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International Center for Policy and Conflict

THE KENYA NATIONAL DIALOGUE AND RECONCILIATION; STOCK TAKING OF AGREED REFORMS

Empowering People Transforming Public Policy

Contents

ACRONYMS

AG Attorney General

CEC County Executive Committee

CIC Commission for the Implementation of the Constitution

CIOC Constitution Implementation Oversight Committee

CKRC Constitution of Kenya Review Commission

CNC Coalition for National Convention

CoE Committee of Experts

COVAW Coalition of Violence Against Women

CRECO Constitution and Reform Education Consortium

CSO Civil Society Organization

ICPC International Center for Policy and Conflict

IDPs Internally Displaced Persons

IEBC Independent Electoral and Boundaries Commission

IIEC Interim Independent Electoral Commission

IPPG Inter Party Parliamentary Group

KNDR Kenya National Dialogue and Reconciliation

NCEC National Convention Executive Council

NARC National Rainbow Coalition

NARC – K National Rainbow Coalition Kenya

NA National Assembly

NAK National Alliance of Kenya

NCA National Convention Assembly

NCIC National Cohesion and Integration Commission

NDP National Democratic Party

NCC National Constitutional Conference

NCCK National Council of the Churches of Kenya

NGOs Non Governmental Organizations

NLP National Land Policy

ODM Orange Democratic Movement

PCK People's Commission of Kenya

PEV Post-Election Violence

PSC Parliamentary Select Committee

PNU Party of National Unity

PCK Proposed Constitution of Kenya

RPP Release Political Prisoners

TJRC Truth, Justice and Reconciliation Commission

INTRODUCTION

The 2007 general elections in Kenya had been sharply polarized by the structure and conduct of political parties and campaigns respectively. The main political parties ODM and PNU had been formed primarily to secure political power by the amalgamation of tribal voting blocs under select tribal leaders.

These political parties thereafter sought to secure votes from their tribal blocks largely through the proliferation of fear propaganda, the vilification of their opponents as well as the communities they come from, and the guarantees of good governance and accountability in contradistinction to their political rivals. Consequently, sentiments of tribal hostility and apprehension were heighted with the communities supporting each party fearing potential oppression under the leadership of the rival candidates and the communities they represent.

In the conduct of the elections, the voting process had been largely peaceful. However, tensions began to escalate when questions of voting and tallying improprieties were raised. The then electoral body failed to take measures to address these concerns and proceeded to announce the winner in spite the contentious and improper state of affairs in which the vote counting had been conducted.

On the afternoon of 30th December, 2007, Hon Mwai Kibaki was declared the winner of the 2007 general elections and was hurriedly sworn in on the same day in spite acrimonious contestations against the legitimacy of the announced results. Hon Raila Odinga and his supports saw themselves as the legitimate winners and would not concede defeat. What ensued was a spate of widespread violence and civil chaos on a scale that was unprecedented in post-independence Kenya.

The violence targeted individuals and communities on the basis of their ethnicity and their political leanings. This was coupled with the wanton destruction of property and wide spread civil disorder. The country's internal security infrastructure appeared helpless to contain the mayhem as most state security agencies had failed to anticipate and, therefore, prepare to contain violence of that magnitude. In less than a month the violence had claimed the lives of 1,133 and resulted in the displacement of over 600,000 people, not to mention the millions of shillings lost in damaged property and livelihoods.

The social, economic and political fabric of the country was degenerating rapidly. Fortunately, the swift action of the international community was able to forestall an escalation of violence. A Panel of Eminent African Personalities(the Panel), composed of former UN Secretary- General, Mr. Kofi Annan (Chairman), former President of Tanzania, Mr. Benjamin Mkapa and former South African First Lady, Mrs. Graca Machel, was established by the then President of Ghana and the African Union, John Kuffor, to assist Kenyans in finding a peaceful solution to the crisis.

The 4 Agenda Items of the KNDR

The Panel was able to bring together the heads of the two main rival parties to negotiate under what was termed the Kenya National Dialogue and Reconciliation (KNDR) process. The KNDR team was composed of the Panel and negotiation teams from PNU and ODM. Negotiations began on 29th January, 2008 and three days later, on 1st February, the parties agreed to address four key agenda items in an effort to resolve the crisis. These were:

1. immediate action to stop violence and restore fundamental rights and liberties,
2. immediate measures to address the humanitarian crisis, promote reconciliation, healing and restoration,
3. how to overcome the current political crisis, and
4. long-term issues and solutions

The parties also agreed on a joint public statement that reflected the agreements reached on specific actions to address **agenda item number 1** (Immediate Action to Stop Violence and Restore Fundamental Rights and Liberties). These actions include among others:

- refraining from irresponsible and provocative statements;
- holding joint meetings to promote peace and tranquility and demobilizing and disbanding illegal armed groups and militia;
- ensuring freedom of expression, press freedom and the right to peaceful assembly;

- the impartial, effective and expeditious investigation of all cases of crime and police brutality and/or excessive use of force;
- the protection and assistance to the safe return of all internally displaced persons to their homes and places of work.
- the cessation of the spread of hate and threatening messages, leaflets, sms, or any other broadcasts of that nature
- Prosecution of all criminal activities, particularly those of a violent nature

The parties agreed that the first three announced that agenda items would be resolved within 7 to 15 days from the date the dialogue began on 29 January 2008. The fourth agenda item would be resolved within one year of that date.

On 4th February 2008, the Chair of the Panel announced that the conciliation teams had agreed on specific action steps to address **agenda item number 2** under the KNDR. These included among others:

1. With Respect to Immediate Measures to Address the Humanitarian Crisis: the KNDR committee agreed that the Government would provide assistance to the victims of the violence and displacement as follows;

a) Assist and encourage displaced persons to go back to their homes or other areas and to have safe passage and security throughout

b) Provide adequate security and protection, particularly for vulnerable groups, including women and children in the camps.

c) Provision of basic services for people in displaced camps:

- Ensure that there is adequate food, water, sanitation and shelter within the affected communities – both those in displaced camps and those remaining in their communities.
- Provide medical assistance with a special focus for women, children, people living with HIV and AIDS and the disabled, currently in displaced camps.
- Ensure all children have access to education. This will involve reconstruction of schools; encouraging return of teaching staff and provision of teaching materials, and assistance for children to return to their learning institutions.

d) Provide information centres where the affected can get easy access to information regarding the assistance that is available to them and how to access it, for example, support for reconstruction of livelihoods, or tracing of family members.

e) Operationalise the Humanitarian Fund for Mitigation of Effects and Resettlement of Victims of Post 2007 Election Violence expeditiously by establishing a bipartisan, multi-sectoral Board with streamlined procedures to disburse funds rapidly.

f) The Fund is open to public contributions and all citizens and friendly countries, governments and international institutions to donate generously.

g) Ensure close linkages with the ongoing national and international assistance to enhance the effectiveness of delivery.

h) Ensure that victims of violence in urban areas are not neglected in the implementation of the above.

i) In order to promote food security, displaced farmers should be assisted to return to their farms. All farmers affected by the crisis should be assisted and encouraged to safely resume their farming activities.

2. With Respect to Immediate Measures to Promote Reconciliation, Healing and Restoration:

a) Joint peace rallies should be convened by all leaders of parties to promote peace and reconciliation.

b) Ensure that the freedom of expression, press freedom and the right to peaceful assembly are upheld.

c) Peaceful assembly as guaranteed by the Constitution should be protected and facilitated.

d) All-inclusive Reconciliation and Peace-building Committees at the grassroots level should be established. The committees should involve the provincial administration, council of elders, women, the youth, conflict resolution/civil society organizations.

e) Counseling support should be provided to those affected communities.

f) A national resettlement programme should be developed.

g) The law on registration of persons should be reviewed to remove the emphasis on ethnicity.

h) A Truth, Justice and Reconciliation Commission that includes local and international jurists should be established.

i) Welcome and encourage the United Nations High Commissioner for Human Rights investigatory team.

Negotiations on resolving the political crisis under **agenda item number 3** didn't go as smoothly or as quickly. The KNDR committee has on 14th February 2008 agreed to resolve the political crisis that stemmed from the disputed electoral results by settling on the establishment of an **Independent**

Review Committee (IREC) that would be mandated to investigate all aspects of the 2007 Presidential Election and to make findings and recommendations to improve the electoral process.

However, there was much acrimony over the discussions regarding the proper seat of executive power between the two principals, Mwai Kibaki and Raila Odinga. These differences failed to abate and on 26th February 2008, the Chair of the Panel, Kofi Annan announced that negotiation between the representatives of the two rival political parties had failed. He added that as a result of this impasse negotiation sessions of the KNDR committee would be suspended and that he would instead convene a meeting between the heads of the two parties.

This move proved to be effective as just two days later the Chair announced that the two principals had arrived at a power sharing agreement to address matters under **agenda item number 3**. This agreement, coined the Agreement on the Principles of Partnership of the Coalition Government, as formalized in public signing outside the President's Harambee House offices on 28th February, 2008.

The agreement contained the formula for the sharing of executive power largely through the creation of the position of the Prime Minister, two Deputies and an agreement to split ministerial positions in the Cabinet. These new arrangement was soon thereafter codified through an amendment to the then constitution of the Republic.

