

**UNIVERSITY OF NAIROBI**

**INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES**

**INTERNATIONAL CRIMINAL JUSTICE MECHANISMS AND THE PLIGHT OF  
POST ELECTIONS VICTIMS: A CASE OF KENYA (2007 - 2014)**

**BY**

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**DECLARATION**

I **FREDD GISHANGA WAKIMANI** hereby declare that this research project is my original work and has not been presented to any other university.

Signed.....Date.....

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This project has been submitted for examination with my approval as University Supervisor

Signed.....Date.....

**Dr Martin Ouma**

## **DEDICATION**

I dedicate this research project to my Father, Gichuru Kimani, without whom, I would not have started and completed this project.

## **ACKNOWLEDGEMENT**

I would like to express my special gratitude to my supervisor Dr Martin Ouma, as well as the Director of the Institute of Diplomacy and International Studies, Professor Amb Maria Ndzomo, who gave me the opportunity to do this project. I also thank my family and friends who helped me put this work together.

## TABLE OF CONTENTS

DEDICATION.....	iii
ACKNOWLEDGEMENT .....	iv
ABBREVIATIONS .....	viii
CHAPTER ONE.....	11
1.1 Introduction .....	11
1.1 Background to the Study.....	11
1.2 Statement of the Problem.....	14
1.3 Objectives to the Study .....	17
1.4 Literature Review.....	18
1.5 Significance of the Study .....	27
1.6 Theoretical Review .....	28
1.6.1 Deterrence Theory.....	28
1.7 Research Methodology .....	30
1.8 Outline of the Study .....	32
CHAPTER TWO .....	34
INTERNATIONAL CRIMINAL JUSTICE MECHANISMS AND THE VICTIMS RIGHTS TO PARTICIPATE PROCEEDINGS .....	34
2.0 Introduction.....	34
2.1 Overview of Victim’s Rights to participate in the Proceedings in ICC .....	34
2.2 The Purpose of ICC Victim Participation Scheme .....	35
2.2.1 Legal Foundations for the Victim Participation Scheme .....	38
2.3 The International Criminal Justice and Participatory Rights of Victims at the Trial Stage.....	41
2.4 The International Criminal Justice and Procedural justice .....	43
2.5 Victim Justice and International Criminal Justice Mechanisms .....	44
2.5.1 Victim Justice and International Criminal Justice Mechanisms in Africa .....	46
2.6 Impact of the ICC on Victim’s Right to Participate in Kenya .....	48
2.7 Direct and indirect ICC Mechanisms and Impacts on Countries That They Operate In.....	50
2.7.1 Political Figures and Human Rights Violations.....	51
2.7.2 Political Parties and Prolonged Conflict .....	53

2.7.3 The ICC Impact on Human Rights .....	54
2.7.4 The impact of the ICC mechanism on political stability.....	56
2.8 Specific problems in relation to victim participation.....	57
2.7 Chapter Summary .....	59
CHAPTER THREE .....	62
THE INTERNATIONAL CRIMINAL JUSTICE MECHANISM AND VICTIMS RIGHT TO PROTECTION. ....	62
3.0 Introduction.....	62
3.1 Overview of the International Criminal Justice Mechanism and Victims Protection.....	62
3.2 International Protection of Victims' Rights.....	65
3.4 International Criminal Court and victim's Right to Protection.....	67
3.5 Challenges of victims' rights protection in East Africa.....	68
3.5.1 Legal challenges.....	68
3.5.2 Cultural and religious challenges .....	69
3.5.3 Economic and social challenges .....	69
3.6 International Criminal Court and the new model of victims' rights .....	70
3.7 Chapter summary .....	72
4.3 Design and Implementation of collective reparations Mechanisms.....	77
4.4 Who may claim reparations?.....	79
4.5 Assessment of damages .....	81
4.6 Links between Two Rights: Participation and Reparations .....	81
CHAPTER 5 .....	86
5.0 Introduction .....	86
5.1 Status of Kenya's PEV ictims.....	86
5.2 The process of participation protection and reparation in the Kenyan case.....	92
5.3 Other options for PEV victims in the International Criminal Justice Mechanisms.....	92
5.3.1 Universal Jurisdiction .....	93
5.3.2. Private Prosecutions in local courts.....	96
5.3.3 Regional Mechanisms .....	97
5.4 Chapter Summary .....	100

CHAPTER 6 .....	102
SUMMARY AND CONCLUSIONS.....	102
6.0 Introduction .....	102
6.1 Summary .....	102
6.1.1 International Criminal Justice Mechanisms and the PEV victims right to participation .....	102
6.1.2 The International Criminal Justice Mechanisms and the PEV victims right to Protection.....	102
6.1.3 The International Criminal Justice Mechanisms and the PEV victims right to Reparation.....	103
6.2 Conclusion.....	103
6.3 Recommendations.....	104

## ABBREVIATIONS

<b>ACHPR:</b>	African Commission on Human and Peoples Rights
<b>AU:</b>	African Union
<b>CAR:</b>	Central African Republic
<b>CAT:</b>	Convention Against torture
<b>CIPEV:</b>	Commission of Inquiry Into Post-Election Violence
<b>CLR:</b>	Common Legal Representative
<b>DDR:</b>	Demobilization and Disarmament and Re-integration Program
<b>DRC:</b>	Democratic Republic of Congo
<b>EAC:</b>	East African Community
<b>EACJ:</b>	East African Court of Justice
<b>EALA:</b>	East African Legislative Assembly
<b>ECOWAS:</b>	Economic Community for West African States
<b>EU:</b>	European Union
<b>ICC:</b>	International Criminal Court
<b>ICTR:</b>	International Criminal Tribunal for Rwanda
<b>ICTY:</b>	International Criminal Tribunal for Yugoslavia
<b>NGOs:</b>	Non Governmental organisations



<b>OAU:</b>	Organization of African Unity
<b>OPCV:</b>	Office of Public Counsel for Victims
<b>PEV:</b>	Post-Election Violence
<b>OTP:</b>	Office of The Prosecutor
<b>SALW:</b>	Small Arms Light Weapons Program
<b>UN:</b>	United Nations
<b>VPRS:</b>	Victims Participation and Reparation Section
<b>VTF:</b>	Victims trust fund
<b>VWU:</b>	Victims Witness Unit

## **ABSTRACT**

Justice for victims targeted in Post-Election Violence is of utmost importance if impunity is to be tamed and eventually eliminated. The right to participation, protection and reparations for victims is of paramount importance in the process of seeking justice. The international criminal justice mechanisms must thus conform to these three requirements if their presence is to be justified. The study therefore analyses these three key areas of participation, protection and reparation in light of the Kenyan case after the post-election violence of 2007/08. The study's objective was to analyse if international criminal justice mechanisms including to a large extent the International Criminal Court, actually contribute to delivery of justice at the local or domestic plane or if they were superfluous and of no effect to the victim on the ground. By looking at international justice mechanisms and their impact on the victims from similar scenarios globally and contrasting them with the Kenyan case, the study gauged the effectiveness of the mechanisms vis a vis the plight of the victims. By the use of quantitative and qualitative methods, through interviews and analysis of numerous reports on the issue, the study was able to deduce that international justice mechanisms are not sufficiently effective in addressing the plight of the victims' whose human rights were violated.. Similarly in the international realm, the study deduced that political factors are also at play in affecting the victims' rights. According to the study's findings, the international justice mechanisms need to be enhanced in order to effectively address the plight of the victims.

## **CHAPTER ONE**

### **INTRODUCTION AND BACKGROUND TO THE STUDY**

#### **1.0 Introduction**

This chapter starts off by giving a brief introduction into the topic of research by first analyzing the background to the study. This sets the tone for the research. It then looks at the statement of the problem which delves into the questions that arise from the topic of the research narrowing down the focus of the study. It then looks at the objectives of the study, which outlines the aims of the research. This is followed by the literature review that identifies the gaps in academia in relation to the topic of research, after which the significance of the study follows. This sets out the reasons for undertaking the study. The theoretical framework then follows, the research methodology and finally the chapter outline

#### **1.1 Background to the Study**

A long held aspiration of the international community was the creation of a permanent court to prosecute cases of unimaginable atrocities that deeply shock the conscience of humanity and threaten the peace, security and well-being of the world.<sup>1</sup> Of the many aspects in and issues arising from the Rome Statute that established the International Criminal Court (ICC), complementary, the principle restates the primacy of national courts in investigating and prosecuting international crimes, seems to have, by far attracted the most attention and intense debate. The controversies surrounding the establishment of the international criminal

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<sup>1</sup> Goldhagen, Daniel J. *Hitler's Willing Executioners: Ordinary Germans and the Holocaust*. London: Vintage, 2010.

justice mechanism court which have been fuelled by glaring anomalies in certain provisions of the Rome Statute. For instance, the formulation of Article 17 of the Rome Statute was not comprehensive (Cryer 147), a fact that has provided a fodder for States that are intolerant to International Crimes to feign eagerness to prosecute as a façade to protect alleged perpetrators of International Crimes from genuine prosecution.<sup>2</sup>

The quest for a permanent and independent court eventually came to fruition when the Rome Statute of the ICC entered into force on 1<sup>st</sup> July 2002.<sup>3</sup> The Court has jurisdiction over four crimes: The crimes of genocide, crimes against humanity, war crimes and crimes of aggression. After a decade of operation responding to crimes committed in crisis situations initially mostly for Africa, the Court became increasingly criticised and pressured from some of the state parties especially from Africa who appeared rattled by the scope of investigations and prosecution before the Court.<sup>4</sup>

As of 25<sup>th</sup>, January 2013, there were 8 situations before the Court all of which were in Africa. These included one case in connection with Northern Uganda, six cases in connection with the Democratic Republic of Congo (DRC), five cases in connection with Dafur, two cases each in connection with Kenya and Côte d'Ivoire and one case each in connection with the Central African Republic (CAR) and Libya, and commenced investigation in the situation in Mali.<sup>5</sup> Four of these countries are state parties to the Rome Statute. The Central African

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<sup>2</sup> Mekjian, Gerard J.; Varughese, Mathew C. "Hearing the victim's voice: analysis of victims' advocate participation in the trial proceeding of the International Criminal Court." *Pace International Law Review* 17 (2012): pp. 1-46.

<sup>3</sup> Lone.L, Powersharing in Comparative Perspective: The Dynamics of a Unity Government, *the Journal of Modern African Studies*, Vol 48, issue, 02, May 2010

<sup>4</sup> Mochochoko .P., "the International Criminal court", in Ankumah.E. and Kwakwa.E.,(eds), *African Perspectives on International Criminal Justice*(SouthAfrica:ABC Press,2014)

<sup>5</sup> Mutisi, Martha "Gacaca Courts in Rwanda: An Endogenous Approach to Post-conflict Justice and Reconciliation" *African Peace and Conflict Journal*, Vol. 2, No. 1, June 2013

Republic, Uganda, and the Democratic Republic of Congo referred the situations in their countries to the Prosecutor.<sup>6</sup>

Prima facie, the belief that the international criminal justice mechanism can deter future crimes might seem harmless. One could argue that the international criminal justice mechanisms are only to contribute to deterrence and not be solely responsible for it.<sup>7</sup> If the Court saves at least some lives, it will still have an aggregate positive effect for affected populations. But the problem is that the ICC and international criminal justice more widely is sometimes used as a relatively ‘cheap’ instrument to substitute for more robust interventions, such as military action. For instance, the UN Security Council was criticized because it appeared to use the ICC in Sudan as an alternative to more serious involvement. In such circumstances, and despite its positive contributions in other aspects, the Court is seen to have failed because supporters inflate hopes and expectations about the Court’s usefulness as a conflict management tool.<sup>8</sup> This is all the more problematic because the short-term failure of justice to deliver an end to hostilities might decrease perceptions about the independent value of justice in the long term. Because of these important policy implications, it is of great relevance to assess the claims made by Court supporters that threats of legal sanctions can deter future atrocities.

The international criminal justice mechanism 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

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<sup>6</sup> Anderson.T., *Trial Justice: The International Criminal Court and the Lord’s Resistance Army*(London: Zed books,2011)

<sup>7</sup> Kaley Nash, 2011, “*Comparative Analysis of Post-Genocide Rwanda: Fostering a Sense of Peace or Reconciliation*” *Africana*, Vol. 1 No.1

<sup>8</sup> Government of Kenya (2012) *Sessional Paper No. 3 of 2009 on National Land Policy*. Nairobi: Government Printer.

Republic and Kenya are subjects of its investigations and prosecutions.<sup>9</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 fulfil the international criminal justice mechanism mandate. While the international criminal justice mechanism marks significant steps forward from its predecessors, there continues to be space for further improvement in ensuring that victim and witness participation does not result in re-traumatisation.<sup>10</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>11</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.<sup>12</sup>

## **1.2 Statement of the Problem**

Thirteen years after it first started operations, international criminal justice mechanism still faces a host of dictators, rebel groups, and other malignant people who frequently break the

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<sup>9</sup> Afrobarometer (2014) Online Data Analysis [Internet] Available from <<http://www.afrobarometer-online-analysis.com>> [ accessed on 17 April 2014].

<sup>10</sup> Human Rights Watch (2012) *Playing With Fire: Weapons Proliferation, Political Violence and Human Rights in Kenya*. Washington, DC: Human Rights Watch.

<sup>11</sup> Kenya National Commission on Human Rights (2012) “*Referendum Report- Behaving Badly*” [Internet] Available from< <http://www.knchr.org/Portals/0/Reports/BehavingBadly.pdf>> [Accessed 29 March 2014].

<sup>12</sup> Kenya for Peace with Truth and Justice and Africa Center for Open Governance (2010) *Reaping the whirlwind? The socio-economic implications of the 2008 post-election violence*[Internet] Available from< [http://www.africog.org/reports/reaping\\_the\\_whirlwind.pdf](http://www.africog.org/reports/reaping_the_whirlwind.pdf)>[Accessed 5 April 2014].

laws it was meant to uphold.<sup>13</sup> A few examples from 2014 are illustrative. The ICC recently underwent a stocktaking exercise with respect to the impact of the Rome Statute system on victims and affected communities, making it an opportune time to reflect on the degree to which the Court's activities are, in fact, meeting the needs of victims. As well, there had been initial concerns by some commentators that the international criminal justice might move slowly and prove cautious in its investigatory scope; however, these fears appear to have been unfounded as the Court continues to expand its investigatory and prosecutorial reach. The entire ICC system functions primarily on the principle of complementarity as provided for in Article 17 of the Rome Statute. Although complementarity reaffirms the primary right of States and sovereignty in exercising criminal jurisdiction, the Court has paradoxically been accused of whittling state sovereignty.<sup>14</sup>

Syagga argues that the International Criminal Court was the most necessary International body to give victims and suspects a fair hearing. Indeed the creation of the ICC comes at right moment to address the issues of conflicts in the world.<sup>15</sup> From the above sentiments of Syagga that the ICC is the right international institution that needs international support, it sometimes does not mean that it is the right institution that may intervene during conflicts because the international criminal justice mechanism in place have not done well from the few cases it has involved itself with. The challenge of providing accurate information and

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<sup>13</sup> Posner, N. (2012) *Regime change and ethnic cleavages in Africa. Comparative Political Studies*, 40(11), 1302-1327.

<sup>14</sup> Truth Justice Reconciliation Commission (2014) "*Report of Truth, Justice and Reconciliation Commission*", Vol 2B. Nairobi: Truth Justice Reconciliation Commission.

<sup>15</sup> Syagga, P. (2014) *Public land, historical land injustices and the new Constitution*. Nairobi: Society for International Development.

outreach to potential victims remains a problem within the Court, as verified in a study undertaken by several victims groups in advance of the recent stocktaking exercise.<sup>16</sup>

The 2007/2008 post elections violence left several victims crying for justice.<sup>17</sup> However, it is no secret that the criminal justice system, society's means for responding to crime, is far from perfect. 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. In view of these, it is noted that there are challenges of implementing victims' rights aimed at achieving justice. This situation was further complicated when Uhuru Kenyatta became the President of Kenya and charges against him had been confirmed and the African Union called on the member states not to cooperate with the ICC, called for deferral of his case and pursuant to a decision taken by the African Union Assembly.<sup>18</sup>

The African Union Commission appointed consultants to work on drafting an amended protocol of the African Court to provide for the expansion of the African Court to deal with specific criminal matters such as international crimes of genocide, war crimes and crimes against humanity.<sup>19</sup> In addition since the confirmation of charges of the Kenyan suspects, all efforts have been made to ensure that they do not stand for trial and this has been with the overwhelming support of the African Union. There have been proposals for amendment of the Rome Statute in order for accused persons not to be present in court and that incumbent

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<sup>16</sup> Ngilu, C. (2014, March 24<sup>th</sup>). Land & Poverty Conference [PowerPoint Slides]. Presented at a World Bank.DC

<sup>17</sup> Kimenyi, S.M & Kibe J (2014) *African Powerhouse* [Internet] Available from <<http://www.brookings.edu/research/opinions/2013/12/30-kenya-economy-kimenyi>> [Accessed 1 May 2014].

<sup>18</sup> Kenya National Commission on Human Rights (2011) "*Waki Report*" [Internet] Available from <[http://www.knchr.org/Portals/0/Reports/Waki\\_Report.pdf](http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf)> [Accessed 9 March 2014].

<sup>19</sup> Halakhe, A. (2013) *Ethic Violence, Elections and Atrocity Prevention in Kenya*: Occasional Paper Series No.4. December 2013. To be used in the project.



heads of states do not face trial at the International Criminal Court.<sup>20</sup> This clearly shows that African states are not willing to cooperate with the international criminal justice mechanisms in place and will do anything to ensure that perpetrators of these heinous crimes are not brought to book as whatever decisions they make, do not take into consideration the victims of the heinous crimes. Thus how does the international criminal justice mechanism affect PEV victims in Kenya in relation to protection, participation and reparation?

### **1.3 Objectives to the Study**

The study general objective is to investigate the role and effect of international criminal justice mechanisms on the plight of post elections victim in Kenya between 2007 and 2014

The Specific objectives are as follows:

- i. To establish the extent to which victim rights to participate in the proceedings have been influenced by international criminal justice mechanisms in relation to the Kenyan case
- ii. To ascertain the extent to which victims protection have been influenced by the international criminal justice mechanisms in relation to the Kenyan case
- iii. To evaluate the extent to which victims reparations have been influenced by the international criminal justice mechanisms in relation to the Kenyan case.

