

**UNIVERSITY OF NAIROBI**

**SCHOOL OF LAW**

**MASTER OF LAWS (LLM) THESIS**

**TOPIC:**

**THE CHALLENGES OF IMPLEMENTING THE VICTIMS' RIGHTS TO  
PARTICIPATION, PROTECTION AND REPARATIONS IN THE  
INTERNATIONAL CRIMINAL COURT PROCESS:  
THE KENYAN CASE**

**SUBMITTED IN PART FULFILMENT OF THE REQUIREMENT FOR THE  
MASTER OF LAWS DEGREE OF THE UNIVERSITY OF NAIROBI**

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**NAIROBI 2012**

## **DECLARATION**

I, **ROSEMARY WANGARI KAMATHI** do hereby declare that this is my original work and has not been submitted for a degree in any other University.

**Signed:**

**Date**

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This thesis has been submitted for examination with my approval as Supervisor, University of Nairobi.

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**Date**

**PROFESSOR PAUL MUSILI WAMBUA**

## **DEDICATION**

This thesis is dedicated to my two lovely daughters Wairimu and Kendi. You are my joy and strength.

## **ACKNOWLEDGEMENTS**

I am grateful to God for giving me the strength and the wisdom to carry out this research.

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All errors and omissions are mine.

## **LIST OF ABBREVIATIONS**

ASP	Assembly of State Parties
CAR	Central African Republic
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
GA.	General Assembly
GC	Geneva Convention
ICC	International Criminal Court
ICT	International Criminal Tribunals
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICRC	International Committee of the Red Cross
IDP	Internally Displaced Person
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
KPTJ	Kenya for Peace with Truth and Justice
NGO	Non-Governmental Organization
OPCV	Office of Public Counsel for Victims
SC	Security Council
TRC	Truth and Reconciliation Commission

TFV	Trust Fund for Victims
TRI	Target Respondents Interviews
UN	United Nations
VWU	Victims and Witnesses Unit
SCSL	Special Court for Sierra Leone
TJRC	Truth, Justice and Reconciliation Commission

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## CHAPTER ONE

### INTRODUCTION

Some injuries can be healed with the passage of time. Others can never heal fully—and that applies especially to the mental anguish suffered by the survivors, whether wounded in body or, by the loss of their loved ones, in spirit.” And that “words of sympathy can bring only hollow comfort . . . no one who is not directly affected can truly share the victims’ grief. At least let us not exploit it. We must respect them. We must listen to them. We must do what we can to help them . . . We must resolve to do everything in our power to spare others from meeting their fate. Above all, we must not forget them.

**(UN Secretary-General Kofi Annan, in address to Madrid Summit on Global Strategy for Fighting Terrorism, March 11, 2005, in Spain).**

#### 1.1 Background

The General Assembly’s Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,<sup>1</sup> has shown a growing recognition in the international arena that victims have rights to both participate in criminal proceedings and to compensation and restitution. There has been a significant growth in international criminal justice, from the early days of Nuremburg and Tokyo International Criminal Tribunals (ICTs), which sought to provide some minimal form of accountability for the atrocities committed during the Second World War.<sup>2</sup> These trials provided the founding principles to the fledging field of international criminal law and sowed the seeds of acceptance for individual criminal responsibility for serious international crimes.<sup>3</sup>

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<sup>1</sup> See United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res 40/34 U.N. GAOR, 40th Session. 96th plenary meeting.

<sup>2</sup> See B Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law (Oxford University Press, UK, 2004).

<sup>3</sup> See F L Morrison “The Significance of Nuremburg for Modern International,” 207 *Military Law Review* , at 214-215(1995).

The Rome Statute of the International Criminal Court<sup>4</sup> has incorporated three main statutory rights in this regard: the right to participation, the right to protection, and the right to reparations. These rights reflect an attempt to mitigate the shortcomings of previous international criminal tribunals along with recognition of the growth of the victims' rights movement. It affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished" and the Court must "put an end the impunity of the perpetrators of these crimes".<sup>5</sup>

These crimes are Genocide, Crimes against Humanity and War Crimes. Genocide<sup>6</sup> is killing or causing serious mental or physical harm with the intention of destroying all or part of a national, ethnic, racial or religious group. Crimes against Humanity<sup>7</sup> are crimes such as killing, torture, enslavement, rape and other inhumane acts, committed as part of an attack on civilians that is widespread or systematic and carried out pursuant to a state or organizational policy. War crimes<sup>8</sup> are prohibited acts committed in war or internal armed conflict, particularly when committed on a large scale or as a result of a plan or policy, such as attacks on civilian targets, pillaging, conscripting, enlisting and using children in hostilities, and destruction of educational and religious institutions.

The Court also marks a watershed for victim involvement within the international criminal trial process. Under the Rome Statute, victims are provided with a set of novel procedural rights,

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<sup>4</sup> Rome Statute of the International Criminal Court, *adopted* on 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force*, 1 July 2002, U.N. Doc. 183/9, Preamble (1998) [hereinafter "Rome Statute"].

<sup>5</sup> *Ibid.*, see the Preamble of the Rome Statute.

<sup>6</sup> *Ibid.*, Art. 6.

<sup>7</sup> *Ibid.*, Art. 7.

<sup>8</sup> *Ibid.*, Art. 8.

which position them as active participants in the criminal process and as potential beneficiaries of reparations.

Victims may include victims of sexual violence, children, persons with disabilities, or elderly persons. A victim can also be a person who suffers harm as a result of a crime targeted at another person, such as a family member of someone who has been killed.<sup>9</sup>

The past twenty years has resulted in a change in status of victims both in domestic and international settings.<sup>10</sup> The impact of crimes on victims has been recognized in common law jurisdiction in victim impact statements and limited participation of victims in proceedings.<sup>11</sup> The participation of victims in criminal proceedings in civil law jurisdictions have provided for participation as *partie civile*, which allow a victim to be a party to the proceedings and to make claims for restitution and compensation.<sup>12</sup>

Judge René Blattman, writing in dissent in the Court's first trial, *The Prosecutor v. Thomas Lubanga Dyilo*, (Lubanga) found it necessary to state, first and foremost... "that victims'

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<sup>9</sup> ICC, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, Doc. ICC-01/04-01/06-925, 13 June 2007, p. 18.

<sup>10</sup> Matti Joutsen, "Victim Participation in Proceedings and Sentencing in Europe", International Review of Victimology, Vol. 3 (1994), pp. 57–67; Jan Van Dijk, "Who is afraid of the crime victim? Criminal victimization, fear of crime and opinions on crime control in an international perspective", keynote lecture at the VII Symposium of the World Society of Victimology, Adelaide, 21–26 August 1994; Joanna Shapland, Jonathan Willmore and Peter Duff, Victims and the Criminal Justice System, Aldershot, Gower, 1985.

<sup>11</sup> See Gerard J. Mekjian & Mathew C. Varughese, *Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceedings of the International Criminal Court*, 17 PACE INT'L L. REV. 1, 15 (2005)

<sup>12</sup> Criminal Procedure: A WORLDWIDE STUDY 45 (Craig ed. .... 1999).

participation is not a concession of the Bench, but rather a right accorded to victims by the Statute”.<sup>13</sup>

For the purpose of this thesis in the Kenyan context, the statutory rights provided to victims will be assessed when analyzing the Court’s recent jurisprudence, namely, the challenges of implementing victims’ right to participation, the right to protection, and the right to reparations.

While these rights are enshrined in the Rome Statute system,<sup>14</sup> how they are to be interpreted remains at the discretion of the various Chambers of the International Criminal Court. The challenges encountered when these statutory rights are being interpreted in the Kenyan cases offers the opportunity to determine the degree to which restorative justice is, in fact, compatible with the ICCs statutory rights of victims right to participation, victim’s right to protection and victim’s right to reparation approach.

The ICC has a global mandate but its activities have concentrated on African countries marked by ongoing violent conflicts. Crimes committed in the Democratic Republic of Congo (DRC), Northern Uganda, Darfur, Central African Republic and Kenya are subjects of its investigations and prosecutions.<sup>15</sup> These diverse societies confront simultaneous needs for sustainable peace, accountability, institutional reform and the mending of fractured relationships within their regions which must fall within and fulfill the ICC mandate.

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<sup>13</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Separate and Dissenting Opinion of Judge René Blattman to Decision on Victims’ Participation, Public, ICC-01/04-01/06-1119, 18 January 2008, Trial Chamber I para. 13 [hereinafter Separate and Dissenting Opinion of Judge Blattman to Trial Chamber I *Lubanga* Decision].

<sup>14</sup> The Rome Statute, Articles 15, 19, 68, & 75.

<sup>15</sup> *Situation in the Republic of Kenya*, Public Redacted Version of Report Concerning Victims’ Representations (ICC-01/09-6-Conf-Exp) and Annexes 2 to 10, Registrar, ICC-01/09-6-Red, 29 March 2010.

While the ICC marks a significant step forward from its predecessors, there continues to be space for further improvement in ensuring that victim and witness participation does not result in re-traumatization.<sup>16</sup> The Court's restorative justice has faced innumerable challenges in balancing competing aims in its attempted incorporation of a greater space for victims, particularly in its attempt to meet victims' right to participation, protection and reparation.<sup>17</sup> These challenges in Kenyan cases will therefore, help add to the knowledge of this justice system.

The Kenyan example provides a further illustration and assessment of how the challenges of implementing restorative aims of the right to participation, protection and reparation could mitigate individual victims to human dignity and rights.

This thesis, therefore, seeks to discern the emerging trends in the approach to victim involvement in the Kenyan cases and the degree to which restorative and reparative aims are being met in relation to these statutory rights.

## **1.2 Statement of the Problem**

Democracy aims at having free and fair elections. The Kenyan constitution<sup>18</sup> enshrines general principles for the electoral system, which include freedom of citizens to exercise their political rights, free and fair elections which should be free from violence, intimidation, improper influence or corruption. However, and in spite of the desired state of democracy to have free and

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<sup>16</sup> Yael Danieli, "Essential elements of healing after massive trauma: complex needs voiced by victims/survivors", in Dennis Sullivan and Larry Tifft (eds.), *Handbook of Restorative Justice: A Global Perspective*, Routledge, London, 2006, pp. 387–400.

<sup>17</sup> Ibid.,

<sup>18</sup> Constitution of Kenya 2010, Article 81.

fair elections devoid of violence, the Kenyan 2007 general election was followed by unprecedented post election violence which culminated into over a thousand people dying, thousands homeless, and livestock and property of untold value destroyed in different parts of the country.<sup>19</sup>

The 2007/2008 post elections violence left several victims crying for justice. However, it is no secret that the criminal justice system, society's means for responding to crime, is far from perfect.<sup>20</sup> Crime victims often feel neglected and ignored by prosecutors and judges; the public does not perceive the system as just and fair, and the system's effectiveness in combating crime is questionable.<sup>21</sup> In view of these, it is noted that there are challenges of implementing victims' rights aimed at achieving justice.

The purpose of this study, therefore, is to critically analyse the rights of the 2007/2008 post election violence victims' rights vis-à-vis the provision of the Rome Statute on the victims' rights to participation, protection and reparation. The study will review the provisions of the Rome Statute of the International Criminal Court on victims' rights. It will analyse the challenges of achieving restorative justice through the implementation of victims' rights to participation, protection and reparation in the Kenyan cases before the ICC. It will answer the question whether victims' rights to participation, protection and reparation rehabilitates the basic notions of retribution and deterrence that have been neglected in modern sentencing schemes, and whether restorative justice contributes new and deeper meaning to those notions and values.

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<sup>19</sup> The Daily Nation, 2<sup>nd</sup> February, 2008.

<sup>20</sup> Ezzat A. Fattah, "Toward a victim policy aimed at healing, not suffering", in Robert C. Davis, Arthur J. Lurigio and Wesley G. Skogan (eds.), Victims of Crime (Thousand Oaks, CA, Sage, 1997), pp. 257–72.

<sup>21</sup> Ibid.,

Amongst the persons this study will consider are the 2007/2008 post election violence victims located in different regions in Kenya.

### **1.3 Objectives of the Study**

1. To establish the basic notions of retributive, restorative and deterrent justice at the ICC.
2. To assess the challenges that the ICC is facing during the implementation of the victims' right to participation, protection and reparations while meeting the basic notions of retributive, restorative and deterrent justice.
3. To investigate whether the Rome Statute protects the Kenyan victims' right to restorative justice.

### **1.4 Research Questions**

1. What are the basic notions of retributive, restorative and deterrent justice at the ICC?
2. What are the challenges that the ICC is facing during the implementation of the victims' right to participation, protection and reparations while meeting the basic notions of retributive, restorative and deterrent justice?
3. How does the Rome Statute protect the Kenyan victims' right to restorative justice?



## **1.5 Hypothesis**

The study aims at testing the following hypothesis, namely, that due to the challenges that the ICC faces, restorative justice resulting from victim's right to participation, protection and reparation in the Kenyan cases before the Court is not being achieved.

## **1.6 Justification**

There are many studies that have been undertaken in Sierra Leone, Cambodia, DRC, Uganda and Darfur on the assessment of the ICC's developing jurisprudence, in particular its evolving victims' participation, protection and reparations mandate, as the Court seeks to fulfill the spirit envisioned by its original drafters.<sup>22</sup> The recognition of victims by legal authorities that the restorative justice approach offers has enhanced victim satisfaction with the criminal justice system.<sup>23</sup>

However, limited research has been undertaken on assessing the challenges of implementing the Court's restorative justice resulting from the victims' right to participation, protection and reparation in the Kenyan cases. The participation in the criminal justice process has helped empower victims and combat the sense of powerlessness that many feel during criminal proceedings by providing victims with recognition that they seek and giving them, through legal

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<sup>22</sup> Robinson.(2010).Implications of the Review Conference for International Justice, in Currie et al.,Taking Stock of the Kampala International criminal Court(ICC)Review Conference(Canadian Council on International Law 2010 Annual Conference materials) pg.1-12.

<sup>23</sup> R.E. Barnett 'Restitution: A new paradigm of restitutive justice') vol 86 Issue 4 *Ethics* 279.pg 288 (1977).

counsel, a clear understanding of how the criminal justice system works.<sup>24</sup> The emergence of restorative justice, and in particular restorative justice values, has provided an opportunity for criminal justice authorities to treat victims as well as offenders with dignity and respect.<sup>25</sup>

The study therefore makes a key academic contribution by availing credible research and literature on the International Criminal Court and specifically on the involvement of victims in the trials on the perpetrators of 2007/2008 post election violence in Kenya. Secondly, the study contributes to the on-going trials of Kenyan cases at the ICC and in particular in the participation of victims in the Court's process. Finally the study will elicit more research on the subject of the International Criminal Court in its endeavor to deal with impunity in the world arena and specifically on the issue of victims' rights to participation, protection and reparation.

## **1.7 Literature Review**

The literature focusing on the assessment of challenges of implementing the International Criminal Court restorative justice in the Kenyan context is limited. A review of the literature produced on this subject suggests that among the most important interests of victims in the context of their interaction with a criminal justice system, beyond the right to reparations, is the right to receive information regarding their case. Victims value information and clarity concerning their role in the criminal proceedings so as to avoid creating erroneous hopes and expectations that cannot be fulfilled or that which will leave victims frustrated.

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<sup>24</sup> Ibid.,

<sup>25</sup> Ibid.,

In her book on restorative justice, Zehr provides a thorough description of what he calls “the restorative lens.”<sup>26</sup> Zehr argues that, restorative justice marks a “paradigm shift” in how justice is conceived. He describes the restorative lens as the view that “crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation and reassurance.” Although this description is not flawless, it offers a clear understanding of the restorative justice paradigm. It emphasizes people rather than norms. It highlights the obligation imposed on offenders, holding them accountable for the offense they committed. It illustrates the necessity of involving the real stakeholders affected by the criminal offense in the justice process and shifts the objective of that system from punishment and the infliction of pain to repairing the harm. These are the basic principles of the restorative justice theory.<sup>27</sup>

The current study builds on Zehr’s argument as it seeks to show that justice can only be achieved when all stakeholders affected by the criminal offence shift the objective from that of punishment and infliction of pain to that of reconciliation and repairing of harm. However the study differs from that of Zehr in that while Zehr’s work is on restorative justice in general, this study has specifically focused on restorative justice on Kenyan cases currently at the ICC which has not been done before.

While there has been increasing consensus in international perspectives and laws that such victims deserve redress in some form in the search for justice and peace, there had been far less

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<sup>26</sup> Zehr, H. Changing Lenses: A New Focus for Crime and Justice, (Scottsdale, Pennsylvania: Herald Press 1995a).

<sup>27</sup> Ibid.,

consensus on how to accomplish this and little is done for such victims. A key achievement of the International Criminal Court is its acknowledgment of the rights of victims to participate in proceedings and to seek reparation before the Court.<sup>28</sup> This may well be derived from the words of Randy Barnett, who is sometimes quoted by restorative justice theorists:

Where we once saw an offense against society we now see an offense against an individual victim. In a way, it is a common sense view of crime. The armed robber did not rob society; he robbed the victim. His debt therefore, is not to society; it is to the victim.<sup>29</sup>

In his article, Randy Barnett proposes a new paradigm of criminal justice, restitution, as a response to a criminal justice paradigm that focuses on punishment of an accused, conceived of crime as an offense against the state rather than against the individual.<sup>30</sup> In the critique of the retributive system, he argues that a crime is an offense by an individual against the rights of another individual and that the restitution of the victim ought to be the main objective of the criminal justice system rather than punishment.

The discourse in Barnett's article is important for the current study for we see the re-conceptualization of crime as harm against a specific individual that requires adequate redress for that specific harm. It is within this context of the proper scope of harm that we find the roots of reparative justice theory. However, since this study focuses on the assessment of challenges of implementing victims' rights on the Kenyan situation per se it is different from Barnett's work which has adopted a broader view of restorative justice.

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<sup>28</sup> Rome Statute, Article 75.

<sup>29</sup> R.E. Barnett 'Restitution: a new paradigm of retributive justice' Vol 86 Issue 4 *Ethics*, 279 (1977).

<sup>30</sup> Ibid.,

In her article on the victims' role at the ICC, Carla Ferstman<sup>31</sup> notes that it is not that the process of victims participation becomes completely victim focused, but rather, "that an equitable justice requires that they are heard in dignity". In this article Carla analyses some of the specific challenges relating to the ICC reparations regime, stemming from the interplay between the ICC and national courts on such issues as tracing assets and implementing protective measures, and in enforcing the ICC's reparations orders. A review of several examples of legislation adopted by states parties on cooperation with the ICC is undertaken with a view to examining its potential impact on these issues.

Carla's article is relevant to this study in that it brings to the fore the challenges faced by the Court in implementing protective measures to the victims and the challenges the Court is likely to face in enforcing reparation orders. However, Carla's article is a comparative of the legislations by state parties while this study differs since it is an assessment of the Kenyan situation before the victim appears at the Court. It seeks to fill the gap of imperfection created where victims feel that their concerns are yet to be addressed before commencement of Court process.

Managing victims' expectations has been one of the biggest challenges facing the ICC today since they expect too much too soon. They view the ICC as the panacea of all their sufferings and loss. Since the Court is yet to start reparations hearings, Carla's study offers an insight into what the expectations of the victims are.

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<sup>31</sup> Carla Ferstman, "The Reparation Regime of the International Criminal Court: Practical Considerations," *Leiden Journal of International Law*, 15, pp 667-686 (2002).

