

The NAIROBI PRINCIPLES on ACCOUNTABILITY



NB: A final version of this report is in production and will be available shortly

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Introduction

Aims of the Principles

The ‘Nairobi Principles of Accountability’ (the ‘Nairobi Principles’ or simply the ‘Principles’) is the outcome of a research project undertaken in the period 2017-18 in collaboration between civil society experts and academics in Kenya and Ulster University’s Transitional Justice Institute, together referred to as the ‘Expert Group’.

Drawing on Kenya’s experiences with accountability for serious crimes committed in the context of the 2007/8 post-election violence (PEV), the Principles aim to set standards and create guidance for future accountability processes addressing international crimes. The Principles focus on international criminal justice, specifically the International Criminal Court (ICC) process, which reflects that this avenue for accountability became the primary focus of actors seeking to advance accountability in Kenya, as efforts to promote accountability domestically encountered serious obstacles from the outset despite efforts made by civil society and other stakeholders.

Despite broad normative commitment, evidence suggests that national authorities are often reluctant to endorse accountability norms when crimes are committed within their jurisdictions or by their own nationals, in particular to the extent that accountability processes put State officials under scrutiny. 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.

By making recommendations for specific measures of reform, and legal, policy or practice change, the Nairobi Principles are relevant to multiple stakeholders, including various organs of the ICC, other international and regional organisations, national justice sector bodies and other governmental agencies involved in justice processes, human rights lawyers and civil society actors working to advance accountability, academics and others. It is envisaged that the Principles and the associated material will be used as an advocacy tool and as reference framework for legal and policy change, both domestically and internationally.

The Nairobi Principles do not purport to offer a ‘one-size-fits-all’ solution to accountability processes. Rather the objective is to draw on the challenges experienced in Kenya as a starting point for identifying more general challenges relating to achieving justice for serious crimes under international law and create principles which can benefit the evolving accountability system more generally.

In summary, drawing on the experiences from Kenya, the Nairobi Principles are intended to inform relevant stakeholders concerning how to address the challenges faced by the contemporary justice system for international crimes with a view to making it more efficient and legitimate.

Working methods of the Expert Group

The Nairobi Principles are developed on the basis of the collective and individual experiences of members of the Expert Group with seeking accountability for PEV crimes in Kenya as well as a thorough review of relevant legal sources and other official documentation, as set out in the justifications section and the resource centre. The Principles are framed so as to strengthen the prospects of accountability through a more faithful and robust application of international law, and makes suggestions for legal, policy or practice change where the Expert Group identifies gaps or challenges with existing rules, standards or practice.

The Nairobi Principles are based on close collaboration between academics and civil society experts. The Principles are drafted by an 'Expert Group', composed of 19 academics and civil society activists with significant research and/ or practical experience relating to the processes of seeking accountability for international crimes in Kenya.

The first meeting of the Expert Group was held in Naivasha, Kenya, from 6 to 7 April 2017. The meeting created the foundation for the development of the Principles, including framing key issues to be addressed by the project, identifying the type of stakeholders to be consulted and discussing means of achieving policy impact. Subsequent meetings in Nairobi advanced the work of the group. These Principles are the ultimate outcome of this process. It was agreed at the outset that no member of the Expert Group is entitled to enter a personal dissent or reservation. Accordingly, the Principles reflect the consensus opinion of the Expert Group.

As a draft version of the Principles was prepared, the Expert Group sought feedback and input from various other stakeholders, including academics, the Government of Kenya, ICC officials and others, in an effort to ensure that the Principles are responsive to the views and needs of multiple actors. Whereas constructive feedback was given, in particular from academics working on accountability issues, and is reflected in the final version of the Nairobi Principles, not all stakeholders substantively engaged the process. The Expert Group is particularly grateful to the following individuals for their comments on earlier drafts of the Principles: Louise Mallinder (Queen's University, Belfast); Luke Moffett (Queen's University, Belfast); Susanne Mueller (Boston University). The final product remains the responsibility of the Expert Group alone.

Moreover, the Expert Group has identified and analysed relevant resources to develop a broader resource centre involving a database with academic publications, NGO and expert reports, policy statements and other material covering the justice processes relating to the PEV.

Expert Group composition

The Expert Group is made up of the following individuals (listed alphabetically by last name) who all contributed in their individual capacity:

- Perpetua Adar (AfriCOG)
- Tina Alai (Physicians for Human Rights)
- Chris Gitari (International Centre for Transitional Justice)
- James Gondi (Independent Human Rights Consultant)
- Thomas Obel Hansen (Transitional Justice Institute, Ulster University)
- George Kegoro (Kenya Human Rights Commission)
- George Morara (Kenya National Commission on Human Rights)
- Njonjo Mue (Kenyans for Peace with Truth and Justice)
- Lydia Muthiani (Former Staff, LRV, Kenyatta; Independent Human Rights Consultant)
- Stella Ndirangu (International Commission of Jurists – Kenya Section)
- Abdul Noormohamed (Open Society Institute for Eastern Africa)
- Patricia Nyaundi (Kenya National Commission on Human Rights)
- Betty Okero (Kisumu CSO Network)
- Gladwell Otieno (AfriCOG)
- Anushka Sehmi (Former case manager, LRV, Kenyatta)
- Andrew Songa (Kenya Human Rights Commission)
- Muthoni Wanyeki (Open Society Foundations)
- Nelly Warega (International Commission of Jurists – Kenya Section)
- Esther Waweru (Independent human rights consultant)

Funding

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Overview of the themes addressed by the Nairobi Principles

The Nairobi Principles were developed with the starting point in assessing criminal justice processes relating to PEV crimes in Kenya, in particular the ICC process. However, the Expert Group has taken a broad view and also considers other justice mechanisms in Kenya where relevant, including attempts at establishing a domestic criminal justice process and various efforts to remedy victims. The Expert Group takes 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. Even if the ICC's intervention in Kenya acts as the key reference point for the Principles, where relevant the Expert Group draws on lessons from other ICC situations.