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<sup>20</sup> United Nation High Commission for Refugees (2014) “*UNHCR country operations profile*” [Internet] Available from < <http://www.unhcr.org/pages/49e45c156.html> > [Accessed 9 April 2014].

## 1.4 Literature Review

According to Rudina and Victoria the highest criminal court in the world which is the ICC, was created on July 2002 through the Rome Statute.<sup>21</sup> It was established to be an independent judicial institution, which would try perpetrators of crimes against humanity, genocide, and war crimes when states are unwilling or unable to carry out domestic trials. However, despite initial optimism the ICC quickly became entwined in controversy. International and African scholars of both political and legal backgrounds have criticised the court's founding document, the Rome Statute, the court's claim of universality, its prosecutor and judges, its apparent focus on Africa, its domination by the EU and the influential role of the US despite its refusal to become a member of the ICC.<sup>22</sup>

The International Criminal Court (ICC or the Court) symbolizes the pinnacle in the rise of the retributivist paradigm in international criminal justice.<sup>23</sup> The Rome Statute for the International Criminal Court (the Rome Statute) 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 to impunity for the perpetrators of these crimes. However, the Court also marks a watershed for victim involvement within the international criminal trial process. The

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<sup>21</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).

<sup>22</sup> Marshall, T. "The Evolution of Restorative Justice in Britain," *European Journal of Criminal Policy and Research*, 4 (2010).

<sup>23</sup> De Brouwer, Anne-Marie. "Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families." *Leiden Journal of International Law*. 20 (2011).

Rome Statute provides victims with a set of novel procedural rights, which position victims as active participants in the criminal process and as potential beneficiaries of reparations.<sup>24</sup>

The Rome Statute incorporated three main statutory rights in this regard: the right to participation, the right to protection, and the right to reparations.<sup>25</sup> These provisions reflected an attempt to mitigate the problems of previous international criminal tribunals along with recognition of the growth of the victims' rights movement. The Rome Statute Preamble provides a stark reminder that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity. A major policy shift, both morally and politically grounded, occurred from the mid- 1980s onwards.<sup>26</sup>

According to Johnson the global growth of a human rights culture blossomed into a new, now much wider, fight against impunity.<sup>27</sup> International agencies such as the United Nations (UN) and the Inter-American Human Rights Court as well as large human rights NGOs cooperated to develop both the norm and the practice of a duty to prosecute crimes against humanity, genocide and war crimes. This in turn resulted in the establishment of the ad hoc tribunals of The Hague (for the former Yugoslavia) and Arusha (for Rwanda) and of the International Criminal Court, and in the gradual spread of the principle of universal jurisdiction. Moreover,

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<sup>24</sup> Bacharach, Michael. "The Protection and Rights of Victims." *The International Law Review* 34 (2010).

<sup>25</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, 2011).

<sup>26</sup> Penrose, Margret.M., "it is good to be king: Prosecuting heads of states and former heads of state under international law," *Columbia Journal of Transnational Law* Vol39(2011)

<sup>27</sup> Johnson.L., "Ten Years Later: Reflections on the Drafting " *Journal of International Criminal Justice* ,Vol 2,(2014)

the choice of retributive justice as a strategy has even been written into internationally brokered peace agreements, as in Guatemala, Sierra Leone and Burundi.<sup>28</sup>

Wanyeki provides a thorough description of what he calls the restorative lens. Restorative justice marks a paradigm shift in how justice is conceived.<sup>29</sup> 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.<sup>30</sup> It highlights the obligation imposed on offenders, holding them accountable for the offences 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.

Plessis asserts that the ICC marks the first substantive attempt by an international criminal judicial institution to meet the reparative needs of victims.<sup>31</sup> However, the Court is able to draw from lessons gained in the fields of general international law and international human rights law that have recognized the right to reparation for some time. The Court, under Article 75(1), is required to establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. However, the article states the creation of principles including the three listed forms of redress, which suggests that the

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<sup>28</sup> Glasius.M. “Global Justice Meets Local Civil Society: The International Criminal Courts Investigation in Central African Republic”, *Alternatives: Global, Political, Vol.33, No.4* (2008)

<sup>29</sup> Wanyeki.L.“The International Criminal cases in Kenya Origin and Impact”, paper no.237 (South Africa: Institute of Security Studies, August 2012)

<sup>30</sup> Plessis.M.African Guide to International Criminal Justice,(South Africa: ISS,Pretoria,2009)

<sup>31</sup> Plessis.M.,*The International Criminal Court That Africa Wants*,(South Africa: Institute of Security Studies, 2010)

Court is not limited to only these types. Previously, regional human rights bodies had thought that reparation should be narrowly conceived as monetary compensation; however, the 2005 Basic Principles substantially expanded the notion of reparation including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>32</sup> The Rome Statute is reflective of the international consensus towards a broader understanding of reparation.

On the African scene, in Musifiky words, impunity is the dictator's greatest and most potent weapon. It is also the victim's ultimate injury.<sup>33</sup> Africa's own efforts to hold senior government officials and rebel leaders accountable for torture, murder, rape and other serious crimes against humanity has been hampered by the same leaders' ability to evade the rule of law. Many countries in Africa; Libya, North and South Sudan, Somalia, Zimbabwe, Egypt and Kenya to name but a few, are bleeding or healing wounds caused by impunity. The search for a clear end to impunity against human rights abuses on the world scene and in Africa culminated in the formation of the International Criminal Court. The ICC has come in handy to assist Africa deal with impunity, for human rights abuses, though not other forms of impunity.

According to Meernik the ICC is part of a new International Humanitarian order, in which big powers act as enforcers of justice internationally.<sup>34</sup> The ICC is a component of this new order an order which draws history of modern western colonialism and the ICC shares an aim of mutual cooperation with the world's only superpower its name notwithstanding the ICC is

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<sup>32</sup> Malekian, Farhad.A., *The Monopolization of International Criminal Law in the United Nations, A Jurisprudential Approach 2nd Ed*(Cambridge: Cambridge University 2010)

<sup>33</sup> Musifiky Mwanasali, (2011). Civil Conflict and Conflict Management in the Great Lakes Region of Africa" in George Klay Kieh, Jr and Ida Rousseau Mukenge (Eds), *Zones of Conflict in Africa: Theories and Cases*, (Connecticut, London: Praeger, Westport.

<sup>34</sup> Meernik J, 2013, '*Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia*', *Journal of Peace Research*, Vol. 42 No. 3.

rapidly turning into a western court to try African crimes against humanity. It has targeted governments that are US adversaries and ignored actions the US does not oppose like those of Uganda and Rwanda in eastern Congo effectively conferring impunity on them. President Paul Kagame has also claimed that the ICC is a new form of imperialism that seeks to undermine people from poor African countries and other powerless countries in terms of economic development and politics the danger with these arguments is that they are supported by dictators and their henchmen who do not want to be held accountable or held responsible, in addition this facts are not substantiated by true facts and this arguments may end up damaging the institution for the following reasons.<sup>35</sup>

Musifiky argues that in spite of the dangers in creating an expectations gap, 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>36</sup> Gabriella 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>37</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. 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.

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<sup>35</sup> Gultung Johan, 2014 *'Twenty-Five Years of Peace Research: Ten Challenges and Some Responses,'* in *Journal of Peace Research* 22 ( 2): 141-158

<sup>36</sup> Musifiky Mwanasali, (2011). *Civil Conflict and Conflict Management in the Great Lakes Region of Africa* in George Klay Kieh, Jr and Ida Rousseau Mukenge (Eds), *Zones of Conflict in Africa: Theories and Cases*, (Connecticut, London: Praeger, Westport.

<sup>37</sup> Gabriella Venturini, 'War Crimes in International Armed Conflicts', in Mauro Politi and Giuseppe Nesi (eds.) *The Rome Statute of the International Criminal Court A Challenge to Impunity*, Aldershot: Ashgate 2012

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. According to Alan a factor limiting the certainty of arrest is that the ICC must deal with alternative modes of transitional justice.<sup>38</sup> Proponents of restorative justice argue that traditional justice mechanisms and truth commissions are more effective in promoting reconciliation and designing effective paths to sustainable peace. What is problematic for the ICC is that these mechanisms may lead to amnesties or grant alternative punishments, circumventing (international) criminal trials. Questions over the offering of amnesties have sparked intense debates about whether to prioritize peace or justice.

Wairagala argues that judicial proceedings can exacerbate conflict and that justice should not be prioritized over peace.<sup>39</sup> Others maintain that amnesties offer perverse incentives and that there can be no peace without justice. The peace versus justice debate intensified in 2007 when Ugandan rebel leader Joseph Kony refused to sign a peace deal because the ICC did not revoke his arrest warrant. Such questions remain relevant today. Peace negotiations in Ukraine and Syria have seen hotly contested debates over whether amnesties should be accepted as part of a peace deal. It is not the intention here to delve too deeply into this debate, but it seems clear that offering amnesties as part of a transitional justice deal would undermine the certainty of legal sanctions, thus limiting the deterrent impact of the ICC.<sup>40</sup>

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<sup>38</sup> Alan C. Tidwell, (2012) *Conflict Resolved? A Critical Assessment of Conflict Resolution*, London and New York: Pinter Publishers

<sup>39</sup> Wairagala, W. (2011). *Victims Participating in Bemba Trial Now Reach 1,600*, The Trial of Jean-Pierre Bemba Gombo, Open Society Justice Institute, July 14, 2011

<sup>40</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript, ICC-01/04-01/06-T-225-RED, 12 January 2010.

Ending the culture of impunity will be difficult if offenders get away with their crimes by using amnesties as a bargaining chip for ending atrocities.

According to Valinas the East African countries have been involved either in intra or interstate conflicts and one could expect that the National Institutions to with the Judiciary, police services/Armies and various National commissions formed to address such conflicts could assist but this has failed and thus there has been a concern to the international community more so the world institutions like the UN whose concerns are to ensure that we have peace.<sup>41</sup> Three types of conflict management initiatives have taken places in the Great Lakes region. The first consists of humanitarian and military responses by the international community under the sponsorship of the United Nations and its specialized agencies, individuals and institutional mediation, conducted under the support of the Organization of African Unity (OAU) and its successor the African Union (AU), alone or in partnership with the UN and ad hoc military responses.

ICC delivered targeted communications to key parties in the civil war to emphasize the possibility of an OTP investigation.<sup>42</sup> This seems to have catalyzed right-wing paramilitary groups to demobilize and left-wing guerilla groups to encourage damage-limitation measures. In Kenya, the ICC messaged that it was monitoring the 2013 elections for the commission of ICC crimes, allegedly contributing to the prevention of these crimes.<sup>43</sup> The Colombian and Kenyan cases, if true, illustrate that the objective certainty of the sanction threat are less important than the potential perpetrator's perception of it.

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<sup>41</sup> Valinas, M. (2010). Interpreting complementarity and interests of justice in the presence of restorative-based alternative forms of justice, in Carsten Stahn and Larissa van den Herik (eds.) *Future Perspectives on International Criminal Justice*. The Hague: T.M.C. Asser Press.

<sup>42</sup> Pena, M. (2010). Victim Participation at the International Criminal Court: Achievements Made and Challenges Lying Ahead, *ILSA Journal of International and Comparative Law*, 16(2), 497-516

<sup>43</sup> McKay, F. (2014) Victims Rights Working Group, Address at the Rome Conference, Redress on Behalf of the Victims Rights Working Group.



The problems related to certainty of prosecution that the ICC is point to the relevance of the experiential effect.<sup>44</sup> The information potential offenders receive from their and their peers' experiences with international criminal justice, will generally suggest minimal chances of being prosecuted or apprehended. Although the ICC has made progress in countering the culture of impunity, the world is still rife with leaders who commit atrocities and get away with it. Recent developments have exacerbated these effects. In December 2014, the ICC Prosecutor publicly dropped her case against Kenyan President Uhuru Kenyatta because the government actively countered her attempts to garner enough evidence to build a case.<sup>45</sup> She also suspended prosecutorial activities against Al-Bashir, citing a lack of international support. Potential offenders may feel that they will be rewarded with a moratorium on their prosecution when they obstruct the ICC for long enough. Al-Bashir and Kenyatta certainly felt vindicated and claimed a victory over the Court.

Although the experiential effect now seems to lead to decreased perceptions of certainty that it will eventually contribute to the ICC's deterrent effect in a positive way seems likely. Justice and accountability are increasingly becoming part of the discourse.<sup>46</sup> International and internal pressures make it more difficult for negotiators to strike peace deals that do not address these issues in some way. The combination of positive complementarily and international criminal trials could mean that potential offenders will look around them, see

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<sup>44</sup> McGonigle, B. (2009). Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court, *Florida Journal of International Law* 21(1).  
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<sup>45</sup> Gavrielides, T. (2013) Restorative Justice—The Perplexing Concept: Conceptual Faultlines and Power Battles within the Restorative Justice Movement, *Criminology and Criminal Justice*, 8(2), 165-183.

<sup>46</sup> de Brouwer, A-M. (2009). What the International Criminal Court has Achieved and can Achieve for Victims/Survivors of Sexual Violence, *International Review of Victimology*, 16(2), pp. 183-209.

that their peers who commit ICC crimes are prosecuted, and therefore increase their perceived costs of offending.<sup>47</sup>

The challenges of meeting these broader restorative goals are already being felt by the Court in its attempt to meet the needs of victim participants.<sup>48</sup> As will be considered with respect to the right to participation, the Court has sought to delineate a more streamlined approach to participation by negating a general right to participation at the investigative phase, necessitating a linkage requirement for trial participation, and the continued promotion of common legal representation in order to maintain the retributive goal of prosecution and enforcement. In respect to the right to protection, the restorative emphasis of an affirmation of moral worth and dignity for all parties has continued to raise challenges in relation to the specific rights of the accused to be able to prepare a full defence. It is argued throughout that the granting of statutory rights to participation and protection, while novel to international criminal law, have not resulted in a transformation of the overall system into a restorative one.<sup>49</sup>

Recently, however, the focus has been on developing proactive outreach processes within transitional justice institutions, such as the ICC.<sup>50</sup> The ICC recognizes that in order to fulfil its mandate, its role and judicial activities must be understood by affected communities. As a result, the Court's outreach program was created to: provide accurate and comprehensive information to affected communities regarding the Court's role and activities; promote

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<sup>47</sup> Bassiouni, M.C. (2011). International Recognition of Victims' Rights. *Human Rights Law Review*, 6(2), 203-279.

<sup>48</sup> Sartori, Giovanni. *Parties and Party systems – A framework for Analysis*. 2014 edition. Essex: European Consortium for Political Research.

<sup>49</sup> Zartman, William and Saadia Touval. "International Mediation in the Post-Cold War Era." In *Managing Global Chaos*, edited by Chester Crocker, Fen Hampson and Pamela Aall. Washington, D.C.: United States Institute of Peace Press 2011.

<sup>50</sup> Subotic, Jelena. "The Paradox of International Justice Compliance." *International Journal of Transitional Justice* 3, no. 3 (2009): 362-383

greater understanding of the Court's role during the various stages of proceedings with a view to increasing support for them among the population; foster greater participation of local communities in the activities of the Court; respond to the general concerns and expectations expressed by affected communities and by particular groups within these communities; counter misinformation; and promote access to, and understanding of, judicial proceedings among affected communities.<sup>51</sup>

### **1.5 Significance of the Study**

In policy terms the study is justified on the grounds that the African Conflict has had great implications on the regional and international system especially in conflict management which needs to be closely analysed in order to institute successful measures for the management of conflicts through international criminal justice mechanism. Policy makers will gain knowledge of conflict spirals and cycles which is useful by designing adequate management strategies for conflict practitioners in prolonged conflicts and also add to existing knowledge and capabilities in the area of conflict management to enhance global security policy.

The study makes a key contribution to the victims by availing credible recommendations on the International Criminal justice 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.

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<sup>51</sup> OTJR. (2012) "Debating International Justice in Africa." In *Oxford Transitional Justice Research*, edited by Justice and Society the Foundation for Law. University of Oxford, n.d. [www.fljs.org](http://www.fljs.org). Kenya and the ICC

The results of this study will provide useful research information and resource to academicians who wish to understand in depth the area of study. Consequently, it offers a basis for further criticisms and development of the knowledge on the need for expetive theory, and practice, in resolution of disputes by the ICC, and broadly, resolution of international crimes.

## **1.6 Theoretical Review**

### **1.6.1 Deterrence Theory**

According to Schelling<sup>52</sup> the deterrence theory is a strategy intended to dissuade an adversary from taking an action not yet started. Schelling adds that the capacity to harm another state is now used as a factor preventing other states from certain action or behaviour. To be coercive or deter another state, violence must be anticipated and avoidable by accommodation. It can therefore be summarized that the use of the power to hurt as bargaining power is the foundation of deterrence theory, and is most successful when it is held in reserve and in contemplation of offensive attack. On a smaller scale, deterrence in the context of the research refers to the use of punitive measures to dissuade future perpetrators from violence. It is the use of punishment and sanctions in a response to impunity.

Moreover the assumption that the international criminal justice mechanisms can deter future atrocities by prosecuting and punishing those responsible for previous atrocities has its roots in national theories on legal deterrence. Taking a utilitarian approach to offending, going back to the theory of deterrence theory by McCarthy.<sup>53</sup> The theory assumes that the decision to commit a crime is based on some sort of cost-benefit calculation. A potential offender will

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<sup>52</sup> Schelling, T. C. (1966), "2", *The Diplomacy of Violence*, New Haven: Yale University Press, pp. 1–34

<sup>53</sup> McCarthy, C. (2009). Reparations under the Rome Statute of the International Criminal Court and Reparative Deterrence Theory, *The International Journal of Transitional Justice*, 3(2), 250–271.

commit a crime only when he considers the expected benefits to be greater than the expected costs. By sufficiently increasing these expected costs, a legal sanction threat can therefore deter crime. This core assumption can be broken down into two sub-assumptions. The first is that individuals make decisions based on a rational cost-benefit calculation. The second is that punishment by the legal system such as fines, prison sentences, and capital punishment can influence this cost-benefit analysis.<sup>54</sup>

The extent of planning and organization that goes into most genocidal activities seems to preclude an explanation solely focused on the irrationality of the senior leadership. Most of the behaviour is clearly goal-oriented and serves some sort of purpose to them. If the potential perpetrator can be influenced by incentives and disincentives, credible international criminal justice mechanisms that would ensure legal sanction threats could theoretically be an effective disincentive. According to McCarthy, justice can mean either lawfulness or fairness, since injustice is lawlessness and unfairness.<sup>55</sup> 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. McCarthy attempted to dissect justice into its smallest components, causing him to postulate three kinds: distributive, correction and equity. Distributive justice, 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.<sup>56</sup>

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<sup>54</sup> Costello, Matthew. "State Softness as a Product of Environmental Uncertainty : A Theory with Applications to Nigeria, Kenya, and South Korea." *Journal of Developing Areas* 28, no. 3 (2011): 345-364.