Once the hurdle of power sharing had been surmounted, the KNDR negotiations were resumed and discussions on **agenda item number 4** on the long term issues and solutions were soon underway. These negotiations picked up speed as on 4th March 2008 the first agreement under agenda item number 4 was reached which set out the parameters and principles for the establishment of a constitutional review process.

Discussions continued on the various issues that needed to be addressed under agenda item number 4 and on 23rd May 2008 the KNDR committee arrived at an agreement on the main areas of focus in an agreement termed principles on long term issues and solutions. These principles include:

1. Constitutional, institutional and legal reforms; this included reform of the:-
    - Judiciary,
    - Police
    - Civil service, and
    - Parliament
2. Land reform
3. Poverty inequality and regional imbalances
4. Unemployment particularly among the youth
5. Consolidation of national cohesion and unity

6. Transparency, accountability, impunity

The agreement contained an implementation matrix that set out the specific activities to be executed within set timelines and the offices responsible for their realization. This agenda agreement itemizes the most significant commitments made by the government toward securing the progressive and effective transformation of the state and state institutions.

The International centre for policy and conflict has been monitoring the implementation of these agendas and has compiled a social audit report on the same. This social audit covers the periods beginning January 2010 to November 2010 and seeks to highlight the extent to which the government has honoured its commitments under the various agenda items.

Progress and Status.

In the aftermath of the KNDR agreements, various commissions and state offices were established to secure the execution of the various KNDR obligations. Though some of these institutions have been successful in fulfilling their mandates, the nation has yet to see political authority move away from the pursuit of partisan political self interest for the sake of the country's progress.

Indeed, most of the KNDR processes have been stymied or face the real threat of frustration as politicians consistently seek to manipulate these processes to secure some form of political gain or protect some political interest. This seems to transpire in apparent disregard to the importance of the effective and expeditious implementation of the various KNDR agenda items to securing national healing and progress for the country.

We seek hereunder to provide an overview of the progress made by the government towards the proper fulfillment of some of its various KNDR obligations through the KNDR Commissions, their successes, failures and challenges facing ongoing processes.

AGENDA ITEM NUMBER 1: Immediate action to stop violence and restoration of fundamental rights and freedoms

1. CIPEV and the ICC

Background

The Commission of Inquiry into the Post-Election Violence (CIPEV), also referred to as the Waki Commission after its chair Justice Phillip Waki, was established on 23rd May, 2008 pursuant to the KNDR agreement on the establishment of the same signed on 4th March 2008. The Commission was mandated to investigate the facts and circumstances surrounding the violence, the conduct of state security agencies in their handling of it, and to make recommendations concerning these matters and appropriate measures of redress.

On 15th October, 2008, the Commission handed over its final report to the President and the Prime Minister, which report recommended, among other things, the formation of a special tribunal to prosecute those responsible for the violence that had erupted following the disputed elections in 2007. However, having contemplated the real possibility of a lack of political will to pursue criminal sanctions for those responsible for the violence, the Waki commission compiled a list of names of persons who their investigations had found to be most responsible for the post-election violence and entrusted this list, along with supporting materials, to Koffi Annan on 17th October, 2008.

The Waki commission, in its report, had admonished that the list of names, was to be sent to the Special Prosecutor of the ICC upon the legislature's failure to set-up the special tribunal to prosecute those responsible for the PEV. As had been expected, Parliament was unable to agree on the establishment of a special tribunal and the list was thereafter sent by Koffi Annan to the ICC Chief Prosecutor on 9th July 2009 upon discovering that a delegation of public officials had visited the ICC Chief Prosecutor requesting for an extension of time to set up prosecutions though a process that they could locally control.

On 5th November 2009, the ICC Chief Prosecutor Louis Moreno Ocampo came to Kenya seeking assurances that the government would refer the matter of dealing with the suspects of the post-election violence to the ICC. But the government failed to provide any clear directions and on the same day, the Prosecutor, through a press conference, announced his intention to submit a request to the pre-trial chamber for authorization to begin investigations into the situation under article 15, paragraph 3 of the Rome Statute of the International Criminal Court by 1 December 2009.

Concordantly, on 26th November 2009, the Prosecutor filled a request for authorization of an investigation into the situation in the Republic of Kenya in relation to the post-election violence of 2007-2008 with the Pre-Trial Chamber. The request was accompanied by approximately 1500 pages of supporting material. In his request, the prosecutor relied on several reports from various bodies on the PEV including the Waki Report[1].

The Judges of the Pre-Trial Chamber initially responded with a demand for additional information and clarification regarding the incidents likely to be the focus of investigation, the identity of the persons or groups of persons to be investigated and to illustrate how the actions in question are linked to a policy of the state or other organization as well as any domestic investigations with respect to the potential cases[2].

On 3rd March 2010 the Prosecutor, in response to this request, provided the Pre-Trial Chamber with a list of the most serious criminal incidents that appear to have resulted from a State and/or organisational policy as well as a preliminary list of 20 political and business leaders belonging to or

[1] The prosecutor relied on reports published by the Commission of Inquiry into Post-Election Violence; the Kenyan National Commission on Human Rights (KNCHR); the Office of the High Commissioner for Human Rights; UNICEF, UNFPA, UNIFEM and Christian Children's Fund; the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; th e Oscar Foundation; the Federation of Women Lawyers (FIDAKenya); Centre for Rights Education and Awareness (CREAW), Hu man Rights Watch; and the International Crisis Group.

[2] Decision Requesting Clarification and Additional Information, ICC-01/09-15 18-02-2010, pg 4

associated with the PNU and the ODM who appeared, at that stage and according to the information available, to bear the greatest responsibility for the most serious crimes of the PEV.

The Pre-Trial Chamber finally authorized the Chief prosecutor to initiate investigations into the situation in Kenya on 31st March 2010. The authorization as to investigate crimes against humanity committed in Kenya between 1st June 2005 (the date the Rome Statute entered into force in Kenya) and 26th November 2009(date of the Prosecutors application for authorization)[3].

On 8th April, 2010, an advance team of ICC investigators arrived in Kenya with a mission to conduct preliminary analysis of the Kenyan situation and more importantly identify and profile key suspects and witnesses. The ICC Prosecutor arrived in Kenya one month later. Between 8th and 12th May, 2010 the Prosecutor met with victims, civil society groups, communities and politicians. During his visit Ocampo focused on the violence that had occurred in Nairobi, primarily within the slums.

The main team of investigators for the ICC arrived in Kenya on 27th September 2010. These investigations came to a head when on 15th November 2010 the ICC Chief Prosecutor announced that he had requested the Pre-Trial Chamber to issue summons against 6 individuals to answer to charges of having committed crimes against humanity. The prosecutor asserted that he had reasonable grounds to believe that crimes against humanity had been committed in Kenya in two cases.

The **first case** is against:

1. **William Samoei Ruto** who is the current MP for Eldoret North and the suspended Minister of Higher Education, Science and Technology;

2. **Henry Kiprono Kosgey** who is currently the Minister of Industrialization, and the MP for Tinderet Constituency; and

3. **Joshua Arap Sang** who was the Head of Operations a local language (Kalenjin) radio station KASS FM and a radio broadcaster during the PEV.

The Prosecutor believes that these individuals were the principal planners and organizers of crimes against PNU supporters.

The **second case** is against:

4. **Francis Kirimi Muthaura,** the current Head of the Public Service and Secretary to the Cabinet and Chairman of the National Security Advisory Committee.

5. **Mohamed Hussein Ali,** formerly the Commissioner of the Kenya Police Force during the PEV and the current Chief Executive of the Postal Corporation of Kenya.

The Prosecution considers the two to have authorized the Police to use of excessive force against ODM supporters and facilitated attacks against ODM supporters.

[3] ICC Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19 31-03-2010, pg 69

6. **Uhuru Muigai Kenyatta,** currently the Deputy Prime Minister, Minister of Finance and MP for Gatundu South constituency. He is considered to have helped to mobilize the Mungiki criminal organization to attack ODM supporters during the post-election violence.

Following this announcement, political allies of those named by the prosecutor quickly moved to attempt to subvert the ICC process by seeking to have Kenya withdraw from the Rome Statute (the international treaty creating the ICC). On 16th December 2010, a motion was brought before Parliament by Chepalungu MP Issac Ruto, a long time ally of Eldoret North MP William Ruto, seeking to have the "Government takes immediate action to have the International Crimes Act repealed so that Kenya be immediately released from any obligation to implement the Rome Statute and further that any criminal investigations or prosecutions arising out of the post election violence of 2007/2008 be undertaken under the framework of the new Constitution and that the Government suspends any links, cooperation and assistance to International Criminal Court forthwith"[4].

This motion was seconded by the Mp for Ndaragwa, Jeremiah Kioni but was objected to on a point of order by Garsen MP Danson Mungatana who decried that the motion was unconstitutional and therefore was not to be determined by the house. The Garsen MP was supported in his assertions by the Minister of Justice, National Cohesion and Constitutional affairs, Mutula Kilonzo and the Gichugu MP Martha Karua. The Deputy Speaker, Farah Maalim, deferred the motion to the next sitting of the house.

