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# The Nairobi Principles on Accountability as a means of monitoring and enforcing the rule of law and accountability for international crimes in Africa

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## Summary

*This article examines the Nairobi Principles on Accountability, a set of principles developed by civil society actors and academics to create standards for accountability processes relating to international crimes. The article describes key aspects of the Nairobi Principles of Accountability as well as their ramifications from a rule of law perspective. By creating standards and guidance relevant to academics, policy makers and practitioners working on justice processes for international crimes, the Principles intends to create a platform for policy and legal change with significant potential to advance the rule of law. This includes informing policy and decision makers at various levels – including the international,*

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*regional and national – on how to address the challenges faced by the contemporary system of justice for international crimes and, consequently, to develop a more efficient and legitimate system of international justice. Having described the justifications, methodology and scope of the Nairobi Principles on Accountability, the article elaborates on the main themes addressed by the Principles, namely, (i) state co-operation in international criminal justice; (ii) immunity of state officials; (iii) complementarity; and (iv) victim and witness issues. Whereas all of these topics are examined with the starting point in the challenges experienced in the Kenyan situation, the article comments on the broader ramifications from a rule of law perspective, including the lessons to be learned from the Kenyan experiences with regard to justice for international crimes, in order to advance accountability norms and, hence, the rule of law, in Africa.*

**Key words:** *international criminal justice; rule of law; state co-operation; immunity of state officials; complementarity; victims and witnesses*

## 1 Introduction

This article uses Kenya as a case study to discuss rule of law issues in Africa. Specifically, the article comments and elaborates on the Nairobi Principles on Accountability. The development of these Principles is based on a research project undertaken by the authors in collaboration with other academics and civil society activists based in Kenya. The primary aim of the Principles is to develop standards for accountability processes for international crimes on the basis of Kenya's experiences with such justice processes. The article describes the work undertaken to date on the Nairobi Principles of Accountability as well as the broader ramifications of the Principles from a rule of law perspective. Accordingly, the article seeks to explain an ongoing research project which has important implications for the rule of law in Africa and elsewhere.

As such, by creating standards and guidance relevant to academics, policy makers and practitioners working on justice processes for international crimes, the Principles create a platform for policy and legal change in areas of the rule of law. It does so primarily by informing policy and decision makers at various levels – including the international, regional and national – on how to address the challenges faced by the contemporary system of justice for international crimes and, consequently, to develop a more efficient and legitimate system of international justice. This is significant from a rule of law perspective as institutions of international justice – and those supporting them – need to learn from the unique challenges they have faced in the past. It is also important to note that the Principles are based on collaboration between academics and civil society activists. This offers a unique basis for achieving such change, including by informing the strategies used by civil society groups to promote accountability norms. At the broadest level, it is widely

recognised that accountability norms, if effectively implemented, should be a key component of the rule of law. In contrast, impunity presents the anti-thesis to the rule of law.<sup>1</sup>

Having described the justifications, methodology and scope of the Nairobi Principles on Accountability, the article elaborates on the main themes addressed by the Principles, namely, (i) state co-operation in international criminal justice; (ii) immunity of state officials; (iii) complementarity; and (iv) victim and witness issues. While all these topics are examined with the starting point in the challenges experienced in the Kenyan situation, the article comments on the broader ramifications from a rule of law perspective, including the lessons to be learned from the Kenyan experiences with regard to justice for international crimes in order to advance accountability norms and, hence, the rule of law, in Africa.

## 2 Goals, justifications and methodology of the Nairobi Principles on Accountability

### 2.1 Overview of the themes addressed by the Nairobi Principles on Accountability

Kenya, as well as several other countries in the region, faces significant challenges with regard to impunity for large-scale human rights violations, including international crimes.<sup>2</sup> As discussed below in the article, in Kenya specifically, neither the involvement of the International Criminal Court (ICC) nor domestic avenues for accountability were successful in achieving accountability for the post-election violence. Whereas there are multiple, partly overlapping reasons for this, some of the most obvious challenges are briefly outlined here, and then discussed in more detail below in the article.

First, notwithstanding states' obligations under the Rome Statute of the International Criminal Court (Rome Statute), the Kenyan case highlights that co-operation with the ICC should not be taken for granted. Further, the Kenyan case illustrates that co-operation may entail more than formal compliance with statutory obligations. Importantly, the Kenyan case exemplifies that the current system of enforcement may be inadequate to promote full co-operation. The Nairobi Principles on Accountability will help provide clarification concerning what can be done in future cases to advance co-operation with international justice mechanisms.

Second – but related to the above – the Kenyan case demonstrates that there are significant challenges related to prosecuting heads of

1 See generally JA McAdams (ed) *Transitional justice and the rule of law in new democracies* (1997).

2 See eg TO Hansen 'Political violence in Kenya: A study of causes, responses, and a framework for discussing preventive action' ISS Paper 205 (November 2009).

state and senior government officials while they hold office. Regardless of the principle of irrelevance of official capacity set out in the Rome Statute, the Kenyan case exemplifies that governments are unlikely to provide the ICC with information which may incriminate state officials. The ICC's treatment of suspects who are state officials may differ significantly from its treatment of other types of suspects. Partly as a consequence of developments in Kenyan ICC cases, new legal regimes, specifically in the context of the African Union (AU), are being developed that do not permit the prosecution of senior incumbent state officials. It is on this basis that the Nairobi Principles on Accountability will help clarify the norms and practices relating to immunity for state officials in international criminal law.

Third, the Kenyan case points to interactions between international and national justice processes that are more complex than typically recognised in the scholarship on complementarity. This includes the possibility that domestic processes may be formally initiated, but without necessarily complying with the principles and values underpinning the ICC's complementarity regime, perhaps even with the aim of undermining accountability at the international level. This raises a range of questions addressed by the Nairobi Principles, including how other stakeholders should approach such domestic processes and, more broadly, about the value for complementarity of the current regime.

Finally, the Kenyan case raises important questions concerning the challenges of the current regimes for witness protection, participation and reparation. For example, is it justifiable that participation and reparation depend on the scope and outcome of criminal cases? The Kenyan case further suggests that the ICC faces significant challenges in providing adequate witness protection, especially when the information held by the witnesses could incriminate state officials. The Nairobi Principles address these and related questions.