<sup>55</sup> McCarthy, C. (2009). Reparations under the Rome Statute of the International Criminal Court and Reporative Deterrence Theory, *The International Journal of Transitional Justice*, 3(2), 250–271.

<sup>56</sup> Makumi Mwagiru 2000, "conflicts in Africa", Theory, Processes and Institutions of Management, contextualizing war

Equitable justice is that kind of justice which McCarthy postulated as being a form of justice superior to legal justice.<sup>57</sup> 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.<sup>58</sup> The 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.<sup>59</sup> It is important to go beyond the statutory provisions of the international criminal justice mechanisms, and consider factors such as the justice process and their relation to the victim and the perpetrator. In view of this, the analysis of the victim's rights in the current study will take a holistic view of assessing the application of victim's rights to participation, protection and reparation in the Kenyan cases.

## **1.7 Research Methodology**

The research uses both primary and secondary data. The case study method was also used and according to Kothari is a form of qualitative analysis wherein careful and complete observation of an individual or a situation or an institution is done efforts are made, to study each and every aspect of the concerned unit in minute details and then from the case data generalizations and inferences are drawn.<sup>60</sup> The researcher adopted a case study approach in order to conduct an intensive study of the units of investigation, in order to deepen the

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<sup>57</sup> Murshed, Mansoob. "Conflict, Civil War and Underdevelopment: An Introduction." *Journal of Peace Research* 39, no. 4 (2002): 387-393

<sup>58</sup> McCarthy, C. (2009). Reparations under the Rome Statute of the International Criminal Court and Reporative Deterrence Theory, *The International Journal of Transitional Justice*, 3(2), 250–271.

<sup>59</sup> Maunganize, M., *Conflict: Theory, Processes and Institutions of Management*, (Nairobi :Centre for Conflict Research, 2006)

<sup>60</sup> Kothari.C., *Research Methodology Methods and Techniques, 2nd Revised Edition*, (New Delhi, New Age International(P) Limited Publishers, 1982)

understanding of the role/ effect of international criminal justice mechanism on the plight of post elections victim.

The tool used to collect data in the case study method documented a review of published primary data of judicial records kept at the Mombasa, Nairobi, Eldoret, Kitale and Nakuru law courts criminal registry in relation to all cases that Kenya has prosecuted and were related to the 2007/2008 post election violence, cases prosecuted under the Kenya international crimes act 2008 which is the domesticated legislation with regard to international crimes. The researcher interviewed judges in the Nairobi high court criminal division, who are well versed with matters in international crimes at the International Criminal Court. Who have handled matters where accused persons have been charged under the International Crimes Act.

The researcher used questionnaires some of which will be open ended and closed ended which were self-administered, to personnel in the Institute of security studies who are knowledgeable on issues on the international criminal justice mechanism and researchers who dedicate their time and resources to international criminal justice mechanism matters. In addition questionnaires were given to various participants from various African countries, in various workshops organised by the Institute of Security Studies who are usually persons in the security sector and well versed with matters of the international criminal justice mechanism, by virtue of attending the ongoing trials at the ICC and participating in the Assembly of states that have ratified the Rome Statute

Other secondary data was obtained from analysis and review of books, journals, published academic work, publications from key institutions working in the peace and security sector as well as reports of government commissions and taskforces on politics and electoral violence in Kenya. The data was analyzed using content analysis. Content analysis is a technique for

making inferences by objectively and systematically identifying specified characteristics of responses and objectively and systematically identifying characteristics of responses and objectively identifying and using the same approach to relate trends. The results were presented under identified themes.

### **1.8 Outline of the Study**

The study is undertaken in six chapters. Each chapter will aim at answering one or more of the research objectives. Chapter one introduces the research topic first setting the broad context of the research study, the statement of the problem, study objectives, literature review, significance of the study, hypotheses, theoretical review and concludes with the methodology of the study.

Chapter two gives analysis victim rights to participate in the proceedings and the international criminal justice mechanism, its broken into the following sub topics: Overview of Victim's Rights to participate in the Proceedings in ICC, The Purpose of ICC Victim Participation Scheme, Victim Justice and International Criminal Justice Mechanisms, Impact of the ICC on Victim's Right to Participate in Kenya, Specific problems in relation to victim participation and finally the conclusions.

Chapter three presents discussion on the international criminal justice mechanism and victim's protection. It is divided in the following subtopics: overview of the international criminal justice mechanism and victim's protection, International Protection of Victims' Rights, International Criminal Court and the new model of victims' rights, International Criminal Court and victim's Right to Protection, Challenges of victims' rights protection in East Africa,



Chapter four analyses The International Criminal Justice Mechanism and Victims Reparations, Design and Implementation of Mass Reparations Mechanisms, Links between Two Rights: Participation and Reparations and finally the conclusions

Chapter five analyses the victims right to participation, protection and reparation in the Kenyan context comparing the same to the findings of chapter 2,3 and 4

Chapter 6 contains the summary conclusion and recommendations.

## **CHAPTER TWO**

### **INTERNATIONAL CRIMINAL JUSTICE MECHANISMS AND THE VICTIMS RIGHTS TO PARTICIPATE PROCEEDINGS**

#### **2.0 Introduction**

This chapter analysis victim rights to participate in the proceedings and the international criminal justice mechanism, its broken into the following sub topics: Overview of Victim's Rights to participate in the Proceedings in ICC, The Purpose of ICC Victim Participation Scheme, Victim Justice and International Criminal Justice Mechanisms, Impact of the ICC on Victim's Right to Participate in Kenya, Specific problems in relation to victim participation and finally the conclusions.

#### **2.1 Overview of Victim's Rights to participate in the Proceedings in ICC**

According to Doak<sup>61</sup> many national authorities have been concerned with improving victim gratification with the criminal justice system. Improving victims' experience is supposed to foster their engagement as witnesses to help prosecutions as well as to improve the legitimacy of criminal trials. While there are similar concerns in international criminal justice, there are stark differences in terms of political dimensions between state sovereignty and distinction from domestic crimes. International crimes generally involve mass victimization and large-scale organized participation such as the Rwanda genocide; they can be ideologically driven

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<sup>61</sup> Doak, J. (2005) Victims' Rights in Criminal Trials: Prospects for Participation, *Journal of Law and Society*, 32(2): 294-316.

by dehumanizing victims to legitimize violence against them; involve the action or inaction of the state; and have a long-term impact on victims, particularly in cases of impunity.<sup>62</sup>

Groenhuijsen<sup>63</sup> states that the International Criminal Court (ICC) has been celebrated for its innovative victim provisions, which enable victims to participate in proceedings, avail of protection measures and assistance, and to claim reparations.<sup>64</sup> The impetus for incorporating victim provisions within the ICC, came from victims' dissatisfaction with the ad hoc tribunals in providing them with more meaningful and tangible justice.

The research established that the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY/R) only included victim protection measures, with no provisions for victims to participate in proceedings nor to claim reparations at them. Developments in domestic and international law, in particular human rights such as the 1985 UN Declaration on Justice for Victims and the UN Guidelines on Remedy and Reparations, and transitional justice mechanisms, such as truth commissions and reparations bodies, have helped to expand the notion of justice for international crimes to be more attuned to victims as key stakeholders in dealing with such crimes. With the first convictions secured at the ICC and the victim participation and reparation regime taking form, it is worth evaluating the extent to which these innovative provisions have translated into justice for victims.

## **2.2 The Purpose of ICC Victim Participation Scheme**

The International Criminal Court's victim participation regime is a product of a broader movement seeking to achieve restorative, rather than strictly retributive, justice. Proponents

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<sup>62</sup> Ibid

<sup>63</sup> Groenhuijsen, M.(2011) "The Role of Victims in International Criminal Proceedings", in Sluiter.p.23

<sup>64</sup> Correa, C., Guillerot, J. and Magarrell, L. (2014). "Reparations and Victim Participation: A Look at the Truth Commission

of restorative justice contend that, to truly achieve justice, punishing the guilty is insufficient. Rather, it is also necessary to allow victims to participate in the proceedings and provide compensation to victims for their injuries. Proponents believe that participation provides victims with a sense of closure, empowerment, and healing. While there is no universal understanding of what victim participation should entail, it has been broadly described as victims “having a say, being listened to, or being treated with dignity and respect.” In translating the desire to serve the goals of restorative justice, the drafters of the ICC Rome Statute were particularly influenced by the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN Victims Declaration), unanimously adopted by the UN General Assembly in 1985.

It was deduced that this Declaration marked the first formal recognition at the international level that victims are assured “access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.” According to Groenhuijsen <sup>65</sup> more specifically, the UN Victims Declaration encourages states to implement measures designed to ensure, inter alia, that victims are “treated with compassion and respect for their dignity. “In addition, states are to facilitate the “responsiveness of judicial and administrative processes to the needs of victims” by: Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information; and allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.

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<sup>65</sup> Groenhuijsen, M.(2011) “The Role of Victims in International Criminal Proceedings”, in Sluiter.p.23

The rights promoted by the Victims Declaration, including the right to receive information regarding relevant judicial proceedings and the right to present their views and concerns to a court, have been repeatedly recognized as fundamental to providing victims access to justice. Indeed, among the most important rights of victims in the context of their interactions with a criminal justice system in domestic systems is the right to receive information, as victims “repeatedly say that one of the greatest sources of frustration to them is the difficulty in finding out from criminal justice authorities on developments in their cases.”<sup>66</sup>

Furthermore, research on “victim notification indicates that victims who are kept informed by authorities feel that they had an opportunity to express their wishes, that their wishes were taken into consideration by the authorities and that they had some degree of influence over the outcome of the case. “In addition, it is commonly understood that victims are more likely to be satisfied with the criminal justice system if their voice has been heard. Importantly, however, this does not mean that victims necessarily want “a role in the adjudication of their cases. “Rather, according to restorative justice experts Heather Strang and Lawrence Sherman, victims merely “seek the chance to present their views on the case to someone, and not necessarily a key decision maker.” It is the “chance to be heard at all” that is “usually the crucial aspect for victims in achieving a sense of satisfaction with the justice system.”<sup>67</sup>

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<sup>66</sup> Vasiliev, S. (eds.) (2009) *International Criminal Procedure: Toward a Coherent Body of Law*, London: Cameron May Publishers.

<sup>67</sup> *Ibid*

### 2.2.1 Legal Foundations for the Victim Participation Scheme

Hemptinne,<sup>68</sup> states that the fundamental provision governing victims' right to participate in proceedings before the ICC is found at Article 68(3) of the Rome Statute, which provides: Where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence. Hence, although victims are guaranteed a right to express their "views and concerns," Article 68(3) does not specify the means by which this should occur, instead leaving the Chambers significant discretion to give meaning to the right. At the same time, the provision makes clear that the Court may require that victims participate through legal representatives, as necessary and in accordance with the ICC's Rules of Procedure and Evidence.<sup>69</sup>

According to Goetz<sup>70</sup> along with Article 68(3) of the Rome Statute, the victim participation scheme at the ICC is governed by a number of provisions in the ICC Rules, as well as those found in the Regulations of the Court and the Regulations of the Registry. Perhaps the most important of these ancillary provisions is Rule 85, which provides the definition of "victim." Specifically, Rule 85 states: 'Victims' means natural persons who have suffered harm as a

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<sup>68</sup> Hemptinne, J. (2010) Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal for Lebanon, *Journal of International Criminal Justice*, 8: 165-179.

<sup>69</sup> *Ibid*

<sup>70</sup> Goetz, M. and Stephens, A. (eds.) (2009) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Leiden: Brill Academic Publishers.

result of the commission of any crime within the jurisdiction of the Court; Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

The research established further relevant provisions in the rules include Rule 89, which governs the process by which victims apply to participate in proceedings before the Court. It states, in part: 1. In order to present their views and concerns, victims shall make a written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute, in particular article 68, paragraph 1, the Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber. Subject to the provisions of sub-rule 2, the Chamber shall then specify the proceedings and manner in which participation is considered appropriate, which may include making opening and closing statements. The Chamber, on its own initiative or on the application of the Prosecutor or the defence, may reject the application if it considers that the person is not a victim or that the criteria set forth in article 68, paragraph 3, are not otherwise fulfilled. A victim whose application has been rejected may file a new application later in the proceedings.

Rule 89 is supplemented by Regulation 86 of the Regulations of the Court and Regulation 99 of the Regulations of the Registry. Specifically, Regulation 86(1) reiterates that victims must make a written application to the Registry and mandates that the Registrar establish a standard application form. While victims are not required to use the standard form, all applications must, “to the extent possible,” contain specific information, such as the identity of the victim, the harm allegedly suffered at the hands of the accused, the location and date of

the crime, evidence showing that the victim’s personal interest is affected, and designation of the stage of proceedings in which the victim wants to participate.<sup>71</sup>

Subparagraph (5) of Regulation 86 requires that the Registrar “present all applications... to the Chamber together with a report thereon,” and that it “endeavour to present one report for a group of victims, taking into consideration the distinct interests of the victims. “Subparagraph (6) then specifies that the Registrar may, subject to an order of the Chamber, choose to submit a single report for multiple applications, “in order to assist [that] Chamber in issuing only one decision on a number of applications” and that “reports covering all applications received in a certain time period may be presented on a periodic basis.

<sup>72</sup>“Regulation 99 of the Regulations of the Registry provides that, upon receipt of an application pursuant to Rule 89, “the Registrar shall review the application and assess whether disclosure to the Prosecutor, the defence and/or other participants of any information contained in such application, may jeopardize the safety and security of the victim concerned” and “shall inform the Chamber of the results of the assessment.”

A victim may also request that “all or part of the information he or she has provided to the Registry not... be disclosed to the Prosecutor, the defence, or other participants,” and the Registry will notify the Chamber of such request. The Chamber then has the authority to order the Registrar to redact information from the applications before being transferred to the parties or other participants.<sup>73</sup>

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<sup>71</sup> Ibid

<sup>72</sup> Ibid

<sup>73</sup> De Greiff, P. (2014). *The handbook of reparations*. Oxford University Press.



According to Edwards<sup>74</sup> Rules 90 and 91 of the ICC Rules relate to legal representation of victims. In particular, Rule 90 provides that, where a large number of victims are participating in a case, the Court may request that the Registrar appoint a common legal representative for a group of victims. Rule 91 specifies that the legal representatives of victims are entitled to “attend and participate in the proceedings,” which “shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative’s intervention should be confined to written observations or submissions.

### **2.3 The International Criminal Justice and Participatory Rights of Victims at the Trial Stage**

One of the major innovations of the ICC Statute consisted in the possibility for victims to freely choose a legal representative, who must be a person with at least ten years’ experience as a criminal lawyer, judge or prosecutor and be fluent in one of the Court’s working languages.<sup>75</sup> A victim who is willing to be legally represented in Court shall submit a written application to a Chamber, which will later consult the Prosecution and the Defence and finally decide on the request. The Court attempted to balance the guarantee of effective participation of victims at trial with the assurance of the right of the accused by setting up a workable procedure: primarily, it directly engages Chambers in the selection of the legal representative; additionally, it limits the number of victims’ counsels and circumscribes their involvement in the proceedings. Plus, in order to deal with the

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<sup>74</sup> Edwards, I. (2004). An Ambiguous Participant: The Crime Victim and Criminal Decision-Making, *British Journal of Criminology*, 44: 967-982.

<sup>75</sup> The Statute of the International Criminal Tribunal for Rwanda, Security Council Resolution 955

consistent amount of requests by potential victims, the Chamber may demand the victims to appoint a collective legal representative (CLR) or representatives, if necessary with the help of the OPVC. In so doing, judges have to guarantee the respect of victims' rights and consider that they usually consist in a diverse group of individuals with different interests; therefore, their categorization must be carefully scrutinized to avoid potential conflicts.<sup>76</sup>

Accordingly it was seen that the general problem both in case of individual and common legal representation concerns the lack of efficient communication between the counsel and its client. Legal representatives often struggle to have direct contact with clients who live far away from The Hague, especially in situations of on-going armed conflict or whether the victims are menaced by their community for their participation in an international trial. In Kenya Judges in Muthaura and Kenyatta tried to overcome this issue by appointing a legal representative for the victims who remains in situ, while the OPCV should coordinate with him or her and act on behalf of the victims during the proceedings, if needed also presenting oral submissions or questioning witnesses.<sup>77</sup>

Some commentators believe that this repartition of roles is “unrealistic”, since it is the legal representative who meets the clients and looks after their interests. Contrarily, it seems that the OPVC, when presenting evidence at trial, would autonomously submit the necessary request to the Chamber and only later communicate the strategic decision to the legal representative, without any chance of preventively consulting victims. This process appears utterly illogical and will probably lead to undue delays, compromising

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<sup>76</sup> Herman, J.L. (2013). *The Mental Health of Crime Victims: Impact of Legal Intervention*, Journal of Traumatic Stress, 16(2): 159-166.

<sup>77</sup> Ibid

the rights of the accused. Such approach could also undermine the rights of the parties and the function of the OPCV.<sup>78</sup> The former could face difficulties in addressing the appropriate interlocutor to debate choices concerning victims, whereas the latter would be affected in its efficiency especially if taking into account the budget limitations of the Court, since its main tasks concern the support and assistance to the legal representatives of victims and to victims themselves and do not include their direct involvement in the proceeding.

#### **2.4 The International Criminal Justice and Procedural justice**

Procedural justice for victims comprises of access to redress and fair treatment within proceedings. As victims' interaction with the criminal justice system can be a source of secondary victimisation, such as denying their victimization or ignoring their needs, procedural justice tries to ensure that they are treated with dignity and respect. In order to protect victims' interests, procedural justice includes a number of provisions including protection measures, participation in proceedings which affect their interests, access to legal representation, assistance and support, and to claim reparations.<sup>79</sup>

The research observed that together these provisions can improve victims' satisfaction of justice processes, improving their legitimacy in the eyes of those most affected by crimes, as well as encouraging their engagement to assist such processes, whether through acting as witnesses or participating in proceedings to ensure that judicial outcomes can more effectively respond to their needs. Importantly for victims recognising their role in

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<sup>78</sup> De Greiff, P. (2012). *The handbook of reparations*. Oxford University Press.

