts during some of the by-elections in June 2010 and during the referendum campaigns in July 2010.¹²
 21. On the basis of the findings for this period, it can be concluded that lack of a collective position within the Government remains the most significant threat to the fight against impunity. If left unaddressed, new divisions over the ICC will hinder implementation of the new constitution. The various interests, some seeking to prevent the ICC investigation and others promoting the ICC cause, will turn the New Constitution into a theatre where to wage their wars. Significant also is that influential individuals are organising against the ICC using ethnic constituencies. This has the potential to distract attention from the pursuit of justice for victims and the need to fight impunity. Political commitment to support the ICC is critical at this stage.
 22. Politicising the ICC intervention will be of little effect. Only the Pre-Trial Chamber (PTC) can stop the ICC. The Pre-Trial Chamber can decide to terminate the case or send the prosecutor back to find more evidence. Kenyan politicians cannot stop the process.

Illegal groups and security sector reforms

23. Chapter 4 of the New Constitution provides for the Bill of Rights, which includes the right to assemble, picket, demonstrate and present petitions to public authorities. Article 34 under the Bill of Rights provides for the freedom of the media. The Constitution provides the freedom and independence of electronic, print and other types of media. However, it states that such freedom may not be abused to propagate war, incite violence and advocate for ethnic hatred and discrimination.¹³

¹² Although there has been no political violence so far, there were several instances where youth engaged in acts of violence during political campaigns. Left unpunished, the youth can easily engage in violence similar to the post-election period. see Police foil campaign clash, Daily Nation 7 June, 2010; Chopper stoned as ‘Yes’ rivals face off, Daily Nation 25 July 2010

¹³ Constitution of Kenya, Chapter Four

24. Ironically, on the date of the Promulgation of the New Constitution, the police arrested activists who were peacefully demonstrating against the Government's decision to invite the Sudanese President, who has been indicted by the ICC. Human rights activists have also accused the Government of failing to uphold the Constitution by allowing the rendition of eight Kenyans to Uganda for investigations over bombings attributed to the Somali militia Al-Shabaab.¹⁴
25. The last review report noted a reduction of violence, a situation attributed to the lull in activities of illegal groups and improved food security following the bumper harvest in the long rains season. The latest statistics from the Ministry of Internal Security show that overall, crime levels have gone down by 4 per cent. However, Nairobi province records the highest increase in crime, attributed to the influx of IDPs who have fled the Rift Valley for the city, where they have boosted the ranks of extortion gangs.¹⁵
26. *Illegal groups re-inventing themselves:* The past four months saw a lull in the activities of known illegal groups ostensibly because some of their leaders were seeking to shed the negative image and present themselves as candidates for public office. However, the rise of macabre murders in Nairobi, Central and Nyanza (Kisii area) regions has raised concerns about the possible resurgence of illegally armed groups. The proliferation of extortion gangs particularly in urban low income areas has continued to pose a serious threat to security. Interviews in Nairobi reveal extortion gangs have taken control of the public transport industry, and a culture of impunity has emboldened them.
27. *Prevention of Organised Crimes Bill enacted:* The government has enacted a new law to deal with organised crimes and criminal groups. The law provides for stiff penalties for involvement in organised crime. Interestingly, the coming into force of the law coincided with the resumption of a nation-wide 'crackdown' on the Mungiki, an illegal group. In the past, such measures, which often resulted in human rights violations including extra-judicial killings, were employed for lack of a policy guideline and strategy to deal with organised criminal gangs. The Organised Crime Act focuses on the criminal dimension of illegal groups but does not address the socio-economical and political problems that promote their existence.
28. *Need for urgency in undertaking institutional reforms:* The re-invention of illegal groups, the return of macabre killings and the resurgence of extra-judicial killings point to the need for urgency in reforming the police and other institutions. More than two years after the signing of the National Accord and Reconciliation agreement, is a sufficient period to determine that police and other institutional reforms have been too slow to have the desired impact. Going into another election without the required police reforms is highly inadvisable. The New Constitution alone cannot guarantee stability; only commitment to the spirit and letter of the new constitution can do this. To show the new will, radical police reforms must be speeded up.
29. Introducing the legislation without reforming the police force, will not achieve the desired results. In fact, the need to reform the police force remains urgent, given the

¹⁴ Public forum on the kidnapping and rendition of Kenyans to Uganda, Nairobi, 24 September 2010

¹⁵ Interview with a senior government official, 25 September 2010

prevalence of internal wrangles, allegations of involvement in crime and conflicts between different organs.¹⁶ The Police Reforms Implementation Committee that oversees actualisation of the recommendations of the Task Force on Police Reforms has drafted a number of legislation to anchor police reforms in law. These include the Independent Policing Oversight Authority Bill, which is intended to establish a police oversight body; the National Police Service Bill which merges the Kenya Police and the Administration Police; and the National Police Service Commission Bill, which will be responsible for the management of the police force.¹⁷ The provisions in these Bills are consistent with Chapter 14 of the Constitution. Passing the Bills and enforcing them should be considered a matter of urgency.

The Referendum and the IDPs

30. Previous reports indicated that by June 2010, a majority of Kenyans believed that violence would not recur and that ethnic relations were steadily improving. Many people also felt more secure than they did at the beginning of 2008. However, as the referendum approached, the re-emergence of leaflets and resurgence of hate speech seemed to reverse the gains made in peace and reconciliation. The use of inflammatory language by the same leaders who had preached peace a few months earlier suggested that the promotion of sustainable inter-ethnic cohesion requires more strategic thinking.
31. *Allegations of disproportionate assistance to IDPs from only one community intensify resentment and reinforce local perceptions of ethnic favouritism:* As reported previously, there have been concerns that IDPs from those groups perceived as 'aggressors' have not received adequate Government assistance. In particular, allegations of lack of systematic assistance to Kalenjin IDPs and others who lost property in the violence has bred deep resentment against Kikuyu IDPs, who are perceived to be favoured by the Government. Allegations that people from some ethnic communities were struck off the registers of 'genuine' IDPs dominate discourses of ethnic favouritism. For instance, a group of 92 households displaced from Subukia and now camping at Chepsion in Kipkelion claim that they have not been assisted while the 'Government favoured' IDPs have been given land right to their camp.¹⁸
32. Records from the Ministry of Special Programmes indicate that of the 6802 families identified to be allocated land, 789 families have already received plots allotments and relocated to their farms.¹⁹ As noted in previous reports, the allocation of land to IDPs who had already bought their own land created divisions within IDP groups, particularly those who had not yet received any funding.²⁰ The records also indicate that only 13 tented camps are remaining, since nearly all IDPs have been 'resettled'. However, the IDP Network indicates that there are more than 40 camps where IDPs unable to return to their former homes continue to live.

¹⁶ Local media showed several incidents of violent confrontations

¹⁷ Speech by Prof. George Saitoti, Minister for Provincial Administration and Internal Security during the National Conference on Security Sector Reforms held on 20 -22 July 2010

¹⁸ Interview with representatives from the camp in Kipkelion, 17 September 2010

¹⁹ Ministry of Special Programmes, IDP Status Brief, 31 July 2010

²⁰ Interview with representative of IDPs in Nakuru, 4 August 2010

Table 1: Existing IDP camps

District	No. of Camps by source of data		Name of Tented camps according to IDP Network
	Ministry	IDP Network	
Molo	11	9	Total, Casino, Mosque, Ragwenda, Githima (Kioo Farm), Karai, Kamwaura A, Keringet Centre, Matunda
Uasin Gishu	2	11	Ya Mumbi, Naka, Kamuingi, Kambi Thomas, Geiti Farm, Rurigi, Kondoo 1-9*, Nyakinyua, Ray Farm, Mafuta
TransNzoia	0	3	Gatatha (Scheme Moto), Patwaka, GSU Salama
Turkana	0	3	Kakuma, Kanamkamer, Nakwamekwi
Kisii	0	1	Ekerenyo
Nyandarua	0	7	Kianda, Kaibaga, Kasuku Oljororok, Uiumiririe, Ridpa, Dundori, Mawingu,
Rongai	0	1	ALKO
Naivasha	0	3	Kikopey, Longonot, Gilgil
Kericho	0	2	Leru, Chepsion,
Nyando	0	1	Muhoroni
Total	13	41	

33. *Differences in meanings associated with the term ‘resettlement’ explain the discrepancy in the numbers.* According to Government practice, once IDPs in a particular camp have received the start up funds (Ksh. 10,000), the camp ceases to exist in records whether or not the IDPs leave the camp. Equating the term ‘resettlement’ with access to Government funds, therefore, does not help in giving an accurate picture of IDPs in camps. It gives a false impression about the number and plight of IDPs. Furthermore, there is also a tendency by some IDPs to divert the ‘resettlement’ funds to other usages while remaining in camps. There is need for an audit of the various categories, locations and circumstances of IDPs in Kenya in order to untangle the contested statistics and claims about the resettlement programme.
34. The number of IDPs who have received government funds is also contentious, fanning increasing allegations of misappropriation and embezzlement. Discussions at the Protection Working Group on IDPs have raised concern about inconsistencies in the data some of which shows in the table below. These inconsistencies in data have fed into observations about misappropriation of IDP resettlement funds.

Table 2: Disbursed Start-up Funds (Ksh. 10,000) as of July 2010

Province	Amount disbursed to IDPs (Ksh.10,000)	
	5 Oct 2009	31 July 2010
Rift Valley	1,096,086,000	1,071,056,000
Coast	8,250,000	11,580,000
Eastern	3,264,000	3,264,000
Central	47,950,000	101,030,000
Nairobi	37,900,000	37,940,000
Western	132,734,500	132,674,000
Nyanza	162,248,000	188,788,000
Total	1,488,432,500	1,509,392,000²¹

Source: MoSSP, IDP Brief, 31 July 2010

35. With regard to allegations of embezzlement, in 2009, the Kenya Human Rights Commission and the Kenya National Commission of Human Rights released separate reports highlighting cases of theft of about Ksh. 250 million by two government ministries, citing an audit report by the Auditor General.²² The Government promised to investigate alleged embezzlement, and the case was referred to the Kenya Anti-Corruption Commission for further investigations.

Conclusions

36. The IDPs continue to suffer; their problems are far from over. The Government is a signatory to the 2006 Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons and the 2009 African Union Convention for the Protection of IDPs in Africa (Kampala Convention). These should serve as important instruments for a lasting solution to the IDP problem. The continued presence of IDPs in camps and other settings is indicative of a structural problem that needs a more effective policy and institutional response.
37. Incoherence within the Grand Coalition Government over the ICC investigations continues to hinder ICC's work. The emergent new divisions in Government seek to politicise the investigations process and will make it difficult for ICC to access objective information and data. The various cliques, some seeking to prevent the ICC investigation and others promoting the ICC cause, are aimed at protecting political interests. The ICC itself must be alert to the reality that impunity has re-organised and is fighting back. The ICC must be aware that these interests promoting impunity are also economically and politically powerful. They have the ability to mobilise ethnic constituencies in their support so as to frustrate the ICC's work difficult. But this is not the time to give up; it is the time to act and with speed before the next General Elections.