Understanding the themes mentioned above, it is important to keep in mind that Kenya and other African countries have voiced concern about the system of justice for international crimes as it currently exists. This is evidenced not only by continuous criticism of the ICC's operations within existing structures, such as the Assembly of States Parties (ASP), but also by threats of withdrawing from the Rome Statute (which have in one instance been followed by actual withdrawal) as well as the AU's adoption of a strategy for collective withdrawal.<sup>3</sup> The Kenyan ICC cases demonstrate that it may be difficult to balance the concerns expressed by Kenya and other African

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3 Burundi, South Africa and The Gambia all sent instruments of withdrawal from the Rome Statute to the UN Secretary-General, but South Africa and The Gambia have since rescinded their withdrawals. See further PI Labuda 'The African Union's collective withdrawal from the ICC: Does bad law make for good politics?' *EJIL Talk* 15 February 2017, <https://www.ejiltalk.org/the-african-unions-collective-withdrawal-from-the-icc-does-bad-law-make-for-good-politics/> (accessed 26 February 2018).

states with the need to achieve accountability and promote the rights and needs of victims. The Nairobi Principles will attempt to achieve such a balance.

## **2.2 Goals and justifications of the Nairobi Principles on Accountability**

Drawing on Kenya's experiences with justice processes relating to the post-election violence, the primary goal of the Nairobi Principles is to set standards and create guidance for future justice processes relating to international crimes elsewhere, in that way offering an important tool for advancing the rule of law in African countries and elsewhere.

Evidence suggests that national authorities often are reluctant to endorse accountability norms, in particular to the extent that accountability processes put state officials under scrutiny. More guidance is needed concerning how to create more positive synergies, which would ultimately benefit goals of conflict prevention and the rule of law in these countries. In simpler terms, justice mechanisms addressing international crimes offer promises for advancing accountability norms, but the experiences from Kenya point to significant challenges in giving effect to these norms in practice when those in power are subject to investigation.

Accordingly, by creating guidance relevant to both academics and practitioners on the issues mentioned above, the Nairobi Principles offer a unique platform to advance the rule of law. In particular, the Principles create a platform for policy and legal change by way of informing policy and decision-makers at various levels on how to address the challenges faced by the contemporary system of justice for international crimes and to develop a more efficient and legitimate system.

The rationale is that important lessons may be learned from the challenges faced by the ICC in the Kenyan situation, which will benefit the ICC itself, regional actors such as the AU, states, and civil society groups working to promote accountability. Accordingly, the Nairobi Principles aim to promote the rule of law in Africa and elsewhere by encouraging states, international and regional actors and others to learn from Kenya's experiences with international justice, rather than repeating the mistakes that ultimately led to the collapse of the accountability processes in this case.

## **2.3 Methodology and scope of the Nairobi Principles on Accountability**

The Nairobi Principles are based on close collaboration between academics and civil society activists. The Principles are drafted by a 'core group of experts', involving 15 academics and civil society activists with significant research or practical experience on the processes of seeking accountability for international crimes in Kenya. The first meeting of the core group of experts was held in Naivasha,

Kenya, from 6 to 7 April 2017 to create the foundation for the development of the Nairobi Principles on Accountability, including framing the key issues to be addressed by the project, identifying the type of stakeholders to be consulted and discussing means of achieving policy impact.

As a draft version of the Principles is being developed, the core group of experts seeks feedback and input from the government of Kenya, the AU, ICC officials and others. Moreover, relevant resources are being collected to develop a broader resource centre involving a database with background material relevant to the Principles, including academic publications, non-governmental organisation (NGO) reports, government statements and other types of publications relating to the process of seeking accountability for post-election violence crimes in Kenya. This will lead to the launch of a dedicated website entailing both the Principles and the resource centre. It is envisaged that these outcomes will be used for training purposes and as an advocacy tool for engagement with the ICC, states and civil society actors, in this way offering a platform for advancing the rule of law.

Some important issues relating to the scope of the Nairobi Principles deserve a brief mention here. First, whereas the Principles take their starting point in the ICC process relating to post-election violence crimes in Kenya specifically, they also address other mechanisms of 'transitional justice' in Kenya where relevant, including attempts at establishing a domestic criminal justice process, the Truth, Justice and Reconciliation Commission (TJRC) as well as the various efforts to remedy victims. Second, whereas the Principles focus primarily on the ICC, they also address other forms of accountability processes and developments in international criminal law more generally. Third, even if the ICC's intervention in Kenya acts as the reference point for the Principles, where relevant the Principles draw on lessons from other ICC situations. Fourth, rather than only examining the period after which the ICC opened a formal investigation into the Kenyan situation, the Principles take a holistic approach to the accountability process, relying on an assessment of relevant developments both before the ICC intervened and after the cases were terminated.

In the following sections, the article turns to an analysis of the main themes addressed by the Nairobi Principles, including state co-operation with the ICC (section 3); immunity of state officials (section 4); complementarity (section 5); and issues relating to victims and witnesses (section 6), and debates why these are issues are important from a rule of law perspective. Section 7 briefly outlines a range of other themes addressed by the Principles.

### 3 State co-operation with the International Criminal Court

#### 3.1 Adjudication by the International Criminal Court of co-operation issues in Kenyan cases

Whereas compliance with international law in general has attracted significant attention in legal scholarship, only limited attention has been paid to how the ICC's co-operation regime works and the implications thereof.<sup>4</sup> The Kenyan case demonstrates some important challenges that the system may face in practice.

The post-election violence-related ICC cases – and, in particular, the *Kenyatta* case – collapsed largely due to a lack of co-operation by the Kenyan government. The ICC Prosecutor has consistently emphasised that a lack of co-operation was a key cause of the cases collapsing,<sup>5</sup> and – as detailed below – Chambers of the Court ultimately reached the conclusion that Kenya's co-operation with the Court fell short of the statutory obligations and, on that basis, referred Kenya to the ASP. However, this decision followed lengthy legal proceedings, which rendered the impact of the decision largely symbolic as the case against Kenyatta had already been withdrawn. The ASP is yet to take any action against Kenya, and it is doubtful if it will ever do so in any meaningful way.