<sup>79</sup> Herman, J. (2013) Realities of Victim Participation: The civil party system in practice at the Extraordinary Chambers in the Courts of Cambodia (ECCC), *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice*, 16(4): 461-481.

proceedings enables them to have the agency to shape outcomes that can respond to their needs and interests.

## **2.5 Victim Justice and International Criminal Justice Mechanisms**

Justice for victims has often been claimed as a purpose of international criminal justice mechanisms. Yet criticism has been levelled at these mechanisms for not doing enough for victims. A further difficulty lies in the ambiguity as to what justice for victim's means within international criminal justice, beyond the rhetoric to its practical application. Commentators have expressed that the ICC offers a 'high-water mark' for victims in terms of its provisions and that it places victims at the 'heart of international criminal justice'. Others have suggested that the Court incorporates restorative justice, in that it seeks to resort victims with less of a retributive focus than demarcated previous international criminal tribunals.

According to <sup>80</sup>Human rights law has also influenced the victim provisions within the Rome Statute, which traditionally takes a victim centred approach. Yet the core purpose of the ICC is to investigate, prosecute and punish those most responsible for international crimes, with justice for victims secondary to this goal. The Court has to balance other interests before it. Instead of being restorative or victim-centred, the ICC represented more victim-orientated justice in that it remains a criminal court, but is responsive to victims' interests as far as possible, without undermining the rights of the defendant.

It is apparent from the proceedings of the ICC that victims are represented and their views and concerns voiced through their legal representatives. However, the effectiveness and meaningfulness of such participation has been increasingly limited over fears that such

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<sup>80</sup> Hoven, E. (2013) *Civil Party Participation in Trials of Mass Crimes: A Qualitative Study at the Extraordinary Chambers in the Courts of Cambodia*, *Journal of International Criminal Justice*, 1-27.

participation undermines the right of the defendant to a fair and expedient trial. Moreover, victim participation while first allowed during the investigate stage, has been reversed by the Appeals Chamber to protect the independence of the Prosecutor, despite human rights jurisprudence finding the importance of victim participation at such a stage to ensure public transparency and scrutiny. In trial proceedings victims can present evidence, but the Court has tried to limit this to the role of the prosecution and defence, to ensure there is equality of arms. That said Trial Chamber III in the Bemba case has allowed victims to present evidence on the criminal culpability of the accused.

It is easy to discern that there is piecemeal approach to victim participation within the Court, with some Chambers enabling victim's greater participatory rights than in others. These inconsistencies have meant there is inequality in participation for victims before the ICC. This distinction can boil down to judges' personal views on victim participation, with Judges Kaul and Steiner more receptive to a broad notion of victim participation, whereas other such as Pikić and Wyngaert concerned that victims risk undermining the rights of the defendant. There is need for greater harmonization of the victim participation regime to ensure equality for victims and other participants, as well as to protect defendants from any legal uncertainty which could undermine their presumption of innocence. With regards to victim representation, concerns over legal aid costs for victim participation and increasing number of applicants has meant that there is growing reliance on collectivizing application and participation.<sup>81</sup>

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<sup>81</sup> Ibid

## 2.5.1 Victim Justice and International Criminal Justice Mechanisms in Africa

According to Humphrey<sup>82</sup> the collectivization of victim applications in the Kenyatta case of Kenya has the potential to further dilute victims' participation in proceedings, given that the 'represented victims have not been subject to an individual assessment by the Court. 'In making participation more economically efficient, one should be careful not to undermine the standing of victims or their individual voices. More worryingly is the impact, or rather lack of, victim participation is having on decision making within the Court. While victims have presented their views and concerns, victims have not been an important consideration in the judges' decision making in determining outcomes such as truth, justice and reparations.

In terms of truth, the Court has enabled a number of victims to present in person their views and concerns in proceedings to help the judges 'determine the truth' under Article 69(1). However, victims' role in such proceedings are functional in determining the truth about the facts of the case for the Chamber's benefit, rather than wider notions of truth that are important to victims, such as documentation of the role of neighbouring states in Mr. Lubanga's crimes. In terms of justice, victims have suggested that in the sentencing of Lubanga and Katanga of Congo the Court should have ordered longer sentences than the respective 14 and 12 years handed down. Similarly in decisions on admissibility of situations before the Court in assessing the effectiveness of domestic capacity, ICC judges have failed to take into account victims' interests in the lack of effective local redress, beyond witness protection. The withdrawal of the prosecution's appeal of the Katanga judgment after the defendant retracted his appeal and accepted the conviction expressing remorse to the victims,

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<sup>82</sup> Humphrey, M. (2003). *From Victim to Victimhood: Truth Commissions and Trials as Rituals of Political Transitional and Individual Healing*, the Australian Journal of Anthropology, 14(2): 171-187.

failed to appreciate victims' interests that the judgment did not find him responsible for sexual violence and other crimes.<sup>83</sup>

Paul<sup>84</sup> says that by preventing victims from appealing the decision the Court evinces its preference of the prosecution and defence, with the victims as participants rather than parties to proceedings. The limited impact of victims' concerns on judges' decision making is perhaps most evident in the Court's first reparation decision in the Lubanga case, where the risk to rights of the defendant and role of the prosecutor were minimized, given the trial has been completed and the accused convicted. In the Lubanga decision, despite representations by the victims for individual and collective reparations to help remedy their suffering, the judges instead ordered that reparations be made through the Trust Fund to benefit the community. With protection and assistance, the Court has been proactive in ensuring that victims are satisfied with their engagement within criminal proceedings. Judges have been sensitive to the individual needs of victims and supportive of them in proceedings. The ICC judges have acknowledged that criminal proceedings can be 'foreign and uncomfortable' and even intimidating to victims and witnesses, these protective and special measures help to facilitate their testimony and participation in proceedings.<sup>85</sup>

The Court has not yet endorsed anonymous victims or witnesses to testify before the Court. A more systemic problem rests in protecting victims domestically, particularly where the ICC is dependent on local police forces, such as in the Kenyan situation where there have been reports of intimidation of those victims participating before the Court. In terms of assistance the Trust Fund for Victims has been somewhat of a success provide support to over 100,000

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<sup>83</sup> Ignatieff, M. (2010) Overview: Articles of Faith, *Index on Censorship*, 25(5): 113.

<sup>84</sup> *Ibid*

<sup>85</sup> Kaminer, N. (2001) The Truth and Reconciliation Commission in South Africa: Relation to psychiatric status and forgiveness among survivors of human rights abuses, *British Journal of Psychiatry*, 178: 373-377.

victims. That said a large percentage of these numbers is made up of victim sensitization or peace-building programmes to affected communities, which offer little direct benefit to victims, in comparison to more remedial reconstructive surgery.

Accordingly while the ICC affords victims a participatory role in proceedings, incorporating principles of procedural justice, their role has minimal impact on the judges' determinations of outcomes of truth, justice and reparations.<sup>86</sup> This reflects an internal challenge of the ICC in balancing the competing interests before it with limited resources. Moreover, in substantive terms, the ICC cannot uncover the complete truth of a conflict, prosecute every perpetrator or offer reparations to every victim. The ICC is more selective and intended to deal with the most serious international crimes and perpetrators. However, the Court can be more responsible to victims in the proceedings before it, in particular the Court needs to better manage expectations as to what it can and cannot do. Nevertheless, it does not mean there should be impunity for crimes which fall outside the Court's capacity, but rather state parties should be adopting victim-orientated provisions to complement the work of the ICC.<sup>87</sup>

## **2.6 Impact of the ICC on Victim's Right to Participate in Kenya**

According to Goetz, M. and Stephens<sup>88</sup> the International Criminal Court seeks to have a positive impact on systems of justice worldwide. The mission statement of the ICC identifies its main goals as putting an end to impunity for the worst crimes that impact the international community and bringing justice to victims and perpetrators. The ICC is not designed to

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<sup>86</sup> *ibid*

<sup>87</sup> The Statute of the International Criminal Tribunal for Yugoslavia, Security Council Resolution 827 of 25

<sup>88</sup> Goetz, M. and Stephens, A. (eds.) (2009) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Leiden: Brill Academic Publishers.



conflict with State Parties, but rather to affect and influence occurrences within them. The International Criminal Court has a number of direct and indirect mechanisms that it successfully utilizes or fails to control when the Court intervenes in a country. The direct mechanisms that the Court uses are contained within its Outreach Programmes and the Cases themselves. The Court can directly influence domestic legal situations, increase education about the Court or international law, provide reparations, or provide justice.

In contrast the research observed that, an indirect mechanism of the Court is the threat or presence of the ICC which casts a large shadow over involvement in violence and human rights. This has caused a wide range of results including unification, deterrence, stability, and judicial change in Kenya. These impacts all involve the effect, or lack of effect, of the Court on individuals. The intervention of the ICC in Kenya has had a large impact on political figures, specifically those who have been accused and those who are closely aligned with accused persons. The Kenyatta/Ruto alliance was directly caused by the Court's effort to provide justice to the people of Kenya. The increase in risk to witnesses is also a direct impact caused by the Court's efforts to provide justice. The ICC also has the power to provide reparations and directly impact individuals. The failure to do so in this case also affects Kenyans.

The ICC has thus far failed to influence the domestic legal situation, as no lower level offenders have been tried. Yet, the direct impacts and mechanisms and their failures have given rise to even greater impacts through indirect mechanisms that the Court cannot control. The indirect mechanisms of the Court stem from the presence and the legal threat of the ICC. The 'shadow' of the ICC influenced the writing of the 2010 Constitution, the creation of an

independent judiciary, and a judiciary which is influenced by international norms. The threat of the Court also led to peaceful elections in 2013.<sup>89</sup>

Ironically, the Court has succeeded in increasing unity in Kenya unity in opposition to the Court. While analysing the impact of the Court on Kenya, it is imperative that the Situation in Kenya be viewed with reference to the cases in International Criminal Law that have come before it. Many scholars, such as Kathryn Sikkink, who are optimistic about the ICC, believe that deterring future acts of violence and bringing peace to war-torn communities should be goals of the Court. According to Sikkink's justice cascade theory,<sup>90</sup> when leaders of countries are tried for crimes against humanity or other similar human rights violations it typically occurs during a time of transition. It also encourages the prosecution of lower level offenders in the affected country as well as promoting peace, democracy and human rights.

Yet, the justice cascade theory argues that accountability prosecutions do not bring about these negative effects. However, in every study that is presented as evidence to the theory the accused are no longer in power or at least are no longer directly in charge of government. The ICC Kenya Cases are certainly an exception to the norm in international justice as the accused came to power (or increased power) after being accused of crimes against humanity.

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## **2.7 Direct and indirect ICC Mechanisms and Impacts on Countries That They Operate In**

The International Criminal Court has several direct mechanisms that they can utilize to impact the right to participation of victims of countries that they operate in. By holding Cases

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<sup>89</sup> Ibid

<sup>90</sup> Ibid

<sup>91</sup> Groenhuijsen, M.(2011) "*The Role of Victims in International Criminal Proceedings*", in Sluiter.p.23

and operating Outreach Programmes the Court can try to curb the violent actions of political figures, influence political alliances or political divisions, pursue justice, provide reparations and representation, and affect perspectives of human rights and of the Court. In the Situation in Kenya, the Court is holding Cases and operating several Outreach Programmes.

### **2.7.1 Political Figures and Human Rights Violations**

One of the largest impacts of the ICC upon Kenya has been upon specific political figures. The International Criminal Court is often viewed by proponents as a deterrent for both previous offenders and a warning to potential offenders. According to international law scholar Mark Drumbl <sup>92</sup> “retribution and general deterrence are the two most prominent punishment rationales in international criminal law.” Drumbl also clarifies the difference in general and specific deterrence. General deterrence is an effort to dissuade others from committing similar crimes in the future whereas specific deterrence is determined to prevent the offender on trial from reoffending in the future. The justice cascade theory predicts that prosecutions do act as a deterrent and cause human rights violations to decrease.

The cases in the Kenyan Situation were initiated, in part, to act as a deterrent, both general and specific, for future crimes and criminals. In order for human rights to improve in Kenya, the threat and practice of organized ethnic violence must be mitigated. The organizers of the violence must be deterred. The trials thus far have not increased violations. Organized violence in the 2013 Presidential Election was non-existent. The impact of the ICC has not resulted in widespread organized violence. This outcome is consistent with the justice cascade theory. However, Kenyatta and Ruto did gain popularity and power due to the ICC’s efforts to provide justice and the lack of violence could be due to other factors.<sup>93</sup> Aside from

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<sup>92</sup> Ibid

<sup>93</sup> McCarthy, C. (2009). Reparations under the Rome Statute of the International Criminal Court and

Reparative Deterrence Theory, *The International Journal of Transitional Justice*, 3(2), 250–271.

the six political figures that were accused, Raila Odinga was also affected by the ICC intervention in Kenya. The 2007 elections were disputed by Odinga as he narrowly lost to Mwai Kibaki. Allegations of election fraud resulted and violence erupted in many parts of the country. In the 2013 presidential elections, Uhuru Kenyatta and William Ruto won in a close but peaceful race with fraud on both sides. Although Odinga did challenge the results, Odinga urged supporters to remain peaceful. Odinga turned to the reformed judiciary to rule on the validity of the election. Odinga called for the judiciary to review the legality of the election and accepted their decision that Kenyatta won.

It can thus be deduced that this acceptance of the judicial review process helped to prevent a repeat of the PEV. While the true cause of presidential-loser Raila Odinga's call for peace in 2013 is widely debated, it can be assumed that the ICC involvement in Kenya did affect Odinga's decision. The ICC was widely criticized in 2010 for not charging Raila Odinga and Mwai Kibaki (opponents in the presidential race) with crimes against humanity, since they were the leaders of the political parties at that time. Odinga, in 2013, was well aware that he would not be immune from prosecution by the ICC should violence erupt again. Although what would have happened had the ICC not intervened cannot be proven, it can be assumed that general deterrence did affect Odinga's choice to remain peaceful and to publically advocate for peace. The current President of Kenya, Uhuru Kenyatta, is accused of crimes against humanity by the International Criminal Court and experts in the field believe that this has had an impact upon his governing style. Kenyatta's indictment has been cited as the reason he could be called "Kenya's gentlest president." The lack of "government" violence in Kenya since Kenyatta's election is an indication that the ICC indictment has forced the President's actions into the international limelight with many waiting to point out mistakes. Kenyatta's actions appear to be curbed, at least in part, by the presence of justice watchdogs

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whether or not the ICC tries or convicts him. The ICC impact upon political figures has been varied, but there was no increase in human rights violations due to the ICC involvement so the impact is a net positive for the people of Kenya who seek justice through legal avenues.<sup>94</sup>

### **2.7.2 Political Parties and Prolonged Conflict**

According to Martha<sup>95</sup> another direct impact of ICC mechanism to victim's right of participation in proceedings is view on Political Parties and Prolonged Conflict. The political parties in Kenya are constantly changing. There are new alliances and reform coalitions at every election. However, the political parties that ran for election in late 2013 were directly impacted by the trials of Kenyatta and Ruto/Sang in The Hague. The major parties in the 2007 and 2013 elections are not formed exclusively according to tribal affiliation. Each political party has a variety of different tribal groups that support its political leaders.

In 2007, Mwai Kibaki was the incumbent president. In the hopes of running a successful campaign, William Ruto, Raila Odinga and Uhuru Kenyatta originally teamed up under the Orange Democratic Movement banner. However, due mostly to internal competition the ODM group split in July with Kenyatta and KANU leaving to support Kibaki a fellow Kikuyu. Only one month later ODM split again as some Kalenjin and Luo formed the ODM-Kenya party in opposition to the Ruto-Odinga alliance. In the December 2007 elections, Kibaki was declared the winner and violence erupted between Kikuyu, Kalenjin and Luo.

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<sup>94</sup> Murshed, Mansoob. "Conflict, Civil War and Underdevelopment: An Introduction." *Journal of Peace Research* 39, no. 4 (2002): 387-393

<sup>95</sup> Mutisi, Martha "Gacaca Courts in Rwanda: An Endogenous Approach to Post-conflict Justice and Reconciliation" *African Peace and Conflict Journal*, Vol. 2, No. 1, June 2013

There were independent international reports that Odinga and ODM had actually won the election and books have been written about Odinga's Stolen Presidency. The announcement of the Ocampo Six aligned the two Kenya cases along tribal and party lines. Ruto, Sang and Kosgey are all Kalenjin associated with ODM at the time of the PEV while Kenyatta and Muthaura are Kikuyu associated with PNU. Ali is of Somali descent and aligned with PNU.

<sup>96</sup> As the cases against Kosgey, Ali, and Muthaura fell apart at the ICC, Kenyatta and Ruto joined forces for the 2013 Presidential Election in the Jubilee Coalition. This particular shift in political parties was caused by the ICC indictments against Kenyatta and Ruto as their effort to show unity and innocence to their country, international community, and the ICC. During the 2013 Presidential Elections, the Jubilee Coalition was the main opponent to the front runner, CORD – the Coalition for Reforms and Democracy led by Raila Odinga. There was media buzz about Ruto's desire to switch sides and support Odinga, but the Jubilee Coalition held together and was declared the winner of the election.<sup>97</sup>

The political impacts of the ICC are vast and varied, but the ICC intervention was the largest factor in creating the Kenyatta Administration and the lack of 2013 PEV indicates that the ICC involvement did not prolong the conflict.

### **2.7.3 The ICC Impact on Human Rights**

The pursuit of justice, providing of reparations, and outreach by the ICC have directly impacted human rights for victims participation in the proceedings, witnesses, the accused, and political figures. These mechanisms have also created impacts on human rights in Kenya, although they are largely confined to the aforementioned groups. Since the intervention of the Court, violence overall has been minimal. In the 2013 elections, the ICC's involvement and the Kenyatta/Ruto alliance acted as a partial deterrent against violence. The decrease in

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<sup>96</sup> Ibid

<sup>97</sup> Ibid

violence is a beneficial effect for those who believe the ICC should seek to improve human rights. Yet, the Court has not reduced ‘ordinary’ crimes in Kenya.<sup>98</sup> In 2008 before the ICC intervention, rape was measured at 735 cases or 1.9 per 100,000 people. In 2009 after the intervention it increased to 847 cases or 2.1 per 100,000 people. These numbers only measure the reported cases.<sup>99</sup> The Court is expected by many to reduce human rights violations caused by organized crime. The number of deaths during the 2007-2008 PEV totalled 1,200. The deaths during the 2013 elections totalled 19. Several police officers were killed by a separatist group on Election Day, but the elections and protested results were very peaceful. The ICC has not had a marked difference on human rights scores in Kenya from 2008-2013.

