



## **Submission to the National Dialogue and Reconciliation Team** **October 19, 2011**

### **Introduction**

This submission will first consider key issues of concern which we believe require the action of the KNDR panel. It will then comment on decisions reached on other agenda items. We conclude this submission with a section outlining emerging threats which we believe have the capacity to undermine social stability.

In our view the key issues of concern at the current time are:

- Constitutional implementation;
- The ICC process;
- Institutional preparedness for the next election, and in this regard progress on reforms of the security sector and the judiciary; and
- Significant emerging threats.

### **Constitutional implementation**

We note that:

- Parliament passed 15 Bills in the last month of the August 27 deadline, whereas during the previous 11 months since the referendum, only 11 bills were passed. The main reasons for the delay in the process of drafting the bills are the lack of a strategic and focused approach, poor coordination between and among various actors, interference and rollback attempts from vested interests and lack of commitment to constitutional implementation. This has had a negative impact on the quality of many of the bills passed, leaving them open to further legal challenges.
- There are constant attempts at exploiting gaps in the emerging laws and the constitution in order to reverse the gains and achievements made since the referendum. In undertaking its mandate on the legislative agenda, The Commission on the Implementation of the Constitution (CIC) faced some challenges, which impacted on its effectiveness. The challenges include the late submission of draft bills to the CIC and substantive amendments to draft bills after the contents have been mutually agreed upon between the Attorney General, Kenya Law Reform Commission, the line Ministries and stakeholders without further reference to the CIC.<sup>1</sup> To its own disadvantage, the CIC's attempts to secure excessive salaries have publicly undermined its legitimacy. The Salaries and Remuneration Commission has yet to be established.
- The resources entailed in implementing the constitution and funding the stipulated institutions requires significant additional resources from an already overburdened government. This has been exacerbated by the extravagant approach to the establishment of new institutions and commissions and the setting of salary scales. The overly liberal approach to the implementation of the constitution and the establishment and financing of commissions' means that government will have increased recourse to

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<sup>1</sup> The Commission on Implementation of the Constitution( CIC) 3<sup>rd</sup> Quarterly report June-September 2011

borrowing to cover recurrent expenses. Insufficient resources will mean that hobbled commissions and constitutional bodies, which cannot deliver on their mandates will breed disenchantment. This could lay and has laid ground for amendments of the constitution on seemingly rational grounds (such as those accompanying the arguments on the electoral date), which are actually aimed at undermining it. Vigilance alone will not be enough to counter this threat.

- The CIC has been vocal in attempting to ensure that the constitution is implemented as envisioned. However, the Commission has faced major challenges in asserting its constitutional role vis a vis Parliament and the Executive. A case in point is the unconstitutional enactment of the County Emergency Fund Act 2011 and the National Government Loans Act.<sup>2</sup> Additionally, the Executive and Parliament have persistently ignored the CIC's advisory opinions on unconstitutional provisions in important bills e.g. those pertaining to elections and political parties<sup>3</sup>, which are critical factors in light of the importance of holding credible elections<sup>4</sup>.
- The new institutions enacted by the constitution are labouring under capacity constraints and are not firmly anchored by supportive policies. In addition, access to information and participation by the public as required by the constitution has been extremely uneven. These principles have not been clearly set out within government culture, policy and procedures. Positive examples of public participation are the judicial appointments and the IEBC interviews.

#### Recommendations

- *It is necessary to insist on government support for, and recognition of, the role of the Commission on the Implementation of the Constitution. It is necessary to point out that the government needs to push not only for the enactment of legislation, but for the development of policy frameworks and capacity building in the new institutions.*
- *It is critical to emphasise the importance of creating a strong legal framework for the electoral campaigns and the next elections.*
- *Emphasise to all stakeholders, particularly the Principals and Parliament that it is critical to respect the constitutional requirement for the most responsible and frugal use of public funds.*

#### **The ICC process**

We note that:

- Public engagement with the ICC process and especially the confirmation of charges hearings by Kenyans was encouraging. The pursuit of accountability for the post-elections violence remains a matter of high public interest with the public support for the ICC still being within the range of 60% - 65%.
- The President's support for one of the ICC suspects through a letter presented the suspects defence during the confirmation of charges hearings is a clear expression of solidarity with the suspects and raises serious questions as to his commitment to ensure

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<sup>2</sup> The Commission on Implementation of the Constitution(CIC)Audit on the acts of parliament. Annex 5 of the CIC 3<sup>rd</sup> Quarterly report June-September 2011.

<sup>3</sup> The Political parties Act 2011 and the Elections Act 2011.