On 21st December 2011, the Deputy Speaker ruled that the the motion to withdraw from the ICC was inadmissible in its original form contending that the Motion in purporting that a repeal of the International Crimes Act would immediately release Kenya from our obligations under the Rome Statute, and that criminal investigations and prosecutions arising out of the post-election violence, which took place while Kenya was a party to the Rome Statute and in purporting that such a repeal would suspend any links, co-operation and assistance to the International Criminal Court forthwith, was contrary to the obligation to respect the rule of law under the constitution as it amounted to a call on the Government to disobey, contravene or defy the law[5].

In his ruling the Deputy Speaker advised that it was his considered view that "….the Motion would have been admissible, and, indeed, would still be admissible, if its text had been limited, or were to be amended to be limited, to calling on the House to resolve that the Government takes immediate action to have the International Crimes Act repealed." And further that it was the wording in the Motion purporting to interpret the effect of such repeal, and in calling for cessation of links, co-operation and assistance to the International Criminal Court forthwith that had rendered the Motion inadmissible.

The Chepalungu MP was prompt to attend the Deputy Speakers' advise and on the very next day at the opening of house business, he reintroduced the motion seeking the repeal of the International Crimes Act and the States withdrawal from the Rome Statute, this time requesting only that any criminal investigations or prosecutions arising out of the post election violence of 2007/2008 be undertaken under the framework of the new Constitution.

[4] Hansard, 16.12.10A, http://www.bunge.go.ke/index.php?option=com_content&view=article&id=91&Itemid=84
[5] Hansard, 21.12.10P, pg 3, http://www.bunge.go.ke/index.php?option=com_content&view=article&id=91&Itemid=84

As with the previous motion, the Ndaragwa MP rose to second the amended motion[6]. This time however, only the Gichugu MP Martha Karua stood to oppose the motion. Consequently the motion passed and was to be thereafter forwarded to the President.

Way forward

The ICC process had been expected by most politicians to be protracted and of little impact. However, the expediency with which the Chief Prosecutor has moved to secure the prosecution of those most responsible for the PEV and the international crimes committed during that period has forced some political actors to engage in subterfuge in attempts to stifle the process for fear that they would be subject to prosecution.

There have been frantic and calculated efforts by parts of the Executive to subvert the ICC process following the announcement by the ICC Chief prosecutor of the cases he intends to prosecute for crimes against humanity arising out of the 2007 -2008 post-election violence. The inclusion of Amb. Francis Muthaura (head of the Public Service and the Presidents' right-hand man) as well as Uhuru Kenyatta (Deputy Prime Minister and the PNU heir apparent) among the suspects narrowed upon by the Prosecutor was extremely unpopular with the PNU arm of the Executive.

Since that announcement, Parliament moved and passed a motion to withdraw from the Rome Statute and repeal the International Crimes Act that domesticates the ICC treaty. The President and members of the Executive allied with the PNU had also been frantically lobbying member states of the African Union to unite towards a collective withdrawal of African State Parties from the Rome Statute.

After sustained pressure from the International community, this push for a mass withdrawal by African States from the Rome Statute switched to a drive to have the case against the six suspects deferred arguing that following the promulgation of the new constitution for Kenya, processes were in place for the reform of the judicial sector and such reform would enable the state to competently take up the case against the six alleged suspects.

The Executive sought to prove this reform initiative by nominating for appointment key officials within the justice sector – the Chief Justice who was to be the independent head of the Judiciary, the Attorney General and the Director of Public Prosecutions. The nomination proved to have been done by the President without consultation with the Prime Minister as required under the Constitution and appeared to be quite suspect considering that they had been done in consultation with three of the six suspects and included two individuals with whom the Deputy Prime Minister and the MP for Eldoret North William Ruto had contacted for professional services.

[6] Others that supported the motion were:- Ahmed Aden Sugow (MP Fafi), Joshua Serem Kutuny (MP Cherangany), Bare Aden Duale (MP Dujis), Dr Mohamed Abdi Kuti (MP Isiolo North), Jamlek Irungu Kamau (MP Kigumo), Chirau Ali Makwere (MP Matuga), Fred Chesebe Kapondi (MP Mt. Elgon), Kabando wa Kabando (MP Mukurweini), Dr. Naomi Namisi Shaban (MP Taveta), Prof. Margaret Chepkoech Kamar (MP Eldoret East), Walter Enock Nyambati (MP Kitutu Masaba), Peter Gatirau Munya (MP Tigania East), George Omari Nyamweya (Nominated MP – PNU),

These nominations were on 17th February rejected by the speaker on the floor of Parliament as having been done contrary to the constitution. Despite the speakers ruling the President and those allied to him and some of the six suspects vowed to push their nominations through the house. Immense pressure from civil society and various segments of the public and private sector against the nominations ensued the President was on 22nd February 2011 forced to withdraw the nominees to the said positions.

Furthermore, as part of their push to appear to be fast-tracking legitimate prosecutions of PEV suspects, the push for a special tribunal was reinstituted through a bill termed the Conferment of Special Tribunal Jurisdiction Bill. This Bill seeks to confer the High Court with Special Tribunal jurisdiction to investigate and prosecute international crimes as laid out in the Rome Statute and other crime committed during the post-poll violence between 2007 and 2008.

This bill has many weaknesses considering that it is dependent on the efficient working of agencies within the justice system that are in dire need of reform and remain subject to political manipulation, i.e. the police service, the witness protection services, the forensic unit etc.

The proposed law also has several weaknesses including the fact that the Tribunal is created by statute which can be repealed at anytime by Parliament should it prove to antagonistic to their ambitions; the funding of the Tribunal is also to be determined by Parliament; the Chief Justice unilaterally selects and considers the dismissal of judges to the tribunal; there is little said about the investigative division of the Prosecutor's Office, the term and reference of the prosecutor, the Registrar, the Chief Defense Counsel and their deputies are to be set by the Public Service Commission who, though requires to consult with the JSC, are not necessarily bound by such consultation, etc.

These weaknesses could easily render the Tribunal ineffective and serve to deny substantive justice to the victims of PEV. Hence the need for immense scrutiny in the establishment of such a tribunal considering the manifest intentions of the current political authority to scuttle the only ongoing judicial process dealing with PEV.

2. Police Reforms

Back ground

One of the main concerns that arose from the outcome of the PEV was the nature of the involvement of the nation's security forces in the violence. The investigations by the Waki Commission had revealed the complicity of the security forces and, more specifically, responsibility of the national and administration police in the violence and killings. There had been, before the violence, calls for reforms to the police service in Kenya. The police involvement in the PEV served to underscore the immense significance of a reconstruction and reinstitution of the nation's police service.

To this end a task force was formed to look into the working of the police service in Kenya and recommend initiatives that would secure comprehensive reform of the policing institutions in Kenya. The National Task-force on Police Reforms, chaired by retired judge Phillip Ransley, concluded its investigations and issued a report providing various recommendations to reforming the police sector in

Kenya. The report also recommended that a Police Reform Implementation Commission (PRIC) be set-up to put into operation the recommendations in the report.

The PRIC, composed of the heads of the various State security organs and chaired by Titus Naikuni, was established on 8th January 2010. Mandated with the role of, among other things, implementing the Report of the National Task Force on the Police Reforms, the PRIC has held a number of consultative meetings with relevant stakeholders to obtain input and consensus in the design of legislation aimed at reforming the police sector.

There has not been a significant impact by the activities of Ransley Task-force or the PRIC on the standards of police service. However, this was to be expected as the bodies were merely mandated to make recommendations for the reform of the security sector. So far the PRIC has been able to formulate 5 bills on security sector reform. These include: the National Police Service Bill 2010, the National Police Service Commission Bill, Independent Policing Oversight Authority Bill, Private Security Industry Regulation Bill 2010 and the National Coroners Service Bill.

It will be upon the government to put in place the necessary organs that will ensure the proper enactment of these legal bills and to secure sufficient resources for their actualisation.

Way forward

a) Enactment and implementation of the bills prepared by the PRIC

Aware that the new constitution creates and identifies specific institutions that will be mandated to design legislation concerning the police service as established under the new law, the PRIC has adapted the draft pieces of legislation to fit the constitutional requirements. In a meeting between members of the PRIC, the Parliamentary Select Committees (PSC) on Justice and Legal Affairs, on Security and Administration and the PSC overseeing the implementation of the Constitution (Constitution Implementation Oversight Committee - CIOC), held in Mombasa between the 18th and 19th November 2010, it was agreed that the design these new laws was properly the responsibility of the Commission for the Implementation of the Constitution (CIC).

The PRIC agreed that they needed to wait for the establishment of the CIC through which they could then push for the implementation of the 5 pieces of legislation in a manner consistent with the new constitution. Though the CIC will not be bound to use these draft bills, they would be wise to consider them in formulating legislation on the same. The draft bills were designed through a widely consultative process and therefore carry the interests of the various stakeholders.

At the same meeting, the Assistant Minister, reading a statement from the Internal Security Minister Prof. George Saitoti, asserted that the implementation of these laws would require a budgetary appropriations to the tune of approximately KSHS. 84.1 Billion.

