

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

**Progress in Implementation of  
the Constitution and Preparedness for 2012**

**First Draft Review Report**

**January 2012**

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## TABLE OF CONTENTS

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List of Figures:.....	3
List of Tables: .....	4
ABBREVIATIONS .....	5
EXECUTIVE SUMMARY .....	6
1. INTRODUCTION.....	10
The Socio-economic Context .....	10
Conclusion .....	15
2. IMPLEMENTATION OF THE NEW CONSTITUTION AND OTHER AGENDA REFORMS .....	4
Introduction.....	16
The Constitution Implementation Process.....	16
Establishment of New Commissions .....	20
Transiting to a Devolved System of Government .....	21
Institutional Reforms.....	28
Land Reforms.....	30
Conclusion .....	34
3. THE COALITION, ELECTORAL REFORMS AND PREPAREDNESS .....	36
Introduction.....	36
Power Sharing and securing of politics .....	36
Setting a Conducive Environment for a Successful Electoral Process .....	41
Managing Elections Competently and Inspiring Public Trust in the Electoral Process ..	46
Settling Electoral Disputes Efficiently and Effectively .....	48
Conclusion .....	49
4. THE LEGACY OF POST-ELECTION VIOLENCE: THE ICCAND IDPs.....	50
Introduction.....	50
Reactions to the ICC investigations.....	50
The Challenge of Resettling IDPs .....	58
Access to Relief and Assistance Funds .....	60
Promoting Healing and Reconciliation .....	62
Conclusion .....	65
5. GENERAL CONCLUSION .....	67

## List of Figures:

Figure 1: In your opinion, what is the most serious problem facing Kenya today? .....	11
Figure 2: Inflation in Kenya (2010 to 2011) .....	12
Figure 3: How satisfied or not satisfied are you with the way the government is handling the following issues, or haven't you heard enough to say? .....	13
Figure 4: Are things generally going in the right direction or wrong direction (by total) .....	14
Figure 5: How satisfied or not satisfied are you with the progress of implementation of the new constitution? .....	18
Figure 6: In preparation for the transition to the county governments, what do you want to see as the government priorities? .....	22
Figure 7: What fears do you have, if any, regarding the formation of county government? .....	24
Figure 8: Please explain why you are in support of: Change election date for next year from August to December 2012? (total) .....	26
Figure 9: Please explain why you are NOT in support of: Change election date for next year from August to December 2012? (total) .....	27
Figure 10: How much do you agree or disagree with the following statements regarding making of new laws under the new constitution? .....	28
Figure 11: Do you think the Coalition Government is doing enough to solve conflicts over land in Kenya (total) .....	31
Figure 12: I am going to read out some statements in relations to land in Kenya. Please state your level of agreement .....	33
Figure 13: I am going to read out some statements on land issues, please tell me if you agree with them .....	34
Figure 14: What do you dislike most about the coalition government? .....	39
Figure 15: In your opinion, do you think the country is prepared to hold the next General Election? (total) .....	41
Figure 16: Please tell me two important things that political parties can do to be strong political organisations .....	44
Figure 17: Please mention one thing that political parties can do to serve Kenyans better (total) .....	45
Figure 18: In your opinion, what is the most important thing to ensure free and fair elections? (total) .....	46
Figure 19: What do you think is most likely to happen if the ICC fails to prosecute any suspects for post-election violence? (total) .....	51

Figure 20: Are you happy or unhappy that The Hague/the ICC is pursuing the six suspects of the post-election violence (PEV)? (by region).....52

Figure 21: If happy/very happy/somewhat happy, please explain your answer.(total) .....53

Figure 22: If unhappy/not very happy/not happy at all, please explain your answer.....54

Figure 23: If ICC trials take place, how likely do you think it is to produce violence? (total).....55

Figure 24: What should be done with the rest of the suspected perpetrators? (by total) .....56

Figure 25: Most important way to prevent future violence.....57

Figure 26: What can the government do to address the problem of IDPs? ..... 60

Figure 27: Thinking about healing and reconciliation among Kenyan communities after post-election violence, how much would you say communities have reconciled? (total).....64

Figure 28: Thinking about healing and reconciliation among Kenyan communities after the post-election violence, how much would you say communities have reconciled? (by region).....65

**List of Tables:**

Table 1: Most important priority for the government to address next year (by total)..... 15

Table 2: Passed and Pending Bills 2011 ..... 17

Table 3: Have you observed any change since in the country since the adoption of the new constitution? ..... 20

Table 4: Do you support the proposal to amend the New Constitution with regard to the following? .....25

Table 5: How much confidence do you have in the following institutions as we go to the next General Election?.....29

Table 6: Name the most important thing the government can do to address land problems in your area .....32

Table 7: How satisfied or dissatisfied are you with the relationship between President Kibaki and Prime Minister Raila Odinga? ..... 37

Table 8: What do you like most about the coalition government? .....38

Table 9: Is power sharing between political parties in government something you would like to see after another election? (Dec 2010) .....39

Table 10: Are you happy or unhappy that the ICC is pursuing the six suspects? ..... 51

Table 11: If violence is likely, why? .....55

Table 12: In your opinion, what is the most important reason IDPs remain in camps? .....59

Table 13: Disbursement of Ksh10,000 and Ksh25,000..... 61

## ABBREVIATIONS

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AG	-	The Attorney General
AU	-	African Union
AP	-	Administration Police
CIC	-	Commission for the Implementation of the Constitution
CIPEV	-	Commission of Inquiry into the Post-Election Violence
COIC	-	Parliamentary Constitutional Implementation Oversight Committee
CRA	-	The Commission for Revenue Allocation
CSO	-	Civil Society Organisation
DPP	-	Director of Public Prosecutions
FIDA	-	Federation of Women Lawyers in Kenya
FORD	-	Forum for the Restoration of Democracy
FPTP	-	First-Past-The-Post
IIBRC	-	Interim Independent Boundaries Review Commission
ICC	-	International Criminal Court
ICT	-	Information Communication Technology
IDEA	-	Institute for Democracy and Electoral Assistance
IDP	-	Internally Displaced Person
IEA	-	Institute for Economic Affairs
IEBC	-	Independent Electoral and Boundaries Commission
IIEC	-	Interim Independent Electoral Commission
IPOA	-	Independent Police Oversight Authority
JSC	-	Judicial Service Commission
KACC	-	Kenya Anti-Corruption Commission
KBC	-	Kenya Broadcasting Corporation
KIE	-	Kenya Institute of Education
KNCHR	-	Kenya National Commission on Human Rights
KNDR	-	The Kenya National Dialogue and Reconciliation
KNHREC	-	Kenya National Human Rights and Equality Commission
K-NICE	-	Kenya National Integrated Civic Education
LDP	-	Liberal Democratic Party
MoSSP	-	Ministry of State for Special Programmes
MP	-	Member of Parliament
NARC	-	National Alliance Rainbow Coalition
NCIC	-	National Cohesion and Integration Commission
NGO	-	Non-Governmental Organisation
NHRI	-	National Human Rights Institution
OCHA	-	Office for the Coordination of Humanitarian Affairs
ODM	-	Orange Democratic Party
PEV	-	Post Election Violence
PNU	-	Party of National Unity
PRIC	-	Police Reforms Implementation Committee
RPP	-	Registrar of Political Parties
SLDF	-	Sabaot Land Defence Force
TJRC	-	Truth, Justice and Reconciliation Commission

## EXECUTIVE SUMMARY

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1. Since 2008, significant progress has been made towards achieving the goal of Kenya National Dialogue and Reconciliation (KNDR) process, which was to secure sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights. Under the KNDR agreements, the main parties to the 2007 elections dispute committed to immediately stop violence, expeditiously facilitate durable solutions to victims of that violence, end the political crisis through power-sharing and find lasting solutions to underlying causes that had sparked the crisis. The promulgation of the new constitution in August 2010 was one of the most important outcomes of the KNDR process and the hallmark of Kenya's reform journey since independence.
2. South Consulting has been monitoring the implementation of agreed reforms since 2008. This is the fourth review report for the year 2011. It is also the fourth review report since the new constitution came into force. Previous reports covering the period between December 2008 and October 2011 can be found at [www.dialoguekenya.org](http://www.dialoguekenya.org)
3. This report covers the September to December 2011 period. Like the previous report, it focuses on what has been achieved thus far and the country's preparedness for the next General Election in 2012. It discusses what needs to be done to consolidate reforms under the new constitution, prepare for a change through a national General Election and to manage a peaceful transition from the current centralised system of governance to a devolved structure. It also discusses the unfinished business from the previous General Election, particularly the problem of impunity, Internally Displaced Persons (IDPs) and lack of reconciliation, and how this 'baggage' might impact the dual transition.
4. The report has utilised both quantitative and qualitative data. Quantitative data derives from a national survey conducted in December 2011. Qualitative data is drawn from interviews with key informants from government ministries, humanitarian and civil society organisations, the media and members of the public. Secondary sources have also been reviewed for additional information.

### FINDINGS

5. The end of 2011 shifts attention away from fundamental reforms to the next General Election. The socio-economic context for the General Election is also a cause for anxiety. Inflation has been on the rise and there are signs of an economic slowdown reminiscent of experiences around election time in the past. Nonetheless, the campaigns have begun in earnest and popular demand for reforms appears to be waning.
6. On the whole, global economic conditions indicate that the Kenyan economy is likely to remain in a state of flux, a likelihood exacerbated by the military incursion into Somalia and measures to address domestic security implications. This notwithstanding, Kenyans are very supportive of the government's fight against the Al Shabaab group in Somalia.

## **Implementation of the New Constitution**

7. The promulgation of the constitution in 2010 anchored institutional reforms and filled legal lacunae that had long prevented change. As reported in the previous review report, the constitutional implementation process remains on track: the necessary legal and institutional framework for implementation is in place.
8. By the end of August 2011, Parliament had passed all Bills listed in the constitution as requiring enactment within a year of its promulgation. Once the deadline was met, the pace of passing Bills slowed down. In this reporting period, nearly all of eight Bills due on 26 February have been taken to the Constitution Implementation Commission for review. Lethargy in producing Bills might replicate the last-minute rush witnessed in August 2011, and sabotage public scrutiny of these proposed laws. This calls for greater civil society oversight and advocacy for expedient legislative process.
9. Lack of consensus and open disagreement between key agencies such as the CIC and the Office of the Attorney General run the risk of undermining public support for the implementation process. Allegations of lack of political will, reinforced by attempts to introduce multiple amendments to the constitution and delays in completing preparations for the devolution legislative framework are likely to give the impression that it is business as usual.
10. As the next General Election approaches, there is mounting public concern that critical Bills for the transition to the devolved system of government have not been passed. Some have not even been drafted, let alone presented for debate. At the same time, tension between ministries over the nature of devolution and financial management continue to delay enactment of requisite laws. Given the complexity of the devolved structure, further delays are likely to cause panic or occasion a constitutional crisis. Many people, up to 47 per cent of survey respondents, see divisions among politicians such as these, as the main hindrance to the implementation process. Public vigilance is required to fight off the vested interests that could undermine the spirit and letter of the constitution.

## **Electoral Reforms and Preparedness for Elections**

11. Some electoral reforms have been made in readiness for the General Election in 2012. Requisite laws have been passed as required by the new constitution. An independent electoral body has been set up and staffed through a competitive recruitment process. Public confidence in the IEBC is on the rise. The new independent electoral body has developed a work-plan the next General Election.
12. However, there is uncertainty about constitutional provisions on gender balance in elective offices, the election date and delimitation of constituency boundaries. There have been proposals to amend the constitution to address some of these concerns. But the public is not generally supportive of all the proposals. While many support the amendment to address the gender equity gaps, survey respondents were not amenable to all proposals on the election date.
13. The absence of a comprehensive civic and voter education is a cause for concern. Plans have already been finalised to roll out activities in this regard. But given that the country is approaching the election date, it would be important to identify priority areas in this respect. Given that 93 per cent of the respondents know only a little or

nothing about the constitution, civil society organisations need to begin voter and civic education early to avoid having some clauses interpreted politically, as happened during the 2010 referendum.

14. Equally important in regard to preparations for elections is the observation that political parties are yet to institutionalise. They appear to be unprepared for the election and therefore one may argue that their parties may prefer a date that is convenient to them. Although they are required to comply with the political parties law, many are yet to commit to it and change their culture. Their weakness as institutions could have spill over effects into the Coalition government. This raises an important concern over whether the Coalition is also cohesive enough to oversee the transition and the conduct of the elections. If divisions in the Coalition intensify, there is no institutional mechanism to resolve disputes and ensure that the divisions between the two parties do not immobilise the government. There is nothing to ensure that this form of institutional immobilism will not affect how elections are conducted.

### **The Legacy of Post-Election Violence**

15. Even as the country prepares for the next General Election, the legacy of 2007 continues to hang over Kenya; the International Criminal Court (ICC) is set to rule on confirmation of charges in January 2012. Lack of consensus in government about how to respond to the independent investigation by the ICC, and whether to punish or grant amnesty to middle and lower-level perpetrators of the post-election violence has sent mixed signals about dealing with impunity as the country approaches another national election. The pursuit of accountability is even less likely to draw political attention or support as the elections approach.
16. Public support for the ICC remains high. A majority of the respondents – 64 per cent – are happy that the ICC is pursuing the six suspects. Despite continued high support for the ICC, public confidence in a local process remains relatively low in spite of the current judicial reforms. In particular, the perception that the government is unlikely to conduct genuine investigations, or prosecute powerful individuals, has sustained high support for the ICC as the justice mechanism of last resort.
17. The government has continued to support IDPs to find durable solutions by giving them money, farm inputs, land and houses. The Parliamentary Select Committee on Resettlement of IDPs finalised a draft Bill on the Protection and Assistance of IDPs. In December, the government appointed an inter-ministerial task force to expedite the resettlement of IDPs before the next General Election. However, as reported in the previous quarter, allocation of land to IDPs rather than all landless people has generated new narratives of favouritism of members of one community, and undermined peace and reconciliation in some return areas.
18. Reconciliation and social harmony in areas most affected by the post-election violence remains fragile. People remember what happened in 2007. Lack of political support for peace and reconciliation efforts by government and non-governmental organisations has created a climate of silence and suspicion. The Truth, Justice and Reconciliation Commission (TJRC) and the National Cohesion and Integration Commission (NCIC) have continued their efforts to inquire into human rights violations and prevent future violence, respectively. However, without political support for the work of these commissions, their impact on ethnic relations and deterrence capacity for future

dissonance remains uncertain.

## Conclusions

19. Public anxiety over the socio-economic and political challenges facing the country could increase as the next national General Election approaches. The high cost of living is affecting everyone and occasioning industrial action by groups hitherto silent on the issue of better wages and services. These are new pressures on the economy, whose growth tends to slow every election year. Increased public disillusionment is showing in the perception of the government's ability to manage economic wellbeing. Up to 80 per cent of those interviewed said they were dissatisfied with the government's performance in managing the economy, and an equal percentage deplored its responsiveness to unemployment. Managing these dynamics is critical this time round to prevent them from conflating with Kenya's major political fault lines.
20. Implementation of the constitution is on track but there are fears that vested interests are again gaining an upper hand to prevent the finalization and passage of critical laws. Furthermore, the window for undertaking brave measures has closed. The campaigns for the next General Election have gained momentum and will soon constrain the undertaking of important reforms. And if leaders begin to politicize some of the implementation processes and demand amendments that would remove important planks from the constitution, then the implementation will be in disarray. These efforts could reduce the momentum for constitution implementation.
21. Preparations to usher in the devolved system of government are experiencing difficulties owing to lack of consensus among some of the key players, particularly the ministries of Finance and Local Government. Delays in finalizing critical Bills could affect the process of laying a solid foundation for the county government. These delays could slow the pace at which relevant measures for setting up county governments are undertaken. The county governments will be introduced at once and therefore all preparations should be completed and anchored on a solid legal and policy framework.
22. The next General Election marks a major turning point in Kenya because it will lead to immediate operationalisation of the central and county governments. For this reason, it is important that adequate preparations be made to transit the country to the two government systems. Indeed, many people have their eyes on the county as a solution to local development problems – including imbalances in regional development. It is important, therefore, to do things right and in a manner that responds to this aspiration.
23. Finally, it is important to underline that the Coalition government has not been very cohesive during much of its time. Although it has matured over time, it is important to establish a solid framework to resolve any disputes that may arise now and the time of conducting the next general election. Their divisions especially over power sharing could have negative consequences on the electoral process. Furthermore, if divisions deepen before the general election, ensuing institutional immobility will make it difficult for the government to operate as one. A framework to ensure coherence must be put in place – reactivating the Committee for the Management of Coalition Affairs is critical at this stage.



## 1. INTRODUCTION

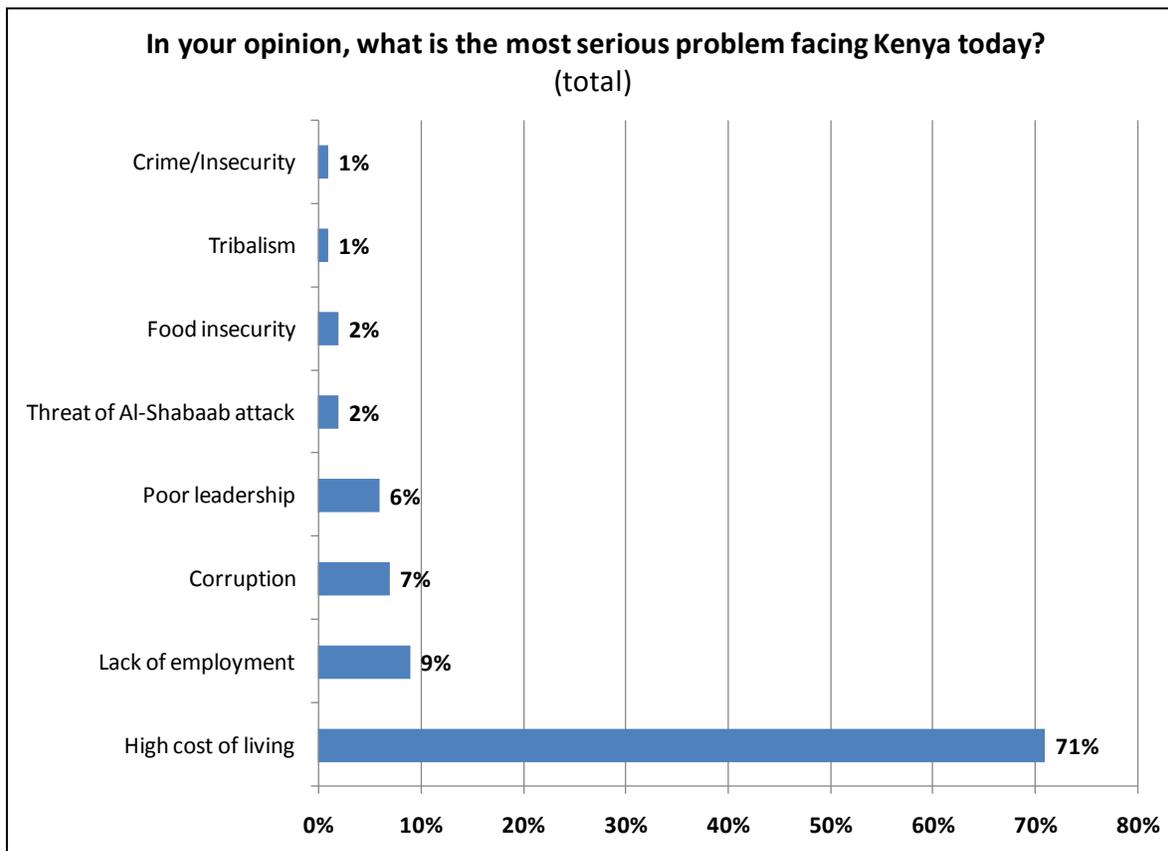
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24. This quarterly review report covers the period between September and December 2011. The review focuses on implementation of the constitution and other reforms agreed upon under the Kenya National Dialogue and Reconciliation (KNDR) mediation process in 2008 under the African Union's (AU) Panel of Eminent African Personalities led by Mr Kofi Annan. Previous reports are found at [www.dialoguekenya.org](http://www.dialoguekenya.org).
25. The report is based on both primary and secondary sources of data. Quantitative data was collected through a national survey comprising 2,500 respondents using multi-stage cluster sampling proportionate to population size, with the 2010 National Census data as the sampling frame. Qualitative data was obtained through interviews with key informants drawn from government ministries, humanitarian organisations, civil society organisations, the media and members of the public. Secondary information was obtained by reviewing reports and documents by the government, development agencies, the media and non-governmental organisations.
26. The report is arranged in five main parts which discuss the main political developments in Kenya in the reporting period. The emphasis in all the parts is the implementation of the new constitution and other reforms outlined in Agenda 4, as well as preparedness for the 2012 General Election. Thus, the report is organised as follows:
  - a. Part I: Introduction and Socio-economic Context
  - b. Part II: Progress Toward Implementing the New Constitution and Agenda 4 Reforms
  - c. Part III: Electoral Reforms and Preparedness for Elections in 2012
  - d. Part IV: The Legacy of Post-Election Violence: The ICC and IDPs
  - e. Part V: Conclusion

### ***The Socio-economic Context***

27. The second half of 2011 saw a steep rise in inflation and depreciation of the Kenya shilling. Measures by the government stabilised the shilling but inflation remained high towards the end of the year. The high cost of living increased the vulnerability of the poor across the country. The 2011 Horn of Africa drought crisis added to these challenges, especially among the poor in northern Kenya.
28. The high cost of living remained the main challenge facing Kenya throughout 2011. When asked, 'In your opinion, what is the most serious problem facing Kenya today?', 71 per cent cited the high cost of living. 9 per cent mentioned unemployment while 7 per cent and 6 per cent mentioned corruption and poor leadership, respectively.

