

# Minor Dissertation

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**Qualification:** LL.M. International Law

**Title:** Victim Participation in Practice at the International Criminal Court: Kenya 2 Case Study

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**Word Count:** 24,927

Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the LL.M. in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses. I hereby declare that I have read and understood the regulations governing the submission of LL.M. dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.

10/02/2015

# Victim Participation in Practice at the International Criminal Court: Kenya 2 Case Study

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## *Abstract*

*This minor dissertation examines victim participation at the International Criminal Court in practice, focusing on the Kenya 2 proceedings. Victim participation has always been a significant part of the mandate of the International Criminal Court, however, the actual practice of victim participation is not well expounded upon in the Rome Statute or through the legal texts of the Court. It has largely been left up to individual chambers to determine and design what modality of victim participation is suitable for the circumstances of the case before it. The Kenya situation presented a number of novel circumstances that required the Court and Counsel to implement new and innovative victim participation practices. The failures and successes of the Kenya victim participation methods deserve to be documented so that lessons can be learnt for current and future victim participation practices.*

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## Introduction

In November 2009, the Prosecutor of the International Criminal Court (“ICC”) filed a request to investigate crimes committed in Kenya during the 2007-2008 post-election violence (“PEV”).<sup>1</sup> From this moment, victims of the PEV had rights to participate in the ICC Kenya situation.

The *Rome Statute of the International Criminal Court* (“*Rome Statute*”)<sup>2</sup> and other ICC legal texts establish a framework for recognition of victims as actors within the international justice scheme greater than any previous international criminal tribunal.<sup>3</sup> Despite this, victim participation rights are left relatively vague and undefined, and the modalities of victim participation are left to be determined by individual chambers as they arise. This drafting technique was described by the first President of the ICC, Philippe Kirsch, as ‘constructive ambiguity’.<sup>4</sup>

The chamber’s decision regarding which victim participation modality to implement is often influenced by a number of factors including the premise of the ICC’s jurisdiction (whether the country has referred itself, a United Nations Security Council referral or a Prosecutor’s *proprio motu* investigation),<sup>5</sup> the state of security in the situation country, Court financial budgets, the crimes charged against the accused, and the anticipated number of participating victims. In making its decision, the chamber may be guided by Assembly of States Parties (“ASP”) reports and strategies,<sup>6</sup> civil society reports and assessments,<sup>7</sup> and experiences and results from previous cases, although they are not bound by such matters.

Even after the chamber has decided on a modality of victim participation for the proceedings, the actual practice and implementation of it is largely left up to various ICC victim-related

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<sup>1</sup> ICC, *Request for Authorisation of an Investigation Pursuant to Article 15*, 26 November 2009, ICC-01/09-3.

<sup>2</sup> *Rome Statute of the International Court* (adopted 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 38544.

<sup>3</sup> Assembly of States Parties (“ASP”) 8<sup>th</sup> Session, *Report of the Court on the Strategy in Relation to Victims*, 10 November 2009, ASP8/45 at 1.

<sup>4</sup> C Kress ‘The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise’ (2003) 1 *Journal of International Criminal Justice* 603, 605–06.

<sup>5</sup> These bases of jurisdiction are found in Article 13 of the *Rome Statute*.

<sup>6</sup> Including ASP subsidiary bodies such as The Hague Working Group on Victims, Affected Communities and Trust Fund for Victims, including Reparations and Intermediaries.

<sup>7</sup> Including the Victims’ Rights Working Group which is a network of over 300 national and international civil society groups and experts created under the auspices of the Coalition for the International Criminal Court.

bodies and victims' legal representatives. While the flexibility of the victim participation scheme at the ICC allows consideration of each situation's unique circumstances, it also presents uncertainty about how the scheme should be applied in practice and begs an assessment of what modalities work best in different circumstances. It also calls into question whether the victim participation system should be harmonized throughout the Court in order to ensure effectiveness, predictability, and timely decision making.<sup>8</sup>

This minor dissertation begins by examining the origins, bases and modalities of victim participation in criminal trials. It will identify and compare the role of the victim in other international criminal tribunals, and then discuss the impetus for inclusion of victims' rights at the ICC.