According to Freedom House<sup>100</sup>, Kenya has remained a “partly free” country during that time period. The country received a rating of 4 for political rights, 3 for civil liberties, and 3.5 for freedom in 2009 after the ICC intervention. In 2008 and 2011, the Freedom House scores for Kenya were identical to those in 2009. Yet, progress for some human rights was measured in the Cingranelli-Richards (CIRI) data on human rights.<sup>101</sup> The physical integrity index in CIRI is a measure of extrajudicial killings, torture, political imprisonment, and disappearance indicators. Kenya received a 2 in 2008 and 2009, but that increased to a 4 in 2010. This shows an improvement in human rights related to physical integrity.

However, in measuring Kenya’s electoral self-determination from 2007-2010 the country scored a 1 every year which indicates “that while citizens had the legal right to self-determination, there were some limitations to the fulfilment of this right in practice. “Human rights are often defined to be more than self-determination and the right to live, freedom of

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<sup>98</sup> Wairagala, W. (2011). Victims Participating in Bemba Trial Now Reach 1,600, The Trial of Jean-Pierre Bemba Gombo, Open Society Justice Institute, July 14, 2011

<sup>99</sup> Ibid

<sup>100</sup> Ibid

<sup>101</sup> United Nation High Commission for Refugees (2014) “*UNHCR country operations profile*” [Internet] Available from < <http://www.unhcr.org/pages/49e45c156.html>> [Accessed 9 April 2014]

speech is often also included. Freedom of speech can be a victim of political strife. During the confirmation of charges hearings for the Kenyan cases at the ICC, the ICC suppressed the freedom of speech by publicly stating that any hate speech issued during the deliberations would be considered in confirming the charges of the accused. Judge Trendafilova of Pre-Trial Chamber II warned the accused that hate speech would not be tolerated by the Court. The ICC directly impacted the freedom of speech for the 6 accused by restricting their right to express themselves. This action was taken in order to preserve peace and prevent the accused from re-offending, although it had a minimal impact on the people of Kenya as a whole.

#### **2.7.4 The impact of the ICC mechanism on political stability**

The electoral violence in Kenya has been a common feature ever since the year 1992 when the country first assumed multiparty politics. However, the intensity of the violence, resulting in massive killings, forceful transfer of people and other human rights violations after the 2007 general election caught the attention of the international community. In order to provide justice to the victims and help stem the culture of impunity in the country, the ICC pursued cases of individuals who allegedly bore the greatest responsibility. The country cannot be oblivious to the impact of the two cases on the national stability especially at this period when Kenya prepares for another general election to be held in March 2013. The proceedings and the ruling of the ICC against the accused are bound to increase communal tensions. Reactions to the ICC determination to prosecute suspects may harm the country's search for a peaceful transition.<sup>102</sup>

Whereas it is imperative that the ICC be allowed to exercise its mandate freely, it must do that cautiously, and the proponents of the court must explain its work and limitations better to

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<sup>102</sup> United Nation High Commission for Refugees (2014) "*UNHCR country operations profile*" [Internet] Available from < <http://www.unhcr.org/pages/49e45c156.html> > [Accessed 9 April 2014]



the public. For there to be stability, the country needs healing and reconciliation more than anything else. Based on what is known about the ICC, it is unlikely that the court will achieve this kind of healing. If anything, it is going to cause division and polarize the country. It would be prudent to embark on reparative and restorative forms of justice as opposed to the retributive one. This would foster unity and correct the wrongs of the past without risking repeating the country's darkest moment witnessed after the controversial announcement of the presidential election results.<sup>103</sup>

Going by the latest happenings in Kenya as reported in the newspapers and seen in political rallies, the ICC has heightened the tensions that risk causing ethnic anxieties. The ethnic polarization in the country has been so overwhelming that even national issues have to be looked at in the lens of ethnicity. This perhaps explains why the ICC ruling is likely to be perceived as being on a different mission from that of ensuring justice, especially at this electioneering period. Support for the ICC among Kenyans has been diminishing ever since the naming of the suspects. This development could be attributed to the campaign by some political leaders that the ICC intends to take out some political opponents in favour of others. Some political leaders reacted to the ICC intervention that it was done in a manner likely to cause a rift in the country, endangering the reconciliation process that had begun nationwide.

## **2.8 Specific problems in relation to victim participation**

According to Jasini and Phan<sup>104</sup> one of the most evident problems arising from the participation regime of victims is that of striking a balance between victim interests and other

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<sup>103</sup> Ibid

<sup>104</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).

interests in criminal procedures. It has often been argued that such participation impedes the equilibrium between prosecution and defence, and that it interferes with the suspected or accused person's right to a fair and expeditious trial and the interest of the Prosecutor in preserving evidence and bringing victims into play as witnesses. Also victim participation, especially if granted with the proviso of protection measures, might obstruct the public's interest in a public hearing which offers full scrutiny of the administration of justice. There is an additional concern specific to the ICC as a treaty-based institution, namely the interests of the member states in expeditious trials and the limitation of costs and expenses. Early victim participation at the investigation phase might interfere with the Prosecutor's interests in an objective, impartial and confidential investigation.<sup>105</sup> The balancing of these conflicting interests must be taken into account by the judges when granting access to victims, especially when defining the scope and modalities of participation. The issue of the balancing of interests may also be seen in a broader context when discussing general aspects of the purposes of punishing and sentencing in international criminal law.<sup>106</sup>

Another important issue to consider in relation to victim participation vis the ambiguity of how to deal with victims who are of interest as witnesses; this issue is especially pertinent in international criminal law processes, which largely rely on victim testimonies. Whereas the ad hoc International Criminal Tribunal for the former Yugoslavia and for Rwanda (ICTY and ICTR) had to deal with the problem of excessive instrumentalization of victims by the parties, the ICC will face the far more complex dilemma of admitting persons to participate as victims in the proceedings who are at the same time of potential interest as witnesses. Neither the Statute nor the Rules excludes victims from participating in the proceedings to

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<sup>105</sup> Ibid

<sup>106</sup> Ibid

testify as witnesses.<sup>107</sup> However, a person who participates as a victim in the ICC proceedings could be lost as witness, mainly because of that person's quasi-party position akin to that of a party in civil law systems and its impact on fair trial guarantees. In view of the above-mentioned limitation of the 'enhanced' participation rights to the victims' representatives, it could be assumed that the personal involvement of a victim does not reach such a level that his or her participation would be incompatible with the role of a witness.

However, even if victims can be heard as witnesses, their testimony could be somewhat flawed because of a certain appearance of partiality and the clear interests they have in the outcome of the procedure, that is, with regard to reparations. The Prosecutor's strong opposition to early and extensive victim participation, as discussed above, consequently becomes somewhat understandable. Trial Chamber I addressed the issue of dual status of victim-witnesses in its 18 January 2008 decision, stating that their status would depend on whether they are called as witnesses during the proceedings and that witnesses would not be generally banned from participating as victims, as this would "be contrary to the aim and purpose of Article 68(3) of the Statute and the Chamber's obligation to establish the truth.

## **2.7 Chapter Summary**

In terms of Article 68(3) of the Rome Statute the research concluded that, victims have a general right to participate at all stages of the proceedings from the initiation of proceedings and investigations to the conclusion of appeals. The decisions rendered by various chambers of the ICC so far reiterate this. However, a further reading of the Statute and its Rules of Procedure and Evidence (ICC RPE) disclosed that this is not an automatic right for every victim to participate in every proceeding and that various factors are relevant

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<sup>107</sup> Syagga, P. (2014) *Public land, historical land injustices and the new Constitution*. Nairobi: Society for International Development.

in understanding the scope of the right to participate.<sup>108</sup> These are; whether proceedings relate to a ‘situation’ or a ‘case’; the fact that there is criteria for participation; the role of the Court (Pre-Trial Chamber, Trial Chamber or Appeals Chamber); the role of legal representation among others. In various circumstances, the Statute and ICC RPE provide a right to participate as either mandatory or facultative. Thus victims have: an absolute right to attend trial proceedings; a discretionary right to participate in specific circumstances –put questions to the accused, witness or experts; the possibility to make representations before the Court even in Pre-Trial procedure; the right to be heard before decisions on reparation; and the right to intervene in appeals concerning reparation orders. Before looking at these circumstances in turn, it is important to clarify some general elements relate to the right to participate.<sup>109</sup>

On the question whether victims are established victims as a third party to proceedings in addition to the prosecutor and defence chapter one can concluded that the Statute bestows on victims a presumptive status of party, not an automatic, full party status as is the case for the Prosecutor and defence. To the extent that victims’ role in particular proceedings is subject to judicial determination and that because their participation is not in the strictest sense essential to the conduct of a criminal trial, victims are but a ‘potential’ and ‘not genuine’. However, whether an essential party or not, the Statute affords victims the right to participate at every stage and to assert certain rights as such, albeit subject to judicial approval.<sup>110</sup>

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<sup>108</sup> Ibid

<sup>109</sup> McCarthy, C. (2009). Reparations under the Rome Statute of the International Criminal Court and Reporative Deterrence Theory, *The International Journal of Transitional Justice*, 3(2), 250–271.

<sup>110</sup> Hoven, E. (2013) Civil Party Participation in Trials of Mass Crimes: A Qualitative Study at the Extraordinary Chambers in the Courts of Cambodia, *Journal of International Criminal Justice*, 1-27.



## **CHAPTER THREE**

### **THE INTERNATIONAL CRIMINAL JUSTICE MECHANISM AND VICTIMS RIGHT TO PROTECTION.**

#### **3.0 Introduction**

This chapter analyses the international criminal justice mechanism and victim's right to protection. It is divided in the following subtopics: overview of the international criminal justice mechanism and victim's protection, International Protection of Victims' Rights, International Criminal Court and the new model of victims' rights, International Criminal Court and victim's Right to Protection, Challenges of victims' rights protection in East Africa, The International Criminal Justice Mechanism and Victims Reparations, Design and Implementation of Mass Reparations Mechanisms, Links between Two Rights: Participation and Reparations and finally the conclusions

#### **3.1 Overview of the International Criminal Justice Mechanism and Victims Protection**

According to Libai<sup>111</sup> the voices of victims of human rights abuses and their concerns have long been neglected in the criminal justice system. In fact, whereas international and national legal frameworks (including the African Charter on Human and Peoples' Rights (African Charter) and domestic constitutions' bills of rights) contain express provisions for safeguarding the rights of accused persons and perpetrators of crimes, none expressly exists for victims of those atrocities. Indeed, critics of the African Charter point to the absence of a specific provision on the right to an effective remedy, although over the years the African Commission on Human and Peoples' Rights (African Commission) has interpreted the right

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<sup>111</sup> Libai, D. (2009). Protection on the Victim of a Sexual Offense in the Criminal Justice System, *The. Wayne L. Rev.*, 15, 977.

as a significant deficiency in the protection of human rights in Africa and perhaps a misplaced preoccupation with rights violators.<sup>112</sup> In recent years, though, there have been marked advances as different legal instruments have acknowledged the place of victims in the criminal justice system. Buoyed by agitation and demands by victims and members of civil society for the recognition and protection of victims of human rights atrocities, the international legal framework has yielded significant normative gains. Indeed, increasingly victims' voices are heard in legal processes that are aimed at bringing an end to the crimes committed against them.<sup>113</sup>

Until the last decade, even where remedies for victims existed, measures tended to end with the indictment and punishment of offenders and perpetrators, on the erroneous assumption that punishing offenders would compensate for the harm or wrong suffered by victims and would restore a much broader international legal order. Victims were also treated as mere witnesses in support of evidence adduced by the prosecution to prove its case. After World War II, the sufferings of victims were noted and prosecutions carried out but nothing substantial was done to alleviate the suffering of victims as they were not accorded any special right to protection, support or reparations and were assigned no other role in the proceedings in their own right as victims rather than just as witnesses. The Nuremberg International Military Tribunal and the Tokyo International Military Tribunal for the Far East conducted trials generally seen as a way of deterring future atrocities. However, victims did not play a major role in those trials.

The establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra

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<sup>112</sup> G Musila (2006) 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' *African Human Rights Law Journal* 442-464; F Viljoen *International human rights law in Africa* (2007) 236-259.

<sup>113</sup> Wright, M. (2010). *Justice for victims and offenders: a restorative response to crime*. Waterside press.

Leone (SCSL) gave momentum to the promotion and protection of victims' rights. The entry into force of the Rome Statute of the International Criminal Court (ICC) on 1 July 2002 heralded a new dawn which is anticipated to improve the participation of victims in criminal proceedings. Articles 5 to 8 of the Rome Statute define international crimes as genocide, crimes against humanity, war crimes and the crime of aggression. The ICC treaty provides for a Victims and Witnesses Unit, and an opportunity for the victims to have legal representation, to participate in proceedings and to receive compensations and reparations.

This chapter looks at the legal framework of victims' participation, their right to reparations, compensations and restitutions with a view to proffering a holistic approach towards the promotion of victims' rights by member states. There are interesting developments in the EAC that make this study imperative.<sup>114</sup> Uganda and Kenya are currently ICC case and situation countries. The Ugandan government referred a case concerning the Lord's Resistance Army to the ICC in December 2003. The Kenyan case was referred to the ICC by the Prosecutor of the ICC using his proprio motu power as provided for in the Rome Statute. Rwanda suffered a vicious genocide that claimed the lives of more than 800 000 Tutsis and moderate Hutus in a hundred days. Burundi is currently setting up accountability mechanisms to deal with the civil wars that occurred in that country. Tanzania is relatively peaceful but not immune to the victims' rights issues besieging its neighbors.. However, the lessons emerging from the study should be applicable and indeed replicable in other countries in Africa.

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<sup>114</sup> Aldana-Pindell, R. (2012). In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes. *Vand. J. Transnat'l L.*, 35, 1399.



### 3.2 International Protection of Victims' Rights

According to Nowrojee<sup>115</sup> the Nuremberg and Tokyo Tribunals represent some of the earliest efforts to hold accountable those who committed mass atrocities during World War II against Jews, homosexuals, gypsies, and other religious and ethnic minorities. The adoption of the Universal Declaration of Human Rights (Universal Declaration) in 1948 marked a positive normative response to respect the fundamental human rights and freedoms of individuals. While the Universal Declaration does not contain specific provisions relating to the rights of victims, the instrument is the cornerstone of human rights protection.

The adoption of the International Covenant on Civil and Political Rights (ICCPR), which codified the civil and political rights of the Universal Declaration in a legally-binding instrument, is therefore seen as positive development in the protection of the rights of victims. For example, ICCPR provides that 'anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation'. Another important instrument that effectively protects the rights of victims is the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT). CAT provides that a victim of torture is entitled to an enforceable right to fair and adequate compensation and rehabilitation and in the case of the death of the victim, adequate compensation to the survivors of the victim. CAT accords victims a right to compensation and provides for the survivors of victims as well.<sup>116</sup>

UN member states have adopted other treaties and conventions which protect the rights of victims. These include the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on the Rights of the Child, and the Convention on the Elimination

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<sup>115</sup> Nowrojee, B. (2015). Making the invisible war crime visible: post-conflict justice for Sierra Leone's rape victims. *Harv. Hum Rts. J.*, 18, 85.

<sup>116</sup> *Ibid*

of All Forms of Discrimination against Women. These conventions and treaties make provision for the protection of vulnerable members of society against discrimination, exploitation and abuse. The UN Office on Drugs and Crime (UNODC) has also drafted a handbook on justice for victims detailing the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>117</sup>

According to the UN Victims' Handbook<sup>118</sup> an effective way of addressing the needs of victims of crime is to establish programmes that provide social, psychological, emotional and financial support, and effectively help victims within the criminal justice and social institutions. In addition, the UN, in recognition of the important need for effective mechanisms to protect victims, has stated: Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victims' right to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms. EAC member states have ratified most of the treaties and conventions mentioned above. They have endorsed some of the resolutions and principles adopted under the auspices of the UN but, beyond ratification and endorsements, nothing much has been done to implement the instruments in national legislation. Several factors, ranging from a lack of political will to the technical manpower requisite to effect the needed changes, are often cited as the cause for the lack of implementation.

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<sup>117</sup> Edwards, I. (2013). *An Ambiguous Participant: The Crime Victim and Criminal Decision-Making*, British Journal of Criminology, 44: 967-982.

<sup>118</sup> Ibid

### 3.4 International Criminal Court and victim's Right to Protection

The right to protection arises naturally from the participation of witnesses in the criminal process. The rights relates to the protection of witnesses in the criminal process, as well as providing safeguards for victims against 're-traumatisation' by virtue of their role in the process. Although one may expect that this right should be afforded to a victim who testifies in the prosecution, circumstances may arise where 'non-witness' victims require protection, especially where there is a backlash directed at a class of victims. The ICC's victims and witness protection framework builds on the protection practice at the ad hoc international tribunals which has for the most part been considered wanting.

The Rome Statute establishes the general standard that all organs of the Court must respond appropriately to protect the privacy, dignity, physical and psychological well-being and the security of victims and witnesses, especially when the crimes involve sexual or gender violence, while fully respecting the rights of the accused.<sup>119</sup> To coordinate these functions, a Victims and Witnesses Unit (VWU) is established in the Registry of the Court, to provide 'protective measures and security arrangements, counselling and other appropriate assistance' for witnesses and victims including those victims 'who appear before the Court and others who are at risk on account of testimony'. In its decision rendered on 18 January 2008, Trial Chamber I (TC I) has clarified the notion 'victims appearing before the Court' noting that victims at risk may be entitled to some measure of protection as soon as their completed application to participate (in a situation or a case) has been received by the Court.<sup>120</sup>

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<sup>119</sup> Ibid

<sup>120</sup> Walklate, S. (2013). *Victimology (Routledge Revivals): The Victim and the Criminal Justice Process*. Routledge.