In spite of the dangers in creating an 'expectations gap,' it has been argued that international criminal justice has no choice but to move towards incorporating an increased role for victims, if its legitimacy and functional relevance is to be confirmed.<sup>32</sup>

In her article on victim participation at the ICC Miriam Cohen asserts that the purpose of victims' participation is to shed light on the suffering and harm that occurred during or as a consequence of the crime being considered and assist in the discovery of the truth.<sup>33</sup> She brings out the views and concerns of the victims and asserts that victim participation can bring a voice to the entire community who suffered, if not as direct victims, certainly as indirect victims of the crimes committed.<sup>34</sup> If participation occurs in this manner, it does not conflict with the roles of other parties and may indeed prove beneficial for the conduct of proceedings, since it puts the crimes in perspective by giving an idea of the reality in times of conflict.<sup>35</sup> In this sense, victims' participation becomes beneficial to the establishment of the truth since they have "first-hand knowledge of the crimes." Furthermore, their participation as victims and not merely their testimony as witnesses can assist the Court with clarification of the facts of the case and can be a "decisive contribution to the prevention of future crimes."<sup>36</sup>

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<sup>32</sup> Miriam Cohen, "Victims' participation rights within the International Criminal Court: A Critical Overview." *Denver Journal of International Law and Policy*.

<sup>33</sup> Ibid.,

<sup>34</sup> ICC-ASP, Final Report, Stocktaking of International Criminal Justice: Impact of the Rome Statute system on Victims and Affected Communities, The Hague Working Group of the Bureau, Secretariat of the Assembly of States Parties, Annex V(a), ICC-ASP/9/25, October 2010, available at [http://www.icccpi.int/iccdocs/asp\\_docs/ASP9/ICC-ASP-9-25-ENG.pdf](http://www.icccpi.int/iccdocs/asp_docs/ASP9/ICC-ASP-9-25-ENG.pdf). [hereinafter Stocktaking of International Criminal Justice, Impact on Victims and Affected Communities].

<sup>35</sup> Ibid., para 29.

<sup>36</sup> Ibid.,

This study agrees with Cohen that indeed victim participation can bring a voice to the entire community who suffered, if not as direct victims, certainly as indirect victims of the crimes committed. The Kenyan case has been shrouded with claims of bribery and falsehood there by compromising the effort to establish the truth.<sup>37</sup> However, while Cohen study is on rights of victims at the ICC in general, the current study has concentrated on the Kenyan cases and aims at determining the extent to which the victims' participation in the judicial process at the ICC will bring clarity of the facts of the case and help in interpretation of the law.

In her article on special evidentiary rules for victims at the ICC, De Brouwer notes that one of the significant developments of the ICC relates to the special evidentiary rules that were incorporated to better meet the needs of victims of sexual violence.<sup>38</sup> These include rules such that victim testimony does not need to be corroborated, consent has been removed as an element of the crime, and evidence of other sexual conduct may not be admitted. She argues that these rules are a significant improvement over numerous national jurisdictions and that through the process of implementing legislation; this may see advancement more broadly in this regard.

The increased recognition of the right to protection is also found in the growth of alternative justice mechanisms that sought to reposition victims as active participants, while acknowledging that this must be done in a manner that would minimize any potential for additional harm to victims.<sup>39</sup>

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<sup>37</sup> Truth, Justice, and Reconciliation Commission, 2010.

<sup>38</sup> De Brouwer A-M), "What the International Criminal Court Has Achieved and Can Achieve for Victims /Survivors of Sexual Violence," *International Review of Victimology*: 16(2) pp.1991-192(2009).

<sup>39</sup> *Prosecutor v Lubanga*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, Trial Chamber I, ICC-01/04-01/06-1191, 26

In Kenya for a long time the law on sexual offense has not been enforced with the perpetrators acquitted for lack of evidence leaving the victims crying for justice thereby agreeing with De Brouwer that there was need for the ICC to provide for the rights of the victims of the sexual offenses. During the post election violence, there were several victims of sexual offences who are crying for justice to be done. It is therefore imperative for this study to determine the extent to which the participation by the victims of the sexual offenses at the ICC as provided by the international law would minimize any potential for additional harm to the victims of post election violence. Therefore the current study deals only with the Kenyan cases currently at the ICC.

In her article, Brady highlights that different delegations involved in the drafting of the protection regime realized a much more practical reason for ensuring adequate protective measures in line with retributivist thought, protection as a tool to guarantee participation.<sup>40</sup>

In her detailed analysis of the negotiation of Rules 87 and 88 of the Rules of Procedure and Evidence, that support the right to protection, Brady describes the development of “two rules with two different purposes.” Rule 87 pertains to protective measures which can be ordered to prevent the release of the identity or location of a victim or witness from the public or media, while Rule 88 describes special measures that may be used to facilitate the testimony of certain vulnerable victims and witnesses, such as traumatized persons, children, victims of sexual violence and the elderly. In her analysis of the negotiation of the supporting rules related to

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February 2008, paras. 35-37.

<sup>40</sup> Brady, “H, Protective and Special Measures for Victims and Witnesses,” in R.Lee (ed.), ICC: Elements of Crimes and Rules of Procedure and Evidence, (Ardsley, New York: Transnational Publishers, Inc.pp.438-440, (2001).



protection, she argues that the Court has been forced to acknowledge that the right to a ‘fair trial’ is not absolute.<sup>41</sup> It must be “conducted in accordance with internationally accepted due process principles and with respect for the rights of the accused,” but also must provide justice for victims and also the wider international community.<sup>42</sup>

The key argument that Brady makes is that as the ICC embarks on enhancing victims’ rights, especially the right of protection, the due process of the law must be followed as indicated in the Rome Statute. She identifies specifically victims of sexual offences and the elderly and argues that such traumatized persons must be handled in accordance with the due principles and with respect.

This study agrees with Brady in noting that victims of sexual offences, elderly and the children must be handled with utmost due respect to avoid retraumatization. However, the study goes further to assess whether the victims statutory rights in Kenya were being met. During the 2007/2008 post election violence in Kenya, a lot of victims especially women and young children suffered sexual offences which left them heavily traumatized.

In his book, *The Rome Statute of the International Criminal Court: A Commentary*, Antonio Cassese looks at the historical evolution of the Court and various provisions of the Rome Statute

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<sup>41</sup> Ibid.,

<sup>42</sup> Ibid.,

while giving a detailed commentary on the issues that arose with regard to those provisions.<sup>43</sup> The book discusses the reaction of the international community to atrocities, the crimes of genocide, war crimes, and crimes against humanity and international criminal trials generally from abortive early attempts between 1919 and 1945, the establishment of mixed criminal courts or tribunals to the ICC generally. Cassese has undertaken to give the actual genesis of victims' rights to participation, protection and reparations in international criminal law. The book gives the inventory of the crimes under the Court's jurisdiction. It gives a detailed analysis of the jurisdiction of the Court and how the Court is moved to take on a matter.

This study will rely heavily on Cassese book during the desk top research as a foundation on which any discourse on the ICC is grounded. However, Cassese does not undertake an application of the law on situations such as the one in Kenya. Therefore, this study will go further and seek, through the survey, the extent to which these rights accorded to the victims have been achieved in the Kenyan cases.

In her article on the overview of victims' rights at the ICC, Gioia Greco notes that the entire court process, "can make an already traumatic experience even more upsetting and stressful" and therefore special measures maybe ordered, in consultation with the Victims and Witness Unit (VWU), to minimize risks of possible secondary victimization.<sup>44</sup>

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<sup>43</sup> A. Cassese, The Rome Statute of the International Criminal Court: A Commentary. (Oxford University Press, UK, 2002.).

<sup>44</sup> Greco, G, "Victims Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis," *International Criminal Law Review* 7(2/3)531-547, pp 545-6 (2007).

Greco asserts that victims' role in trials gained greater relevance over the span of the history of domestic legal systems. Even so, it was only after the Second World War that compensation claims enhanced the crescendo of victims' rights recognized at international level. The ICC legal framework stands out as a glaring achievement in the international field. In fact, the Rome Statute grants to victims a wide range of rights starting from the pre-trial stage throughout the trial. Accordingly the protection and involvement of victims in trials reflects not only procedural fairness but also takes into consideration victims' needs and claims for justice. Beginning from a teleological approach, this paper illustrates the victims' rights under the Rome Statute. Particularly, it analyzes the Court's jurisprudential interpretation of the underpinning criteria for victim status and the rights of participation and to justice as illustrated in the *Lubanga case*.<sup>45</sup>

The current study builds on Greco's argument as it seeks to assess whether the rights of victims of post election violence in Kenya have been achieved. That the entire Court process can be traumatizing to the victims is an understatement. Greco brings out the trauma suffered by some of the victims who testified in Lubanga case. The current study is however different in that while Greco has concentrated on the Lubanga trial, the current study concentrates on the Kenyan trials. In his illustration of the Lubanga case, the accused, Thomas Dyilo Lubanga, was locked in while in the Kenyan case, the accused are mingling freely with the victims thereby complicating the ICC process.

In his book on Redress for Victims of Crimes under International Law, Boltiglierio asserts that

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<sup>45</sup> See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1119, Decision on Victims' Participation, Public, 93-95 (Trial Chamber I, Jan. 18, 2008) [hereinafter Decision on *Lubanga* Trial Participation].

redress for victims of crime forms a basic principle of justice.<sup>46</sup> Throughout history, most of the world's legal systems have acknowledged this principle that victims should receive some form of redress. However, Boltiglierio, notes, it has been much easier for victims of "ordinary" crimes- such as vandalism, robbery, assault and even murder, to obtain redress, than for victims of more severe crimes such as war crimes, human rights violations or genocide. Boltiglierio examines the historical origins of the principle of victims redress; its evolution, and its application in the current framework of domestic law, regional and universal human rights regimes, humanitarian law and state responsibility.

The current study builds on Boltiglierio argument as it seeks to show the current conception of the 2007/2008 post election violence victims' plight in Kenya and their search for justice. However, this study is different in that it argues that justice for the post election violence as far as the ICC process is concerned is yet to be achieved.

Funk's book is hailed as the first detailed analysis of the newly-recognized right of victims to participate in the trials of their accused abusers.<sup>47</sup> It provides a historical account of the ICC's creation and the origins of victims' rights. In addition, he gives a practical guidance on what it takes to litigate cases before the ICC. He combines international justice theory with practical discussions of developing ICC practice, procedure and evidentiary rules. It conducts the first in-depth analysis of the important, complex, and often misunderstood role of victims at the ICC. It

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<sup>46</sup> Boltiglierio, Ilaria, Redress for Victims of Crimes under International Law, (Leiden: Martinus Nijhoff Publishers 2004).

<sup>47</sup> T.Markus Funk, "Victims' Rights and Advocacy at the International Criminal Court A Study of the Status of Victims before International Criminal Tribunals and Factors Affecting this Status.(Oxford University Press 2005)

includes a primer on why the ICC was established, as well as on how it is structured, financed, and operated. Funk engages in a frank and earnest discussion of the disjunction between the Court's public proclamations of its intended mission and its actual results to date. He also draws comparisons with the under-performance of other ad hoc criminal tribunals, pointing out reasons for these shortfalls, as well as proposals for reform.

The key argument that Funk makes is that ICC has triumphed where the ad hoc tribunals failed in as far as victims' participation in the Court's process is concerned. He identifies the practical challenges faced by the victims especially in their adherence to the already complex procedure and rules governing the ICC.

The book is relevant to this study because it analyzes the procedure before the Court and brings to the fore the operations of the Court as far as victim participation is concerned. However, the book in its assessment focused solely on the DRC and the CAR victims but did not include the victims of the 2007/2008 post election violence in Kenya.

In his article on victims' rights, Bassiouni traces the historic origin of victims' rights in domestic and international legal systems, focusing particularly on the adoption of the two international instruments, namely: the 1985 Declaration of Basic Principles of justice for Victims of Crime and Abuse of Power and the 2006 Basic Principles and Guidelines on the right to a Remedy Reparations for Victims of Gross Violations of International Humanitarian Law, and more particularly on the negotiating history of the 2006 Principles.<sup>48</sup>

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<sup>48</sup> M.Charif Bassiouni, "International Recognition of Victims' Rights," *Human Rights Law Review* 6(2):203-279 (2006).

Essentially, this article gives the genesis of these rights in the international arena with the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. It is this Declaration that defined who a victim is, a definition that was later adopted by the Rome Statute of the ICC.

This study is different from the work of Bassiouni in that while Bassiouni deals with the theoretical part of the law on victims' rights, this study has gone further and carried out a survey on the actual application of these rights specifically in the Kenyan context.

There are three key statutory provisions provided within the Rome Statute, which outline the scope of the right to participation provided to victims. Article 15(3) describes the possible involvement by victims through the provision of information and representations during an examination of a Prosecutor's request for authorization to proceed with an investigation.<sup>49</sup> Article 19(3) provides for the submission of observations regarding jurisdiction or admissibility applications.<sup>50</sup> Article 68(3) provides the transformation aspect to the victim participation framework. It states that where "the personal interests of the 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 and a fair and impartial trial."<sup>51</sup> It was this innovative provision that sparked much debate and interpretation by both academics and commentators alike.

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<sup>49</sup> Rome Statute.

<sup>50</sup> Ibid.,

<sup>51</sup> Ibid.,

In his article, Charles Trumbull IV argues that the scope that this provision is afforded will provide guidance on what the court's overarching aim to victims involvement is. He notes "a narrow interpretation of Article 68(3) indicates the Court's principal objective is to bring human rights abusers to justice."<sup>52</sup> A more liberal interpretation, on the other hand, while undoubtedly making prosecutions more cumbersome, will also suggest that the Court believes that giving victims a voice and recognizing their suffering, is one of its central objectives. It is Trumbull's recognition that victim participation will likely always conflict with retributivist aims for efficacy of prosecution and fail to meet the full restorative needs of victims.

While Trumbull work is on the general application of the victims' rights by the ICC, this study seeks to determine the extent to which the involvement of the victims in the justice process enhances the restorative justice in the Kenyan cases in particular. It seeks to find out how the law on victims' rights has been interpreted in order to afford the victims of 2007/2008 post election violence in Kenya, the opportunity to participate in the judicial proceedings at the ICC. The Rome Statute attempted to incorporate two alternative justice approaches into its novel victim's participation and reparations regime through the inclusion of certain restorative and reparative justice practices.

In their article on the South African Truth and Reconciliation Commission, Robert Howe and Jennifer Llewellyn argue that restorative practices, grounded in relational theory, have much to offer communities attempting to repair the harm caused by massive crimes that strike at the heart

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<sup>52</sup> See articles, such as Trumbull, C.P., "The Victims of Victim Participation in International Criminal Proceedings," *Michigan Journal of International Law*, 29(4)777-826 (2007-8).

of the community.<sup>53</sup> It is restorative justice's focus on the restoration of fractured relationships to those of equality that is particularly beneficial in cases of widespread and serious crimes that shatter community relationships.

Even though there are similarities between the Kenyan and the South African situation (seeking justice for the victims) the point of departure is that Robert and Jennifer's article is discussing the achievement of restorative justice through the Truth and Reconciliation Commission (TRC) while the current study is assessing the achievement of restorative justice vis-a-vis challenges of implementation, of the victims' rights of participation, protection and reparation on the Kenyan cases at the International Criminal Court.

In his article on the rights of victims in Cambodia, David Boyle asserts that victims have the right under Cambodian law to participate in the Cambodian Extraordinary Chambers' trials.<sup>54</sup> The manner in which they will exercise this right remains unsettled, but will affect whether these trials are eventually fair, their impact on national reconciliation, and the establishment of precedents for future Cambodian litigation. The exercise of victims' rights should be adapted to the context of trials for mass crimes, affecting victim participation, representation, protection and reparation.

Boyle has based his study specifically on the Cambodian litigation. In his article, he argues that there is a need to handle the issue of victim participation in the Extraordinary Chambers in the

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<sup>53</sup> Howse, R. and Llewellyn, J.J., "Institutions for Restorative Justice: The South African Truth and Reconciliation Commission," *University of Toronto Law Journal*, 49(3), 355-388 (1999a).

<sup>54</sup> D.Boyle, "The Rights of Victims: Participation, Representation, Protection, Reparation," 4 *Journal of International Criminal Justice*, 307-313 (2006).



Courts of Cambodia (hereinafter, ECCC) with a lot of caution so as to bring out the intended results of a fair trial. This is more so since it will create a precedent for future litigations which will draw heavily on the success or failure of the tribunal.

This study draws a parallel with the situation in Cambodia in that while the Cambodian case is creating a precedent for future litigation, the Kenyan cases at the ICC are in themselves creating a similar precedent not only for Kenya judicial process but also for the ICC. However, this study differs from Boyle's in that while his study is on Cambodia, this study is an assessment of the challenges of implementing the ICC victims' right to participation, protection and reparation to the victims of post election violence in Kenya.

In their article on victim participation in the trials before the ECCC, Rudina Jasini and Victoria Phan assess the utility of victim participation in the trials before the ECCC, in fostering reconciliation and realizing restorative justice.<sup>55</sup> Specifically, it investigates the parameters of a legal mechanism designed to give 'victims of atrocity' a voice, whilst striking a vital balance between rights of victims and rights of defendants to a fair trial.

While participation affords victims the opportunity to present their views and observations, thereby enhancing prospects for retributive and restorative justice, this article submits that participation affords the international community an historic opportunity to meet Rome Statute

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<sup>55</sup> Rudina Jasini and Victoria Phan, "Victim Participation at the Extra Ordinary Chambers in the Courts of Cambodia: Are Retributive and Restorative Principle Enhancing the Prospect of Justice?," *Cambridge Review of International Affairs*, Vol.24, Issue 3, (2011).

objectives to ‘not only to bring criminals to justice but also to help the victims themselves obtain justice’. Indeed while concrete benefits of participation remain to be seen, victim participation in the ECCC's case offers promise for breaking new ground, setting international standards and establishing precedence for other ad hoc and hybrid tribunals as well as the permanent International Criminal Court.

This study takes cognizance of the different opinions on what victims wish to achieve by participating in a criminal court process. On the one hand, retribution is often seen as the primary goal, on the other hand there is said to be the desire for healing and forgiveness. Indeed this article has brought to the fore the benefits that the Rome Statute attributes to the victims through the provision of the participation of victims in the judicial process. However, while Rudina's article is on the Cambodian litigations, the current study has concentrated only on the Kenyan cases currently at the ICC.

In his book, Stover describes experiences at the International Criminal Tribunal for the former Yugoslavia (hereinafter, ICTY), that there, most of the witnesses expressed no desire to seek revenge.<sup>56</sup> Some especially those who had been raped or tortured had harbored such fantasies after their release from captivity, but these had soon dissipated. Instead many victims expressed the need that truth shall be revealed and that society officially condemned the criminal act.

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<sup>56</sup> See Stover, *The Witnesses War Crimes and the Promise of Justice in The Hague*. Philadelphia, University of Pennsylvania Press, at page 76 (2005) .

Victims did not clamour for more severe punishment but rather wanted the perpetrator to be held accountable officially.

There are similarities between Yugoslavia and the Kenyan case in that just like in Yugoslavia, Kenyan victims of post election violence have been crying for justice which the ICC has promised to provide. However, while the current study seeks to assess the extent to which the ICC will provide the restorative justice to the post election violence victims through participation, protection and reparation Stover's book is on the ICTY. By use of the survey this study seeks to establish how the victims feel towards the Courts process in order to ascertain whether justice has been done.