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

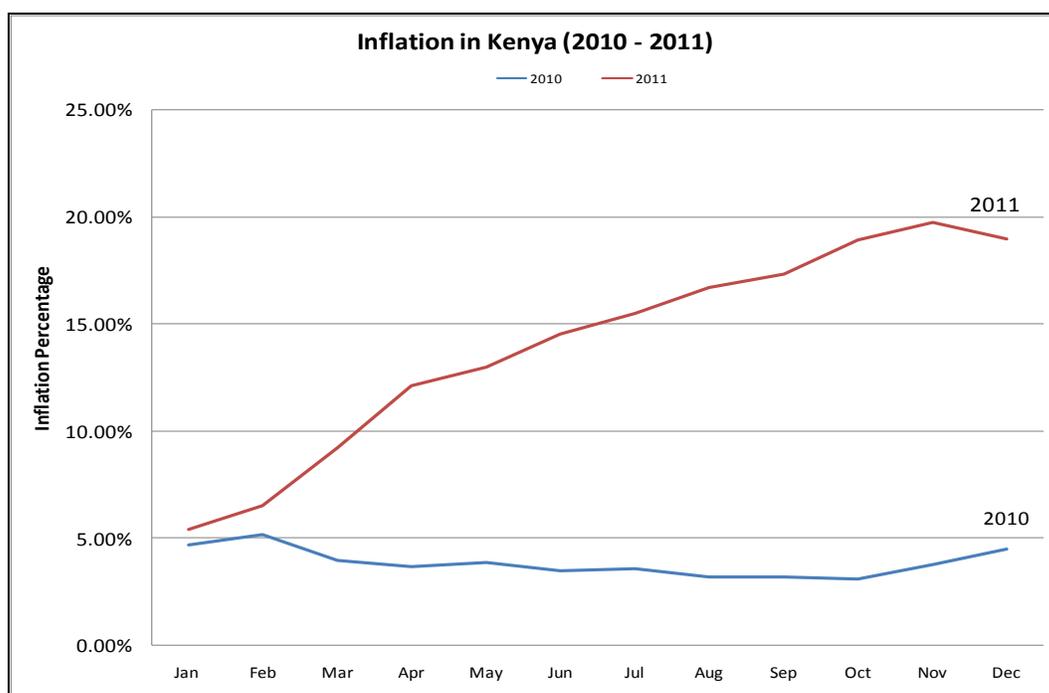


29. Other issues mentioned include unemployment, poor infrastructure, food shortages due to rain failure/drought, diseases and lack of social amenities, high death rate and population increase. As mentioned in previous reports, the high cost of living is slowly becoming an important fissure for an election contest. In this regard, it is notable that protests by some labour unions and workers' strikes demanding higher remuneration and better terms of service featured prominently in the last quarter of 2011.
30. These development slowed growth in some sectors. It is, therefore, possible that the overall growth would be lower than expected.<sup>2</sup> The country, therefore, moves into the election year on the verge of an economic slowdown. Failure to manage the risks associated with a weak shilling could reduce this growth further.<sup>3</sup>
31. The year 2011 has seen a steady rise in inflation, peaking in November at 19.75 per cent. In December, it dropped to 18.6 per cent.

<sup>2</sup>There is some optimism, however, in that growth had not slumped. See World Bank, *Kenya's Economic Update*, No. 5, Dec 2011, p. ii

<sup>3</sup>The weak shilling was attributed to high international food and fuel prices, drought crisis which affected a large part of northern and north-eastern regions, conflict in the Horn of Africa region, the Euro crisis and widening fiscal and current accounts deficits, *ibid*

Figure 2: Inflation in Kenya (2010 to 2011)



32. *The high cost of living is pushing more people into poverty.* More and more people are unable to meet their basic needs, a trend exacerbated by high levels of unemployment particularly among the youth. The Youth Scenarios report released by the Institute for Economic Affairs in November 2011 observed that countries with a high youth population have registered a 3.6 per cent economic growth. The report noted that over the next 15 years, a big youth population is inescapably going to lead to higher unemployment (double the national average), exacerbating rural-urban migration and competition for resources, with increased crime and insecurity.<sup>4</sup>
33. Although these are future projections, they are relevant for the present time. This is reflected in how people feel about safety: 52 per cent feel safer than they did after the post-election violence while 34 per cent are feeling less safe and 14 per cent feel about the same. Whereas more Kenyans should be feeling safer, it is possible to attribute the low numbers to a number of factors. First, the high cost of living has increased petty crime and domestic violence.<sup>5</sup> There are also different forms of inter-communal resource-based conflicts in several parts of the country.<sup>6</sup> In some areas, people are also concerned about the outcome of confirmation of charges hearings by the International Criminal Court, which is expected to rule in January 2012. Finally, the sense of safety has further been impacted by Kenya’s fight against the Al Shabaab militia in Somalia from October 2011. Since the launch of the military operation, retaliatory attacks and heightened insecurity in northern Kenya as well as security alerts in other parts of the

<sup>4</sup> Institute for Economic Affairs, *Kenya Youth Scenarios* (Nairobi: IEA, 2011), p.

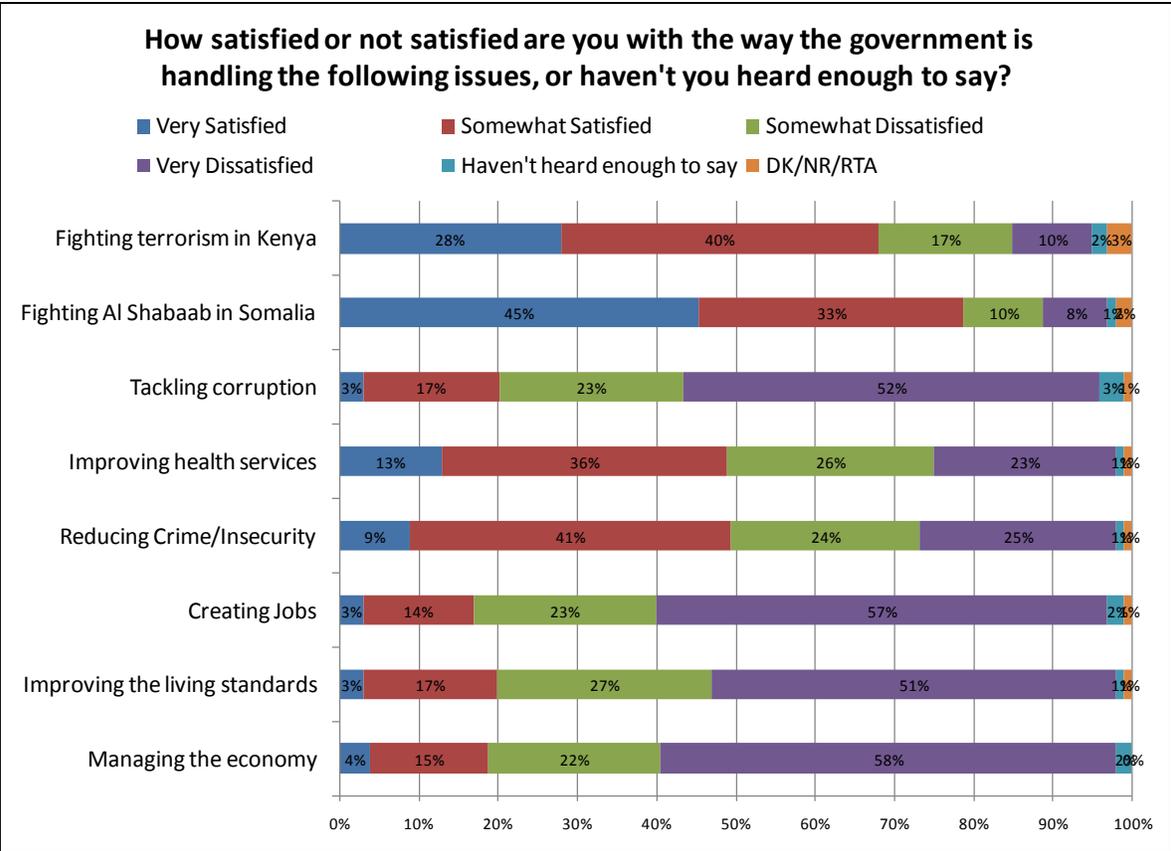
<sup>5</sup> Reported cases of mugging, pick-pocketing and domestic violence have increased dramatically. Interview with senior government official in the Ministry of Internal Security, October 2011

<sup>6</sup> OCHA, *Kenya Humanitarian Bulletin*, 29 Dec 2011

country have increased public anxiety about the consequences of the ‘war’, particularly due to lack of clarity about when the military operation will end.

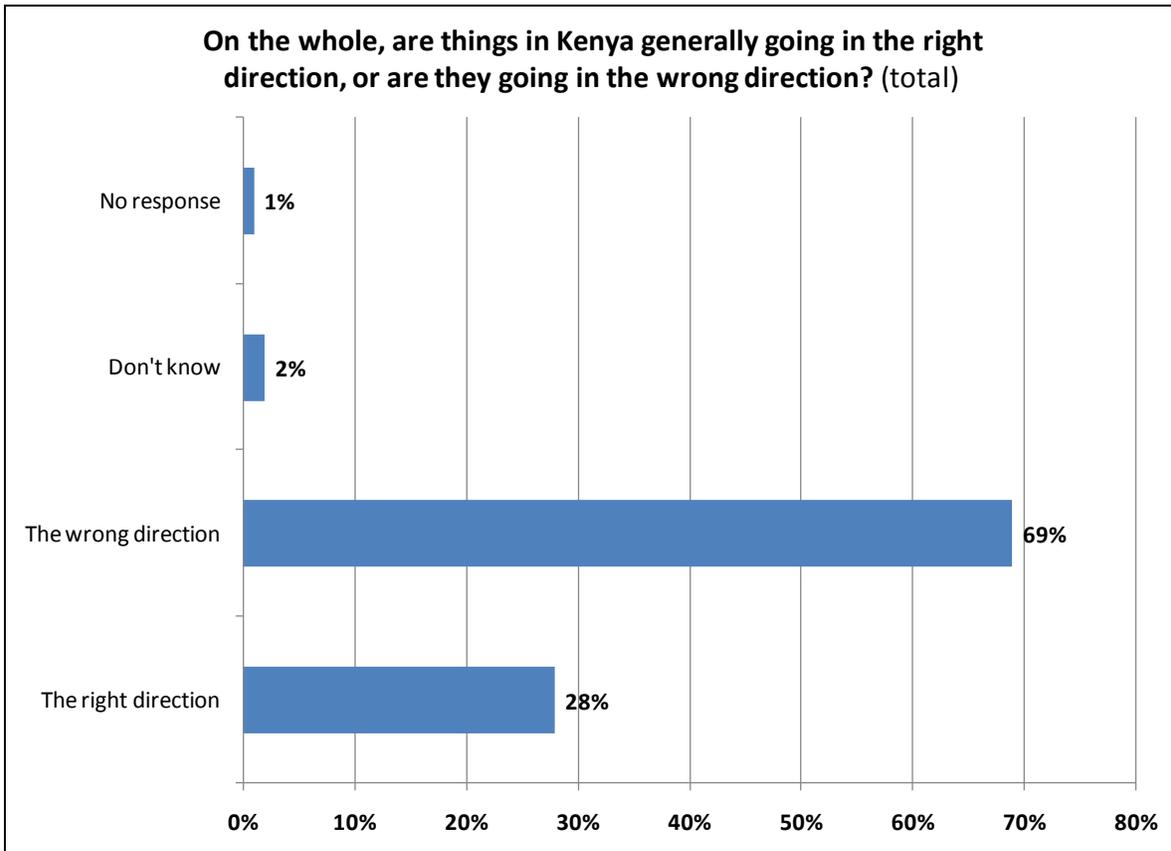
34. This notwithstanding, many Kenyans are supportive of the government’s fight against Al Shabaab through the Operation Linda Nchi, launched after Somali militants associated with the terror group kidnapped international aid workers in Daadab refugee camp and tourists in the coastal towns of Mombasa and Lamu. Although there have been retaliatory attacks on Kenyan territory, over 70 per cent of survey respondents said they are satisfied with the way the government is handling the Al Shabaab and terrorism. In fact, these are the only areas where the government has the highest approval rating. There is general dissatisfaction with how the government is handling the economy (80%), tackling corruption (75%), and creating jobs (80%).

Figure 3: How satisfied or not satisfied are you with the way the government is handling the following issues, or haven't you heard enough to say?



35. Uncertainty engendered by the fluid economic and political environment and insecurity has resulted in some disillusionment. Asked if, on the whole, things in Kenya are generally going in the right direction, or the wrong direction, 69 per cent of respondents said things are not going in the right direction:

Figure 4: Are things generally going in the right direction or wrong direction (by total)



36. *People would like the government to prioritise addressing the cost of living.* When asked what should be the priority of the government in the next year, 64 per cent of the respondents said they wanted the coalition to concentrate on lowering the cost of living. Eleven per cent mentioned creation of jobs. This is a persistent response in previous surveys. This is indicative that some of the underlying causes of the post-election violence remain inadequately addressed even as Kenya prepares for another General Election:

Table 1: Most important priority for the government to address next year (by total)

<b>Please tell me what you think are the TWO most important priorities for the government to address next year, starting with the MOST important? (Most important, by total)</b>	
Reduce prices of essential commodities/food	64%
Create Jobs	11%
Promote peace and reconciliation/intercommunity harmony	6%
Fight corruption	5%
Undertake land reforms	4%
Fight crime/improve on security	3%
Improve social amenities	2%
Other	2%
Resettle IDPs	1%
Improve infrastructure	1%

## Conclusion

37. Socio-economic and political challenges facing the country could increase public anxiety as the next General Election approaches. The high cost of living is affecting everyone. Demands for better wages and remuneration by professionals that featured in the previous quarter followed similar demands by the urban poor in the first half of 2011. These are new pressures on the economy whose growth tends to slow every election year. Increased public disillusionment is showing in the perception of the government's ability to manage their economic wellbeing. Up to 80 per cent of those interviewed are dissatisfied with the government's performance with managing the economy and an equal percentage deplors its responsiveness to unemployment. The government is quickly losing support as shown by 30 per cent of those interviewed saying they like 'nothing' about the government.
38. Failure to address factors that impinge on household food security is likely to project the state of the economy as a significant campaign theme in 2012. Income inequalities combined with poor means of livelihood and the government's capacity to deliver could add to the Kenya's fault lines during the elections. As 2012 approaches, undertaking measures to cushion the poor and prevent the economy from the usual slump associated with electoral cycles in Kenya should be prioritised.

## 2. IMPLEMENTATION OF THE NEW CONSTITUTION AND OTHER AGENDA 4 REFORMS

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### *Introduction*

39. The Kenya National Dialogue and Reconciliation (KNDR) mediation process acknowledged that institutional failure and political divisions emanating from Kenya's 2005 referendum on the constitution contributed to the post-2007 election violence. Under the mediation's Agenda Item 4, the agreement underscored the importance of undertaking far reaching constitutional and institutional reforms in order to move the country forward and prevent future violence. The promulgation of the constitution on 27 August 2010 was, therefore, not only the main achievement of the KNDR process, but also the watershed moment for a new culture in the management of public affairs.
40. Schedule 5 of the Constitution listed up to 49 pieces of legislation needed to bring the Constitution into effect in a timely manner. This report examines the progress made towards implementation of the constitution. It discusses the Bills that have been passed, the work of implementation commissions, institutional reforms, challenges encountered, devolution and Agenda 4 issues such as land reform, poverty reduction and the fight against corruption.

### *The Constitution Implementation Process*

#### **Passing of Bills**

41. In addition to the 26 laws passed by the end of the first year, Parliament passed several other laws between October and December 2011. The laws passed and those pending are shown in the Table 2.

Table 2: Passed and Pending Bills 2011

**Passed Bills**

1. Vetting of Judges and Magistrates Act, 2011
2. Judicial Service Commission Act, 2011
3. Supreme Court Act, No. 7 of 2011
4. Independent Offices Appointment Act, 2011
5. Independent Electoral and Boundaries Commission Act, 2011
6. Salaries and Remuneration Commission Act, 2011
7. Political Parties Act, 2011
8. Kenya Citizenship and Immigration Act, 2011
9. Urban Areas and Cities Act, 2011
10. Kenya National Commission on Human Rights Act, 2011
11. National Gender and Equality Commission Act, 2011
12. Commission on Revenue Allocation Act, 2011
13. Contingencies Fund and County Emergency Funds Act, 2011
14. National Government Loans Guarantee Act, 2011
15. Environment and Land Court Act, 2011
16. Industrial Court Act, 2011
17. Power of Mercy Act, 2011
18. Ethics and Anti-Corruption Act, 2011
19. Commission on Administrative Justice Act, 2011
20. Elections Act, 2011
21. Public Appointments (Parliamentary Approval) Act, 2011
22. National Police Service Commission Act, 2011
23. Kenya Citizens and Foreign Nationals Management Act, 2011
24. National Police Service Act, 2011
25. Price Control (Essential Goods) Act, 2011
26. Tourism Act, 2011
27. Veterinary Surgeons and Veterinary Para-Professionals Act, 2011
28. Prohibition of Female Genital Mutilation Act, 2011
29. Industrial Training (Amendment) Act, 2011
30. Independent Policing Oversight Authority Act, 2011

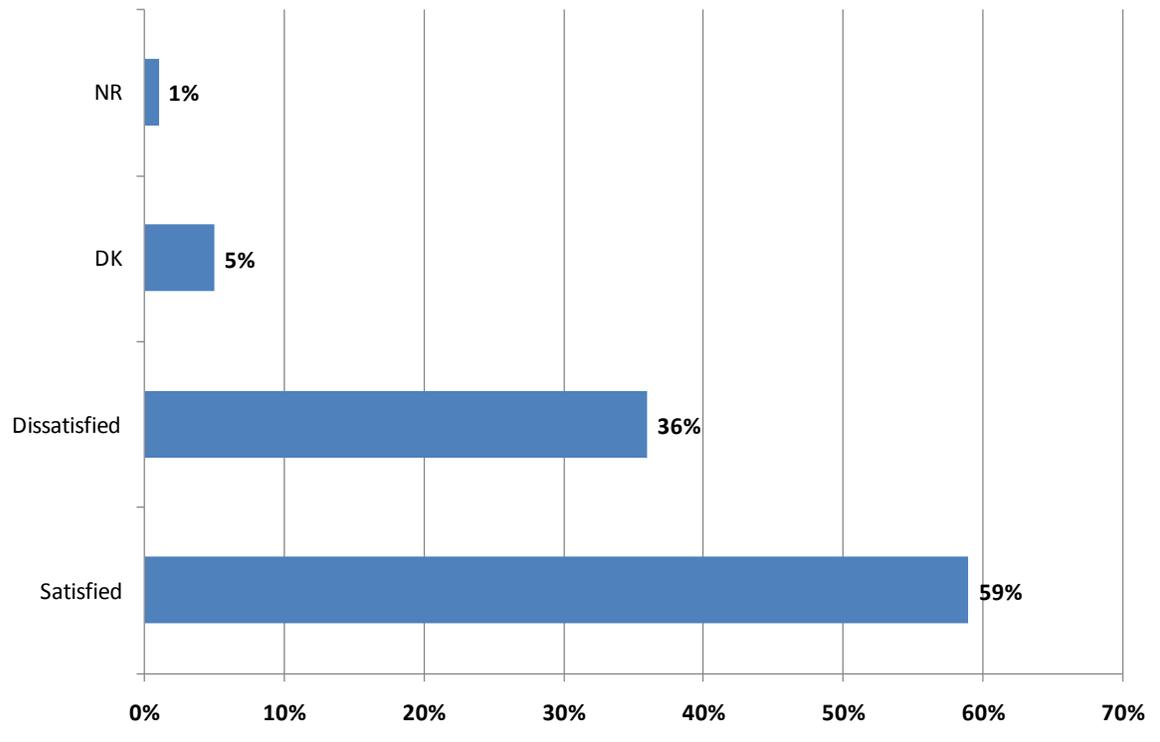
42. The legislative process has slowed down since August 2011. In this review period, only two Bills have been enacted --the Public Appointments (Parliamentary Approval) Bill, 2011 and Independent Policing Oversight Authority Bill, 2011. Of the eight Bills due by 26 February 2012, only the Land Bill, 2011 and Land Registration Bill, 2011 are with the CIC undergoing review. The Transition to Devolved Government Bill, Intergovernmental Relations Bill and County Government Bill, have been submitted to the AG for onward transmission to Parliament.
43. Delays in finalizing the pending Bills should be addressed because a pattern of delay and rushing at the eleventh hour is likely to undermine public participation and oversight in the legislative process and ultimately undermine the constitution itself.<sup>7</sup>As noted in previous reports, there are vested interests contributing to delays in finalising some of the Bills. There are also attempts to subvert public participation. The delays could again lead to the rushing of the Bills without scrutiny and adequate public participation.
44. Attempts to find the cause of delays results in blame games among the various actors involved in the preparation of the Bills. For instance, the CIC and the office of the Attorney General have engaged in an acrimonious public exchange, with CIC accusing the AG of blocking the implementation process and undermining the rule of law, while the AG has accused the CIC of overstepping its mandate. Interviews in different parts of Kenya show that while the majority of respondents are happy with the implementation of the new constitution, they are concerned about failure to enforce and adhere to the new law. *They are also taking issue with the attempt by politicians to amend the constitution. They see this as just another ploy to destroy the constitution. They think the constitution is good but the problem is not the constitution; it is the political leadership.*<sup>8</sup>
45. These observations point to lack of coordination among various actors, competing interests, and the absence of a common vision in terms of what the Bills aim to achieve in relation to the spirit of the constitution. They are a pointer to ineffective conflict management mechanisms in the implementation process. These competing interests and blame games remain the single most important new threats to the Kenya's new dawn.
46. Notwithstanding these challenges, public satisfaction with the implementation process remains high, at 59 per cent. This is an improvement from the previous review period, when 52 per cent were satisfied.

Figure 5: How satisfied or not satisfied are you with the progress of implementation of the new constitution?

<sup>7</sup> Briefing Note, November 2011

<sup>8</sup> Interview with civil society leader and political activist in Mombasa, 7Dec 2011

**How satisfied or not satisfied are you with progress of implementation of the new constitution? (total)**



## ***Establishment of New Commissions***

47. The government has also established/reconstituted independent institutions and commissions. The bodies established in the reporting period include:
- The Salaries and Remuneration Commission
  - Independent Electoral and Boundaries Commission
  - Gender and Equality Commission
  - The Commission on Administrative Justice
  - The Ethics and Anti Corruption Commission
48. The very public and transparent nature of interviews and recruitment processes for Commissioners drew some approval, with 23 per cent citing the transparent and public vetting of candidates as an important change resulting from the constitution. However, there are concerns about the Executive compromising the processes of establishing new institutions. Some respondents said they were concerned about horse trading by the two parties in the coalition and the two Principals in particular. They were worried that this is taking the form of political interference with the process of establishing new institutions. Significant also is that some appointments were not done within the stipulated timeframe. This is in addition to the integrity questions, concerns about gender and ethnic representation that were raised with composition of some of these bodies.
49. These issues do not augur well for nascent institutions. They weaken the foundation on which the institutions will stand. The issues generally suggest a need for Kenyans to remain vigilant and to make the vetting process more effective. There is also a need to establish a framework to guide public participation in the vetting process as well as a framework to put Article 10 and Chapter 6 (Leadership and Integrity) of the Constitution into operation. Lack of defined criteria to guide balancing of regional, gender and ethnic interests with professional skills will result in all forms of interference in the recruitment process. And if the process is not predictable or based on transparent recruitment processes, then it will prevent qualified people from applying for jobs in these bodies.
50. This trend of ‘going back to the old ways of doing things’ with respect to appointments, has resulted in a reduced number of Kenyans who say they have seen changes since the promulgation of the new constitution. In a survey done in September 2011, up to 53 per cent of Kenyans said they had seen some changes. In December 2011, that number reduced to just 44 per cent.