Specifically, despite finding that Kenya had not fully complied with its obligations under Part 9 of the Rome Statute by failing to provide the material requested, in a decision of December 2014 the Trial Chamber in *Kenyatta* initially decided not to refer Kenya to the ASP. In part, the Chamber justified this decision by pointing to the Prosecutor's own problematic conduct.<sup>6</sup> However, based on the Prosecutor's appeal of that decision, the Appeals Chamber in August 2015 held that the Trial Chamber had erred in its discretion and referred the matter back to the Trial Chamber. It took the Trial Chamber more than a year to reach a new decision, which is problematic from a rule of law perspective. However, in its decision of

<sup>4</sup> A notable exception to this involves the recently-published edited volume O Bekou & JB Daley (eds) *Co-operation and the International Criminal Court: Perspectives from theory and practice* (2016).

<sup>5</sup> See eg F Bensouda 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr Uhuru Muigai Kenyatta', <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-05-12-2014-2> (accessed 26 February 2018). For civil society statements, see eg Kenyans for Peace with Truth and Justice (KPT) *All bark no bite? State co-operation and the International Criminal Court* (2014).

<sup>6</sup> *Prosecutor v Kenyatta* 'Decision on prosecution's application for a finding of non-compliance under article 87(7) of the Statute' ICC-01/09-02/11-982, 3 December 2014, [https://www.icc-cpi.int/CourtRecords/CR2014\\_09899.PDF](https://www.icc-cpi.int/CourtRecords/CR2014_09899.PDF) (accessed 26 February 2018).

19 September 2016, the Trial Chamber opted to refer Kenya to the ASP for non-co-operation.<sup>7</sup> Kenya's lack of co-operation was not discussed during the November 2016 ASP, and it is unclear whether and, if so how, the Assembly will seize on the matter at the next ASP in November 2017. So far, not a single state party has indicated that they will push strongly for action being taken against Kenya within the framework of the ASP.<sup>8</sup>

Given the delays in reaching a decision on whether to refer Kenya to the ASP, some speculate that the ICC Chambers may have attempted to time their decisions in ways to limit controversy with state parties, even if this is to the detriment of the ICC's co-operation regime and, hence, the rule of law. Indeed, the decision by the Trial Chamber to refer Kenya to the ASP was rendered almost three years after the Prosecutor had filed the first petition, for the Chamber to make a finding of non-compliance under article 87(7) of the Rome Statute against Kenya on the grounds that the Kenyan government did not comply with the Prosecutor's April 2012 request concerning the provision of evidence.<sup>9</sup>

### **3.2 Effectiveness of the International Criminal Court's co-operation and enforcement regime in the Kenyan situation**

The above raises broader questions concerning the effectiveness of an enforcement system that is largely based on (potential) action by a political body, namely, the ASP. Importantly, the Trial Chamber's decision to refer Kenya to the ASP presents the only enforcement measure available to a Chamber that finds a state party to be in breach of its co-operation obligations under article 87(7) of the Rome Statute in situations that had not been referred to the Court by the United Nations (UN) Security Council. Whereas a Chamber's finding of non-co-operation in theory is strictly judicial, the actual

<sup>7</sup> *Prosecutor v Kenyatta 'Second decision* [https://www.icc-cpi.int/CourtRecords/CR2014\\_09899.PDF](https://www.icc-cpi.int/CourtRecords/CR2014_09899.PDF) (accessed 26 February 2018); Prosecution's application for a finding of non-compliance under art 87(7) of the Statute', ICC-01/09-02/11-1037, 19 September 2016, available at [https://www.icc-cpi.int/CourtRecords/CR2016\\_06654.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_06654.PDF) accessed 26 February 2018).

<sup>8</sup> See further TO Hansen 'Referring Kenya to the ICC Assembly of States Parties, Part 1: A battle for the narrative' *Justice in Conflict* 3 October 2017, <https://justiceinconflict.org/2016/10/03/referring-kenya-to-the-icc-assembly-of-states-parties-part-1-a-battle-for-the-narrative/> (accessed 26 February 2018).

<sup>9</sup> The last submissions by the parties on the issue were filed in October 2015, and there were no significant legal or factual issues to resolve (tellingly, the Trial Chamber's 19 September 2016 decision comprises only 18 pages, at least half of which are devoted to a summary of the proceedings and the parties' submissions). The most obvious conclusion, therefore, is that the Trial Chamber was seeking to limit the controversy which an ASP referral of Kenya would create by delivering its decision at a point where there was less attention on the Kenyan ICC cases (and the conduct of the parties). See further TO Hansen 'Referring Kenya to the ICC Assembly of States Parties, Part 2: Implications for co-operation and enforcement' *Justice in Conflict*, 4 October 2016, <https://justiceinconflict.org/2016/10/04/referring-kenya-to-the-icc-assembly-of-states-parties-part-2-implications-for-co-operation-and-enforcement/> (accessed 26 February 2018).

enforcement of such a finding is essentially political as it belongs to a body comprised of state representatives, namely, the ASP. The Statute does not offer any guidance concerning the type of action the ASP can take, although the ASP itself has created a 'formal response procedure', but this procedure is primarily aimed at promoting co-operation in ongoing cases.<sup>10</sup>

Accordingly, the ICC's co-operation regime can be said to be essentially based on a 'managerial model' of compliance.<sup>11</sup> Whereas such a model may be useful in certain contexts, it is less likely to promote compliance when the relevant state has a limited motive for co-operating with respect to the actual case that triggered the co-operation proceedings. It raises particular problems when the case that led to a non-co-operation finding has already been terminated, as happened in the *Kenyatta* case. In the absence of goodwill by the state subject to co-operation proceedings, the efficiency of the ICC's co-operation regime, therefore, largely depends on the potential action taken by external actors.<sup>12</sup> However, such unified action has frequently been absent. Since international partners have seemingly come to view the ICC as an obstacle to having 'normal relations' with Kenya after Kenyatta became President, there are no good reasons to believe that there will be any unified push in or outside the ASP for sanctioning Kenya.<sup>13</sup>

The above raises questions about whether there are other ways of promoting co-operation and, thereby, the rule of law, for example by elevating the reputational costs of non-co-operation or creating more space for states that in principle may be interested in advancing co-operation to utilise tools such as aid restrictions and travel bans for the accused person and his or her family which may have a more direct impact on the affected state's will to co-operate.