In her interview, Wendy Lobwein, Support Officer of the Victim and Witnesses Unit of the ICTY, inferred that from the many anecdotes of hundreds of witnesses, that victims and witnesses essentially came to testify for four reasons: to speak for the dead, to look for justice in the present and to help the truth be known by the world, in the hope that such crimes could be prevented in the future.<sup>57</sup>

Wendy's response informs this study in that every victim has their own story to tell about the conflict they have been through. Just like the conflict in Yugoslavia was fueled by ethnic rivalry, the same was with the Kenyan situation where ethnic rivalry erupted into unprecedented violence. In assessing the challenges of implementing victims' rights to participation, protection

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<sup>57</sup> See Rohne, H.C The Victims and Witnesses Section at the ICTY. An Interview with Wendy Lobwein, Max Planck (2005). .

and reparation, this study seeks to find out how restorative justice is being achieved in the Kenyan cases. Through target respondent interviews, this study seeks to find out from the victims their experience during participation in the ICC judicial proceedings. This way the Kenyan government can be in a position of implementing measures to vindicate the victims.

In his book, Rohne de scribe the events in Srebrenica and the people from Srebrenica whom he talked to, wanted the leaders punished but mostly had no desire that all Serbs be punished.<sup>58</sup> On the contrary, many expressed the desire to live with Serbs in peace as they did before the war.

Rohne book illuminates the darkness that comes about due to internal conflict. It is relevant to this study in that just like the victims in Srebrenica expressed the desire to live peacefully with the Serbs, majority of the victims in Kenyan situation, having lived in the same area for over sixteen years were desirous to live in peace with their offenders.

This study is however different from Rohne in that while Rohne's book is on the conflict in former Yugoslavia, this study is basically on the Kenyan situation. However the desire for the victims to see the perpetrators punished is one that is relevant to this study since both countries faced similar conflicts as far as ethnic rivalry is concerned.

In his article on Restorative Justice and Victims of Crime in Kenya, N.R.O.Ombija examines the extent to which restorative justice is applicable in Kenya.<sup>59</sup> He first examines the legal basis for adopting or implementing restorative justice in Kenya and asserts that the Judicature Act gives

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<sup>58</sup> Ibid.,

<sup>59</sup> Justice N.R.O.Ombija, "Restorative Justice and Victims of Crime in Kenya: A Practitioner's Perspective" *Kenya Law Review Journal*, Vol.II. (2008-2010)

the sources of the laws of Kenya which in extension gives the guidelines for this implementation.<sup>60</sup>

Ombija explains further that an examination of the sentencing as applied in Kenya demonstrates the extent to which restorative justice may be applicable in Kenya. He concludes that the sentencing policy in Kenya and the types of sentences offered do not look at the victim as a factor to be considered. Likewise, the sentencing policy does not offer an opportunity for dialogue and problem solving amongst offenders and their families. This then leads him to assert that in Kenya's written law, the concept of restorative justice does not have a firm foundation.

The article by Ombija informs this study in that it is examining the extent to which restorative justice is applicable in Kenya whereas this study has focused upon the assessment of the challenges of implementing victims' rights vis-a vis desired achievement of restorative justice in the Kenyan case currently at the ICC. However the point of departure is that whereas Ombija is focusing on the national courts, this study's focus is on the ICC and the application of its provisions on victims' rights to victims of the 2007/2008 post election violence in Kenya.

Kenyan for Peace with Truth and Justice, in its special report entitled, The Post- Election Violence in Kenya: Seeking Justice for Victims, argues that the proposed Special Tribunal for Kenya has the potential to act as an engine for the reforms of Kenya's judicial system.<sup>61</sup> The report queries whether private prosecutions are viable for seeking justice for the victims of post

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<sup>60</sup> Cap 8 of the Laws of Kenya.

<sup>61</sup> Kenyan For Peace With Truth and Justice, a coalition of citizen and organizations working in the human rights, governance and legal areas that came together after the crisis over the disputed results of the 2007 presidential elections and the violence that followed it. Special Report, July 2010. For the full version of the report visit [www.africog.org](http://www.africog.org) (accessed on 10<sup>th</sup> March 2012).

election violence, given the current political climate prevailing in the country. The report explores the possibility of using regional and international mechanisms such as the African Union (AU), the African Court on Human and People Rights (ACHPR) and the Pan-African Parliament (PAP) amongst others. The report points out that the ICC, the proposed Special Tribunal, Universal Jurisdiction actions and private prosecutions are unlikely to satisfy some survivors' need to see low-level offenders brought to justice. All the same, the report concludes that these approaches have a strong potential in providing for retributive or punitive justice in relation to the crimes of high and middle-level perpetrators.

The current study is informed by this report in as far as achievement of justice for the post election victims is concerned. Whereas the report explores different avenues for seeking justice for the victims, the current study has concentrated on the ICC only and has not explored other avenues, such as the regional bodies or the special local tribunal.

In a study on the Reparative Demands of Kenyans Victims of Human Rights Violations, Simon Robins asserts that reparations are the most victims –centered of the various transitional justice mechanisms that have been used in different post-conflict settings.<sup>62</sup> In Kenya, he argues, early attention to transitional justice has focused on the Truth Justice and Reconciliation Commission (TJRC). Victims saw the TJRC as the pre-eminent opportunity to narrate their experience of human rights violation. The study emphasizes that reparations to victims are accepted as the main goal of pursuing transitional justice in Kenya.

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<sup>62</sup> Simon Robins, "A Study of the Reparative Demands of Kenyan Victims of Human Rights Violations," *International Centre for Transitional Justice*, 2011 @ [www.ictj.org](http://www.ictj.org) (accessed on 10<sup>th</sup> March, 2012).

The study recommends the implementation of an urgent reparation program in Kenya that will address the needs of the most vulnerable victims. Further the study recommends the establishments by the State of a process leading to a more comprehensive reparation program, in which the wide range of violations of civil and political as well as social and economic rights that victims have are acknowledged and their consequences and causes addressed through a combination of symbolic as well as material reparations measures.

This study informs the current study in that it's expounding more on the use of reparations as a mitigating measure against violation of rights of victims. The study has focused on Kenya and explores victims of post election as well as victims of economic and social rights abuse. However the current study assesses the challenges of implementing victims' rights at the ICC and specifically on the post election victims per se. It does not deal with all victims of human rights abuse as does Robin's study.

In an article on the Gacaca Justice in Post-Genocide Rwanda, Alana Erin Tiemessen explains how restorative justice is working amongst the victims and the offenders of the genocide.<sup>63</sup> Gacaca, which means "judgment on the grass", offers a pragmatic and community based solution and represents a model of restorative justice because it focuses on the healing of victims and perpetrators, confessions, plea bargains and reintegration. It is these characteristics that render it a radically different approach from the retributive and punitive nature of justice at the ICTR and the national courts. To juxtapose the principles and procedures of Gacaca with the ICTR is to contextualize the normative differences between the two types of Courts.

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<sup>63</sup> Alana Erin T, "After Arusha: Gacaca Justice in Post-Genocide Rwanda," *African Studies Quarterly* Vol 8:Issue I, (2004)

The norms underlying Gacaca reflect both cultural traditions and the characteristics of restorative justice. The benefits that Gacaca brings to the reconciliation process are tied to the integrity of its indignity and its adherence to a restorative model of justice. Great hope has been placed in the ability of restorative justice to contribute to reconciliation at the individual and community level. This article is relevant to this study because of its explanations on how restorative justice principles are being implemented in the post –genocide Rwanda. It offers insight on how restorative justice is helping in the reconciliation of victims of the genocide with the offenders. Whereas the Gacaca principle is applied as an out of court settlement, this study has focused on the judicial process of the ICC as provided for by the Rome Statute on victims' rights and the application of those rights to the Kenyan cases.

In her article on restorative justice, Andrea Gittlemen, cites the South African Truth and Reconciliation Commission,<sup>64</sup> as an appropriate case study for a discussion on the place of restorative justice in the context of domestic violence cases in South Africa.<sup>65</sup> Emerging from apartheid, South Africa initiated its Truth and Reconciliation Commission (TRC) in 1995, to encourage truth telling about abuses that had happened under the former regime and to foster reconciliation between previously adverse groups. The TRC helped people overcome what had been done to them so that a future might be built.<sup>66</sup> Andrea argues that, although restorative justice has many applications, what worked in one situation may not be an appropriate solution

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<sup>64</sup> Andre Gittlemen, Drawing the Line: When to Apply Restorative Justice to Cases of Violence against Women New York University School of Law at [www.americanbar.org/content/dam/aba/Gittleman2.pdf](http://www.americanbar.org/content/dam/aba/Gittleman2.pdf) (accessed on 16<sup>th</sup> June 2012).

<sup>65</sup> Official Truth and Reconciliation Commission Website. <http://www.doj.gov.za/trc> (accessed on 16<sup>th</sup> June 2012)

<sup>66</sup> Collen Scott, "The South African Truth and Reconciliation Commission: Harrowing the Ground So that Others May Build," *European Platform for Conflict Prevention and Transformation*. [http://www.gppac.net/documents/pbp/11/3\\_safric.htm](http://www.gppac.net/documents/pbp/11/3_safric.htm) (accessed on 16th June 2012).



for all societies with divided pasts. The South African case is often cited as the main success story of restorative justice work.

Essentially this paper demonstrates the success story of the application restorative justice in post conflict society. Whereas this study has focused on restorative justice from the ICC context, the paper makes the case for the present study in demonstrating that restorative justice while fully implemented can bring healing and reconciliation in a society.

## **1.8 Theoretical Framework**

This study seeks to demonstrate that victim' rights to participation, protection and reparation as provided for by the Rome Statute of the International Criminal Court have not been achieved in the Kenyan cases currently before the ICC. The assessment of these rights is based on the theory of justice in general and specifically on the restorative justice theory which aims to restore the victims' rights. The victims' right or restorative justice is the dependent variable which in this study was influenced by the independent variables of victims' participation, victims' protection and victims' reparations.

To appreciate the notion of restorative justice and victims' rights, one has to understand the concept of justice. Justice is an abstract concept.<sup>67</sup> It is used to measure what is naturally right and what is not. The concept of justice comes from the very structure of social life and organization. Justice represents the beliefs and practices of the community. Justice is bound up

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<sup>67</sup> Zehr, H. Changing Lenses: A New Focus for Crime and Justice, Scottsdale, Pennsylvania: Herald Press. (1990).

with the system of social relationship existing in the society whose institutions rest on the collective basis.<sup>68</sup> It is this background that embodies the concept of restorative justice and the reference to the victim, the family and the community.

One of the leading jurists in this area of justice is Aristotle who thought about justice and developed theories about the sublime aspects of being just. According to Aristotle,<sup>69</sup> justice can mean either lawfulness or fairness, since injustice is lawlessness and unfairness. In his view, laws encourage people to behave virtuously, so, the just person, who by definition is lawful, will necessarily be virtuous. According to Aristotle, justice must be distributed proportionately. Aristotle attempted to dissect justice into its smallest components, causing him to postulate three kinds: distributive, correction and equity.<sup>70</sup> Distributive justice, according to Aristotle, is a relative distribution of property, honor, disgrace etc between two or more persons which results in equality of ratios, meaning that the objects to be distributed are divided proportionately to the merits of each person.

Corrective justice unlike distributive justice is the direct equality that is one to one, of exchange between two parties. The law here is concerned only with the “distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged.” Aristotle’s presumption here is that the law, through the judge, is just and that it is the function of the judge

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<sup>68</sup> Ibid.,

<sup>69</sup> Introduction To Aristotle, Edited by Richard McKeon, Modern Library College Editions,(1947)

<sup>70</sup> Ibid.,

then, to equalize the defect and the excess, or the gain and loss, by determining the intermediate between them.

Equitable justice is that kind of justice which Aristotle postulated as being a form of justice superior to legal justice. Realizing that the universality (generality) of the law sometimes gave rise to injustices, Aristotle postulated equity which was to function as a correction of the law where it is defective owing to its universality.

John Rawls is another widely regarded philosopher on justice. He is known for his theory of justice and fairness. Rawls' theory provides a framework that explains the significance, in a society assumed to consist of free and equal persons, of political and personal liberties, or equal opportunity, and cooperative arrangements that benefit the more and the less advantaged members of society. In his book, *A Theory of Justice*, Rawls explains how the logical ordering of principles of justice may answer such questions as how society should be structured, how basic rights and duties are assigned and how social and economic advantages should be distributed to all members of society.<sup>71</sup>

Rawls discusses the applicability of justice as fairness (which is a social contract theory) and argues that social contract theory provides stronger support for equality of basic rights for all individuals. In the theory of justice as fairness, the principle of equal rights for all citizens has

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<sup>71</sup> Rawls, John, *A Theory of Justice*. Cambridge: Harvard University Press, (1971).

priority over the goal of producing the greatest amount of happiness for the largest number of individuals<sup>72</sup>. According to Rawls, justice as fairness implies that the principles of justice apply equally to all individuals. These principles, he asserts, must be decided upon in such a way as to benefit all individuals and must not be designed to favor the interests of a particular group of individuals over another group of individuals.<sup>73</sup>

In essence, the argument here is that any application of the law in the society must be seen to be fair and just to all individuals. Thus in determining whether or not the law is just and fair, it is important to analyze the other factors that impact on the application of the law. This approach is applied in the current study to support the argument that in providing victims the rights to participation, protection and reparation the International Criminal Court aims at applying the law fairly between the perpetrator and the victim.

It is important to go beyond the statutory provisions of the Rome Statute, and consider factors such as definition of the victim, victim confidentiality, information on the Court process and their relation to the victim and the perpetrator. In view of this, the analysis of the victims' rights in the current study will take a holistic view of assessing the application of victims' rights to participation, protection and reparation in the Kenyan cases before the ICC.

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<sup>72</sup> Ibid., pg.26.

<sup>73</sup> Ibid., pg.53.

On the other hand, restorative justice is a legal theory based upon values that emphasize the importance of providing opportunities for more active involvement in the process of offering support and assistance to crime victims, holding offenders directly accountable to the people and communities they have violated, restoring the emotional and material losses of the victims and offering offenders the opportunities for competency development and integration into productive community lives.<sup>74</sup> Essentially, restorative justice values correspond with what victims want: recognition and validation from the criminal justice system as well as protection from the offender without burdening victims with too much responsibility.<sup>75</sup> It also lays a foundation to open up the criminal justice process to include victims.

Restorative justice as a legal theory applies the tools of social equilibrium theory and conciliation theory to the analysis of victim's rights. The social equilibrium theory contends that an anti-social conduct has the effect of disrupting the equilibrium of social and economic forces. The disruption of the equilibrium once disrupted must be rectified with immediate effect. The equilibrium may require the compensation and restitution to the affected victim by the perpetrator.

In contrast, the conciliation theory aims at a permanent and amicable settlement. Instead of using force to arrive at a verdict, the adjudicators adopt an arbitative and freewill settlement applying persuasion and reason as the main tools. The goal is to settle rather than decide, appease and

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<sup>74</sup> Supra, note 57.

<sup>75</sup> Villa-Vicencio, C, "Transitional justice, restoration, and prosecution," in D. Sullivan and L. Tifft (eds.), Handbook of Restorative Justice: A Global Perspective, London: Routledge, p. 387 (2006).

reconsider rather than force. In a justice and fair process victims are invited to participate into the process and by protecting them, given an opportunity to express their views and concerns. As active participants, victims are empowered and can influence what happens.<sup>76</sup>

Thus, the Kenyan example provides a more recent trend by the ICC through its Outreach Unit to ensure effective information during the initial stages in order that victims are better aware of their potential rights. The Court has sought to improve its outreach mandate recognizing that “victims must first be aware of their right to participate so that they can make informed decisions about whether and how to exercise it, and must be assisted to apply to participate throughout, if they wish to do so.”<sup>77</sup>

In this study, it is argued that the recognition of victims by legal authorities that this approach offers is likely to enhance victim satisfaction with the criminal justice system. By providing victims with the recognition that they seek and giving them, through legal counsel, a clear understanding of how the criminal justice system works, victim participation in the criminal justice process can help empower victims and combat the sense of powerlessness that many victims feel during criminal proceedings.<sup>78</sup> The emergence of restorative justice, and in particular restorative justice values, provides an opportunity for criminal justice authorities to treat victims

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<sup>76</sup> Ibid.,

<sup>77</sup> International Criminal Court, Report of the Court on the Strategy in Relation to Victims, ICC-ASP/8/45, 10 November 2009, para.3, pg. 4.

<sup>78</sup> Wemmers, J. Victims in the Criminal Justice System. Amsterdam: Kugler (1996).

as well as offenders with dignity and respect while upholding the justice and fairness in the law.<sup>79</sup>

## **1.9 Research Methodology**

The research is desk research supplemented by limited primary research using non probability purposive/judgmental sampling technique. The research will use secondary materials which will be sourced diversely from resources such as the internet and local libraries. It will be complemented by courts library information, with documented facts on this subject being explored. It will include an in depth case analysis of the leading ICC jurisprudence, with respect to the rights to protection, participation and reparations to allow for an assessment of the challenges of implementation of these statutory rights in the Kenyan cases before the ICC.

The research will be supplemented by primary data through key informants on the issue of victim participation, protection and reparations. Actual victims of the 2007/2008 post election violence victims are identified in the five regions that were mostly affected by the violence, namely, Nairobi, Coast, Rift Valley, Nyanza and Central regions and interviewed by way of Target Respondents Interviews (TRI) using the questionnaire in the appendix and focused group discussions. For purposes of further complementing of the study, private interviews will be

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<sup>79</sup> Ibid.,

conducted with persons who were actively involved with the victims at the Court level who, for purposes of security, remain anonymous.

The study will not deal with the whole affected population and the Non-Probability Purposive/Judgmental sampling technique will be used. Under this sampling technique, there is prior decision on who to include and who to exclude. In this case, areas where there was no prevalence of post election violence will be excluded.

## **10. Chapter Breakdown**

### **Chapter One**

The chapter entails a general introduction and conceptual analysis of the study title which is the challenges of implementing the victims' right to participation, protection and reparation. It discusses the background to the problem, statement of the problem, research questions, research objectives, research methodology and theoretical framework. It also includes review of the literature relevant to the study and justification of the study.

### **Chapter Two**

The chapter considers some of the key developments in victim participation that are illustrative of the emerging areas of tension between retributive and restorative aims. In order to assess the right to participation, a few aspects of the Court system are outlined. These are a brief sketch of the overall ICC process, an explanation of the Rome Statute definition of victim, and an overview of the key statutory victim participation provisions. The chapter also provides a review



of the victim's protection rights. It assesses the challenges of implementing the victim's right to protection, seeking to reposition victims as active participants, while acknowledging that this must be done in a manner that minimizes any potential for additional harm to participants. These issues are assessed in light of the data analysis of the study presented in Chapter Four.

### **Chapter Three**

This chapter assesses the challenges of implementing victim's reparations rights. It reviews principles relating to reparations to victims, which includes restitution, compensation and rehabilitation as established by the ICC. The chapter also explores the work of the Trust Fund for Victims and the challenges it is likely to face in the administration of reparation awards to the victims.

### **Chapter Four**

The chapter focuses on the presentation of analyzed data. It assesses the challenges of the implementation of victims' right of participation, right of protection and right of reparations in Kenyan cases currently before the ICC. The analyses address the research questions.

### **Chapter Five**

The concluding chapter presents the research findings, summary, conclusion and recommendations. It looks at the evidence, facts gathered by the research and the law and conclusions based on the Kenyan environment.

## CHAPTER TWO

### ROME STATUTE AND VICTIMS RIGHTS TO PARTICIPATION AND PROTECTION

#### 2.1 Introduction

This chapter seeks to consider some of the key developments in victims' right to participation and victims' right to protection. It expounds on the literature review and theoretical framework on victims' rights, which were reviewed in Chapter One. The right to participation is the first statutory right accorded to victims as enshrined in Articles 15(3), 19(3), and 68(3) of the Rome Statute.<sup>1</sup> The right to participation allows for the involvement of victims and their legal representatives, in a variety of roles during the entire Court process. It positions victims as active participants and has aptly been described as "the promise of justice *for*, not justice *with*, the victims."<sup>2</sup> The right to protection is the second statutory right accorded to victims under the Rome Statute of the International Criminal Court. It seeks to reposition victims as active participants, while acknowledging that this must be done in a manner that minimizes any potential for additional harm to victims.<sup>3</sup>

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<sup>1</sup> Rome Statute of the International Criminal Court, *adopted* on 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force*, 1 July 2002, U.N. Doc. A/CONF.183/9, Preamble (1998) [hereinafter "Rome Statute"].