This is a significantly large amount, though it is possibly quite understated considering the myriad of demands on and by the police for facilitation of effective service delivery. The

legislature will need to move swiftly to ensure the proper enactment of the aforementioned pieces of legislation set to reform the security sector within the country. The enactment of he said pieces of legislation must be coupled with budgetary or fiscal prioritization of the reform measures. Again political will here is key. The importance of a well established and professional security sector to the overall development and advancement of the State cannot be overemphasized.

b) Reform of the criminal justice system

The Waki report had found that some members of the police force had been responsible for the violence and unlawful killings during the post-poll skirmishes. Yet, most of those responsible have yet to be prosecuted. One of the few police officers arrested and prosecuted for the murder of a protester was acquitted as the prosecution was unable to secure the weapon that fired the lethal shot[7].

Between the 16th and 25th February, 2009, the UN Special Rapporteur on Extrajudicial killings visited Kenya to investigate into the extrajudicial killings that had occurred in the country during and after the PEV. The findings in his report were heavily criticized by the government which has since taken no action either verify or inquire into the grave assertions made in the report. Yet, claims and allegations of extrajudicial killings by police officers continue to surface from time to time.

The state of disregard for the rule of law has facilitated a corrupt, callous, understaffed, underpaid and overwhelmed criminal justice system that has failed to hold state and public officers accountable for some of the most atrocious crimes witnessed in post-independence Kenya.

There is a most pressing need, therefore, for the complete reform and transformation of the criminal justice system in Kenya especially within the Judiciary, Police Service and the Public Prosecution departments of the State. The new constitution contemplates and provides for most of these changes. However, extreme vigilance will be necessary to ensure that the holders of these state offices are individuals of integrity and of the highest attainable level of competence.

3. Militia and Criminal Gangs

Background

Most of the incidences of post-election violence, and indeed most politically instigated violence in the country's history, were executed by criminal gangs and militia groups allied to prominent political figures. Immediately after the PEV, it was perceived that there was a need to disband the criminal gangs and militia groups that were being used to perpetuate the violence.

[7] Edward Kirui who was based in Kisumu during the 2007 election was acquitted by a Nairobi Court for lack of evidence linking him to the shooting of two protesters. High Court Judge Fred Ochieng ruled that the bullets found in the victims' bodies did not match the gun used by the officer.

Though there have been various efforts by the police to address the question of militias and criminal gangs, they have not been carried out in the context of a formal processes that takes into consideration the mix of factors involved in the creation and operation of criminal gangs and militia.

Only recently have the government made a concrete step against militia groups and criminal gangs. On 13th September 2010, Parliament passed the Prevention of Organized Crimes Act which imposes heavy criminal sanctions on individual convicted of engaging in organized criminal activity. The term organized criminal activity is amply defined under the Act[8] and the crimes command hefty fines and prison sentences. In November, 2010, the government in the Kenya Gazette outlawed 33 criminal groups which include among others the Munguki, Sungu Sungu, Chinkororo, Kamjesh, Bagdad Boys, Jeshi la Mzee and the Saboat Land Defence Force.

The enactment of the Prevention of Organized Crimes Act has created a platform upon which state security institutions can hold accountable not only those who participate in gang activities, but those who assist, support or in any way facilitate the activities of the criminal gangs. After the enactment of the Act, the police have been on a crackdown of criminal gangs. Most have gone underground while some , such as the Mungiki have hiked their extortion rates and fees to obtain money to secure the release of arrested gang members whether on bail or upon conviction by payment of the fine.

There has yet to be an arrest of the prominent politicians or business people who are patrons or financiers of the militia groups and criminal gangs. These individuals must be aggressively pursued and convicted if the state is to effectively tackle the menace. However, such a move will demand

[8] Section 3 of the Act provides that " A person engages in organised criminal activity where the person -
(a) is a member or professes to be a member of an organised criminal group;
(b) knowingly advises, causes, encourages or recruits another person to become a member of an organised criminal group;
(c) acts in concert with other persons in the commission of a serious offence for the purpose of obtaining material or financial benefit or for any other purpose;
(d) being a member of an organised criminal group, knowingly directs or instructs any person to commit a serious crime;
(e) threatens to commit or facilitate the commission of any act of violence with the assistance of an organised criminal group;
(f) threatens any person with retaliation in any manner in response to any act or alleged act of violence in connection with organised criminal activity;
(g) being a member of an organised criminal group with intent to extort or gain anything from any person, kidnaps or attempts to kidnap any person, threatens any person with injury or detriment of any kind;
(h) provides, receives or invites another to provide or receive instructions or training, for the purposes of or in connection with organized criminal activity;
(i) possesses an article for a purpose connected with the commission, preparation or instigation of serious crime involving an organised criminal group;
(j) possesses, collects, makes or transmits a document or records likely to be useful to a person committing or preparing to commit serious crime involving an organised criminal group;
(k) provides, receives, or invites another to provide property and intends that the property should be used for the purposes of an organised criminal group;
(l) uses, causes or permits any other person to use property belonging to an organised criminal group for the purposes of the activities of an organised criminal group;
(m) knowingly enters into an arrangement whereby the retention or control by or on behalf of another person of criminal group funds is facilitated;
(n) being a member of an organized criminal group endangers the life of any person or causes serious damage to the property of any person;
(o) organises, attends or addresses a meeting for the purpose of encouraging support of an organised criminal group or furthering its activities."

comprehensive reform of the criminal justice system as well as a strong political determination to put an end to the insecurity and socio-economic damage occasioned by the use of these and other organized criminal groups.

Way forward

The use of criminal gangs and militia to achieve political ends has been at the heart of the many incidences of politically motivated violence in this country. Patronage and support by politicians, business men and other bodies of influence has contributed significantly to the flourishing of these criminal groups in Kenya.

Currently, the police are engaged in the pursuit of low level gang members. While this effort is laudable, there is unfortunately not enough space in the already overcrowded prisons to accommodate the large number of already recruited gang members. To deal an effective blow to criminal gangs, there instead need to be uncompromising and comprehensive investigations to ascertain the identity of the patrons, politicians and leaders that are involved with criminal gangs and militia. This will go a long way to addressing the impunity that has and continues to shred the states social, economic and political fabric.

However, patronage from influential political, religious and business persons is not the only factor facilitating the proliferation of criminal gangs. Poverty, insecurity, unemployment, improper or inadequate education, poor access to information, lack of social welfare institutions as well as the culture of impunity all play instrumental roles in fostering the propagation of criminality through organized groupings.

These factors represent governance failures by the state and these criminal groups develop to opportunistically fill those gaps in the state's governance obligations that has been ignored or disregarded by the state. In the absence of institutions of good governance and the effective delivery of services by the state, criminality will abound. The state must therefore proactively and deliberatively facilitate the widest enjoyment of political, economic, social and cultural rights, as well as security and the rule of law, if it is to effectively quash the proliferation of criminal gangs.

The state and state security mechanisms must also be vigilant to apply the new laws on organized crime in line with the Bill of Rights under the Constitution of Kenya. The pursuit of perpetrators engaging in organized criminal activity must not result in the wanton use of police powers to suppress or violate civic and political rights as has been the experience in Kenya's history with the Mwakenya fiasco in the late 1980's under the Moi regime.

AGENDA ITEM NUMBER 2: immediate measures to address the humanitarian crisis, promote reconciliation, healing and restoration,

1. IDP's

Background

As a result of the PEV over 650,000 people were displaced from their homes and areas of residence. While over 310,000 people fled to live amid host communities where they remained for several months, the remaining 350,000 internally displaced people (IDPs) took refuge in some 118 camps[9]..

For those in the camps the government launched Operation Rudi Nyumbani (return home) through which it sought to close down the main IDP camps dotted across the country and have those IDPs return to the areas from which they had been displaced. The government used a mix of force and insentivisation through the award of compensation monies from the National Humanitarian Fund for Mitigation and Resettlement to achieve this end. Kshs. 10,000 was to be awarded o each IDP household for family assistance and a further Kshs. 25,000 to repair or reconstruct their houses. There was no programme for the IDPs that had been integrated in host communities.

Though, some humanitarian assistance was given to the IDP's in the camps, it was the State that was responsible for securing proper living conditions for those living in the camps, safe passage and security for those who wished to return to their homes as well as facilitate the resettlement of those who did not desire to return to their former areas of residence. These would require sustained, strategic and well coordinated efforts from the government.

However the government's approach seemed geared toward short term superficial measures to do away with the IDP problem and create the impression that there were no more IDPs. Hence the reason that, according to Government practice, once IDPs in a particular camp have received the start up funds (Ksh. 10,000), the camp ceases to exist in records whether or not the IDPs had left the camp[10].

a) Corruption

The monies meant to compensate IDPs were to be administered mostly by members of the provincial administration in the areas where the IDPs had camped. Large sums of these monies have been lost through misappropriation and abuse. As early as 7th January, 2010 it was reported that a district commissioner had been charged with misappropriating Sh8.75 million meant for internally displaced persons.

Mr Javan Sagero, the Laikipia DC, faced two charges of fraud and another of false accounting, which he allegedly committed when serving as a district officer in Molo. The DC is accused of

[9] International Displacement Monitoring Center; Speedy reform needed to deal with past injustices and prevent future displacement; 2010, pg

[10] South Consulting, Kenya National Dialogue and Reconciliation (KNDR) Monitoring Project; Review Report October 2010, pg 16

misappropriating Sh8.75 million on March 10, 2009, in Molo Town, which was earmarked for IDPs. Mr Sagero, who was in charge of registration of IDPs in the same area, is also said to have committed fraud on October 28, 2009, by including in the register names of persons who did not qualify for government financial support[11].