Table 3: Have you observed any change since in the country since the adoption of the new constitution?

<b>Have you observed any change in the country since adoption of the new Constitution?</b>					
	Oct 2011	Dec 2011		OCT 2011	DEC 2011
Yes	53%	44%	Don't know	3%	4%

No	44%	51%	No response	0%	1%
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51. The reduced number of respondents who say they have noted changes suggests that the high sense of optimism expressed during the promulgation is subsiding. The decline may be attributed to people feeling that there is a slide to the old ways, a relapse to business as usual, or even feeling that there is lack of political commitment to Chapter Six of the Constitution. Public disagreements between implementing agencies and numerous attempts to amend the sections of the constitution reinforce the perception of lack of political commitment to the letter and spirit of the Constitution. Arguably, real change is yet to trickle in; it is yet to be felt in people’s everyday lives at the community level.

### Transiting to a Devolved System of Government

52. Previous reports did mention that many Kenyans supported the new constitution because it provides for a devolved system of government. The October 2010 report, in particular, observed that people appreciated that devolved government would be responsible for the management of local affairs. They supported devolution because they wanted resources to address their local issues. The devolved system of government will come into effect immediately after the next General Election. Its implementation will not be phased. This means that preparations for a *devolved system of government must be completed before the next General Election*. The delicate transition from the current governance system to the devolved structure requires a sturdy legal, institutional and financial framework.
53. As already noted, despite the urgent need to be prepared for the transition, requisite Bills on devolved government have not been debated; the legal framework is yet to be completed. There are matters outstanding in the courts regarding the constitutionality of some of the Bills enacted before the August 2011 deadline.<sup>9</sup> Adding to this complex context is also progress in finalising the Intergovernmental Fiscal Relations Bill, 2011. While the CIC had announced in December 2011 that it was finalising review of the Bill, the Ministry of Finance appeared not to be aware of this development<sup>10</sup>.
54. The proposed National Security Council Bill, 2011, which creates a County Security Committee that excludes the governor, has also raised concern. Some argue that this not only undermines the independence of the county but could also undermine the security situation in the devolved system.<sup>11</sup> There are concerns too with respect to the role of the Provincial Administration. There is apparent determination to retain the Provincial Administration, which will be accountable to the national government. Some concerns have been raised about the creation of the positions of county co-ordinators and representative of the national government before the law on the legal framework on devolution structures is finalised.<sup>12</sup>

<sup>9</sup> ‘CIC Moves to Court Over Bills Row’ *The Star*, 25 August, 2011

<sup>10</sup> ‘Proposed Law Hands Counties Greater Control of Public Funds’ *Sunday Nation*, 4 December 2011:

<sup>11</sup> Interview with a civil society official monitoring devolution and implementation of the constitution, 25 November 2011

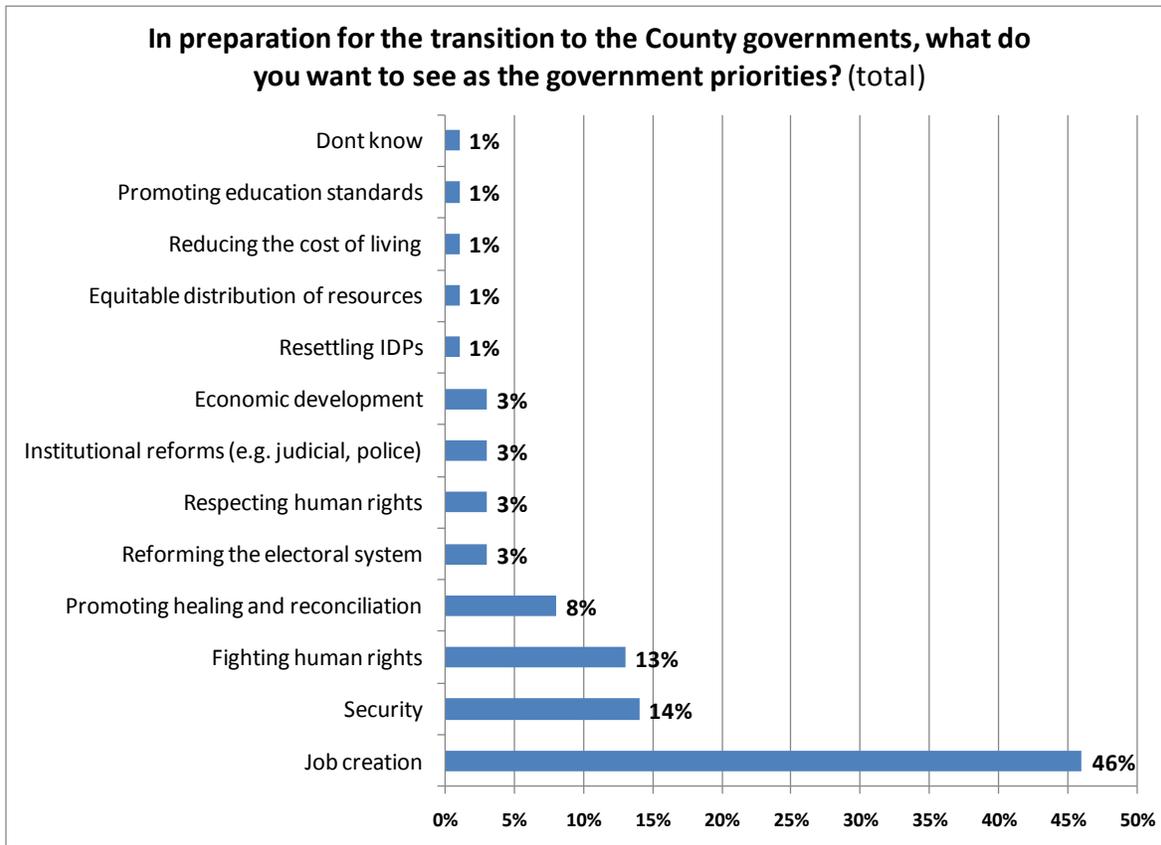
<sup>12</sup>Media reports: Civil Society Groups Demand Amendment of Security Bills, 20 November 2011

55. Even more disturbing is the lack of clarity about the nature of the relationship between the central government and devolved structures. Some leaders have even proposed to abolish the Senate, and effectively remove the bi-cameral provisions of the Constitution. This, of course, cannot be done without weakening the foundation of devolution.
56. Nonetheless, lack of clarity on relationships between the central and the devolved government has continued to animate inter-ministerial debate and contestation on devolution. For instance, the ministries of Finance on the one hand and that of Local Government and the Task Force on Devolved Government on the other have taken different positions on the Public Finance Management Bill. Their opposing positions have occasioned a protracted delay in processing the Bill. Mediation efforts by the CIC and the Principals have been unsuccessful. Contestation over such a critical Bill risks polarising the nation and heightening tensions ahead of the next elections.<sup>13</sup>
57. Chapter Two of the Constitution provides the guiding principles on how devolved governments will deliver services in a democratic Kenya, notably in accordance with national values outlined in Article 10. Many people are still optimistic about devolution. A majority of the respondents said they wanted the devolved government to prioritise job creation:

Figure 6: In preparation for the transition to the county governments, what do you want to see as the government priorities?

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<sup>13</sup> Interview with a civil society leader, 5 December 2011



58. But in some counties, devolution appears to lend itself to interpretations that could frustrate national unity and the principles of diversity spelt out in the constitution. Interviews show that in multi-ethnic counties, devolution is viewed as an opportunity to exploit local resources to the exclusion of those who are numerically fewer.<sup>14</sup> Some leaders in these counties also perceive devolution as an opportunity to restrict competition for political power and control of resources within particular spaces.<sup>15</sup> In some regions, the minority groups have openly been cautioned against aspiring for any leadership positions in the counties.<sup>16</sup> Others perceive county governments as an opportunity to deal with historical injustices, particularly grievances around land distribution. Fears and possibilities of marginalisation of perceived foreigners and minority groups are real. They could galvanise ethnic polarisation and undermine national stability and cohesion in some counties.<sup>17</sup>
59. In some counties, dominant communities are already demanding control of the public service and resources.<sup>18</sup> Fears about discrimination, biased use of resources and marginalisation are evident among Kenyans as the country prepares for devolution.

<sup>14</sup> Interview with a community elder and leader in Rift Valley, 16 November 2011

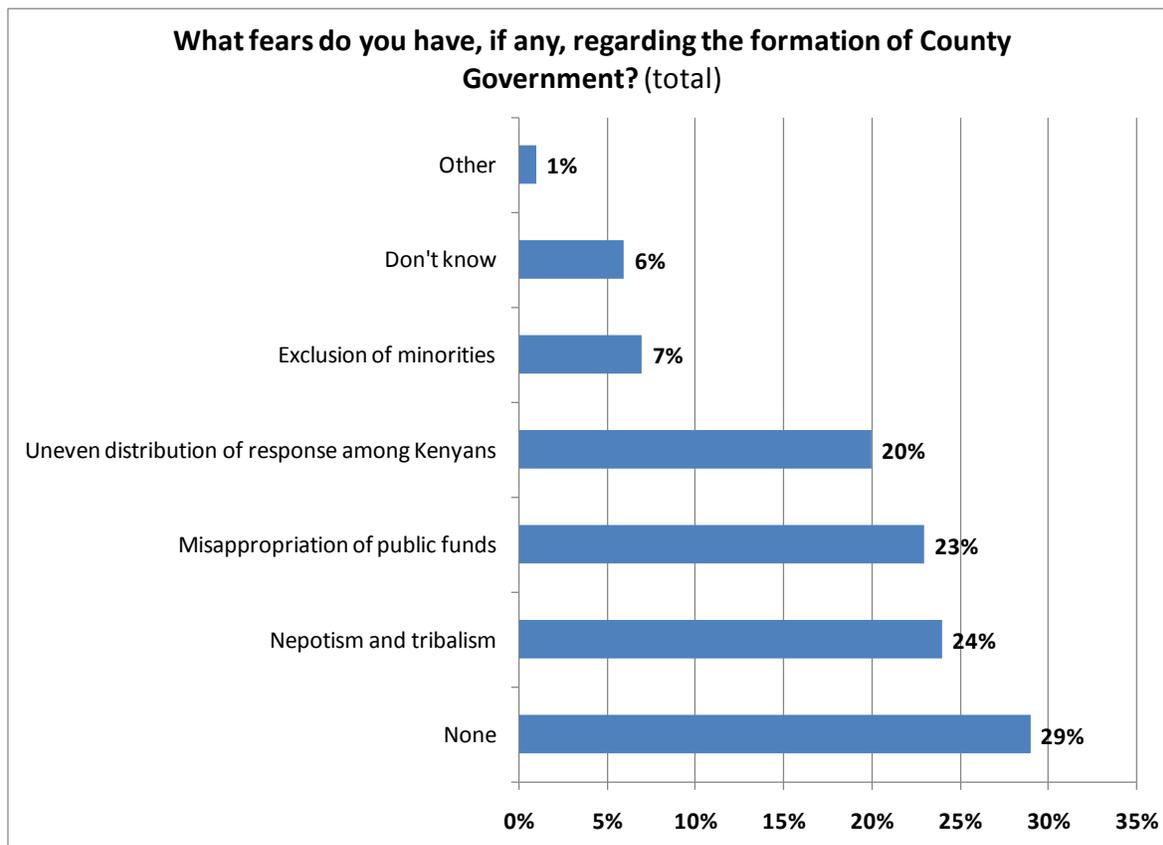
<sup>15</sup> Interviews with political leaders in Rift Valley, November 2011, and Coast, December 2011

<sup>16</sup> Interview with a civil society official in the Rift Valley, 17 November 2011

<sup>17</sup> Interviews with a leader of a civil society organisation in Eldoret, 16 November 2011

<sup>18</sup> Interview with an official of the Provincial Administration, Rift Valley, 15 November 2011

Figure 7: What fears do you have, if any, regarding the formation of county government?



60. *Lack of civic education:* That the implementation process has been going on for over a year without civic education raises serious questions about the capacity of Kenyans to participate in the process and also transform their way of life in line with the requirements of the constitution. The Task Force on Devolved Government was mandated to develop a programme on civic education on the devolved government.<sup>19</sup> Although the Task Force had drafted a detailed programme and even proposed a Bill on civic education, which was dropped, the civic education programme on counties has not kicked off.
61. *There are other challenges.* Not everyone in the country is supportive of the proposal to amend the constitution. While there is wide consensus on the necessity to amend the provision on how to achieve gender balance and other provisions that appear inconsistent, only about half of the survey respondents support the proposed amendment on the election date.
62. Over half of the survey respondents support all the proposed changes. In the December 2011 survey, over three quarters of respondents were supportive of the amendments to

<sup>19</sup> Gazette notice number 12876 of October 25, 2011

provide for gender equity in elective posts but only half were supportive of other proposed amendments.

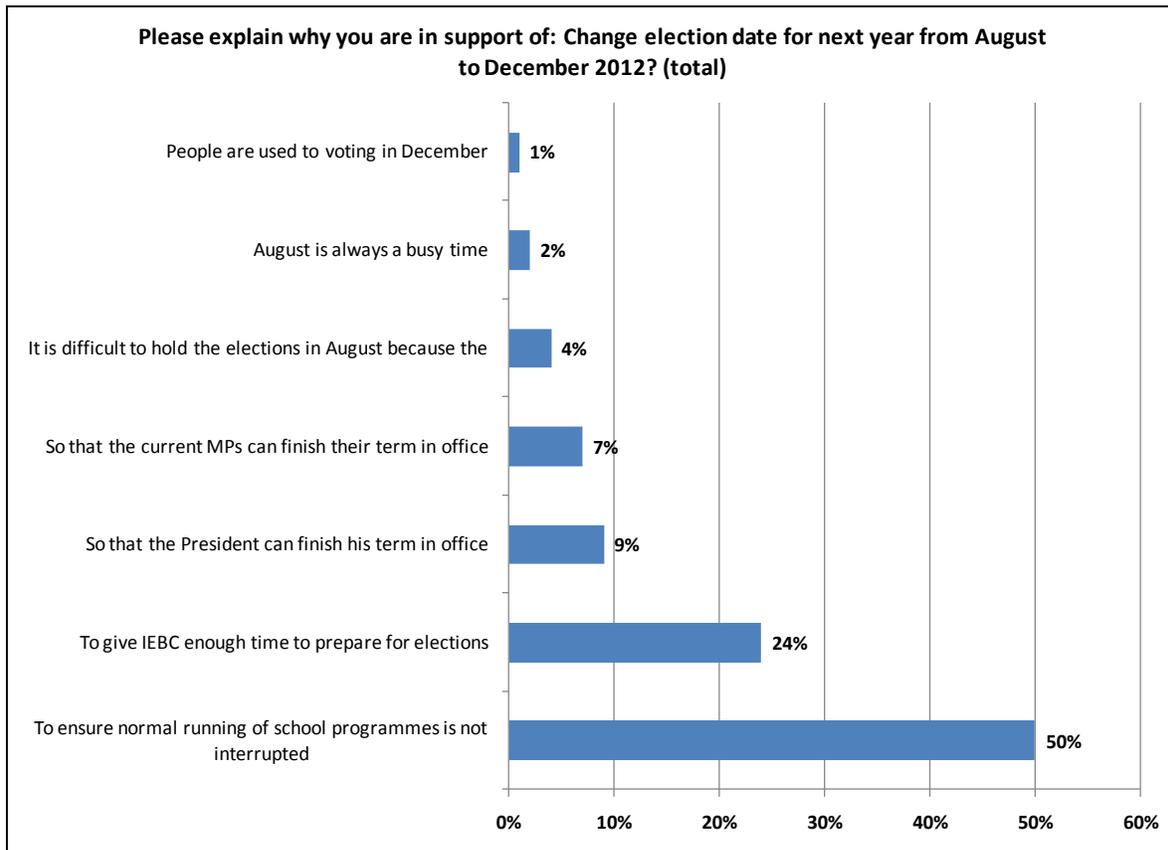
Table 4: Do you support the proposal to amend the New Constitution with regard to the following?

<b>Do you support the proposal to amend the New Constitution with regard to the following?</b>			
	Yes	No	Don't Know/NR
Change election date for next year from August to December 2012	55%	41%	4%
Change the election date from August to December in all future elections	52%	44%	4%
Amend to ensure women get one third members in Parliament	72%	25%	3%
Amend to ensure 80 new constituencies vote in the next election	57%	35%	8%

63. Half (50 per cent) of the 54 per cent supporting the change of the election date from August to December 2012 argue that holding elections in August could interrupt the smooth running of school education programmes, particularly because schools are used as polling centers. *'It means the whole term is disrupted by loud political campaigns. If there is a run-off, schools will not open on time in September. If elections are not peaceful, schools will be turned into IDP camps. August is not a good time; candidates are preparing for final exams and need peace and quiet to prepare.'*<sup>20</sup>

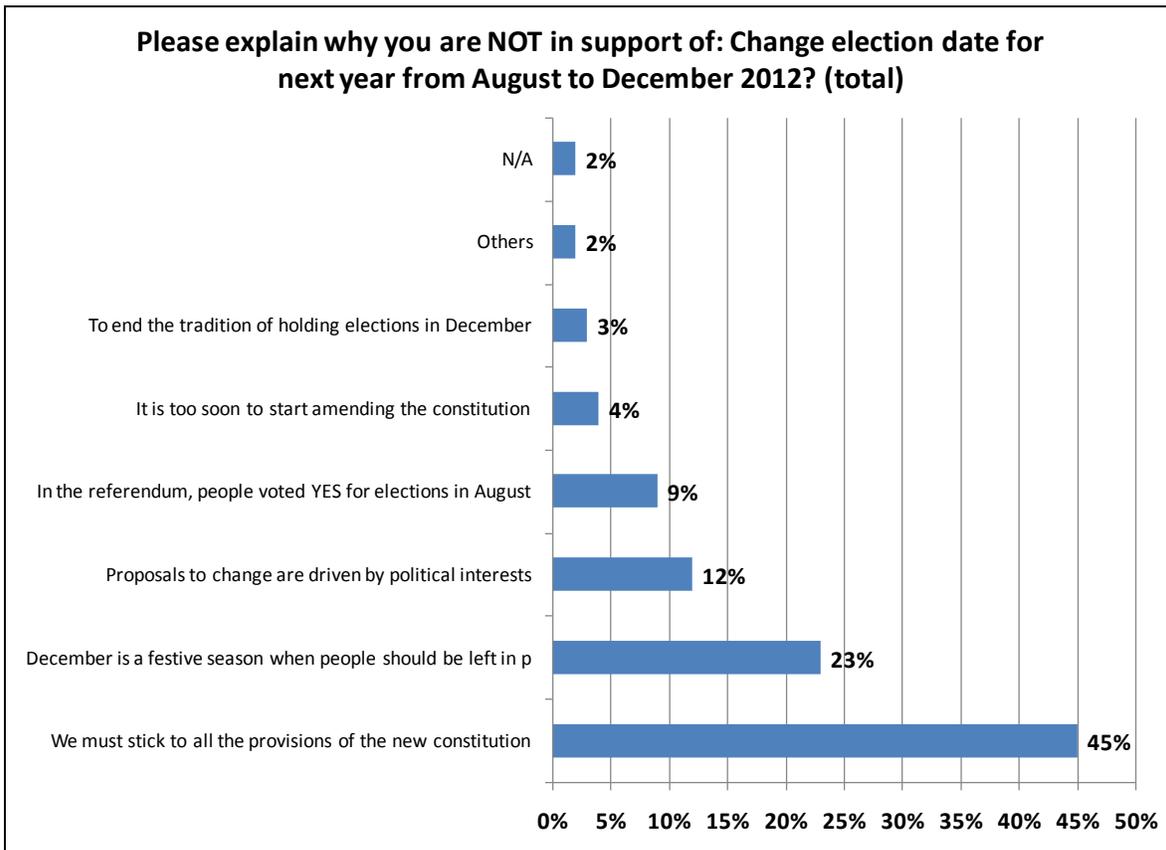
<sup>20</sup> Interview with an elderly man in Kibera, 4 Dec 2011

Figure 8: Please explain why you are in support of: Change election date for next year from August to December 2012? (total)



64. Another 24 per cent think the newly established Independent Electoral and Boundaries Commission should be allowed adequate time to prepare for the complex elections in 2012, including voter registration and civic/voter education. Nine per cent and 7 per cent, respectively, think the President and elected MPs should be allowed to finish their terms. Of those opposed to a change of the electoral date, 45 per cent believe the government should adhere to provisions of the constitution.