<sup>2</sup> Wemmers, J. *Victims in the Criminal Justice System*. (Amsterdam: Kugler 1996).

<sup>3</sup> Brady, "H. Protective and Special Measures for Victims and Witnesses," in R. Lee (ed.), *ICC: Elements of Crimes & Rules of Procedure & Evidence*, (Ardsley, New York: Transnational Publishers, Inc, 2001), pp. 451-2.

This chapter starts with an overview of the ICC process, an explanation on the definition of victim as defined by the Rome Statute, an overview of the key statutory victims' participation provisions and an emphasis on common legal representation.

When discussing the right to protection, this chapter will consider an explanation on the issue of anonymity as a protective measure of the victims, an overview of the key statutory provisions on victims' protection, protection as the complement to the right to participation and the establishment of the office of Public Counsel for Victims. The application of these rights in other cases as discussed herein offers a better view of how these rights are being applied to the victims in the Kenyan situation. The right to reparation will be discussed in Chapter Three. An understanding of these victims' rights as enshrined in the Rome statute is paramount in proving the challenges being faced by the Court as it seeks to implement these rights in the Kenyan cases currently at the ICC.

## **2.2 An Overview of the ICC Process.**

The ICC process has stages by which a matter develops and proceeds through to the trial and reparations proceedings in order to properly gauge victim participation. States Parties or the Security Council can refer situations of crimes within the jurisdiction of the Court to the Prosecutor.<sup>4</sup> After evaluating the information, the Prosecutor may then commence an

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<sup>4</sup> Rome Statute, Articles 13-14.

investigation. The Prosecutor also has the power to commence an investigation *proprio motu* if he finds there is sufficient information.<sup>5</sup>

At the investigation stage the Pre-Trial Chamber oversees matters and, on the application of the Prosecutor, may issue a warrant of arrest or a summons to appear for an accused.<sup>6</sup> Once an individual voluntarily appears before the Court or has been surrendered to the Court, the Pre-Trial Chamber holds a hearing to confirm the charges that will be the basis of the trial.<sup>7</sup> A case is then assigned to a Trial Chamber following the confirmation of charges, in preparation for the trial and subsequent reparations proceedings. Throughout the process, the accused or the Prosecutor may appeal decisions of the Chambers as specified by the Statute. At this stage the Appeals Chamber is to provide further guidance on the proper interpretation of key statutory provisions.

## **2.3 Defining the Victim.**

### **2.3.1 Provision of Rule 85**

Before considering actual participation rights, the first question that must be addressed is who can apply for victim status within the Rome Statute regime? The parameters are established by the Court's Rules of Procedure and Evidence (RPE), in particular Rule 85, which defines the victims.<sup>8</sup> This definition marked an expansion from the previous *ad hoc* tribunals' definition that

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<sup>5</sup> Ibid., Article 15.

<sup>6</sup> Ibid., Articles 56-60.

<sup>7</sup> Ibid., Article 61.

<sup>8</sup> Rules of Procedure and Evidence, July 1, 2003, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 101 (Antonio Casesse et al, eds.,

restricted the scope to a direct victim of a crime, described as “a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.”<sup>9</sup> Rule 85 establishes the following criteria: (i) the applicant must be a natural person or in certain circumstances an organization or institution; (ii) the applicant must have suffered harm; (iii) the crime must fall within the Court’s jurisdiction; and (iv) there must be a causal link between a crime and the harm.<sup>10</sup>

From the survey findings, majority of the respondents met the criteria as stipulated under these provisions and therefore qualified as victims.<sup>11</sup>

### **2.3.2 A Requirement of Personal Harm**

Rule 85 outlines that victims are those who have “suffered harm as a result of the commission of any crime “within the jurisdiction of the Court.”<sup>12</sup> However, it lacks a definition of harm.

The Trial Chamber I’s January 18, 2008 decision in *Lubanga* provided the first substantive consideration of the conceptualization of harm, where the Chamber sought to provide general guidelines on all matters relating to the participation of victims throughout the proceedings.<sup>13</sup>

Trial Chamber I held that “whereas Rule 85(b) of the Rules provides that legal persons must

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2002), available at [http://www.un.org/law/icc/asp/1stsession/report/english/part\\_ii\\_a\\_e.pdf](http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_a_e.pdf) [hereinafter Rules of Procedure and Evidence].(accessed on 10<sup>th</sup> March 2012).

<sup>9</sup> Fernandez de Gurmendi, S.A, “ Definition of Victims and General Principle,” in R. Lee (ed.), *ICC: Elements of Crimes & Rules of Procedure & Evidence*, Ardsley, New York: Transnational Publishers, Inc 2001), p. 428.

<sup>10</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, Fourth Decision on Victims’ Participation, Pre-Trial Chamber III, ICC-01/05-01/08- 320, 12 December 2008, para. 30. *See also* Pre-Trial Chamber I *DRC Situation* Decision of 17 January 2006, para. 79.

<sup>11</sup> See Table 2 on the effects of Post Election Violence.

<sup>12</sup> Rules of Procedure and Evidence, *Supra* note 8.

<sup>13</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims’ participation, Trial Chamber I, ICC-01/04-01/06-1119, 18 January 2008, Lubanga Decision of 18 January 2008].

have ‘sustained direct harm’, Rule 85(a) of the Rules does not include that stipulation for natural persons, and applying a purposive interpretation, it follows that people can be direct or indirect victims of a crime.”<sup>14</sup> The Trial Chamber then sought guidance from the 2005 Basic Principles according to which “a victim may suffer, either individually or collectively, from harm in a variety of different ways such as physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights.”<sup>15</sup>

In its reconsideration of this decision, the Appeals Chamber provided further clarification stating that while harm suffered by victims does not necessarily have to be direct, it must be personal.<sup>16</sup> It confirmed that harm could include material, physical, and psychological harm as long as it is suffered personally.<sup>17</sup>

The application of Rule 85(iv) criteria that there must be a causal link between a crime and the harm is fundamental to this study in that, from the research findings it was evident that a lot of victims who suffered direct harm as a result of the violence were never included in the list of those who participated in the ICC process. Indeed, majority of those interviewed queried the criteria used to select the participants. Restorative justice allows for the inclusion of all parties affected by harm, victim, offender and community. Subsequently, since victims are only those

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<sup>14</sup> Ibid., para. 91.

<sup>15</sup> See United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res 40/34 U.N. GAOR, 40th Session., 96th plenary meeting.

<sup>16</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Partly Dissenting opinion of Judge G.M. Pikis, 23 July 2008, ICC-01/04-01/06-1432, 11 July 2008.

<sup>17</sup> Ibid., para.3.

that have suffered harm personally and in relation to the charges as presented, there remain many victims who may be barred from participation within the Rome Statute regime.

## **2.4 Treaty Provisions on the Right to Participation.**

Having considered the definition of victim, it is now possible to assess the actual right to participation afforded to victims within the Rome Statute. There are three key statutory provisions provided within the Rome Statute, which outline the scope of the right to participation provided to victims.

Article 15(3) describes the possible involvement by victims through the provision of information and representations during an examination of a Prosecutor's request for authorization to proceed with an investigation.<sup>18</sup> Article 19(3) provides for the submission of observations regarding jurisdiction or admissibility applications.<sup>19</sup> Article 68(3) provides that where the personal interests of the 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 and a fair and impartial trial.<sup>20</sup>

The various Chambers, in their determination of victim status, have determined that beyond merely meeting the definitional test for a victim, the right to participation in proceedings as provided for in Article 68(3) must be considered for each stage. This has resulted in the

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<sup>18</sup> Rome Statute, Article 15(3).

<sup>19</sup> Ibid., Article 19(3).

<sup>20</sup> Ibid., Article 68(3).

development of four part test for participation in proceedings: (i) qualification of victim within the meaning of Rule 85; (ii) a demonstration that the applicant's personal interests are affected by the proceedings; (iii) that their participation is appropriate at that particular stage; and (iv) that the manner of such participation would not be prejudicial to or inconsistent with the rights of the accused and a fair trial.<sup>21</sup>

In the Kenyan scenario, the fact that majority of victims have not been given a chance to participate in the judicial process, despite having made formal applications thereby affirming their interests in the proceedings, cast doubts on the practicality of this provision.<sup>22</sup>

#### **2.4.1 The Investigation Stage**

In order to ensure adequate and effective victim participation throughout all stages of the Court process, proper involvement during these first stages is crucial. Article 68(3) provides that “the Court shall permit views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court.”<sup>23</sup> It was appropriate to interpret the proper definition of victim participation for the scope of proceedings covered by this provision.

A trend emerged that allowed for a general right of participation during the investigation stage<sup>24</sup>. However, once leave to appeal was granted, this expansive interpretation was narrowed to participation only during *judicial* proceedings at the investigation phase.<sup>25</sup>

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<sup>21</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision entitled “Decision on Victims’ Participation”, Trial Chamber I, ICC-01/04-01/06-1335, 16 May 2008, para. 36.

<sup>22</sup> See Table 3 on the Victims Participation.

<sup>23</sup> Rome Statute, Art. 68(3).

<sup>24</sup> *Situation in the Democratic Republic of the Congo*, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber I, ICC-



The study established that in Kenya according to majority of the respondents (68%) the victims of the post election violence never took part in the investigation process,<sup>26</sup> thereby implying that the Article 68(3) of the Rome Statute on the was not fully applied. It is, however, noted that the ICC carried out investigations in a discrete manner to avoid endangering the victims.<sup>27</sup>

#### **2.4.2 Interpretation of Article 68(3)**

The first recognition of the right of victims to participate during the investigation stage of a situation was provided by the Pre-Trial Chamber I's decision of January 16 2006.<sup>28</sup> The Pre-Trial Chamber I rejected Prosecution's argument challenging the applicability of Article 68(3) to the investigation phase.<sup>29</sup>

Most importantly, from a restorative approach, the Chamber held that a teleological interpretation that allowed for participation during the investigation stage was "consistent with the object and purpose of the victims participation regime established by the drafters of the Statute, which ensued from a debate that took place in the context of the growing emphasis placed on the role of victims."<sup>30</sup> The Chamber held that, "the Statute grants victims an independent voice and role in proceedings before the Court" drawing upon broader international

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<sup>25</sup> 01/04-101, 17 January 2006 [hereinafter Pre-Trial Chamber I *DRC Situation* Decision of 17 January 2006].  
*Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court', Appeals Chamber, ICC-01/04-01/06-2205, 8 December 2009, paras. 88-97.

<sup>26</sup> *Supra*, note 22.

<sup>27</sup> KPTJ Bulletin September 2011, The ICC and Kenya: Understanding the Confirmation of Charges Hearings.

<sup>28</sup> Pre-Trial Chamber I *DRC Situation* Decision of 17 January 2006, para. 54.

<sup>29</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution's Reply on the Applications for Participation 01/041/dp to 01/04- 6/dp, OTP, ICC-01/04-84-Conf, 15 August 2005.

<sup>30</sup> Pre-Trial Chamber I *DRC Situation* Decision of 17 January 2006, para. 50.

jurisprudence, which had also recognized that often the roles and objectives of the Prosecution and victims do not align.<sup>31</sup>

### 2.4.3 Article 15(3) on Victims' Representation

The Court order required the VPRS to (i) identify community leaders of affected victim groups against the Rule 85 victim definitional requirements, and (iv) summarize the representations into a report for the Court.<sup>32</sup> This approach stood in contrast to the more limited role originally promoted by the OTP who, out of security concerns, had wished to notify victims by the more general means of a widely publicized general notification. The Prosecutor argued that direct conduct would “pose a danger to the integrity of a future investigation or to the life or well-being of victims and witnesses.”<sup>33</sup> This is reminiscent of the OTP’s approach during the *Darfur, Sudan Situation* where after significant delays the Pre-Trial Chamber sought advice from experts on the ability to conduct an investigation despite security concerns.<sup>34</sup>

In its report filed March 29, 2010 the Pre Trial Chamber highlighted that there was significant room for improvement in victims’ awareness of Court procedures.<sup>35</sup> It noted that most victims were unaware of victims’ rights to make representations and the few who were aware were

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<sup>31</sup> Ibid.,

<sup>32</sup> *Situation in the Republic of Kenya*, Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute, Pre-Trial Chamber II, ICC-01/09-4, 10 December 2009.

<sup>33</sup> *Situation in the Republic of Kenya*, Request for authorization of an investigation pursuant to Article 15, OTP, ICC-01/09-3, 26 November 2009.

<sup>34</sup> Schabas, W.A., *An Introduction to the International Court* (4th ed.). New York: (Cambridge University Press, 2011) pp. 11-16.

<sup>35</sup> *Situation in the Republic of Kenya*, Public Redacted Version of Report Concerning Victims' Representations (ICC-01/09-6-Conf-Exp) and Annexes 2 to 10, Registrar, ICC-01/09-6-Red, 29 March 2010.

confused as to what information should be included.<sup>36</sup> The report canvassed victims' views, but what it illustrated was that an effective outreach program in Kenya was missing. While there was substantial media interest in the Court's potential investigation, there was also a great deal of mixed messaging presented by the different political groups involved.

The challenge of providing accurate information and outreach to potential victims remains a problem within the Court, as verified in study undertaken. The ICC later undertook a more proactive outreach program in an attempt to rectify this gap, which included more regular informational visits and the creation of a Kenyan TV series, *Ask the Court*, to provide answers to the Kenyan population on the Court's investigation and later summonses to appear for six leading figures.<sup>37</sup>

The Kenyan example provides not only an example of a more expansive usage of the Article 15(3) representations provision, but also of a more recent trend by the ICC through its Outreach Unit to ensure effective information during the initial stages in order that victims are better aware of their potential rights. The Court has sought to improve its outreach mandate recognizing that "victims must first be aware of their right to participate so that they can take

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<sup>36</sup> Ibid.,

<sup>37</sup> ICC Press Release, ICC launches Kenyan-wide TV series *Ask the Court*, ICC-CPI-20110310-PR638, 10 March 2011, available at <http://www.icc-cpi.int/NR/exeres/96659CF9-4605-405B-9985-FB1D94875886.htm>. See also *Ask the Court* video <http://www.youtube.com/watch?v=M04D5M-q1EA> and ICC's Public Information and Outreach in Kenya, Calendar of Activities – January 31, 2011, highlighting certain activities to address misconceptions over Court activities, available at <http://www.icccpi.int/NR/rdonlyres/FFD6BCBE-AD58-4FA1-9B92-C94760F6B06E/282993/OutreachRAKNY201101ENG.pdf>. (accessed on 30<sup>th</sup> June 2012).

informed decisions about whether and how to exercise it, and must be assisted to apply to participate throughout if they wish to do so.”<sup>38</sup>

## **2.5 Emphasis on Common Legal Representation**

The final aspect of victim participation to be considered is the continued emphasis on common legal representation for victims. The need for legal representation was foreseen in the drafting process where it was argued that representation would be necessary to ensuring effective participation.<sup>39</sup>

The two primary provisions are Rule 90 that considers the assignment of legal representatives, and Rule 91 that deals with the manner in which a legal representative may participate in the proceedings. Bitti and Friman note that it was agreed by negotiators that the Court would have to facilitate the process of obtaining and sustaining legal representation for victims and therefore “there must exist a substantive incentive for the victims to group together around a common legal representative.”<sup>40</sup>

This approach was outlined for the first time in *Lubanga* where Trial Chamber I noted “that the personal appearance of a large number of victims could affect the expeditiousness and fairness of the proceedings, and given that the victims’ common views and concerns may sometimes be

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<sup>38</sup> International Criminal Court, Report of the Court on the Strategy in Relation to Victims, ICC-ASP/8/45, 10 November 2009, para. 3 p. 4.

<sup>39</sup> Bitti, G. and H. Friman, “Definition of Victims and General Principle,” in R. Lee (ed.), ICC Elements of Crimes & Rules of Procedure & Evidence, Ardsley, New York: Transnational Publishers, Inc. 2001), pp. 462-469.

<sup>40</sup> Ibid., p. 462.

better presented by a common legal representative (i.e. for reasons of language, security or expediency), the Trial Chamber will decide either *proprio motu*, or at the request of a party or participant, whether or not there should be legal representation. These incentives are specific provisions that allow for greater participatory rights for victims if they are exercised through legal representatives. This confirms Rule 90(3) whereby if victims are unable to agree upon a common representative, the Chamber may request the Registrar to choose one for them.<sup>41</sup>

In an interview with one of the respondents during the survey, it was established that the issue of Legal representation was one that affected the victims in the Kenyan case. The victims were not given a chance to choose their legal representative but instead the trial Chamber allocated them legal a representative. Given that the accused were allowed to choose their own Legal Counsels, the victims did not understand why the same could not be allowed for them. In the end victims were left to be represented by a foreign Counsel who according to them was a stranger to them and they felt they could not articulate their issues as they would have wished.

## **2.6 Treaty Provisions on the Right to Protection**

Article 68(1) requires the Prosecutor to take appropriate measures, particularly during the investigations and prosecutions of crimes to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.<sup>42</sup> Article 68(3) provides that the ICC may also protect the identity of victims and witnesses from the press and public by conducting any part of the proceedings by video camera or allow the presentation of evidence by electronic or

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<sup>41</sup> International Criminal Court Regulations of the Court, ICC-BD/01-01-04, adopted May 26, 2004, Regulation 90(3) [hereinafter ICC Regulations].

<sup>42</sup> Rome Statute Supra note 1.

other special means.<sup>43</sup> Article 68(4) authorizes the Unit to advise the Prosecutor and the rest of the ICC on such measures. It has experienced staff, trained to deal with traumatized individuals, including victims of sexual violence and child victims.<sup>44</sup>

Article 68(5) further provides that the Prosecutor may withhold the trial evidence and information, by submitting a summary thereof, if it may lead to grave endangerment of the security of the witness or his/her family.<sup>45</sup> Article 64(7) considers the scope of possible protective measures by requiring that trials be held in public.<sup>46</sup> Article 43(6) provides for the establishment of a Victims and Witnesses Unit (VWU) in the ICC Registry. The Victims and Witnesses Unit has a duty first and foremost to the interests of victims and witnesses and to act impartially in the exercise of this duty. It provides protective measures, security arrangements, counseling and other appropriate assistance to victims, witnesses who appear before the ICC and others, such as family members, who are at risk because of such testimony.<sup>47</sup> Article 5(1) (b) requires the Prosecutor during the course of an investigation or prosecution to respect the interests and personal circumstances of victims and witnesses, including age, gender and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.<sup>48</sup> In addition, pursuant to Article 57(3)(c) of the Statute, one of the functions of the Pre-Trial Chamber is, where necessary, to provide for the protection and privacy of victims and witnesses.<sup>49</sup> Rule 86, establishes, as a general principle, that a Pre-Trial Chamber, in making any determination or order, and other organs of the Court in performing their

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<sup>43</sup> Ibid.,

<sup>44</sup> Ibid.,

<sup>45</sup> Ibid.,

<sup>46</sup> Ibid.,

<sup>47</sup> Ibid.,

<sup>48</sup> Ibid.,

<sup>49</sup> Ibid.,

functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with Article 68 of the Statute.