Kenya faces significant challenges with regard to impunity for serious human rights violations, including serious crimes committed in the context of the PEV. Neither the involvement of the ICC nor domestic avenues for accountability have proven successful in achieving any meaningful accountability for PEV crimes or more broadly reverse the culture of impunity. Whereas there are multiple, partly overlapping reasons for this, some of the most significant challenges were identified at the outset by the Expert Group with a view to inform the focus themes of the Nairobi Principles.

First, notwithstanding States' obligations to cooperate under the Rome Statute, the Expert Group identified significant challenges in this regard. As such, the Kenyan case highlights that cooperation with the ICC should not be taken for granted. It also suggests that cooperation entails more than formal compliance with statutory obligations. In this sense, the Kenyan case exemplifies that the current system of enforcement is inadequate to promote full cooperation in situations where national decision-makers are not fully committed to accountability principles. Accordingly, the Expert Group agreed that a primary aim of the Nairobi Principles should be to provide clarification concerning measures that can be taken to advance cooperation with international justice mechanisms in future cases.

Second – but related to the above – there are significant challenges related to prosecuting heads of State and senior government officials. Regardless of the principles of irrelevance of official capacity and equality before the law set out in the Rome Statute, the Kenyan case exemplifies that governments are unlikely to provide the ICC with information which could incriminate their own State officials. It also demonstrates that the ICC's treatment of suspects who are State officials at times differs significantly from its treatment of other suspects. Partly as a consequence of developments in the 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.

Third, the Kenya case points to interactions between international and national justice processes that are more complex than typically recognised in the literature 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 with reference to the complementarity principle. This raises a range of questions addressed by the Nairobi Principles, including how other stakeholders should approach domestic legal processes and, more broadly, about the value of complementarity.

Finally, the Kenyan case raises important questions concerning the challenges of the current regimes for outreach, victims' participation, reparation, and witness protection. For example, the Expert Group considered questions such as whether it is justifiable that participation and reparation depend on the scope and outcome of criminal cases. The Expert Group further observed that the Kenyan case suggests that the ICC faces significant

challenges in providing adequate witness protection, especially when the information held by the witnesses could incriminate State officials, and that such challenges may persist throughout the entire cycle of cases.

In developing the Principles, the Expert Group takes note 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 some African States withdrawing – or stating their intention to do so – from the Rome Statute and the AU's adoption of a strategy for collective withdrawal. While the Nairobi Principles are cognisant of the concerns expressed by African States and others, the Expert Group emphasises the need to achieve accountability and promote the rights and needs of victims.

As follows from the above, the Principles address four overall themes, which have been identified as central not only to Kenya's experiences with justice for the PEV but also more generally for creating an effective accountability system globally, namely 1) State cooperation; 2) Immunity of State officials and equality before the law; 3) Complementarity; and 4) Outreach, victims' participation, reparation, and witness protection. Addressing these four themes, however, the Principles engage a range of other topics, including issues relating to civil society strategies and the politics of accountability.

Following this overview, the Nairobi Principles on Accountability are set out. This is followed by a more detailed discussion and justification for the Principles. Both the Principles and the justifications for the Principles are structured according to the four overall themes mentioned above, ie 1) State cooperation; 2) Immunity of State officials and equality before the law; 3) Complementarity; and 4) Outreach, victims' participation, reparation, and witness protection.

The Principles

State cooperation

Emphasising that the Kenyan ICC cases demonstrate a need for increased clarity regarding the ICC's cooperation regime and that there is a need for the various organs of the ICC to recalibrate their relationship with non-cooperative States and take action at the earliest opportunity, including sanctions for non-cooperation, the Expert Group proposes the following Principles relating to State cooperation:

Principle 1: State Parties must comply fully with their obligations to cooperate with the ICC in good faith.

Principle 2: Where cooperation is lacking, relevant organs of the ICC, including the Office of the Prosecutor, must promptly liaise with relevant State Parties, and if not leading to the desired outcome, as soon as possible bring the lacking cooperation to the attention of the relevant Chamber.

Principle 3: ICC Prosecutors must make sure that cooperation requests and submissions to Chambers are sufficiently specific, and clearly set out what the Office expects from the relevant State and Chambers, respectively.

Principle 4: ICC Prosecutors should endeavour to obtain all relevant information from sources other than the affected State, including civil society organisations, international organisations, other State Parties and other actors, to enable them to accurately gauge the prospects of State cooperation and prepare to engage accordingly.

