The Kenya National Dialogue and Reconciliation:
Building a Progressive Kenya

Background Note
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INTRODUCTION

1. Following the political violence that engulfed Kenya after the disputed December 2007 General Election, international mediation by the African Union’s (AU) Panel of Eminent African Personalities, comprising Mr Kofi Annan (Chair), Mr Benjamin Mkapa and Mrs Graca Machel, brought the two main parties -- the Government/Party of National Unity (PNU) and the Orange Democratic Movement (ODM) -- into the Kenya National Dialogue and Reconciliation (KNDR) forum for dialogue and mediation. The overall goal of the KNDR process was to achieve sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights.

2. The parties committed themselves to end violence and identified long-standing issues that had caused the crisis. The high number of people killed and displaced from their homes raised an urgent need for the parties to end the crisis. The Panel subsequently facilitated the signing of the National Accord and Reconciliation Act 2008, which marked the end of violence.

3. The parties agreed to a four-point agenda:
- Agenda Item 1: Immediate action to stop the violence and restore fundamental rights and liberties;
- Agenda Item 2: Immediate measures to address the humanitarian crisis, and promote healing and reconciliation;
- Agenda Item 3: How to overcome the political crisis;
- Agenda Item 4: Addressing long-term issues, including undertaking constitutional, legal and institutional reforms; land reform; tackling poverty and inequality as well as combating regional development imbalances; tackling unemployment, particularly among the youth; consolidating national cohesion and unity; and addressing transparency, accountability and impunity.

4. This background note provides a summary of progress made towards realising the goals of the KNDR process. The discussion examines what has been achieved thus far and the country’s preparedness for the next general election. The note also aims at initiating a debate on how to transform Kenya into a progressive nation, especially now that its constitution opens the space

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1 South Consulting is a Kenya-based research and consulting firm mandated by the Panel of Eminent African Personalities to independently monitor and evaluate implementation of KNDR agreements. The periodic progress reports are found at: [http://www.dialoguekenya.org/sreport.aspx](http://www.dialoguekenya.org/sreport.aspx)
for far reaching reforms. The note draws from the various quarterly reports released by South Consulting over the past three years. The reports examine progress made in the implementation of reforms under the KNDR agreements.

5. The promulgation of a new constitution in August 2010 turned a new page in Kenya’s history. This achievement was the biggest milestone in Kenya’s tortuous reform journey of over two decades. Indeed, it is the most important outcome of the KNDR process so far.

6. The new constitution has raised public optimism for a new political culture by laying down national values and principles of governance to guide Kenya into the future. It establishes a sound framework for a new and a progressive nation - complete with new institutions and new values. It has demolished old institutions and created new ones – there is a new sense of optimism and hope. Upholding fundamental rights and freedoms are the cornerstone of this new Kenya.

7. It is acknowledged that the constitution has filled a major lacuna that had long prevented the realisation of fundamental reforms. But the new constitution is not an end in itself; it is a means to realising a new society and a new future. It is a means to sustainable peace, stability and justice in Kenya. However, the constitution is being implemented in an environment that is continuously changing: both the economy and politics are in a state of flux which pose certain challenges for the journey to a new and progressive Kenya. The section below discusses the significance of this environment for the journey to a progressive Kenya.

THE SOCIO-POLITICAL CONTEXT TODAY

8. Kenyans identify the rising cost of living as the most serious problem facing the country. In a survey conducted in October 2011, as many as 76 per cent of the population said that the cost of living is a major problem. Others cited corruption (10%), and unemployment (7 %). This observation about the high cost of living as the most serious problem is shared in most counties but perhaps felt more acutely among women.

9. The fact that three quarters of the population are facing challenges in meeting their basic needs is an issue of serious concern. As shown in Figure 1, inflation has been rising throughout the year. In an election period, inflation, combined with unemployment among the youth, has the potential to roll back progress the country has made since the signing of the National Accord in 2008.

10. The insecurities accompanying inflation could compound Kenya’s socio-political fault lines or even create a convergence with other fault lines to lay conditions for conflicts. Indeed concern about the high cost of living is an indication that a population facing the challenge of meeting basic needs is unlikely to pay attention to radical reforms and would be prone to political manipulation and violence. This raises the need for urgent policy intervention to bring down the rate of inflation so as to minimise its potential to converge with other fault lines as the country moves towards the next General Election.
11. The high inflation rate appears to be consistent with trends in economic growth seen over the past two decades. As shown in Figure 2 below, growth sharply declines around the time of a general election. The period preceding any general election usually witnesses a sharp decline in economic growth.