Part two scrutinizes the legal texts of the ICC to identify the basis and foundation of victim participation at the ICC, and the subsequent established jurisprudence on victim participation.

Part three will concentrate on the Kenya 2 proceedings and how the Court applied certain provisions of the ICC legal texts in practice.<sup>9</sup> The Kenya situation was the first Prosecution *proprio motu* investigation at the ICC and therefore the first situation to exercise the right of victims to make representations to the Court regarding an investigation under Article 15(3) of the *Rome Statute*. This obliged the Court to design a process to allow victims to make such representations, and then determine what influence these representations would have on the Chamber. Then, faced with potentially hundreds of thousands of victims and unprecedented security concerns, the Kenya Trial Chamber, Trial Chamber V, was required to determine what modality of victim participation would suit the situation's unique circumstances. The 3 October 2012 Decision on Victims' Representation and Participation<sup>10</sup> was of huge significance as the Chamber used its powers under the Rules of Procedure and Evidence<sup>11</sup> to alter the modality of victim participation in the Kenya trials. They appointed a Common Legal Representative ("CLR") to represent the victims, and simplified the victim participation application process by delegating the victim-status determination role to the CLR rather than to the Chamber. Despite this decision, the Chamber largely left the actual practice of the new

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<sup>8</sup> ASP 13<sup>th</sup> Session, *Report of the Bureau on victims and affected communities, Trust Fund for Victims and reparations*, ASP13/32 para 21.

<sup>9</sup> The Kenya situation was divided into two cases: Kenya 1 and Kenya 2. This minor dissertation will concentrate on the Kenya 2 proceedings.

<sup>10</sup> *Prosecutor v Muthaura and Kenyatta*, 'Decision on Victims' Representation and Participation', ICC-01/09-02/11-498, 3 October 2012. ("3 October 2012 Decision"). The same decision was also rendered in the Kenya 1 trial: ICC-01/09-01/11-460.

<sup>11</sup> *Rules of Procedure and Evidence (ICC)*, 9 September 2002, ICC-ASP/1/3.

modality up to ICC victims' bodies and the CLR. This part will discuss how the ICC victims' bodies and the Kenya 2 CLR and his field team carried out their mandate, and will exemplify how decisions and instructions from The Hague were translated into practice in the field.

The minor dissertation will conclude by examining broader issues and problems with the ICC victim participation scheme as identified by the Kenya 2 proceedings, and will make recommendations for improving the scheme.

### **Background and Methodology**

In 2013, I spent three months working as the intern for the Common Legal Representative of the victims in the Uhuru Kenyatta (Kenya 2) trial at the International Criminal Court. I was based in Nairobi, Kenya, and worked directly for the Common Legal Representative, Fergal Gaynor.<sup>12</sup>

The 3 October 2012 Decision dramatically altered the standard victim participation scheme at the ICC, and as the first situation using this system, I thought it was important to document its effects. I decided to base my minor dissertation on my experience in the field as it would provide a much needed recorded account of this specific modality of victim participation, and would offer a unique insight into the logistics and practicalities of carrying out the Kenya 2 victim representative's mandate.

This minor dissertation is based largely on my own experience in the field, and interactions with my former team members. This field exposure to a process of experimentation and operationalization gave me a unique opportunity to describe the processes involved and to reflect more critically in retrospect. My field experiences are then reconstructed *ex post facto* in the light of literature review and a more critical engagement with the field experience.

The information I have gathered (from when I started working at the ICC until the completion of this minor dissertation) from team members is the result of informal conversations I have had and knowledge I gained from working alongside them. Unless

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<sup>12</sup> I must express sincere gratitude to my former employer, Fergal Gaynor, who not only gave me the opportunity to experience victim participation in the field, but also provided constant support for this minor dissertation. Seeing the victims react to Fergal as their representative caused me to believe the new system of victim representation can work, and encouraged me to investigate what needs improving.



otherwise expressly noted, any information regarding the activities of the Kenya 2 team are my perceptions only. I do not purport to reflect the opinions of any of my former colleagues.