Principle 5: ICC Prosecutors must make all efforts to familiarise themselves with the political context of situation countries and take the steps necessary to adjust practices to reflect this; in some cases, including where reports point to State officials' or agencies' involvement in crimes, this should entail commencing examinations and investigations with no expectations of good faith cooperation by the affected State.

Principle 6: Chambers must make reasoned judicial findings on matters of non-cooperation within a reasonable time and in such a manner that the decision is still relevant to the resolution of the underpinning case.

Principle 7: Whereas the Rome Statute does not provide Chambers with the possibility of sanctioning States that fail to cooperate, Chambers must make clear, reasoned and prompt judicial findings on cooperation issues, and if finding – on the basis of an assessment of the standards established by Chambers, including that the States' action or inaction prevents the Court from exercising its powers and functions – that there is a situation of non-cooperation, refer the case to the ASP as a matter of urgency.

Principle 8: The ASP must take prompt, adequate and effective action on referrals from Chambers relating to non-cooperation, in order to reinforce the notion that State non-cooperation is unacceptable and must have tangible consequences.

Principle 9: Keeping in mind that the Rome Statute does not offer any guidance concerning the type of action the ASP can take in situations of non-cooperation and that the ASP's 'formal response procedure' primarily aims at promoting cooperation in ongoing cases and remains ambiguous on a range of points, the ASP is encouraged to adopt a clearer procedure which allows prompt and effective handling of cases of non-cooperation and to adhere to this procedure when addressing situations of non-cooperation.

Principle 10: The amended procedure for the ASP's handling of situations of non-cooperation should include a mechanism whereby relevant stakeholders, including civil society organisations, can present 'shadow reports' on cooperation issues.

Principle 11: Other State Parties, civil society organisations and academics should make all efforts to highlight situations of non-cooperation and bring relevant facts to the attention of organs of the ICC and the broader public.

Principle 12: Civil society organisations can and should play a vital role, domestically and internationally, promoting justice for international crimes; to do so they must continuously monitor and engage developments at the national and international levels, including devising strategies from an early stage, to counter propaganda by governments and other actors, thereby effectively challenging any attempts to use the government machinery to undermine accountability efforts.

Principle 13: Where the ASP's handling of situations of non-cooperation gives no meaningful results, other State Parties must consider alternative ways of promoting cooperation with the ICC, for example by applying targeted individual sanctions for the persons responsible for non-cooperation, and other diplomatic measures as appropriate.

Principle 14: Since the level of cooperation may change significantly over time, State cooperation should not be viewed in static terms, and relevant stakeholders, including organs of the ICC, should attempt to identify and effectively utilise 'windows of opportunity' where there is temporarily a favourable environment to push for and achieve State cooperation.

Immunity of State officials and equality before the law

Noting its concern with the concessions that were afforded to the Kenyan accused persons by the ICC, including by Chambers and the ASP, and taking into account the criticism expressed by African State Parties and others relating to the ICC's approach to issues of immunity, the Expert Group proposes the following Principles relating to immunity of State officials and equality before the law:

Principle 15: As the Rome Statute affirms the irrelevance of official capacity with respect to the prosecution of international crimes, all organs of the ICC must uphold this principle and State Parties must respect it.

Principle 16: All organs of the ICC must make sure that requests, orders and decisions, including judicial decisions, comply with the text and spirit of Article 27(1) of the Rome Statute, according to which the Statute applies equally to all persons without any distinction based on official capacity.

Principle 17: Chambers should – and are obligated to – refrain from granting any preferential treatment to suspects based on their official capacity.

Principle 18: Where summonses to appear have been issued for an accused person, but that person does not consistently abide by the terms of the summonses or uses his or her official position to make threats of non-cooperation as a means of achieving particular judicial outcomes, Chambers should substitute warrants of arrest for the summonses, even if the accused persons are former, current or prospective senior State officials.

Principle 19: Whereas the ASP as the governing political organ of the ICC can make amendments to the Rome Statute, it must avoid amending the Rules of Procedure and Evidence as a means of achieving legal change relating to immunity of State officials, which is an issue regulated by the Statute.

Principle 20: All organs of the ICC, including the ASP, must strive to establish efficient structures necessary to remain abreast of developments aimed at securing and institutionalising immunity of State officials from prosecution for commission of international crimes, in order to promptly and effectively take action, including putting in place mechanisms to ensure that such developments would not adversely affect the existence, legitimacy and utility of Article 27(1) of the Rome Statute.

Complementarity

Recalling that despite sustained talks of creating a domestic criminal justice process for PEV crimes in Kenya, a genuine process never materialised; that the limited investigatory processes taking place in Kenya were flawed and often appeared aimed at ending the ICC process with reference to the complementarity principle; and that the Kenyan Government unsuccessfully sought to have the cases declared inadmissible with reference to the principle of complementarity, the Expert Group proposes the following Principles relating to complementarity:

Principle 21: State Parties must domesticate the Rome Statute and establish the needed national institutional framework to facilitate accountability; however, an adequate legal and institutional framework presents only a first step towards facilitating genuine domestic accountability processes covering international crimes; commitment to accountability principles by decision-makers and strong and independent legal bodies are crucial factors for making complementarity work in practice.