²¹ The records obtained from the Ministry indicate the total disbursed by end of July to be sh. 1,428,320,000

²² KNCHR Press release 'Outcome of KCNCHR assessment of GOK resettlement program of IDPs and corruption allegations' 2 Dec 2009; KHRC, *Out in the Cold*, December 2009

3. THE REFERENDUM AND THE NEW CONSTITUTION OF KENYA

Introduction

38. The parties to the mediation process and the Panel of Eminent African Personalities recognised that there were several long-standing issues that had caused the crisis and that these would still lead to recurrence of violence if unaddressed. Among these were constitutional and institutional reforms. The KNDR formulated Agenda Item 4 to guide implementation of reforms on these issues.
39. This report examines the development of Kenya's New Constitution because of its significance in opening an opportunity for far-reaching reforms including those in all Agenda Item 4 issues. The report recognises that issues under Agenda Item 4 are very important and would complement consolidation of the philosophy and values undergirding the New Constitution. Implementation of the police, civil service, judicial and parliamentary reforms, for instance, should proceed seamlessly even as the framework for implementing the New Constitution evolves. Institutional reforms should not be delayed.

Key Findings

- At 72 percent, the referendum voter turnout is the highest ever recorded turn out in Kenya's electoral history
- The Constitution received an overwhelming popular endorsement but the 30 per cent disapproval rate points to strong vested interests that will continue to linger on the horizon
- The referendum was viewed as a low-stakes national event unlike personalised electoral contests
- Heavy police presence and the looming shadow of the ICC deterred violence
- The campaign by the National Cohesion and Integration Commission (NCIC) against hate speech curtailed mobilisation for violence
- The Interim Independent Electoral Commission's handling of the voting and tallying process restored confidence in the electoral process
- IDPs and 'outsiders' take pragmatic measures to avoid violence and its effects

The historical significance of the New Constitution

40. The passing of a New Constitution through a peaceful constitutional referendum in August 2010 marks a major positive milestone in Kenya's political history. It is a culmination of years of protracted struggle that has defined the second phase of democratic consolidation after the reintroduction of multi-party democracy in November 1991. It represents the attainment of major structural reforms and, in this sense, complements the economic recovery and transition ushered in through the Economic Recovery Strategy for Employment and Wealth Creation (ERS) launched at the beginning of the National Rainbow Coalition (NARC) government in 2003. It also complements policies around Vision 2030.
41. It is indisputable that Kenya's New Constitution enjoys wide popular support and legitimacy as evidenced by the huge number of people who turned up to vote (72 per

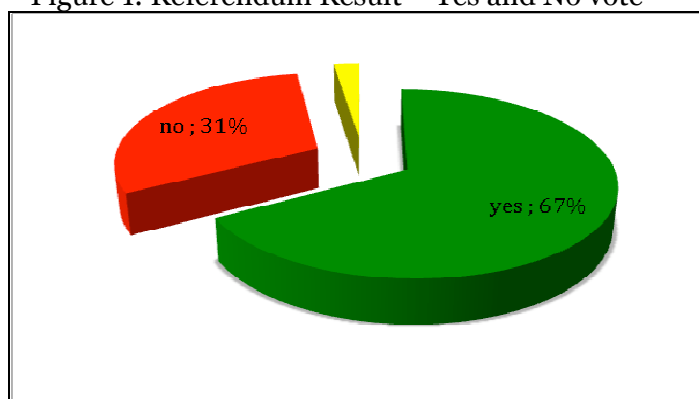
cent of all votes cast) and the number that approved it (67 percent). But what distinguishes the August 2010 referendum from past major political events is its popularity. At a 72 percent voter turnout, the 2010 referendum voter turnout is the highest recorded in the history of elections in Kenya. This alone is indicative of renewed confidence in the ballot and the vote itself after the post-2007 election violence that left a legacy of deep mistrust in electoral processes. Secondly, with the 67 percent of the votes in favour, the New Constitution has passed an important legitimacy test. The referendum and the passing of the New Constitution, therefore, is of great historical significance to Kenya and even to Africa in general.

- 42. The passage of the New Constitution marks the beginning of reforms on important issues that have remained unaddressed for a long while. Some of these issues informed the pattern of voting during the referendum and may even affect implementation of some of the articles of the New Constitution. This pattern of voting and its possible impact on implementation is discussed below.

The Referendum Result: An Analysis

- 43. An examination of the voting pattern during the referendum reveals that there is no clear linkage between people’s regional location and their voting behaviour with regard to the constitution. Constituencies in the same county and region would vote differently in spite of sharing similar experiences or local circumstances. But the vote on whether to approve a proposed constitution or not is different from a vote for a leader. The latter is about personal stakes for which people put their lives at risk. It is apparent that the constitution did not have such stakes. This would mean that nationhood is yet to mature – more people tend to vote for personal rather than national interests. Nevertheless, it is important to begin to pay attention to exactly why voters in some areas voted against the New Constitution. The 31 per cent No vote is sizable and also significant in terms of uncovering the strong interests that were threatened by the New Constitution. These cannot be ignored for they will continue to threaten effective implementation of the New Constitution.

Figure 1: Referendum Result – Yes and No vote

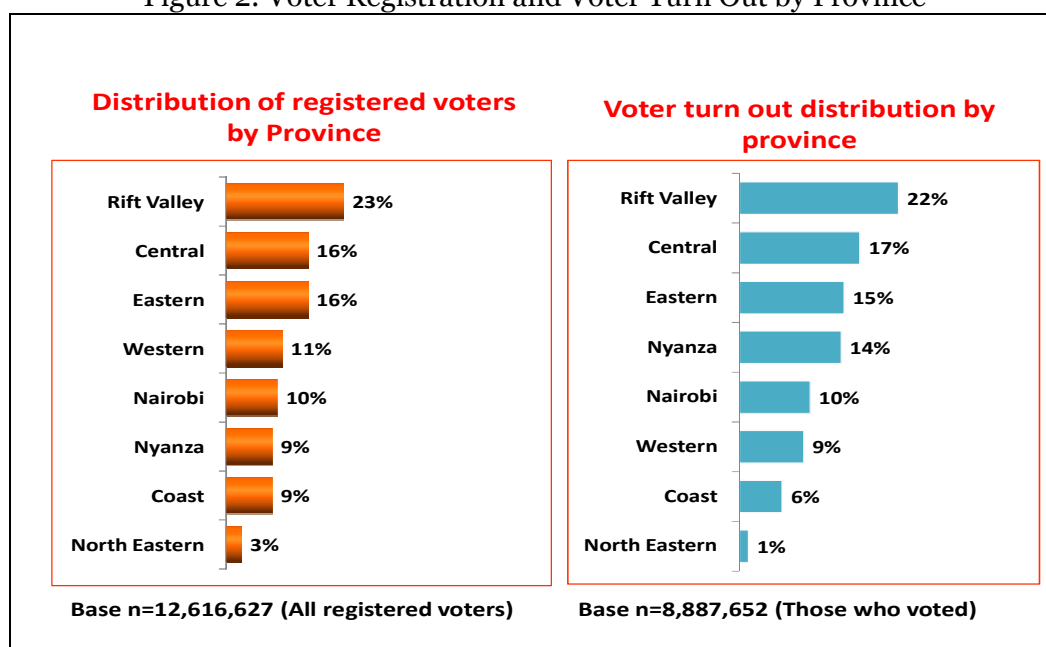


- 44. *Rift Valley had the highest No vote:* The majority of the No vote was in the Rift Valley (66 per cent) and several other areas that voted against the proposed constitution because they feared “local imperialism” – i.e. they feared domination by other groups

in the new Counties.²³ Lower Eastern Province also had a significant No vote – about 43 percent. Although the Church’s opposition to the draft constitution influenced this outcome in these areas, it is certain that the ‘County question’ was one of the key factors influencing this pattern of voting. This implies that the County question will remain on the radar even as implementation sets off. This calls for strict adherence to Article 10 of the Constitution – National Values and Principles of Governance – in establishing County governments in order to ensure that they are inclusive and that they are anchored in the principles of equity, democracy and best practice.

45. *There is poor correlation between voter registration and voter-turn out:* An examination of the relationship between percentage voter registration (VR) and voter turnout (VT) on a constituency and regional basis show interesting patterns and asymmetries. Areas that had high voter registration are not necessarily the same areas that had a high voter turn out. Voter turnout and voter registration were only at par in Nairobi, also traditionally the lowest voter turnout region in the previous elections. Voter turnout was higher than voter registration only in Nyanza and Central provinces. The biggest VT: VR ratio was witnessed in Coast and Western provinces. Turn out was lower than registration in these provinces, which may suggest that the Constitution did not sufficiently respond to the voter expectations that voters had at the time of registration as voters.²⁴ It is also possible that they were complacent that the constitution will go through and therefore did not turn out to vote.

Figure 2: Voter Registration and Voter Turn Out by Province

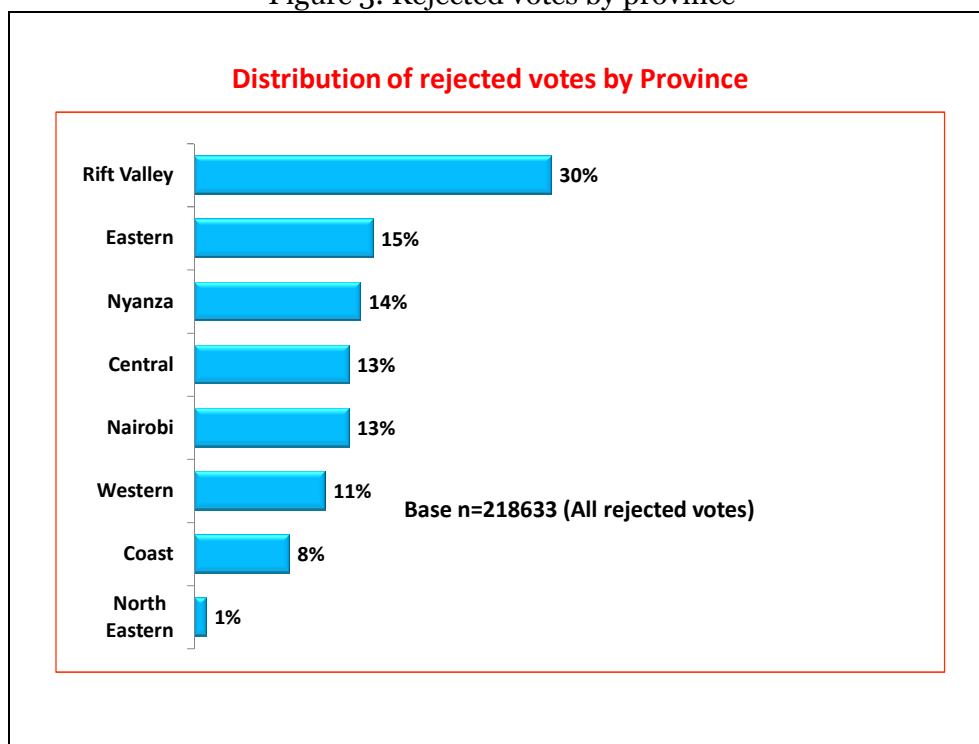


²³ July 2010 National Poll, South Consulting.