## 1. The Origins of Victim Participation

### A. Introduction

It may come as a surprise to a victim of a crime to know that when and if the perpetrator of the crime is caught, the victim will have next to no say or involvement in the prosecution or proceedings of the offence. Particularly in common law countries, the victim of a crime is side-lined throughout court proceedings and their only involvement may be as a witness testifying on behalf of the Prosecution.

While a layman may look at the traditional criminal justice system and assume that the Prosecutor's role is to represent the victim of a crime, this is quite often not the case.<sup>13</sup> Prosecutors are bound by principles of impartiality and objectivity and focus on upholding the law and protecting the community. They are not necessarily concerned with every offence of the accused nor the extent of the damage to the victim the offender has caused. They will follow the law and charge whatever the evidence will allow them to and whatever they consider to be in the public interest. Victims on the other hand are likely to want each crime committed against them considered by the court, and want to share their story and have their trauma and suffering acknowledged by the court. They want to see the correct person facing charges and they want redress for their suffering. At the very least, victims want to be informed about the charges and the progress of the trial.<sup>14</sup>

Thus the issue of whether victims should be allowed to participate in criminal trials independently from the Prosecution becomes relevant. Empirical research suggests that where the judicial system acknowledges and values the victims' plight, victims may report higher overall levels of satisfaction with the criminal justice system.<sup>15</sup> This is because it often

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<sup>13</sup> J Doak 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32 *Journal of Law and Society* 294, 303-06.

<sup>14</sup> C.P Trumbull IV 'The Victims of Victim Participation in International Criminal Proceedings' (2007-2008) 29 *Michigan Journal of International Law* 777, 816-817.

<sup>15</sup> Doak op cit (n11) 312.

promotes truth-finding by shedding light on what occurred,<sup>16</sup> and empowers victims by giving them an opportunity to be heard, and to better understand the proceedings. A better understanding of the proceedings and the decision-making processes of the court can promote better victim acceptance of the decision itself.<sup>17</sup> Of course there are criticisms and doubts about victims participating in the judicial process. For example, a victim may find themselves being re-traumatised by an over zealous defence counsel, or re-victimised if their case is unsuccessful.<sup>18</sup>

In international criminal law cases there are likely to be anywhere from several to millions of victims. Larger numbers of victims can cause logistical problems and ‘the risk of delays in the administration of justice, the issue of equality of arms, and the threat of subversion and fraud are all exacerbated.’<sup>19</sup>

Nevertheless, in the past 40 years there has been progress in acknowledging and enforcing the rights of victims in the criminal justice system. This has happened on both a domestic and international level, and was spurred by civil, political and women’s rights movements, and a greater focus on restorative and corrective justice rather than just retributive justice and deterrence.<sup>20</sup>

## B. Origins of Victim Participation

The study of victimology took off in the 1950s. The following decade, there was a rise in Western government victim compensation programmes and associations for the defence of victims, prompted by political, civil and women’s rights movements.<sup>21</sup> In 1985, the United Nations General Assembly made a Resolution titled ‘United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power’ (“1985 Declaration on Victims”).<sup>22</sup> This Resolution describes victims as ‘persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or

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<sup>16</sup> H Hobbs ‘Victim Participation in International Criminal Proceedings: Problems and Potential Solutions in Implementing an Effective and Vital Component of Justice’ (2014) 49 *Texas Journal of International Law* 1, 10.

<sup>17</sup> J Hagan ‘Victims Before the Law: A Study of Victim Involvement in the Criminal Justice System’ (1982) 73 *Journal of Criminal Law & Criminology* 317, 329.

<sup>18</sup> Hobbs op cit (n14) 11.

<sup>19</sup> Trumbull op cit (n12) 816.

<sup>20</sup> M Rauschenbach and D Scalia ‘Victims and International Criminal Justice: A Vexed Question?’ (2008) 90 *International Review of the Red Cross* 870, 442.

<sup>21</sup> Ibid.