Principle 22: All organs of the ICC, including the Office of the Prosecutor, should remain vigilant of ongoing accountability proceedings at the national level, and where it is established that these genuinely aim at advancing accountability for Rome Statute crimes provide relevant information, including evidence, to national authorities, as appropriate in the circumstances and to the extent this can strengthen national proceedings in line with the principle of complementarity.

Principle 23: Whereas ICC Prosecutors endorse a policy objective of ‘positive complementarity’ whereby the Court should take active steps to promote domestic legal processes covering crimes subject to the Court’s jurisdiction, justice is better served by promptly proceeding to a full ICC investigation in situations where it is clear that the relevant State is unwilling or unable genuinely to carry out investigation or prosecution to promote accountability.

Principle 24: Keeping in mind that States may attempt to make reference to the complementarity principle as a means to avoid accountability, the ICC should uphold a strict test for the complementarity assessment, including maintaining that proceedings at the national level must be prompt, genuine, effective, transparent and concern the same persons subject to – or likely to be subject to – ICC investigations and otherwise comply with the standards established in the Rome Statute and the Court’s jurisprudence.

Principle 25: Civil society organisations are encouraged to document and inform the ICC and other stakeholders of steps taken domestically with regard to complementarity, including the mandate and operations of such domestic measures and the status of investigations and cases as well as any information pointing to complementarity being used by government authorities as a ‘delaying tactic’.

Principle 26: Since there is significant value in having comprehensive documentation processes covering the nature and patterns of crimes, evidence pointing to specific actors' responsibility for these and legal and policy responses to the crimes, civil society organisations and other non-state actors are encouraged to carry out accurate, thorough and comprehensive documentation processes in ways that have the potential to initiate and shape domestic accountability processes as well as ICC cases.

Principle 27: Whereas input and support by international development agencies and civil society organisations to domestic accountability processes is a critical aspect of promoting complementarity, such actors need to carefully consider the intentions of domestic decision-makers and avoid rendering legitimacy to processes which are not created with a genuine intent to promote accountability.

Principle 28: Beyond a narrow understanding of complementarity, civil society organisations are encouraged to utilise alternatively legal avenues to promote different forms of accountability, including use of strategic litigation, which can be instrumental in promoting State responsibility and a level of redress for victims.

Outreach, victims' participation, reparation and witness protection

Noting that ICC outreach was insufficient in the Kenyan cases; noting that despite the State's obligations under international law, many victims in Kenya never received compensation nor sufficient assistance; stressing that the ICC's Trust Fund for Victims – despite many promises to carry out a needs assessment – never provided any assistance to victims in Kenya; noting that whereas some improvements took place in Kenya concerning the implementation of the ICC's victim participation regime, several shortcomings remain; and stressing the glaring deficiencies in the protection afforded to witnesses testifying in the Kenyan ICC cases, the Expert Group proposes the following Principles relating to victims and witnesses:

Principle 29: Outreach must be re-conceptualised as a core part of the ICC's operations, including forming part of the core budget of the Court and be seen as a priority area for all relevant organs of the ICC.

Principle 30: Keeping in mind that victims' knowledge of the ICC is often poor and that obtaining clear and consistent information about the ICC is vital for advancing meaningful participation, relevant organs of the ICC must make sure that outreach activities are undertaken effectively, including in regular and pre-scheduled cycles, and actively engage various groups of victims at all stages of the proceedings.

Principle 31: Supplementing the ICC's own outreach activities, civil society organisations, the media and other relevant actors can and should play an active role in informing victims – in an objective, transparent and context-sensitive manner – about the Court's mandate

and procedures and their role therein, including with respect to issues of participation, reparations and protection of victims and witnesses.

Principle 32: Recalling the State's primary obligation to provide justice and reparations to victims, States must provide effective remedies to all the victims of the situation, regardless of the ICC's approach to victims.

Principle 33: In line with Rule 86 of the Rules of Procedure and Evidence which requires Chambers to take into account the needs of all victims and witnesses in making any direction or order, Chambers must adequately consult victims before making decisions relating to victim participation.

Principle 34: Processes relating to registration of victims should be conducted transparently and consistently across situations, in a manner that avoids creating hierarchies between different groups of victims, while at the same time managing victims' expectations to the outcome of ICC proceedings.

Principle 35: In making decisions on legal representation of victims, organs of the ICC should respect victims' rights to choose their own counsel and take into account the need for extensive field presence of the legal representatives appointed, and provide them with sufficient resources to facilitate meaningful, continuous and secure consultation with victims throughout the time span of a case.

Principle 36: Relevant organs of the ICC should regulate the manner, frequency and forms of communication between legal representatives of victims and the persons they represent.

Principle 37: Relevant organs of the ICC are encouraged to publicise clear standards concerning intermediaries who facilitate victims' engagement with and participation in ICC proceedings, including who can serve as an intermediary and standards for how this should be done.

Principle 38: Relevant organs of the ICC should put in place structures and mechanisms to ensure regular communication between victims, witnesses and the Court, in particular the Office of the Prosecutor, towards ensuring that victims and witnesses are continuously informed on the progress of proceedings and that relevant organs of the ICC are kept aware of issues relating to the welfare and security of victims and witnesses at all times.

Principle 39: Reflecting that the Court has a duty of care towards victims, relevant organs of the ICC must ensure that staff working with victims include qualified legal and field officers from the situation country who are well versed with the context and nuances of situation countries, as well as the situation and reality of victims participating in ongoing cases at the ICC.