<sup>4</sup> The CIC made various recommendations to the Ministry of State for defence with regards to administrative measures that guarantee recruitment exercises that meets the Constitutional threshold as provided for under Articles 10, 27, 54, 55, 56 and 232 of the Constitution. Yet this was never put into any of the security sector bills nor has the Ministry taken any action towards ensuring that recruitment of officers is in line with the constitution.

justice for victims of post election violence. This raises the possibility of Kenya's failing to cooperate with the ICC if cases are confirmed.

- Although the country was calm during the confirmation of charges hearings, the suspects and their political supporters have been exploiting the ICC proceedings in order to make political capital rather than adhering to the legal requirements for the confirmation of charges hearings. There is an increasing level of malevolence along ethnic lines on the internet (blogs, forums and social media sites) from the supporters of the ICC suspects.
- A local justice mechanism is still needed even if the cases before the ICC are confirmed. There is, however, no discussion on this, and as the country moves closer to elections, this is likely to become a taboo political subject. Rather than securing accountability, the state has been prioritising challenges to the admissibility of the cases before the ICC. There has not been any credible action showing that Kenya is serious about pursuing the main perpetrators of violence, nor has there been action to secure accountability for middle and lower level culprits to deter them from engaging in violence again.
- The Attorney General (AG) and Director of Public Prosecutions (DPP) have persistently requested the release of evidence from the Office of the Prosecutor in the pretext that they will use the evidence to launch local proceedings. Their action should be seen as laying the ground for possible non-compliance with the ICC if certain suspect's charges are confirmed by the ICC. It is disappointing that one of the first official actions of the new AG should appear to be aimed at undermining the ICC process.
- Concerns around witness protection and the capacity and composition of the Witness Protection Agency persist. Political will to support the agency is still lacking and government continues to be over-represented on its board.
- There is continuing ground for concern on the safety of those who are perceived to be ICC witnesses and their families residing locally. An ICC suspect has been reportedly meeting with leaders in Naivasha and Nairobi with a view to identifying so-called "community traitors".

#### Recommendations

- *Emphasise the importance of the government establishing credible local mechanisms to exact accountability for post election violence crimes at all levels before the next elections.*
- *Insist on action by the National Cohesion and Integrity Commission (NCIC) and the Communications Commission of Kenya (CCK) towards tracking and penalising the perpetrators of hate speech in whatever form that it is broadcast.*
- *Insist that the government make a clear commitment to cooperate with the ICC to ensure the suspects whose charges are confirmed appear for the trial- if that should be the outcome.*
- *Insist that it is incumbent upon the political leadership to refrain from mobilising local populations against the ICC and exact accountability for any acts of incitement or intimidation against witnesses or any other targets.*

#### **Security Sector Reforms**

We note that:

- Institutional reforms of the police largely remain at the status of 2010, with the exception of the attempts at engaging in a vetting exercise- which lacked transparency and independent oversight. It was deemed unconstitutional by the Commission on the Implementation of the Constitution (CIC) and the Kenya National Commission on

Human Rights and aborted. The National Police Service Act<sup>5</sup> and the Police Service Commission Act<sup>6</sup> were passed in August 2011. However the Independent Policing Oversight Authority Bill (and The National Coroner's Service Bill) which were tabled at the same time as above acts were unduly stalled and are awaiting to be debated when Parliament resumes its sitting. The Police Oversight Authority Bill will create mechanisms to monitor and sanction the actions and misconduct of individual police officers and should therefore precede or be passed at the same time as the aforementioned laws.

- Despite the passing of legislation aimed at reforming the police force there are still significant issues of operational capacity and a missing policy framework. The lack of a policy framework to ensure a coordinated approach to reform by all actors in the security sector is an impediment to reforms as envisioned in the new legislation. This is complicated by the present leadership's lack of commitment to reforms since the tenure of most incumbents is now slated to end. The continuing predominance of one ethnic group in leadership positions in the security sector is a cause for deep concern.
- Security sector reforms within a democratic governance framework are increasingly being undermined by counter terrorism<sup>7</sup> and anti-piracy operations. These are becoming the lens through which Kenya's security challenges are being measured by key donor countries such as the US and UK. The US government is proposing the expansion of aid to for East African military and police forces for training, equipment and weaponry at a time when reforms are lagging and PEV has not been addressed. While these issues appear separate from the mediation accord efforts, counter terrorism abuses ultimately undercut the efforts underway to instil the rule of law in Kenya and create a permissive environment for security force abuses.