In the Chamber's view, the process of 'appearing before the Court' is not dependent on either an application to participate having accepted or the victim physically attending. An Office of Public Counsel for Victims (OPCV), which will provide support and assistance to victims and victims' legal representatives, has been established. It has a role to play in ensuring effective victim participation in the proceedings. It is notable that witness protection is perhaps the only concern of victims that has hitherto received considerable attention in international criminal law, at least since the establishment of the ad hoc tribunals, which have overseen some interesting developments in this regard.<sup>121</sup> Despite this, it is argued that its application remains deficient, perhaps because the attribution of such rights to victims essentially constitutes a counter claim to the assertion by accused perpetrators of traditional fair trial guarantees. That witness protection undercuts the rights of accused persons is a vehement assertion of some commentators. Among these, the accused's rights to a public trial and adequate time and facilities to prepare a defence are cited. It becomes imperative that the international tribunal balances these competing claims. This study does not discuss the right to protection beyond this brief introduction, except insofar as it relates to the right to participation and reparations and the relevant functions of the VWU and the OPCV.

### **3.5 Challenges of victims' rights protection in East Africa**

#### **3.5.1 Legal challenges**

The research established that one of the problems militating against victims' protection in the EAC is the lack of effective implementation of laws adopted to protect and promote the rights of victims. There have also been some flaws in the implementation procedures of victim-

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<sup>121</sup> Bassiouni, M. C. (2013). Searching for peace and achieving justice: The need for accountability. *Law and Contemporary Problems*, 9-28.

based legislation in some states as political office holders are allowed to hold sensitive positions and may be influenced by the government in power. Even when these laws are passed, there is also a lack of implementation as there is no sensitization of the public regarding the provisions of the law and how it should be implemented. These have impacted negatively on victims' rights on the continent.

### **3.5.2 Cultural and religious challenges**

According to Garkawe<sup>122</sup> certain cultural and religious challenges also affect the protection of victims' rights on the continent. EAC member states, like other African countries, hold to traditional cultural and religious values. Sexually-related offences have also been seen to be on the increase in situations where it is alleged that sleeping with young virgins could cure HIV/AIDS or enhance business prospects. Women who are victims of domestic or sexual violence find it difficult to relate their experiences for fear of being rejected, especially where it results in HIV infection and its attendant social and public stigma. Some cultures also do not allow women to say things without the consent of their husbands and this means that where a woman is willing to testify about what has happened, she may be confronted with the anger of her husband or kinsmen who object to such an open confession.

### **3.5.3 Economic and social challenges**

Ford<sup>123</sup> poverty, ignorance and illiteracy, all virtually endemic in Africa, are some of the challenges seriously affecting the rights of victims. Economic dislocation and attendant corruption, rife on the continent, mean that those at the lowest rung of the economic ladder

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<sup>122</sup> Garkawe, S. (2013). Victims and the International Criminal Court: three major issues. *International Criminal Law Review*, 3(4), 345-367.

<sup>123</sup> Ford, D. A. (2013). Wife battery and criminal justice: A study of victim decision-making. *Family Relations*, 463-475.

continue to live in abject poverty and squalor. Most victims are ignorant of their rights and those who know have little or no means to pursue them. Additionally, bureaucracy and incessant delays have led to the loss of faith in the administration of justice because of corruption and public perceptions of miscarriages of justice.

### **3.6 International Criminal Court and the new model of victims' rights**

The Rome Statute of the ICC provides for victims' rights and a robust protection regime for victims and witnesses. The Statute requires the Court to 'take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses'. The ICC gives attention to specific vulnerable victims such as the aged, child victims and victims of sexual and gender violence. The Rome Statute establishes a Victims and Witnesses Unit (VWU) located in the Registry to provide 'protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the ICC and others who are at risk on account of testimony given by such witnesses'. The Statute further provides that VWU 'shall include staff with expertise in trauma, including trauma related to crimes of sexual violence'.<sup>124</sup>

Wemmers<sup>125</sup> states that the Court is a permanent institution established to hold accountable those who bear the greatest responsibility for genocide, crimes against humanity, war crimes and the crime of aggression. The Rome Statute operates on a principle of complementarity which provides that it is the primary responsibility of states to hold their citizens accountable for international crimes.<sup>126</sup> It is only when states are 'unwilling and genuinely unable' or there are no legitimate proceedings that the ICC steps in to prosecute those responsible for these

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<sup>124</sup> Ibid

<sup>125</sup> Wemmers, J. A. (2009). Victims and the International Criminal Court (ICC): Evaluating the success of the ICC with respect to victims. *International Review of Victimology*, 16(2), 211-227.

<sup>126</sup> Ibid

crimes to ensure that there is no impunity for mass atrocities. As recognised by the ICC's strategy in relation to victims: A key feature of the system established in the Rome Statute is the recognition that the ICC has not only a punitive but [also] a restorative function. It reflects growing international consensus that participation and reparations play an important role in achieving justice for victims. The ICC will enable victims to do more than only participate in the proceedings.<sup>127</sup> They will have a right to present their views and observations before the Court. Participation before the Court may occur at various stages of proceedings and may take different forms. For example, proceedings may be held *in camera* or the presentation of evidence may be by electronic or other means in cases of sexual violence or a child victim or witness. However, it will be up to the judges to give directions as to the timing and manner of participation.

Victim-based provisions within the Rome Statute provide victims with the opportunity to have their voices heard and to obtain, where appropriate, some form of reparation for their suffering. The award of reparations to or in respect of victims, including restitution, compensation and rehabilitation, is seen as a balancing process involving retributive and restorative justice that will enable the ICC not only to bring criminals to justice, but also to help the victims themselves obtain justice.<sup>128</sup> In furtherance of providing adequate representation for the victims participating at the trials, the ICC established the Office of Public Counsel for Victims (OPCV) in accordance with the Regulations of the Court. The establishment of the OPCV, the ICC argues, is a new step in the international criminal justice system which seeks to ensure effective participation of victims in the proceedings before the Court. Furthermore, the Court also believes that it is an important precedent which should

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<sup>127</sup> Clarke, K. M. (2015). *Fictions of justice: The International Criminal Court and the challenge of legal pluralism in Sub-Saharan Africa*. Cambridge University Press.

<sup>128</sup> *Ibid*

enhance the system of representation for victims who, pursuant to Rule 90(1) of the Rules of Procedure and Evidence of the Court, are free to choose their legal representatives.<sup>129</sup>

### **3.7 Chapter summary**

Enhancing the protection of the rights of victims should be a priority of all the states. At the international level, the ICC presents unique opportunities since at the moment all its cases are from Africa. For EAC member states including Kenya, the GLP and its Protocols offer good tools for protecting the rights of victims. These instruments need domestic implementation to have the force of law. Political will to bring about the needed changes is necessary. It should be reiterated that the ICC will only try those who bear the greatest responsibility for war crimes, crimes against humanity and genocide. The bulk of the trials for international crimes will be conducted by national judicial systems. It is therefore necessary for Kenya to have procedures in their judicial systems to complement the work of the ICC. It is also important that those who have ratified the Rome Statute but are yet to implement it should do so as a matter of urgency, bearing in mind the need to bring the provisions of the criminal justice legislation in consonance with emerging trends in international criminal justice.

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<sup>129</sup> Ibid



## **CHAPTER 4**

### **INTERNATIONAL CRIMINAL JUSTICE MECHANISMS AND VICTIMS REPARATIONS**

#### **4.0 Introduction**

This chapter analyses the victims' rights to reparations, starting with the origins of reparations in international criminal justice, collective reparations versus individual reparations, Design and Implementation of collective reparations mechanisms, who may claim reparations, the links between the two Rights: Participation and Reparations, and finally the chapter summary.

#### **4.1 Origins of reparations**

It was established that effectively fighting impunity against international crimes requires compensating its victims for harm suffered. The International Criminal Court (ICC) Pre Trial Chamber I, in the case Prosecutor v. Thomas Lubanga Dyilo<sup>130</sup>, recognized that the success of the Court is, to a great extent, linked to the success of its reparation system<sup>131</sup>

Until the adoption of the Rome Statute of the International Criminal Court, the rights of victims in international criminal proceedings were largely marginalized. Reparations provisions in international criminal law evolved at a slower pace than corresponding rights in human rights law. This development can partly be explained by the significant influence of municipal criminal law in the evolution of this sphere in international law. While it has been argued that international criminal law now can provide that which international human rights law has lacked from a victim's perspective, experiences seeking reparations to date have been

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<sup>130</sup> Ibid 40

<sup>131</sup> Suprs para. 136.

more successful on the basis of human rights law.<sup>132</sup> The aim of international criminal justice is essentially to help restore international peace and security by punishing those responsible for heinous crimes during wartime (retributive justice). The impartial trial and punishment of some criminals and in some cases not always the most culpable ones, by itself was considered vindication. Justice was done in the name of the abstract notion of "humanity" but not necessarily in that of the victims.

Giovanni<sup>133</sup> highlights that restitution as a right of victims of crime, has been central to the claims of the victim rights movement. Its centrality is acknowledged by many commentators who concur that restitution is perhaps the most important concern for victims of crime anywhere. It is no surprise, perhaps, that the provision for reparations under Article 75 of the Rome Statute, read together with the provision for a Victims Fund in Article 79, have attracted the loudest concerns in the context of the ICC victims' regime. Article 75, in its relevant parts requires the Court to establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation and determine the scope and extent of any damage, loss and injury to, or in respect of, victims.

The research noted that in the Yugoslavia and Rwanda tribunals, victims could only enter the courtroom only as witnesses, providing one of the means through which evidence was brought before the tribunal. In the Rome Statute, however, those who have suffered have been elevated from a mere one time witnesses, into full legitimate participants in a holistic process of seeking justice. Several provisions in the Rome Statute stipulate the involvement

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<sup>132</sup> Simpson G (2013) *Law, War, Crime*: Polity Press Cambridge Pg 23

<sup>133</sup> Giovanni, A. (2014). Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence, *The. J. Int'l L & Int'l Rel.*, 2, 25.

of victims during all phases of the case<sup>134</sup>. Most importantly, victims of international crimes now can claim reparation for the violation of their rights. They can do so on their own behalf or through their representatives. This idea is however not new. The research established that the European Court of Human Rights and then the Inter-American Court of Human Rights, have for decades been awarding victims reparations.

As the first part of the research shows, the individual's right to reparation is a fundamental human right that is not only expressly guaranteed by global and regional human rights instruments, but also routinely applied by international and national courts. The Universal Declaration of Human Rights provides that everyone has the right to an effective remedy by the competent tribunals, for acts violating the fundamental rights granted by him by the constitution or by municipal laws<sup>135</sup>. The International Covenant on Civil and Political Rights<sup>136</sup> calls for states to ensure that any person whose rights and freedoms recognized by the covenant are violated, shall have an effective remedy, notwithstanding that violations have been committed by persons acting in an official capacity, determined by a competent court. Moreover the United Nations Convention Against Torture refers to in Article 14 that each state party shall ensure in its legal system that the victim of an act of torture shall obtain redress and compensation deemed adequate in proportion to the gravity of the human right violation. Additionally the African Charter has several remedies<sup>137</sup> for compensation of victims, yet, it is only with article 75 of the Rome Statute that the idea of restorative justice against the individual perpetrators of violations has become a dimension of international criminal justice. Therefore one can conclude that the right to reparations is not a new concept.

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<sup>134</sup> Articles 15.3, 19.3, 68.3, 75, and 82.4

<sup>135</sup> Article 8

<sup>136</sup> Article 2.3

<sup>137</sup> Article 7

Despite this the remedies provided should satisfactorily ensure the psychological and social functions of rehabilitation and re-integration of the victim and guaranteed. The need to return to previous ways of life and functioning is crucial for proper reparation. Additionally victims are entitled to be informed of their right to seek redress as opposed to assuming that they are aware of the rights.

#### **4.2 Collective reparations versus individual reparations**

It was observed that there is a difficulty in determination of compensation as it should not over or under compensate. This is crucial because inadequate or excessive awards frustrate the compensatory function of the law. Thus the need to evaluate collective reparations versus individual reparations is important

The ICC under the Rome statute may order that an award mass reparations against a convicted person, to be made through the Trust Fund (TFV) where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.<sup>138</sup> This is due to the fact that individual reparations may not be effective in certain cases and the time and resources expended may undermine the reparation process if individual reparation is preferred. Despite a rapidly growing use of the concept of collective reparation at the national and international level it has not been defined under international law. It has been pointed out that the term is still ambiguous and it can be understood in several ways. A reparation measure can be said to be collective, firstly, because it is awarded for the violation of a collective right or for the violation of a right that has an impact on a community. Secondly, a reparation measure may be collective when the subject of the

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<sup>138</sup> Rule 98.3

reparation is a specific group of people. Thirdly, it can refer to the types of goods distributed or the mode of distributing them, such as an apology addressed to the victims in general.<sup>139</sup>

The research established that collective forms of reparation include the establishment of a development fund for health, housing, education programs the provision of medical and psychological treatment<sup>140</sup> a public act of apology to the victims, the translation of the judgement of the Court in the community's language, the construction or maintenance of a commemorative building, the delimitation, demarcation, and titling of the property of indigenous communities, the obligation to conduct environmental and social impact assessments, the delivery of basic services and goods to a community<sup>141</sup> a communication system for health emergencies, and the guarantee of safety for community members<sup>142</sup>. Thus in most cases collective or mass reparations is has a larger effect and is felt more especially on a national and international plane. However if the individual suffered violations sufficient for reparation procedures there is no bar preventing them seeking redress as an individual.

#### **4.3 Design and Implementation of collective reparations Mechanisms**

In whatever case that comes before the Court, there will be tens, hundreds or thousands of victims eligible to claim reparations. Yet, the Court can only deal with a few of these in its trial processes. To deal with this reality, it will have to use effective means possible under the instruments, which may only lie in approaches that respond appropriately to the nature or crimes and large number of victims they generate. The design of reparations mechanism(s) must consider this fact. In this part, historical mass

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<sup>139</sup> Rosenfeld, F. 'Collective reparation for victims or armed conflicts' (2010) 870 *International Review of the Red Cross* 731, 732

<sup>140</sup> Inter-American Court of Human Rights Case of the Plan de Sánchez Massacre v. Guatemala Judgment of November 19, 2004 (Reparations)

<sup>141</sup> *ibid*

<sup>142</sup> *Ibid*

reparations mechanisms are explored with a view to providing lessons in design as well as principles that may be applied by the ICC.<sup>143</sup>

As a preliminary observation, it appears that while in general victims' claims (to compensation schemes) are often couched and pursued as individual entitlements, models have been adopted allowing for mass tort claims under special legislation.<sup>144</sup> To the extent that claims for reparations under the ICC may be made by numerous victims relating to the same set of facts or circumstances, domestic systems proffer some lessons as shown on 4 how to deal with mass claims. It emerges that one common approach in these circumstances has been resort to the 'fund model', which offers a no-fault liability approach to mass tort litigation. This has been a favoured alternative to mass tort litigation because it is a less complicated, non-adversarial way of compensating identified victims. An important aspect of mass reparations mechanisms fund model is exclusivity. Victims who choose to participate waive their right to sue in the Courts or pursue other recourse against the same parties. It was also concluded that collective claims lower the likelihood of full compensation depending on the number of victims

To the contrary, ICC victims do not relinquish potential claims available to them in domestic and international law merely by obtaining some form of remedy from the ICC or the VTF. Another approach which may be of greater relevance to the nature of crimes dealt with by the ICC has been deployed in more specific circumstances, as transitional justice mechanisms to address the question of accountability for mass atrocities. While Truth and Reconciliation Commissions fit generally in the complementarity framework, they may also serve as reference points for the ICC, in particular with respect to victims. The

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<sup>143</sup> Ibid

<sup>144</sup> Boyle, D. (2014). The Rights of Victims Participation, Representation, Protection, Reparation. *Journal of International Criminal Justice*, 4(2), 307-313.

South African TRC, celebrated by commentators as a possible model for post conflict societies grappling with accountability issues, may inform how the ICC deals with some reparations issues. It follows that some international mechanisms such as claims commission carry useful lessons for the ICC in fashioning a mechanism to process reparations.<sup>145</sup> It was noted that collective reparations do not eliminate the need for individual reparation. There are violations that cause individual harms and that require individualised measures to repair them. Therefore, if the Court is to be guided by the principle of reparation *in integrum*, its jurisprudence should reflect a reparation system where both types of measures are potentially applicable.

Some of the challenges that collective reparation faces are that First, the ICC following Rule 85 of the RPE, can only award reparations to victims “who suffered a harm as a result of the commission of any crime within the jurisdiction of the Court”. Therefore, the victim’s harm needs to have a nexus to the crime committed by the perpetrator<sup>146</sup> Additionally according to the Rome Statute,(Article 75.2) the reparations ordered by the Court are to be provided by the person convicted for having committed the crime. This may be unsatisfactory especially were the convicted party does not have the resources required.

#### **4.4 Who may claim reparations?**

The designation of who is a victim is an international legal question. In general a victim is an individual whose right or freedom has been violated. However one need not be a resident of the defendant state. Third parties may also be victims either directly or indirectly.<sup>147</sup> Additionally pecuniary and non-pecuniary claims survive and automatically pass to the victims heirs or successors. Family members are thus victims by extension. It was observed

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<sup>145</sup> Ibid

<sup>146</sup> Prosecutor v. Thomas Lubanga Dyilo Case no.ICC-01/04-01/06 Redacted version of Decision on 'indirect victims', (ICC Trial Chamber I 8 April 2009), paras. 45-46.

<sup>147</sup> David Bedeman (1994) The UN compensation commission and tradition of international claims settlement Int and POL

that claims may be made by unnatural persons such as municipalities, religious groups, non-governmental organizations societies among others as well, in relation to damages to property or violation of special interests of such groups such as the right to congregate.

Ferstman<sup>148</sup> states special procedural rules are laid down for reparation proceedings, which are also open to persons who did not previously participate as victims in the ICC proceedings. A decision on reparation must be requested by the victims in writing, in a comprehensive and detailed application that differs from other participation applications, as the Court would only in exceptional circumstances act on its own motion. While the Rome Statute and rules seem to foresee that the reparation decision would normally be taken within the regular trial proceedings, Article 76(3) of the Statute suggests that if a separate sentencing hearing had been requested, reparations would be dealt with in a distinct sentencing proceeding of that nature or even, where necessary, in another additional reparation hearing. In any form of reparation procedure, the Court considers representations from or on behalf of the convicted person, victims, other interested persons or interested states, and then makes an order directly against a convicted person, specifying appropriate reparations to, or in respect of, victims, such as restitution, compensation or rehabilitation.<sup>149</sup>

Unlike victims' representations in other proceedings, the questioning in a reparation hearing is more comprehensive, and cannot be limited to written observations or submissions pursuant to Rule 91(4). On the contrary, the victim representative can, subject to leave by the Chamber concerned, even question witnesses, experts and the person concerned. Reparation hearings aim at establishing injury, harm or loss resulting from a crime committed by the

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<sup>148</sup> Ferstman, C. (2012). The Reparation Regime of the International Criminal Court: Practical Considerations. *Leiden Journal of International Law*, 15(03), 667-686.