²⁴ Coast, for example, has always desired a majimbo (federal) system of government which is a more radical form of devolution than the new constitution provides for. Western province also had reservations about the size and number of counties that some argued did not correspond with their numeric strength – a point more or less vindicated by the census whose results were released after the referendum.

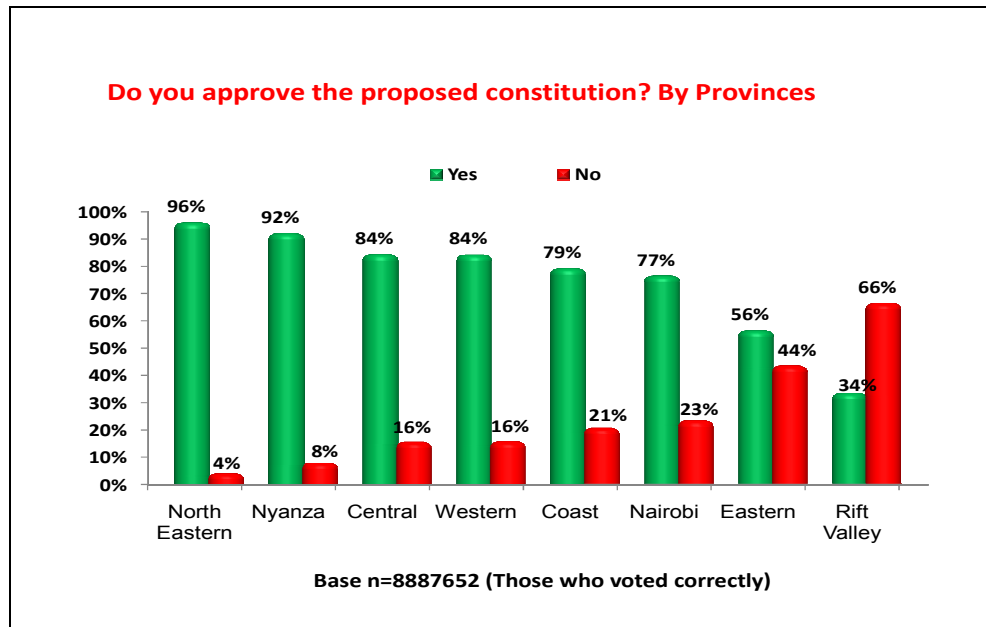
46. *The number of rejected votes was high:* The other notable point in the referendum results is that at 218, 633 (2 percent of voter turn out) the number of rejected or spoiled votes was rather high. Although as a statistic it appears small in value (2 percent), it has significant practical and political implications - the total number of spoiled votes is almost equivalent to the difference between the PNU and ODM presidential candidates' results in the disputed 2007 presidential elections results. In percentage terms Rift Valley, Eastern and Nyanza had more rejected votes than other regions. Many constituencies had between 5 and 10 percent rejected votes. The probable explanations for this high number of rejected votes may have to do with confusing instructions on the use of symbols or marking the ballots. It may as well be attributable to insufficient voter education. This is one area that requires the attention of the IIEC in the transition period particularly given the likely complexity of ballots and logistics in the coming elections. There will be many positions to vote for compared to the past when people voted for only the President, MP and a civic leader. Voters will be making choices on many positions. The ballot and logistics will be complex.

Figure 3: Rejected votes by province



47. The approval rating was generally strong in seven of the eight provinces. It was highest in North Eastern at 96 per cent and lowest in Rift Valley at 34 per cent. In four provinces the approval rating was over 80 per cent; in two it stood at over 70 per cent; and in one it registered 56 per cent. A regional and constituency assessment of the vote suggests that the steadiness or lack thereof of the political leadership may have influenced the strength of the vote either way. Regions whose political leadership exhibited low passion also registered low results. This observation also holds for areas that in the main eventually voted 'Yes'.

Figure 4: Approval rating of the New Constitution by regions



NAIROBI REGION

48. In Nairobi all the constituencies returned a strong Yes vote. Except for the largest constituency, Embakasi, the No vote in all the areas was less than 26 percent in all constituencies. Most of this was attributable to the Church whose strongest support base is among the urban poor. Langata had the highest number of rejected votes (4 per cent), surpassing Embakasi which that has the highest number of voters. This may have resulted from misinterpretation of the voter guidelines as well as poor voter education.

Table 3: Referendum results – Nairobi region

Nairobi								
Constituency	Yes	Yes [%]	No	No [%]	Rejected votes	Rejected votes[%]	Voter turn out	Voter turn out [%]
Makadara	62,636	72%	22,397	26%	1,802	1%	86,835	69%
Kamukunji	64,211	73%	20,508	23%	2,938	2%	87,657	66%
Starehe	68,815	70%	25,529	26%	4,612	3%	98,956	72%
Langata	89,280	76%	22,653	19%	6,251	4%	118,184	73%
Dagoretti	63,855	73%	21,119	24%	2,257	2%	87,231	71%
Westlands	76,398	78%	18,540	19%	3,345	2%	98,283	71%
Kasarani	104,214	77%	28,245	21%	2,596	1%	135,055	74%
Embakasi	149,212	73%	49,204	24%	5,497	2%	203,913	69%

COAST REGION

49. All the 22 constituencies in Coast province returned a strong Yes verdict. In all but one constituency, over 70 percent of the voters approved the draft constitution. But Ganze

had the narrowest Yes win; about 31 percent rejected the draft. Even though the overall Yes margins were still large, 20 – 25 percent voters rejected the draft constitution in 10 of the 22 constituencies.

50. The strong Yes vote in this region may have been a result of the interplay of three issues: land, devolution and religion, particularly the Kadhis Court question²⁵. The region has a historical land squatter problem which the Constitution, both in the land chapter and the Bill of Rights, promises to deal with. The region has also been the strongest advocate for the majimbo system of government. The region's mainstream leadership rallied around the Constitution with the exception of one. The fear of dominance by the majority in the County probably contributed to this exception.

Table 4: Referendum results – Coast Region

Coast								
Constituency	Yes	Yes [%]	No	No [%]	Rejected votes	Rejected votes[%]	Voter turn out	Voter turn out [%]
Changamwe	42,515	73%	13,658	24%	1,829	2%	58,002	63%
Kisauni	54,494	75%	15,989	22%	2,206	2%	72,689	63%
Likoni	22,710	80%	4,322	15%	1,242	2%	28,274	56%
Mvita	32,820	80%	7,065	17%	1,093	2%	40,978	60%
Msambweni	29,862	81%	5,882	16%	1,243	2%	36,987	54%
Matuga	17,623	87%	2,522	12%	169	0%	20,314	49%
Kinango	17,122	75%	4,965	22%	797	2%	22,884	45%
Bahari	30,750	75%	8,751	21%	1,415	2%	40,916	49%
Kaloleni	23,080	71%	8,242	25%	1,305	2%	32,627	48%
Ganze	11,407	66%	5,455	31%	469	1%	17,331	50%
Malindi	31,561	77%	8,808	21%	821	1%	41,190	58%
Magarini	13,945	75%	4,096	22%	590	2%	18,631	52%
Garsen	10,196	73%	3,552	25%	205	1%	13,953	50%
Galole	7,609	75%	2,313	23%	167	1%	10,089	53%
Bura	9,511	89%	1,025	10%	192	1%	10,728	48%
Lamu East	2,615	95%	112	4%	15	0%	2,742	30%
Lamu West	12,097	74%	3,748	23%	607	2%	16,452	57%
Taveta	11,155	75%	3,046	21%	574	3%	14,775	69%
Wundanyi	13,159	86%	1,731	11%	463	2%	15,353	60%
Mwatate	15,541	84%	2,335	13%	541	2%	18,417	60%
Voi	15,854	78%	3,915	19%	445	1%	20,214	62%
Kinango	55,072	86%	7,767	12%	1,047	1%	63,886	80%

²⁵ The issue of religion may need to be treated with a little more circumspection given that the constituencies where Islam is strongest – particularly Mombasa County – also returned significant NO votes. It may be that the pulling power of the landed gentry was strong.

NORTH EASTERN

51. This region and all its Counties returned a very strong Yes vote that in percentage terms, was the highest in the country (96 per cent). This strong showing could be attributed to two factors: one, Kadhi's Court, which enjoys universal support of the predominantly Muslim region in an area under-served by the formal judiciary and, two, the promise of devolution. Interestingly the region was one of the two constituencies country wide (Wajir North and Vihiga in Western) that had zero rejected votes. Generally the number of rejected votes in North Eastern province is negligible compared to other regions.

Table 5: Referendum results – North Eastern Region

North Eastern								
Constituency	Yes	Yes [%]	No	No [%]	Rejected votes	Rejected votes[%]	Voter turn out	Voter turn out [%]
Dujis	17,378	92%	1,337	7%	221	1%	18,936	57%
Lagdera	7,751	97%	177	2%	73	1%	8,001	37%
Fafi	3,475	97%	94	3%	10	0%	3,579	40%
Ijara	6,066	95%	292	5%	28	0%	6,386	51%
Wajir North	3,840	89%	472	11%	0	0%	4,312	43%
Wajir West	10,755	98%	242	2%	6	0%	11,003	46%
Wajir East	12,675	96%	541	4%	46	0%	13,262	56%
Wajir South	7,047	94%	395	5%	48	1%	7,490	34%
Mandera West	11,738	99%	77	1%	14	0%	11,829	65%
Mandera Central	17,145	98%	303	2%	87	0%	17,535	60%
Mandera East	13,122	92%	1,040	7%	66	0%	14,228	50%

EASTERN

52. Eastern province is ethnically heterogeneous, with central and lower parts heavily settled by the Meru, Embu and the Kamba. In the north are mainly the Gabra, Rendille, Somali, Samburu and Borana. While all the constituencies in the north returned a strong Yes vote, the other two parts of Eastern had a marginal Yes vote. In Lower Eastern, six constituencies returned a No vote. Even in areas where Yes won, the margins for the most part were exceptionally thin.
53. The voting pattern in Lower Eastern emerged from a combination of factors: one, indecisive leadership by the area leaders; two, the strong influence of the Church; and, three, misgivings about the low number of Counties measured against the population size. Lower Eastern had a tension between grievances over the County and a natural urge to support the Constitution because senior leaders such as the Vice President and senior Cabinet Ministers campaigned for it. Voter loyalty was also split between political and religious leadership. Again there is need to begin paying attention to issues especially around the County government so as to assuage the anxieties

expressed by the opponents of the Constitution in the area.