Figure 9: Please explain why you are NOT in support of: Change election date for next year from August to December 2012? (total)



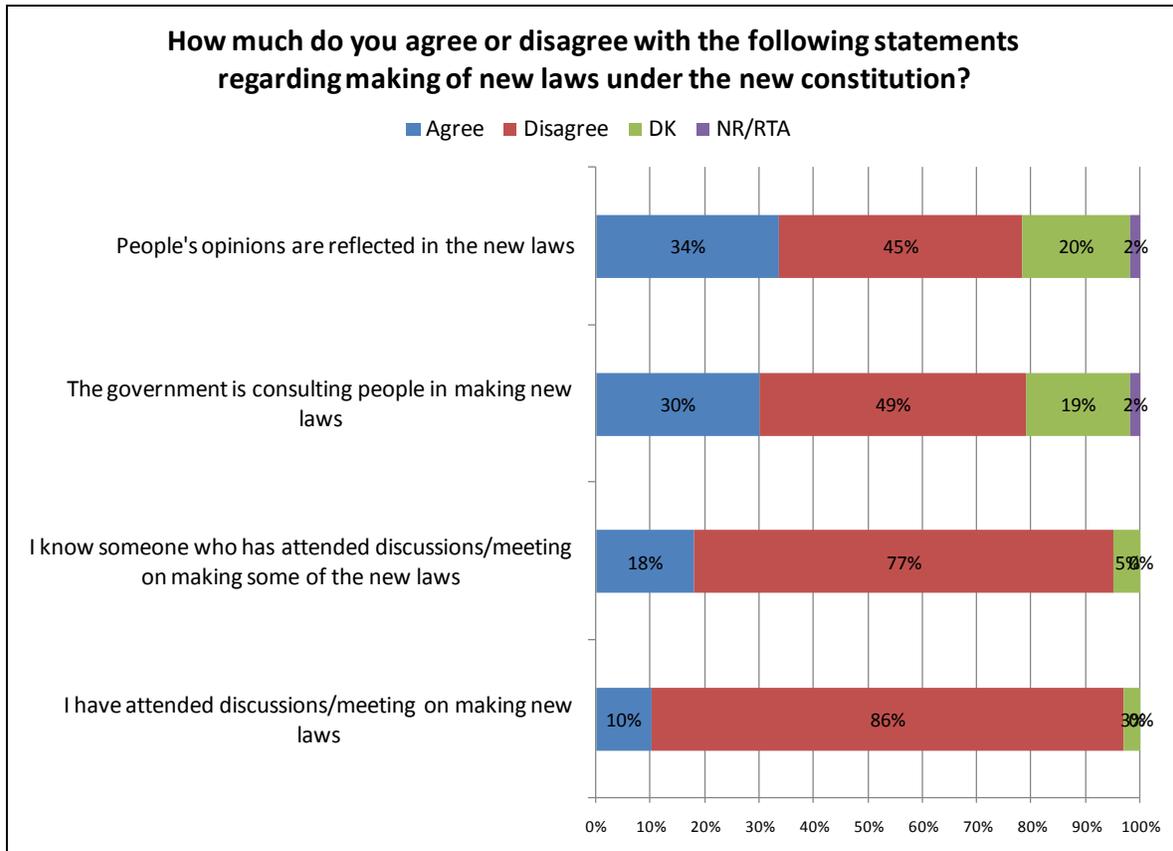
65. Up to 12 per cent argue the proposed changes are driven by political interests. Nine per cent reinforce this view by recalling that when majority voted YES in the referendum, they knew they were endorsing elections in August. Another 23 per cent say elections in December interrupt the festive season for families, while 4per cent say it is too early to start introducing changes to the new constitution. Some argue that legislators are rushing to make amendments without first attempting to implement the sections of Constitution in question.<sup>21</sup>
66. Efforts to introduce changes to the Constitution have undermined the bi-partisan consensus that had already begun to form within Parliament. Those who are in favour of amendment say minimum changes are imperative in the short term, while those opposed argue proposed changes are reminiscent of the fate of the independence constitution, which was *'amended so many times it was unrecognisable and ultimately lost its capacity for necessary checks and balances.'*<sup>22</sup> Because of this and as noted in the previous reports, once again, about half of the respondents cited political divisions as a threat to implementation.

<sup>21</sup> Remarks by an MP during a public forum, 5 December 2011

<sup>22</sup> Remarks by a politician during the 3<sup>rd</sup> KNDR Conference, 5 December 2011

67. Public participation in the constitution implementation process is still low. Most Kenyans say they have not attended meetings where the new laws are being discussed.

Figure 10: How much do you agree or disagree with the following statements regarding making of new laws under the new constitution?



### Institutional Reforms

68. The 2007 electoral dispute and the ensuing violence were attributed to institutional failure stemming from internal weaknesses or political interference in the operations of those institutions.<sup>23</sup> The police force, the electoral commission, the judiciary and the civil service did not enjoy public confidence. The new constitution contains provisions for re-engineering some of these institutions, in addition to creating new ones.
69. Perhaps inspired by the manner in which some of the institutions have recruited their senior leadership, many Kenyans (77%) have confidence in the Independent Electoral and Boundaries Commission. Another 65 per cent of survey respondents said they have confidence in the Judiciary, while a relatively small (40%) number have confidence in the police force and political parties (36%).

<sup>23</sup> Report of the Task Force on Devolution, September 2011

Table 5: How much confidence do you have in the following institutions as we go to the next General Election?

Do you support the proposal to amend the New Constitution with regard to the following?				
	Confident	Somewhat Confident	Not at all Confident	DK/NR
The Electoral & Boundaries Commission(IEBC)	77%	8%	2%	13%
Judiciary	65%	24%	5%	5%
Police	40%	36%	22%	2%
Political Parties	36%	36%	24%	4%

70. As noted in the last quarterly report, judicial reforms remain an important change the country has seen since the promulgation of the new constitution. In this reporting period, the Chief Justice gave an outline of plans for the next year when he presented his report of his first 120 days in office to the public. The Judicial Service Commission also recruited more High Court and Court of Appeal judges and advertised vacancies expected to be filled by early 2012. This is expected to improve the capacity of the Judiciary in dealing with its workload and to reduce its case backlog. JSC has also proposed landmark measures to improve the welfare of judicial officers by making provisions for loans and mortgages.<sup>24</sup>
71. Measures to build the capacity of the Judiciary are also underway. The Judicature Amendment Bill, 2011, is expected to increase the Court of Appeal judges from 12 to 30 and those of the High Court from 70 to 150<sup>25</sup>in order to ease the backlog of cases and speed up review of disputes.
72. Vetting of sitting judges and magistrates will start in January 2012. After a case challenging vetting of judges was dismissed in September 2011,<sup>26</sup> the Vetting of Judges and Magistrates Board issued a notice calling for public views on judges and magistrates. Parliament also received two names of foreign Judges nominated by the Principals to serve on the vetting board.
73. Between October and December 2011, the President assented to the Independent Policing Oversight Authority Act, 2011, setting the stage for civilian oversight of the police. At the same time, the process of choosing the first Inspector General of police commenced with the selection panel interviewing applicants for positions in the National Police Service Commission.<sup>27</sup> The Selection Panel shortlisted 11candidates for

<sup>24</sup> "Judiciary Staff Get Sh20 Million Mortgage Plan," *Daily Nation*, 11 December 2011

<sup>25</sup> "Bill Increasing Number of Judges to Be Tabled This Week," *Daily Nation*, 11 December 2011

<sup>26</sup> 'Daily Nation, 19 November 2011

<sup>27</sup> Inadequate applications from the administration police for membership to the Commission. This has forced the panel to re-advertise the position and invite more applications from retired officers. 'AP fail to apply for police commission posts' *Standard*, 23 November 2011

the position of chair of the National Police Service Commission. Once formed, the commission will recruit a new Inspector General and two deputies.

74. During the period, it was also reported that the internal affairs unit of the police force had been set up and will be managed by both Administrative and Regular police.<sup>28</sup> The internal affairs unit is supposed to handle internal complaints. The Kenya Institute of Education is conducting a Training Needs Assessment for the police. A new code of conduct developed by the police has been promulgated.<sup>29</sup>

### Land Reforms

75. Agenda item 4 had identified land reforms as critical to securing sustainable peace and stability in Kenya. The national land policy is anchored in the constitution. Some stakeholders are worried about slow progress in land reforms. They argue that vested interests and corrupt officials are slowing reforms. Nonetheless, the Ministry of Lands has established the Land Reforms Transformation Unit, which stakeholders say is weak and does not have sufficient autonomy.<sup>30</sup> The unit was meant to lead the land reform process pending the establishment of the National Land Commission. Secondly, the Ministry of Lands started piloting how to computerise a land information management system. The pilot program was to be carried out in Nairobi, Mombasa, Nakuru and Thika. The results have not been encouraging.<sup>31</sup>
76. The Ministry of Lands has been preparing draft legislation but non-state actors pulled out of the process in September 2011, accusing ministry officials of not consulting adequately and lacking commitment to reforms<sup>32</sup>. The other concern is that the legislative process on land is uncoordinated, as every line ministry handling related issues works separately without reference to each other.<sup>33</sup> Coordination is constrained by practical factors and vested interests in the sector.<sup>34</sup>
77. The limited progress is also reflected in people's responses. Only 35 per cent of survey respondents think the government has performed well in dealing with land problems in the country. A significant 61 per cent are of the view that the government has not done well. Similarly, 31 per cent of Kenyans feel the government has done enough to deal with land related conflicts while 62 per cent feel the government has not done enough.

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<sup>28</sup> Remarks by a member of the Police Reform Implementation Committee in a roundtable meeting to discuss police reforms, 10 November 2011

<sup>29</sup> *ibid*

<sup>30</sup> Interview with a member of the civil society, 4 October 2011

<sup>31</sup> *ibid*

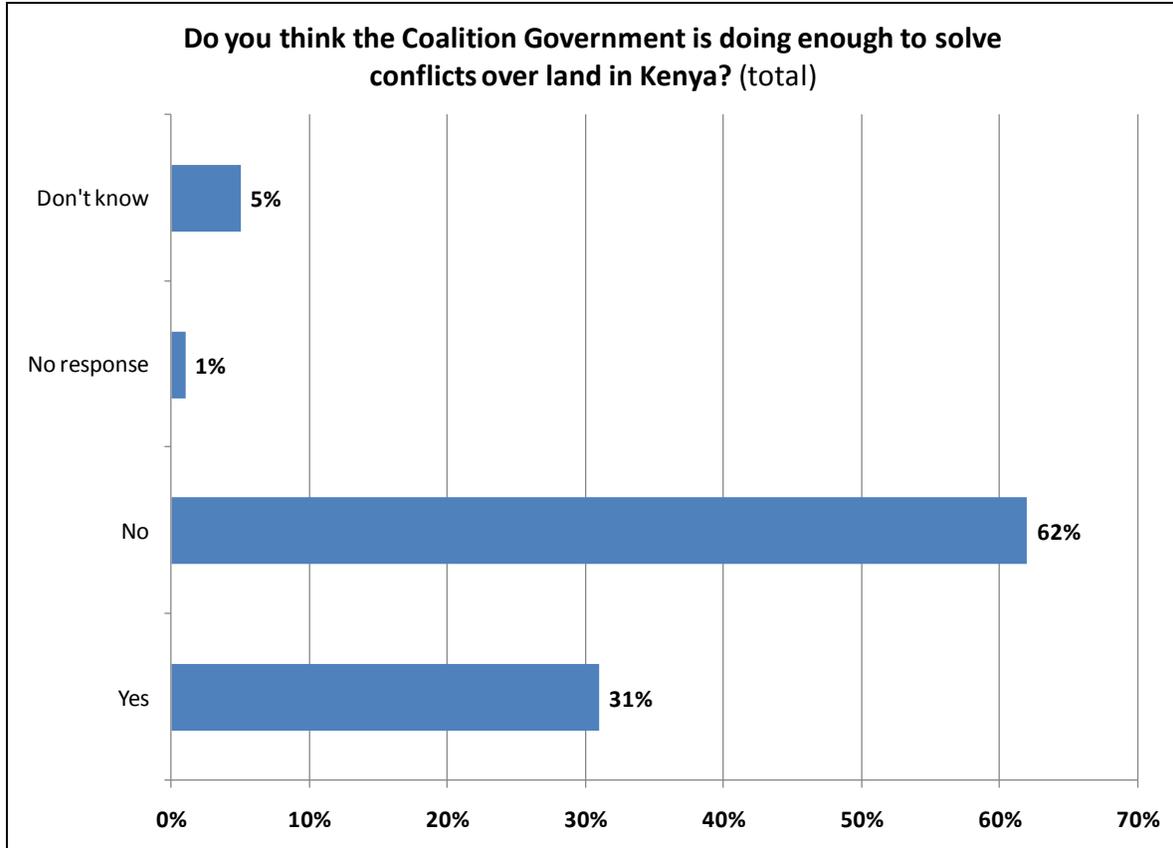
<sup>32</sup> Memorandum by Land Sector Non State Actors to the ministry of lands titled "continued engagement with the ministry of lands on land reforms" September 30, 2011: the CSOs demanded a clear reform roadmap and reorganisation of the Land Reforms Transformation Unit to give it autonomy

<sup>33</sup> Interview with a civil society executive working in the land sector, 4 October 2011

<sup>34</sup> See Daily Nation, Page 13, 14 October, 2011

This may suggest that land related conflict is the most serious issue Kenyans associate with the phrase “land problems”.

Figure 11: Do you think the Coalition Government is doing enough to solve conflicts over land in Kenya (total)



78. Most Kenyans want the government to repossess irregularly acquired land, public or otherwise. An overwhelming 85 percent of respondents said they wanted the government to repossess any land that was allocated irregularly while 83 percent wanted the government to repossess any public land that was acquired irregularly.
79. When asked about what they felt was the most important thing the government needed to do to address land related problems in their area, 36 per cent of respondents said there was need to issue genuine title deeds, 11 per cent wanted clear land boundaries while another 6 per cent cited the need to set up land dispute resolution boards at divisional level.

Table 6: Name the most important thing the government can do to address land problems in your area

Issue genuine title deeds	36%
There's no land problem in this area	23%
Set clear land boundaries	11%
Stop corruption in land office	7%
Set up land dispute boards at division level	6%
Offer land to the landless	5%
Reconcile communities	4%
DK	4%
Support traditional land dispute resolution mechanisms	2%
Establish nations land commission	1%

80. Key stakeholders in the land sector feel the government has been slow on land reforms.<sup>35</sup> The National Land Commission, which is created at Article 67 of the Constitution, should have been in place by 26 August 2011 and the office of the Commissioner of Lands disbanded and its functions taken over by the National Land Commission. Delays have been attributed to internal resistance by vested interests in the land sector, including alleged corruption cartels.<sup>36</sup> In the December survey, only 9 per cent of Kenyans felt the government had implemented land reforms well. This means the majority of Kenyans felt land reform was not on track. Just 12 per cent felt the government had done well in protecting the rights of land owners everywhere.

<sup>35</sup> Letter by civil society groups to the Ministry of Lands, September 2011

<sup>36</sup> A letter by non-state actors to Parliament on the land question, 6 October 2010

Figure 12: I am going to read out some statements in relations to land in Kenya. Please state your level of agreement

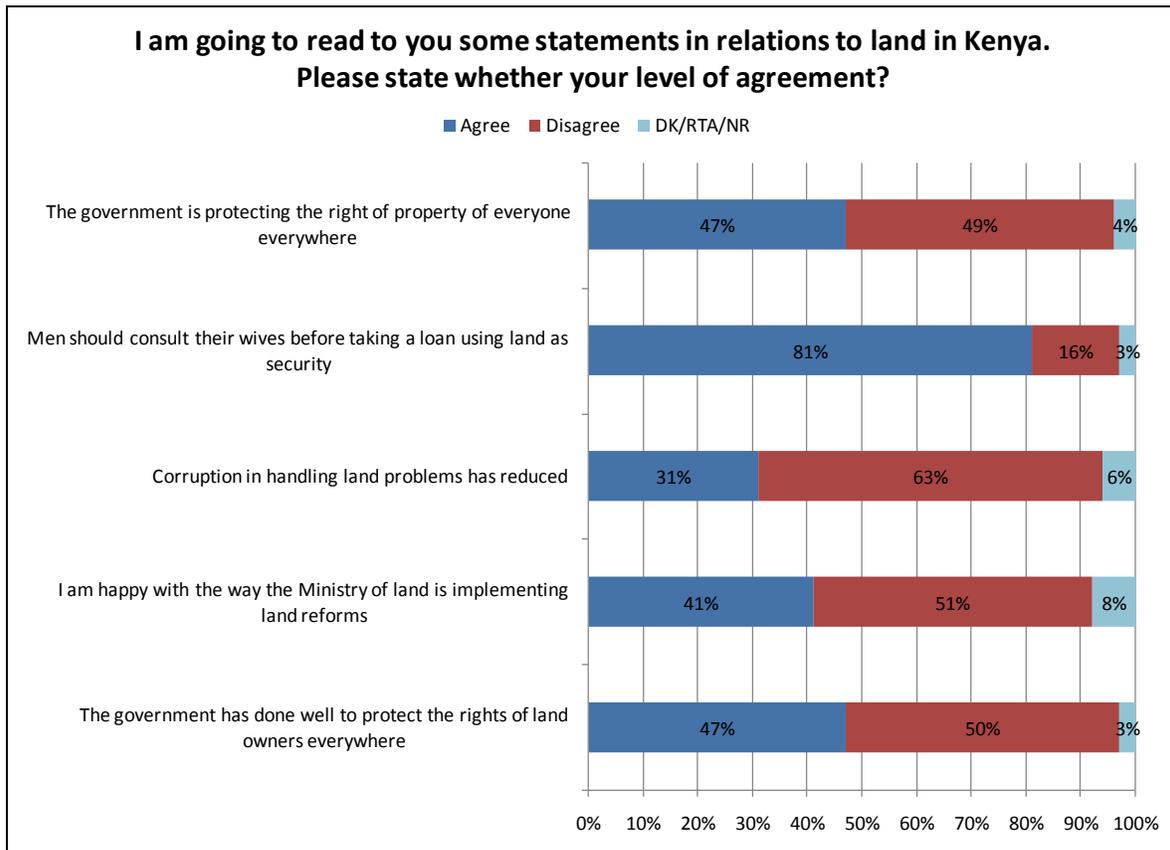
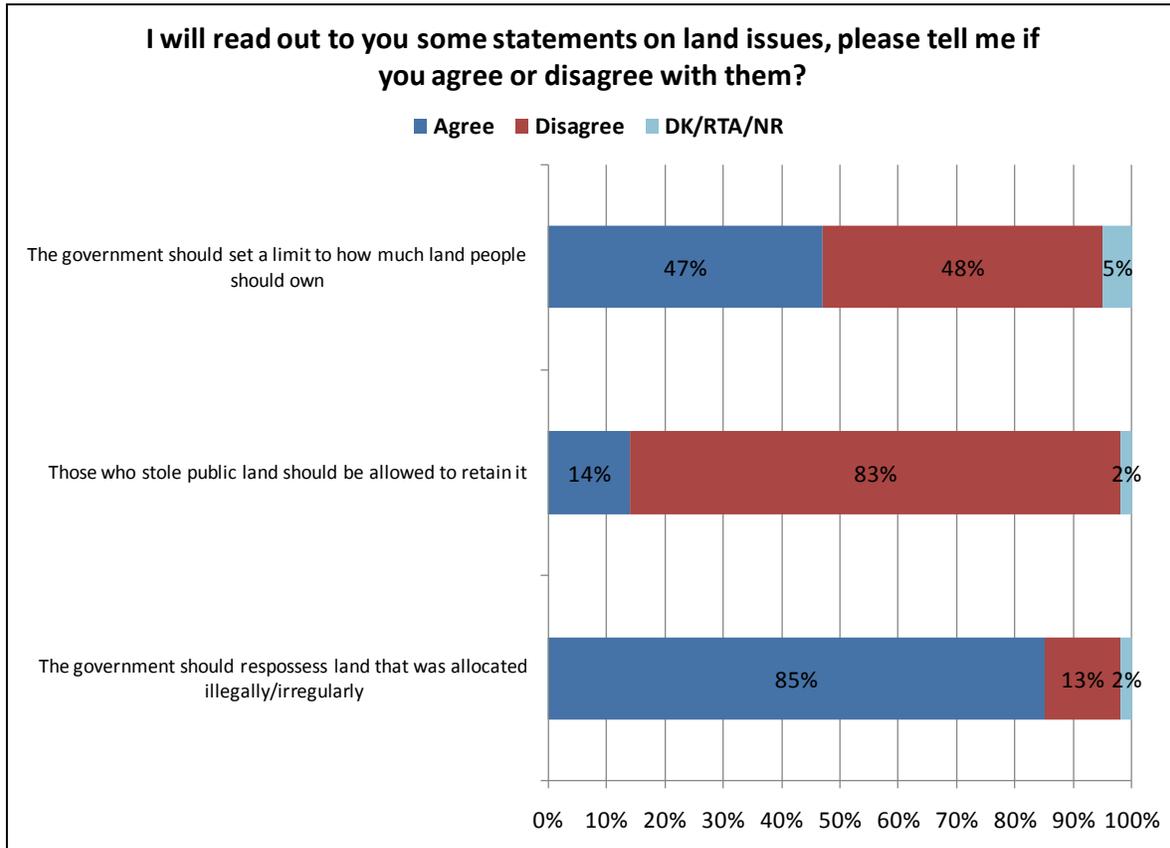


Figure 13: I am going to read out some statements on land issues, please tell me if you agree with them.



## Conclusion

81. The constitution implementation process so far has stayed the course, with all requisite legal and institutional frameworks in place. However, campaigns for the next General Election will divert attention, energy and resources from the implementation process and even reduce the opportunity for brave reforms if cautionary measures are not put in place. If leaders begin to politicize some of the processes and demand amendments that would remove important planks from the constitution, then implementation will be in disarray. These efforts could reduce the momentum for constitution implementation.
82. Preparations to usher in the devolved system of government appear constrained by lack of consensus on some key provisions of necessary laws. Delays in finalizing these Bills could affect the process of laying a solid foundation for the county governments. Further, these delays could result in critical Bills being rushed for debate without adequate scrutiny and public participation. Vested interests within the national government are resisting the full establishment of a devolved structure of government. These attempts include the proposed amendment to do away with the Senate, the setting up of perceived parallel structures that could destabilise the county

governments and the slow pace at which relevant measures for setting up these governments.

83. To have a solid foundation for the devolved system of government, preparations should be completed by the time of the next General Election. The county governments will be introduced at once. Preparations should be completed and anchored on a solid legal and policy framework.

### 3. THE COALITION, ELECTORAL REFORMS AND PREPAREDNESS

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#### *Introduction*

84. A review of the Coalition government in regard to internal cohesion is a useful starting point for a discussion on preparedness for the next general elections. The holding together of the Coalition government and in particular the demonstration of ability of leaders to transcend ethnic and political cleavages for the purpose of promoting national good is very critical at this stage. This report emphasises the need for the Coalition to hold together and for the leaders to demonstrate 'unity of purpose' because parochial divisions can fail the country yet again.
85. There a number of political developments that have taken place that are an issue of worry in this regard. Notably debate on the merits and demerits of constitutional amendments proposed by the cabinet, the discourses on election date, which is itself also a subject of amendment to the constitution, aroused divisiveness and acrimonious debate in parliament<sup>37</sup>. Although the Supreme Court is expected to rule on what, constitutionally, should be the precise election date in January 2012, it bears mention that the debate has so far demonstrated the lack of preparedness among political parties and political leaders, and even candidates for the different elections. Some prefer a date when they are individually secure or prepared rather than a date that secures the constitutional and the political well being of the country.
86. Related to the divisions causing incoherence within the Coalition is the debate on the ICC process and confirmation of charges. This is one issue that fractured the Coalition as well as the political parties themselves. How the Coalition government in its entirety treat the ICC process and the outcome could have implications for the running of the government. And given the propensity to frame the ICC intervention as an election agenda, it is possible the outcome will have implications that will spill over to the electoral process. Political alliances will form and fragment along new lines. These alone will could weaken the foundation of the Coalition government if mitigation measures are not established and applied at the outset.