<sup>22</sup> UN Doc A/Res/40/53, 29 November 1985.

substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States.<sup>23</sup> It then proposes that:

- Victims should be informed of their role, the scope and timing of the proceedings;<sup>24</sup>
- Victims should have their views and concerns presented and considered by the court;<sup>25</sup>
- Courts should avoid unnecessary delay in the proceedings;<sup>26</sup>
- Victims should receive restitution,<sup>27</sup> compensation in certain circumstances,<sup>28</sup> and receive assistance such as social and health support.<sup>29</sup>

As this document is just a Declaration, it is considered ‘soft law’ and its principles are not binding on States. Nevertheless, it proves the international community was taking greater interest in the rights and role of the victim in criminal proceedings.

The right for victims to claim reparations for wrongs committed against them was first propounded in the Universal Declaration of Human Rights (“UDHR”).<sup>30</sup> Despite its non-binding nature, the UDHR is very influential and is the premise of most countries’ human rights standards. Subsequently, victims’ rights were acknowledged in the International Covenant on Civil and Political Rights (“ICCPR”) and the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), both of which create obligations on States that have ratified them.<sup>31</sup> Victims rights were reaffirmed in 2005 when the United Nations General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation,<sup>32</sup> which reminded States of their obligation to ensure victims of serious human rights violations obtain ‘adequate, effective and prompt reparation for harm suffered.’<sup>33</sup> It opened the door to more restorative legal responses such as restitution, compensation and rehabilitation.<sup>34</sup> It also encourages other methods such as ‘satisfaction’

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<sup>23</sup> Article 1.

<sup>24</sup> Article 6(a).

<sup>25</sup> Article 6(b).

<sup>26</sup> Article 6(e).

<sup>27</sup> Articles 8-11.

<sup>28</sup> Articles 12-13.

<sup>29</sup> Articles 14-17.

<sup>30</sup> Article 8 UDHR.

<sup>31</sup> Article 2(3) ICCPR, Article 6 CERD.

<sup>32</sup> UN Doc A/RES/60/147, 21 March 2006.

<sup>33</sup> Art 11(b).

<sup>34</sup> Rauschenbach op cit (n18) 456.

(search for the truth, public revelation of the facts, memorials for recognition purposes), and guarantees of non-repetition through reformed laws, strengthening of the judicial system and effective control of the police and armed forces.<sup>35</sup>

The International Victimology Institute Tilburg and the World Society of Victimology have proposed a draft United Nations Convention that seeks to provide victims with more concrete legal rights. The draft was completed on 8 February 2010, and among other things, seeks that victims have access to judicial and administrative processes that provide redress, allow greater involvement in the trial including being informed about prosecutorial strategy and the opportunity to oppose it, and the opportunity for victims to be represented by a lawyer.<sup>36</sup>

### **C. Victim Participation in International Criminal Courts and Tribunals**

The gravity and scale of international crimes means that its victims will have suffered particularly serious violence and severe trauma. Often entire communities (ethnic, religious, political) are targeted which means the victim will not only have to deal with individualized victim issues, but also identity issues in belonging to the particular targeted group.<sup>37</sup> The victim is tasked with not only recovering on a personal level, but also contributing to rebuilding their damaged community.<sup>38</sup> When the trauma suffered is so serious, it can also pass down through generations such as the children of the Holocaust victims.<sup>39</sup> It is therefore crucial that victims of international crimes are given the support and rights they need in the criminal justice process in order to encourage recovery and transition. International criminal tribunals have taken different approaches to victim participation with some excluding them completely, some providing minor roles, and the International Criminal Court offering a major role.

#### **(i) The International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR)**

The establishing Statutes of the ICTY and ICTR clearly declare the aim of the Tribunals as ‘...prosecuting persons responsible for serious violations of international humanitarian law’.<sup>40</sup>

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<sup>35</sup> Ibid.

<sup>36</sup> UN Convention on Justice and Support for Victims of Crime and Abuse of Power, 8 February 2010, available at: <http://www.ohchr.org/Documents/HRBodies/CCPR/GConArticle9/Submissions/WorldSocietyOfVictimologyDraftConvention.pdf>.