<sup>149</sup> Keller, L. M. (2013). Seeking Justice at the International Criminal Court: Victims' Reparations. *Thomas Jefferson Law Review*, 29(2), 189.



convicted person.<sup>150</sup> Pre-Trial Chamber II has already indicated that the standard of proof with regard to the nexus element of the victim definition is much higher for reparation purposes than for other stages of the proceedings. Awarding reparations on a collective basis is explicitly provided for in Rule 97(1), which also stipulates that such awards may be handled by the Trust Fund “where the number of the victims and the scope, forms and modalities of reparations make a collective award more appropriate.”<sup>151</sup>

#### **4.5 Assessment of damages**

Life cannot be replaced and neither can torture or rape be expunged from the victims life. Monetary compensation it was observed is just a means of returning the victim to the position he/she was before the occurrence of the violence. It is thus not an easy task to assess damages especially for physical pain, mental and emotional anguish. It should also be noted that loss of consortium was also assessed if one lost his/her spouse. Other considerations include duration of torture, length of detention, victims age and actual losses. Moreover in some cases the injuries may continue after the proceedings and it is thus a factor that is crucial in determining damages. All these are factors that determine the amount, nature and mode of reparations. The research established that each case of reparations is unique and therefore no one formula can apply across the board.

#### **4.6 Links between Two Rights: Participation and Reparations**

It is suggested that one question is of pertinence here whether participation is a prerequisite for obtaining reparations. It would appear that in view of the two focal points for reparations the Court and the Trust Fund the answer to this question depends

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<sup>150</sup> Ibid

<sup>151</sup> Rubio-Marin, R. (2012). Reparations for conflict-related sexual and reproductive violence: A Decalogue. *Wm. & Mary J. Women & L.*, 19, 69.

on whether one is speaking to the ICC or the VTF. Either way, it is difficult to imagine a successful reparations programme without some form of participation from victims lodging claims forms, giving evidence to support claims, participating in outreach programmes, appeals etc. Participation as it relates to the right to reparations is not used in the same sense as participation under Article 68(3).<sup>152</sup>

It is suggested that it must be considered as participation in proceedings other than Article 68(3) proceedings. Otherwise, it would produce undesirable results. If the fairly strict triple test under Article 68(3) of the Statute is applied as general criteria for participation in all proceedings, including reparations proceedings, then it must be applied less restrictively to reparations proceedings. The implication is that any victim who has a 'plausible' claim on the papers filed should be allowed to make representation in support of their claim at an appropriate time. In any case, in terms of the triple test, once one meets the requirement of 'victim', it is opined that it is no longer necessary to inquire whether 'participation' would prejudice a defendant, who would already have been convicted (in case reparations are considered as part of a post-trial procedure). The case is clearly different if reparations, or part of reparations issues, are dealt with in the trial, in which case the Court has to be careful to weigh other factors such as the presumption of innocence and other rights of accused persons.

The third factor that 'personal interests are affected' is of little importance either way.<sup>153</sup> The Court seems to take the view so far that whenever a victim has reason to claim reparations, it must be considered that their personal interests are affected. As to the fundamental question whether the right to reparations is predicated on the right to participate under Article 68, in

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<sup>152</sup> Pena, M., & Carayon, G. (2013). Is the ICC Making the Most of Victim Participation?. *International Journal of Transitional Justice*, ijt021.

<sup>153</sup> Carayon, G. (2013). Is the ICC Making the Most of Victim Participation?. *International Journal of Transitional Justice*, ijt021.

the sense that only victims who are granted the right to participate in proceedings can eventually claim reparations later on, the answer is a resounding no.<sup>154</sup> No links based on right to participate are apparent in Articles 68, 75 and 79 in this regard. The basic requirement and the obvious link is that one has to be a victim (as defined under Rule 85) to participate based on Article 68 criteria as well as to benefit from reparations under Articles 75 and 79 of the Statute. Further, it is possible for victims to obtain reparations from projects initiated by the Trust Fund, which are unlinked to the Court process. While the right to reparations is not dependent on participation, the extent and forms victim participation will take at the trial is dependent on whether reparations hearings will be held as part of the trial.<sup>155</sup>

Pursuant to article 75 of the Rome Statute, the Court may lay down the principles for reparation for victims, which may include restitution, indemnification and rehabilitation. The Court must also enter an order against a convicted person stating the appropriate reparation for the victims or their beneficiaries.<sup>156</sup> This reparation may also take the form of restitution, indemnification or rehabilitation. The Court may order this reparation to be paid through the Victims Trust Fund (VTF), which was set up by the Assembly of States Parties in September 2002. The Court has the option of granting individual or collective reparation, concerning a whole group of victims or a community, or both. If the Court decides to order collective reparations, it may order that reparation be made through the VTF and the reparation may then also be paid to an inter-governmental, international or national organization.<sup>157</sup>

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<sup>154</sup> Fischer, P. G. (2014). Victims' Trust Fund of the International Criminal Court-Formation of a Functional Reparations Scheme, *The. Emory Int'l L. Rev.*, 17, 187.

<sup>155</sup> Ibid

<sup>156</sup> Wierda, M., & de Greiff, P. (2014). Reparations and the International Criminal Court: a prospective role for the Trust Fund for Victims. *International Center for Transitional Justice*, <http://www.vrwg.Org/Publications/02/ICTJ%20Trust%20Fund%20Paper.pdf> (last visited Feb. 27, 2007).

<sup>157</sup> Ibid

According to <sup>158</sup> the Rome Statute also established the VTF in accordance with article 79 of the Rome Statute. With the unique roles of implementing both Court-ordered and general assistance to victims of crimes under the ICC's jurisdiction, the VTF offers key advantages for promoting lasting peace, reconciliation and wellbeing in war-torn societies. That is possible through implementing Court-ordered reparation awards against a convicted person when directed by the Court to do so and general assistance using voluntary contributions from donors to provide victims and their families in situations where the Court is active, along with physical rehabilitation, material support and psychological rehabilitation, as the case may.

The VTF considers its assistance to victims of sexual and/or gender-based violence (SGBV) a key step towards ending impunity for perpetrators, and establishing durable peace and reconciliation in conflict settings. The VTF is currently mainstreaming a gender-based perspective across all programming and specifically targeting the crimes of rape, enslavement, forced pregnancy, and other forms of sexual and gender-based violence. The VTF benefits from the leadership and guidance of a five-member board of directors elected by the ASP for three-year terms. The five seats are distributed according to the five major world regions. Each member serves in an individual capacity on a pro bono basis.<sup>159</sup>

#### **4.6 Chapter Summary**

Reparations confer an opportunity to accord justice to those who have suffered from the heinous crimes committed by those indicted and convicted of crimes. Reparations should remain largely a state responsibility as those considered to have carried the greatest responsibility for serious violations may have exercised functions of state authority. In as

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<sup>158</sup> Frase, R. S., & Weigend, T. (2015). Criminal justice as a guide to American law reform: Similar problems, better solutions. *BC Int'l & Comp. L. Rev.*, 18, 317.

<sup>159</sup> Ibid

much as reparations may not reverse some of the effects of international crimes, the compensation is meant to cushion the victim(s) against the hurt pain and suffering

Reparations include restitution, compensation and rehabilitation so as to be holistic and effective in the long run. The reparation procedure especially for collective reparations can be difficult to assess and may take a long period bearing in mind that reparation proceedings are carried out after the trial is concluded. To avoid this courts should develop a clear process for filling claims early enough in the process and maintain the same standard it throughout the proceedings.

International reparation procedures are thus developing and it can be appreciated that unlike before more provisions and opportunities for those affected either directly or indirectly to seek redress.

## **CHAPTER 5**

### **AN ANALYSIS OF VICTIMS RIGHTS TO PARTICIPATION, PROTECTION AND REPARATION IN THE KENYAN CASE**

#### **5.0 Introduction**

This chapter looks at the rights of victims in relation to participation, protection and reparation and contrasts it against the PEV victims in the Kenyan case. It strictly analyses the data collected in the previous chapters and juxtaposes it against the Kenya situation. The chapter looks at the status of Kenya's PEV victims in detail through data collected all over the country and collated into various reports. The Commission of Inquiry into Post-election Violence Report, the Center for Rights Education and Awareness report on sexual violence Kenya Human Rights Commission report (Gains and Gaps: A status report on IDPs in Kenya 2008— 2012), Ministry of State for Special Programs Report On The Progress Of Resettlement Of Internally Displaced Persons 2012, Kenya National Dialogue and Reconciliation Report 2008, as well as the PEV Survey findings 2009 by South Consulting. It also looks at the process of participation, protections and reparation of victims in the Kenyan case and analysis the avenues victims in the Kenya case can get redress for rights violations

#### **5.1 Status of Kenya's PEV (2007-2008) victims**

The first attempt to document the status of victims of the 2007—2008 post-election violence took place in 2008, only a few months after the violence had subsided and a political power-sharing agreement had been put into place<sup>160</sup>The Commission of Inquiry into Post-Election

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<sup>160</sup> Kenya National Dialogue and Reconciliation, Through the Mediation of H.E. Kofi A. Annan and the Panel of Eminent African Personalities on the Resolution of the Political Crisis: Annotated Agenda and Timetable (Feb. 2008), at [http://www.dialoguekenya.org/docs/Project context and summary of findings.pdf](http://www.dialoguekenya.org/docs/Project%20context%20and%20summary%20of%20findings.pdf) (last accessed May 1, 2012).

Violence<sup>161</sup> (CIPEV) undertook a detailed and comprehensive examination of the causes and consequences of the violence that shook Kenya. The Commission's report broadly grouped the crimes that took place into the following categories: sexual violence, displacement, deaths, injuries and destruction of property.

First, CIPEV examined deaths as a result of the violence. The Commission's data reflect not only the tragic loss of life as a result of the conflict, but also the regional patterns reflected in the violence. The most severely affected region in terms of loss of life was the Rift Valley. CIPEV found that 744 individuals were killed in the region, accounting for two thirds of the total 1133 deaths nation-wide. This finding highlights the regional intensity of the violence. CIPEV reported a total of 3,561 injuries that did not result in the death of the victim, with almost two thirds being reported in Rift Valley. In relation to sexual violence a report from the Center for Rights Education and Awareness (CREAW)<sup>162</sup> stated that 653 cases of sexual violence as a result of the postelection violence were treated at a single hospital in Nairobi, some 80% of which were rape cases<sup>163</sup>

Property destruction had a significant impact on many victims. CIPEV reported that more than 100,000 properties were destroyed during the violence.<sup>164</sup> Other reports indicated that 78,254 homes were destroyed during the violence<sup>165</sup> Displacement was seen as the most well documented aspect of the post-election violence. The Kenyan Government initially reported that 350,000 people were displaced as a result of the 2007—2008 violence.<sup>166</sup> Later reports

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<sup>161</sup> Nairobi: Commission of Inquiry into Post Election Violence 2008 (Waki Commission).

<sup>162</sup> *Women Paid the Price – Sexual and Gender Based Violence in the 2007 Post Election Conflict in Kenya* (CREAW, n.d.), at <http://www.creawkenya.org/creawpublications/women-paid-the-price.html> (last accessed May 1, 2012);

<sup>163</sup> Ibid

<sup>164</sup> Ibid 160 Ch 5

<sup>165</sup> *Gains and Gaps: A status report on IDPs in Kenya 2008—2010* (Kenya Human Rights Commission, National Network for IDPs in Kenya, February 2011).

<sup>166</sup> Ibid 160 Ch 7

indicated that the number was almost double that, more than 660,000<sup>167</sup> The vast majority were internally displaced within Kenya, with approximately half of them moving into established camps and the other half integrating into communities around Kenya. By 2009, the Kenyan Government had been focusing its efforts on addressing displacement. Several programs had been initiated to provide support in camps, resettle IDPs, and provide some economic assistance for resettlement and reintegration costs. Little attention was paid to addressing other types of issues, such as stigmatization, loss of livelihood, disruption of learning in relation to the children, medical and health complications, like HIV, Cancer, and other health issues, clean water and sanitation.

No specialized mechanism had been established to prosecute anyone responsible for the violence, and only a handful of prosecutions were moving through the national courts. Despite efforts to address displacement, reports indicate that the Government was facing substantial challenges in meeting its responsibilities to victims. Although the Government claimed that all IDP camps had been closed in 2009, but this was far from the reality. Substantial numbers of IDPs had been moved to transit camps.

In relation to cash assistance, the Government initiated a program to provide KSh. 10,000 for resettlement expenses and KSh. 25,000 for home reconstruction. A survey of IDPs indicated that by May 2009, 83% of those in camps reported having received the cash assistance of KSh. 10,000<sup>168</sup>. This mirrors other reports indicating that the majority of cash assistance went to individuals living in camps as opposed to displaced persons who had moved in with family or found other places to live integrated within other communities.<sup>169</sup> The Ministry of State for Special Programs reports that KSh. 1,617,590 was paid to individuals under the

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<sup>167</sup> Ibid 164

<sup>168</sup> Ibid 164 p22

<sup>169</sup> Ibid 164 p 23



program.<sup>170</sup> A substantially smaller proportion of individuals received assistance from the home rebuilding fund according to the CIPEV report. In 2009, only 6% of IDPs in camps reported having received funds to reconstruct homes.<sup>171</sup> The Ministry reported that the Government paid KSh. 25,000 to 37,788 heads of households amounting to KSh. 944,700,000.<sup>172</sup>

The distribution of the funds has followed the pattern of the violence, with almost 70% of the total amount of funds disbursed in Rift Valley, and just under 12% disbursed in Nyanza.<sup>173</sup> Another 8% was disbursed in Western and 6% in Central.<sup>174</sup> In October 2009, the Kenya Red Cross and UNHCR closed down the IDP camps that they were managing in Kenya at the direction of the President.<sup>175</sup> Despite the official closure of camps, reports indicate that 19,000 individuals remained in 76 transit camps and other informal camps.<sup>176</sup> A few months into 2010, close to 4000 households remained in transit camps in the Rift Valley in particular.<sup>177</sup> Moreover, by 2010 no specific programs had been designed to compensate or assist victims of other human rights violations, such as deaths, injuries, or sexual and gender-based violence.

The Government initiated a truth-seeking process through the establishment of the Truth, Justice and Reconciliation Commission in 2008, to examine human rights violations that took place from Kenya's independence through to the post-election violence period. The

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<sup>170</sup> Ministry of State for Special Programs, "Press Release: Progress on resettlement of internally displaced persons (IDPs)" (Republic of Kenya, January 6, 2012)

<sup>171</sup> *Situation Analysis of Post-Election Violence Areas (PEV Survey Findings)* (South Consulting, May 2009)

<sup>172</sup> *Ibid* 168

<sup>173</sup> Kenya National Dialogue and Reconciliation: *Status of Implementation of Agenda Items 1–4, Progress Report For January–March 2010* (South Consulting, April 2010), p. 22.

<sup>174</sup> *Ibid*

<sup>175</sup> *Speedy reform needed to deal with past injustices and prevent future displacement* (Internal Displacement Monitoring Centre, June 2010).

<sup>176</sup> *Ibid* 171 p 21

<sup>177</sup> *Ibid* 171 p 22

commission was granted power to make recommendations for reparations to victims. However, leadership scandals, funding delays, conflicts with civil society and the massive mandate of the commission raised questions as to its ability to effectively address the needs of victims of postelection violence. Upto date recommendations of the report are yet to be implemented.

## **5.2 The process of participation, protections and reparation of victims in the Kenyan case.**

Victim support in the process of participation, protection and reparations has largely been from the government with international efforts conspicuously lacking. By the beginning of 2012 – four years after the end of the post-election violence – the holistic concept of international criminal justice was not as prominent as expectations were at the start of the process back in 2008. From the international realm the ICC trials at the Hague were the only response visible reaction without any visible action on the ground.

In terms of monetary compensation the government through the Ministry of Lands had spent half of the allotted funds on land purchases for resettlement,<sup>178</sup> with another Ksh 10,000 going to 83% of the IDP families. A Government press release admitted that IDPs remain to be resettled and that a special Government task force will work “round the clock including weekends and public holidays so as to ensure that genuine IDPs are settled within the shortest time possible.”<sup>179</sup>

As for victims of crimes other than displacement, reports indicate that little has been done to address their plight. Families who lost loved ones to murder during the violence have yet to

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<sup>178</sup> Ibid

<sup>179</sup> Ibid

be compensated or assisted by the State. The Ministry of special programs report<sup>180</sup> indicated that 94 perpetrators had been brought to justice for post-election violence, although the Human Rights Watch found that only a handful of convictions were for serious crimes that were actually related to the election violence.<sup>181</sup> At the time of this report, no member of the police force had been convicted for crimes during the 2007—2008 post-election violence, despite evidence of 962 police shootings as well as sexual violence perpetrated by police.<sup>182</sup> Financial assistance related to medical costs has been provided for some victims, but the process has not been transparent or comprehensive.<sup>183</sup> Despite the fact that 21 victims of post-election violence have sued the Government for compensation and were awarded damages in court, the Government had by the time of publication refused to pay the awards. However in relation to sexual and gender based violence the government has been lacking<sup>184</sup> in efforts to protect the victims.

It was noted that no process of registration and documentation of the victims and their ordeals has been reported. Additionally no major prosecutions linked directly to the sexual violence during the PEV, has been documented. The research observed that many victims of displacement are still struggling to access education and face serious challenges because of cost, discrimination, interruption in their educational progress, and missing documents. Victims of displacement, as well as other crimes, remain in urgent need of assistance to re-establish their livelihoods. Government programs in this regard have reached only a small proportion of victims.

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<sup>180</sup> Ibid

<sup>181</sup> *“Turning pebbles”*: evading accountability for postelection violence in Kenya (Human Rights Watch, 2011), p. 4., at <http://www.hrw.org/reports/2011/12/09/turning-pebbles-0> (last accessed May 1, 2012).