The Nairobi Principles on Accountability address a range of additional challenges and lessons learned from the Kenyan case

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- 10 In addition to relying on the informal work of the ASP president, the ASP's own guidelines create a 'formal response procedure' when a decision by the Chambers regarding non-co-operation has been referred to the ASP. The procedure seems to be primarily aimed at promoting co-operation with respect to *ongoing* cases. The procedure provides, *inter alia*, that the president may write an 'open letter' to the state concerned reminding it of the obligation to co-operate; the holding of 'public meetings'; discussions in plenary; and the appointment of a dedicated facilitator to consult on a draft resolution containing concrete recommendations on the matter'. Importantly, the procedure does not lay down a framework for actually sanctioning a state party that refuses to co-operate.
  - 11 On the managerial model, see further A Chayes & A Chayes *The new sovereignty: Compliance with international regulatory agreements* (1998).
  - 12 As Rastan argues, '[i]f the non-compliance procedure is genuinely to influence state behaviour, the support for justice must be matched by concerted and unified action by the international community under a notional responsibility to enforce'. See R Rastan 'Testing co-operation: The International Criminal Court and national authorities' (2008) 21 *Leiden Journal of International Law* 431.
  - 13 See further S Brown & R Raddatz 'Dire consequences or empty threats? Western pressure for peace, justice and democracy in Kenya' (2014) 8 *Journal of Eastern African Studies* 43.

relating to state co-operation. For example, the co-operation requests made by the ICC Prosecutor may not have been sufficiently specific, and there are broader questions about how to make such requests more ‘compliant’. Furthermore, the extent to which it is possible for the ICC Prosecutor to obtain evidence and information from sources other than the state in the face of a state’s non-co-operation deserves more attention. At the same time, it is clear that basic state co-operation is needed to allow ICC investigators in the country and to conduct other operations, for example relating to victim participation and outreach activities. One important question in this regard concerns the expectations of the ICC Prosecutor in relation to state co-operation. In some cases, the Prosecutor would likely benefit from commencing investigations with no expectations of good faith co-operation by the affected state. Weak separation between the office held by accused persons and the personal interests of the persons holding the office can present significant challenges for promoting co-operation. The Kenyan situation further illustrates that it is important not to view state co-operation in static terms. Since the level of co-operation may over time change significantly, the ICC Prosecutor, civil society and other actors may be able to take advantage of situations where there is temporarily a favourable environment to push for state co-operation. The Kenyan case, moreover, points to significant obstacles, genuinely bringing into play domestic proceedings with a view to securing needed co-operation and, thus, a significant challenge to the rule of law. For example, in the early phases of the ICC investigation, the ICC Prosecutor sought to interview senior Kenyan police officers, but domestic judicial processes were used to block access to these officers. Domestic proceedings in Kenya have also been used to shield three Kenyans indicted for article 70 offences relating to the obstruction of justice from transfer to the ICC for prosecution.

## 4 Immunity of state officials

### 4.1 Rome Statute

The irrelevance of official capacity with respect to the prosecution of international crimes, specifically genocide, crimes against humanity and war crimes, appears to have now been settled in international law. Article 27 of the Rome Statute concerning ‘irrelevance of official capacity’ states as follows:

- 1 This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
- 2 Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international

law, shall not bar the Court from exercising its jurisdiction over such a person.

While these provisions make it clear that in principle no one is immune from prosecution before the ICC, the question of how – or even whether – to give effect to these norms concerning accountability for state officials is subject to increased controversy in scholarly debates.<sup>14</sup> One particularly contested issue that has been highlighted following the refusal by several African countries to arrest Sudan's President Omar al-Bashir (and the AU's support for such inaction) concerns the scope of states' obligations to arrest and transfer to the Court persons subject to an arrest warrant where that person holds state office and is protected by the general rules on immunity in international law.<sup>15</sup>

#### **4.2 Dilemmas in the Kenyan ICC cases**

The Kenyan ICC cases demonstrate that notwithstanding the irrelevance of official capacity under the Rome Statute system, prosecuting state officials – in particular a sitting head of state – faces immeasurable obstacles. In the context of running for office, the accused persons stated that it was possible to make a distinction between their personal and official capacity. In reality, however, this distinction was easily blurred as Kenyatta had been elected President and Ruto Deputy-President in 2013. The Kenyan government, as an entity, was responsible for complying with requests for co-operation from the ICC, but that entity was led by Kenyatta himself as President, raising a clear conflict of interest. Notably, Kenyatta was also the Chairperson of the National Security Council and, thus, had control over the bodies tasked with enforcing the ICC's co-operation requests. The accused persons consistently used the state apparatus to challenge and undermine the accountability process. Kenyan leaders also used the threat of withdrawing from the Rome Statute to create leverage with respect to contested issues of the accountability process,

14 See eg D Akande & S Shah 'Immunities of state officials, international crimes, and foreign domestic courts' (2010) 21 *European Journal of International Law* 815.

15 See eg J Iverson 'Head of state Immunity is not the same as state immunity: A response to the African Union's position on article 98 of the ICC Statute *EJIL Talk* 13 February 2012, <https://www.ejiltalk.org/head-of-state-immunity-is-not-the-same-as-state-immunity-a-response-to-the-african-unions-position-on-article-98-of-the-icc-statute/> (accessed 26 February 2018). In this regard, it is important to take note of art 98 of the Statute, which provides as follows: '(1) The Court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the Court can first obtain the co-operation of that third state for the waiver of the immunity. (2) The Court may not proceed with a request for surrender which would require the requested state to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending state is required to surrender a person of that state to the Court, unless the Court can first obtain the co-operation of the sending state for the giving of consent for the surrender.'

including attempting to influence the outcome of specific proceedings before the Chambers.<sup>16</sup>