#### *Power Sharing and securing of politics*

87. The preceding discussion has highlighted how the phenomenon of horse trading and compromising the appointment procedures has continued to feature in the process of establishing new constitutional offices. Previous reports also noted that the formation of the Coalition Government was not an end in itself but a vehicle for reforming State institutions through necessary laws and institutional reforms. In its formative years, disputes in the coalition focused on power and control, creating an image of 'two-governments-in-one'. As it matured, the nature and extent of disputes changed. While political elite and their respective parties openly lobby and canvass for their candidates

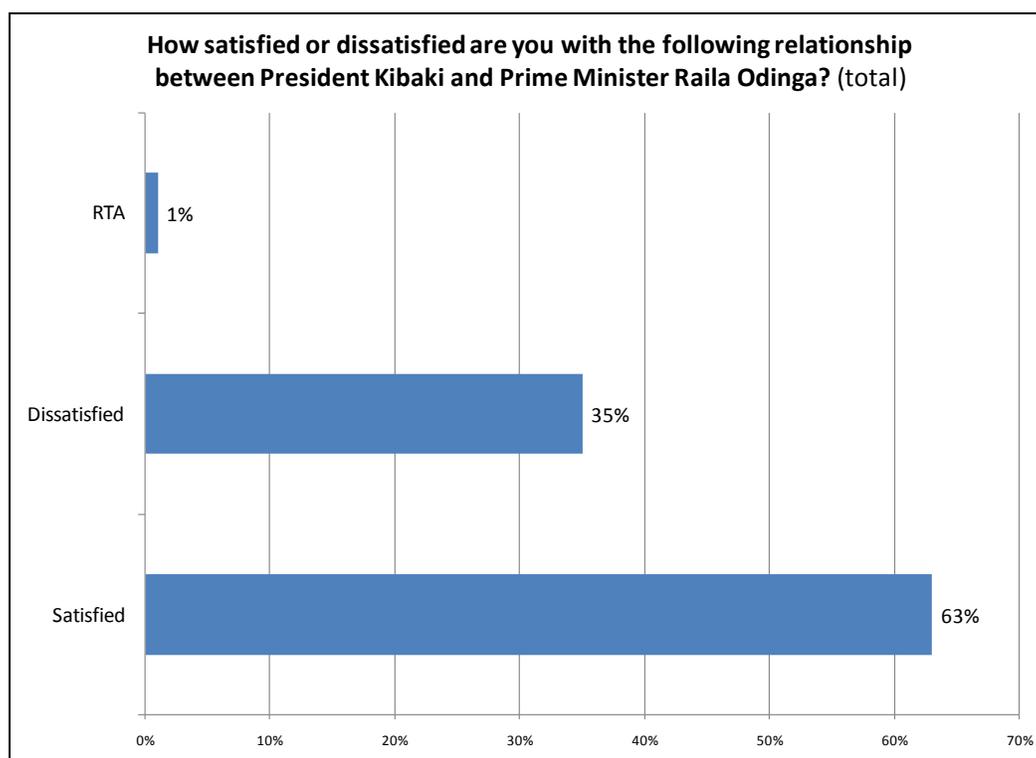
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<sup>3737</sup> See Capital FM News, December 22, 2011: MPs Go on Recess Amid Finance Bill Row

for recruitment to senior positions in government, the Principals appear to quietly horse-trade and share public positions between their preferred choices.

- 88. The trend has raised fears that the executive may be infusing the old culture of patronage into the new constitutional dispensation. This is rapidly undermining open and competitive hiring processes. Horses trading even where recruitment is competitive and transparent also risks embracing political suitability rather than merit. It will have the effect of compromising and undercutting the integrity of new institutions. But there is general reluctance to engage, in a constructive manner, the subject of ethnicity and skewed composition of public sector institutions.<sup>38</sup>
- 89. The Coalition has not had open disagreements between the two Principals. Kenyans are also happy with relationship between the Principals: most Kenyans are satisfied with the working relationship between the President and Prime Minister, who have managed to project an image of unity:

Table 7: How satisfied or dissatisfied are you with the relationship between President Kibaki and Prime Minister Raila Odinga?



- 90. The show of unity, is, however, not deep. Political undercurrents and an aura of competition and mistrust inform the manner in which they address policy issues and

<sup>38</sup> An article by a commissioner of the Kenya National Human Rights and Equality Commission, which raised concern about the skewed nature of sharing of senior positions in the public sector, raised debate that failed to engage the subject candidly. People debated on basis of ethnic identity.

how technocrats from both parties relate to each other and with either Principal. Suspicions and mistrust are usually demonstrated every time an issue of ‘who should take responsibility for the post-election violence’ comes to the fore.<sup>39</sup> Further, although mutual political tolerance has thawed the frosty relations and public altercations over time, occasional tensions at cabinet level and between technocrats assigned to each of the Coalition partners intercept Cohesion. Some have been protesting alleged interference of their ministerial dockets by colleagues, a pointer that there is need to insulate the coalition from divisions that could spill to the electoral process.<sup>40</sup> Such public protests are symptomatic of the fractious nature of the government. Mutual suspicion, lack of cohesion and pursuit of sectarian interests undermine the functioning of the coalition government.

91. Asked what they like most about the Coalition government, about one third said they liked nothing at all. Qualitative interviews across Kenya found that although Kenyans were happy the coalition government had promulgated a new constitution after decades of reform and restored peace after the 2007 political crisis, it remained unresponsive to the everyday needs of ordinary citizens.

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

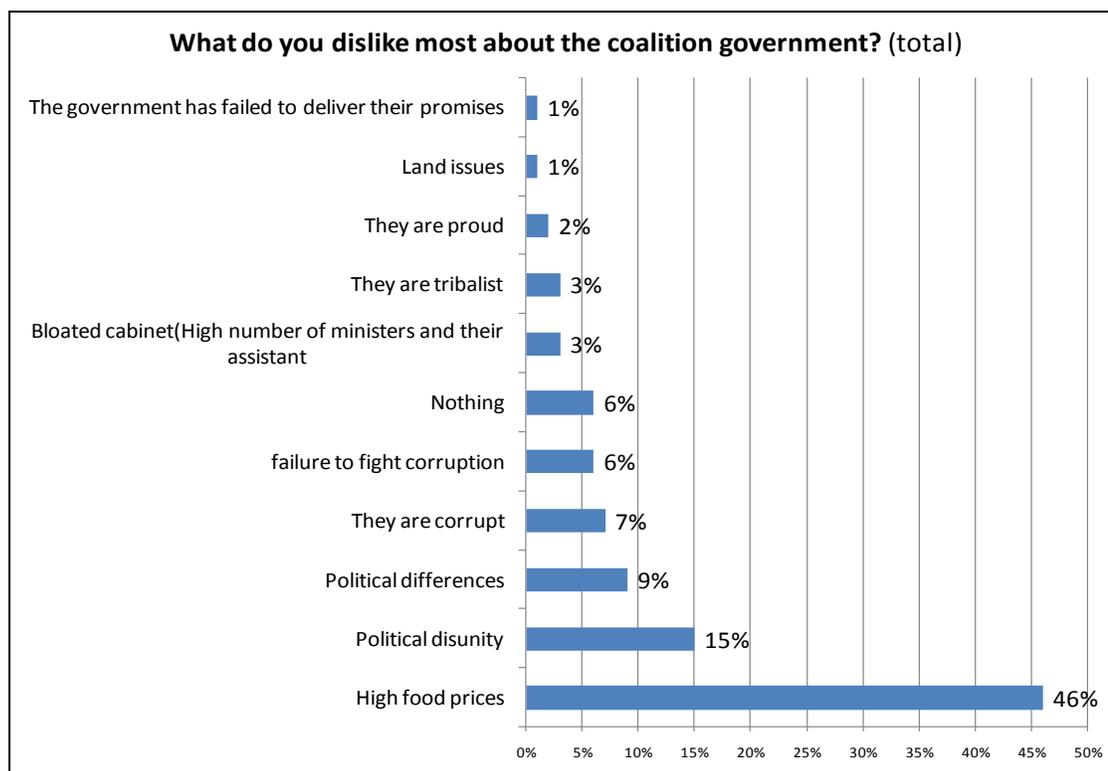
<b>What do you like most about the coalition government?</b>	
Nothing	30%
Gave us a new constitution	24%
Brought peace and reconciliation after the 2008 post election violence	22%
Brought checks and balances in government	8%
Improved infrastructure	9%
Fighting corruption	2%
Economy has improved	2%

92. As noted earlier in the report, the coalition government’s apparent inability to rein in rising inflation and resultant high commodity prices has bred public resentment and perception that politicians are only interested in pursuing vested interests. In the latest survey, majority of the respondents in all parts of the country are unhappy with the high commodity prices.

<sup>39</sup> For instance, some argue that comments by the Prime Minister that the President should take personal responsibility for police killings in the post-election violence sparked outrage from PNU members and caused strained relations among the Coalition partners for a while.

<sup>40</sup> ‘Nyong’o Protests to the President Over VP’ *Daily Nation*, 26 October 2011

Figure 14: What do you dislike most about the coalition government?



93. An analysis of survey data over time shows that public disenchantment with the Coalition government has been growing. Whereas Kenyans were initially dismayed by frequent political bickering and jostling for control, the government’s failure to fight corruption, the prevalence of high levels of unemployment and perceived lack of commitment to implement the constitution, promote reconciliation, protecting rights and resettle the displaced alienated the public from the government. In particular, the steady rise of high food prices and lack of lack of cohesion on how to address pressing issues of public concern eroded the sense of protection. By the end of 2010, majority of Kenyans said they would not like the to have another coalition government:

Table 9: Is power sharing between political parties in government something you would like to see after another election? (Dec 2010)

Is power sharing between political parties in government something you would like to see after another election? (Dec 2010)	
No	75%
Yes	21%
DK	4%

94. As the next general elections approach, lack of civic engagement with the government is low. The perception of the state as a predatory mechanism that does not respond to

the livelihood and physical security of the population has increased public detachment and dependence on the coalition government. As reported in earlier review reports, increased fascination of the unemployed youth with organised criminal gangs and other extractive extra-state organs portend security risk as the next general elections approach.

95. The Principals have had difficulties mobilising MPs to collectively support government agenda in parliament. In this quarter, they failed to persuade MPs to drop drastic amendments to the Finance Bill even after hosting them for an informal meeting.<sup>41</sup> The proposed amendments seek to, among other things, control the banking sector by imposing a ceiling on how much interest banks can charge on loans. The Executive is however opposed to this amendment, arguing that this could interfere with the operations of the sector in a liberalised market. The principals could also not rally MPs into supporting their three nominees to Ethics and Anti-Corruption Commission (EACC). They nominated candidates for vetting and approval, but the parliamentary Justice and Legal Affairs Committee rejected the nominees.
96. Besides apparent politicisation of the war against corruption,<sup>42</sup> there is concern that the political culture in Kenya is far from adopting the values enshrined in the new constitution. Political violence witnessed during the party nominations suggests that the threat of electoral violence remains real as we approach the next general elections. However, the enactment of the Political Parties Act, 2011 is a significant step towards reforming the country's political culture and institutionalising political parties.<sup>43</sup>
97. But political parties also appear to be a problem; they are yet to institutionalise and become viable vehicles the democratisation process. They are yet to develop party ideologies and policies. In other words, the parties have not evolved as good political institutions. And because of lack of institutionalisation, they are hardly prepared for the elections. They would prefer an election date that is convenient for them rather than a date that is constitutionally and politically relevant for the country.
98. The constitution promulgated in August 2010 forms a firm foundation for the forthcoming General Election. But the constitution provides largely for a First Past the Post electoral system, or a win-tak-all framework that locks out the losers from power. The Commission of Inquiry into the 2007 General Election (Headed by Judge JohannKriegler) recommended an overhaul of the electoral system and changes in the manner in which politics is conducted. It also recommended the establishment of an acceptable conflict resolution mechanism to arbitrate disputes arising from elections and party nominations. The envisaged reforms, therefore, should be viewed not simply in terms of making voting fairer, but making politics in Kenya more relevant for a healthy and accountable democratic order
99. The country has made key steps in undertaking electoral reforms in readiness for the next General Election. The IEBC commissioners were competitively hired after a rigorous vetting exercise. They have assumed office and have been giving regular

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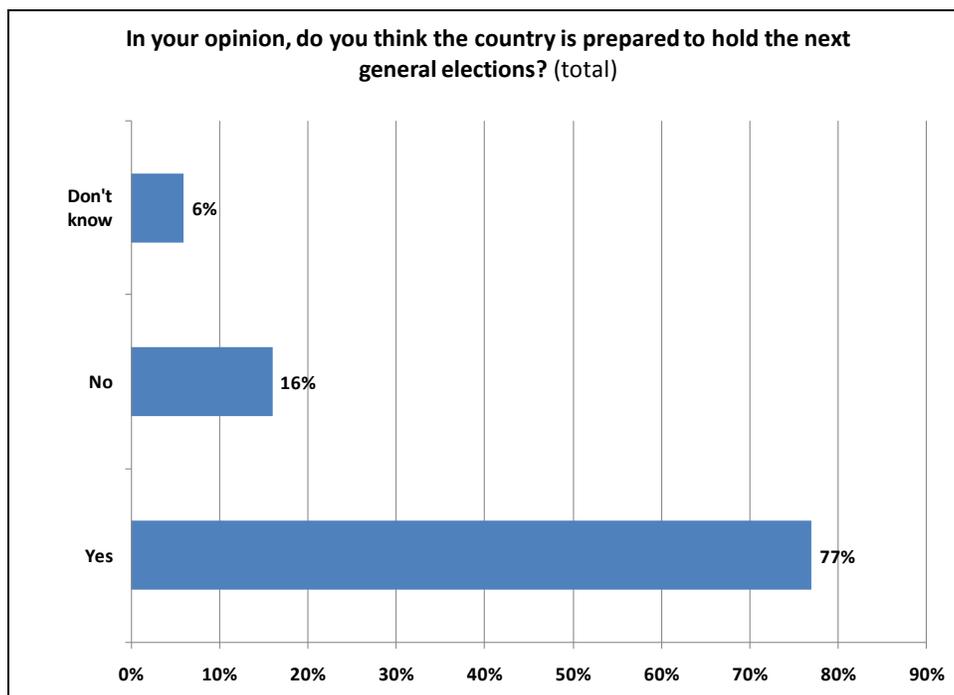
<sup>41</sup> "MPs refuse to toe Kibaki, Raila line," Standard, 21 December 2011

<sup>42</sup> "PM Told to Resign Over Jobs Scandal" *Daily Nation* 23 October 2011

<sup>43</sup> Interview with a former civil society activist who is now an official of a political party, December, 2011

updates on how the commission is preparing for the next General Election. Asked whether they think the country is prepared for the next General Election, as many as 77 per cent of respondents answered in the affirmative. Only 16 per cent said the country is not prepared.

Figure 15: In your opinion, do you think the country is prepared to hold the next General Election? (total)



100. This section thus looks at the steps the country has taken in preparing for the elections. The analysis focuses broadly on election preparedness, hence providing an opportunity to point out a range of electoral and development challenges that may affect the quality and perception of elections.

### ***Setting a Conducive Environment for a Successful Electoral Process***

101. Managing elections effectively requires an effective legal framework that is unambiguous, understandable and transparent --one that addresses all components of an electoral system necessary to ensure democratic elections.<sup>44</sup> The Constitution, the IEBC Act, the Elections Act and the Political Parties Act set clear guidelines and timeframes within which various obligations are to be met to ensure a free and fair election. A breach of any of these provisions has the potential to invite serious legal challenges.

102. To a large extent, the constitution has settled the question of the electoral system and

<sup>44</sup>IDEA (2002).*International Electoral Standards: Guidelines for Reviewing the Legal Framework of Elections* (Stockholm: International IDEA) p. 11.

the manner of holding elections. The constitution provides for a plurality-majority design for some elections: it provides for a two-round system in the presidential elections in case there is no candidate who gets a 50 percent plus one vote; and a first-past-the-post (FPTP) system with quotas for the national assembly, the senate and county assemblies. It also establishes requirements for registration as a voter; establishes a new election management body; lays down criteria for the delimitation of electoral units; restructures key elective offices in the executive and the legislature; and establishes standards for the formation and management of political parties.

103. *Uncertainty on some constitutional provisions:* Uncertainty about some electoral provisions in the constitution, especially on the date when elections must be held, has led to suggestions of amendments to the constitution that are likely to have implications for preparations for the next elections. The pending issues need to be settled as soon as possible. The more a decision is delayed, the more it will strain IEBC timelines for preparing and holding the elections. Delays in deciding the election date could also increase public anxiety on the schedule of the next General Election.
104. *Critical laws on elections and transition to counties not passed:* It is also notable that critical Bills touching on the General Election and transition to the county governments have not been enacted. Key among these is legislation on vacation of office of member of County Assembly and legislation on the removal of county governors. The Campaign Finance Bill is currently being discussed by the Commission on the Implementation of the Constitution. The Bill aims to safeguard against the use of illegal resources to promote the interests of candidates or political parties in nomination and election campaigns. It seeks to cap the amount of money a politician can use in an election as well as put an end to the exploitation of political incumbency, especially through the use of public resources in campaigns. Aside from laws, political will and coherence within government is necessary for a peaceful transition.<sup>45</sup>
105. *IEBC enforcing the political parties and elections laws:* The Political Parties Act came into effect on 2 November 2011 and the Elections Act a month later, setting off a rigorous timeline within which political parties and candidates must adjust to comply with various legal requirements. Some provisions in the two laws are already effective and are being enforced by IEBC. For example, political candidates can no longer hold fundraising events (*harambees*) until after the 2012 elections since the Elections Act 2011 prohibits anyone aspiring for political office from participating in a fundraising event eight months before the election.<sup>46</sup> To effectively enforce this provision, the IEBC intends to set up a committee to monitor the candidates.<sup>47</sup> Section 43(5) of the Elections Act also requires any public officer who intends to contest an election to resign at least seven months before that election. The IEBC has given notice to public officers keen on seeking elective posts that they have until 14 January to vacate offices.<sup>48</sup> These are welcome measures since enforcement of the electoral laws has been the weak link in the management of elections in the country.

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<sup>45</sup> Interview with an official from the Commission on Implementation of the Constitution, 21 November 2011

<sup>46</sup> "Early rules set for candidates for elections," <http://www.iiec.or.ke/index.php/early-rules-set-for-public-officers-seeking-elective-posts.html>

<sup>47</sup> Ibid

<sup>48</sup> Ibid

106. The IEBC has also directed councillors to declare their wealth or risk being barred from contesting in the next General Election. This is a significant development since it aims to promote accountability as provided for in the Public Officer Ethics Act. However, this directive needs to apply to all elective positions. Most importantly, there should be a provision to allow for making the wealth declaration public because that is the best way to enforce scrutiny and enhance accountability.
107. *Political parties have started complying with the law:* Some political parties have started taking measures to institute discipline and prevent party hopping as intended by the Political Parties Act. Some have started disciplinary proceedings against their members who have violated the Political Parties Act. “Parties are being funded by taxpayers and one way to be accountable is [by] adhering to the law.”<sup>49</sup> There are also others that have changed their party constitutions to bar public office holders from holding party offices as required by the law. However, full compliance with the Political Parties Act and election laws is still being challenged by the lack of awareness among the political parties on their new obligations.<sup>50</sup>
108. Already, there are quite a number of efforts by various CSOs to build the capacities of political parties in terms of accountability, internal democracy, building integrity of the party leaders and restoring political parties as credible institutions.<sup>51</sup> There have been other initiatives such as appraising political parties’ performance as well as training officials to develop strategic plans that will help them to implement their objectives and to be more accountable to members. All of these efforts are happening in partnership with the Office of the Registrar of Political Parties and the IEBC.
109. However, these capacity building and awareness creation efforts need to be enhanced. When asked during the survey what they think is the most important thing that political parties can do to be strong organizations, 26 per cent of respondents say they should not be founded on ethnic grounds. Another 15 per cent felt that parties needed to keep promises made during campaigns as the second most important thing that they should do to be strong organizations.