On 19th February 2010, a report sighting an audit commissioned by the Kofi Annan-led Panel of Eminent African Personalities indicated that only 38 per cent of the displaced persons had been paid Sh25,000 for shelter reconstruction while more than 150,000 others had been paid Sh10,000. The audit report blamed poor coordination between the ministries of Internal Security, Lands and Special Programmes are to blame for the dismal record in resettling internal refugees

The report also highlighted that Sh1.4 billion from the ministry of Special Programmes was transferred to the ministry of Lands to buy land for the displaced, causing a huge deficit in the operations of the Naomi Shaaban-led docket. This money was 68 per cent of the total budgetary allocation to the ministry. The ministry of Internal Security was also roped into the confusion when about Sh180 million meant for those displaced was embezzled. The ministry distributed the money and isolated the ministry of Special Programmes.[12]

Several months later, on 22nd June 2010, it was reported that a former provincial commissioner and 22 district commissioners are among officials expected to be charged in court over the loss of Sh500 million meant for the resettlement of internally displaced persons. The report asserted that the former PC, a serving PC, the 22 DCs, and a large number of district officers, accountants, and other government officials had already recorded statements with a special squad of detectives from the Criminal Investigations Department.

Mr. Gideon Kimuli of the CID confirmed that a team of investigators was investigating the fraud and had confirmed that the investigators have established that some of the suspects, including the former PC and several DCs, bought prime property in Nairobi and other major towns during the period when the money was stolen.

The detectives, who had been on the case for the past three months on the instructions of the Office of the President, had reportedly gathered loads of documents from the districts affected and the Rift Valley provincial headquarters. Forensic audits had traced how Sh148 million of the stolen money was re-routed to private pockets by provincial administration officials responsible for the resettlement programme.

The investigators found that the administrators would withdraw millions of shillings meant for IDPs and create fictitious lists of victims that would then be presented as beneficiaries. However,

[11] The Daily Nation; 7th January 2010; http://www.nation.co.ke/News/-/1056/838150/-/voso99/-/index.html

[12]The Daily Nation; 19th February, 2010; http://www.nation.co.ke/News/politics/-/1064/865210/-/wr5iabz/-/index.html

when the investigators went to the ground and tried to trace the supposed beneficiaries, they found that they did not exist[13].

The next day a report emerged indicating the theft of money meant for internal refugees was uncovered in an audit by the Ministry of Finance. The audit tracking expenditure on internally displaced people focused on 22 districts where people displaced by the post-election violence i.e.: Narok South, Nakuru Town, Naivasha, Molo, Kipkelion, Kericho, Buret, Sotik, Uasin Gishu, and Koibatek districts. Nandi South, Nandi Central, Nandi North, Nandi East, Marakwet, West Pokot, Kwanza, Turkana South, Turkana Central, Trans Nzoia East, and Trans Nzoia West.

The audit uncovered anomalies in expenditure in key districts such as;

Molo District

The Ministry's of Headquarters issued Authority to Incur Expenditure (AIE) for an amount of Kshs.361,070,000.00 to the Molo District Commissioner during 2008/2009, to facilitate the Government's support to the Internally Displaced Persons (IDPs) in Molo District. According to information available, each IDP was to receive a sum of Kshs.10,000.00 in form of cash support and an additional amount of Kshs.25,000.00 for every house burnt during the post-election violence in 2008. However, and out of the sum of Kshs.361,070,000.00 disbursed to the District Commissioner, an amount of Kshs.13,490,000.00 appears to have been paid to individuals who were not in the approved list of IDPs and were therefore not eligible for the support

Nakuru District

A total of Kshs.135,783,960.00 was similarly disbursed to Nakuru District during the same period, on account of Government's support to the IDPs in the District. However, and out of the total, propriety of payments totaling Kshs.33,450,000.00 made to ten (10) officers in the District, on 7 November 2008 and 10 June 2009 could not be ascertained due to lack of the relevant supporting documents, including a list of the IDPs assisted.

A further amount of Kshs.74,181,158.00 paid to nine (9) other officers between August 2008 and November 2008 could not also be accounted for due to lack of various supporting documents, including IDPs' photographs and copies of identity cards.

Eldoret (Uasin Gishu) District

Records maintained at the District Commissioner's Office – Eldoret in respect of Government's support to the IDPs in the District indicate that during the year, an amount of Kshs.246,975,000.00 was paid to the District Commissioner for the support. However, the propriety of a sum of Kshs.8,450,000.00 paid out to IDPs at the Eldoret Show Ground could not be confirmed due to lack of a list of payees and witnesses to the payments. In addition, the payments do not appear to have been authorized by three officials as required.

[13] The Daily Nation, 2nd June 2010; http://www.nation.co.ke/News/Fat%20cats%20used%20IDP%20cash%20to%20buy%20posh%20city%20homes/-/1056/931156/-/item/0/-/12ingi8/-/index.html

The audit in tracking the Payment of IDPs through Cooperative Bank of Kenya found that the available information indicated that the Cooperative Bank of Kenya had received a sum of Kshs.207,760,000.00 for payment to IDPs in Molo, Koibatek and Uasin Gishu Districts. This arrangement followed a Memorandum of Understanding and Partnership Agreement between the Ministry and the Cooperative Bank, signed on 11 June 2008. However, and according to records made available during the audit, there appears to have been a balance of Kshs.8,540,000.00 which the bank ought to have refunded the Ministry as at 30 September 2009. No records have been seen to confirm that a refund of this particular amount has been received by the Ministry[14].

b) Government Maladministration and Neglect

The conduct of affairs by government with regard to the IDPs was less than exemplary. Complaint over government neglect and disregard were frequent throughout the year. On 17th February 2010, it was reported that a group of IDPs had attempted to walk from their camp in Mawingo area of ol-Kalou division in Nyandarua Central District to State house in Nairobi in a bid to present their grievances to President Kibaki.

However their endeavour was twice thwarted by the provincial administrationand police – once when approaching Gilgil town and again when they had regrouped in Nakuru Town. They were later driven back to the camp in hired Lorries. The grievances concerned their predicament at the camp for the past two years and non-fulfilment of promises made to them by the government[15].

On 5th March 2010, an article in the Standard newspaper reported that iron sheets from China that were meant to be distributed to 19 camps had not been released to most of the camps. This delay was attributed by the Nakuru DC Kang'ethe Thuo to a change of policy by the State."It was decided they will only be released once the IDPs are moved to their farms," said the DC.[16]

A report on 11th March 2010, relayed that hundreds of displaced people at Mawingu Camp in Ol Kalou constituency were forced to look for alternative shelter after torrential rains destroyed their tents. Tens of families were left without shelter when the rains washed away more than 50 tents, which had become weaker as they have outlived their tenacity.

The families were forced to share few tents that withstood the rains.Mawingu camp hosts more than 14,000 post-election violence victims. According to the chairman of the IDPs at the camp

[14] REPORT OF THE CONTROLLER AND AUDITOR GENERAL ON THE APPROPRIATION ACCOUNTS, OTHER PUBLIC ACCOUNTS AND THE ACCOUNTS OF THE FUNDS OF THE REPUBLIC OF KENYA FOR THE YEAR ENDED 30 JUNE, 2009, pg 301 http://www.kenao.go.ke/Reports_CG/Report%202008-2009.pdf

[15] The Daily nation, 17th February 2010; http://www.nation.co.ke/News/regional/-/1070/864058/-/8q3dbg/-/index.html

[16] The Standard, 5th March, 2010 http://www.standardmedia.co.ke/news/InsidePage.php?id=2000004833&cid=159&story=Where%20are%20our%20iron%20sheets?%20IDPs%20demand%20donation%20from%20China

Peter Kariuki, the tents that had been meant to last only six months were now two years old and in poor condition[17].

Similarly, on 9th May 2010, it was reported that some 300 displaced people camping at Wamura, Laikipia asserted that the Government has neglected them, seven months after they walked there from Limuru. The IDPs claimed the Government had failed to provide them with basic services, including health, water and infrastructure. Further, that since the end of 2009 when the IDPs arrived at the land, they have been living communally in two iron sheet structures. The halls accommodate women, men and children.

Mr Martin Ndung'u, their chairman, said the victims had contracted diseases, with some suffering from chronic illnesses.For instance, Ms Ann Wambui, 27, said she was supposed to undergo surgery to treat a gynecological problem, but could not raise funds for the operation. Mungai, who is expecting a baby in a month, said she developed complications after the long walk from Limuru. "I started bleeding and when I went to hospital, I was subjected to X-ray examination. Doctors recomended an operation," she said.

Three months ago Ruth Wairimu, 40, gave birth to a baby in the women's "dorm" after the IDPs failed to raise transport to take her to hospital.She said she has since been trekking to Ngobit Health Centre, about 40km away for clinics. "I take at least six hours to the hospital, and I am forced to camp at well wishers' homes since I cannot return to the camp the same day," she said.