Rule 87 pertains to protective measures which can be ordered to prevent the release of the entity or location of a victim or witness from the public or media, and includes a non-exhaustive list of possible measures.<sup>50</sup> On the other hand, Rule 88 describes special measures that may be used to facilitate the testimony of certain vulnerable victims and witnesses, such as traumatized persons, children, victims of sexual violence and the elderly.<sup>51</sup>

### **2.6.1 Anonymity as a Protective Measure**

The Trial Chamber recognizes that it is preferable that the identities of victims are not disclosed in full to the parties.<sup>52</sup> It is conscious of the particularly vulnerable position of many of these victims, who live in an area of ongoing conflict where it is difficult to ensure their safety. The Trial Chamber is also of the view that extreme care must be exercised before permitting the participation of anonymous victims, particularly in relation to the rights of the accused.<sup>53</sup>

In order not to expose them to further risks, the applicants should not be contacted directly by any organ of the Court, but only through their legal representatives or through the Victims Participation and Reparations Section (VPRS) if they have no legal representatives and, if necessary, through the Victims and Witnesses Unit (VWU).<sup>54</sup> Protective measures for victims

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<sup>50</sup> Rules of Procedure and Evidence, *supra* note 8 , Rule 87.

<sup>51</sup> *Ibid.*, Rule 88.

<sup>52</sup> *Prosecutor v. Lubanga*, Decision on the Arrangements for Participation of Victims a00001/06, a00002/06 and a00003/06 at the Confirmation Hearing, Trial Chamber I, ICC-01/04-01/06-462-tEN, 22 September 2006, para. 6.

<sup>53</sup> *Ibid.*,

<sup>54</sup> ICC Rules of Procedure and Evidence, *supra* note 8, Rule 80&81.

are often the legal means by which the Court can secure the participation of victims in the proceedings. Such measures do not constitute favours but are instead the rights of victims, enshrined in Article 68(1) of the Statute.

While the safety and security of victims is a central responsibility of the Court, their participation in the proceedings cannot be allowed to undermine the fundamental guarantee of a fair trial.<sup>55</sup>

The greater the extent and the significance of the proposed participation, the more likely it will be that the Chamber will require the victim to identify himself or herself. Accordingly, when resolving a request for anonymity by a victim who has applied to participate, the Chamber will scrutinize carefully the precise circumstances and the potential prejudice to the parties and other participants.<sup>56</sup> Given that the Chamber will always know the victim's true identity, it will be well placed to assess the extent and the impact of the prejudice whenever this arises, and to determine whether steps that fall short of revealing the victim's identity can sufficiently mitigate the prejudice.<sup>57</sup>

The Trial Chamber instructs the Registry to consult with the victims and their legal representatives generally as regards the level of protection that is necessary during the trial. The Registry is to remind the victims and their legal representatives of the availability of protective and special measures other than complete anonymity, which may enable a greater degree of participation by them in the proceedings, consistent with the rights of the accused and a fair trial (*e.g.* confidentiality of the victims' identity towards the public).

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<sup>55</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, Trial Chamber I, ICC-01/04-01/06-1119, 18 January 2008, para131.

<sup>56</sup> *Ibid.*,

<sup>57</sup> *Ibid.*,



The surveys carried out on the victims of the 2007/2008 post election violence in Kenya showed that majority of the victims are still apprehensive over their protection. Though 85% of the respondents felt that the ICC had assured them of their confidentiality, 91% of the respondents indicated that they would feel concerned about their security if their identity as victims/witnesses were to be revealed. Indeed, due to lack of protection, results show that majority of the respondents (89%) do not feel confident to testify against the perpetrators.

### **2.6.2 Protection against Re-traumatization**

Applying Article 64 of the Rome Statute and with respect to Rules 87 and 88 of the Rules of Procedure and Evidence, the Chamber ensures that appropriate steps are taken to guarantee the protection of all victims and witnesses, and particularly those who have suffered trauma or who are in a vulnerable situation. The Chamber rules on the merits of individual application [under Rules 87 and 88] taking into account, inter alia, whether, I) the testimony of a vulnerable witness is to be treated as confidential and access to it is to be limited to the parties and the participants in the proceedings; ii) evidence in appropriate circumstances can be given out of the direct sight of the accused or the public; iii) a witness should be able to control his or her testimony, and, if so, to what extent; iv) breaks in the evidence should be allowed as and when requested; a witness can require that a particular language is used.

Indeed, from the survey findings, 82% of the respondents indicated that they suffered psychological harm. At the same time, 77% of the respondents felt that the ICC had not provided psychological support to the victims.

### 2.6.3 Protection as the Complement to the Right to Participation

The right to protection remains a statutory right that ought to be conceived of as the partner to participation. Trial Chamber I affirmed the position that “protective measures are not favours, but are, instead, the rights of victims enshrined in Article 68(1) of the Statute.”<sup>58</sup> The Rome Statute recognizes that measures to guarantee the safety, physical and psychological well-being, dignity and privacy of victims, witnesses and their families are essential to support the ICC’s credibility and legitimacy.<sup>59</sup> The need for protective and special measures for victims and witnesses supports the need of: (i) minimization of serious risks to their security, (ii) avoid serious incursions of their privacy and dignity, and (iii) reduce the trauma associated with participation or testimony, the roots of which can be found in Article 6(d) of the 1985 Basic Principles.<sup>60</sup>

In protecting victims the ICC recognizes that victims have not only survived traumatic hardships, but that many of them also testify despite the threat of retaliation. It thus includes explicit protections for the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. The ICC's Victims and Witnesses Unit ensures that victims are safe, receive support and counseling, are appropriately treated in the courtroom, that staff in all branches of the Court to include experts on trauma, that witnesses should have a helper (like a family member) present during testimony, and that the judges must prevent their harassment or intimidation during questioning.<sup>61</sup> At all stages of a trial, the Court endeavors to protect the

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<sup>58</sup> Gillett, M.,” Victim Participation at the International Criminal Court,” *Australian International Law Journal* 16, 29-46, p. 38. (2009).

<sup>59</sup> 1985 Victims Declaration Supra note 15. Article 6(d).

<sup>60</sup> Ibid.,

<sup>61</sup> Rome Statute, Supra, note 1.

confidentiality and safety of victims, witnesses, their families, and others endangered by their testimony, including relocation if necessary.

## **2.7 The Office of the Public Counsel for Victims.**

The purpose behind the establishment of the Office of Public Counsel for Victims, (OPCV) is to provide support and assistance to victims and legal representatives of victims, pursuant to Regulations 80 and 81 of the Regulations of the Court. Regulation 80 of the Regulations of the Court provides for the appointment of legal representatives of victims from the Office of Public Counsel for victims, by a Chamber following consultation with the Registrar.

Regulation 81 of the Regulations of the Court provides that the Registrar shall establish and develop an Office of Public Counsel for victims for the purpose of providing assistance as described in Sub-Regulation 4. The Office of Public Counsel for victims shall fall within the remit of the Registry solely for administrative purposes and otherwise shall function as a wholly independent office. Counsel and assistants within the Office shall act independently.

The Office of Public Counsel for Victims may include a counsel who meets the criteria set out in Rule 22 and Regulation 67. The Office shall include assistants as referred to in Regulation 68.

The Office of Public Counsel for Victims shall provide support and assistance to the legal representative for victims and to victims, including, where appropriate, (a) Legal research and advice; and (b) Appearing before a Chamber in respect of specific issues”.

The Office has assisted external legal representatives in all situations and cases and provided legal advices/researches to them.<sup>62</sup> Furthermore, the task of providing support and assistance to victims has included direct legal representation by the Office in the proceedings. It is noteworthy to mention that the number of victims represented by the Office does not include victims and affected communities contacted through joint efforts with other sections of the Court in order to reach targeted groups and increase awareness of the proceedings before the Court and encourage victims' applications for participation.<sup>63</sup>

In accordance with Regulation 81(2) of the Regulations of the Court, the Office functions as an independent office. Accordingly, its members do not receive instructions from anybody in relation to the fulfillment of its mandate.<sup>64</sup> Therefore, the Office falls within the Registry solely for administrative purposes. This independence is a prerequisite for carrying out the mandate of assisting legal representatives of victims and assisting and representing victims. Such independence allows the Office to work without being subjected to pressure of any kind and preserves the privileged relationship between victims and their counsel.<sup>65</sup>

As a consequence, in the performance of their mandate, members of the Office are bound by the Code of Professional Conduct for Counsel before the ICC. In performing its tasks, the Office

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<sup>62</sup> OPCV, *Helping Victims Make Their Voices Heard*, at 6.

<sup>63</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Décision aux fins de comparution des victimes a/0381/09, a/0018/09, a/0191/08 et pan/0363/09 agissant au nom de a/0363/09, Trial Chamber II, ICC-01/04-01/07-2517, 9 November 2010 [hereinafter Trial Chamber II *Katanga and Ngudjolo* Decisions of 9 November 2010].

<sup>64</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Role of the Office of Public Counsel for Victims and its Request for Access to Documents, ICC-01/04-01/06-1211, 30 (Trial Chamber I, 6 March 2008). See also *The Prosecutor v. Joseph Kony, et al.*, Decision on the OPCV's Observations of Victims' Applications and on the Prosecution's Objections Thereto, ICC-02/04-01/05-243, at 5-6 (Pre-Trial Chamber II, 16 April 2007).

<sup>65</sup> Ibid.,

takes into account concerns relating to the security and safety of victims, and endeavors to respect the will of victims, as well as the language spoken by them and the specificities related to gender and children issues.<sup>66</sup>

As part of its related role of representing the general interests of victims and raising the awareness on victims' rights and prerogatives under the Rome Statute and the Rules of Procedure and Evidence, the Office is involved in outreach activities for members of the judiciary, the legal profession and the civil society in countries where investigations and/or cases are ongoing, as well as in other countries. The Office has also participated in several conferences and seminars on victims' issues and in several publications.<sup>67</sup>

The Office has managed to promote numerous goals that champion victims' rights in international criminal law, including; facilitating the process by which victims, through their participation before the Court, can "tell their story" and have a recognized voice in the proceedings, contributing to the general perception by victims of their ability to influence the proceedings before the Court by actively responding to any requests for information and by helping them navigate the procedural steps required for their participation, thereby promoting their sense of empowerment and legally advocating victims' rights to hold the dual status of victims and witnesses before the Court, thereby promoting their sense of dignity as a witness while at the same time helping to meet their need for international recognition as victim of

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<sup>66</sup> Ibid.,

<sup>67</sup> International Criminal Court, *Report of the Court on Legal Aid: Legal and Financial Aspects of Funding Victims Legal Representation Before the Court*, ICCASP/ 8/25, ¶ 42 (5 October 2009) (citing a background document prepared by the OPCV and presented to The Hague Working Group on 10 June 2009).

crimes within the jurisdiction of the Court, and paving the way through its active advocacy in the proceedings for victims' rights in international criminal law.

The mandate of the Office of Public Counsel for Victims is not being felt on the ground as it was found out during the survey. A majority of the victims (65%) indicated that they did not participate in the ICC process. In fact majority of these queried the criteria which the ICC used to select the victims who were to participate. 70% of the respondents indicated that their views were never considered. Asked whether they appreciated the ICC process, 88% of the respondents indicated that they would like the ICC to share information on the judicial process so that they can be aware of what was expected of them. Due to the lack of information about the judicial process, 64% of the respondents felt dissatisfied with the ICC process.

## **2.8 Conclusion**

The consideration of victim participation during the investigation, pre-trial and trial phases has sought to illustrate the relevant participation within the ICC. It has shown that though it was expected that victim participation would present challenges of interpretation and lengthen the process, it remains a significant improvement of restorative justice.

The definition of victim within the Rome Statute saw an expansion over that of the *ad hoc* tribunals' definition; however, the Appeals Chamber clarified the definition can include indirect victims as long as the harm is suffered personally. The law is very clear on the victims' right to protection. Article 68 of the Rome Statute spells out the right of the victims with regard to protection and the measures to be taken to ensure the right to participation is upheld. And this

must be done without compromising the safety of the victims by ensuring anonymity of the victims and through legal representation. The protective measures are meant to minimize serious risks of the victims' security, avoidance of serious incursions to privacy and dignity and reduction of trauma associated with participation or testimony.

This chapter has therefore shown that the emerging trend with respect to the right to participation appears to be a reversal of the broader initial decisions by the lower Chambers, which were more in line with a restorative approach, in order that the efficacy and efficiency required of a retributivist framework is maintained. This included the reversal of general right of participation during the investigation phase, the addition of a linkage requirement in the pre-trial and trial phases, and an increased emphasis on common legal representation for larger groups of victims.

The right to reparation is discussed in the next chapter.

## CHAPTER THREE

### ROME STATUTE AND VICTIMS RIGHT TO REPARATIONS

#### 3.1 Introduction

The ability of the ICC to award reparations to victims is a critical component of its overall framework to implement victims' rights.<sup>1</sup> The Court can award reparations to victims of the most responsible perpetrators prosecuted and convicted by the ICC. Reparations are seen as “an essential criterion for the restoration of social harmony between communities which have been at war with each other and a *sine qua non* for the establishment of a deep-rooted and lasting peace,”<sup>2</sup> The ICC Statute provides that the Court establish principles for reparations to victims, including restitution, compensation, and rehabilitation.<sup>3</sup>

#### 3.2 Victims' Right to Reparations

The term “victims” includes natural persons who have suffered harm from any crime within the

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<sup>1</sup> See the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly Resolution 60/147, 16 December 2005, E/CN.4/Sub2/1993/8. See also REDRESS, Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation, March 2006, [www.redress.org/downloads/publications/Reparation%20Principles.pdf](http://www.redress.org/downloads/publications/Reparation%20Principles.pdf), available in English, French, Spanish, Arabic and Russian.(accessed on 8<sup>th</sup> August 2012).

<sup>2</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on victims' participation, Trial Chamber I, ICC-01/04- 01/06-1119, 18 January 2008, Lubanga Decision of 18 January 2008].at pg 1398.

<sup>3</sup> Rome Statute of the International Criminal Court, *adopted* on 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force*, 1 July 2002, U.N. Doc. A/CONF .183/9, Preamble (1998) [hereinafter “Rome Statute”].



jurisdiction of the Court.<sup>4</sup> Because certain war crimes are usually directed at legal persons, “victims” also includes organizations or institutions that have sustained direct harm to property like a building used exclusively for religious purposes.<sup>5</sup>

The ICC Statute provides that the Court establish principles for reparations to victims, including restitution, compensation, and rehabilitation. Article 75(1) provides that “the Court shall establish principles relating to reparations to, or in respect of victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury of victims and will state the principles on which it is acting.”<sup>6</sup>

Specifically, international human rights law generally recognizes a right to a remedy for victims, including: restitution which entails restoring victim to original position in terms of property, liberty, employment, etc; compensation for physical or emotional harm, lost opportunities and earnings, harm to reputation and costs for legal or expert assistance; rehabilitation through medical and psychological care as well as legal and social services; satisfaction through cessation of violations, truth telling, official recognition, and apology; and Guarantees of non repetition (measures to prevent reoccurrence of violations).<sup>7</sup> While the ICC Statute does not

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<sup>4</sup> Rules of Procedure and Evidence, July 1, 2003, 3 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 101 (Antonio Casesse et al, eds., 2002), available at [http://www.un.org/law/icc/asp/1stsession/report/english/part\\_ii\\_a\\_e.pdf](http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_a_e.pdf) [hereinafter Rules of Procedure and Evidence].(accessed on 10<sup>th</sup> March 2012).

<sup>5</sup> See Dinah L. Shelton & Thordis Ingadottir, “The International Criminal Court Reparations to Victims of Crimes (Article 75 of the Rome Statute) and the Trust Fund (Article 79) Part One,” at 8 (1999), [http://www.pictpcti.org/publications/PICT\\_articles/REPARATIONS.PDF](http://www.pictpcti.org/publications/PICT_articles/REPARATIONS.PDF) (describing war crimes whose victims are usually legal persons such as religious institutions or museums).(accessed on 10<sup>th</sup> March 2012).

<sup>6</sup> Rome Statute, Article 75(1).

<sup>7</sup> Amnesty International, “The International Criminal Court: Ensuring an Effective Role For Victims,”

explicitly exclude traditionally recognized remedies such as satisfaction and non repetition, the Court does not have jurisdiction over States. Therefore, official recognition or apology or other forms of State action are beyond its powers. Collective awards, however, may approximate such forms.

### **3.3 Trust Fund for Victims (TFV)**

The ICC offers two avenues of compensation for victims: payments from convicted defendants or awards from a Trust Fund for Victims(TFV). The Court can make awards to individual victims against a convicted defendant, either directly or through the TFV.<sup>8</sup> These awards would be funded primarily by fines and forfeitures of the convicted defendant. But the TFV can also award reparations based on “other resources” of the TFV, specifically, voluntary contributions to the Fund.

The Court relies on the TVF, which has a dual mandate of implementing Court-ordered reparations awards and that of providing general assistance to victims. The TFV has two main functions under the Rome Statute and Rules of Procedure and Evidence of the ICC.<sup>9</sup> First, it acts as a depository for the proceeds of fines and forfeitures when it is “impossible or impracticable” to immediately grant awards to individual victims.<sup>10</sup> Second, it acts as an intermediary if the Court determines that: (a) a collective award against a convicted defendant should be made

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(1999),[http://web.amnesty.org/library/index/  
http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://web.amnesty.org/library/index/http://www.un.org/News/dh/sudan/com_inq_darfur.pdf)(accessed on 27<sup>th</sup> August, 2012).

<sup>8</sup> Cf. Redress, The International Criminal Court’s Trust Fund for Victims: Analysis and Options for the Development of Further Criteria for the Operation of the Trust Fund for Victims 19-20 (2003), <http://www.redress.org/publications/TFVReport.pdf> (discussing voluntary contributions as most important source of income for general uses of Trust Fund)(accessed on 27<sup>th</sup> August,2012).

<sup>9</sup> Rules of Procedure and Evidence supra note 4.

<sup>10</sup> Ibid., Rule 98, at 107; see also Rome Statute, Articles, 75(2) & 79(2), at 42, 44.

through the TFV; or (b) an award against a convicted defendant should be made to an organization approved by the TFV.<sup>11</sup>

The Rules of Procedure and Evidence also provide that the TFV can use “other resources” for the benefit of victims.<sup>12</sup> The Assembly of State Parties (ASP) could have interpreted these rules to mean that the awards against convicted defendants could be augmented by other resources. Instead, the ASP has chosen to give the TFV an independent role: providing support for the benefit of victims regardless of Court-ordered reparations.

### **3.3.1 Fines & Forfeitures of Convicted Defendants**

The court can order, in addition to imprisonment, a fine or forfeiture against the convicted defendant. However, a significant challenge facing the Court is related to the fact that most accused either are indigent or have been able to successfully hide their assets, such that there are limited monies for seizure and forfeiture.<sup>13</sup> Moreover, defendants with assets will likely expend them on their defense. As a result, convicted defendants will not provide sufficient resources for reparations.

First, forfeiture of proceeds, property, and assets of a defendant is only on the table if they are derived (directly or indirectly) from the crime of which the defendant has been convicted.<sup>14</sup> Even if states promptly and effectively give effect to forfeiture under their national procedural law,

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<sup>11</sup> Ibid.,

<sup>12</sup> Ibid.,

<sup>13</sup> Ibid., pg 807.

<sup>14</sup> Rome Statute, supra note 3, Article. 77.

bona fide third party rights must be respected.<sup>15</sup> This is, of course, assuming that any property or assets of a defendant remain after trial.

Second, fines are also limited. Assuming that defendants are not able to claim indigency, few assets will remain upon conviction. Again, since states must process the fines in accordance with national law some states might be reluctant to do so meaning that fines would not be enforceable. Moreover, the Court must consider whether a fine is warranted on top of a prison sentence.<sup>16</sup> Thus, forfeitures and fines against individual defendants are likely to yield little in the way of reparations for victims.