Principle 40: To advance meaningful participation, it is vital that the basic needs of participating victims are first met and that victims get support to enable their engagement in a comprehensive legal process.

Principle 41: Whereas the Trust Fund for Victims has limited resources and is not necessarily able to assist all victims, as a minimum the Trust Fund for Victims has an obligation to a) conduct assessments in every situation country, in order to meaningfully determine victims' needs for assistance; b) make only genuine promises and undertakings to victims and other relevant stakeholders, including with respect to forthcoming assistance; c) do its outmost within the existing mandate to provide adequate, prompt and effective assistance to victims, including consolidating its efforts towards raising additional funds from State Parties as well as other relevant entities; and d) regularly conduct an internal capacity assessment and resource analysis in order to ensure that the Trust Fund for Victims is adequately and appropriately resourced and staffed, as needed to fulfil its mandate as outlined in and envisioned by the Rome Statute.

Principle 42: Rules should be enacted requiring a minimum contribution to the Trust Fund for Victims from all State Parties, to make it feasible to implement Principle 41.

Principle 43: Keeping in mind that witness interference has serious ramifications, both for witnesses and the legal process, relevant organs of the ICC, including the Victims and Witness Unit, have a responsibility to effectively secure and evacuate witnesses well in advance, and ICC Prosecutors should, where possible, avoid over-reliance on live witnesses who may be threatened, bribed, intimidated or killed and do its outmost to obtain the needed documentary and forensic evidence in cases where government opposition to ICC intervention is to be expected.

Principle 44: Relevant organs of the ICC must ensure that there is an exit strategy covering situations where cases are terminated; such an exit strategy should include direct communication by relevant organs of the ICC with affected victims and witnesses, including issues relating to why the case was terminated and the ramifications for victims and witnesses in terms of their participation, right to assistance and compensation and other consequences that are best understood by directly engaging victims and witnesses.

Justifications for the Principles

State cooperation with the International Criminal Court

1. The Expert Group observes that the Kenyan ICC cases demonstrate some significant challenges facing the broader system for State cooperation. ICC Prosecutors have consistently emphasised that lack of cooperation was a key challenge in the Kenyan cases, and a factor that ultimately contributed to the cases collapsing.¹ Chambers of the Court held that Kenya's cooperation with the Court fell short of the statutory obligations and, on that basis, ultimately referred Kenya to the ASP.² Accordingly, the Expert Group observes that the Kenyan ICC cases collapsed for a large part due to a lack of cooperation by the Kenyan Government.
2. The Expert Group notes with regret the significant delays and obstacles to making the ICC's cooperation regime operate effectively in the Kenyan cases, something which was at least in part caused by the Court's actions and inactions. Indeed, the final decision by the Trial Chamber to refer Kenya to the ASP was rendered almost three years after ICC Prosecutors 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.³ 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.⁴ 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.⁵ It took the Trial Chamber more than a year to reach a new decision, even if there were no new significant factual or legal matters to address. Even if this decision came too late, the Trial Chamber – and rightly so in the view of the Expert Group – opted to refer Kenya to the ASP for non-co-operation. Accordingly, the Expert Group observes that Chambers' handling of cooperation issues in the

1 See e.g. Fatou Bensouda 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr Uhuru Muigai Kenyatta', 5 December 2004, available at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-05-12-2014-2>.

2 The Prosecutor v. Uhuru Muigai Kenyatta, Second decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, ICC-01/09-02/11-1037, 19 September 2016.

3 The Prosecutor v. Uhuru Muigai Kenyatta, Second decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute, ICC-01/09-02/11-1037, 19 September 2016. For the Prosecutor's request, see The Prosecutor v. Uhuru Muigai Kenyatta, Prosecution application for a finding of non-compliance pursuant to Article 87(7) against the Government of Kenya, ICC-01/09-02/11-866, 29 November 2013.

4 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.

5 Prosecutor v Kenyatta, Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", ICC-01/09-02/11-1032, 19 August 2015.

Kenyan cases was unreasonably delayed, inefficient and undermined the prospects for achieving cooperation while the cases were ongoing.

3. The Expert Group further notes with regret the significant delays and obstacles to making the cooperating regime effective in the Kenyan cases caused by the ASP's handling of the matter. The Expert Group further notes with regret that Kenya's lack of cooperation has not been on the agenda at subsequent ASPs, and not a single State Party has indicated that it will push for meaningful action to be taken against Kenya within the framework of the ASP. In the view of the Expert Group, the fact that the ASP has failed to take any meaningful action against Kenya several years after the Chamber's referral, undermines the integrity and credibility of the ICC's enforcement system – as well as the credibility of the ASP as a body mandated with fostering respect for the Statute.
4. The Expert Group observes that, taken together, the two issues mentioned above raise 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 cooperation obligations under Article 87(7) of the Rome Statute in situations that have not been referred to the Court by the United Nations Security Council (UNSC). Whereas a Chamber's finding of non-cooperation is in theory strictly judicial, the actual enforcement of such a finding is essentially political as it belongs to a body comprised of State representatives. 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'.⁶ However, this procedure is primarily aimed at promoting cooperation in ongoing cases, and is hence of limited value in situations such as Kenya where a case of non-cooperation is referred to the ASP only after the case leading to the referral was already terminated.
5. The Expert Group believes that even if a 'managerial model' of compliance may be useful in certain contexts, it is unlikely to promote compliance when the relevant State has no or only limited motive for cooperating with respect to the actual case that triggered the cooperation proceedings, as would usually be the case when State officials are indicted by the Court. It raises particular problems when the case that led to a non-cooperation finding has already been terminated, as happened in the *Kenyatta* case. In the absence of goodwill by the State subject to cooperation proceedings, the Expert Group observes that the efficiency of the ICC's cooperation regime therefore largely depends on the potential action taken by external actors. However, the Kenyan situation is not unique in that such unified action has been absent. Since 'international