The Kenyan leaders further used the threat of non-co-operation as a means of achieving particular procedural outcomes. For example, Kenyatta made it clear that he would only continue to co-operate with the Court if it treated positively his request to have his and Ruto's trials run on alternating days.<sup>17</sup> Having initially rejected such a request, the Chamber ultimately granted the suspects' request after this statement had been made.<sup>18</sup> More generally, at times it appeared that the Court was willing to stretch the Statute to its limits to accommodate the concerns of Kenyatta and Ruto. In one notable decision, the Trial Chamber granted Ruto's request to be generally absent from his trial, notwithstanding the fact that article 63(1) of the Statute clearly states that the 'accused shall be present during the trial'. The Chamber explicitly cited Ruto's official status as a reason to provide him with this preferential treatment, raising questions about the application of article 27 mentioned above concerning the irrelevance of official capacity and the obligation to treat all persons equally under the law.<sup>19</sup> This preferential treatment was further consolidated within the framework of the ASP, where Kenya, with the assistance of other African states, successfully lobbied for the adoption of new Rules 134bis, 134ter and 134quater of the Rules of Procedure and Evidence, whereby the accused persons would be allowed to be absent from trial hearings.<sup>20</sup>

The developments discussed above must be viewed in light of the adoption of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol).<sup>21</sup> Although not yet in force, the Protocol creates a framework for prosecuting international crimes whereby senior state officials are exempted from prosecution while still in office. Article 46Abis provides:

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- 16 See further TO Hansen 'The price of deference: Is the ICC bowing to pressure in the Kenya cases?' *Justice in Conflict* September 2013, <http://justiceinconflict.org/2013/09/16/the-price-of-deference-is-the-icc-bowing-to-pressure-in-the-kenya-cases/> (accessed 26 February 2018).
  - 17 See *Standard Newspaper* 'President Uhuru Kenyatta rejects parallel Hague trial with William Ruto' 9 September 2013, [https://www.standardmedia.co.ke/?articleID=2000093115&story\\_title=uhuru-rejects-parallel-hague-trial-with-ruto](https://www.standardmedia.co.ke/?articleID=2000093115&story_title=uhuru-rejects-parallel-hague-trial-with-ruto) (accessed 26 February 2018).
  - 18 See further Hansen (n 16 above).
  - 19 For a further discussion of this decision, see TO Hansen 'Caressing the big fish? A critique of ICC Trial Chamber V(A)'s Decision to grant Ruto's request for excusal from continuous presence at trial' (2013) 22 *Cardozo Journal of International and Comparative Law* 101.
  - 20 See further Coalition for the International Criminal Court 'Report on the 12th session of the ASP, 20-28 November 2013', [http://www.iccnow.org/documents/asp12\\_report.pdf](http://www.iccnow.org/documents/asp12_report.pdf) (accessed 26 February 2018).
  - 21 Malabo Protocol, adopted 27 June 2014, <https://www.au.int/web/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights> (accessed 26 February 2018).

No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

While organisations such as Amnesty International argue that this aspect of the Protocol undermines accountability norms and the rule of law,<sup>22</sup> the Kenyan ICC cases demonstrate that the *practical* difference between the Rome Statute and African Court system may be less significant than what first meets the eye.

Further, the fact that Kenyatta and Ruto were elected President and Deputy-President respectively only after ICC charges had been brought raises broader questions concerning how to ensure a swifter determination of ICC cases, rather than creating a situation where ICC cases can be instrumentalised politically by accused persons. An argument may be made that, although the Prosecutor sought and the Chamber issued summonses to appear, requests for warrants of arrest could have been made in the early days as the accused persons did not consistently abide by the terms of the summonses. On the other hand, had warrants of arrest been issued, this may have resulted in a deadlock between the Kenyan government and the ICC earlier on.

Taken together, the above raises questions as to whether the prosecution of a sitting head of state and other senior government officials is feasible in the current system of international justice and, hence, as to the ability of this system to support a crucial aspect of the rule of law, namely, equality before the law.

## 5 Complementarity

### 5.1 Concepts of complementarity and positive complementarity

The principle of complementarity, whereby national courts are given priority in the prosecution of international crimes, has often been pointed to as the cornerstone of the Rome Statute.<sup>23</sup> Article 17(1)(a) of the Rome Statute provides:

The Court shall determine that a case is inadmissible, where: The case is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution.

<sup>22</sup> See Amnesty International Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court, 22 January 2016, <https://www.amnesty.org/en/documents/afr01/3063/2016/en/> (accessed 26 February 2018).

<sup>23</sup> See eg M Benzing 'The complementarity regime of the International Criminal Court: International criminal justice between state sovereignty and the fight against impunity' (2003) 7 *Max Planck Yearbook of United Nations Law* 591; JI Charney 'International criminal law and the role of domestic courts' (2001) 95 *American Journal of International Law* 120; M Bergsmo 'Occasional remarks on certain state concerns about the jurisdictional reach of the International Criminal Court, and their possible implications for the relationship between the Court and the Security Council' (2000) 69 *Nordic Journal of International Law* 87.

Besides complementarity as a legal threshold for admissibility, the ICC Prosecutor endorses 'positive complementarity', seen to require national judicial authorities and the ICC to 'function together'.<sup>24</sup> The Prosecutor has explained that 'positive complementarity' implies 'a proactive policy of co-operation and consultation, aimed at promoting national proceedings and at positioning itself as a sword of Damocles, ready to intervene in the event of unwillingness or inability by national authorities'.<sup>25</sup> However, the extent to which positive complementarity works in practice remains disputed.

## 5.2 Lessons from Kenya

The concepts of complementarity and positive complementarity proved important to the Kenyan situation. Notably, prior to the ICC's official opening of an investigation, sustained debate took place in Kenya as to whether a local mechanism for prosecuting post-election violence crimes should be established. This was partly due to the dynamics surrounding the work of the Commission of Inquiry on Post-Election Violence (popularly known as the Waki Commission) set up after the post-election violence crisis to make recommendations for accountability and reform. The Commission made it clear that in the event that the Kenyan government did not create a credible accountability process domestically, it would hand over a list of key suspects to the ICC prosecutor.<sup>26</sup> As several attempts to set up a special tribunal in Kenya to prosecute the perpetrators of the 2007-2008 post-election violence crimes had failed, the list of suspects eventually was forwarded to the ICC Prosecutor.<sup>27</sup> Referring to Kenya's failure to create a domestic accountability mechanism that could address post-election violence crimes, in March 2010 the ICC

24 Office of the Prosecutor Policy Paper on Preliminary Examinations November 2013 para 100.

25 F Bensouda 'Reflections from the International Criminal Court Prosecutor' (2012) 45 *Case Western Reserve Journal of International Law* 505.

26 See further C Sriram & S Brown 'Kenya in the shadow of the ICC: Complementarity, gravity and impact' (2012) 12 *International Criminal Law Review* 219.