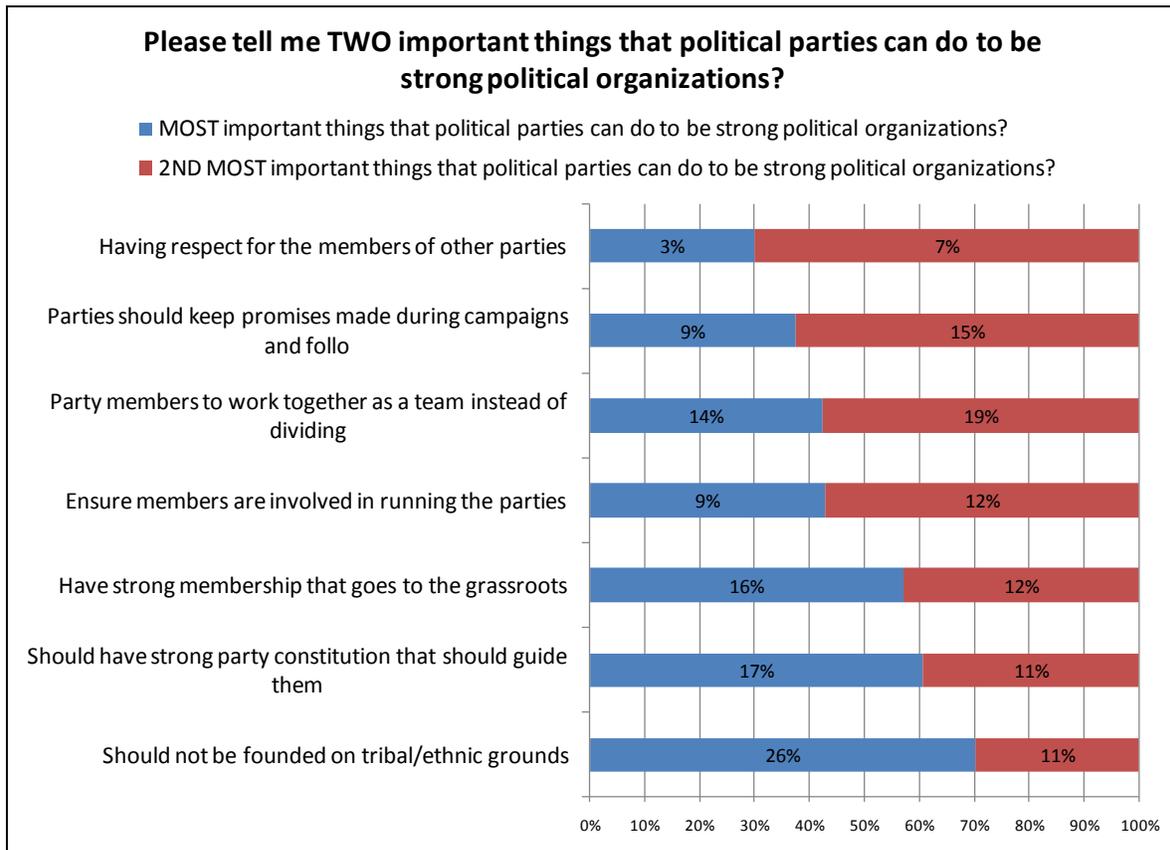
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<sup>49</sup> Interview with Safina Secretary General, 11 November 2011

<sup>50</sup> Interview with Secretary General of a political party, 11 November 2011

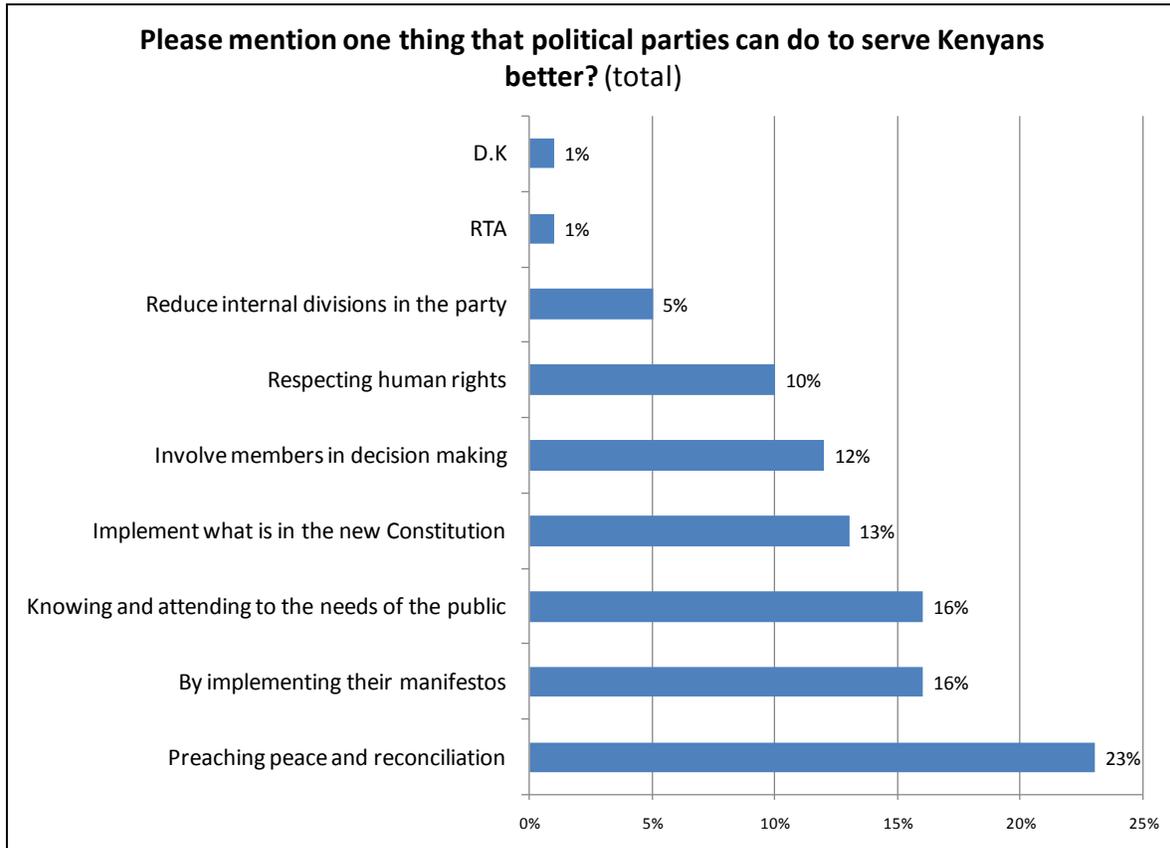
<sup>51</sup> Interview with a civil society leader, 25 October 2011

Figure 16: Please tell me two important things that political parties can do to be strong political organisations.



110. In order to serve Kenyans better, 23 per cent of respondents said they wanted political parties to preach peace and reconciliation; 16 per cent wanted them to implement their manifestos.

Figure 17: Please mention one thing that political parties can do to serve Kenyans better (total)



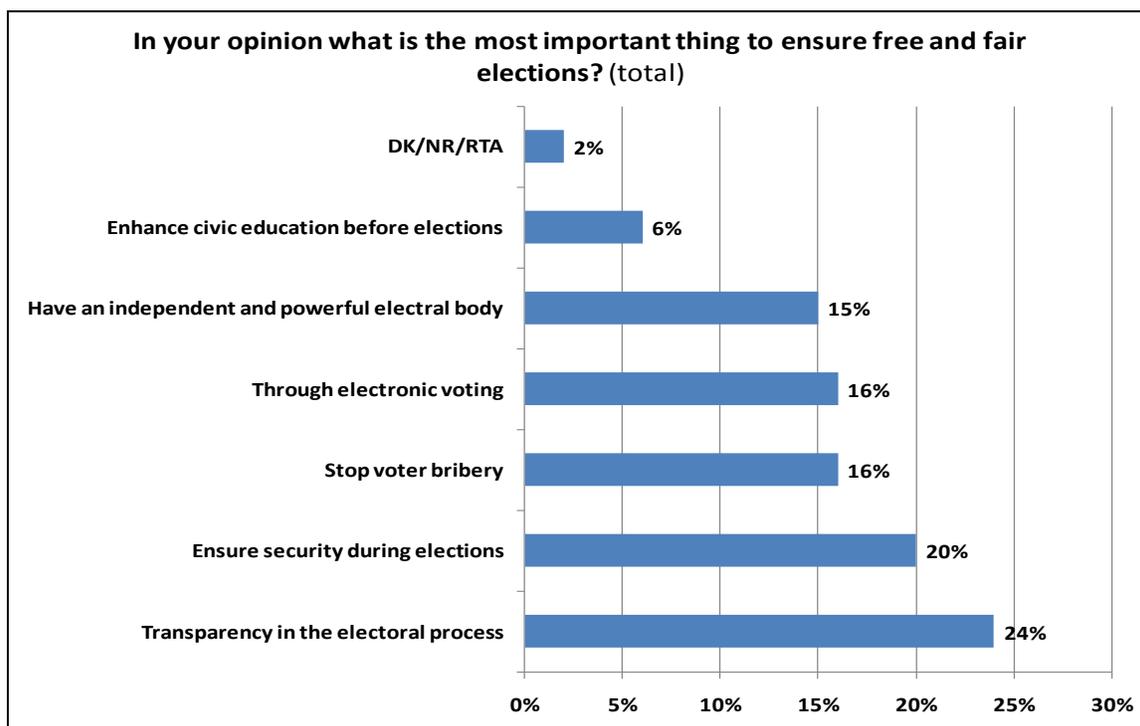
111. The political stability of any country and rule of law is largely underpinned by institutionalized political parties that are disciplined. The rationale for the Political Parties Act is, therefore, to help parties to grow as institutions that adhere to democratic practices. However, the party system is yet to take root. Maintaining discipline within political parties is proving to be one of the biggest threats to their institutionalization. Membership and commitment to political parties in Kenya is still largely on the basis of tribal affiliation as opposed to ideology.
112. *Office of the Registrar of Political Parties still vacant:* Despite the coming into force of the Political Parties Act in November 2011, the Office of the Registrar of Political Parties has not been filled. This is partly attributable to the protracted differences in the parliamentary Committee on Justice and Legal Affairs, which has been immobilised for several months.<sup>52</sup> Recruitment processes for the Registrar of Political Parties still remain in abeyance, yet the office of the registrar is charged with ensuring full compliance with the Political Parties Act.

<sup>52</sup> 'Bickering in House team stalls political parties registrar vetting.' *Daily Nation*, 30 November 2011

### ***Managing Elections Competently and Inspiring Public Trust in the Electoral Process***

113. During the previous review report, we noted that it is important to ensure, from the outset, that the Independent Electoral and Boundaries Commission is perceived as independent, fair, competent and impartial. The preceding section has also noted that as many as 77 per cent of the survey respondents have confidence in the IEBC going into elections. Important in this respect also is that the IEBC has already started preparing for the polls. The commission has released a timeline of what needs to be done to ensure free and fair elections as stipulated in the constitution.
114. Most Kenyans want to see a transparent electoral process as a way of ensuring free and fair elections. Kenyans also want to see an end to voter bribery and security provided during the electoral period.

Figure 18: In your opinion, what is the most important thing to ensure free and fair elections? (total)



115. The preliminary report of the boundaries delimitation is to be released in January 2012 and the entire demarcation exercise is supposed to be completed within four months – by April 2011. Voter registration will then take place thereafter while the process of establishing the administrative mechanisms necessary for the elections are also proceeding concurrently.<sup>53</sup>

<sup>53</sup> Remarks by IEBC chairman during the 3<sup>rd</sup> KNDR conference, 5 December 2011

116. *Challenges in sequencing activities:* Most processes for required actions before the 2012 elections are sequential and can only start once the preceding one is complete.<sup>54</sup> If there is a delay in one process, it also means a delay in the other processes, hence affecting the entire preparations for elections. For example, Section 28 of the Elections Act, 2011 requires registered political parties to submit their party membership lists to the Registrar of Political Parties at least three months before they nominate their candidates. The IEBC is required by sections 16 and 17 of the Elections Act to receive party nominations at least 21 days before an election. Political parties cannot, however, submit a list of members if voter registration is not complete and the register has not been verified. These are statutory processes with strict deadlines that need to be followed.
117. *Use of ICTs to be enhanced:* The Interim Independent Electoral Commission embraced information technology in the electoral process by setting up a modern system for collection, collation, transmission and tallying of electoral data. It must be noted that the speedy transmission of election results is critical for confidence building among voters since delays tend to cause anxiety. The progressive use of technology in the electoral process needs to be enhanced and institutionalised. Certain laws, policies, structures and guidelines to make ICTs effective should be among IEBC's priorities. Issues relating to compatibility, security, sustainability and appropriateness of the selected technology should be a major consideration.
118. *K-NICE to provide integrated voter and civic education:* The government, through the Ministry of Justice and Constitutional Affairs, has developed a national plan for civic education – the 'Kenya National Integrated Civic Education' (K-NICE) programme, meant to educate Kenyans on provisions of the constitution. This is critical in facilitating the much needed public awareness as the country heads towards the General Election. The programme is inclusive and provides an integrated national approach towards civic education that brings together both state and non-state actors in order to ensure sustainability, consistency and national coverage. It is hoped that this civic education will be driven by demand and supply mostly in enhancing new values in both the national and county governments.<sup>55</sup>
119. *National voter education curriculum drafted:* The IEBC through the Kenya Institute of Education (KIE) has developed a National Voter Education curriculum that will be a reference text for all organisations involved in voter education in the country.<sup>56</sup> The development process involved extensive consultations with relevant government ministries and non-state actors in voter/civic education. The curriculum was developed in line with the new constitution and is intended for use in schools. It will serve as a quality check mechanism for civic education in the country. Indeed, concern has been raised about the different manuals being used by the various civic education providers without any quality checks.<sup>57</sup>

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<sup>54</sup> Remarks by IEBC chairman during the 3<sup>rd</sup> KNDR conference, 5 December 2011

<sup>55</sup> Interview with a council member of K-NICE, 10 November 2011

<sup>56</sup> Interview with a council member of K-NICE, 10 November 2011

<sup>57</sup> Remarks by a CIC commissioner during a public forum to discuss devolution, 14 November 2011

120. *Electoral malpractices still go unpunished:* The old political habits of violence, vote buying and voter bribery, among other malpractices, are still very much alive in the political arena. Furthermore, perpetrators are still not being punished. This was evident during the Kitutu Masaba by-election, the first to be held by the IEBC. There were reports of violence, assault and voter bribery but the IEBC has not taken any action on these offences.<sup>58</sup> Election-related violence has also been reported in Rongo, Migori County. Electoral violence can be addressed only if there is recognition of the problem and the political commitment to fight impunity and respect the rule of law.
121. As the next General Election approaches, it is important that the electoral body sends a strong signal that electoral offences will not be tolerated. Given its expanded mandate and powers, the IEBC can now make it part of its business to punish political parties that perpetrate or engage in electoral malpractices. Further, the IEBC should engage with political parties and politicians to design a process that will incorporate accountability for political and electoral violence as part of its regulatory mandate.

### ***Settling Electoral Disputes Efficiently and Effectively***

122. The importance of an effective electoral dispute resolution mechanism is recognised by the constitution which, in Article 87 (1), creates an obligation on Parliament to enact legislation for the timely settlement of electoral disputes. The IEBC Act in Section 4 (e) empowers the commission to be responsible for “the settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results.” This provision is restated in Section 74 of the Elections Act, 2011, which empowers the IEBC to make regulations to “provide for complaints resolution mechanisms and for the manner of settlement of electoral disputes.”
123. So far, the Political Parties Tribunal and the Registrar of Political parties have managed to arbitrate disputes between NARC Kenya and other Party of National Unity affiliates over the sharing of the coalition’s share of the political parties funding; the Social Democratic Party dispute over its leadership and the FORD Kenya dispute over its grassroots elections, among other cases. It is encouraging that political parties are seeking arbitration from the relevant organs for peaceful resolution of their differences.
124. However, there is some lack of clarity over the jurisdiction of the High Court and that of the Political Parties Tribunal. While some politicians have rushed to the High Court to have their cases heard and decided, other political players argue that the courts would be overstepping their mandate if they determined such cases without first establishing whether or not they had been raised at the tribunal. For them, it was necessary for the courts to stay away from such disputes as that would create conflict between established systems.<sup>59</sup> There is thus need to emphasise the role of the respective organs on the management of disputes touching on political parties in order to streamline mandates for timely and clear institutional responses.

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<sup>58</sup> Interview with an electoral officer in Kitutu Masaba, 28 November 2011; “Magara attacked as voting starts in Kitutu Masaba,” Standard, 28 November 2011

<sup>59</sup> Interview with Safina Secretary General, 11 November 2011

## ***Conclusion***

125. The country is increasing its preparedness for the 2012 General Election. The legal framework is in place, but civic and voter education are yet to roll out in a comprehensive manner. Measures to institutionalise political parties are also yet to be deepened. Enforcement of the Political Parties Act is yet to show.
126. Elections are a complex and challenging undertaking that require the cooperation and support of all stakeholders. Trust needs to be built among electoral stakeholders, particularly political parties, the media and civil society, which can only be achieved through continuous engagement. Political leadership at all levels must work together to achieve a credible process that enjoys the confidence of all people. Application of the law and punishment of those who err is what can bring discipline and demonstrate a break with the past.

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

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##### *Introduction*

127. The previous four review reports have shown that failure to address impunity for the post-election violence has remained a sore point in the reform process. It remains the main indicator of failure to change Kenya's political culture. It has undermined peace and reconciliation and presents a real threat to a peaceful transition in 2012. Internally Displaced Persons (IDPs) have been unable to return to places from which they were displaced either due to a deeper problem of landlessness or largely due to failure to restore social cohesion.
128. Observing the pattern of violence every five-year electoral cycle and the ensuing impunity, the Commission of Inquiry into the Post-Election Violence (CIPEV, chaired by appeal court judge Philip Waki), recommended the setting up of a Special Tribunal for Kenya to investigate and prosecute suspected perpetrators of crimes committed during the crisis period. It also recommended handing over the matter to the International Criminal Court (ICC) if Kenya failed to set up the Tribunal.
129. As the country transits to 2012 and begins preparations for the next General Election, the legacy of 2007 hangs over the population. On 15 December 2010, the ICC Chief Prosecutor named six persons suspected to bear the greatest responsibility for crimes committed during the post-election violence (PEV). The judges of the Trial Chamber are expected to rule on whether or not to confirm these charges in January 2012.<sup>60</sup> The confirmation of charges has far-reaching political implications for 2012. This section of the report looks at public perceptions of the ICC involvement in the Kenya situation and implications for peace and stability ahead of 2012. It also examines progress in addressing the problem of IDPs and promoting reconciliation.

##### *Reactions to the ICC investigations*

130. The confirmation of charges hearings at The Hague drew widespread public interest in rural and urban areas. The testimonies and cross-examination sessions elicited much public debate about the evidence presented and arguments made, as Kenyans speculated on possible outcomes. Since the end of the hearings, discussion on the ICC process in Kenya has significantly reduced. Lack of robust debate may be attributed to anxiety the process has engendered among the suspects and their supporters. *'The suspects and their lawyers put up a good fight; there is not much more to say except wait for the ruling.'*<sup>61</sup> The lull may also be attributed to apprehension about the implications of the confirmation of charges for the political careers of individual politicians and the communities they represent. The outcome will determine how politicians and their supporters align ahead of the elections.<sup>62</sup>

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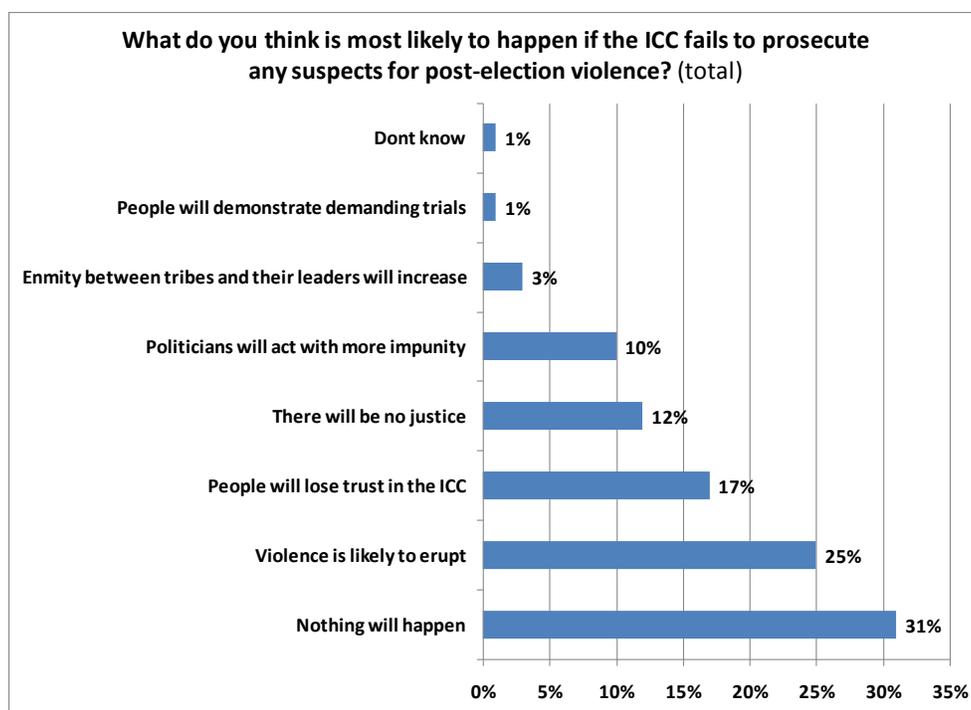
<sup>60</sup> 'Ocampo six to know their fate on the same day' *Daily Nation* 26 October 2011. See also [www.icc.cpi.int](http://www.icc.cpi.int)

<sup>61</sup> Interview with an elder in Eldoret, 4 November 2011

<sup>62</sup> Interview with a university lecturer in Nairobi, 17 December 2011

131. Asked what they thought would happen if the ICC failed to prosecute any suspect, as many as 31 per cent of respondents thought nothing would happen while 25 per cent said there might be violence. Yet others said the matter of ‘whose’ charges are confirmed or dropped would determine public reactions. *‘The suspects do not have equal weight. Kenyans don’t care whether some cases are confirmed or dropped; actually Kenyans are looking at the two presidential candidates only.’*<sup>63</sup>

Figure 19: What do you think is most likely to happen if the ICC fails to prosecute any suspects for post-election violence? (total)



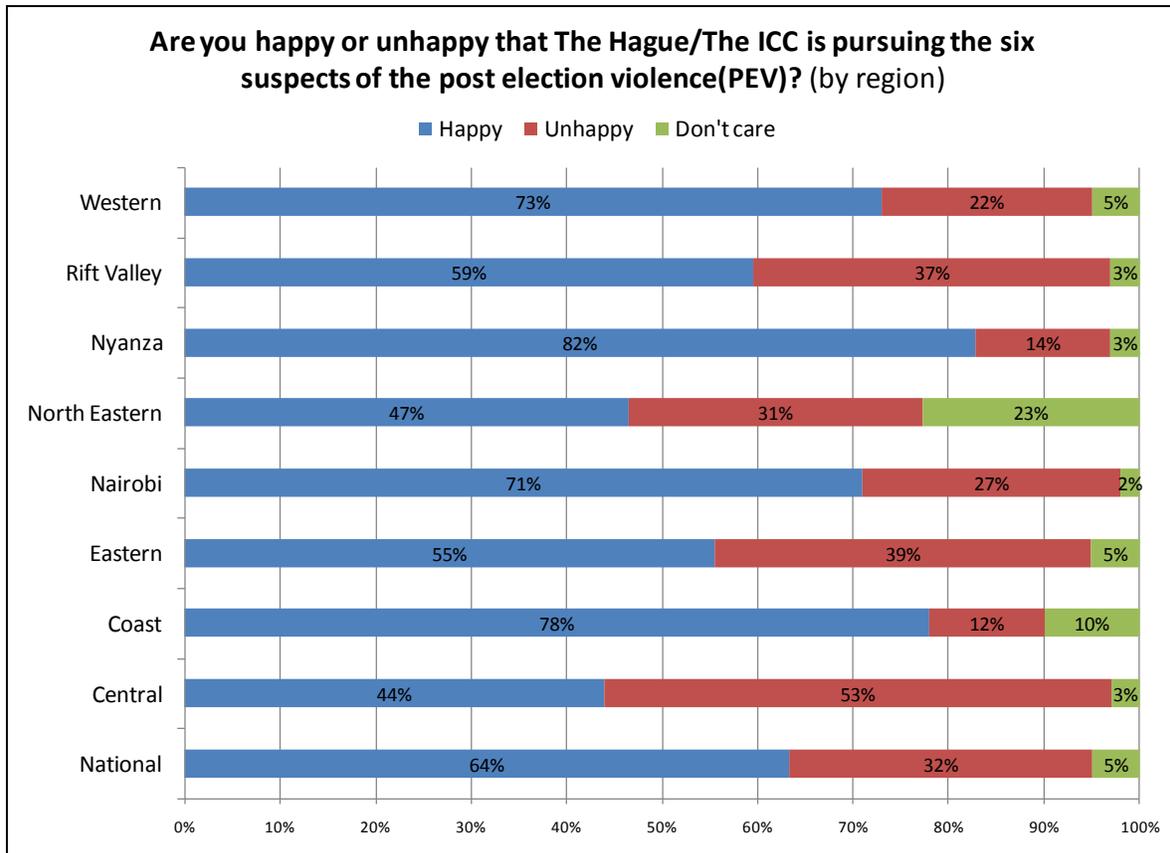
132. Important in this respect is that public support for the ICC remains high. Up to 64 per cent of those interviewed said they were happy that the ICC was pursuing the six suspects. The level of public support for the ICC intervention over time has remained over 50 per cent, but support has been on increase from June 2011.