Moreover, they said their appeal to the Government for more food had been turned down as they had been told by the local Provincial Administration there was no more relief supplies[18].

The Kenya National Commission on Human Rights (KNCHR) reported on 22nd May, 2010 that it was concerned about the government's failure to resettle Internally Displaced persons almost three years after the post election violence. The commission which blamed lack of coordination between various line ministries concerned with the resettlement of Internally Displaced Persons also said that the disconnection between the ministries has been hindering the resettlement agenda.

KNCHR's Collins Omondi asserted that the presidential directive given in September 2009 to resettle all IDPs within two weeks was yet to be implemented six months down the line. "Out of the targeted 19 camps the exercise has only commenced in one- Mawingu camp- where less than a third of the targeted have been relocated but not resettled," he said. He also said that the concerned ministries needed to start working within a clearly defined structure to prevent duplication of roles[19].

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[17] The Standard, March 11 2010; http://www.standardmedia.co.ke/InsidePage.php?id=2000005403&cid=159&story=Rains%20leave%20hundreds%20of%20IDPs%20without%20shelter

[18] The Standard, 9th May 2010; http://www.standardmedia.co.ke/InsidePage.php?id=2000009296&cid=4&

[19] Capital News, 22nd May, 2010; http://capitalfm.co.ke/news/Kenyanews/Kenyan-IDPs-in-dire-situation--8554.html

On 8th October 2010, IRIN News having visited IDPs in several camps reported that the Mawingo IDPs continue to live in dire camp conditions despite calm being restored across the country and many displaced people having been resettled through efforts of the government and aid agencies. Initially, Mawingo hosted 3,389 households (15,460 people), but the government has since resettled some of them at Giwa Farm in Rongai, along Nakuru-Eldoret highway.

While all of these households received an initial Ksh10,000 ($125) compensation payment, 1,680 of them are still waiting for the second promised payment of Ksh25,000 ($312), according to the camp's communication officer, Evans Karanja. At Mawingo camp, poor access to health services and lack of proper housing top the list of basic needs.

Njeri only attends to medical cases that require first aid treatment, referring the more complex ones to the Ol'Kalau district hospital, 10km away. "Accessing Ol'Kalau District Hospital is expensive and most patients call on me when it is too late," she said, adding that most of the IDPs failed to raise the Ksh3,000 ($37) taxi charge. Evans Karanja, the camp's communication officer, said: "In case of an emergency, we are at times forced to contribute so that we can save the life of one of us."

Karanja said asthma was the common cause of death at the camp. Since its establishment, more than 20 people have died in asthmatic attacks. There is only a two-roomed brick house for medical services, and there are no professional medical workers, to serve the camp.

According to the report, the situation for IDPs at a nearby camp in Kikopey, Gilgil District in Rift Valley Province, was even worse; they had neither a clinic nor a social worker. Ibrahim Mburu, the camp's chairman, said: "We normally carry patients to the Gilgil district hospital, 8km away, as we cannot afford the 600 shillings [$8] that taxis charge from the camp to the hospital. It is sad that the camp, with a population of 1,000 people, does not have even an emergency health facility."

Milka Waceke, 23, who lost her baby on 13 March when she went into labour on the way to hospital, said: "I still feel the pain of losing my child, I wish I was near a hospital or had money to pay for a taxi, then I would not have lost my baby."

For the 6,500 IDPs at Pipeline camp, along the Nakuru-Nairobi highway, the situation is slightly better. A well-wisher has constructed a two-roomed clinic. However, there is no medical professional to administer drugs although the clinic has supplies, donated by well-wishers. Paul Thiongo, the camp's chairman, said: "The nearest clinic is 4km away; a sick person cannot walk such a distance to seek treatment."

In all three camps, many IDPs said they were forced to remain standing in their tents every time it rained as water flowed into the tents. This situation is worse in Gilgil and Pipeline camps where tents often flood as they are situated on flat ground. "While the rest of the country considers the ongoing heavy rains a blessing, it is like a curse to us," Mburu said[20].

[20] IRIN News, 8th October 2010; http://www.irinnews.org/report.aspx?ReportID=90714

Way Forward

In spite of the may setbacks and hurdles to the proper resettlement if IDPs, one of the significant gains has been the design of a policy on internal displacement. The draft policy, was unveiled in Nairobi on 17 March, and broadens the definition of internal displacement to cover displacement due to political and resource-based conflict and natural disasters, as well as development projects that force people from their homes without proper relocation

The draft IDP policy borrows heavily from the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa that obliges governments to recognize IDP vulnerabilities and need for support. The policy, which emphasizes the criminality of arbitrary displacement, also calls for laws to address historical injustices, such as the national land policy 2009. Land is often at the root of conflict and subsequent displacement.

The draft policy, through its institutional framework, gives clear roles to stakeholders; it further proposes the creation of an IDP fund, which experts hope will increase accountability as there will be one kitty from which evolving IDP needs can promptly be met[21]. There is a profound need to have this policy enacted into legislation in order to streamline government action in the management of IDPs.

So far the government claims that it has spent Kshs. 7 Billiion in the resettlement of IDP. Yet the living conditions of IDPs whether settled into self-help groups or in satellite camps remains deplorable. Moreover, the Minister for Special programmes on 5th November 2010 claimed that her ministry needed Sh32 billion to resettle all the people displaced by the 2007 post election violence. "We need a lot of money and I don't think the government has a choice; we have to get funding. Right now we are trying to see where we can get the money through the Treasury but the plans have not been finalised yet," she said"....The priority now is to remove people who are in camps. We don't want them to keep relying on the government for their upkeep. They have to go back to their normal lives and that is what we are trying to help them do," [22]

One of the attempts by the ministry for special programmes to resettle IDPs was to move them to a contentious piece of land located in Mau Narok. This move has proved to be unsuccessful as local maasai community claiming indigenous ownership of the land have refused to allow anyone to settle thereon. The leaders from the Maasai community that have been opposing the resettlement of the IDPs on the land, arguing the land is subject to a suit they have filed in court over land injustices committed against them by the colonial government and the late President Jomo Kenyatta's regime. Nonetheless, the government has vowed to continue with the resettlement of internally displaced persons at Rose Farm in Mau Narok despite residents' opposition.

A forced resettlement of this nature would only lead to conflict and displacement in the future. This exemplifies the need for a more coordinated and strategized approach to the problems concerning internal displacement in the country. The implementation of the IDP policy through legislation would

[21] Kenya London News http://www.kenyalondonnews.co.uk/index.php?option=com_content&view=article&id=5487:draft-policy-offers-hope-for-idps-kenya&catid=41:kenya-headlines&Itemid=44

[22] Capital News 5th November 2010; http://www.capitalfm.co.ke/news/Kenyanews/3,500-IDPs-to-be-resettled-in-three-months-10436.html

be the first step. This should quickly followed by the implementation of land reform as provided for under the Constitution and the National Land Policy.

2. TJRC

Soon after the formation of the TJRC and the appointment of its Commissioners, matters came to light about the Chairs unsuitability to hold office arising out of his alleged involvement in three major matters of historical significance that would fall within the purview of the TJRC to investigate i.e. the Ouko Murder, the Wagalla massacre and the Inquiry into the illegal/irregular allocation of public land.Following this revelation, there was sustained pressure upon the TJRC Chair to step down from segments of the government, civil society and victims groups. ICPC together with other Civil Society Organizations (CSOs), held a press conference on 31st January 2010 asking for the resignation of TJRC chairman Amb. Bethuel Kiplagat. Their argument was based on the provisions of the Article 10 (6) (a) (b) (c) of the TJRC Act 2008.

This was followed up by a press conference on 7th February 2010 where CMD and ICPC tabled evidence against the TJRC Chair and contrasted the same with the TJR Act 2008 on its provisions regarding qualifications to serve in the Commission. Later On 9th February 2010, International Center for Policy and Conflict together with other CSOs wrote a letter to Amb. Bethuel Kiplagat and copied it to all commissioners, affirming their support of the Commission's work but on condition of his resignation and further attached all the documents that held evidence against him.

On 25th February 2010, Archbishop Desmond Tutu led nine former heads of truth commissions across the world in calling for his resignation. Asking him to step down as chair of the Truth, Justice and Reconciliation Commission (TJRC), the former heads and commissioners of past truth commissions cited two commissions of inquiry they said had raised serious questions on Mr Kiplagat's involvement in injustices.

The commissioners included Bishop Joseph Christian Humper, the former chairperson of the Truth and Reconciliation Commission for Sierra Leone and Salomon Lerner Febres, former chairperson of the Peruvian Truth and Reconciliation Commission. Others who endorsed the statement included Alexander Lionel Boraine, the chairperson of the Mauritian Truth and Reconciliation Commission and former commissioners of the South African truth commission among them Dumisa Ntsebeza, Yasmin Sooka, Bongani Blessing Finca, Mary Burton, Richard Lyster and Fazel Randera[23].

Despite immense local and international appeals to the Chair to step down in the interests of the Commission and the truth seeking process, Kiplagat came out adamantly the next day on the 26th February 2010 and refused to step down claiming that the push by civil society to have him step down would b e a violation of his rights and that his stepping down would cast aspersions of guilt upon him. However, He did not refute the grounds upon which his resignation had been requested.