27 In December 2008, then President Mwai Kibaki and Prime Minister Raila Odinga signed an agreement stipulating that a cabinet committee would draft a Bill on the Special Tribunal. In February 2009, the Constitution of Kenya Amendment Bill 2009, drafted by then Justice Minister Martha Karua, proposed to create a Special Tribunal, but was voted down in Parliament, with many parliamentarians arguing that accountability for the PEV instead should be pursued by the ICC. In July 2009, the Cabinet, citing its decision to establish a Truth, Justice and Reconciliation Commission (TJRC) to 'deal with PEV perpetrators', refused to table in Parliament a second Bill on a Special Tribunal, drafted by then Justice Minister Mutula Kilonzo with input from civil society. In November 2009, in another attempt to enact the Special Tribunal, a revised Constitutional Amendment Bill was tabled but not passed as quorum had not been met in Parliament (only 18 out of 222 parliamentarians were present). See further TO Hansen 'Complementarity in Kenya? An analysis of the domestic framework for international crimes prosecution' in R Slye (ed) *The Nuremberg Principles in non-Western societies: A reflection on their universality, legitimacy and application* (2016) 143.

Prosecutor decided to use the *proprio motu* powers under the Rome Statute to open an investigation into Kenya.<sup>28</sup>

The Kenyan leadership soon took up a hostile attitude towards the ICC, as it became clear that among the so-called 'Ocampo Six' were government officials and prominent politicians. On the basis of ostensible domestic efforts to investigate post-election violence crimes, the Kenyan government filed an admissibility challenge with the Court. However, the admissibility challenge was rejected first by the Pre-Trial and later by the Appeals Chamber, which held that there was a situation of 'inactivity' in Kenya since the government had not provided information pointing to the existence of genuine proceedings relating to the same suspects and incidents subject to ICC investigation.<sup>29</sup> The Chamber emphasised that the Kenyan government had contradicted itself by arguing that the ongoing investigations would later extend to the highest level of the hierarchy, while at same time stating that there were actually on-going investigations in relation to the six suspects involved in the cases under the Chamber's consideration.<sup>30</sup> Accordingly, the judges made it clear that for an admissibility challenge to succeed, investigations at the national level concerning the persons subject to ICC investigations must be *ongoing*, as opposed to some future investigations, and, further, that it is insufficient for a state with jurisdiction over the crimes to merely claim that there is an ongoing investigation; there must also be 'concrete evidence of such steps' with regard to the specific suspects investigated by the Court.<sup>31</sup>

It has been suggested that, rather than promoting accountability norms, the real aim of Kenya's admissibility challenge was to construct another obstacle to the criminal prosecution of those responsible for planning and organising the post-election violence. Kenyan human rights activist George Kegoro at the time argued:<sup>32</sup>

The government has the right to challenge admissibility, but if wise counsel prevailed, they would spend that time doing something else. If government was saying it has got something of its own that it's falling back on, then you would sympathise with the government. But they are saying let's not have ICC and instead let's have nothing. They are saying – leave us alone.

- 28 On these developments, see further TO Hansen 'Transitional justice in Kenya? An assessment of the accountability process in light of domestic politics and security concerns' (2011) 42 *California Western International Law Journal* 1.
- 29 See further TO Hansen 'A critical review of the ICC's recent practice concerning admissibility challenges and complementarity' (2012) 13 *Melbourne Journal of International Law* 217.
- 30 *Prosecutor v Muthaura & Others* Decision on the application by the government of Kenya challenging the admissibility of the case pursuant to article 19(2)(b) of the Statute, ICC-01/09-02/11-96, 30 May 2011.
- 31 *Muthaura* (n 30 above) para 60.
- 32 George Kegoro as quoted in *Daily Nation* 'State enlists Queen's Counsel in Hague cases' 12 March 2011, <http://www.nation.co.ke/News/politics/State+enlists+Queens+Counsel+in+Hague+cases+-/1064/1123962/-/6qr9cm/-/index.html> (accessed 26 February 2018).

The continued reference to 'bringing the ICC cases home', coupled with the absence of concrete action at the domestic level, thus gives weight to Mueller's conclusion that the overall goal of Kenyan decisions makers has been to 'use as many delaying tactics as possible to ensure that no one would ever be held accountable for the post-election violence', and that the government attempted to use the ICC's complementarity regime as one such tactic.<sup>33</sup> Although the government's admissibility challenge failed, this raises broader questions about how to ensure that the Rome Statute's complementarity regime actively promotes the rule of law domestically, including in situations where states are hostile to ICC intervention.

The debates about a domestic framework for accountability in Kenya continued both while the ICC cases were ongoing and thereafter. Kenya domesticated the Rome Statute by adopting the International Crimes Act (ICA), which came into force on 1 January 2009.<sup>34</sup> The ICA provides the foundation for giving effect to the Rome Statute within Kenyan law, including the principle of complementarity. The Act gives Kenyan courts jurisdiction to prosecute Rome Statute crimes; creates the foundation for Kenyan authorities to provide the ICC with requested information; gives the right to transfer to the Court persons against whom the ICC has issued arrest warrants and otherwise to co-operate with the ICC; and lays down provisions permitting the ICC to operate in the country. In 2015 the Kenyan judiciary confirmed that it would establish a so-called International and Organised Crimes Division (IOCD) within the High Court, which is intended to have jurisdiction over international crimes as defined by the Rome Statute, as well as transnational crimes such as organised crime; piracy; terrorism; wildlife crimes; cybercrime; human trafficking; money-laundering; and counterfeiting.<sup>35</sup> However, at the time of writing, the IOCD is not yet operational, and Kenyan authorities have continuously stated that the post-election violence crimes will not be prosecuted by the IOCD.<sup>36</sup> President Kenyatta has affirmed this approach, stating that no further efforts would be made

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33 S Mueller 'Kenya and the International Criminal Court (ICC): Politics, the election and the law' (2014) 8 *Journal of Eastern African Studies* 25.

34 International Crimes Act 2008 (Kenya), ISN KEN-2008- L-82568, [http://www.kenyalaw.org/Downloads/Acts/The\\_International\\_Crimes\\_Act\\_2008.pdf](http://www.kenyalaw.org/Downloads/Acts/The_International_Crimes_Act_2008.pdf) (accessed 26 February 2018).