### **3.3.2 Category of Victims**

The ICC reparations system divides victims into two categories: those who happen to be victims of defendants selected for prosecution by the Court, and those who are victims of the same conflict or situation but whose tormentors are not before the Court. Direct awards against convicted defendants cover only those victims affected directly or indirectly “by the crimes committed by the convicted person.”<sup>17</sup>

This is likely to be a small subset of the total number of victims. The remaining victims will have recourse only through the “other resources” of the TFFV i.e., voluntary contributions.<sup>18</sup>

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<sup>15</sup> Ibid.,

<sup>16</sup> See Rules of Procedure and Evidence, Rule 145, 146, at 121-23.

<sup>17</sup> International Criminal Court, Resolution ICC-ASP-4-32-Res.3, Regulations of the Trust Fund for Victims, at 3 (Dec. 3, 2005), [http://www.icc-cpi.int/library/about/officialjournal/ICC-ASP-4-32-Res.3\\_English.pdf](http://www.icc-cpi.int/library/about/officialjournal/ICC-ASP-4-32-Res.3_English.pdf) at page 46.(accessed on 8<sup>th</sup> August 2012).

<sup>18</sup> Technically, other resources would include discretionary funding of the ASP. See International Criminal Court, Resolution ICC-ASP/1/Res.6 at 2(d). In reality, States Parties are already in arrears on their required

Those victims excluded from direct awards against the defendant will look to the TFV's "other resources" for relief. This part of the TFV is not limited to victims of those prosecuted before the ICC. The TFV's voluntary contributions can cover a broader group of victims: those persons and their families who have suffered physical, psychological and/or material harm as a result of any crime within the jurisdiction of the Court.<sup>19</sup>

Another challenge that the TFV faces is how to determine who these victims are and whether a crime within the jurisdiction of the Court has occurred and also whether the victims have suffered the right type or sufficient amount of harm. As it were the TFV regulations only provide for how to identify victims who should be awarded direct reparations from the convicted defendant. Because the regulations are silent as to victim eligibility for the use of other resources from the TFV, the Court is guided by the provisions of the Rome Statute on crimes within the jurisdiction of the Court and the mechanisms used by the first Pre-Trial Chamber to determine victim status for the purposes of victim participation in the investigation of the situation within the DRC.

### **3.3.3 Scarcity of Resources**

After the TFV identifies the victims of crimes under the jurisdiction of the Court, it then decides what type of reparation to award the victims; individual or collective awards, monetary

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assessments to the ASP, so the chances of additional funding being available for the Trust Fund are slim to none. Cf. International Criminal Court, Part III CBF Reports and Financial Statements for the Period of 23 November - 1 December 2006 [Advance Copy] at 12 (Dec. 13, 2006), <http://www.icc-> (accessed on 8<sup>th</sup> August 2012).

<sup>19</sup> See Rome Statute, Art. 77, at 43; Rules of Procedure and Evidence, Rule 85, at 101; International Criminal Court, Resolution ICC-ASP-4-32-Res.3, at 48.

compensation or social projects infrastructure or education, physical rehabilitation or psychological counseling, memorials or hospitals or some combination thereof. The situation in the DRC illustrates the enormity of the victim population. The OTP objected to the participation of victims at the investigatory stage because of the large numbers of potential victims.<sup>20</sup> The OTP noted that due to the “massive scale of alleged criminality in the DRC” tens of thousands if not hundreds of thousands of individuals would qualify as victims of crimes within the jurisdiction of the Court.<sup>21</sup> This is assuming the TFV were to spend almost all of its existing contributions on only one of the three situations currently before the ICC. Even with robust and consistent contributions over the long-term, direct cash payments cannot fully compensate all victims for their harm. Although individual awards do not have to take the form of monetary compensation, that seems to be the most likely form of individual award from the TFV.

Regardless, individual awards would be based, at bottom, on monetary resources even if they were distributed in the form of material goods or other mechanisms. The regulations also provide that the TFV should consider using voluntary contributions to augment Court-ordered awards against convicted defendants with insufficient means.<sup>22</sup> The TFV would have to consider criteria for priority of payments (such as need, type of harm, type of victim) as well as installment

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<sup>20</sup> Situation in the Democratic Republic of the Congo, In the case of the *Prosecutor v Thomas Lubanga Dyilo*, Prosecution's Observations on the Applications for Participation of Applicants a/0001/06 to a/0003/06, 6 June 2006 Doc. No.: ICC-01/04- 01/06.

<sup>21</sup> International Criminal Court, Resolution ICC-ASP-4-32-Res.3, Regulations of the Trust Fund for Victims, at 5 (Dec. 3, 2005), [http://www.icc-cpi.int/library/about/officialjournal/ICC-ASP-4-32-Res.3\\_English.pdf](http://www.icc-cpi.int/library/about/officialjournal/ICC-ASP-4-32-Res.3_English.pdf). (accessed on 27<sup>th</sup> October 2012).

<sup>22</sup> International Criminal Court, Resolution ICC-ASP-4-32-Res.3, at 56 (empowering Board to decide whether to complement individual awards with “other resources” and providing Board should manage resources accordingly).

payments (such as pro rata payments until more funding becomes available).<sup>23</sup> Thus, individual monetary awards are likely to be unsatisfactory.

### **3.3.4 Collective Awards**

Due to the sheer numbers of victims likely to exist in any situation giving rise to jurisdiction by the ICC, collective awards should be favored for reparations using ‘other resources’ of the TFV. Indeed, the Court already has the authority to determine that collective awards are more appropriate even for awards against a convicted person. In particular, the Court can choose a collective award to be made through the TFV based on the number of victims as well as “the scope, forms and modalities of reparations.”<sup>24</sup> Thus, collective awards are generally a preferred mechanism to deal with large numbers of victims. Collective awards seem better-suited to achieving restorative justice than individual awards.

First, restorative justice is tied to the society as a whole; collective reparations might facilitate social healing more effectively than individual awards. Second, collective awards might draw more heavily on victim input. The process of developing community priorities based on victims’ needs can be part of the healing process.

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<sup>23</sup> See Shelton & Ingadottir, at Part Two, n. 16-18 and accompanying text; see also Redress, *supra* note 28, at 37-39 (discussing methods of disbursing of awards by other funds such as tiered and phased systems). Amnesty International has proposed that the Board prioritize rehabilitation expenses for children and victims of torture. See Amnesty International; *supra* note 7, at Part IV B. Amnesty International also suggests the Board should not worry about the level of assets within the Trust Fund when making monetary awards, on the theory that contributions will increase as awards are made.

<sup>24</sup> Rules of Procedure and Evidence *supra* note 4.

Collective awards might also benefit the broader society and promote reconciliation between victims and other groups. For example, a memorial or museum to commemorate the victims of atrocities might not only recognize and legitimate the suffering of victims, but also educate others. It might contribute to understanding and discourage divisions across various groups in a way that individual awards are unlikely to do. This is not to say, however, that individual awards cannot achieve justice--including restorative justice. The TFV could adopt a blend of individual and collective awards for the “other resources” mechanism. Such an approach would provide flexibility and tailoring to each situation. But it might also breed confusion regarding the two types of awards and the recipients of each. As a practical matter, it might be difficult to sustain such a hybrid system requiring administration of both an individualized assessment system and collective projects. On balance, it seems collective awards should be favored.

Collective awards can have other advantages as well. Collective awards can reach unidentified victims, particularly those who are unlikely to claim reparations through an individualized award system due to social circumstances or economic situation.<sup>25</sup> Collective assistance can maximize funding by pooling resources and establishing economies of scale, while avoiding the drain of an individualized assessment system.<sup>26</sup> Collective assistance can also take advantage of existing programs and organizations. For example, other U.N. funds provide assistance through existing humanitarian organizations.<sup>27</sup> The TFV is already empowered to seek and approve

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<sup>25</sup> See, e.g., Claude Jorda and Jerome de Hamptonne, *The Status and Role of the Victim in 2 THE ROME STATUTE: OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1387, 1388 (Antonio Cassese et al, eds., 2002) (discussing ICC as a “new step forward” in according victims ‘double status’ not provided by prior ad hoc international criminal tribunals). Thordis Ingadottir, *The International Criminal Court: The Trust Fund for Victims: A Discussion Paper* 16 (2001), <http://www.vrwg.org/Publications/02/PICTTrustFundFeb2001.pdf> (accessed 8<sup>th</sup> August 2012).

<sup>26</sup> Ibid.,

<sup>27</sup> Ibid., at 28.



intergovernmental, international, or national organizations to administer a Court-ordered award against a convicted defendant.<sup>28</sup> It should build on such programs and complement, rather than duplicate, current efforts. In addition, such cooperation might help provide for long-term assistance that would be beyond the scope of the TFV's resources.<sup>29</sup>

Symbolic reparations can help enable the group to live on, at least in memory.<sup>30</sup> Some symbolic measures that the TFV could accomplish without state support include annual tributes or the building of monuments or museums.<sup>31</sup> Other symbolic measures such as truth-telling or an official apology would require the participation of the state; similarly, state or local governments would have to approve "memory" reparations like official declarations rehabilitating victims or naming roads after them.<sup>32</sup> While the state has no legal responsibility under the Rome Statute, even for the actions of its agents, it might feel a moral responsibility.<sup>33</sup> State support for TFV activities might be forthcoming where the crimes were committed under a previous government, particularly if the new leadership is from the victimized group. In such circumstances, symbolic reparations such as truth-telling and prevention of future occurrences via state reforms might be achieved by cooperation between the state and the TFV.<sup>34</sup>

Other types of collective assistance would vary based on the needs of victims and the resources available. Similarly, resources might go to the establishment of orphanages, which would not

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<sup>28</sup> Rules of Procedure and Evidence, *supra* note 4, Rule 98, at 106.

<sup>29</sup> Cf. Redress, *The International Criminal Court's Trust Fund for Victims: Analysis and Options for the Development of Further Criteria for the Operation of the Trust Fund for Victims* 19-20 (2003), pg 34-35 <http://www.redress.org/publications/TFVReport.pdf> (discussing voluntary contributions as most important source of income for general uses of Trust Fund)(accessed on 8<sup>th</sup> August 2012).

<sup>30</sup> *Ibid.*,

<sup>31</sup> *Ibid.*,

<sup>32</sup> See, Jorda & Hamptonne, *supra* note 25, at 1410.

<sup>33</sup> Ingadottir, *supra* note 23, at 21.

<sup>34</sup> *Ibid.*, at 28.

necessarily be restricted to victims, if<sup>35</sup> warranted by the circumstances. Other possible projects would include schools, job training, community centers, and other activities aimed at rebuilding the society. Despite the promise of collective awards there are, of course, problems as well. The most significant might be human nature: some victims may not feel vindicated without individual awards. Now, the reparations sought include group reparations such as economic empowerment and education projects to benefit the broader community.

The legitimacy of the ICC will be undermined if victims see reparations as a false promise. Outreach should include efforts to educate recipients about the benefits of symbolic and collective reparations. Victims should understand the aims of collective awards in relation to reconciliation. Victims might embrace collective projects if they feel they contribute to healing and lay the foundation for a better, more peaceful future for all. Thus, TFV should consult victims about their needs and priorities.

### **3.5 Information, Outreach and Training**

In order to ensure that victims are able to access reparations they require information about the Court's mandate and, more specifically, information about the possibility of petitioning the Prosecutor, participating in proceedings and requesting reparation.<sup>36</sup> Effective and targeted

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<sup>36</sup> The ICC's *Strategy in Relation to Victims* recognizes the importance of communicating the role of the Court, its judicial activities and victims' rights to petition the Court, participate in proceedings or seek reparation. See, The ICC Strategy in Relation to Victims, November 2009, ICC-ASP/8/45, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8/ICC-ASP-8-45-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/ICC-ASP-8-45-ENG.pdf) . Objective I, p.4 aims to "Ensure that the role of the Court and its judicial activities are clearly communicated to all victims of a situation or case potentially falling within the jurisdiction of the Court, including their right to petition the Court (i.e. the right to give information to the Prosecutor to form the basis of a *proprio motu* investigation), to participate in proceedings at the Court or to seek reparation." (accessed on 27th May, 2012).

outreach activities must address all these aspects specifically; using means adapted to reach rural communities and the most vulnerable and dispossessed victims.

Specific strategies need to be adopted and applied to ensure that information is able to be transmitted to women and girl victims and other vulnerable or disadvantaged groups and that these groups are able to engage with the Court and exercise their rights under the Statute.<sup>37</sup>

In all cases, attention must be given to ensuring that media used, such as television, radio, street theatre or other market place outreach are appropriate, sufficient and effective in achieving the desired two-way communication.<sup>38</sup>

With respect to victims' specific rights to participate in proceedings or request reparation, outreach is fundamental in clarifying expectations and reducing potential frustration and re-victimization. Greater awareness of victims' needs from a trauma perspective should underpin strategies to manage expectations more systematically. Outreach strategies should recognize that inevitably, justice becomes intertwined with victims' continuing experiences in the same manner as any other trauma work.<sup>39</sup>

The importance of recognition, acknowledgement through listening, compassion, and the significance of relationships that victims build in the aftermath of trauma can be factored into outreach strategies, so as to ensure that existing interactions are qualitatively adapted to

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<sup>37</sup> McCarthy, C. "Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory," *The International Journal of Transitional Justice*, 3(2), 250–271, p. 253. (2009).

<sup>38</sup> Ibid.,

<sup>39</sup> Goetz, M., "Interview with Maitre Marie-Edith Douzima, Lawyer and Victims' Representative in the Bemba," in ACCESS: Victims' Rights before the International Criminal Court, Victims' Rights Working Group Bulletin, Issue 17, Winter 2010, p. 3, (2010). available at <http://www.vrwg.org/ACCESS/ENG17.pdf> (accessed on 27<sup>th</sup> May 2012).

constitute positive experiences for victims as opposed to reinforcements of injury.<sup>40</sup> Training on trauma and working with victims of trauma should be provided to all staff that are in contact with victims as a matter of course.<sup>41</sup> Awareness of principles relating to trauma work should also be included in trainings conducted for intermediaries.<sup>42</sup>

From the survey findings it was apparent that victims of the 2007/2008 post election desired to be compensated for their losses. 79% of the respondents felt that they would feel satisfied if they were repaid what they lost in the violence, while 71% indicated that they would feel satisfied if they were resettled. 83% of the respondents indicated that ICC should develop comprehensive reparation for the victims. This concern arose from the fact reparation is tied to participation and given that majority of the victims were not given a chance to participate, they were apprehensive of being left out on the reparation process.

### 3.6 Conclusion

The importance of reparation to the victims is emphasized as essential criterion for the restoration of social harmony. The collective nature of restorative justice is consonant with collective or group reparations for victims. The victims of mass atrocities cannot be made whole by compensation alone. Realistically, sufficient individual payments are not feasible. Even

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<sup>40</sup> International Criminal Court Newsletter #6, *VPRS: Frequently asked Questions*, at 7 (November 2006); International Criminal Court, *Victims Before the Court*, ICCPIDS-FS-02-001/09.

<sup>41</sup> It is noted that the Seminar on Victims held at the ICC on 8-9 November 2010 identified as a priority area the need for staff to also have protection against secondary traumatization. In order for staff to be able to appropriately work with victims, it is key that they too receive such support as part of a holistic approach to increased awareness about trauma. See press statement on the seminar at <http://www.icc-cpi.int/NR/exeres/90631044-6F99-4D24-93B6-72EA91253883.htm> (accessed on 27<sup>th</sup> May 2012).

<sup>42</sup> See for instance: David Becker, "Dealing with the Consequences of Organized Violence in Trauma Work," *Research Centre for Constructive Conflict Management*, Edited version August 2004. Available at [http://www.berghofhandbook.net/documents/publications/becker\\_handbook.pdf](http://www.berghofhandbook.net/documents/publications/becker_handbook.pdf) (accessed on 27<sup>th</sup> May 2012).

if the TFV has millions of dollars to disburse, the sheer scales of international crimes will likely dwarf monetary resources. As a result, the TFV should typically complement the retributive justice achieved through the prosecution of the worst offenders with restorative justice measures in the form of collective reparations. Thus, the TFV should consider favoring collective awards to a broader class of victims to further the restorative justice goal of the ICC. If the TFV manages the expectations of these large numbers of potential victims and gives them a voice in the allocation of scarce resources through collective reparations, it can contribute to the healing of victims and society.

In chapter four the practical application of these rights is assessed under a survey carried out on the actual victims of the 2007/2008 post election violence in Kenya and a conclusion of the challenges facing the Court in the implementation of these rights and recommendations are given in chapter five.

## **CHAPTER FOUR**

### **DATA ANALYSIS**

#### **4.1 Introduction**

The preceding chapter discussed victims' right to protection and reparations. The chapter noted that without protection victims cannot participate in the ICC judicial process and in extension cannot apply for reparations. Indeed it was noted that without adequate information a victim is limited in his endeavor to advocate for these rights.

This chapter deals with the primary data collected from the victims of the 2007/2008 post election violence. In chapter two and three, the provisions of victims' right as provided under the Rome Statute has been expounded. In this chapter, the data collected is analyzed and presented in figures, tables and charts. The interpretations of the study results are also done in this section. The analysis presentation and interpretation is done in such a way that the objectives of the study are addressed in a separate section. The findings are presented in the subsequent subsections.

The study could not deal with the whole affected population and sampling method was used. The study used Non-Probability sampling method and specifically the Non-Probability Purposive/Judgmental sampling technique. Under this sampling technique, there is prior decision on who to include and who to exclude. In the study, therefore, there was a deliberate attempt to include those who were victims of the 2007/2008 post election violence. In this case, areas where

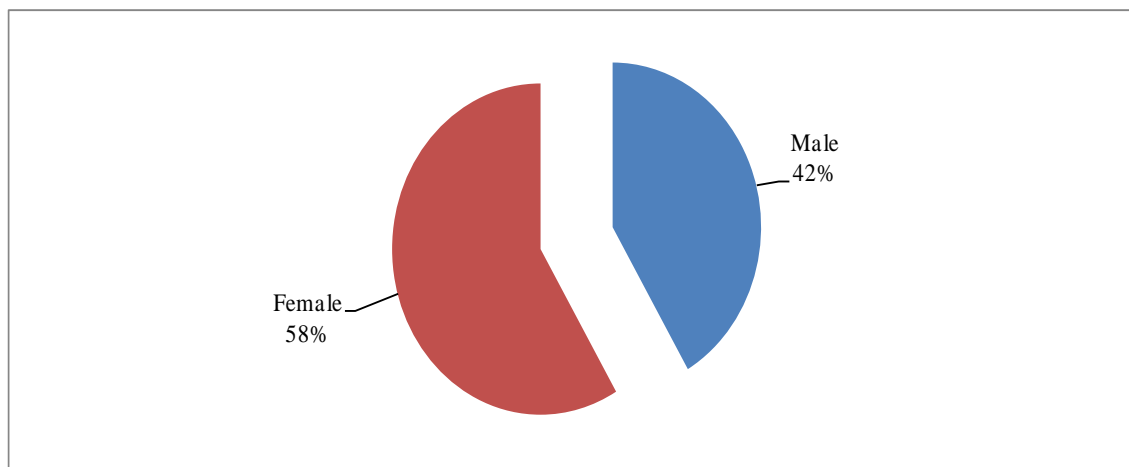
there was no prevalence of post election violence were excluded. A total of 2000 questionnaires were administered in the selected regions and a total of 1,300 questionnaires were received.

## **4.2 Data Analysis**

### **4.2.1 Demographic Data: Gender**

The study sought to find how the people were affected by the violence in the various regions in terms of gender. The study results in Figure 1 revealed that most of the respondents (58%) were female compared to only 42% male.