Table 6: Referendum results – Eastern Region

Eastern								
Constituency	Yes	Yes [%]	No	No [%]	Rejected votes	Rejected votes[%]	Voter turn out	Voter turn out [%]
Moyale	10,196	80%	2,518	20%	85	1%	12,799	42%
North Horr	5,568	85%	951	15%	11	0%	6530	32%
Saku	7,723	81%	1,823	19%	46	0%	9,592	59%
Laisamis	6,800	73%	2,465	27%	30	0%	9295	47%
Isiolo North	16,646	78%	4,398	21%	339	2%	21383	64%
Isiolo South	6,668	94%	360	5%	75	1%	7103	60%
Igembe South	20,635	36%	35,365	62%	1,276	2%	57276	75%
Igembe North	15,603	34%	29,477	64%	875	2%	45955	75%
Tigania West	20,464	66%	9,665	31%	1,018	3%	31147	70%
Tigania East	24,667	65%	12,444	33%	806	2%	37917	75%
North Imenti	51,598	73%	18,076	26%	1,121	2%	70795	68%
Central Imenti	35,406	73%	11,497	24%	1,528	3%	48431	75%
South Imenti	39,827	69%	17,418	30%	610	1%	57855	73%
Nithi	49,515	67%	21,957	30%	2,408	3%	73880	71%
Tharaka	14,627	47%	15,655	51%	680	2%	30962	68%
Manyatta	27,548	52%	23,392	45%	1,594	3%	52534	69%
Runyenjes	23,630	52%	18,086	40%	4,000	9%	45716	67%
Gachoka	17,231	53%	14,341	44%	1,140	3%	32712	69%
Siakago	9,330	40%	13,344	57%	862	4%	23536	69%
Mwingi North	24,489	61%	14,780	37%	854	2%	40123	63%
Mwingi South	22,372	59%	14,541	38%	965	3%	37878	63%
Kitui West	14,283	41%	19,639	56%	944	3%	34866	63%
Kitui Central	19,416	53%	16,201	44%	1,069	3%	36686	62%
Mutito	14,201	58%	9,654	39%	606	2%	24461	66%
Kitui South	13,488	48%	14,177	50%	620	2%	28285	60%
Masinga	15,197	53%	13,356	46%	309	1%	28862	66%
Yatta	18,342	58%	12,550	40%	831	3%	31723	63%
Kangundo	26,568	49%	26,477	49%	834	2%	53879	62%
Kathiani	31,243	52%	28,804	48%	52	0%	60099	64%
Machakos Town	22,069	43%	27,654	54%	1,627	3%	51350	66%
Mwala	19,489	48%	20,453	50%	694	2%	40636	63%
Mbooni	20,554	45%	23,737	52%	941	2%	45232	69%
Kilome	9,572	43%	12,315	55%	494	2%	22381	65%
Kaiti	13,506	46%	15,465	53%	384	1%	29355	68%
Makueni	28,340	51%	26,150	47%	834	2%	55324	67%
Kibwezi	24,298	49%	22,924	47%	1,918	4%	49140	64%

CENTRAL

54. Central province returned a strong Yes vote in all constituencies. The NO vote was stronger in greater Kiambu County partly because of the strong influence of the Church and partly as a product of indecisive leadership. Furthermore, influential leaders in many parts of the region belatedly decided to support approval of the constitution particularly after the President's had held large campaign rallies in the country. It was not politically prudent, therefore, to go against the President's desire to support approval of the draft. Nevertheless, it is notable that there are still some constituencies where the No vote was about 20 percent.

Table 7: Referendum results – Central Region

Central								
Constituency	Yes	Yes [%]	No	No [%]	Rejected votes	Rejected votes[%]	Voter turn out	Voter turn out [%]
Kipipiri	25,976	88%	3,074	10%	531	2%	29,581	78%
Ol Kalou	60,036	92%	4,238	6%	1,127	2%	65,401	79%
Ndaragwa	30,432	94%	1,780	5%	241	1%	32,453	82%
Tetu	30,183	92%	2,232	7%	382	1%	32,797	81%
Kieni	55,659	90%	5,085	8%	889	1%	61,633	79%
Mathira	53,736	87%	7,158	12%	595	1%	61,489	81%
Othaya	34,806	90%	3,039	8%	626	2%	38,471	80%
Mukurweini	30,507	89%	3,148	9%	443	1%	34,098	80%
Nyeri Town	42,288	85%	6,281	13%	1,274	3%	49,843	82%
Mwea	45,385	79%	10,765	19%	1,334	2%	57,484	75%
Gichugu	36,078	75%	11,655	24%	653	1%	48,386	75%
Ndia	32,183	85%	5,554	15%	248	1%	37,985	78%
Kirinyaga Central	34,995	80%	8,491	19%	489	1%	43,975	78%
Kangema	26,924	9%	2,589	9%	429	1%	29,942	80%
Mayhioya	30,411	91%	2,430	7%	489	1%	33,330	81%
Kiharu	55,752	85%	8,386	13%	1,594	2%	65,732	79%
Kigumo	38,060	85%	5,765	13%	923	2%	44,748	79%
Maragwa	41,025	84%	6,319	13%	1,409	3%	48,753	77%
Kandara	48,630	86%	6,278	11%	1,728	3%	56,636	80%
Gatanga	48,655	85%	8,050	14%	750	1%	57,455	78%
Gatundu South	32,422	75%	10,209	24%	541	1%	43,172	78%
Gatundu North	30,290	79%	7,014	18%	1,211	3%	38,515	78%
Juja	101,472	74%	33,589	24%	2,687	2%	137,748	74%
Githunguri	45,542	78%	11,243	19%	1,244	2%	58,029	82%
Kiambaa	63,799	75%	18,848	22%	2,031	2%	84,678	80%
Kikuyu	71,490	78%	18,537	20%	1,884	2%	91,911	79%
Limuru	39,127	80%	8,392	17%	1,392	3%	48,911	79%
Lari	34,032	79%	7,672	18%	1,501	3%	43,205	80%

RIFT VALLEY

55. Rift Valley province is highly cosmopolitan and its referendum vote results mixed. Of its 49 constituencies, 31 voted No and 18 voted YES. All the Kalenjin constituencies in the Kericho, Baringo, Eldoret and Nandi Counties voted overwhelmingly No. So did Pokot and Transmara. However, Samburu, Trans Nzoia, Laikipia, Nakuru, Narok, and Kajiado counties all voted Yes. But in some of these Counties the returns were split: for example, Kajiado Central voted No as did Narok South and Kuresoi in Nakuru County. Surprisingly, voter turnout was low in many constituencies in North Rift that voted Yes. This pattern of voting, nonetheless, reveals that Rift Valley did not have a bloc No vote. The vote was fragmented compared to the 2005 referendum and the 2002 general election when the Kalenjin, Masai, Turkana and Samburu voted as a block and in a similar pattern.
56. Factors responsible for this pattern included political grievances, fear of the implications of land clauses particularly regarding land acquired through political patronage, and some influence of the Church. There may have been an overlay of ethnicity in this vote but many in these regions may have also seen the Constitution as a possible cure to their historical marginalisation. Important, however, is that the region stood distinctly, in isolation from the rest of the country.
57. The fact that leaders from a single community would choose to vote against the constitution while other regions and communities approved it, could impede implementation if the factors responsible for the voting pattern are not identified and addressed in earnest. A point of caution: the voting behaviour could have arisen from issues extraneous to the constitution. Interviews with many respondents in the area point to political factionalism within ODM as the main factors responsible for this trend.

Table 8: Referendum results – Rift Valley Region

Rift Valley								
Constituency	Yes	Yes [%]	No	No [%]	Rejected votes	Rejected votes[%]	Voter turn out	Voter turnout [%]
Kacheliba	3,962	29%	9,324	69%	151	1%	13,437	62%
Kapenguria	7,891	19%	31,970	79%	687	2%	40,548	81%
Sigor	5,824	17%	28,363	81%	624	2%	34,811	81%
Samburu West	18,142	61%	11,307	38%	418	1%	29,867	72%
Samburu East	7,747	81%	1,685	18%	77	1%	9,509	63%
Kwanza	28,190	64%	14,520	33%	1,171	3%	43,881	73%
Saboti	53,915	70%	21,251	28%	1,731	2%	76,897	73%
Cherangany	23,266	52%	16,577	37%	4,519	10%	44,362	79%
Eldoret North	43,317	39%	65,007	58%	2,951	3%	111,275	82%
Eldoret East	14,565	22%	50,667	76%	1,459	2%	66,691	84%
Eldoret South	22,889	33%	41,161	60%	4,610	7%	68,660	82%
Marakwet East	1,817	8%	20,008	91%	177	1%	22,002	92%
Marakwet West	1,580	5%	28,484	93%	596	2%	30,660	89%

Keiyo North	1,528	6%	23,643	93%	349	1%	25,520	86%
Keiyo South	2,443	7%	34,424	92%	615	2%	37,482	89%
Mosop	2,611	5%	46,884	92%	1,546	3%	51,041	90%
Aldai	7,130	16%	33,027	76%	3,401	8%	43,558	81%
Emgwen	12,240	19%	48,869	77%	2,006	3%	63,115	86%
Tinderet	9,624	17%	45,398	79%	2,711	5%	57,733	83%
Baringo East	4,895	42%	6,681	57%	97	1%	11,673	70%
Baringo North	1,323	4%	28,369	95%	310	1%	30,002	89%
Baringo Central	6,734	14%	38,875	84%	850	2%	46,459	85%
Mogotio	1,509	7%	19,273	91%	373	2%	21,155	91%
Eldama Ravine	7,865	23%	25,021	74%	702	2%	33,588	85%
Laikipia West	58,810	85%	9,020	13%	1,051	2%	68,881	82%
Laikipia East	45,338	85%	5,869	11%	2,340	4%	53,547	77%
Naivasha	91,197	85%	11,898	11%	4,578	4%	107,673	78%
Nakuru Town	81,782	78%	19,018	18%	4,548	4%	105,348	76%
Kuresoi	14,377	21%	54,832	79%	554	1%	69,763	89%
Molo	71,825	77%	18,926	20%	2,103	2%	92,854	84%
Rongai	24,182	52%	20,391	44%	1,878	4%	46,451	81%
Subukia	55,425	89%	4,098	7%	2,965	5%	62,488	84%
Kilgoris	15,231	26%	41,885	72%	855	1%	57,971	82%
Narok North	35,355	70%	14,513	29%	900	2%	50,768	75%
Narok South	22,690	36%	38,410	62%	1,096	2%	62,196	75%
Kajiado North	61,926	68%	27,500	30%	2,018	2%	91,444	76%
Kajiado Central	14,076	37%	23,461	62%	447	1%	37,984	78%
Kajiado South	14,545	53%	12,682	46%	391	1%	27,618	72%
Bomet	2,622	4%	65,870	95%	962	1%	69,454	90%
Chepalungu	2,979	7%	42,169	92%	615	1%	45,763	89%
Sotik	2,398	4%	54,045	95%	681	1%	57,124	90%
Konoin	2,549	6%	42,368	93%	522	1%	45,439	89%
Buret	1,774	3%	52,807	96%	594	1%	55,175	91%
Belgut	4,760	7%	59,061	91%	1,048	2%	64,869	89%
Ainamoi	7,809	14%	47,621	84%	1,104	2%	56,534	100%
Kipkelion	9,530	15%	52,434	82%	1,729	3%	63,693	88%
Turkana North	9,310	63%	5,459	37%	90	1%	14,859	36%
Turkana Central	19,022	73%	7,097	27%	106	1%	26,225	54%
Turkana South	10,812	73%	3880	26%	141	1%	14,833	57%

WESTERN

58. Western province voted overwhelming in support for the Constitution. Only Mt Elgon delivered a No vote. But Mt Elgon has always been an outlier constituency given that it has stronger cultural similarities to the Kalenjin in Rift Valley than to the predominant groups in Western. This is the same with the three Rift Valley constituencies of Kwanza, Saboti, and to a lesser extent Cheranganyi – all of which voted for the Constitution as Western province, albeit with much smaller margins than the rest of Western. The Mt Elgon vote was also informed by the County question and the fear of domination by numerically larger groups in Western.