<sup>182</sup> Ibid

<sup>183</sup> *“To live as other Kenyans do” a study of the reparative demands of Kenyan victims of human rights violations* (International Center for Transitional Justice, 2011).

<sup>184</sup> Ibid 161 p 41

A report to the ICC's Trial Chamber V filed on 21<sup>st</sup> July 2014 by the Victims Participation and Reparations Section (VPRS) in collaboration with the Common Legal Representative (CLR) reveals that a majority of the victims in Kenyan case are experiencing hardships. Hundreds of victims living in the country were interviewed personally or through phone conversations. They raised a series of concerns, ranging from worries about the delay in the start of Kenyatta's case to claims of unfairness over government compensation. The CLR reported that he personally met with 196 victims, 179 of whom had previously been registered to participate in the case. The CLR's field team also consulted with approximately 100 victims through telephone communication on the various issues that arose during the reporting period.

The victims - who live in various counties across the Rift Valley, Nyanza and Western regions - are drawn from the Luhya, Luo, Kalenjin, Kisii and Kikuyu communities. Many can barely make ends meet. According to the report in Nakuru, the widows and orphans have been most affected, with a large number of widows left without a means to earn a living after the sole breadwinners in the family were killed. Orphans have to fend for themselves. The CLR reported that at one session in Nakuru, a son narrated how he had to take over his father's shoes as his father succumbed to kidney complications that arose from allegedly being forcibly circumcised during the 2007/8 violence. At the time of the meeting, the victim's body was still in hospital because the family could not pay the outstanding bill. The CLR notes in the report that "this example is hardly exceptional and that the indignity wrought on the victims of the post-election violence appears to follow them even after they have died." Elderly people are also living under considerable stress. Many have no income since they are unable to do the manual work that is available. In Siaya county, many have resorted to begging because they have to take care of their grandchildren.

For many of the victims in this report, the proposed fact-finding mission by the ICC's Trust Fund for Victims was welcome, despite many saying more needs to be done not only by the government, but the international community as well. It was also worthy to note that many did not want the Trust Fund to channel any assistance through the government due to bureaucracy and corruption. Some of the victims also claim to have lost faith in the trial process because of the time period it has taken so far. During the reporting period the VPRS was unable to conduct any field related activities in some areas due to instances of violence and insecurity in various parts of Kenya. Instead, the VPRS relayed key messages on the developments in proceedings and various other victim related information through its trusted intermediaries. The research could thus deduce that a lot needed to be done to address the victims plight in seeking justice and so far the International Criminal Justice mechanisms could not be really felt as most of the assistance came from government, which most victims did not trust.

### **5.3 Other options for PEV victims in the International Criminal Justice mechanism.**

The research has observed that there are numerous challenges facing the victims in accessing justice. One of the limitations is that the intended scope of the ICC's work encompasses situations from all over the world yet it has finite resources. The question is raised as to whether a single court can really investigate and prosecute the numerous acts of international crimes committed in different countries around the world? Can the ICC convince both its supporters and critics that it can effectively address the five highly complex situations under its jurisdiction with an infrastructure that is generally equivalent to that of the ICTY or ICTR? Thus the study looked at other mechanisms of accessing justice available to the victims

### **5.3.1 Universal Jurisdiction**

The notion of 'jurisdiction' relates to the basis upon which courts have the ability to act – the limits of their competence to take up a particular matter. Typically, national courts have the jurisdiction to deal with events which occur within their territory i.e. to nationals of that state, or crimes that have had an impact on that state. Universal jurisdiction is an additional basis for legal action. It recognises that the most serious crimes under international law are those that offend the sensibilities of the international community as a whole. In other words, states have the ability (and at times are under obligation) to investigate and prosecute individuals accused of certain categories of crimes recognised as the most serious; irrespective of where the offence took place or the nationality of the accused person. The principle is not new. It has long been recognised by customary international law that states may exercise universal jurisdiction over piracy, slavery, slave trading, war crimes and crimes against humanity, genocide, torture, enforced disappearances and extrajudicial executions. The principle of universal jurisdiction is also codified in a number of international treaties. In particular, the 1949 Geneva Conventions and the Convention against Torture (CAT) require states to investigate, prosecute and punish persons who commit 'grave breaches' and inflict torture irrespective of where they may be found.

Universal jurisdiction has been used to commence investigations or hold trials for crimes committed in various countries by institution of suits in other states. This cases include: Europe: Bosnia-Herzegovina, Croatia, Serbia, Germany (in relation to Second World War cases), Asia, Afghanistan, Bahrain, Burma/Myanmar, Cambodia, China, India, Iran, Iraq, Sri Lanka, In Africa Universal jurisdiction has been applied in Chad, Congo (Brazzaville), Central African Republic, DRC, Ivory Coast, Liberia, Mauritania, Morocco, Rwanda, Sudan

In the Americas Argentina, Chile, Cuba, Guatemala, Peru, United States of America have also had Universal jurisdiction used to seek justices. These trials have led to convictions in relation to crimes perpetrated in, among other states

The option of pursuing a case under universal jurisdiction first requires the identification of an appropriate state(s) in which there are reasonable chances of success. It may be that lodging cases in Europe against African leaders on the basis of universal jurisdiction is not a tenable option for political reasons.<sup>185</sup> While Belgium, France and Spain have shown willingness in the past to allow universal jurisdiction cases against wanted Africans. However with the advent of the ICC most states are unwilling to take on this responsibility especially bearing in mind the possibility is damaging diplomatic ties between the west and Africa.

The advantages of Universal Jurisdiction are that it is an important jurisdictional base. It recognises that some crimes are so serious that the traditional jurisdictional bases of territoriality and nationality could operate in a manner that perverts justice. The principle is therefore important in promoting accountability for the worst crimes and ensuring that there are no 'safe havens'. In the modern world of speedy travel and migration, victims and alleged perpetrators alike may end up settling in other countries or continents, particularly at the end of a period of conflict. Extradition will not always be an option. The country seeking extradition, if it is the country where the crimes occurred, may not be interested in seeing justice done. At times this may be because the state is involved. Other times it will simply be impossible due to protracted conflict, instability or the lack of effectiveness of the justice system. Moreover, the ICC, as a treaty-based court with a limited mandate for crimes which took place after 1 July 2002, will only ever be capable of pursuing a handful of cases.

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<sup>185</sup> Kenyans For Peace With Truth And Justice (2010) The Post-Election Violence in Kenya: Seeking Justice for Victims Special Report

However on the other hand it faces challenges in that universal jurisdiction cases is that they take place away from the scene of the crime and thus have less resonance with local communities. A criminal trial serves a number of purposes – deterrence, punishment and strengthening of the rule of law. Universal jurisdiction prosecutions contribute to some of these objectives although they do not contribute as much to the restoration of the rule of law in the countries where the crimes occurred. However, they can serve as a catalyst for future domestic prosecutions. Moreover other weaknesses that relate to the difficulties inherent to universal jurisdiction are investigations and prosecutions.<sup>186</sup> It is difficult for foreign investigators to comprehend the local context of the crimes and to locate witnesses and ensure witness protection. It can also be difficult to get the cooperation of the territorial state to conduct investigations. Foreign judges and jurors are likely to have difficulty assessing foreign witnesses and appreciating the evidence. Additionally the state must show that it cannot determine the case within its own jurisdiction first, and that there is no possibility of the case proceeding before national courts. In practice however, this has occurred in a number of cases including Spain (regarding Peru and other cases) and Germany (regarding the United States). Some countries have incorporated a ‘subsidiarity’ principle into domestic legislation to ensure domestic avenues are first exhausted.

Universal jurisdiction cases can be initiated directly. This then necessitates that a competent investigating judge who critically evaluates the evidence. In certain common law countries, it is possible for victims’ lawyers to directly request that a court issues an arrest warrant (on the basis of sound evidence). Nonetheless, if a case is to proceed to trial, it is important that victims’ lawyers work closely with prosecution services to ensure they are fully on board. However, victims do not have to be physically present for universal jurisdiction cases to

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<sup>186</sup> Ibid



commence. What is required is a body of comprehensive evidence suggesting that there is a prima facie case that a grave crime has been committed. It is important therefore, for civil society groups and lawyers working with victims to closely liaise with the prosecutor's office from the outset. This would, for example, include the preparation of a dossier of evidence providing background factual information; liaising with victims where appropriate; and assisting prosecutors to contact victims.

### **5.3.2 Private Prosecutions in Local Courts**

Private prosecutions refer to instituting criminal proceedings before a court of law against an individual or body corporate by a private citizen as opposed to a public prosecutor. This power is conferred on individuals under Section 88 (1) of the Kenyan Criminal Procedure Code (CPC) and by inference Section 26 (3) (b) & (c) of the current Kenya Constitution. The police and the Attorney General are charged with the responsibility of conducting criminal proceedings in Kenya. The drafters of the Constitution of Kenya envisaged situations where both the police and the AG would choose not to institute criminal proceedings in certain circumstances or against certain individuals. The option of private prosecutions exists to remedy this potential problem. Prerequisite conditions are as follows: Before a private prosecution can be instituted, certain requirements must be met. These include: a) failure of the police and the AG to take action in the matter, b) locus standi i.e. the 'private prosecutor' must have a legitimate interest in the matter.

As matters currently stand, there have been limited investigations and prosecutions by the police. It is therefore a reasonable inference that high-ranking PEV perpetrators will probably not be brought to justice through the customary public prosecutions route. Given the current political climate and the lack of independence in institutions such as the state law office, it is

debatable whether the AG will allow the prosecution of certain high level individuals. There is also the danger that the authorities will have recourse to delaying tactics e.g. that police investigations into post-election atrocities have been halted pending the decision to use a local tribunal, the ICC or a special division of the High Court. Possibility and practicability of the use of private prosecutions: To reiterate, the avenue of private prosecution ensures that a victim is able to obtain retributive justice irrespective of refusal by any relevant public authority to act. Furthermore, the use of private prosecutions is advantageous as it is not dependent on the police or the prosecutor's ability to unearth evidence, which in many instances is done incompetently either by mistake or by design.

Potential challenges involved with using or considering the approach: There are also several questions that remain unanswered by both the police and the AG. Are the police able to conduct investigations without interference from external forces? What of incidents or offences committed by police officers? CIPEV indicted the police for numerous extrajudicial killings and other human rights violations. Can the police therefore be reasonably expected to deal impartially with their own members? Limitations of using private prosecutions: The provisions of Section 26 (3) (b) and (c) of the Constitution and Section 82 (1) of the Criminal Procedure Code have the potential to undermine the process of private. prosecutions by giving the AG powers to take over or terminate private prosecutions.

### **5.3.3 Regional Mechanisms**

The East African Community (EAC) Treaty seeks to promote governmental accountability and human rights, among other values, within the community. In spite of it being relatively new terrain for human rights groups, the EAC Treaty might open up new opportunities for human rights action in relation to Kenya's post-election atrocities. The East African

Legislative Assembly (EALA): The regional legislature was the first African institution to openly condemn PEV in Kenya.<sup>187</sup> Building on this particular distinction, human rights groups may want to consider how to balance their historical reliance on domestic and regional courts and executive agencies with collaboration with the EALA.

EAC Summit: The executive organ of the EAC exists to promote and monitor peace, security and good governance within the community. • Could human rights groups establish a formal working relationship with the Summit's upcoming conflict early warning platform as well as its Small Arms and Light Weapons (SALW) Programme? • How could human rights groups position themselves to be influential in the development of the planned EAC Demobilization, Disarmament and Reintegration (DDR) unit? All these mechanisms have critical potential in the resolution of conflict and for peace building in Kenya. Accordingly, human rights groups should plan to benefit from them in order to improve the impact of their interventions against political violence. East African Court of Justice (EACJ): In the future, Kenyans may have a new, regional human rights court operating close to home. So far, the East African Court of Justice (EACJ) does not have specific human rights jurisdiction because the Draft Protocol developed to extend its jurisdiction is yet to come into force.<sup>52</sup> However, articles 6 and 7 of the EAC Treaty explicitly link the EACJ to the African Charter on Human and People's Rights.<sup>53</sup> Debate over whether the EACJ should have international criminal jurisdiction for the East African region has however been met with resistance from the court.

The African Commission on Human and People's Rights (ACHPR) is a particularly important mechanism for human rights action on the continent. Human rights groups have the option of taking cases before the Commission for redress or getting advisory opinions on

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<sup>187</sup> See Report of the East African Community Observer Mission: Kenya General Elections December 2007 of January 2008

specific human rights concerns. Article 56 of the African Charter on Human and People's Rights (African Charter) spells out several requirements that govern the admissibility of communications brought before the Commission detailing the process.

Cases before the Commission are simple but rather lengthy. Where both victims and states cooperate, redress for human rights violations may be realised in about 18 months. A new rule is now in operation which reduces this period to 12 months.

Regrettably, the decisions of the Commission are not binding on state parties. Nonetheless, new rules allow the Commission to ask the AU Assembly to take specific actions in relation to states. This happened when Senegal was compelled by the AU to act against former Chadian dictator, Hissène Habré, an asylum seeker, who had been accused of perpetrating grave human rights violations in Chad in the 1980s. The AU Assembly, on the Commission's urging, could recommend specific actions for the Kenyan state to consider in response to the post-election crisis as well. Victims of human rights violations may be awarded reparations which are paid by the state found to be responsible for violating their rights. Because the African Commission allows for the incorporation of international norms and principles on human rights, there is theoretically a wide range of options for reparations that can apply.

It is also instructive to point out that in keeping with the Pan-African concept other regional mechanisms include the Economic Community for West African States (ECOWAS) Court, which has specific human rights jurisdiction and can also be another avenue that victims can pursue although the geographical limitation and the exclusive membership to the regional grouping may provide a challenge. However in terms of proximity in comparison with other Courts in the West, it is a more viable option.

## **5.4 Chapter Summary**

From the data analysed in this chapter it is clear to deduce that the victim's plight in seeking justice has merely scratched the surface. A multitude of victims are still suffering whilst the Kenyan case slowly trudges on at the Hague. It was also pertinent to note that the government is to a large extent the only player in addressing the victims' rights albeit not satisfactorily. From information gathered from the actual victims on the ground the international mechanisms are non-existent or non-beneficial to their cause. The VTF has to work through government due to limited resources and yet victims have claimed that they do not have faith in the government. Additionally the entire process has been rather slow and time consuming leaving many feeling neglected and abandoned. It can thus be said that international criminal justice mechanisms despite being in place in the international realm, its impact has not been felt substantially on the ground.

## **CHAPTER 6**

### **SUMMARY, CONCLUSIONS AND RECOMMENDATIONS**

#### **6.0 Introduction**

This chapter concludes the findings and discussions drawn from the research, based on the objectives of the study, which was to look at the plight of post-election violence victims and international criminal justice mechanisms from a Kenyan perspective.

#### **6.1 Summary**

##### **6.1.1 The International Criminal Justice Mechanism and PEV victims right to Participation**

The research revealed that the victims right to participate in proceedings is based on the broader notion of restorative justice rather than retributive justice. It is a right that was not as prevalent in the international criminal justice system, prior to the Rome statute, but has now subsequently received more prominence. Participation need not be the physical presence at the court sessions, but rather inclusiveness in the process. This can be facilitated by simply informing the victims of the goings on in relation to the judicial process and any other relevant information concerning them. It can also include listening to the victims ordeals and documentation of their plight. Representation can be done by a legal representative through individual institution of a suit or through class action. In relation to the Kenyan case, victims have been represented through a legal representative at the ICC although this avenue has been for a select few. Majority of the victims as the research found out have been neglected with their basic need not met and there is a disconnect between them search for justice. Additionally other mechanisms in the international justice system like the universal jurisdiction and regional courts are not accessible to the majority. Similarly it can be concluded that identifying those who fall in the category of victims so as to accord them a

right to participate is also a challenge due to the those affected directly and those affected indirectly

### **6.1.2 The International Criminal Justice Mechanism and PEV victims right to Protection**

Protection of victims' rights need domestic implementation first so that this can facilitate international support. Local procedures and structures need to be in place first. This includes the judicial to political goodwill. In addition the research deduced that the support of other states whether state parties to the ICC or not need to contribute to protection of victims. Moreover over reliance on the ICC to protect PEV victims should change, and other international mechanisms should be pursued. This includes exhausting local avenues because the bulk of the violations occurred through other smaller perpetrators not targeted by international prosecutions

### **6.1.3 The International Criminal Justice Mechanism and PEV victims right to Reparation**

Reparation for victims includes compensation, restitution and rehabilitation. Reparations confer the opportunity to mend the monetary losses and to pacify the emotional scars of violence. Various avenues for reparations exist and to a large extent still remains a function of the state. However other several avenues in the international real are available like the VTF under the Rome Statute. The main challenge is identifying the victims eligible for reparations and quantification of the amounts. In some cases like Kenya the high number of victims makes it difficult to award reparations that can make a significant impact to the victims. Similar to victim protection cooperation from state parties as well as non-state parties is the most viable way to have an effective system of victim reparations

## **6.2 Conclusion**

The International Criminal Justice mechanisms provide for victim participation, protection and reparation however they are not sufficient in addressing the plight of the victims satisfactorily. More needs to be done in ensuring that the victims are catered to. Restoration of the victims back to the position they were before the violence should be a priority. This requires the concerted effort of government as well as the international community of member states. The plight of victims should be deemed to be the plight of all humans in the same way international crimes are seen as the concern of the international community as well. The international community should gradually shift the criminal justice mechanism from retributive to restorative by allocating more resources to the latter

## **6.3 Recommendations**

1. International Criminal Justice mechanisms should address social economic rights violations with a greater emphasis on restorative justice as opposed to retributive justice. This would include putting more emphasis on allocation of resources from the international community aimed creating tangible avenues to access redress for the victims.
2. Setting up of local and regional mechanisms to address international Crimes. This can be done through local legislation as well as regional agreements.
3. Elimination of corruption and the integration of good governance structures, democratic principles and transitional mechanisms of transference of power during election periods. This will address the root of violence caused by election processes.
4. Transparency and fairness in judicial proceeding for international crimes. This will enhance the rule of law, and make decisions by international tribunals credible and acceptable to the majority.



5. The creation of an international victim's tribunal that will accord victims the right to be heard and to air out their grievances in a similar fashion to a truth justice and reconciliation commission. This will be specifically used as an avenue for the victims voices and should be devoid of any sanctions with an aim of reconciling and providing closure for victims

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