12. The fluctuating pattern of economic growth associated with the electoral cycle suggests that there is a need to find ways to stabilise Kenya’s politics. Many Kenyans are of the view that the divisions among politicians – and lack of a unified vision among them – is responsible for the challenges the country is experiencing. They cite mobilisation of politics along ethno-regional lines and promotion of individual political interest as an example in this regard. Again, this suggests a need to have strong electoral laws and enforcement mechanisms in order to begin building a rule of law culture.

13. In spite of the rising cost of living, about half of Kenyans feel safer today than they did just after the 2007 elections. When asked about safety now, compared to just after the 2007 General Election, 53 per cent of respondents reported that they felt safer while 34 per cent said they felt less safe.

14. Taking measures to improve the security of the population is critical at this point in time to inspire public confidence in the transition from the old order to the new. To demonstrate this change, there must be a strong commitment to protect the poor and vulnerable, promote the rule of law and to end all forms of impunity so that the people can face the future with confidence.

PROGRESS ON IMPLEMENTATION OF THE NEW CONSTITUTION

15. The passing of the Constitution in August 2010 through a peaceful constitutional referendum marks a major positive milestone in Kenya’s political history. The constitution enjoys wide popular support and legitimacy. The constitution marks the beginning of reforms on important issues that have remained unaddressed for a long time.

16. Considerable progress has been made in passing the relevant laws and setting up new institutions. By the end of August 2011, the first anniversary of the promulgation, parliament had passed critical Bills in line with the deadline set in Schedule 5 of the constitution. Parliament met the 27 August deadline for the passage of these enabling laws. But there is a need to pause and reflect on the process of passing these laws. For about 11 months, parliament had passed only 11 Bills since the promulgation of the new constitution – an average of one Bill a month. Among these Bills, nine were part of the mandatory 24 Bills required within one year after the coming into force of the new constitution. Towards the end of the deadline, in a period of one week, Parliament passed 15 Bills. Some of these were rushed through debate and approved, thereby raising concerns about their quality.
17. Parliament has passed the following laws:\(^2\)

| 1. Vetting of Judges and Magistrates Act, 2011 |
| 3. Supreme Court Act, No. 7 of 2011 |
| 4. Independent Offices Appointment Act, 2011 |
| 5. Independent Electoral and Boundaries Commission Act, 2011 |
| 7. Political Parties Act, 2011 |
| 12. Commission on Revenue Allocation Act, 2011 |
| 13. Contingencies Fund and County Emergency Funds Act, 2011 |
| 15. Environment and Land Court Act, 2011 |
| 16. Industrial Court Act, 2011 |
| 17. Power of Mercy Act, 2011 |
| 18. Ethics and Anti-Corruption Act, 2011 |
| 26. Tourism Act, 2011 |
| 27. Veterinary Surgeons and Veterinary Para-Professionals Act, 2011 |
| 28. Prohibition of Female Genital Mutilation Act, 2011 |
| 29. Industrial Training (Amendment) Act, 2011 |
| 30. Independent Policing Oversight Authority Act 2011 |

18. Questions have also been raised about the reasons for the delays and the subsequent haste with which the Bills were passed. It is certain that old habits and vested interests combined to undermine the momentum of developing and passing the Bills at different stages. Even the Commission for Implementation of the Constitution (CIC) complained about being by-passed in the process of reviewing and overseeing the development of some of these laws. These developments are generally a reminder of the need for public vigilance over the constitution implementation process.

19. *Establishment of constitutional implementation bodies:* The following bodies have been established and offices filled:

- The Parliamentary Constitutional Implementation Oversight Committee (CIOC)
- Judicial Service Commission (JSC)\(^3\)
- The Commission on Implementation of the Constitution (CIC)

\(^2\) for details see [http://eickenya.org](http://eickenya.org)

\(^3\) The JSC has since appointed 28 new judges of the High Court, including 14 women and 2 from among minority groups.
20. **Appointments to Critical Offices**: The following critical offices have been filled:
- Appointment of Chief Justice and Deputy Chief Justice
- Appointment of Attorney-General
- Appointment of Director of Public Prosecutions
- Appointment of the Controller of Budget
- Appointment of Auditor-General
- Supreme Court constituted
- Appointment of Members of the Judges & Magistrates Vetting Board

The only critical appointment pending is that of the Inspector General of the Police.