Recommendations:

- *Insist on accelerated police reforms and training in preparation for the next general elections in keeping with the recommendations of task forces and commissions such as the Waki, Kriegler, Ransley and Alston.*
- *The Kenyan police cannot be left to reform itself; international assistance and partnerships, particularly from countries in the region which have undergone major police and security sector reform, is critical.*
- *Emphasise to donor governments to Kenya that all security sector assistance (particularly with regard to counter terrorism and anti-piracy efforts) should be undertaken within a democratic governance framework in order to ensure that Agenda 4 goals on security sector reform are not undermined*
- *Insist that security sector reforms need clear independent monitoring and citizen oversight, especially regarding the implementation of the new legislation recently passed by parliament.*

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<sup>5</sup> The National Police Act provides for the independence of the Police Service from the executive, the involvement of the people in policing, devolution of police services, inculcation of human rights, including those of police officers, integration of accountability mechanisms, amongst others

<sup>6</sup> The Police Service Commission Act introduces professionalism and reforms in the National Police Service, including ensuring impartial and independent recruitment, appointments, promotions, and transfers in the police service. The NPSC is also responsible for maintenance of a fair disciplinary system. It will be involved in the recruitment and appointment of the new Inspector-General and Deputy Inspectors-General.

<sup>7</sup> Counter-terrorism abuses occurring in the region include illegal renditions and extraditions, mistreatment, secret detentions, fair trial abuses and harassment of lawyers and human rights monitors, including the notorious case of Al Amin Kimathi who was kidnapped and imprisoned in Uganda for about a year.

## **Judiciary**

We note that:

- One of the most promising and popular advances arising from the new constitution is the process of vetting of applicants for key public offices and of the existing judicial officers. It contains much potential for introducing accountability into the public sector and raising the bar for the integrity of public officials. The revamped Judicial Service Commission (JSC) and the Judges and Magistrates Vetting board are expected to radically reform the Judiciary and there is renewed public confidence in the judiciary and its ability to implement credible institutional reforms. However, there have been challenges in the recruitment of international members of the vetting board.
- Currently judges and magistrates appear opposed to the vetting of the judiciary; they have challenged the Vetting of Judges and Magistrates Act as unconstitutional.
- While the process of appointment of the current Chief Justice and Deputy Chief Justice was welcomed as transparent, that of the appointment of the Director of Public Prosecutions was criticized. The Constitutional Implementation Oversight Committee (CIOC) report on the process makes it clear that the appointment of the DPP was dogged by controversy which could not be resolved within the committee. The committee recommended the DPP's appointment while calling for further investigations into the serious allegations raised against him. There has been no report of such investigations.

### Recommendations

- *It is necessary to stress, to the Judiciary and the public that the overhaul of the judiciary is essential to restore public confidence both generally and specifically in the run-up to the next elections.*
- *Emphasise that the envisaged public interrogation and vetting of candidates for high judicial office is a welcome break from the past. However the process should be protected against manipulation and abuse through the development of the procedures and regulations to ensure the just implementation of the Judges and Magistrates Vetting Act 2011. The government needs to further ensure that there is support for judicial reforms and that the process is not subject to undue influence by the executive.*
- *Inquire on the progress of the investigations as recommended by the CIOC into the allegations presented against the Director of Public Prosecutions, which is the central office in prosecuting serious crimes, such as post-election violence and grand corruption, and whose credibility continues to be overshadowed by this unresolved problem.*

## **In respect of further decisions reached under the National Dialogue and Reconciliation agreement:**

### **Agenda item 2: Internally Displaced Persons**

We note that:

- There is much opacity in the government's responses to IDPs. Complaints abound over the management of funds destined for IDPs. More openness is required in interventions for IDPs. Furthermore, there is ethnic and age discrimination in the responses towards supporting IDPs; whereas non-Kikuyu IDPs do not receive as much attention as they deserve, the older IDPs have been grouped together and do not receive appropriate support as they are not able to actively engage in economic activities.

### Recommendations

- *Insist that the investigations with regard to all irregularities in the disbursement of funds for IDPs are pursued and concluded and that the culprit's, especially the high level actors, be punished.*

### **Agenda item 3: The Grand Coalition Government**

We note that:

- After delivering a new constitution and pushing through the first set of laws to help in its implementation, the Coalition Government is no longer speaking with one voice on key issues as the electoral season heats up. This is undermining progress on important aspects of the reform agenda.

#### Recommendations:

- *As the two Principals come to the end of their tenure there is still a need for a unified approach, especially with regards to the ICC process and the necessary preparations for the next elections. In your capacity as chief mediator in the KNDR process it would be necessary to address the ever-more obvious divisions in the coalition by publicly and privately raising the issue as a matter of concern.*

### **Emerging Threats**

We note the following that could pose a threat to social cohesion and stability:

- With the rising cost of living and inflation expected to increase to 20+% by end of the year, the monetary policy tightening underway will make an already bad situation much worse. There is a limit to which people will take such stress before social tensions escalate.
- Increased economic pressures will impact significantly on youth, risking their increased radicalisation and their availability for destabilising activities and negative political recruitment.
- The above will be exacerbated by Kenya's current military engagement in Somalia, which also poses the threat of increased insecurity and vulnerability to terrorist attacks.

*(end/kptj/oct/11)*