<sup>37</sup> Rauschenbach op cit (n18) 450-451.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Article 1 in ICTY and ICTR Statutes.

This aim is distinctly retributive and deterrence based, and does little to address broader ideals of justice such as restorative and corrective justice. It focuses on the wrongdoer rather than the victims. Victims do not play an autonomous role in the proceedings, their involvement is limited to appearing as witnesses (if called by the Prosecution),<sup>41</sup> they have no input in the direction of the Prosecution case or investigation,<sup>42</sup> and any claims for compensation must be made through national courts pursuant to national legislation, and not through the international tribunals.<sup>43</sup> The former Deputy Prosecutor at the ICTR acknowledged that ‘We all know that the ICTR was created to serve the people of Rwanda but unfortunately the Rwandan society is not actively involved in the activity of the Tribunal...’ further, the ICTR remains ‘foreign to Rwanda, and the Rwandan people, the very society it was designed to help.’<sup>44</sup> NGOs have criticized the lack of victim involvement in the *ad hoc* tribunals, particularly the lack of recourse to compensation claims.<sup>45</sup> Further, testifying before the tribunals risked ‘secondary victimisation’ meaning that victims would be victimised for a second time as a result of a judicial process in which they could not fully participate.<sup>46</sup>

It is hard to reconcile the Security Council’s objectives of promoting peace, stability and security with the purely prosecutorial and retributive nature of the *ad hoc* tribunals they set up.

## (ii) Extraordinary Chambers in the Courts of Cambodia (ECCC)

The ECCC as a hybrid tribunal implements a combination of Cambodian and international law. Victims can participate in the trials as Civil Parties and are given broad rights similar to

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<sup>41</sup> JM Kamatali ‘From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans’ (2005) 12(1) *New England Journal of International and Comparative Law* 89, 96.

<sup>42</sup> C Jorda and J de Hemptinne, ‘The status and role of victims’ in Antonio Cassese, *The Rome Statute of International Criminal Court Vol II* (2002) p1389.

<sup>43</sup> Articles 106 in ICTR and ICTY Statutes.

<sup>44</sup> BA Muna, ‘The Early Challenges of Conducting Investigations and Prosecutions Before International Criminal Tribunals, Observations at the Colloquium of Prosecutors of International Criminal Tribunals (Nov. 25-27, 2004), available at <http://ict-r-archiv09.library.cornell.edu/ENGLISH/colloquium04/muna.html>, last accessed 29 January 2015.

<sup>45</sup> See *Memorandum to the International Criminal Court*, Human Rights Watch, 3 March 2004, available from <http://www.hrw.org/news/2004/03/02/memorandum-international-criminal-court> last accessed 6 February 2015; and *Ensuring the Effective Participation of Victims Before the International Criminal Court Comments and Recommendations Regarding Legal Representation for Victims*, Redress, May 2005, available at <http://www.redress.org/downloads/publications/REDRESS%20-%20Legal%20Representation%20for%20Victims%2023%20May%202005.pdf> last accessed: 6 February 2015.

<sup>46</sup> C van den Wyngaert ‘Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge’ (2012) 44 *Case Western Reserve Journal of International Law* 475, 477.

that of the Prosecutor and Defence.<sup>47</sup> They may participate in the trial as well as claim moral and collective reparations from the Court.

At the pre-trial phase, the Civil Parties may act individually and request the co-investigating judges to undertake investigations. However, at the trial phase, the victims are grouped together and represented by Civil Party Lead Co-Lawyers.<sup>48</sup> Hobbs argues that despite having certain rights to participate in the trial, victims have largely been side-lined and ‘reduced to a merely supportive role in a decidedly restrictive scheme’.<sup>49</sup>

### (iii) Special Tribunal for Lebanon (STL)

The STL is another international tribunal that recognises a role for victims in trial. While victims may participate, they are not a party to the proceedings, nor can they claim reparations or compensation.<sup>50</sup> Once the Pre-Trial Judge has confirmed the applicant qualifies as a victim, they can participate by making oral and written submissions, calling, questioning and cross-examining witnesses and tendering evidence. Victims are generally represented by lawyers who are funded by the STL’s Legal Aid scheme.<sup>51</sup> As of November 2014, 70 victims had been authorised to participate in the STL’s only current violence related trial.<sup>52</sup>