21. Nearly a half of Kenyans are satisfied with the progress in the implementation of the constitution. When asked, ‘How satisfied or dissatisfied are you with the progress of implementation of the new constitution?’ 52 per cent of the respondents said they were satisfied. Only 37 per cent said they were not satisfied at all. The perception that the new constitution presents an opportunity for changing the style in which public affairs are managed has sustained public confidence in the implementation process.

22. The level of satisfaction varies across all regions; how people voted in the referendum does not seem to be a factor in determining the level of satisfaction. The level of satisfaction is the same as in areas that voted against the document at the referendum in August 2010. It is, however, noteworthy that even with this broad canvass of support, regions that approved the document in large numbers are also the ones that are satisfied with the implementation process. Generally, there is no significant relationship between how people voted and how they are judging implementation.

*Challenges to implementation*

23. There are a number of challenges facing the birth of a new and progressive Kenya through effective implementation of the constitution. The new society is yet to show; there are signs that old habits have not died. First, the political culture is yet to change; the culture of bad governance and failure to embed accountability and the rule of law in the society has firm roots in many institutions and even among the citizens. Many tend to promote self interest rather than the public good. Second, there is resistance to change by those who stand to lose from the Constitution being fully implemented. Some people opposed the constitution at the referendum because of self interest rather than for ideological reasons. Others will continue opposing and resisting the constitution as long as it threatens the status quo.

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4 The only critical appointment pending is that of the Inspector General of the Police. The police has been slow to reform; lack of consensus on modalities of merging the various units, how leadership will be shared and uncertainty about their role in the devolved government continue to hinder expedient reforms.
24. Not all ministries and departments from which some of the Bills originate have the capacity to develop quality laws. Those with capacity are overstretched, particularly because there are many Bills being drafted at the same time. Also, there are some actors that are not effectively coordinating their work with the rest in drafting Bills. Sometimes, differences have emerged at the finalisation stage. Some of these differences are the result of extreme positions embedded in how some people are interpreting the Constitution. The divide in debates where some take radically conservative or extremist positions on a particular issue will continue to constrain implementation. There still remains much more legislation that is outstanding and will be required at least over the next four to five years.

25. The extent and nature of public participation in the development of some of the Bills has also been raised as a concern. The Bills should have been debated earlier but vested interests, lethargy, and poor coordination between and among various actors delayed the process of drafting and public participation. The finding that only a minority of Kenyans say they know the provisions of the new constitution compounds the problem of public participation. While it is difficult for the entire population to have expert knowledge of the new laws, lack of civic awareness about the constitution is an issue of concern. This raises the need to embed civic education in the implementation process.

26. As many as 65 per cent of Kenyans see divisions among politicians as the main challenge facing the implementation process. Another 19 per cent think it is political campaigns ahead of 2012 while 14 per cent see lack of resources as a major problem. This finding suggests that competing viewpoints about unclear provisions and sectarian interests will continue to threaten the journey to a new Kenya.

27. These challenges indicate the need for continuing and concerted oversight of the implementation process. Civil society organisations have played a critical role in monitoring implementation. This role needs to be strengthened by drawing in more stakeholders, including the private sector, and more consultations with the CIC.

Institutional reforms
The Judiciary

28. The Judiciary has made significant progress in terms of transformative reforms since the promulgation of the new constitution. The Judiciary has set high standards for institutional reforms and rejuvenated public confidence in the sector. The transparent process through which judicial officers were appointed and the high integrity standards demanded of applicants to the Judiciary are responsible for this shift in perceptions about the institution.

29. Close to half of those interviewed are confident that the Judiciary is taking the country in the right direction. This finding alone underlines the need to develop a strong foundation for a progressive society through an open and transparent process of recruitment to public offices. People tend to prefer a transparent and competitive processes rather than horse-trading. Importantly, the improvement in perceptions of the Judiciary must be matched with visible results and achievements in line with people’s expectations in order for the level of satisfaction to
be sustained. This means that reforms must be seen at points of contact with the public, especially in courts.