Figure 1: Distribution by Gender

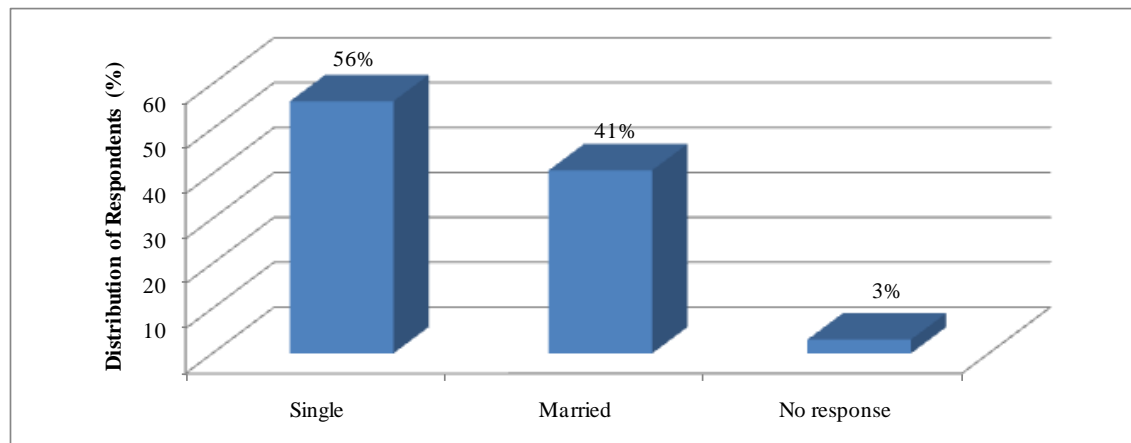


### **4.2.2 Demographic Data: Marital Status**

The study sought to find out the effects of the violence on households in the respective regions.

The findings of the study in Figure 2 show that most of the respondents (56%) were singles. The findings showed that 41% of the respondents are married.

Figure 2: Marital Status

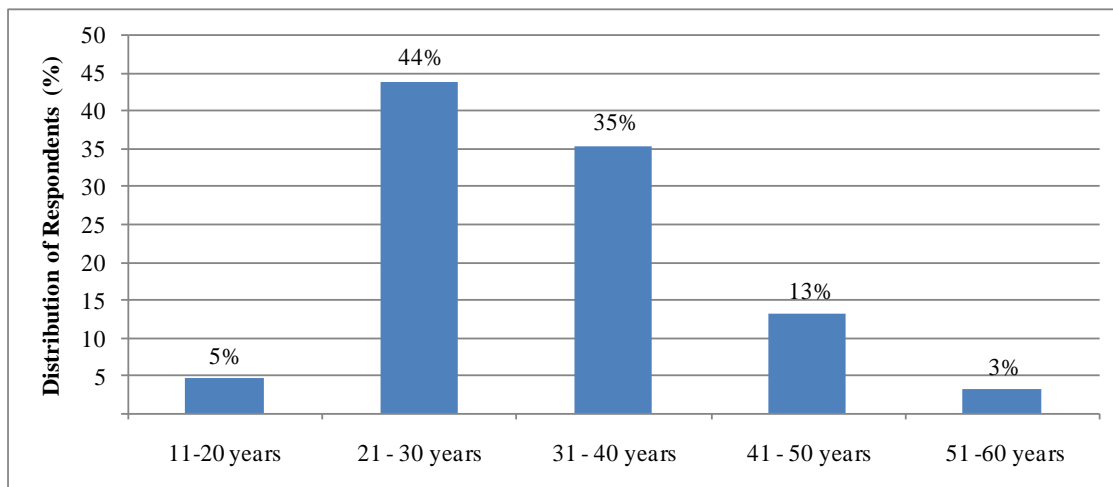


#### 4.2.3 Demographic Data: Age

The study sought out the effects of the violence on the different age groups in the affected regions. The results in Figure 3 show that 44% of the respondents are aged between 21 and 30 years while 35% are aged between 31 and 40 years. This shows that most of the respondents were middle aged which confirms the notion that youth aged between 18 to 35 years were actively involved in post election violence.



Figure 3: Distribution by Age



#### 4.2.4 Residence at the Time of 2007/2008 Post Election Violence

The question of residence at the time of violence was paramount as it indicated where the respondents were at the time of violence. The findings in Table 1 show that the distribution of respondents was close across the regions. This can be attributed to the fact that sampling was done evenly across the regions and indicated that the post election violence was widespread across affected provinces in the country.

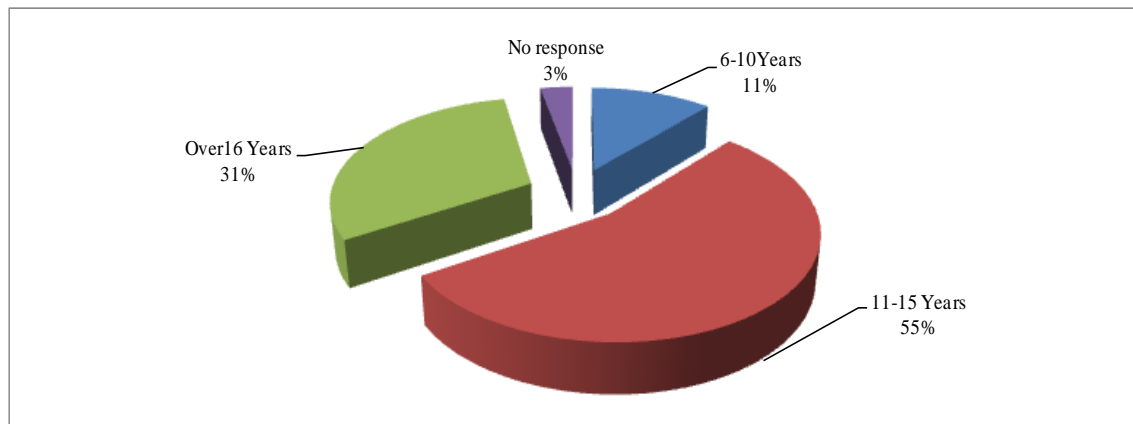
Table 1: Residence at the time of 2007/2008 Post Election Violence

	Frequency	Percent
Nyanza	195	15
Coast	234	18
Rift Valley	325	25
Central	273	21
Nairobi	273	21
Total	1300	100

#### 4.2.5 Length of Stay in the Region before Post Election Violence

The question of time of residence was paramount in that the study sought to find out how the length of stay of the victims in the areas affected by the violence was related to the violence. The results show that majority of the respondents (85%) had lived in the areas for more than 10 years prior to the 2007/2008 post election violence. These findings may be taken to mean that majority of the victims of the post election violence were actually permanent residents in the regions of the post election and the reason why they lost so much property.

Figure 4: Length of Stay in the Region before Post Election Violence

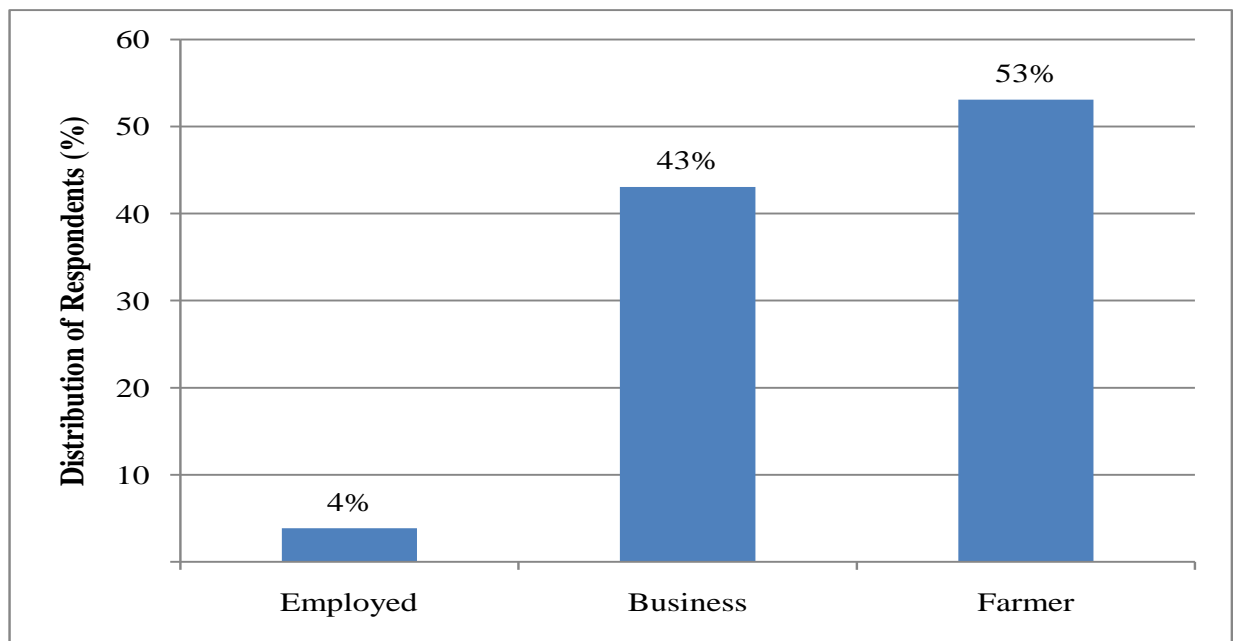


#### 4.2.6 Occupation

The study sought to find the occupation of the victims at the time of the post election violence. The study found out that most of the victims of post election violence were farmers (53%) or business persons (43%). This then explains the reason why most destruction of property was in

form of cereals and livestock. The findings also show that business persons operating in the same regions were equally affected.

Figure 5: Occupation



#### 4.3 Effects of Post Election Violence

As to how the post election violence affected Kenyans, the study results presented in Table 2 show that majority of the respondents (63%, mean score 4.27) indicated that their homes were destroyed. Most of the respondents (58%, mean score 4.07) had their homes torched while 59% (mean score 3.97) had their animals stolen. The results further revealed that 60% (mean score 3.98) lost their grains/cereals and the same proportions (60%, mean score 4.02) lost their family members in the skirmishes. Majority of the respondents (66%, mean score 4.45) lost their livelihood while 57% (mean score 3.98) had their crops destroyed.

According to the results, majority of the respondents (82%, mean score 5.22) suffered psychological harm. The findings of the study revealed that 59% (mean score 4.09) of the respondents lost their belongings. The respondents (75%, mean score 5.07) were affected psychologically and emotionally, due to the losses that they suffered during the post election violence.

Table 2: Effects of Post Election Violence

	Least affected	Unaffected	Somewhat unaffected	Somewhat affected	Affected	Highly affected	Mean	Std. Deviation
Home was destroyed (n=1300)	24	1	11	2	15	48	4.27	1.075
Our home was torched (n=1300)	26	12	3	1	5	53	4.07	1.249
Our animals were stolen (n=1300)	33	4	2	2	11	48	3.97	1.282
Lost all my grains/cereals (n=1300)	32	4	2	2	18	42	3.98	1.219
I lost my family member(s) (n=1300)	30	5	3	3	15	45	4.02	1.210
I lost my source of livelihood (n=1300)	20	4	10	0	9	57	4.45	1.062
My crops were destroyed (n=1300)	26	14	2	0	9	48	3.98	1.236
I suffered psychological harm (n=1300)	3	4	11	0	29	53	5.22	.116
We were chased from our home (n=1300)	21	10	10	8	14	37	3.95	1.003
I/My family member(s) was raped (n=1300)	40	27	2	5	8	18	2.68	.942
I/My family member(s) suffered burns (n=1300)	38	28	3	2	5	23	2.76	1.026
Our property was taken by the neighbors (n=1300)	25	6	12	2	14	41	3.97	1.094
I/My family member(s) was sexually assaulted (n=1300)	28	7	24	2	12	28	3.47	.997
We lost all our belongings (n=1300)	23	10	7	2	12	47	4.09	1.137
I suffered Physical attacks (n=1300)	22	9	2	6	14	47	4.22	1.081
Have suffered emotional imbalance (n=1300)	2	2	9	12	24	51	5.07	.208

## **4.4 Findings**

### **4.4.1 Challenges of implementing Victims Right to Participation**

The findings of the study show that slightly more than 50% of the respondents have made formal application to participate in the international judicial process. Most of the respondents (65%, mean score 3.11) indicated that they did not participate in the investigations of the post election violence. Majority of the respondents (68%, mean score 2.92) indicated that they never took part in the pre trial process at The Hague. The views of the respondents according to most respondents (70%, mean score 2.85) were never considered.

As the result, most of the respondents (64%, mean score 2.89) feel dissatisfied with the ICC process. From the study, 88%, mean score 5.26, of the respondents indicated that they would like the ICC to share information with the victims. The study show that 58% (mean score 3.92) of the respondents have sent information to The Prosecutor to initiate investigation. Majority of the respondents (72%, mean score 4.64) would like to testify as witnesses in the justice process. These findings may be interpreted to mean that the victims have not been accorded a chance to participate in the justice process despite the desire and frantic efforts to be included in the process.

Table 3: Victims right to Participation

	Strongly disagree	Disagree	Slightly disagree	Slightly agree	Agree	Strongly agree	Mean	Std. Deviation
I have made formal application to participate in the process (n=1300)	32	8	3	4	42	12	3.53	.973
Took part in the investigation of post election violence (n=1300)	38	7	20	2	10	24	3.11	1.039
Took part in the ICC pre trial process at the Hague (n=1300)	38	25	5		5	28	2.92	1.112
My views/evidence were considered (n=1300)	42	12	16	2	6	22	2.85	1.021
Most victims were given a chance for participation (n=1300)	44	42	8	2	2	2	1.85	.082
Participation made me feel satisfied with process (n=1300)	47	13	4	2	9	25	2.89	1.168
The ICC should share information with the victims (n=1300)	7	5	1	2	14	72	5.26	.497
I sent information to the prosecutor to initiate investigation (n=1300)	34	8	1	1	4	53	3.92	1.358
I would like to testify as a witness in the justice process (n=1300)	15	6	6	5	5	62	4.64	.957
I have been contacted by the prosecutor on various ICC issues (n=1300)	37	7	1	2	3	51	3.79	1.381
I have made a request for reparation (n=1300)	30	9	3	3	7	48	3.91	1.260

#### 4.4.2 Challenges of implementing Victims' Right to Protection

The results of the study in Table 4 show that majority of the respondents (93%, mean score 2.18) indicated that the social environment was not secure. The results revealed that 91% (mean score 1.97), of the victims right of expression was violated. 91% (mean score 1.89) of the respondents indicated that they were not accorded the protection to enable them move freely. 95% (mean score 1.58), of the respondents, indicated that their right to property ownership was violated and their job security was affected. The respondents (94%, mean score 1.65) also felt that they did not have the freedom of association. Finally, 91% ( mean score 1.58) of the respondents indicated that their right to life is not guaranteed.

Table 4: Victims right to Protection

	Very dissatisfied	Dissatisfied	Somewhat dissatisfied	Somewhat satisfied	Satisfied	Very satisfied	Mean	Std. Deviation
Social environment (n=1300)	25	46	22	3	2	2	2.18	1.038
Freedom of expression (n=1300)	32	52	7	7	1	2	1.97	.996
Freedom of movement (n=1300)	45	35	11	5	5	0	1.89	1.073
Family values (n=1300)	55	23	15	4	2	1	1.77	1.068
Property rights (n=1300)	59	28	8	3	1	0	1.58	.834
Job security (n=1300)	65	22	8	2	2	1	1.54	.925
Freedom of association (n=1300)	60	24	10	5	0	2	1.65	1.009
Right to life (n=1300)	72	14	5	5	3	2	1.58	1.147

The study sought to determine the extent to which the victims of the 2007/2008 post election violence in Kenya have been accorded protection in the ICC proceedings. The results of the study in Table 5 show that according to majority of the respondents (87%, mean score 2.51), despite the ICC Statute which requires the protection of the victims, the government of Kenya have not ensured protection of the victims. The results show that 85% of respondents (mean score 5.16) indicated that victims live under constant threat from suspects. Majority of the respondents (86%, mean score 5.32) indicated that protection accorded victims of post election violence was not enough.

The study results show that 88% of respondents (mean score 2.14) indicated that victims cannot move freely without fear due to lack of protection. Due to lack of protection, results show that majority of the respondents (89%, mean score 1.82) do not feel confident to testify against perpetrators. Lack of protection has made most of the respondents (92%, mean score 1.69) to

indicate that they feel dissatisfied with the justice process. The ICC, according to 77% of the respondents (mean score 2.38), has not provided psychological support to the victims.

The findings, however, revealed that according to 85% of the respondents (mean score 5.13) the ICC has assured the victims of confidentiality. The majority of the respondents (91%, mean score 5.42) would feel concerned about their security if their identity was revealed as victims/witnesses. Almost all the respondents (99%, mean score 5.85) want more security to be provided to the victims. These findings reveal that the government is yet to provide the victims of 2007/2008 post election violence with adequate protection.

Table 5: State of protection to the Victims

	Strongly disagree	Disagree	Slightly disagree	Slightly agree	Agree	Strongly agree	Mean	Std. Deviation
The ICC and the Government of Kenya have ensured protection of victims (n=1300)	18	39	30	6	2	5	2.51	1.215
Victims live under constant threat from the suspects (n=1300)	5	5	6	5	12	68	5.16	1.477
The protection so far accorded is not enough (n=1300)	7	2	5	2	9	75	5.32	1.458
Victims can move freely without fear as a result of protection (n=1300)	45	25	18	3	2	7	2.14	1.435
I feel confident enough to complain/testify against perpetrators (n=1300)	56	22	11	6	3	2	1.82	1.191
Protection accorded made me satisfied with justice process (n=1300)	62	18	12	4	1	2	1.69	1.120
The ICC has provided psychological support to the victims (n=1300)	46	15	16	8	7	8	2.38	1.640
The ICC has ensured victims confidentiality (n=1300)	4	3	8	8	15	62	5.13	1.377
I would feel concerned about my security if my identity is revealed as a victim/witness (n=1300)	2	2	5	8	9	74	5.42	1.160
More security should be provided to the victims (n=1300)	0	0	1	1	10	88	5.85	.549



#### **4.4.3 Challenges of Implementing Victims right to Reparation**

The results of the study presented in Table 6 show that 79% of the respondents (mean score 4.78) would feel satisfied if they are repaid back what they lost in the violence. The study show that 71% of the respondents (mean score 4.49) the victims of 2007/2008 post election violence would feel satisfied if they are resettled in the same place they were before the violence. Majority of the respondents (73%, mean score 4.52) would be satisfied if they are compensated for the lives lost in the violence. The study results show that 75% of the respondents (mean score 4.61) would feel satisfied if the property they lost was restituted.

The findings also show that 83% of the respondents (mean score 5.31) feel that the ICC should develop a comprehensive reparation program for victims. According to the results of the study, 86% of the respondents (mean score 5.05) would feel satisfied if justice is done to the victims of post election violence. The results mean that there is a positive relationship between reparation and restorative justice.

Table 6: Relationship between Reparation and Restorative Justice

	Strongly disagree	Disagree	Slightly disagree	Slightly agree	Agree	Strongly agree	Mean	Std. Deviation
I feel satisfied if am repaid back what I lost in the violence (n=1300)	20	2	0	2	12	65	4.78	1.997
I feel satisfied if am resettled in the same place (n=1300)	23	2	5	1	14	56	4.49	1.088
I feel satisfied if am compensated for loss of life (n=1300)	24	2	1	5	9	59	4.52	1.107
I feel satisfied if am restituted of lost property (n=1300)	21	3	1	1	19	55	4.61	1.017
The ICC should develop a comprehensive reparation program for victims (n=1300)	8	2	3	3	9	75	5.31	.483
Would feel satisfied if asked by the court to request for reparation (n=1300)	14	5	2	5	8	66	4.88	.855
I would feel satisfied if compensated for lost opportunity (n=1300)	15	7	2	10	4	62	4.67	.947
I would feel satisfied if compensated for emotional distress (n=1300)	19	3	2	2	9	65	4.73	1.011
I would feel satisfied if restituted to my former business (n=1300)	18	5	2		12	64	4.76	.980
I would feel satisfied if justice will be done to the victims (n=1300)	12	1	1	5	18	63	5.05	.665
I would feel satisfied if all my medical bills be taken care of (n=1300)	14	9	3	3	3	68	4.75	.961

The next chapter concludes the study and makes recommendations for the necessary reforms of making sure victims' rights to participation, protection and reparations becomes a reality to majority of crime victims.