6 Assembly procedures relating to non-cooperation, ICC-ASP/10/Res.5, annex.

partners' have seemingly come to view the ICC as an obstacle to having 'normal relations' with Kenya after Kenyatta became President, the Expert Group notes with regret that it seems unlikely that there will be any unified push in or outside the ASP for sanctioning Kenya for its failure to fulfil its obligations under the Rome Statute to cooperate with the ICC.

6. In the view of the Expert Group, the above means that stakeholders must look for other ways of promoting cooperation. For example, organs of the ICC must carefully consider what they can do to effectively promote cooperation within the current legal framework. One challenge in the Kenyan cases, in the view of the Expert Group, was that the cooperation requests made by the ICC Prosecutor were not always sufficiently specific. Furthermore, the ICC Prosecutor must consider to what extent it is possible to obtain evidence and information from sources other than the State in the face of non-cooperation. State Parties should also consider utilising sanctions against State officials responsible for non-cooperation, something which may have a more direct impact on the affected State's willingness to cooperate.
7. Additionally, the Expert Group observes that State cooperation is needed to allow ICC investigators to operate in situation countries and for Court officials to conduct other operations, for example relating to victim participation and outreach activities. In this regard, the Expert Group emphasises that expectations of the ICC Prosecutor in relation to State cooperation must be realistic. In some cases, the Prosecutor would benefit from commencing investigations with no expectations of good faith cooperation by the affected State. In particular, it is necessary for the Prosecutor to assess early on when whether weak separation between the office held by accused persons and the personal interests of the persons holding the office is likely to present challenges for cooperation.
8. The Expert Group further notes that the Kenyan cases point to significant obstacles genuinely bringing into play domestic proceedings with a view to securing needed cooperation. 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.
9. The Expert Group finally observes with respect to State cooperation that the Kenyan situation points to a need not to view State cooperation in static terms. Since the level of cooperation may change significantly over time, the ICC Prosecutor, civil society and other stakeholders would be well advised to attempt to identify 'windows of opportunities', in that way taking advantage of situations where there is temporarily a favourable environment to push for State cooperation, for example to obtain needed material and evidence.

Irrelevance of official capacity; immunity of state officials and equality before the law

10. The Expert Group takes note that the irrelevance of official capacity with respect to the prosecution of international crimes – specifically genocide, crimes against humanity and war crimes – is now a matter settled in international law.⁷
11. At the same time, the Expert Group notes that even if Article 27 of the Rome Statute makes 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 part due to other provisions in the Statute.⁸ 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 this inaction) concerns the scope of third 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.
12. The Expert Group further notes that 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 Kenya, 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 was elected President and Ruto Deputy President in 2013. The Kenyan Government, as an entity, was responsible for complying with requests for cooperation from the ICC, but that entity was led by Kenyatta himself as President, raising an obvious conflict of interest. President Kenyatta, in his capacity as chairperson of the National Security Council, had control over the State organs tasked with enforcing the ICC’s cooperation requests. The Expert Group notes with regret that accused persons in Kenya consistently used the State apparatus to challenge or undermine the accountability process. Kenyan leaders also used the threat of withdrawing from the Rome Statute to create leverage

7 Article 27 of the Rome Statute concerning ‘irrelevance of official capacity’ provides 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.

8 Article 98 of the Rome Statute 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.

with respect to contested issues in the proceedings, including attempting to influence the outcome of specific proceedings before the Chambers.

13. The Expert Group notes with regret that Kenyan leaders further used the threat of non-cooperation as a means of achieving particular procedural outcomes – and they did so successfully. For example, Kenyatta made it clear that he would only continue to cooperate with the Court if it treated positively his request to have his and Ruto’s trials run on alternating days. Having initially rejected such a request, the Chamber ultimately granted the suspects’ request.⁹ In the view of the Expert Group, this gave the regrettable impression that the accused persons, not the Chamber, was in charge of affairs
14. More generally, the Expert Group is disappointed that Chambers of the Court appeared willing to stretch the Statute to its limits to accommodate the concerns of Kenyan accused persons. 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.¹⁰
15. The Expert Group finds that this preferential treatment was further consolidated within the framework of the ASP. With the assistance of other African States, Kenya successfully lobbied for the adoption of new Rules 134*bis*, 134*ter* and 134*quater* of the Rules of Procedure and Evidence which allows an accused person holding office to be absent from trial hearings under certain conditions.¹¹
16. The Expert Group believes the developments outlined 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 (the Malabo Protocol). Although not yet in force, the Malabo Protocol creates a framework for prosecuting international crimes whereby senior State officials are exempted from prosecution while still in office. Article 46*Abis* of the Protocol provides: ‘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

9 Announcement at status conference, as cited in Nation, ‘International Criminal Court agrees to stagger Uhuru Kenyatta and William Ruto cases’, 9 September 2013, available at <https://www.nation.co.ke/news/politics/ICC+judges+ruling+saves+Kenya+from+power+crisis/-/1064/1986244/-/jpkap/-/index.html>.