Police service

30. Important laws to reform the police service have been passed but concrete reforms in the police service remain tenuous. A new training curriculum has been introduced with an emphasis on, among other things, the Bill of Rights. The police service is also in the process of strengthening internal accountability systems by forming the Independent Police Oversight Authority. Generally, the Police Reforms Implementation Committee formed to coordinate reforms recommended by the Police Reforms Commission (Ransley Commission) has made progress in making some changes, but the impact of these is yet to be seen. Most of the changes in the police have been administrative. The police still lack capacity to carry out their everyday policing work and the relationship with the public needs to be improved. A majority of Kenyans are still not satisfied with the performance of the police.

THE LEGACY OF THE POST-ELECTION VIOLENCE

31. The KNDR agreement recommended the establishment of a commission of inquiry to investigate the causes of the post-election violence. The Commission of Inquiry into the Post-Election Violence (CIPEV or the Waki Commission5) was established in line with this recommendation. CIPEV recommended, inter alia, the setting up of a Special Tribunal for Kenya within a given time frame to investigate and prosecute suspected perpetrators of crimes committed during the crisis period. It also recommended handing over the matter to the International Criminal Court (ICC) if the government failed to set up the Special Tribunal.

32. On two occasions in 2009, the government failed to obtain enough support in Parliament to pass the necessary laws to set up the Special Tribunal. Some political leaders preferred the matter to be handed over to the ICC, ignoring the recommendation for a Tribunal altogether. There was limited support for a local Tribunal. Following this development, and in line with CIPEV recommendations, in March 2010, the ICC Prosecutor sought permission from the Pre-Trial Chamber II to open an investigation into the situation in Kenya. The Chamber granted permission for investigations to commence.6 Consequently, on 15 December 2010, the ICC Prosecutor named six persons suspected of bearing the greatest responsibility for crimes committed during the post-election violence (PEV). On 8 March 2011, the ICC issued summonses for the suspects to appear before the Court. On 7 and 8 April 2011, the six suspects made their initial appearance before the ICC.

33. By the time the ICC investigation began, there was no evidence that the police had been investigating any of the six individuals named by the Prosecutor. Indeed, the ICC ruled on 30

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5 Named so after Justice Philip Waki, who chaired it.
6 See previous South reports at www.south.co.ke and www.dialoguekenya.org
August 2011 that the Government of Kenya had failed to demonstrate any evidence that investigations into any of the six suspects were on-going. This resonated strongly with public perceptions in support of the ICC. Thus, when asked whether they believed the government could conduct genuine investigations and prosecutions of the six suspects, 58 per cent of respondents said they did not believe it could. Only 26 per cent said that they thought the government could conduct investigations and prosecute the six suspects.

34. These findings dramatise perceived lack of political will to fight impunity regarding the post-election violence. They underline the absence of progress in fostering accountability. Because of this, public support for the ICC has been high: by October 2011, up to 65 per cent of Kenyans said they were happy that the ICC was pursuing the six suspects in the post-election violence cases. A similarly high number of people, 64 per cent, said they trust that the ICC can effectively protect witnesses. Further, many people wanted to see the prosecution of all suspects, including lower and middle level perpetrators. The public perception that the government is not able to conduct genuine investigations suggests that impunity, as an underlying cause of the post-election violence, has not yet been adequately addressed.

35. Nonetheless, the ICC intervention in the Kenya situation has deepened fissures within the coalition government. Whether to support or not support the ICC intervention has re-established the cold relations that characterised the early days of the coalition government when many Kenyans viewed it as a ‘two-governments-in-one’.

36. The divisions in the coalition have undermined the ability to create a coherent position on the ICC. Overtures to protect political careers rather than articulate and pursue a coherent government strategy to hold people to account, appear to dominate this outcome of the post-election violence. There are, thus, very high expectations of the ICC to deliver justice to victims of the violence and help end impunity in Kenya.