35 Wayamo Foundation 'International and Organised Crimes Division (ICD) of the Kenyan High Court', 19 June 2014, <http://www.wayamo.com/archives/international-and-organised-crimes-division-icd-of-the-kenyan-high-court/> (accessed 26 February 2018).

36 Following a series of statements that the PEV cases would prove difficult to prosecute due to a lack of evidence, in February 2014 the Director of Public Prosecutions in Kenya made it clear that no further PEV cases would be prosecuted before Kenyan courts. See B Koech 'Fresh doubt about mandate of Kenya's Special Court' *Institute for War and Peace Reporting* 21 February 2014, <https://iwrpr.net/global-voices/fresh-doubts-about-mandate-kenyas-special-court> (accessed 26 February 2018).

to pursue accountability for post-election violence crimes, but that a fund would instead be established to assist victims of the violence.<sup>37</sup>

Accordingly, it seems clear that the main challenge to giving effect to the principle of complementarity in Kenya has not been a lack of capacity, but a lack of political will.

## 6 Victim and witness issues

### 6.1 Rome Statute provisions and Chambers' decisions on victim participation

According to article 68(3) of the Rome Statute, victims are permitted to participate in ICC proceedings when it is not prejudicial to the rights of the defence and a fair and impartial trial.<sup>38</sup> Rule 85 of the RPE defines a victim as a natural person who has suffered harm as a result of the commission of any crime in the jurisdiction of the Court. These provisions leave a lot to Chambers' interpretation.

On 3 October 2012, Trial Chamber V issued its decisions on victim participation and representation for the trial in the two Kenyan cases.<sup>39</sup> Emphasising that participation must be 'meaningful' and not 'purely symbolic',<sup>40</sup> the Trial Chamber stated that an individual, organisation or institution must 'have suffered harm as a result of an incident falling within the scope of the confirmed charges' to qualify as a victim under Rule 85 of the RPE.<sup>41</sup> Compared to earlier decisions on victim participation, the decisions in the Kenyan cases set themselves apart in a number of important ways. Notably, victims who do not wish to appear in court in person need not submit a detailed application as otherwise required under Rule 89 of the RPE, in this way distinguishing between 'direct individual participation' and 'indirect participation through a common legal representative'.<sup>42</sup> Further, the Legal Representatives for Victims (LRVs) are tasked with representing the views and concerns of *all* individuals qualifying as victims in the cases, including those who chose not to register or were unable to do so, but whom the LRVs have reason to believe qualify as

<sup>37</sup> Daily Nation 'PEV victims get Sh10bn fund' 26 March 2016, <http://www.nation.co.ke/news/PEV-victims-get-Sh10bn-fund/-/1056/2667062/-/114lb3g/-/index.html> (accessed 26 February 2018).

<sup>38</sup> Art 68(3) of the Rome Statute provides that '[w]here the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused'.

<sup>39</sup> *Prosecutor v Ruto & Sang* Decision on victims' representation and participation ICC-01/09-01/11-460, 9 October 2012; *Prosecutor v Muthaura and Kenyatta* Decision on victims' representation and participation ICC-01/09-01/11-498, 6 October 2012.

<sup>40</sup> *Ruto & Sang* (n 39 above) paras 10 & 9, respectively.

<sup>41</sup> *Ruto & Sang* paras 46-47; 45-46, respectively.

<sup>42</sup> *Ruto & Sang* paras 24, 29, 23, 28, respectively.

victims in the cases.<sup>43</sup> The decision is also noteworthy in that it requires the LRVs to be based in Kenya and only be present in the courtroom during important moments of the proceedings. In all other instances, the Office of the Public Counsel for Victims (OPCV) is in charge of handling the legal proceedings in the courtroom, based on the LRV's instructions.<sup>44</sup>

## 6.2 Challenges for meaningful victim participation in Kenya

Although presenting some important progress compared to previous models, the ICC's regime for victim participation faced significant challenges in the Kenyan case, from which important lessons can be learned for future cases.

Whereas Rule 86 of the RPE requires the Chambers to take into account the needs of all victims and witnesses in making any direction or order, it has been argued that the Trial Chamber had failed to sufficiently consult victims before making the above-mentioned decision.<sup>45</sup> To advance more meaningful participation, it is also important that the basic needs of victims are first met and that they are compensated before (or while) engaging in a lengthy legal process.<sup>46</sup> While obtaining clear and consistent information about the ICC is vital for advancing meaningful participation, victims' knowledge of the ICC and the framework for participation has generally been poor in Kenya (although participating victims had a better knowledge compared to victims not participating in ICC cases, and some improvements have over time taken place). This raises serious questions concerning the scope and quality of ICC outreach activities.<sup>47</sup> The registration process also faced significant challenges in Kenya, particularly in the early phases of the process where victims lacked information and often were confused about how to register and the purpose thereof. A key challenge in this regard concerns a lack of consistency in the registration process, including the Court's continued alteration of the forms used for registration.<sup>48</sup> Moreover, whereas it may be necessary to uphold the Court's distinction between case and situation victims, this can be problematic from the point of view of victims who often view the distinction as arbitrary. In some situations, the distinction may have created tensions between different groups of victims.<sup>49</sup> Whereas the Chamber's requirement that the LRVs be based in Kenya was beneficial to victims as it

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43 *Ruto & Sang* paras 53, 52, respectively.

44 *Ruto & Sang* paras 60, 59, respectively. See further Impunity Watch 'In the shadow of politics: Victim participation in the Kenyan ICC cases' June 2016.

45 Impunity Watch (n 44 above) 22-23. See also M Pena & G Carayon 'Is the ICC making the most of victim participation?' (2013) 7 *International Journal of Transitional Justice* 518.

46 Impunity Watch (n 44 above) 57.

47 As above.

48 As above.

49 Impunity Watch (n 44 above) 57-58.

facilitated more regular consultation, this also resulted in the LRVs being less frequently present in the courtroom. This is seen as problematic by some as the OPCV may be less familiar with the preferences of victims in specific cases.<sup>50</sup> In the view of the Nairobi Principles on Accountability, victim participation in Kenya often left the impression that court officials viewed victim participation merely as an 'add on' with little thought of how to best promote meaningful participation. As the post-election violence-related cases collapsed, so did victims' opportunities to participate in the proceedings and obtain reparations from the Court.