10 The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial, ICC-01/09-01/11-777, 18 June 2013.

11 International Crimes Database, ‘The International Criminal Court on Presence at Trial’, ICD Brief No 5, September 2014, available at <http://www.internationalcrimesdatabase.org/upload/documents/20140916T170341-ICD%20Brief%205%20-%20Knottnerus.pdf>; Coalition for the International Criminal Court ‘Report on the 12th session of the ASP, 20-28 November 2013’, http://www.iccnw.org/documents/asp12_report.pdf.

functions, during their tenure of office.¹² The Expert Group believes this aspect of the Protocol presents a set-back for international justice, but at the same time takes note that 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.

17. The Expert Group considers that 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, to avoid a situation where ICC cases can be instrumentalised politically by accused persons. In this regard, the Expert Group observes that, although the Prosecutor sought – and the Chamber issued – summonses to appear, requests for warrants of arrest could have been made as it became clear that the accused persons did not consistently abide by the terms of the summonses.

Complementarity

18. The Expert Group takes note that Article 17(1)(a) of the Rome Statute provides that ‘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.’ In this regard, the Expert Group takes note that the principle of complementarity whereby national courts are given priority in the prosecution of international crimes is often pointed to as the cornerstone of the Rome Statute.
19. The Expert Group further observes that, beyond complementarity as a legal threshold for admissibility, the ICC Prosecutor endorses a policy objective of ‘positive complementarity’, seen to require national judicial authorities and the ICC to ‘function together’ and for the ICC to adopt ‘a proactive policy of co-operation and consultation, aimed at promoting national proceedings’.¹³
20. The Expert Group observes that the concepts of complementarity and positive complementarity proved important to the Kenyan situation. Notably, both prior to and following the ICC’s opening of an investigation, debate took place in Kenya as to whether a local mechanism for prosecuting PEV crimes should be established. This debate was initiated by the Commission of Inquiry on Post- Election Violence (popularly known as the Waki Commission) which made it clear that in the event that the Kenyan Government did not create a credible accountability process domestically,

12 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, available at <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>.

13 See e.g. Office of the Prosecutor, Policy Paper on Preliminary Examinations, November 2013, available at https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf, para. 100; Fatou Bensouda ‘Reflections from the International Criminal Court prosecutor’ (2012) 45 Case Western Reserve Journal of International Law 505.

the Commission would hand over a list of key suspects to the ICC prosecutor.¹⁴ As several attempts to set up a special tribunal in Kenya to prosecute the perpetrators of the 2007-2008 PEV crimes failed, the Commission forwarded a list of suspects to the ICC Prosecutor. Referring to Kenya's failure to create a domestic accountability mechanism that could address PEV crimes, in March 2010 the ICC Prosecutor decided to use the *proprio motu* powers under the Rome Statute to request the opening of an investigation into Kenya, which the Chamber granted.¹⁵ The Expert group lauds that a comparatively prompt decision was made by the ICC Prosecutor to pursue a full investigation, rather than pursuing a policy objective of 'positive complementarity' in a situation where it seemed clear national authorities would not do what was required under the Rome Statute to investigate and prosecute domestically.

21. The Expert Group is of the view that the Kenyan leadership took up a hostile position towards the ICC, as it became clear that several of the Court's suspects were Government officials and prominent politicians.
22. In this regard, the Expert Group notes that on the basis of ostensible commitments to prosecute PEV crimes domestically, the Kenyan Government filed an admissibility challenge with the Court. However, that admissibility challenge was rightly 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 crimes subject to ICC investigation. 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. 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.¹⁶
23. The Expert Group agrees with the findings and standard created by Chambers, in this regard emphasising that, rather than promoting accountability norms, the real aim of Kenya's admissibility challenge appeared to be to construct yet another obstacle to the criminal prosecution of those responsible for planning and organising the PEV. In the

14 See http://kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf.

15 Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010.

16 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

view of the Expert Group, the continued reference among Kenyan leaders to ‘bring the ICC cases home’, coupled with the absence of concrete action at the domestic level demonstrate the Government’s resort to ‘delaying tactics’. The ICC’s complementarity regime appeared to the Government as a measure to pursue these tactics. Although the Government’s admissibility challenge failed, in the view of the Expert Group 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.

24. The Expert Group notes that 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. 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, a body 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. However, the Expert Group takes note that at the time of drafting the Nairobi Principles, the IOCD was not yet operational, and further notes that Kenyan authorities have continuously stated that PEV crimes will not be prosecuted by the IOCD.
25. Accordingly, the Expert Group observes 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.

Outreach, victims’ participation, reparation and witness protection

26. The Expert Group observes that the legal framework with respect to victim participation leaves Chambers with a considerable amount of discretion. 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.¹⁸ Rule 85

17 International Crimes Act 2008 (Kenya), ISN KEN-2008- L-82568.

18 Article 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’.

of the Rules of Procedure and Evidence 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.