37. A point to emphasise here is that the Commission that investigated the post-election violence in Kenya recommended the ICC intervention in the event the government did not establish a credible local judicial mechanism. Both the Executive and Parliament endorsed the Commission’s report containing the recommendation. Secondly, it should be recalled that the ICC does not supplant the authority of national courts. Rather, it is a court of last resort, governed by the principle of complementarity. The Court was established to help end impunity for the perpetrators of the most serious crimes of concern to the international community, and provide justice for victims. The Court does not target communities. It holds individuals to account, particularly those individuals deemed to be the most responsible for grave crimes. The ICC thus is not politically manipulated. A majority of respondents across the country are of the view that those supporting the ICC are doing so to get justice for the victims of violence rather than protecting the suspects or eliminate political rivals.

THE PROBLEM OF INTERNALLY DISPLACED PERSONS

38. Agenda II of the Kenya National Dialogue and Reconciliation Agreements outlined measures to address the humanitarian crisis, particularly how to end the problem of internal displacement during the post-2007 election crisis. In May 2008, the government launched “Operation Rudi Nyumbani” to facilitate the return of IDPs to their homes or to find suitable resettlement for them.
in another part of the country. Through the Humanitarian Fund for Mitigation of Effects of the post-election violence, the government disbursed Ksh10,000 to returning IDPs to help them ‘start up’ their lives and Ksh25,000 to help those whose homes had been destroyed reconstruct their houses.

39. The government has also supported peace-building activities through the District Peace Committees and collaboration with peace-building and religious organisations. With donor support, the Ministry of Special Programmes and members of the Shelter Cluster have constructed thousands of houses for returning IDPs. Humanitarian NGOs have supported livelihood recovery programmes through distribution of seed, fertiliser and voucher schemes. The government has supported psychological counselling programmes particularly in the Rift Valley, which was most affected by the post-election violence. In 2009, the government decided to allocate land to about 7,000 households, which had pooled their start-up funds to purchase land for settlement.

40. Despite these positive efforts, not all IDPs have returned to their homes or been resettled in other parts of the country. A significant number of IDPs are still living in camps or have been integrated into the general population in urban and rural areas, unable to find durable solutions. The continued existence of IDPs a few months before the next elections is the most visible indicator of lack of reconciliation in violence-affected areas. It also is a manifestation of underlying causes of displacement, the problem of landlessness. But many Kenyans think that the solution to the IDPs problem is to resettle the affected where they were evicted from.

41. The fact that the majority think return is the most durable solution suggests that efforts to restore confidence in return areas should be given fresh impetus. At the same time, calls for displaced persons to return to their ancestral lands indicate that a more active role by political leaders is needed to foster the sense of ‘one Kenya one people’.

42. As the next General Election and establishment of county governments approach, the problem of IDPs presents a unique challenge. Possible negative interpretation of devolution to mean ethnic homelands might trigger forced displacement of minorities to their ‘home’ counties. How the county government is managed presents risks that could restrict the freedom of movement and enjoyment of rights by minority groups. It also could hinder the durable return of IDPs who are still unable to go back to their homes. Developing a solid foundation for inter-community harmony at the county level is, therefore, an issue worth consideration even before the actual work of establishing the county governments begins.

ELECTORAL REFORMS AND PREPAREDNESS FOR 2012

43. The Coalition Government was tasked with undertaking far-reaching and comprehensive reforms. The Independent Review Commission on the 2007 General Elections (IREC/Kriegler Commission) recommended fundamental electoral reforms. The Electoral Commission of Kenya was disbanded and the Interim Independent Electoral Commission (IIEC) established. Its ability to manage by-elections and the referendum, as well as reforms such as introduction of electronic voter registration and the new voting system, went a long way in restoring public confidence in the electoral body. By the time the IIEC’s mandate came to an end, it enjoyed wide public confidence.
44. Since the promulgation of the new constitution, several laws have been enacted to improve the electoral process. A new electoral body has also been established: the Independent Electoral and Boundaries Commission (IEBC). All pertinent legislation on electoral reforms was passed by 26 August 2011. The Government has also allocated Ksh12 billion for the IEBC to carry out the elections and related preparatory work, in 2012.7

45. The establishment of an independent electoral body marks a significant transition in election management in Kenya. How appointments are done and how the new electoral body is established creates the context that will be perceived as conducive (or not) for a successful and democratic electoral process in future. It will determine the new body’s ability to inspire public confidence in its independence and capacity to manage elections competently and with integrity, including the ability to settle electoral disputes efficiently and effectively.