Apart from the above, the Nairobi Principles on Accountability observes that the two LRVs at the trial stage viewed their roles differently. The Principles also observe that the Trust Fund for Victims (TFV) has not met the expectations of victims. To date, the TFV has continued to raise expectations without offering any assistance. One concrete suggestion is that the assistance of the TFV ought to be mandatory in all situation countries, at least in the form of smaller projects which could potentially attract other donors or promote the government itself to offer assistance. In Kenya, challenges relating to promoting victims' interests and rights were further intensified as the Kenyan government itself took a narrow view of reparations. The government simply offered victims – sometimes allegedly on a discriminatory basis – a small sum of money, without adequately addressing questions of medical assistance, psycho-social support and livelihoods.

### **6.3 Challenges to the protection of witnesses**

The Kenyan ICC cases have been marred by witness interference, and witnesses have often been subject to harassment or worse. As Judges Fremr and Eboe-Osuji noted in the *Ruto and Sang* case, there has been 'a disturbing level of interference with witnesses' which, together with other factors, has had a negative effect on the proceedings and 'appear to have influenced the prosecution's ability to produce more (credible) testimonies'.<sup>51</sup>

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50 Impunity Watch 58. On the challenges facing victim participation in Kenya and elsewhere, see further Amnesty International and Redress 'Independent Panel of Experts report on victim participation at the International Criminal Court' July 2013, <http://www.amnesty.org/fr/library/info/IOR53/001/2013/en> (accessed 26 February 2018); E Haslam & R Edmunds 'Common legal representation at the International Criminal Court: More symbolic than real?' 12 *International Criminal Law Review* 871; UC Berkeley School of Law, Human Rights Center, 'The victims' court? A study of 622 victim participants at the International Criminal Court' 2015, [https://www.law.berkeley.edu/wp-content/uploads/2015/04/VP\\_report\\_2015\\_final\\_full2.pdf](https://www.law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf) (accessed 26 February 2018); L Moffett 'Meaningful and effective? Considering victims' interests through participation at the International Criminal Court' (2015) 26 *Criminal Law Forum* 255.

51 *Prosecutor v Ruto and Sang* 'Public redacted version of decision on defence applications for judgments of acquittal' 5 April 2016, ICC-01/09-01/11-2027-Red (reasons of Judge Fremr) para 147.

In this light, the Nairobi Principles on Accountability emphasise that there is a need to secure and evacuate witnesses well in advance, especially in cases where government opposition to the ICC's intervention can be expected. The Principles also address the role of civil society in advancing witnesses protection. However, one challenge in Kenya is that civil society groups often were similarly subject to intimidation and may lack the necessary resources and facilities to promote the security of witnesses.<sup>52</sup> At the same time, the Kenyan cases illustrate that in some cases there is a need to avoid over-reliance on live witnesses who may be threatened, bribed, intimidated or killed and, where possible, to rely more on documentary and forensic evidence.

## 7 Other topics addressed by the Nairobi Principles on Accountability

Besides the four main themes discussed above, the Nairobi Principles on Accountability address a range of other topics that, for reasons of space, are not elaborated on in detail in this article, but will be briefly described here.

One such theme addressed by the Principles involves outreach. The Kenyan ICC cases demonstrate the importance of providing affected communities with sufficient information about the ICC. Yet, in the Kenyan situation, only one ICC staff member specifically worked on outreach, despite the significant challenges in the country. Partly due to limited ICC outreach, Kenyan civil society organisations were heavily involved in outreach activities, including disseminating key messages regarding the operation of the ICC and crucial moments in the proceedings. Consequently, the Nairobi Principles on Accountability emphasise that outreach must be re-conceptualised as a core part of the Court's operations, and form part of the core budget of the ICC.<sup>53</sup>

Another, but related, theme, addressed by the Nairobi Principles on Accountability concerns civil society strategies in promoting accountability. The experiences of Kenyan civil society will prove useful for civil society groups elsewhere. It is generally acknowledged that civil society groups in Kenya played a vital role on the international stage promoting justice for the post-election violence, for example by attending ASP sessions and offering alternative versions to the narrative presented by the Kenyan government.<sup>54</sup>

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52 On the intimidation of civil society, see further TO Hansen & C Sriram 'Fighting for justice (and survival): Kenyan civil society accountability strategies and their enemies' (2015) 9 *International Journal of Transitional Justice* 407.

53 As above.

54 As above.

Finally, the Nairobi Principles on Accountability address the politics of accountability. This must be viewed in light of the failure of both the ICC and Kenyan civil society to insulate the ICC trials from political interference. Although the notion that criminal trials devoid of any political interference or considerations can be conducted when state officials are the target may be unrealistic, both the Court and other actors have important lessons to learn about how to promote the rule of law in the face of political manipulation.

## 8 Conclusion

This article has presented an overview of the Nairobi Principles on Accountability, including an analysis of four main themes addressed by the Principles, namely, state co-operation; the immunity of state officials; complementarity; and issues relating to victims and witnesses. In so doing, the article has explained the particular challenges experienced in the Kenyan ICC cases, while at the same time pointing to the broader ramifications of these from a rule of law perspective.

Although some of the challenges for giving effect to accountability norms experienced in Kenya are unique, the lessons learned from this case will be valuable for understanding how justice processes relating to international crimes can be improved. For example, elite manipulation of justice processes is not unique to Kenya, and civil society groups across the African region and elsewhere frequently struggle to identify and operationalise strategies that can effectively counter the narratives presented by ruling elites. Moreover, challenges relating to state co-operation and giving effect to the rules governing immunity of state officials are facing other ICC situations, as evidenced by the failure of African states and others to arrest Sudan's President Omar al-Bashir while present in their territories. Notwithstanding its claimed benefits, complementarity faces challenges across the African region and elsewhere. Despite claims that the ICC is a court for victims, it is also clear that the challenges described in this article relating to meaningful victim participation and effective reparations are far from unique to the Kenyan situation.

The Nairobi Principles on Accountability will provide a platform for advancing the rule of law in Africa and elsewhere by informing actors – ranging from the ICC itself to the AU, state parties and civil society – on how to improve the system of justice for international crimes.