Table 9: Referendum results – Western Region

Western									
Constituency	Yes	Yes [%]	No	No [%]	Rejected votes	Rejected votes [%]	Voter turn out	Voter turn out [%]	Voter turn out
Malava	33,232	85%	5,120	13%	859	2%	61841	39,211	63%
Lugari	52,835	83%	8,810	14%	2,017	3%	93853	63,662	68%
Mumias	39,615	89%	4,043	9%	713	2%	66422	44,371	67%
Matungu	25,622	89%	2,472	9%	608	2%	41668	28,702	69%
Lurambi	49,234	85%	7,301	13%	1,579	3%	96057	58,114	60%
Shinyalu	24,984	88%	2,636	9%	733	3%	57420	28,353	49%
Ikolomani	22,469	92%	1,637	7%	430	2%	35833	24,536	68%
Butere	28,018	90%	1,954	6%	1,051	3%	48162	31,023	64%
Khwisero	20,783	92%	1,415	6%	453	2%	35192	22,651	64%
Emuhaya	35,922	90%	3,052	8%	1,092	3%	66482	40,066	60%
Sabatia	28,809	91%	1,900	6%	1,013	3%	47949	31,722	66%
Vihiga	19,326	93%	1,374	7%	0	0%	34012	20,700	61%
Hamisi	25,382	86%	2,432	8%	1,823	6%	52211	29,637	57%
Mt. Elgon	12,766	31%	27,682	67%	976	2%	51845	41,424	80%
Kimilili	43,695	80%	8,281	15%	2,773	5%	81562	54,749	67%
Webuye	36,764	80%	8,048	17%	1,259	3%	67510	46,071	68%
Sirisia	34,560	78%	7,893	18%	1,727	4%	67176	44,180	66%
Kanduyi	30,376	71%	11,683	27%	964	2%	68148	43,023	63%
Bumula	23,255	76%	5,826	19%	1,550	5%	51600	30,631	59%
Amagoro	42,543	80%	9,553	18%	1,101	2%	77823	53,197	68%
Nambale	33,859	84%	5,734	14%	728	2%	61096	40,321	66%
Butula	22,774	91%	1,739	7%	597	2%	37435	25,110	67%
Funyula	16,694	86%	2,302	12%	315	2%	32250	19,311	60%
Budalangi	12,397	84%	2,185	15%	111	1%	22909	14,693	64%

NYANZA

59. All the constituencies in Nyanza, except Kuria, voted in favour of the New Constitution. However, there was a significant No vote in Kisii Nyanza compared to the Luo-dominated constituencies, where approval rating was above 95 percent of the vote. An interesting outcome in Luo-dominated Nyanza is the voter turn out in all constituencies where it was generally above 80 percent and two constituencies

recorded about 90 percent voter turn out. The number of rejected votes was generally low in the area. In Kisii-dominated areas of Nyanza, however, voter turn out was under 64 percent generally except one with 73 percent. Two other constituencies had about 50 percent.

Table 10: Referendum results – Nyanza Region

Nyanza								
Constituency	Yes	Yes [as percentage of voter turn out]	No	No [as percentage of voter turn out]	Rejected votes	Rejected votes [as percentage of voter turn out]	Voter turn out	Voter turnout [as percentage of Registered voters]
Ugenya	49,788	97%	642	1%	891	2%	51,321	80%
Alego	49,155	97%	535	1%	986	2%	50,676	81%
Gem	38,892	97%	552	1%	506	1%	39,950	79%
Bondo	40,580	98%	375	1%	349	1%	41,304	83%
Rarieda	35,206	98%	429	1%	244	1%	35,879	80%
Kisumu Town East	45,294	95%	1,189	2%	1,293	3%	47,776	81%
Kisumu Town West	68,699	95%	2,780	4%	717	1%	72,196	79%
Kisumu Rural	39,024	98%	489	1%	305	1%	39,818	82%
Nyando	38,009	98%	282	1%	317	1%	38,608	84%
Muhoroni	37,434	96%	1,203	3%	209	1%	38,846	83%
Nyakach	35,805	99%	276	1%	242	1%	36,323	82%
Kasipul-Kabondo	54,015	98%	330	1%	770	1%	55,115	89%
Karachuonyo	44,408	98%	205	0%	507	1%	45,120	87%
Rangwe	50,701	98%	547	1%	292	1%	51,540	86%
Ndhiwa	42,478	99%	240	1%	277	1%	42,995	88%
Rongo	51,634	97%	530	1%	880	2%	53,044	87%
Migori	48,677	99%	478	1%	242	0%	49,397	89%
Uriri	28,977	98%	294	1%	228	1%	29,499	84%
Nyatike	37,805	99%	255	1%	201	1%	38,261	89%
Mbita	26,230	98%	310	1%	156	1%	26,696	84%
Gwassi	23,673	98%	254	1%	164	1%	24,091	83%
Kuria	16,486	42%	21,717	56%	836	2%	39,039	71%
Bonchari	17,039	70%	6,761	28%	648	3%	24,448	73%
South Mugirango	15,658	75%	4,928	24%	237	1%	20,823	50%
Bomachoge	26,018	77%	7,187	21%	481	1%	33,686	51%
Bobasi	28,182	74%	7,840	21%	2,144	6%	38,166	63%
Nyaribari Masaba	22,076	83%	3,718	14%	684	3%	26,478	62%
Nyaribari Chache	23,109	72%	8,004	25%	1,127	3%	32,240	66%
Kitutu Chache	30,891	68%	13,253	29%	1,200	3%	45,344	63%
Kitutu Masaba	37,301	84%	6,202	14%	1,068	2%	44,571	64%
West Mugirango	29,815	86%	4,195	12%	689	2%	34,699	63%
North Mugirango Borabu	40,974	86%	5,491	11%	1,367	3%	47,832	63%

The Referendum: Free and Peaceful

60. *The Referendum on the New Constitution was conducted peacefully:* After several months of lively campaigns on the Proposed New Constitution, Kenyans went for a national referendum on 4 August 2010. The voting and tallying process started and ended peacefully in all parts of the country. The peaceful referendum was lauded locally and internationally as a crucial step in the consolidation of democratic institutions and the rule of law. It was a statement on the Coalition Government's capacity to deliver on needed reforms.²⁶ Having a peaceful referendum two years after the post-election violence and concluding a constitutional review process after about two decades of failed attempts are significant achievements. Some have termed this as the most important achievement since independence itself in 1963.²⁷
61. *Peaceful referendum reduced anxiety:* The days preceding the referendum were filled with anxiety as Kenyans expressed fear of post-referendum chaos in the fashion of the 2007 post-election violence. Peace-building NGOs mapped potential hotspots of violence and identified early-warning signs. Among these were the resurgence of hate speech, and circulation of literature warning certain communities to leave some areas particularly in the Rift Valley.²⁸ However, there was no violence reported during the period.

Factors behind the peaceful referendum

62. Several factors, combined, led to a peaceful referendum. There were political, institutional or structural, and ethnicity-related factors. Amongst these were also ICC-related factors that may be considered.

Political factors

63. *The alliance between PNU and ODM solidified support:* First, the main political parties, PNU and ODM, generally allied in support of the constitution. All the major ethno-political groups, except sections of the Rift Valley, mobilised in support of the Constitution. Although ODM remained factionalised, the main block within the party allied with PNU to support approval of the New Constitution. This prevented organisation of a major political opposition against the proposed Constitution as was the case in the referendum held in November 2005.
64. *Opposition against the Constitution was organised along new lines and not the traditional ones that cause violent conflicts:* Secondly, the Church emerged as a strong opposition against the Constitution. Opposition to the Constitution therefore did not coalesce along the traditional ethnic and political party lines, which in the past resulted in violent conflicts. Generally, the opposition by the Church, given its national spread, weakened the basis for ethno-political mobilisation, which would have contributed to violence. But field interviews also show that, in addition to the above, there are other significant dynamics that eroded the basis for violent conflicts including in the areas

²⁶ UNOCHA-Kenya, Humanitarian Update Special Edition –Constitutional Referendum, 11 Aug 2010

²⁷ Remarks by the US Ambassador to Kenya at a forum on Civil Society and the Implementation of the New Constitution, Nairobi, 23 September 2010, p.1

²⁸ 'Ancestral lands, injustices are real issues' *Daily Nation*, 29 August 2010; 'Cohesion team issues violence alert over referendum' *Daily Nation*, 25 July 2010

where political violence usually occurs. Some of these are discussed here.

65. *Political and religious leaders unified in support of a peaceful referendum:* Both the national political leadership and religious leaders collectively called for a peaceful referendum. In spite of divisions between opponents and supporters of the proposed New Constitution, leaders called for a peaceful referendum. Moreover, the political alliance between the President and the Prime Minister, both representing different political parties in the Grand Coalition, brought together groups previously opposed to one another. The alliance brought together major ethnic and political groupings thereby reducing the ethno-political acrimony that usually characterises national political competition. Furthermore, political and religious leaders opposed to the Constitution called on Kenyans to be peaceful regardless of the outcome of the referendum.²⁹
66. *The referendum was a low-stakes national contest and it was not essentially about the personal quest for political survival.* The referendum was viewed as a low-stakes issue for a number of reasons. Firstly, unlike the general elections, which determine the political future of individual politicians, the referendum was not about personal stakes. Some of the respondents interviewed noted that the outcome of the referendum could not affect the immediate political careers of politicians: *'It was not a matter of life and death... politicians did not campaign with passion because no one was going to lose an elected post or seat whether or not the people approved the Proposed Constitution.'*³⁰ Secondly, the ordinary people did not relate the outcome of the referendum to tangible and direct benefits at the local level. There was a feeling that *'there is nothing to fight for; this thing is not for my tribe.'*³¹ Because of this sense of abstraction and lack of ownership, people viewed the contest around the New Constitution as something external to them.³²

Institutional and structural factors

67. *The NCIC's campaign against hate speech halted mobilisation for violence:* From June 2010, the National Cohesion and Integration Commission (NCIC) warned against perpetuating of hate speeches. The Commission summoned senior politicians over hate speech and demanded their arrest.³³ The arrest of a few politicians over allegations of propagating hate speech-making during the early period of the referendum campaigns forced politicians becoming more cautious. Gradually the referendum campaign became issues based; politicians could not mobilise protests and demonstrations as expected. On the whole, the NCIC sustained a campaign for a peaceful referendum particularly through monitoring the campaigns.³⁴
68. *The public confidence in the Interim Independent Electoral Commission (IIEC) legitimised the results.* People praised the IIEC for transparent management of several

²⁹ Catholic Information Service for Africa, 'Catholic Bishops Statement on the Constitution' 20 Aug, 2010

³⁰ Interview with a teacher in Rongai Constituency, 3 Aug 2010

³¹ Interview with an area chief in Kipkelion Constituency, 6Aug, 2010

³² Interview with a human rights activist in Nairobi, 23 July 2010

³³ Kenya Human Rights Commission, 'The Good, the bad and the ugly: Kenya's match to the referendum' 30 July 2010

³⁴ Presentation by NCIC at the National Protection Working Group meeting at KNCHR offices, 27 July 2010

by-elections held before the 4 August 2010 referendum. Public confidence in the IIEC and the electoral process legitimised the results. This made it difficult to employ discourses of rigging, which could have led to violence. Further, all parties accepted the referendum results. Those opposed to the Constitution conceded defeat and urged supporters to maintain peace and participate in the implementation of the New Constitution. Leaders who supported approval of the New Constitution also urged for inclusiveness in the implementation process, despite nascent intra-party divisions and civil society debate over whether or not to include No supporters in the implementation structures.