[23] Africa Online News, 25th February 2010; http://africanewsonline.blogspot.com/2010/02/desmond-tutu-leaders-world-pressure-on.html

On the 27th February 2010, the TJRC Vice Chair, Betty Murungi offered to step down if questions of the Chairs credibility continued to persist. And one month later on 27th March 2010 Betty Murungi resigned from being the vice chair of the Commission. Ms. Murungi sent her resignation to President Mwai Kibaki on the 21st April 2010 and informed the embattled chairman pursuant to Section 16(b) of the Truth Justice and Reconciliation Commission Act, 2008.

Earlier, on 13th April 2010, TJRC chairman Bethuel Kiplagat lost the support of the entire commission, putting in jeopardy his tenure. The commissioners wrote to the Ministry of Justice informing it that Mr. Kiplagat had agreed to step aside and asked Justice and Constitutional Affairs Minister Mutula Kilonzo to ask the Chief Justice to form a tribunal to investigate the chairman. However, later the Chair went against his word and in a press conference said that he was not going to step aside.

Disturbed by the failure of the Truth, Justice and Reconciliation Commission (TJRC) to discharge its duties, the Kenyan government has now initiated the process of disbanding the body. Justice, National Cohesion and Constitutional Affairs Minister, Mutula Kilonzo, under whose docket the TJRC falls, said on 15th April 2010 that he had asked the Parliamentary Committee on Legal Affairs to work on modalities of disbanding the Commission. He said the entire Commission had failed to carry out its mandate of addressing long-term issues stipulated in Agenda Four of the mediation talks, making the Commissioners irrelevant.

The Minister has been hinting to the public that the entire commission will be disbanded to pave way for a fresh commission. However, the conduct of the commission sends different messages. Towards the end of May 2010, the commission traveled to Mt Elgon to visit victims and collect statements. The civil society raised a red flag on the way the TJRC was conducting itself and exposing victims without clear protection mechanisms. On 27th June 2010 the TJRC published their rules of procedure. The commission has also recruited staff and has trained statement takers. A bulk of its staff are victims of past human rights abuse thus deeply affecting the independence of the commission.

Way Forward

The TJRC was established with the mandate of, among other things, establishing an **accurate, complete** and **historical** record of violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office, both serving and retired, between 12th December 1963 and 28thFebruary 2008. The Commission had a maximum two and a half year period to complete this mandate. One and a half years on, the TJRC is nowhere close to the fulfillment of this objective having instead been mired in controversy concerning stark allegations of the impropriety of the Chair to hold such office.

Since the formation of the Tribunal to investigate the TJRC Chair Amb. Bethwel Kiplagat, the TJRC has sought to reconstitute itself and conduct its mandate despite its numerous conceptual and logistical problems. Most donors and civil society organizations continue to view the TJRC as a failed entity incapable of properly executing its mandate, and for good reason.

The prolonged delay in the establishment of a tribunal to investigate charges against the chairs' suitability to hold office and his refusal to step aside to allow the process to continue further

exacerbated the TJRC's conceptual problems and occasioned irreparable damage to the TJRC's ability to effectively execute its most fundamental and comprehensive mandate in the brief period remaining.

In spite these severs shortcomings the members of the Commission have adamantly determined to continue with the process in apparent disregard for the unique and fundamental importance of this processes to the proper healing and reform of the nation's political, cultural and socio-economic order. TJRC recently published its work schedule and intends to begin conducting hearings in the month of March, 2011. Yet, little is known regarding the workings, functions and abilities of the TJRC by most communities at the grassroots.

There is little chance that the TJRC will be capable of properly completing its wide mandate in the brief period remaining for it to conduct its activities. A new truth telling process that is conceptually well founded, competently and suitably manned and enjoys the engaged interest and trust of the public needs to be reinstituted and restructured to operate within the new political and constitutional order.

1. National Cohesion and Integration Commission.

The National Cohesion and Integration Commission is the first official attempt to inculcate a spirit of nationhood at a time when an upsurge in ethnic tensions is expected should perpetrators of the post-election violence be taken to The Hague for trial.

The commission was set up after President Kibaki assented to the National Cohesion and Integration Bill, 2008. The Commission was created as one of the mechanisms to address the post-election crisis and the underlying issues that caused the crisis. Primarily, the Commission is established to facilitate and promote equality of opportunity, good relations, harmony and peaceful co-existence between persons of different ethnic and racial communities in Kenya and to advice the Government on all aspects thereof.

It seeks to provide a mechanism for addressing, on a continuing basis, the ethnic conflicts experienced in a multi-ethnic/plural societies setup. But the question uppermost on the minds of many is whether it will succeed in the face of inter-ethnic suspicion that has been alive for four decades.

On February 24th 2010, President Mwai Kibaki called on the National Cohesion and Integration Commission to identify the cause of emerging inappropriate behavior that was a threat to national cohesion and integration.

On March 15th 2010, the National Cohesion and Integration Commission (NCIC) in partnership with GTZ in support of a national unity cohesion and integration agenda in Kenya sought the services of a media firm for a national multi-media advocacy campaign on the Agenda Four theme, in creating an informative platform for exchange in stimulating discussions that prompts public debate. This was followed by live broadcast discussions on mandate of NCIC.

On April 19th 2010, the National Cohesion and Integration Commission organized a four-day conference of National Elders Cohesion at Bomas of Kenya. The conference brought together over 300 selected

elders from communities across the country seeking to discuss matters on national unity under the theme 'One Nation, One People, and One Destiny'.

On the 18th of June 2010 the National cohesion and integration commission said it has over 20 names of politicians who are been investigated in connection with hate speech. Some of these politicians were taken to court but released on bail. This has led to the suspension of one assistant minister. On Thursday the 15th of July 2010, the commission in conjunction with the other four commissions hosted a conference on post referendum in Nairobi. It had the participation of people from all over the country. The aim was to try and initiate peace in post referendum.

The NCIC continuously monitored any form of hate speech and hostility during the period preceding and after the referendum. They had established a telephone line to receive any form of threats which worked effectively. This greatly helped to maintain peace during the referendum.

AGENDA ITEM NUMBER 3: How to overcome the current political crisis,

1. The Independent Review Committee

The Independent Review Committee headed up by Judge Johann Kreigler, was mandated to, among other things, look into the the constitutional and legal framework and identify weaknesses and inconsistencies in the electoral laws, completed and submitted its report to the President on the 17th September 2008. Among the recommendations of the report was the formation of a boundaries review commission to look into the delimitation of administrative and electoral boundary units. To this end, the Interim independent Boundaries commission was established by an amendment of the old constitution.

Interim Independent Boundaries Review Commission.

The interim independent boundaries review commission hereby known as IIBRC was set up by an act of parliament on May 12, 2009. The commission was mandated to review the existing constituency boundaries to reflect geographical size and population. The commission was responsible for making recommendations to parliament on the delimitation of the constituencies and local authority electoral units and the optimal number of constituencies on the basis of equality of votes.

On the 18th of January, the chairman addressed a media briefing on the commissions' 100-day tour starting February to collect views of Kenyans on boundaries demarcation. According to the commission, they expected to analyze the information gathered by July and make preliminary decisions on where the electoral and administrative boundaries will be by November 2010.

On 10th November, 2010 the Ligale lead Interim Independent Boundaries Review Commission (IIBRC) proposal for the distribution of the 80 new constituencies was leaked to the public. Since then there has been immense dissatisfaction from politicians especially from Central province and the Coast regarding the rationale used to distribute the new units.

The mandate of Commission was described in the old constitution under which it was created. Its mandate was to make recommendations to parliament on the delimitation of constituencies and local authority electoral units on the basis of equality of votes; to making recommendations to parliament on administrative boundaries including fixing, reviewing and variation of districts and other boundaries, as well as other roles as determined by Parliament.

However, the new constitution redefined the role of the Commission, though Article 27 (1) of the Sixth Schedule of the new constitution which clearly states that the Interim Independent Boundaries Review Commission shall continue to function as constituted under the old constitution and prohibits the Commission from determining the boundaries of the counties [Schedule 6, Article 27(1) (a)]. The constitution clearly states that the Commission '*shall* determine the boundaries of constituencies and wards using the criteria mentioned in this Constitution' [Schedule 6, Article 27(1) (b)] only stating that its review of boundaries should not result in the loss of already existing constituencies [Schedule 6, Article 27(4)]

The new constitution provides simple formulae for the creation of electoral units such as constituencies. Article 89 of the constitution in clause (5) and (6) provides that:

"(5) The boundaries of each constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota, but the number of inhabitants of a constituency may be greater or lesser than the population quota in the manner specified in clause (6) to take account of—

(a) geographical features and urban centres;

(b) community of interest, historical, economic and cultural ties; and

(c) means of communication.

(6) The number of inhabitants of a constituency or ward may be greater or lesser than the population quota by a margin of not more than—

(a) forty per cent for cities and sparsely populated areas; and

(b) thirty per cent for the other areas."

On the face of it the formulae seems to have been ignored or misapplied in several instances. For example, Langata constituency with a population of 355,188 was proposed to be split into three and while Dagoretti with a population of 329,577 was to be left untouched. Similarly, Sabatia constituency with a population of 129,678 which is already below the quota of 133,139 was proposed to be split while Kaloleni with 252,924 was to be left as it was. And Kitui Central with a population of 175,633 and a geographical area of 1,029 square kilometres was proposed for division while Mwingi North with 204, 932 people and covering an area of 5,777 square was not.