### (iv) The International Criminal Court (ICC)

Heavily influenced by the 1985 Declaration on Victims and the failures of the *ad hoc* tribunals to bring justice to victims, the drafters of the *Rome Statute* decided to implement a victim participation scheme into the ICC.<sup>53</sup> The definition used in the 1985 Declaration on Victims laid the foundation for the negotiations on the definition to be adopted for the ICC during the Preparatory Committee discussions.<sup>54</sup> Due to the completely different nature of international

<sup>47</sup> ‘Victim Participation’, *Extraordinary Chambers in the Courts of Cambodia*, available at <http://www.eccc.gov.kh/en/victims-support/participation>, last accessed 29 January 2015.

<sup>48</sup> Hobbs op cit (n14) 6-7.

<sup>49</sup> Ibid at 7.

<sup>50</sup> ASP 11<sup>th</sup> session, *Report of the Court on the review of the system for victims to apply to participate in proceedings*, 76.

<sup>51</sup> ‘Victims’ Participation’, *Special Tribunal for Lebanon*, available at <http://www.stl-tsl.org/en/about-the-stl/structure-of-the-stl/registry/victim-participation>, last accessed 29 January 2015.

<sup>52</sup> *Ayyash et al* STL-11-01. Note there are two other current trials at the STL based on contempt charges.

<sup>53</sup> *Victim Participation Before the ICC*, War Crimes Research Office - ICC Legal Analysis and Education Project, November 2007, available at [https://www.wcl.american.edu/warcrimes/documents/12-2007\\_Victim\\_Participation\\_Before\\_the\\_ICC.pdf](https://www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf) last accessed 27 October 2014.

<sup>54</sup> *Representing Victims Before the International Criminal Court: A Manual for Legal Representatives, Office of Public Counsel for Victims*, International Criminal Court, December 2013, Available at [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/victims/office%20of%20public%20counsel%20for%2](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/office%20of%20public%20counsel%20for%2)

justice to domestic systems, national victim participation schemes could not simply be transplanted into the international context. ‘A participatory regime must be carefully constructed to meet the specific demands of an international court...’<sup>55</sup> For example, in most international crimes that get prosecuted in an international court or tribunal, it is not the accused that has directly committed the individual crimes. It is far more likely that they have ordered, instigated, facilitated or aided or abetted a crime through their position of authority. Generally the accused is a military or political leader, and therefore the victim would have to prove a causal connection between the actions of the accused, and the harm they suffered. Further, the number of victims of an international crime far outweigh that of any domestic crime.

The ICC was forced to consider the delicate balance between the fair trial rights of accused persons, the right of victims to have their say and participate in proceedings where their personal interests are affected, and a workable procedure that would not be overwhelmed by the numbers of victims and survivors wishing to participate.<sup>56</sup>

Aware of these logistical hurdles, the drafters of the *Rome Statute* nevertheless decided their mandate was ‘to exercise its jurisdiction over persons for the most serious crimes’ rather than solely prosecuting accused persons.<sup>57</sup> 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<sup>58</sup> and therefore, victim participation was adopted. It is considered by the ICC that victims’ participation empowers them, recognises their suffering and enables them to contribute to the establishment of the historical record, the truth as it were of what occurred.<sup>59</sup> The Court’s own website declares that:

‘One of the great innovations of the Statute of the International Criminal Court and its Rules of Procedure and Evidence is the series of rights granted to victims. [...] For the first time in the history of international criminal justice, victims have the possibility under the Statute to present their views and observations before the Court [...] The

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[0victims/Pages/a%20manual%20for%20legal%20representatives.aspx](#) last accessed 23 January 2015. (“OPCV Manual”)

<sup>55</sup> Trumbull op cit (n12) 822-824.

<sup>56</sup> S Garkawe ‘Victims and the International Criminal Court: Three Major Issues’ (2003) 3 *International Criminal Law Review* 345, 359-60.