69. *Deployment of security officers deterred violence.* A few days before the referendum, the Government deployed thousands of security officers drawn from the Regular Police, General Service Unit, Administration Police, the Kenya Wildlife Service and Kenya Prisons Service to areas mapped as possible scenes of violence. The Rift Valley province was ‘inundated with security’.³⁵ Although some have argued that this created an environment of safety, allowing them to vote freely without fear of attack, there are those who frowned upon the ‘unprecedented show of overbearing security officers’ at the local level. To some, the security forces ‘came armed for war, not to provide security’.³⁶ The fear that the enhanced security had orders to ‘deal firmly’ with any incidents of unrest obscured local discourses of possible violence and deterred attacks because ‘nobody wanted to die’.³⁷ Memories of police shootings during the post-election violence and the absence of police reforms also raised questions about security officers’ ability to manage possible riots. ‘*They have not gone through new training. It’s the same drill; why would you expect them to act differently this time?*’³⁸

Ethnicity- related considerations

70. *Rift Valley leaders were keen not to be associated with political violence.* It is significant that there were those who observed that the deployment of security officers was meant to protect certain communities especially in the Rift Valley Province, the epicentre of the post-2007 political violence.³⁹ They observed that police presence was higher in the Rift Valley than elsewhere in the country. Local leaders were concerned about the area being associated with violence and possible isolation by other communities. Local leaders sought to address this by urging for a peaceful referendum: ‘we had to demystify the mindset of Kenyans about this community, we were not going to enact the stereotype’.⁴⁰
71. *In areas affected by the post-election violence, voters registered in separate polling stations, minimizing interaction on polling day.* In cosmopolitan regions notably in Uasin Gishu, people from different communities registered in different polling stations and in particular polling stations where their own ethnic group formed the majority. One IDP for instance noted that ‘*as a minority, we didn’t want to risk being caught up*

³⁵ Interview with a community elder in Eldoret, 16 Sept 2010

³⁶ Ibid

³⁷ FGD with some youth leaders in Eldoret, 15 Sept 2010

³⁸ Interview with a senior government official, 25 Sept 2010

³⁹ Interview with a group of young men in Mauche shortly after the Referendum, 5 Aug 2010

⁴⁰ Interview with a community leader, Eldoret 16 Sept 2010

in violence if it broke out at the polling station. We also wanted them to know there are those among them who voted Yes. If we voted there, they would have said all YES were Kikuyu votes; now they know.' The Kalenjin also registered to vote away from Kikuyu dominated polling stations. This deliberate segregation, though not widespread across the Rift Valley, was a manifestation of lingering lack of trust between the communities.

72. *Some voters in the post-election violence flashpoint preferred not to practice their democratic rights so as to prevent violence:* This lack of trust between various communities in PEV areas resulted in people having difficulties in freely and openly taking part in the referendum. Those in No strongholds who were supportive of the New Constitution could not freely support the New Constitution.⁴¹ The opposite is true of those who live in Yes strongholds; they could not afford to be openly associated with the No team .⁴² This is a legacy of the 2007 PEV, when those who supported the rival political opinion were isolated as 'the enemy within' and attacked. People in these areas did not debate the referendum openly for fear of reprisal.⁴³
73. *Some IDPs moved out of flashpoints of violence but returned after the peaceful referendum:* the campaign for and against the proposed New Constitution initially created anxiety in post-election violence hotspots. IDPs who felt unsure of their security moved their families and moveable assets temporarily out of the flashpoints. For instance, some Kikuyu families moved away from some parts of Mauche area of Central Rift Valley, while a sizeable number of Luo families left Uasin Gishu. Thus even if violence had occurred, not many people would have been affected.
74. *Lessons learned from the 2007 post-election violence minimised willingness to be recruited into an agenda of violence:* Kenyans regret the 2007 post-election violence because everyone felt the consequences of the violence, whether they were victims or perpetrators. Interviewees observed that Kenyans had learnt that violence does not pay. In the Rift Valley, elites realised that the local economy has suffered significantly because traders and consumers of goods and services migrated out of the area. This general awareness informed a public determination to shun violence. For instance, when a grass-thatched house belonging to a returning IDP was set on fire in Kuresoi a day before the referendum, the public cooperated with the police in looking for and arresting the suspected arsonists.⁴⁴ In Burnt Forest, the murder of two young men, from two different communities a day after the referendum created tension but did not spark violence. Elders from both communities met and resolved that 'it is clear someone was trying to instigate violence, but we refused to be used.'⁴⁵
75. *Spectre of indictment by the International Criminal Court deterred mobilisation for violence:* The looming shadow of the ICC was felt throughout the referendum campaigns. Respondents observed that politicians were worried about the chance of

⁴¹ Interview with a former Member of Parliament,

⁴² Interviews in Kisumu, 14 Aug 2010

⁴³ Interview with official of the Provincial Administration, Bomet, 6 Aug 2010

⁴⁴ Interview with a representative of IDPs, 6 Aug 2010; see also OCHA Kenya, *Constitutional Referendum Update*, 5 Aug 2010

⁴⁵ FGD with members of a peace project based in Burnt Forest, 15 Aug 2010

another 'secret envelope' with names of perpetrators of post-referendum chaos. Leaders were less willing to associate themselves with violent causes. This pattern of behaviour suggests the need to strengthen measures and institutions mandated to fight impunity for political violence.

Conclusion

76. The voting pattern in all regions and constituencies demonstrates that it was not one factor that motivated approval or rejection of the New Constitution. There were regional and other specific issues that shaped the way people voted. It is these issues that must be distilled out during implementation of the Constitution in order to assuage opposition, no matter how limited, against the New Constitution. The fact that constituencies in the same region would vote differently, with some voting overwhelmingly in favour and others overwhelmingly against the Constitution raises a need to carefully identify the underlying currents that shaped this pattern.
77. Interviews with different respondents in various regions as well as the survey carried out in July before the 4 August 2010 referendum revealed that concern about devolution is one of the many issues at the centre of this pattern. To some, devolution, as provided for in the New Constitution, is an important achievement for them as a collective. But there are others who are afraid that numerically larger groups, ethnic or sub-ethnic or even clans, would dominate them if they were to be in the same County. Their No vote, therefore, symbolised their rejection of domination by these numerically larger groups.
78. The process of implementing the Constitution should not lose sight of these new tensions between groups in the same County. The fears may be genuine if Kenya's political culture does not change to embrace the national values and principles of governance spelt out in Article 10 and Chapter Six of the New Constitution. Establishing County governments should, therefore, be based on the principles of inclusion, transparency and accountability. A change of political culture from being patronage-based politics to one of public service and accountability must be underlined as critical requisites for the successful renewal of Kenya.
79. Was there a correlation between ethnicity and voting choices? Was the jinx of Kenya's electoral politics broken? The approval vote itself was very strong. But it was not devoid of the usual jinx, ethnicity. Approval was delivered in most regions through brokerage of regional ethnic leaders. Even where the No vote was strong, the regional or ethnic leaders were, directly or indirectly, at the centre of this result. Again only by implementing the New Constitution in a manner that does not respect the status quo will people begin to realise that change has occurred. Circumventing the spirit of the New Constitution will promote the status quo and bring about unintended conflicts once again.

4. THE NEW CONSTITUTION AND IMPLICATIONS FOR GOVERNANCE AND POLITICS

80. Literature on how to promote political stability in deeply fragmented societies has settled on an institutional tool kit for such societies including those fragmented along ethnic lines such as Kenya: this involves a parliamentary system of government; Mixed Member Proportional Representation (MMPR); devolution and the special protection of minorities. Kenya has cherry-picked from this list to create a strong presidential system but with an elaborate system of checks and balances. It is nonetheless encouraging that an attempt to limit excessive presidential powers was made.
81. This section of the report discusses how the New Constitution will impact on governance and politics in Kenya. The discussion also identifies what may be critical challenges to implementation. Suggestions on key interventions are also made.