Table 10: Are you happy or unhappy that the ICC is pursuing the six suspects?

<i>Are you happy or unhappy that the ICC is pursuing the six suspects?</i>				
	<i>Dec 11</i>	<i>Oct 11</i>	<i>Sept 11</i>	<i>June 11</i>
Happy	64%	62%	65%	51%
Unhappy	32%	28%	31%	38%
Don't care	5%	5%	4%	5%

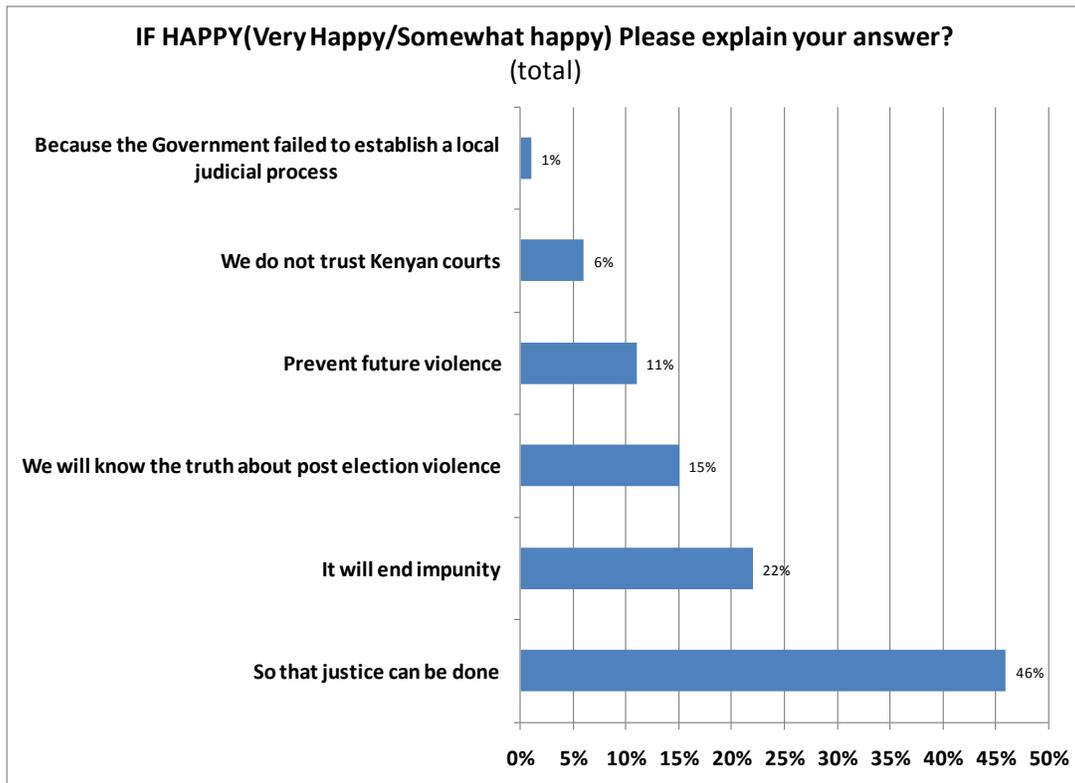
<sup>63</sup> Interview with a university student, Bungoma, 8 December 2011

Figure 20: Are you happy or unhappy that The Hague/the ICC is pursuing the six suspects of the post-election violence (PEV)? (by region)



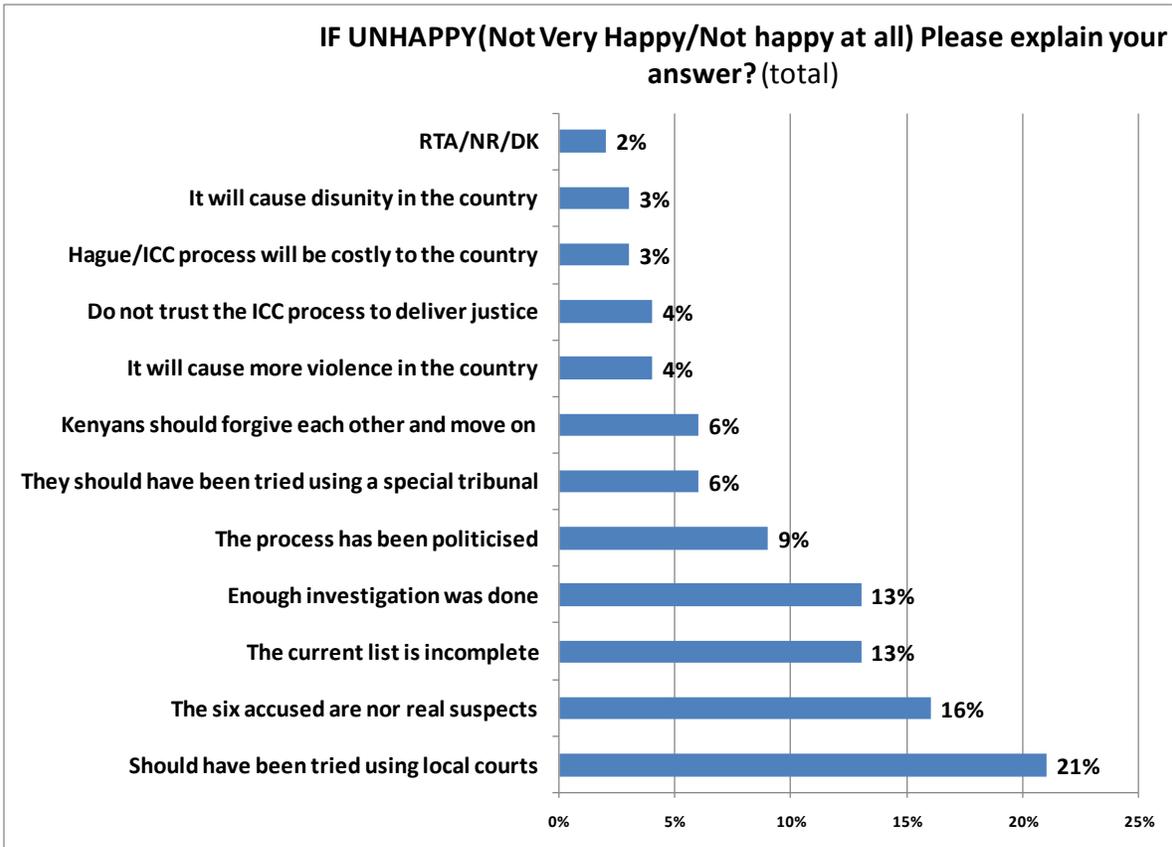
133. The majority (46%) of those who are happy with the ICC intervention said it would bring justice to victims, while 22 per cent said it would end impunity. Another 15 per cent said the investigation would help bring out the truth about the post-election violence. Interestingly, only 11 per cent said they thought the ICC could deter future violence, and 6 per cent noted that Kenyan courts are still not to be trusted:

Figure 21: If happy/very happy/somewhat happy, please explain your answer. (total)



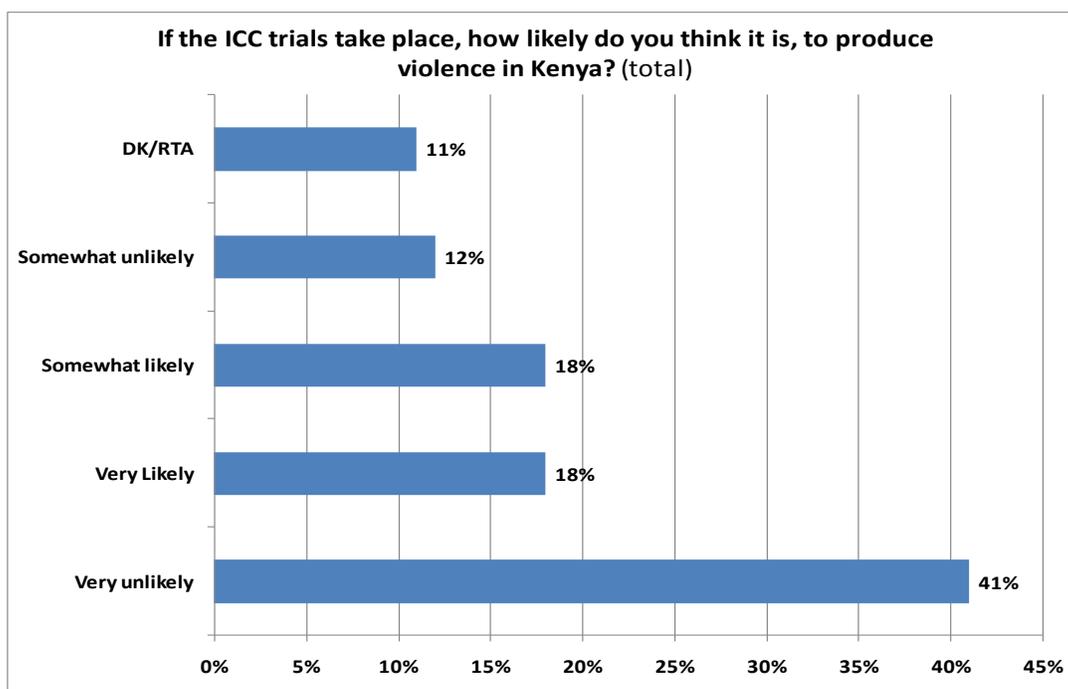
134. Those who are unhappy with the ICC intervention argue for a local mechanism, including the existing courts (21%) or a Special Tribunal (6%). However, more people are concerned about the selection of cases, saying the list of six is incomplete as it leaves out other known suspects and the six are not the real suspects. Others regret the lack of exhaustive investigations and the politicisation of the ICC process.

Figure 22: If unhappy/not very happy/not happy at all, please explain your answer.



135. In earlier phases of the investigation, there was concern that indictment of some of the suspects would trigger retaliatory violence. However, successive surveys have shown that in all parts of the country, significant majority believe that violence is highly unlikely to occur regardless of the outcome of the confirmation of charges.

Figure 23: If ICC trials take place, how likely do you think it is to produce violence? (total)



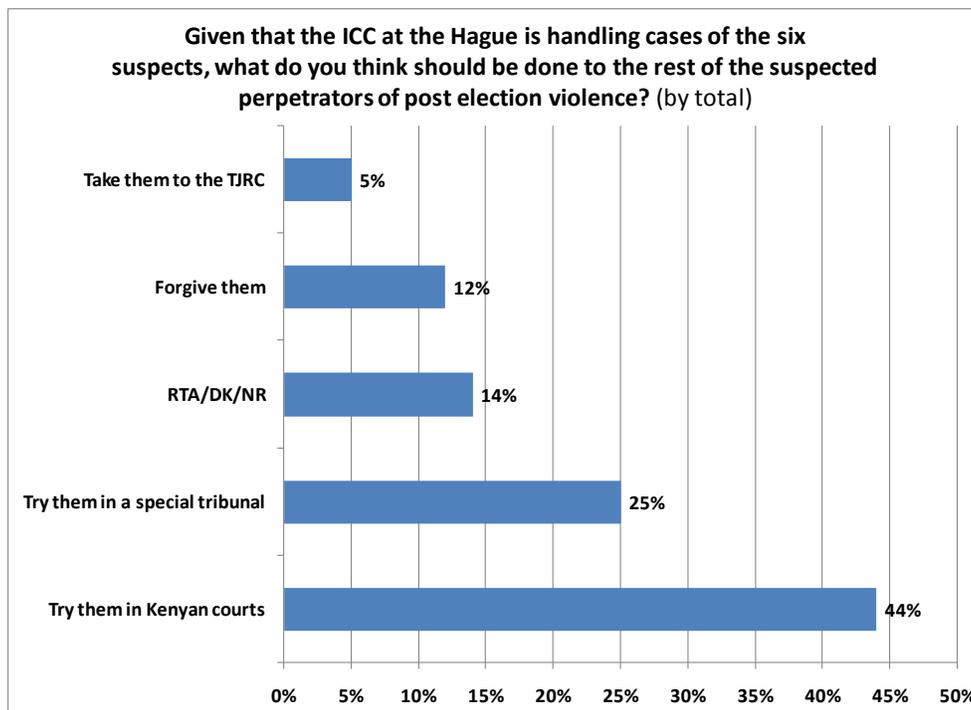
136. A comparison over time, however, shows that the number of those who think violence is likely to occur has steadily increased. For instance, only 23 per cent considered the possibility of violence in October 2011 compared to 36 per cent in December 2011. The shift may be attributed to local discourses of victimisation. In many parts of the country, perceptions that the six suspects ‘are not the ones who bear the greatest responsibility’ continue to dominate public debate on the ICC process.
137. The 36 per cent who think violence is likely to occur attribute their fears to a number of factors. The most important of these include: to express solidarity with suspects in their strongholds, protest because no action has been taken against other perpetrators, and to revenge against those supporting the ICC.

Table 11: If violence is likely, why?

If very/somewhat likely, why do you think violence will occur?	
To express solidarity with politicians in their strongholds	37%
Because no action has been taken against perpetrators of PEV	29%
To revenge against those supporting the ICC	22%
Because of unresolved land issues	4%
I don't know	3%
Due to tribalism	2%
Because the listing of the 6 PEV suspects was politicised	2%

138. As concerns about retaliatory violence increase, intimidation of witnesses continues to be reported.<sup>64</sup> The ICC’s Head of Jurisdiction, Complementarity and cooperation division, while on an official visit to Kenya, stated that tougher sanctions would be taken against any suspect who was found to be intimidating witnesses.<sup>65</sup>
139. The fear of violence in the wake of ICC trials suggests that Kenyans are yet to embrace and value the concept of fighting impunity. The discourse that those who support the ICC should be punished has obscured debate on impunity and ethnicised the ICC process. The perception that the government is unwilling to conduct genuine investigations and try all suspects at all levels further entrenches impunity and creates conditions for future violence: *‘2012 might be worse than 2007 because this time nobody will accept to be beaten. Everybody is ready, just in case.’*<sup>66</sup>
140. Increasing impunity and readiness to participate in violence stem from impunity among lower level perpetrators. Asked what should be done about youths who carried out actual attacks, the majority of respondents said they should be tried through existing courts or establish a Special Tribunal for them:

Figure 24: What should be done with the rest of the suspected perpetrators? (by total)



141. The fact that 69 per cent of survey respondents call for the prosecution of perpetrators suggests that a majority of Kenyans are not happy about impunity. Over the past four years, poor investigations resulted in the acquittal of suspects due to lack of sufficient

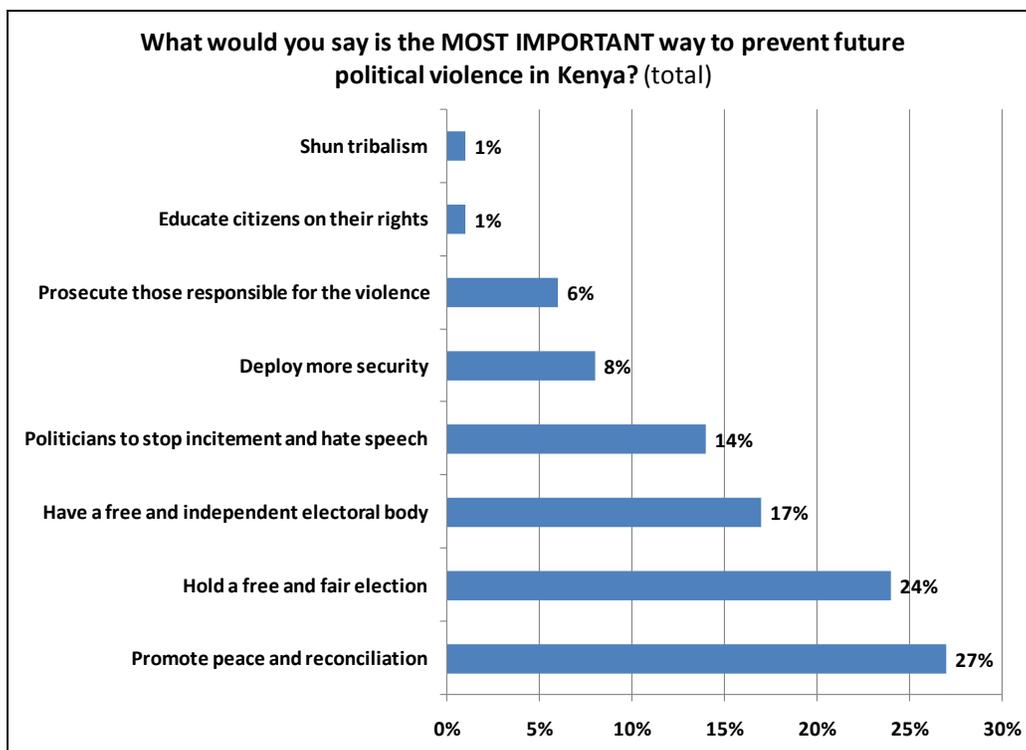
<sup>64</sup> The Standard 14 October 2011, *‘Now Ali witness suspended from union’*

<sup>65</sup> The Standard on 18 November 2011, pg 7 *‘Ocampo six warned not to intimidate witnesses’*

<sup>66</sup> Interview with a middle-aged man in the Rift Valley, 4 November 2011

evidence. Up to 19 per cent of respondents in the Rift Valley suggested forgiveness. Asked what would be the best way to prevent violence, only 6 per cent said the perpetrators should be prosecuted. This is interesting considering the high support for the ICC and the recommendation that other perpetrators be tried through a local process. An examination of results over time shows that shortly after the post-election violence in 2008, only 1 per cent cited prosecution. However, as people felt safer, the figure rose to 72 per cent in 2010. It then began to decline again as the next General Election began to approach.

Figure 25: Most important way to prevent future violence



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

## ***The Challenge of Resettling IDPs***

143. The past review reports have outlined government efforts to deliver on the resettlement of IDPs. Although nearly all camps have since been closed and the bulk of IDPs returned to their homes, thousands of landless people who were not able to return to their places of origin continue to be displaced. As noted in the last review report, these are the so-called ‘self-help groups’ that are waiting to be allocated land by the government.
144. During the reporting period, the government recognised the need to urgently resettle the remaining IDPs before the next General Election. The Ministry of Lands opened bids for the purchase of land to allocate to selected beneficiary households.<sup>67</sup> Of the 6,978 families targeted for land allocation, the ministries of Special Programmes, Lands and Provincial Administration had settled 2,287 families or 32.7 per cent on 8,412 acres by the end of 2011.<sup>68</sup>
145. According to the Ministry of Special Programmes, houses for 1,006 households have been constructed for those already allocated land, comprising approximately 44 per cent. By the end of 2011, the ministries had procured 8,412 acres of land and an additional 5,335.11 was at various stages of procurement.
146. Efforts to procure land are constrained by lack of land suitable for agriculture. Besides, where land is available, owners overprice it, making it beyond the reach of allocated resources. As noted in the previous review report, resistance to the settlement of ‘foreigners’ on community land presents a new challenge to IDP resettlement. To overcome this challenge, the government has encouraged IDPs to help in identifying available land for purchase. The government has also set aside Ksh8 billion for resettlement. In the last quarter of 2011, the government set up an inter-ministerial task force to expedite the resettlement of IDPs in the shortest time possible.
147. Previous review reports have highlighted the challenges to finding durable solutions for IDPs, particularly because of structural challenges of landlessness and poverty. Ever increasing family sizes as displaced children turn into adults and form their own families means giving land is not a sustainable strategy in the long term. At the same time, addressing landlessness only among the displaced --the majority of whom are members of one community --breeds resentment among other landless persons who may not be displaced. It undermines peace and reconciliation because it creates a sense of official favouritism and exploitation of vulnerability caused by displacement to make undue claims for land allocation and other assistance.
148. From this perspective, land allocation to IDPs and building for them houses on the allocated land, even after some have already received Ksh 10,000 start-up funds and

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<sup>67</sup> Presentation by an official from the Lands Office at Pangoni Beach Resort, Mombasa, 30 Sept- 1 Oct 2011. The official stated that the ministries of Special Programmes, Lands and Provisional Administration have so far settled 2,093 families on 7,008.08 acres of land. Another presenter observed that the MoSSP was planning to resettle affected families on 1,000 acres of land donated by a county council. See also ‘The state resettles 76 displaced families’ *The Standard* 15 December 2011, p.22

<sup>68</sup> Ministry of Special Programmes, Press Release – Progress on Implementation of the IDPs Resettlement, *Daily Nation*, 23 December, p. 25

Ksh 25,000 shelter reconstruction funds, is likely to do harm. Even within the displaced community, there are genuine IDPs who have waited four years to receive the Ksh 10,000. Therefore, resentment is bound to rise when those waiting hear that persons who already received both amounts are now about to be allocated land and houses. For those from other communities that perceive disproportionate assistance to one side, peace and reconciliation may be hampered.