## CHAPTER FIVE

### SUMMARY, CONCLUSION AND RECOMMENDATIONS

#### 5.1 Summary of the Findings

The overall purpose of the study assessed the challenges being faced by the International Criminal Court in the implementation of victims' right to participation, victims' right to protection and victims' right to reparations in the Kenyan cases before the Court.<sup>1</sup> The first objective was to establish the basic notions of retributive, restorative and deterrent justice at the ICC. The second objective was to assess the challenges that the Court is facing during the implementation of the victims' right to participation, protection and reparations while meeting the basic notions of retributive, restorative and deterrent justice, and lastly, to investigate whether the Rome Statute protects the Kenyan victims' right to restorative justice.

##### 5.1.1 Assessment of Effects of Post Election Violence

The study established that majority of the 2007/2008 post election violence victims suffered in a number of ways. The results showed that majority of the respondents (63%) had their homes destroyed. Most of the respondents (58%) had their homes torched and 58% their animals stolen. The study results also revealed that the respondents lost grains/cereals and also had their family members killed. Due to these losses the study revealed that majority of the respondents (82%)

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<sup>1</sup> Rome Statute of the International Criminal Court, *adopted* on 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force*, 1 July 2002, U.N. Doc. A/CONF.183/9, Preamble (1998) [hereinafter "Rome Statute"].

were affected psychologically and emotionally. The study also established that the post election violence victims suffered rape and burns.

### **5.1.2 Challenges of implementing Victims Right to Participation**

When analyzing victims' right to participation, the study established that most respondents (50%) made formal application to participate in the ICC judicial process. From the findings of the study it revealed that majority of the respondents (65%) did not participate in the investigations of the post election violence. The study results showed that 68% of the respondents never took part in the pre trial process at The Hague. Respondents (70%) views were never considered in the pre trial process. As a result, most of the respondents (64%) feel dissatisfied with the ICC process. The desire for participation by the victims can be demonstrated by the fact that most of the respondents (58%) sent information to The Prosecutor to initiate investigation and yet still, majority of the respondents (72%) would like to testify as witnesses in the justice process.

The participation of victims in proceedings is enshrined in the Rome Statute and developed in the Rules of Procedure and Evidence, the Regulations of the Court, and the Regulations of the Registry, as well as in the Court's jurisprudence.<sup>2</sup> The nature of the crimes within the jurisdiction of the ICC makes clear that large numbers of victims pose a great challenge in the implementation of victims' rights to participation and therefore every effort should be made to ensure that procedures facilitate the participation and engagement of the identified victims.

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<sup>2</sup> Ibid.,

The Court's application for participation process is another challenge that is affecting the Court's implementation of victims' rights. The Court, should therefore, look at making the process more efficient and working to make participation most meaningful for those affected, drawing on the extensive experience and practice in both domestic and internationalized proceedings on efficient methods to process large numbers of claimants

### **5.1.3 Challenges of implementing Victims' Right to Protection**

When analyzing the victims' right to protection, it emerged from the study that despite the Rome Statute's emphasis on victims' right to protection,<sup>3</sup> the victims of the 2007/2008 post election violence are not satisfied with the protection offered. The results revealed that according to majority of the respondents (87%), the governments of Kenya and the ICC have not ensured adequate protection of the victims. The victims, according to 85% of the respondents, live under constant threat from the suspects despite the assurance by the government that it will provide protection to the victims. Majority of the respondents (86%) have a feeling that the protection accorded the victims was not enough. As a result of the lack of protection, 88% of the respondents indicated that they cannot move freely without fear.

The challenge here is that, for fear occasioned by the lack of protection, 89% of the respondents did not feel confident to testify against perpetrators. This then makes majority of the respondents (92%) did not therefore feel satisfied with the justice process. The ICC, according to majority of the respondents (77%) had not provided psychological support to the victims. Lastly, however, the ICC had assured the victims of confidentiality without which, majority of the respondents

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<sup>3</sup> Ibid., Article 68(3).

(91%) would feel concerned about their security if their identity were revealed as victims/witnesses.

Due to lack of adequate protection, the study established that for a majority of the respondents (93%), the social environment was not secure. According to 91% of the respondents, their right of expression was violated. The respondents also indicated that they were not accorded the protection to move freely. Majority of the respondents (94%) felt that they did not have the freedom of association while 91% lived in fear because their right to life is not guaranteed.

#### **5.1.4 Challenges of implementing Victims' Right to Reparations**

It emerged from the study that the victims of the 2007/2008 post election violence would feel that justice has been achieved if they were restituted what they lost. The study revealed that majority of the respondents (79%) would feel satisfied if they were compensated what they lost in the post election violence. The study results further revealed that 71% of the respondents would feel satisfied if they were rehabilitated. Majority of the respondents (73%) would be satisfied if they were compensated for the lives lost in the violence while 75% would feel satisfied if the property they lost was restituted. Respondents feel that the ICC should develop a comprehensive reparation program for victims.

The Rome Statute provides that individual and/or collective awards of reparation to victims are given at the end of a case.<sup>4</sup> The biggest challenge that the ICC faces as far as the right to reparations is the large number of victims who have expressed a desire to be awarded

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<sup>4</sup> Ibid.,

reparations. Against this backdrop is the limited recourses that the Court has allocated in reparations awards. It is noted that none of the Kenyan cases before the Court is currently close to the reparations phase despite the fact that the study established that majority of the victims of the post election violence would feel satisfied with the justice process if they were restituted what they lost.

## **5.2 Conclusion**

In this study the provisions of the Rome Statute of the International Criminal Court on victims' rights were analyzed. The study assessed the challenges that the ICC is facing in the implementations of victims' rights to participation, protection and reparations in the Kenyan cases before the ICC.

The findings of this study indicate that it is not yet time for the victims to celebrate that the ICC will ensure restorative justice. This is due to the fact that majority of victims interviewed have not been able to participate in the ICC process despite making attempts for participation and as a result the respondents felt dissatisfied with the justice process. The study also established that protection as envisaged in the Rome Statute has not been accorded to the victims despite the constant assurance from both the ICC and the government to protect all the victims of post election violence. The victims still live under constant threats of the perpetrators. The respondents, therefore, felt that justice is not being achieved. However, the study established that the victims of the post election violence would feel satisfied with the justice process if they are restituted what they lost.

On reparations awards to the victims, the study established that most of the victims of post election violence expect to be compensated for the losses that they incurred during the violence. The Court, through the Trust Fund for Victims should move in and ascertain the bonafide victims who are eligible for reparations awards. In the event that individual awards are not amenable, the Court, through consultation with the Government of Kenya, should explore the practicability of awarding collective awards to the victims. This way, the victims' high expectations for compensation and restitution could be met.

### **5.3 Recommendations**

From the findings of the study, the need for information was identified as the most common need amongst the respondents' interviewed. The study showed that majority of the respondents (88%) would like the ICC to share information with the victims. This is very important, as information is often vital in order to access services. Victims who do not know whether a service exists cannot use it. Victims need to be informed about the services available to them such as participation, protection, compensation, psychological support and legal services.

Victims view notification as common courtesy that acknowledges their personal interest in the case. The justice system can be intimidating for victims who do not know what to expect or what is expected of them. As their cases proceed through the criminal justice process, victims want to be notified about new developments, such as whether an arrest has been made, whether charges have been made, the outcome of any trial, and the sentence imposed. To have the most impact the ICC's work must be understood in the communities most affected by the crimes within its jurisdiction.



The recent decisions on the confirmation of charges on the Kenyan cases and the drop of charges on Henry Kosgey and Major Ali cases underscore the importance of having sufficient and efficient outreach in order to pre-empt misperceptions that may otherwise arise, and to diffuse community tensions that may result from such misperceptions.

The study recommends the setting aside of sufficient resources to ensure that the Court can effectively meet its obligations to inform victims of specific decisions and give general information on the Court to affected communities. The Court should make use of civil society, notably non-governmental organizations, that are already active in the field in many of the countries under scrutiny of the ICC. The Court is faced with the challenge that, its target groups tend to be geographically distant and dispersed, often in rural areas where illiteracy makes written materials inadequate. In the most affected areas, television and radio are not accessible to all, and consequently not all are being reached. Many women and other vulnerable victims such as the elderly or destitute remain uninformed about the activities of the Court. This leaves considerable room for manipulation from politicians and militia leaders on the ground.

The study established that the victims' right to participate in the proceedings faced a lot of challenges due to large numbers of victims and therefore did not fulfill the desire of the Rome Statute of achieving restorative justice due to the fact that most of the respondents did not participate in the ICC judicial process, despite the fact that they qualified to be victims according to the definitions of Rule 85 of the Statute.<sup>5</sup> The study therefore recommends that the ICC should

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<sup>5</sup> Rules of Procedure and Evidence, July 1, 2003, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 101 (Antonio Casesse et al, eds., 2002), available at [http://www.un.org/law/icc/asp/1stsession/report/english/part\\_ii\\_a\\_e.pdf](http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_a_e.pdf) [hereinafter Rules of Procedure and Evidence].(accessed on 10<sup>th</sup> March 2012).

enforce the law by ensuring the participation of the victims whether direct or through legal representation as this is the only way to ensuring restorative justice.

The study recommends that the ICC in conjunction with the Government of Kenya should enhance the security of the victims especially those who are standing as witnesses against the suspects with the aim of ensuring restorative justice. The study established that the victims' right to protection as provided by the Rome Statute which requires for the protection of safety, physical and psychological well-being, dignity and privacy of victims and witnesses has not been achieved. The victims have continued to live in fear of attacks from the suspects despite the continued assurance by the government and the ICC.

The study recommends that the ICC should initiate a process by which the victims of post election violence would be restituted according to the losses they underwent with the aim of ensuring restorative justice to the victims of the post election violence. The study established that there is a positive relationship between reparation and restorative justice as the respondents indicated that they would feel satisfied if they are restituted of the losses they incurred. Victims who did not get a chance to participate in the ICC process could benefit from 'other recourses' of the TFV.

#### **5.4 Areas for future Research**

This study was an assessment of the challenges facing the International Criminal Court in the implementation of victims' right to participation, right to protection and right to reparation in the

Kenyan cases before the ICC. The study therefore recommends that future research should be carried out on the ICC process on victims' rights, in other jurisdictions, with the aim of identifying the challenges that the ICC process is facing in its endeavor of implementing victims right to participation, protection and reparations and resolving these challenges in order to achieve restorative justice.

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5. Regulations of the Trust Fund for Victims; ICC-ASP/4/Res.3, adopted and entered into force 3 December 2005
6. Report of the Working Group on Procedural Matters of the Rome Conference, A/CONF.183/C.1/WGPM/L.2/Add.7 (13 July 1998).
7. Report on the Establishment of an International Criminal Court, Draft Statute and Final Act, UN Doc. A/Conf.183/2/Add.1, 1998
8. Resolution adopted by the Assembly of States Parties on the Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and the families of such victims, adopted 9 September 2002, Doc.ICC-ASP/1/Res.6 (2002) 354

### **III. UN Resolutions**

1. Universal Declaration of Human Rights, G.A. Res. 217 A (III) of 10 December 1948  
Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34 of 29 November 1985
2. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147 of 16 December 2005

## **APPENDIX 1**

### **QUESTIONNAIRE**

**Research Topic:     The Challenges of Implementing the Victims' Rights to Participation, Protection and Reparations in the International Criminal Court**  
**Process: The Kenyan case.**

I am currently carrying out a survey of assessing the challenges of implementing Victim's Rights to Participation, Protection and Reparation in the Kenyan cases at the ICC, for my Master of Law Degree thesis.

The survey targets the victims of 2007/2008 post election violence in specific regions in Kenya, who were directly or indirectly affected by the post poll violence. You are kindly requested to participate by providing response to the following questions. This questionnaire is designed to collect information on victim's right to participation, protection and reparation and the challenges that they may have encountered as they participated in the ICC process. The information obtained will only be used for academic purpose and shall be treated in confidence. Your prompt response will be highly appreciated.

### Part 1: Demographic Data

1. Gender                      Male (        )              Female (        )
2. Marital Status Single (        )              Married (        )
3. Age                      11-20 years (        )              21 – 30 years (        )  
                                    31 – 40 years (        )              41-50 years (        )  
                                    51-60 years (        )              Over 61years (        )
4. Where were you living at the time of 2007/2008 post election violence in Kenya?  
  
Nyanza (        ) Rift Valley (        ) Coast (        )              Central (        )  
  
Nairobi (        )
5. For how long had you lived in the area before the 2007/2008 post election violence in Kenya?  
  
0 – 5 years (        )              6 – 10 years (        )              11 – 15 years (        )  
  
) Over 16 years (        )
6. Occupation      Farmer(        )              Business (        )              Employed (        )

Others (specify)\_\_\_\_\_

7. The 2007/2008 post election violence affected most Kenyans in various forms which many are yet to come into terms with. Please state the extent to which you were affected by the forms of effects listed below on a six point likert scale where 1 represents least affected and 6 highly affected. Overall, how affected were you by? (Please circle one number)



		Highly affected		Least affected			
i)	Home was destroyed	1	2	3	4	5	6
ii)	Our home was torched	1	2	3	4	5	6
iii)	Our animals were stolen	1	2	3	4	5	6
iv)	Lost all my grains/cereals	1	2	3	4	5	6
v)	I lost my family member(s)	1	2	3	4	5	6
vi)	I lost my source of livelihood	1	2	3	4	5	6
vii)	My crops were destroyed	1	2	3	4	5	6
viii)	I suffered psychological harm	1	2	3	4	5	6
ix)	We were chased from our home	1	2	3	4	5	6
x)	I/My family member(s) was Raped	1	2	3	4	5	6
xi)	I/My family member(s) suffered burns	1	2	3	4	5	6
xii)	Our property was taken by the neighbours	1	2	3	4	5	6
xiii)	I/my family member(s) was sexually assaulted	1	2	3	4	5	6
xiv)	We lost all our belongings	1	2	3	4	5	6
xv)	I suffered Physical attacks	1	2	3	4	5	6
xvi)	Have suffered emotional imbalance	1	2	3	4	5	6

## Part II: Victim's Right to Participation

8. Justice for victims of 2007/2008 post election violence in Kenya can only be assured by allowing them to participate in the proceedings at the International Criminal Court (ICC) against the perpetrators of the violence. Please state the extent to which you agree or disagree with the following sentences with regard to the victim's right to participation in the Court's proceedings on a six point likert scale where 1 represents strongly disagree and 6, strongly agree.

	Strongly disagree				Strongly agree	
i) I have made formal application to						
participate in the process	1	2	3	4	5	6
ii) Took part in investigation of post						
election violence	1	2	3	4	5	6
iii) Took part in the ICC pre trial process						
at The Hague	1	2	3	4	5	6
iv) My views/evidence were considered	1	2	3	4	5	6
v) Most victims were given a chance						
for participation	1	2	3	4	5	6
vi) Participation made me feel						
satisfied						
with process	1	2	3	4	5	6

vii) The ICC should share information

with the victims	1	2	3	4	5	6
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viii) I sent information to the prosecutor

to initiate investigation	1	2	3	4	5	6
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ix) I would like to testify as a witness

in the justice process	1	2	3	4	5	6
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x) I have been contacted by the prosecutor

on various ICC issues	1	2	3	4	5	6
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xi) I have made request for reparation

1	2	3	4	5	6
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9. In your opinion, how would participation/no participation in the proceedings at the ICC make you feel that justice to the victims would be done?

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10. What in your opinion are some of the challenges that victims face in terms of victim participation in the proceedings at the ICC?

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### Part III Victim's Right to Protection

11. Justice for victims of 2007/2008 post election violence in Kenya can only be achieved by assuring them of protection against the perpetrators as provided for by the Statute of the International Criminal Court (ICC).

Please state the extent to which you agree or disagree with the following sentences with regard to the victim's right to protection on a six point likert scale where 1 represents strongly disagree and 6, strongly agree. (Please circle one number)

		Very Dissatisfied					Very satisfied
i)	Social environment	1	2	3	4	5	6
ii)	Freedom of expression	1	2	3	4	5	6
iii)	Freedom of movement	1	2	3	4	5	6
iv)	Family values	1	2	3	4	5	6
v)	Property rights	1	2	3	4	5	6
vi)	Job security	1	2	3	4	5	6
vii)	Freedom of association	1	2	3	4	5	6
viii)	Right to life	1	2	3	4	5	6

12. Please tick as appropriate in the space provided to state the extent to which you would be satisfied with justice resulting from the victim's right to protection in the ICC proceedings in the following aspects.

Overall, to what extent do you agree with victim's right to protection? (Please circle one number)

	Strongly Disagree			Strongly agree		
i) The ICC and the government of Kenya						
have ensured protection						
of victims	1	2	3	4	5	6
ii) Victims live under constant threat from the						
suspects	1	2	3	4	5	6
iii) The protection so far accorded is not enough	1	2	3	4	5	6
iv) Victims can move freely without fear as a						
result of protection	1	2	3	4	5	6
v) I feel confident enough to complain/testify						
against perpetrators	1	2	3	4	5	6
vi) Protection accorded made me satisfied						
with justice process	1	2	3	4	5	6
vii) The ICC has provided psychological						
support to the victims	1	2	3	4	5	6

viii) The ICC has ensured victims confidentiality    1       2       3       4       5       6

ix) I would feel concerned about my security if my

identity is revealed as a victim/witness                      1       2       3       4       5       6

x) More security should be provided to the victims    1       2       3       4       5       6

13. What protective measures have the government of Kenya accorded to you, to prevent further violence against you?

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14. In your opinion, how does protection of victims in the ICC proceedings make you feel that justice to the victims would be done?

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15. What in your opinion are some of the challenges that victims face in terms of victim protection in the proceedings at the ICC?

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#### Part IV: Victims Right to Reparations

16. State the extent to which you agree with the following sentences with regard to reparation on a scale of 1 to 6 where 1 represents strongly disagree and 6, strongly agree

	Strongly disagree			Strongly agree		
I feel satisfied if am repaid back what I lost						
in the violence	1	2	3	4	5	6
I feel satisfied if am resettled in the same place	1	2	3	4	5	6
I feel satisfied if am compensated for loss of life	1	2	3	4	5	6
I feel satisfied if am restituted of lost property	1	2	3	4	5	6
The ICC should develop a comprehensive reparation program for victims						
	1	2	3	4	5	6
Would feel satisfied if asked by the court to request for reparation						
	1	2	3	4	5	6
I would feel satisfied if compensated for lost Opportunity						
	1	2	3	4	5	6
I would feel satisfied in compensated						

for emotional distress	1	2	3	4	5	6
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I would feel satisfied if restituted to

my former business	1	2	3	4	5	6
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I would feel satisfied if justice will be

done to the victims	1	2	3	4	5	6
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I would feel satisfied if all my medical

bills be taken care of	1	2	3	4	5	6
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17. In your opinion, what do you think should be done for you, so that you could be satisfied that justice has been done to the victims of 2007/2008 post election violence in Kenya?

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Thank you for your cooperation