Though these divisions could be explained by the IIBRC, the use of the formulae in Article 89 (5) and (6) could not be proved without the drawing up of the physical boundaries which would show that the population within those boundaries was pegged on the population quota.

In spite the dissatisfaction with the proposed boundaries, the IIBRC attempted to have the boundaries gazette on the 15th August. However, on the next day, a Nairobi businessman, John Kimathi, moved to the High Court to bar Andrew Ligale's boundaries Commission from publishing the new constituencies. In granting the injunction against the gazetting of the proposed constituencies High Court Judge Daniel Musinga agreed that the Ligale commission ought to have clearly determined the physical boundaries of the new constituencies. "Without clear borders it is impossible to know the basic information like the number of voters in the constituency," said the judge.

The IIBRC's mandate ended soon thereafter on the 27th November 2010. On this day Mr Ligale presented the boundaries report to the House Committee on Justice and Legal Affairs, which he had on the previous day presented to President Kibaki and Prime Minister Raila Odinga.

With the issues unresolved, members of the already established Constitution Implementation Oversight Committee (CIOC) [which is a Parliamentary Select Committee, the House Committee on Justice and Legal Affairs and the MPs' Caucus on Boundary Review convened by Ikolomani MP Bonny Khalwale and Ndaragua MP Jeremiah Kioni met on 1st December, 2010 to discuss options to resolve the crisis. At this meeting it was agreed that the most prudent option was to dissolve the IIEC and create the Independent Electoral and Boundaries Commission as provided under the new constitution.

The other options were deemed to be too problematic. They included having the Ligale commission reinstated and their term extended to allow it to complete its work or expanding the mandate of the IIEC to include boundary review and extend its term. This would be extremely complex as these interventions would have required amendments to the new constitution. The other option was to table the Ligale report as it is and have Parliament pass it through a resolution. This would have been difficult considering the highly divided nature of the House on the issue of Boundaries.

Way Forward

In its motion before Parliament seeking the adoption the Report of the Departmental Committee on Justice and Legal Affairs on the Report of the Interim Independent Boundaries Review Commission (IIBRC), the Chair of the Justice and Legal Affairs made the proposed as a solution to the crisis created by the report of the Ligale led commission, that the Independent Electoral and Boundaries Commission created under the Constitution to handle the matter regarding the delimitation of boundaries but within the set limits - that the legislation created to operationalize the IEBC limit the Commission as follows:

> **"a) That the Independent Electoral and Boundaries Commission be granted a defined limited mandate to address the identified issues outstanding from the first review of the constituencies and ward boundaries as undertaken by the IIBRC in accordance with Articles 41(B) and (C) of the former Constitution and Article 27 of the Sixth Schedule of the Constitution.**
>
> **(b) That in undertaking its limited mandate over the said first review, the IEBC shall:**
>
> > **(i) as its primary reference material, use the Report of the IIBRC annexed hereto and adopted by this House;**
> >
> > **(ii) as its secondary reference material, the Commission shall use this Report of the Justice and Legal Affairs Committee**

(c) That at the conclusion of its defined limited task of addressing the identified outstanding issues, the IEBC shall consult widely for the purposes of feedback and validation prior to gazettment. The validation exercise shall include the Commission referring its Report to Parliament."[24]

This limitation is unconstitutional bearing in mind that the IEBC is an Independent Commission under Article 248 of the constitution whose mandate can only be limited by the constitution. Article 249 (2) (b) provides that:

"**(2) The (independent) commissions and the holders of independent offices—**

(a) are subject only to this Constitution and the law; and

(b) are independent and not subject to direction or control by any person or authority."

The aforementioned statement by the Chair of the Parliamentary Committee on Justice and Legal Affairs is a call to Parliament to design legislation that will limit the IEBC' ability to conduct its duties as explicitly provided by the Constitution in Article 88 (4) (c)and Article 89 (5), (6) and (7).

There will be need to scrutinize the establishment and operation of this constitutional commission to ensure that it is manned by competent personnel and that it maintains its independence in the execution of its mandate.

AGENDA ITEM NUMBER 4: long-term issues and solutions

1. CONSTITUTIONAL REFORMS.

One of the key anticipated milestones to addressing the governance challenges of the country was the creation of a new constitution for Kenya that secured the principles of constitutionalism, separation of powers, checks and balances, popular representation, fundamental rights and freedoms and devolution. Indeed, such a constitution was deemed to be the foundation upon which all other reform processes would have to be built upon if they were to be successful.

The process of designing the constitution was however filled with political manipulations and intrigue that threatened to derail the realization of the new law. The process began in 2008 with the amendment of section 47 of the former constitution. Section 47A gave the sovereign right to replace the constitution to the people of Kenya through a popular vote in a referendum.

On 4th November 2008 parliament passed the Constitution of Kenya Review Bill received Presidential assent on 11th December, 2008. The Act set out the roadmap for the review process within such strict limit as to avert delays or subversion. Early 2009, the Committee of Experts (CoE) on constitution writing was appointed to harmonize the various constitutional Drafts that had been proposed over the years.

On 17th November 2009, the Committee of Experts (CoE) released the harmonized draft constitution to the public for perusal. The public was given 30 days to review the draft and provide feedback. After the 30 days had lapsed the CoE reviewed the draft and incorporated the views of the public and presented

[24] Hansard, 21st December, 2010, pg 30;

the revised draft to the Parliamentary Select Committee (PSC) on Constitution Review on 8th January 2010.

The PSC revised the draft and returned the draft to the Committee of Experts who published a Proposed Constitution on February 23, 2010 that was presented to Parliament for final amendments. However due to a deeply polarized parliament, the house was unable to pass the vast number of amendments proposed. Realizing that the house was in deadlock, parliament finally unanimously passed the proposed Constitution as it had been presented on 1st April 2010.

The proposed constitution was presented to the Attorney General of Kenya on April 7, 2010 and was officially published on May 6, 2010. Over the next 30 days the CoE was to conduct civic education of the Proposed Constitution of Kenya. However, parliamentarians and politicians took over the civic education process as the sought to ally themselves with those in favor or those against the constitution.

After a 60days of campaign, the PCK was put to a referendum on 4th August 2010 and was subsequently ratified by a majority of over 66% of the votes cast. The constitution was thereafter promulgated at a public ceremony at the Uhuru Park in Nairobi on 27th August 2010 effectively becoming the supreme law of Kenya.

Way Forward

The Fifith and Sixth Schedule of the constitution set forth the transitional and consequential arrangements by which the state was bound in the implementation of the constitution. However, ignorance of the implications of the new law, a desire to maintain the status quo, succession concerns of the current political class, and specifically the push to secure the availability of ostensible political successors and heirs against international criminal prosecutions has significantly affected the implementation process.

So far the constitution implementation process has endured major violations at the hands of a segment of the Executive and Parliament. These include;

- The beach of international obligations to the ICC by provision of safe passage to President Bashir of Sudan into and out of Kenya on the day of the Constitutions promulgation
- the over one and a half month delay in the appointment of the members of the Judicial Service Commission,
- the two day delay in the appointment of members of the CIC and CRA,
- the unlawful preparation of draft bills to implement the constitution by the Ministry of Justice together other with Ministries and State offices,
- the uncompetitive, unconsultative and unconstitutional nomination of individuals to hold key State Offices,

- the wanton disregard for the constitutions National Values and Principles in its push to protect the Ocampo six from prosecution at the Hague.

The actions of Parliament and the Executive seem to indicate a disturbing reluctance to implement the constitution in letter or in Spirit. Furthermore, there has been little civic education on the implications and provisions of the new constitution. This information vacuum provides fertile ground for the dissemination of misinformation on the constitution in the pursuit of political gain in the coming 2012 elections.

Conclusion

In recent months the coalition government has been under strain as the PNU wing throws its weight around the suspects named by the ICC Chief Prosecutor as those his investigations have found to be most responsible for crimes against humanity committed during the post-election violence. The ODM arm of the coalition government has found itself standing in opposition to the PNU wing as its leader is counted as an enemy to the latter's future political aspirations.

In this political standoff the constitution implementation process is fast becoming a battle ground for political dominance with the effect that most of the very necessary legislative and administrative measures are yet to be put in place six months into the new constitutional dispensation. Those in political authority have and continue to illustrate their allegiance to personal political interest and cronyism over the important transitional and developmental concerns of the state.

IDPs still continue to endure abhorrent living conditions, the absence of rain points to an impending food crisis, many of the public institutions are in dire need of elementary reforms, there is still a significant lack of understanding among individuals at the grassroots about the true implications of the constitution and preparations for the 2012 elections are yet to be undertaken.

There is a serious need for the two principals to reassess their priorities if the implementation process is to be prevented from collapse and the gains made thus far are lost. Credit must be given to institutions such as the Commission for the Implementation of the Constitution (CIC), the IIEC and those members of the Judiciary that have chosen to stand above political intrigues and sought to apply the constitution in letter and in spirit.

The fight for the substantive reform has just began.