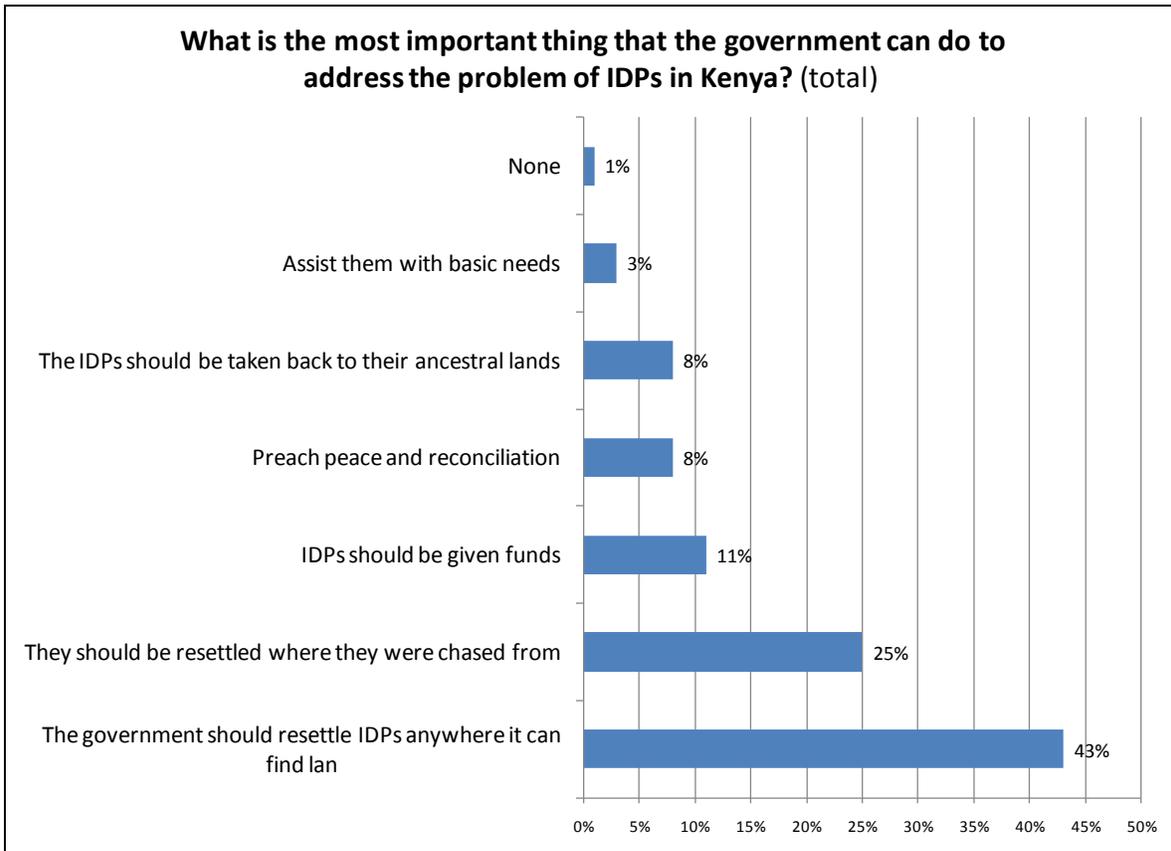
149. The majority of those interviewed thought IDPs were living in camps due to lack of land, while others were waiting for ex-gratia payments from the government:

Table 12: In your opinion, what is the most important reason IDPs remain in camps?

<b>In your opinion, what is the most important reason IDPs remain in camps?</b>	
They lack land	31%
Waiting for funds from the government	29%
Fear of attacks	25%
DK/NR/RTA	8%
IDPs are not genuine	7%

150. That fear of attacks presents a major hindrance to return suggests that social cohesion is yet to be achieved in some places. Indeed, the previous section highlighted the need to promote healing and reconciliation as the General Election approaches. The majority suggested that the most important way to address internal displacement is to settle people wherever land is available.

Figure 26: What can the government do to address the problem of IDPs?



151. Previous surveys showed that more people wanted IDPs settled where they were displaced from. The shift may be indicative of the realisation that return to places of origin may not always be possible, especially for landless IDPs.

***Access to Relief and Assistance Funds***

152. The data on disbursements, like most available data on IDPs, is disaggregated only by administrative units, not by other factors such as gender, ethnicity, age, etc. It is, therefore, difficult to know who the beneficiaries are. Allegations of corruption and embezzlement of funds largely stem from lack of reliable data. By the end of December, the MoSSP has continued to disburse ex-gratia payments to IDPs, as follows:

Table 13: Disbursement of Ksh 10,000 and Ksh 25,000

S/No.	Province	Start-up Fund (KShs.10,000/= per Household)	Support for Reconstruction of Houses (Kshs.25,000 per Household)
1.	Rift Valley	1,100,570,000/=	623,375,000/=
2.	Coast	11,580,000/=	4,100,000/=
3.	Eastern	2,880,000/=	-----
4.	Central	102,850,000/=	79,150,000/=
5.	Nairobi	38,650,000/=	10,575,000/=
6.	Western	134,370,000/=	186,450,000/=
7.	Nyanza	226,690,000/=	41,050,000/=
<b>TOTAL KSHS.</b>		<b>1,617,590,000/=</b>	<b>944,700,000/=</b>

Source: Ministry of Special Programmes, Dec 2011

153. Figures of this type are not very useful for analysis because they do not indicate who received what assistance. One of the key findings of the Parliamentary Select Committee on IDPs<sup>69</sup> has been that resettlement is characterised by structural inequalities, bureaucratic encumbrances and lack of a legal framework to inform protection and assistance activities. There is a lack of clarity about who were counted, by whom and when. The process of producing registers was characterised by dishonesty, corruption and discrimination. This has resulted in many genuine and deserving IDPs being left out of existing lists. Many 'fake' IDPs found their way into those lists. As a result, those officially registered and recognised exclude many genuine IDPs deserving of assistance.
154. In the reporting period, three officials in the MoSSP have been arraigned in court over embezzlement of funds allocated to the resettlement process. Other officials in the Rift Valley have also been charged in a Nyandarua court for stealing food meant for IDPs in camps.<sup>70</sup>
155. As reported in the previous review report, continued assistance is promoting dependency among IDPs. Some observers argue that IDPs are reluctant to reinsert

<sup>69</sup> Ibid 6

<sup>70</sup> 'DPP orders arrest of three over graft' *The Star*, 5 October 2011, p.5; also 'Senior officials in the MoSSP to be arrested and prosecuted over misappropriation of Sh15 million meant for IDPs between January and May 2009', *Daily Nation*, 10 October 2011

themselves into the harsh economic realities in the country characterised by high food and commodity prices.

### *The National Policy on IDPs*

156. The Draft National Policy on IDPs completed in early 2010 has been awaiting Cabinet approval for more than a year. However, the Parliamentary Select Committee on Resettlement of IDPs, with support from NGOs, has drafted a Bill on IDPs. The draft was debated by civil society organisations and other stakeholders and will be presented to the Cabinet for approval in 2012. The Bill will be based on the National Policy, itself derived from the Great Lakes Protocol on the Protection and Assistance to IDPs, and the African Union Convention on the Protection and Assistance of IDPs.

### ***Promoting Healing and Reconciliation***

157. Agenda 2 of the KNDR required the Principals to lead measures to promote reconciliation in regions affected by the violence. The government established the Truth, Justice and Reconciliation Commission (TJRC) and the National Cohesion and Integration Commission (NCIC) to spearhead peace and reconciliation efforts in the country. These were to work in collaboration with existing structures, such as the District Steering Groups, the District Peace Committees and the National Steering Committee on Peace-building and Conflict Management.
158. In the reporting period, the Truth, Justice and Reconciliation Commission (TJRC) continued to hold public hearings in various parts of the country. The commission has developed a timetable of its intended public hearings.<sup>71</sup> Hearings already conducted in the Rift Valley and the Coast highlighted human rights violations during the post-election violence and historical grievances over land dispossession.<sup>72</sup> Criticism has continued to hound the TJRC. Civil society organisations have raised concern about its methodology and lack of expertise. Its term of office was extended to April 2012.<sup>73</sup>
159. Some analysts fear the TJRC report, when completed, might not adequately fulfil its mandate. The need to rush through to make up for lost time did not allow for in-depth discussion and analysis of issues it was mandated to investigate. For instance, political assassinations were allocated two days of public hearings, yet the violations span a period of more than 60 years. Two days may not be adequate to bring out a representative truth about the violation.<sup>74</sup>
160. The NCIC has been active in the quarter under review. It intensified its peace initiatives in various parts of the country in collaboration with District Peace Committees. In the

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<sup>71</sup> [www.tjrc.org](http://www.tjrc.org)

<sup>72</sup> 'Emotive land issues dominate TJRC's Narok sittings', *The Star*, 3 October 2011, p. 5

<sup>73</sup> 'TJRC granted a further 6 months extension' [www.tjrkenya.org](http://www.tjrkenya.org) accessed 29 October 2011

<sup>74</sup> Interview with a human rights defender, 1 October 2011; see also Press Conference by Human Rights Watch Group on 27 October 2011, which highlighted the need to not only investigate the Mt Elgon atrocities by SDLF but also by the Army. The report, *Hold your heart: Waiting for justice in Kenya's Mt Elgon Region* was launched. The Universal Periodic Review, September 2010 – September 2011 also reported on the Human Rights Watch report and raised concerns about the TJRC.

reporting period, at least two legislators and one political activist who had earlier been arraigned in court on hate speech charges were found not guilty and acquitted.<sup>75</sup> It is hoped the ruling will not hinder attempts to curb use of hate speech and divisive rhetoric by the political class. A Kenya National Commission on Human Rights commissioner also appeared before the NCIC to defend himself against claims that he made incendiary comments in a press article alleging that a certain community should never lead Kenya again.<sup>76</sup> This was viewed as hate speech against the particular community. NCIC is yet to make a decision on the matter.<sup>77</sup>

161. The NCIC trained over 200 teachers on how to use drama in the promotion of messages of peace. It has also taken the same teachers to Rwanda to have a firsthand experience of the genocide memorials so that they can return to share knowledge with their counterparts how to handle explosive situations in their specific areas. It has also partnered with the Kenya Institute of Education in formulating a school syllabus that covers peace and reconciliation.
162. The NCIC, in collaboration with the Ministry of Justice, National Cohesion and Constitutional Affairs, has embarked on developing a National Values policy to be a guideline on ethical issues. It also launched the National Cohesion and Integration Manual, to be used by different actors in the dissemination of cohesion and integration messages around the country.<sup>78</sup>
163. The Commission predicts that Kenya's next General Election in 2012 will be peaceful.<sup>79</sup> Religious leaders have also expressed concerns about the slow pace of healing and reconciliation in the country. They have asked the Panel of Eminent African Personalities to push the political leaders to be proactive in the healing process before the next General Election.<sup>80</sup>
164. It is notable that in the December survey, 62 percent of respondents said "just a little" reconciliation between communities had taken place since the post-election violence while another 8 percent said there was no reconciliation at all. This means that, even though there has been no violence, communities have not reconciled.

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<sup>75</sup>'Machage's hate speech to go to trial' *The Standard*, 25 October 2011', also 'Suspects fight hate speech charges' *The Daily Nation*, 18 November 2011

<sup>76</sup> Omar Hassan 'What do Kibaki's men know or what they are planning', *Sunday Nation*, 27 November 2011

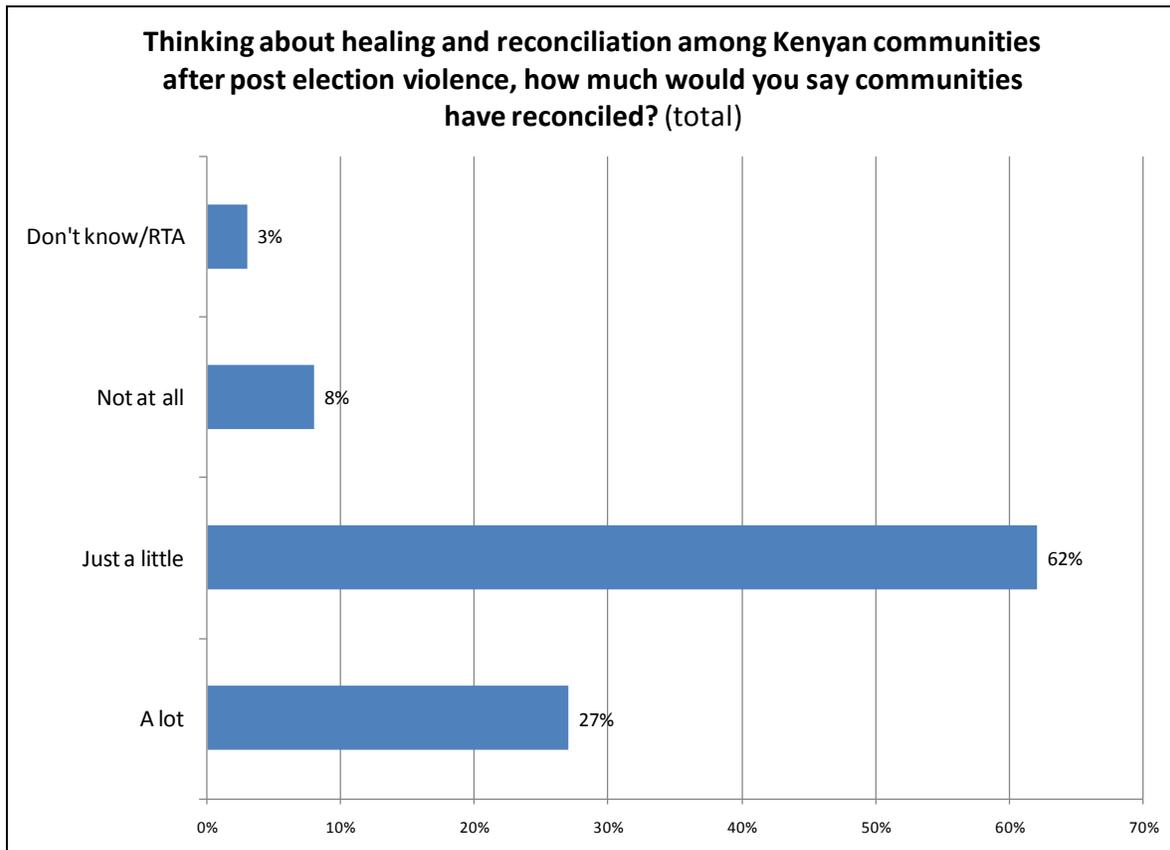
<sup>77</sup> 'Activist reports Omar to Kibunja team over hate speech' *The Standard*, 30 November 2011

<sup>78</sup> 'NCIC launches Training Manual NCIC press release, *Daily Nation*, 22 November 2011, p.39

<sup>79</sup> 'NCIC: 2012 General Election likely to be peaceful.' *The Standard* 10 October 2011, p. 24

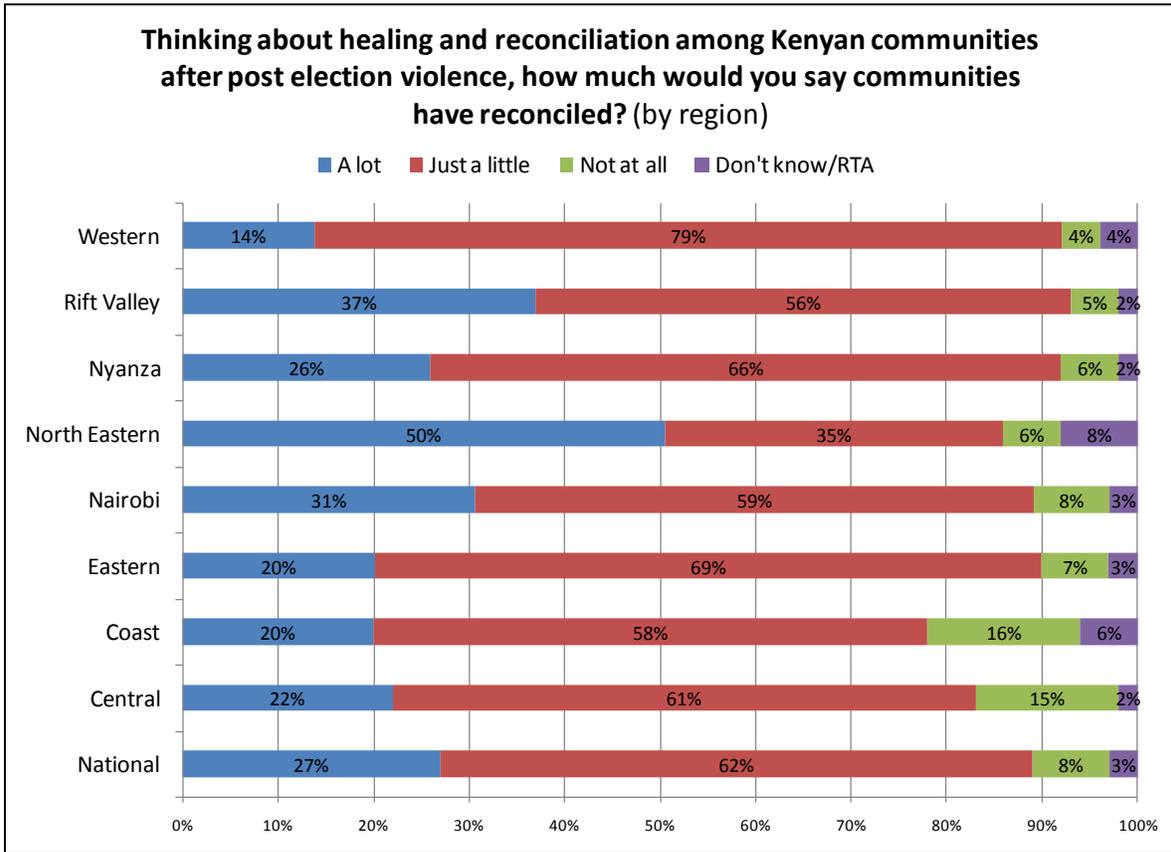
<sup>80</sup> Message of Religious Community in Kenya to the Panel of Eminent African PersonPersonalities led by Kofi Annan dated 19 October 2011

Figure 27: Thinking about healing and reconciliation among Kenyan communities after post-election violence, how much would you say communities have reconciled? (total)



165. A regional analysis shows that most people in the areas affected by violence in 2008 are of the view that there has not been sufficient reconciliation. However, 50 per cent of respondents in North Eastern said a lot of reconciliation had taken place:

Figure 28: Thinking about healing and reconciliation among Kenyan communities after the post-election violence, how much would you say communities have reconciled? (by region)



### Conclusion

166. The ICC process in Kenya has made progress bringing about accountability for the post election violence. However; there is no movement on holding the lower and middle level perpetrators of the violence accountable. Demand for domestic accountability for crimes has been reducing in terms of attention. This raises the need to increase public awareness, particularly because the government's commitment to hold people accountable for PEV is an issue of concern.
167. Failure to fight impunity, by establishing Complementarity mechanisms for domestic accountability for international crimes, and lack of trust in government programmes, suggests that the causes of the post election violence have not been addressed. Nonetheless, it is important to note that a significant majority of Kenyans believe there will be no violence as result of the ICC investigation or during the next General Election.
168. Internally displaced persons have continued to be a sore reminder of the post-election violence, yet their continued presence in a state of homelessness begs fundamental

questions about the reasons they are unable to go back to places from which they were displaced. The presence of IDPs is also a reminder that reconciliation is taking a while to firm up. A lot of efforts have been put into restoring peace and reconciliation in violence affected areas. However, it appears that such peace has not become deeply rooted as fear of reprisals and mistrust pervade the society. Ethnic divisions may be compounded by the outcome of the ICC, implementation of devolution and ahead of 2012. Public vigilance is, therefore, important to ensure peaceful co-existence.



## 5. GENERAL CONCLUSION

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169. Several conclusions have been drawn in the preceding sections. This section recapitulates some of the key issues for further discussion and/or intervention at different levels. To begin, the findings once again demonstrate that the cost of living is a major challenge facing the country today. This challenge affects everyone. The depreciation of the Kenya shilling in the last quarter of the 2011 was an additional burden on the economy. An issue of concern, however, is that these challenges could compound and confound the growing problem of youth unemployment. This will complicate the context within which the next General Election will be contested and could even make the economy a major campaign issue. Such a shift would add value to the country's politics because it would assist in making the competition an issue-based campaign.
170. Notable also is the military action against Al Shabaab in Somalia, which adds a security dimension to these challenges. Close to 78 per cent of survey respondents approve of the government's intervention in Somalia against the Al Shabaab. However, still not many think the country is headed in the right direction. Only 28 per cent of survey respondents think it is. As many as 69 per cent think the country is headed in the wrong direction. Also, as many as 80 per cent of respondents were not satisfied with the measures the government was taking to address economic problems.
171. With regard to the implementation of the constitution, the development of Bills and the construction of a legislative framework is on track. However, there are delays in passing some of the requisite laws. These delays could result in the Parliament rushing to debate and pass Bills without public participation and scrutiny.
172. An important finding is that the ongoing composition of new bodies is resulting in leaders deepening 'horse-trading' and patronage approaches in appointments to key positions. Although initial efforts at recruitment emphasised transparency and merit, there are new attempts to bring back old habits. Leaders are protecting and defending applicants from their home regions under the guise of merit. The result is absence of balance between merit and ethnic or even gender equity. Good candidates are missing out on account of this if they do not have ethnic power brokers to present their case. Those appointed through horse-trading and patronage-based processes can easily be compromised in the future. This will reduce public confidence in these institutions. It is important therefore to adhere strictly to transparent, ethical and merit based appointment procedures reflecting article 10 and the spirit of Chapter 6 on leadership and integrity under the constitution.
173. The devolved system of government is clearly under threat, going by developments around the Public Finance Management Bill. Delays in finalising some of the Bills on the devolved system of government could delay preparations for the transition to the dual system after the next General Election. This raises a need to yet again evolve dispute resolution mechanisms for the purpose of stepping in as soon as a problem arises between any of the agencies performing any role in developing laws or even implementing them.

174. The findings show continued support for the ICC intervention. There are concerns, however, that action is yet to be taken on the middle and low level perpetrators of violence. As the next General Election approaches, the government may need to send a clear message that it is not business as usual for those who participated in the post-election violence. Demonstrating that the government is watching these perpetrators is critical in stopping the mobilisation of youth for political violence. The signs of localised violence are slowly coming to the fore.
175. Finally, it is important to underline that the Coalition government has not been very cohesive during much of its time. Although it has matured over time, it is important to establish a solid framework to resolve any disputes that may arise between now and the time of conducting the next general election. Internal divisions especially over power sharing could have negative consequences on the electoral process. Furthermore, if divisions deepen before the general election, ensuing institutional immobility will make it difficult for the government to operate as one. A framework to ensure coherence must be put in place – reactivating the Committee for the Management of Coalition Affairs is critical at this stage.