46. However, a close look at the laws passed to support the electoral process reveals that, in some cases, short-term interests informed the decisions taken. For instance, the Political Parties Bill was introduced to streamline the operations of political parties, instil political party discipline, provide guidelines on party loyalty and arrest the ‘party hopping’ that normally characterise election periods, when candidates would switch to multiple parties in search of nomination to contest polls. The Bill was amended to exclude strict control over, among others, party hopping and formation of alliances. The enacted law, nonetheless, contains important provisions to streamline political party operations as provided for under Article 91 of the Constitution.

47. An important aspect of preparations for the election is the institutional capacity of the body that will manage the elections. It is important that enabling electoral legislation is in place. However, laws on their own without the power to enforce and impose sanctions on those who breach them amount to little, especially in a country where electoral violence, because of impunity, appears to have become a culture. Giving the new electoral management body adequate powers to punish those who breach the law is imperative.

48. By end of November 2011, the Courts were still seized of the matter pertaining to the election date. But it is important to be mindful of the fact that it is possible to agree to hold an election on a particular date, only to realise that the country is not politically and institutionally – or even technically – prepared to conduct the election properly. Thus, the debate on the General Election date should be accompanied by a discussion on technical, legal, political and institutional preparedness (see annex on election preparedness).

49. Related to the question of preparation is the election theme: elections usually require a clear theme around which the campaigns will revolve. Election themes also help citizens to identify the qualities of leaders to champion reforms. At present, however, there is absence of an appropriate theme for the next elections. Absence of a political leadership to galvanise and lead a platform for a progressive Kenya suggests that anything can become the issue. Competing themes such as the ICC process or the high cost of living can become the campaign theme. How this theme is constructed, and how politicians use it, will determine the type of leaders that control the

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7 Based on IIEC projections, this will leave a shortfall of Ksh7 billion from requirements. This figure does not include the needs of civil society to carry out domestic observation and civic/voter education.
implementation of the constitution after 2012. It is therefore important to have a positive election theme based on implementation of reforms.

CONCLUSION

50. The implementation of the new constitution is on track. This marks the beginning of a new and progressive Kenya. The critical legal and institutional framework for implementation has been put in place. There is generally a high sense of optimism and hope: about half of Kenyans are satisfied with progress in implementation of the constitution. Thus, one may argue that the constitution has opened space for new reforms and genuine opportunities for creating a progressive society. The main challenge, however, is Kenya’s political culture. Old habits die hard. These will continue to constrain this journey to a progressive society. Provision of comprehensive civic education, including voter education and information, should be embedded in the implementation process in order to promote a good understanding of the constitution. This is important for the purpose of building vigilance on this important journey.

51. Implementation of the constitution is at a critical point; the next General Election will take the country through a democratic transition if the polls are properly and effectively managed. But failure to manage the electoral process or prevent partisan political considerations from influencing decisions about the electoral process – including the date when elections are held -- could fail the country yet again. Further, there are no themes that have emerged to define the platform on which the campaigns for the next General Election will be contested. Generally, several questions are competing for attention. These include effective implementation of the Constitution; fighting impunity and seeking accountability; and establishment of a new, values-driven leadership. This is the time to build a theme on progress in order to prevent rolling back the gains achieved thus far.

52. Thus, the next election could emerge as a contest pitting progressive forces against antireform forces or those who prefer the status quo. The election will determine whether or not the promise of the new constitution becomes a reality: it will determine whether the country’s transition is towards a progressive and a democratic society or the status quo obtains. For this reason, it is important to begin building a platform for the effective implementation of the constitution.

53. The new electoral body could midwife a democratic dispensation to a progressive Kenya or fail the country altogether. Failure to effectively and efficiently manage the electoral process would certainly be disastrous for the country. It is important, therefore, for attention to be paid to ‘institutional preparedness’ -- legal, political and institutional preparations must be finalised in advance.

The legacy of the post-election violence continues to present itself in two important ways: the ICC intervention and the IDPs problem. Although the ICC has intervened and the confirmation of charges hearings has been concluded, the country must begin thinking about domestic accountability for the crimes that occurred. The country must establish appropriate judicial mechanisms to hold lower and middle level as well as other perpetrators accountable. Public awareness on complementarity – awareness of domestic accountability for international crimes --should be built in earnest before the next elections. This will safeguard the journey to a progressive Kenya.