The New Constitution and governance

82. *The electoral system is not altered*; it could be a source of tensions in the future: The New Constitution has not altered Kenya's electoral system. It has retained the 'first-past-the-post' electoral system and largely ignored MMPR. It has also privileged delineation of constituencies on the basis of population as the dominant criteria. The main challenge here is that the 'majoritarian system' promotes a 'winner-take-all' approach to political power. This approach often produces violent conflicts because those who lose represent communal interests. Delineation of boundaries on the basis of population size will create additional tensions when constituency boundaries are being drawn. Further, it is possible that communities that are geographically dispersed, even if they are not numerically large in absolute terms, will enjoy stronger parliamentary presence both in the National and the Senate. If appointment to various commissions and offices are pegged to parliamentary seats then they will reflect this form of representation.
83. *Devolution is the fulcrum around which major political conflicts and issues will revolve*: Devolution is one of the issues that raised support for and opposition to the Constitution. The public perception of how successful the New Constitution is will be made on the basis of how well devolution is effected. Indeed, devolution is what speaks most concretely to the general public in terms of what represents real change in their lives. However, its implementation will face several challenges. Because of its significance, it is expected that there will be multiple interpretations of several articles that are not definitive in meaning. Among these is Article 203 on what 'equitably distribute' the 15 per cent revenue is; two is the design and the operation of the provincial administration and local authorities alongside the counties; and finally there is the capacity gap in the counties in terms of technical abilities as well as quality of political elite. The Commission for the Implementation of the Constitution (CIC) as well as the Constitutional Implementation Oversight Committee (CIO) will be required to identify and address these issues in earnest before they undermine effective operationalisation of what many people consider the most important aspect of the New Constitution, devolution.
84. *The New Constitution is focusing on resource sharing and not power sharing*: Whereas the dispersal of power has been achieved through creation of a variety of institutions, the Constitution has elected to move away from power sharing to resource

sharing. Rather than developing an approach to ‘inclusive government’ in order to address the political problem of group marginalisation, the constitution has approached the problem from a resource perspective. The search for a more united and cohesive Kenya has clearly taken a resource rather than a political dimension. The implications for the country in this respect are enormous as new institutions have to be created to help advance the economic and political agenda to enable the realisation of unity and cohesion. This approach to the problem of political marginalisation will incite new demands from the people and will require the government to be accountable and responsive in the exercise of power. Striking the right balance between demand and supply is not going to be easy. Unfortunately, public expectations are high. Only by committing to the values of the New Constitution and breaking from the past will these expectations be addressed. Failure break from the past by demonstrating a new way of doing things will frustrate and disillusion the public

85. *Volume of work for governance institutions will increase rapidly:* The Bill of Rights, the provision for direct public petition to the legislature, enforcement of Chapter Six on Leadership and Integrity, and the independent commissions, for example, are going to generate a considerable volume of work for governance institutions. The loosening of the requirement for *locus standi* on rights questions; provision for public interest litigation; expansion of the Bill of Rights to include economic and social rights; easing of procedures in accessing the courts and conduct will see an upsurge in the demand for justice. This raises the need to urgently pay attention to rapid expansion of the operational capacity of the judiciary and to speedy automation of judicial proceedings. This on its own requires that judicial reforms be speeded up lest implementation of the Constitution meets an unprepared institution. There would be a judicial crisis if this were to happen.
86. *Building capacity of existing institution is critical:* New institutions must be created and existing ones given capacities to deliver on their new or revised mandates. There is a new Senate, new Supreme Court, new independent commissions, new County Governments and Assemblies, new security organs to establish – and within a fairly tight timeframe. For both new and existing institutions of government there must be a demonstration of ability and capacity to process inputs from the public. This will certainly generate tension as the ‘supply institutions’ may neither possess nor be capable of immediately acquiring the necessary internal capacity to process these demands. Beyond capacity, many may not have the attitude that would respond to this New Constitutional reality that privileges service to the public.
87. *The New Constitution embraces best international practice; this will create new and distinct demands:* Philosophically, the New Constitution embraces international best practice and its articles embed norms and principles in international law. As a consequence, it imposes on Kenya the obligation to honour and abide by its international commitments, which have now been recognised as being a source of Kenyan laws. This is going to raise new demands. Institutions need to be prepared for this eventuality.
88. *Vision 2030 should be aligned with the provisions of the New Constitution:* The delivery of a New Constitution was one of the activities contained in the Vision 2030. The Constitution is now the Supreme Law and therefore it is important to now align Vision 2030 with the provisions of the Constitution. There may not be significant

points of divergences on issues such as values – which are fairly congruent in the two documents – people-centeredness, equity, democracy, and inclusivity. However, the institutional framework for the economy and politics has changed. The creation of County governments that possess fiscal, legislative and executive powers and responsibilities will require some significant revisions in Vision 2030. On the whole, however, the New Constitution provides a good institutional and structural platform for the implementation of Vision 2030. An alignment of these two will enable both political and economic transformation.

Conclusion

89. Kenya's New Constitution has significant implications for governance and politics. Although it is a product of negotiation between self-interested political elites, it has the potential to alter the practice of politics and governance itself. The Constitution espouses a progressive philosophy of governance that has far reaching implications.
90. The New Constitution has the potential to address political instability in Kenya. It has established a context for addressing political instability by especially promoting devolution and respect for minorities. The philosophy of sharing resources among Kenyans is itself an innovative approach to problems of marginalisation. However, the electoral system has remained unaltered. There may be need to revisit the debate on the best cure of representation problems in Kenya.

5. THE CHALLENGES OF IMPLEMENTING THE NEW CONSTITUTION

Introduction

91. The passage of the New Constitution in the 4 August 2010 Referendum, its eventual promulgation and the declaration of Kenya's 'Second Republic' on 27 August is, no doubt, the most significant development in the country since independence. Not surprisingly, the optimism of the Kenyan people about their lives and nation's future has hit an all-time high. However, after the referendum, Kenya grapples with the twin challenges of reconciliation and implementing the New Constitution. Maintaining the bipartisan spirit, national consensus and momentum created by the referendum to ensure effective implementation of the New Constitution is currently the challenge facing Kenya's political leaders, especially the two main political formations — Party of National Unity (PNU) and the Orange Democratic Movement (ODM).

Cohesion challenges during the implementation process

92. *Divisions in the Coalition Government:* The constitution provides for the establishment of the Commission for the Implementation of the Constitution (CIC) and the Constitutional Implementation Oversight Committee of the Parliament as the organs to steer the transition. However, lack of cohesion within the Coalition appears to constrain establishment of these important organs. Nevertheless, the Cabinet formed technical committees to help draft Bills before the two organs come into effect. The formation of such committees before the CIC becomes operational has been criticised as an attempt to hijack the implementation process, a view reinforced by claims that wider consultations are lacking before drafting and publishing of Bills.⁴⁶
93. *Lack of ownership.* It is interesting that sometimes the Cabinet is agreed to certain positions but fails to whip MPs or party members to adopt these positions. This suggests absence of a determined and committed leadership on the issue of implementation of the constitution. The absence of implementation institutions and apparent leadership vacuum has led to a situation in which different leaders make contradictory statements on how some provisions of the Constitution will be implemented.
94. *Lack of bi-partisan consensus and cohesion:* A key challenge for the Coalition in the short term is how to sustain the national consensus and momentum that led to a successful referendum.⁴⁷ The two principles have made personal efforts and appealed for unity in the transition period. But the Coalition Government lacks a functional dispute resolution mechanism to mediate emerging concerns about legal and institutional arrangements to manage in the transition period. The open disagreements by Cabinet members do not augur well for a cohesive, effective government. There is need to establish such a mechanism because unresolved differences will spill over into decision-making committees and hinder expedition of tasks outlined in the implementation schedules. Implementation of the New Constitution requires continued consensus within the coalition, consultation and participation of key stakeholders in the run-up to 2012.
95. *Factionalism within the main political parties:* In the post-referendum period, both

⁴⁶ Interview with a civil society key informant, 23 September 2010

⁴⁷ Interview with a PNU official, 7 September 2010

PNU and ODM parties are facing internal divisions over how to deal with members who campaigned against the New Constitution. Some members have called for party disciplinary action or dismissal from the Cabinet. However, affected MPs have vowed to fight back.⁴⁸ Lack of inter and intra-political party cohesion might spill into parliament and affect the bi-partisan consensus needed to pass bills that anchor the New Constitution. The deadlines for passage of these new laws are tight. Parliament cannot meet these deadlines if there is no bi-partisan consensus. Internal conflicts within the parties as well as inter-party conflicts will clearly make it difficult for Parliament to meet this challenge. Thus, Parliament needs unity of purpose devoid of the intrigues arising from political brinkmanship.⁴⁹ Fundamentally, Parliament has a Leader of Government Business, a position that the House itself did not fill for two years owing to conflicts between the two parties. It is now expected that passing the new bills required to anchor the constitution will speed up.

96. *Anti-reformers can sabotage the process:* Previous reports have observed that anti-reformers have regrouped and formed political and bureaucratic alliances to frustrate the reform process. In the run up to the referendum, they buttressed the numbers of the undecided (colloquially referred to as ‘water melons’ to denote people who were green for Yes, and red for No). Because of the passion with which such groups protect self-interests, it is possible that they will use the bureaucracy and their political influence to develop legislation of a low standard or ensure that proposed legislation protects the status quo.⁵⁰ This of course calls for vigilance. Anti-reform forces including the ‘water melons’ may take over the implementation of the Constitution. If they do, the old order will prevail, and the country will revert from a reform mode to ‘business as usual’.
97. *The water melons and non-reformers are very much in place:* The old order is still entrenched, even if they supported the Constitution. Those who lacked passion for the New Constitution and the so called ‘water melons’ occupy strategic decision-making positions and control enormous resources. Their capacity for mischief is limitless especially in the absence of a strong political bulwark both from the top and below. Again public vigilance is crucial to stem the influence they may have in how implementation will proceed.
98. *Meeting the high public expectations:* The overwhelming support for the constitution was due to the hope by Kenyans that it marked the beginning of a new era of accountability and delivery of services.⁵¹ To many, it heralds a better life and future through creation of employment opportunities, improved security and better access to basic services. Strategies for managing these expectations, particularly in the short term, will sustain or reduce public support for the Constitution implementation process. In this regard, some argue that there is need for the government to produce quick wins so that immediate impact is visible to the citizenry even before its substantive effects are felt.⁵² However, it is not only the high expectations that need to be managed; there are cynical Kenyans who do not expect anything from the New Constitution. The government also needs to bring such people on board to realise the

⁴⁸ Interview with a former NO secretariat official, 23 August 2010

⁴⁹ Remarks by a COE official at a public forum, 24 August 2010

⁵⁰ Interview with a former MP, 6 September 2010

⁵¹ Proceedings from focus group discussions in Nakuru, Mauche and Eldoret South, held in September 2010

⁵² Interview with a policy analyst, 1 September 2010

dividends of the New Constitution.⁵³ There needs to be adequate consultation and citizen participation to sustain support for the process. In this regard, continuous civic education on the constitution is important.⁵⁴

99. *Comprehensive civic education and public communication are key to fostering understanding of the provisions of the new constitution and to managing expectations.* The referendum did not provide an adequate opportunity to learn the complexity and significance of the new constitution in terms of political, social and economic governance of the country. The complexity of the new constitution implies that both government and civil society organisations need to provide civic education. Civil society organisations need to create awareness about what the public should be demanding of the government, and the government needs to create awareness within its structures and organs about what the new constitution demands of it and what to supply to citizens. This demand and supply type of civic education places responsibility on both the government and civil society organisations to carry out civic education, which will give meaning to the letter and spirit of the new constitution.
100. *There is need for a national public forum to debate what type of civic education is required and who should be providing it.* Civic education was not been embedded in the new constitution. To better understand its provisions and expedite its implementation, there is an urgent need to begin to think of how to institutionalise civic education at all levels, including embedding it in the school curriculum.
101. *The political culture and absence of constitutionalism are a key threat:* The New Constitution is progressive on many fronts but it still faces the risk of a-yet-to-be-changed political culture. This is the argument long made by a leading Kenyan constitutional scholar who observed that Africa's main governance problem is less about the existence of a good constitutional structure than the absence of the culture of constitutionalism – the habit of respecting and observing rules.⁵⁵ Kenya's longstanding political culture of impunity and unaccountability will take a while to erode, even though the new law will certainly provide incentives to begin to reverse it. The resilience of the old political culture may be strengthened by the fact that the enactment of a New Constitution has not simultaneously corresponded with the emergence of a new political and bureaucratic elite. For instance, the Judiciary, which would have provided a possible cure to this problem, is yet to be reformed.
102. *Political ownership is weak because elites lost out:* Political elites lost out in many ways because self-interest did not enable them to effectively compromise. This fact poses a significant challenge to the implementation of the Constitution: it weakens political ownership at the top while raising expectations from below. This in itself will generate tensions of delivery and performance. In other words, the New Constitution lacks a strong political constituency, particularly within the political elite. All sections of the political elite 'lost' something significant in the negotiations, which has weakened rather than tightened the ownership. While a good number of the so-called 150 amendments proposed in the House before the referendum might have been frivolous, many still betrayed bitterness over the 'loss' of privileges that were significant for members and the political elite. Grieving over these losses continues and increases

⁵³ Remarks by a civil society leader during a public forum, 2 September 2010

⁵⁴ Interview with an elder, 14 September 2010

⁵⁵ See H. W. O. Okoth-Ogendo, *Constitutions without Constitutionalism in Africa*

the incentives to frustrate implementation. Public vigilance over the political elites is critical in this respect. This demands that civil society and the private sector pull themselves up to put pressure on the elites to respect by the new rules.