27. The Expert Group notes that on 3 October 2012, Trial Chamber V issued its decisions on victim participation and representation for the trial in the two Kenyan cases. Emphasising that participation must be ‘meaningful’ and not ‘purely symbolic’, 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 Rules of Procedure and Evidence.¹⁹
28. The Expert Group observes that, compared to earlier decisions on victim participation, the decisions in the Kenyan cases offered for some important progress. Notably, judges decided that 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 Rules of Procedure and Evidence, in this way distinguishing between ‘direct individual participation’ and ‘indirect participation through a common legal representative’. Further, the Legal Representatives for Victims (LRVs) were 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 victims in the cases. 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 is in charge of handling the legal proceedings in the courtroom, based on the LRV’s instructions.
29. However, while acknowledging the decisions present some important progress compared to previous models, the Expert Group observes that the ICC’s regime for victim participation faced significant challenges in the Kenyan case. In particular, whereas Rule 86 of the Rules of Procedure and Evidence requires the Chambers to take into account the needs of all victims and witnesses in making any direction or order, the Expert Group believes that the Trial Chamber failed to sufficiently consult victims before making the relevant decision. The Expert Group further observes that the victim registration process faced significant challenges in Kenya, particularly in the early phases of the process where victims lacked information and were often 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. More generally, the Expert Group further observes that whereas obtaining clear and consistent information about the ICC is

¹⁹ The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on victims’ representation and participation ICC-01/09-01/11-460, 9 October 2012; The Prosecutor v. Uhuru Muigai Kenyatta, Decision on victims’ representation and participation, ICC-01/09-02/11-498, 6 October 2012.

vital for advancing meaningful participation, victims' knowledge of the ICC and the framework for participation has generally been poor in Kenya. In the view of the Expert Group, this raises questions concerning the scope and quality of ICC outreach activities, which would need to be addressed in future cases. Moreover, whereas the Expert Group understands the rationale for the Court's distinction between case and situation victims, it is observed that this distinction can be problematic from the point of view of victims who often view it as arbitrary. The Expert Group observes that the distinction created tensions between different groups of victims in Kenya. Whereas the Expert Group endorses the Chamber's decision that the LRVs be based in Kenya since this facilitated more regular consultation with victims, this resulted in the LRVs being less frequently present in the courtroom. This is problematic, in the view of the Expert Group, since the LRVs are best placed to represent victims before Chambers. In the view of the Expert Group, the victim participation regime in Kenya at times 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 ICC cases collapsed, so did victims' opportunities to participate in the proceedings and obtain reparations from the Court.

30. More generally, to advance more meaningful participation, the Expert Group believes that the basic needs of victims must first be met before (or while) engaging in a comprehensive and often lengthy legal process. In this regard, the Expert Group notes with regret that the Trust Fund for Victims has not met the expectations of victims in Kenya. To date, the Trust Fund for Victims has continued to raise expectations without offering any assistance to Kenyan victims. In the absence of clear criteria for deciding Trust Fund for Victims interventions, the Expert Group proposes that it becomes mandatory for the Trust Fund for Victims to conduct assessments in every situation country, in order to meaningfully determine victims' needs for assistance, and to make the TFV's decisions to intervene in certain situations and not in others more objective.
31. The Expert Group observes that challenges relating to promoting victims' interests and rights were further intensified as the Kenyan Government itself took a narrow view of reparations, which could only be described as 'assistance' as opposed to '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.
32. On the basis of the above, the Expert Group concludes that the rights and interest of victims in Kenya largely remain unmet to date, and, regrettably, that the ICC's intervention has done little to change this.
33. The Expert Group additionally is of the view that going forward, the ICC should respect victims' right to choose their own legal counsel; ensure that ICC staff has sufficient capacity and expert knowledge of local context; and continuously liaise and

communicate with witnesses and victims, to keep them informed of any significant developments in the ICC process, including in situations where the cases are prematurely terminated. In this regard, the Expert Group emphasises that regular communication fosters healthy and stable relationships between the ICC and victims and witnesses, including by preventing the upshot of rumours and pockets of misinformation which can adversely affect victims and witnesses' support of the ICC and willingness to continue engagement in ICC processes.

34. The Expert Group notes with regret that the Kenyan ICC cases have been marred by witness interference. 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'.²⁰ In this light, the Expert Group emphasises 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.
35. At the same time, the Expert Group notes the positive role played by civil society in advancing witnesses protection in Kenya, but also observes this was complicated by the fact that civil society groups were often subject to various forms of intimidation, including by government actors. The Expert Group also takes note that these groups do not have the necessary resources and facilities to promote the security of witnesses in the face of State interference.
36. More generally, in the view of the Expert Group, 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. The Expert Group believes 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.

²⁰ Prosecutor v Ruto and Sang, Public redacted version of decision on defence applications for judgments of acquittal (reasons of Judge Fremr), ICC-01/09-01/11-2027-Red, 5 April 2016, para. 147.

Resource Centre

A database informing the development of the Nairobi Principles, including academic publications, NGO and expert reports, policy statements and other material covering the justice processes relating to the PEV, is available in a separate document.

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