103. *A heavy legislative agenda with tight deadlines is ambitious:* The New Constitution has several laws that need drafting and passing. There is a heavy legislative agenda not just in terms of new legislation that has to be enacted to operationalise various provisions, but also with respect to amendments to existing statutes to ensure that they remain constitutional. However, parliamentary speed in passing new laws may not match this demand. Unless the current parliament prioritises the passing of new laws, then it will be difficult to finalise the legislative agenda on time.

Operational challenges

104. The New Constitution will also face a number of operational challenges or difficulties. One of these will be the establishment of the county governments and their relationship with the provincial administration and local authorities. This process of design will face the stiff opposition and challenge from vested interests. It will also be the theatre of struggle between the national and county governments.
105. The second operational challenge has to do with the capacity deficit in various institutions, both new and old. In Parliament, for example, confirmatory hearings will be a challenge not only because of their newness but also because of the high number of hearings – now estimated at about 300.
106. Parliament will also have to learn to generate its own Bills. The legislative drafting support usually offered by the office of the Attorney General no longer exists and yet Parliament has not built the capacity for generating bills. For the County governments the challenges will be similar and worse particularly with respect to drafting legislation that is not only technically competent but also constitutional. The Supreme Court faces the challenge of interpreting a pure presidential system constitution with a stronger Westminster tradition and influence. The Executive itself has to learn a new art of practicing politics where power is shared with other arms, Counties and independent Constitutional Commissions. Trying to find the right balance will be difficult during the initial stages of implementation of the constitution.

Conclusion

107. *Build political consensus:* Political consensus is vital for a smooth implementation process. It is important for the government to engage in building bi-partisan consensus and alliances for the passage of key Bills in parliament. Regular joint parliamentary group meetings for the coalition partners are one way of building the consensus and buy-in. The window for passing parliamentary bills might close by December 2011 and the campaigns begin in earnest. With an uncertain future in national politics, there is little to bind politicians to the principals. Those who opt for county seats will then shift their focus to their respective counties. Thus it is vital for most of the Bills to have been passed by then, especially those with a bearing on the 2012 elections.
108. *Need for religious tolerance:* During the referendum campaigns, the country experienced was confronted by religious intolerance. Thus, it is important for the Government, Church and civil society to engage in efforts towards building religious tolerance amongst the people.

109. *Effective public participation:* Most people did not vote on the provisions in the Constitution but according to the stand taken by their leaders. It is vital for sustained civic education to be conducted to help the electorate understand the Constitution and play their part in implementation. Kenyans can only own the process if they understand the constitution and counter the misinformation that was spread during the referendum. The government and civil society also need to develop structures for popular participation of the people.

SUMMARY OF FINDINGS AND CONCLUSIONS

110. This report is about two issues that have gained prominence throughout 2010: the ICC intervention in the Kenyan situation; and development of a New Constitution of Kenya. The various sections of this report have highlighted the importance of a number of issues around these two themes. One, the findings reveal a need to concentrate on ending impunity with regard to the post-2007 election violence. The discussion has noted that punishing the perpetrators of post-election violence will go some way to providing justice to victims and, at the same time, lay the foundation of a process to change Kenya's political culture. The ICC intervention is an important entry point in this respect.
111. Two, the findings have shown the importance of Kenya's New Constitution. The report suggests that the New Constitution will open a window of opportunity for far-reaching reforms including speeding up the Agenda 4 reforms on which the window shut when the process of delivering a New Constitution gained momentum.
112. This section of the report reiterates some of the findings and conclusions. The discussion also makes suggestions on how to deepen reform in light of the New Constitution.

The ICC and the Post-Election Violence

113. *The ICC investigation of the Kenyan situation has begun in earnest.* This is important in one respect. It will impact on Kenya's political culture of tolerating and celebrating impunity especially when senior and influential politicians are involved. In spite of the post-election violence, Kenya's political culture has not changed. There are very clear signs that it is 'business as usual'. Some senior politicians appear to lack commitment to the ICC intervention or are seeking to politicise it to promote their self-political interests. In other words, impunity has re-organised and it is fighting back at all levels. The clearest sign of this re-organisation is attempted mobilisation of ethnic constituencies against the ICC investigation. While this is happening, leaders appear to pay scant attention to the problem of IDPs many of who have remained without secure livelihood for more than two years.
114. *Divisions within the Grand Coalition Government have begun to show yet again. This is preventing development of a collective position on how to support the ICC intervention.* On the whole, there is no clear leadership on how to deal with the post-election violence and support the ICC investigation of the Kenyan situation. Pronouncements by some influential politicians appear to suggest that that they are keen to protect their political interests by delaying or avoiding the investigation process. Limited attention is paid to pursuing justice for thousands of victims and IDPs who suffered during the post-election violence.
115. *All communities should be aware of the fact that one of their own could be indicted and tried for the post-election violence.* They should accept that the ICC is not targeting a community. And everybody will be required to recognise the fact that communities as a group do not commit crimes. Nor do they pay criminals to perpetrate violence. Individual politicians and other influential people have been behind the post-election violence. And because they have never been put on trial, impunity has thrived and continued to threaten the life of the very communities they claim to represent. The

ICC is an avenue for justice for many people who suffered during the post-election violence.

116. This development suggests a need for the Government in its entirety to commit itself to cooperate with the ICC. Some people within Government, including senior and influential officials, may be subject to investigation. It is such people who could be solidifying an ethnic agenda by insisting that the ICC is targeting communities. In the spirit of cooperating with the ICC, the government must let such people go if the ICC indicts them. Politicising the ICC intervention will not stop the ICC from investigations. Only the Pre-Trial Court (PTC) can stop the ICC. The Pre-Trial Court can decide to terminate the case or send the prosecutor back to find more evidence. Kenyan politicians cannot stop the process.

Implementation of the New Constitution

117. *The passing of a New Constitution and in a peaceful referendum marks a major turning point in Kenya's history.* It is commendable that a process that had taken decades without completion, was finalised within a period of about two years from the time the Committee of Experts was appointed to start the process. The New Constitution enjoys wide popular support and legitimacy. The voter turnout itself was unprecedented; at 72 percent, the referendum turnout is the highest in Kenya's multi-party electoral history. And at 67 percent approval rating, the constitution is highly legitimate. This is important in one significant way: renewed confidence in the ballot after the post-election violence. The New Constitution, therefore, is of monumental historical significance to Kenya and even to Africa in general.
118. *The New Constitution has given Kenyans a sense of optimism and opened opportunities for far-reaching reforms.* It has rightly raised public expectations on possibilities of a new culture of governance. However, the process of delivering it presents certain challenges. Some of these challenges issue from the factors that shaped the regional and constituency voting patterns. Other challenges stem from grey areas that were left unattended to during the negotiations among the elites at different points. These areas will become an arena of more political contest in future.
119. *The endorsement and promulgation of the New Constitution should not mask the fact that it faced considerable opposition from some key groups and influential actors in the Kenyan society.* One should also not gloss over the fact that there were many undecided 'water melons' or influential leaders who did not want to endorse the New Constitution but nonetheless pretended to do so. The support of others was secured through political coercion. These will likely to cause hiccups throughout the implementation process.
120. *Devolution prompted more No votes outside Rift Valley than other issues.* Some of those who voted No feared domination by minorities in the new Counties. They wanted their own Counties. This is an issue the implementation process must acknowledge and recognise as central to creating the new Kenya. To assuage the fears of the numerically small groups in the Counties, legislation on County governments must underline the principle of 'inclusive government' and ensure that all groups are adequately represented. The laws governing their operations must also seek to protect the minorities. Article 10 on 'National Values and Principles of Governance' as well as Chapter 6 on Leadership and Integrity should be established as the cornerstones posts

for the County governments.

Conclusions

121. These findings suggest that the New Constitution has set up a new framework; it is aiming at composing a new Kenya complete with new institutions and new values. Rights and freedoms are the cornerstone of this new Kenya. It is demolishing old institutions that were based on the colonial order. There is also an attempt to shield the new institutions from political patronage. There is renewed sense of optimism and hope – the constitution has created opportunities for recovery.
122. The challenges facing creation of a new Kenya, however, are many. The new society is yet to show; the old habits have not died. The political culture is yet to change; the culture of bad governance is deeply embedded in all institutions and sectors but there is little debate on how to end it. The trend is to promote self-interest rather than the public good. Secondly, there is no public dialogue on what this new society is about and how it should be achieved. Thirdly, there is resistance to change by those who stand to lose in the event of its delivery. They opposed the Constitution because of personal interests rather than an ideological reasons. Some will continue opposing the Constitution and resisting it as long as it threatens the status quo and their chances of benefiting from bad governance. Fourthly, expectations are high. Some are unrealistic and yet they must be addressed. The public will be disillusioned once they see the culture of ‘business-as-usual’ slipping back in.
123. There are several ways to mitigate against some of these challenges. One, policies and legislation around the New Constitution must draw from extensive consultations. The legislation must set high standards; the benchmarks must be so high that even those wishing to bring the standards down will find it difficult to do so. Two, policy dialogue or debates must begin. And this is not the work of the government alone. This is the responsibility of all actors and in particular civil society, the private sector and the media. The hard task has begun and people must make decisions from an informed point of view. Three, the religious intolerance witnessed during the referendum must be addressed. These religious divisions have not disappeared with the conclusion of the referendum. These can be addressed only by promoting a clear understanding of the principles around which the Constitution is built: the principles of an open society.
124. Institutional and electoral reforms must be undertaken and completed with urgency. Another election is due less than two years from now. The high number of rejected votes (spoilt votes) in the referendum is enough evidence of the need to undertake comprehensive voter education. The Interim Independent Electoral Commission must also contend with the fact that the amount of investment required in order to deliver a free and fair poll at in the next general election. Establishing the electoral body in line with the requirements of the New Constitution must begin in earnest for the system to be prepared for these reforms.