<sup>57</sup> *Rome Statute*, Article 1.

<sup>58</sup> ASP8/45 op cit (n2) at 3.

<sup>59</sup> ASP 11<sup>th</sup> Session, *Court’s Revised strategy in relation to victims*, ASP11/38 at 10.

victim-based provisions within the Rome Statute provide victims with the opportunity to have their voices heard [...]’<sup>60</sup>

In the Assembly of States Parties 2009 Report of the Court on the Strategy in Relation to Victims, the Court firmly declared that ‘Victims’ participation is a statutory right, not a privilege<sup>61</sup> and that ‘The Court will seek to ensure that no victim participating in Court proceedings is unrepresented.’<sup>62</sup>

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<sup>60</sup> *Victims and Witnesses*, International Criminal Court, available at [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/victims/Pages/victims%20and%20witnesses.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/Pages/victims%20and%20witnesses.aspx), last accessed 6 February 2015.

<sup>61</sup> ASP 8/45 op cit (n2) at 45.

<sup>62</sup> Ibid at 58.



### 3. The Development of the International Criminal Court Victim Participation Scheme

#### A. Introduction

The International Criminal Court victim participation scheme gives a number of participatory rights to victims. In deciding whether to commence a *proprio motu* investigation into a situation, the Prosecution must consider the victims' interests.<sup>63</sup> The victims also have the right to make representations to the Pre-Trial Chamber regarding the investigation authorisation.<sup>64</sup> During different stages of the trial, victims can also apply to participate and influence the direction of the case, and should a guilty verdict be handed down, victims can claim reparations from the accused.<sup>65</sup>

The framework for these types of participation is founded in the ICC's legal texts. Of primary importance is the *Rome Statute* which is the treaty on which the ICC is based. Among other things, it sets out the crimes falling within the jurisdiction of the ICC and the rules of procedure and mechanisms for States to cooperate with the ICC. Most importantly to this discussion, it is also the legal instrument that authorises victims to participate in ICC proceedings.

However, the *Rome Statute* actually says very little about how victim participation is to be organised and implemented. Other legal texts of the ICC such as the Rules of Procedure and Evidence ("RoPE"), the Regulations of the Registry ("RoR"), and the Regulations of the Court ("RoC") supplement and expound upon the *Rome Statute*, however, they too contain a surprisingly small amount of assistance, largely leaving victim participation modalities and practice up to the Court and Counsel.

#### B. The Legal Texts of the International Criminal Court

##### (i) Authorising Victim Participation:

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<sup>63</sup> Article 54.

<sup>64</sup> Article 15.

<sup>65</sup> Articles 68(3), 75.

Victim participation at the ICC is established in Article 68 of the *Rome Statute*: ‘Protection of the Victims and Witnesses and their Participation in the Proceedings.’ Subsection 3 reads:

‘Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. 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.’

This provision grants victims an independent voice and role in the proceedings before the Court.<sup>66</sup> One Chamber declared that the ‘object and purpose of Article 68(3) of the Statute... is to provide victims with a meaningful role in the criminal proceedings before the Court (including at the pre-trial stage of a case) so that they can have a substantial impact in the proceedings.’<sup>67</sup>

## (ii) The Definition of ‘Victim’:

The drafters of the *Rome Statute* decided that to define a ‘victim’ in the same manner as that in the 1985 UN Declaration on Victims would create logistical constraints. They concluded that judges should be able to determine the modalities of victim participation on an *ad hoc* basis and therefore stopped short of providing a definition of a victim in the *Rome Statute*. Nevertheless, a definition was later included in the RoPE.<sup>68</sup> Rule 85 reads:

‘For the purposes of the Statute and the Rules of Procedure and Evidence:

- a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
- b) 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.’

<sup>66</sup> *Situation in the Democratic Republic of Congo*, ICC-01/04-101-tEN-Corr, Pre-Trial Chamber I, 17 January 2006, at 51.

<sup>67</sup> *Prosecutor v Katanga and Chui*, ICC-01/04-01/07-474, Pre-Trial Chamber I, 13 May 2008, at 157.

<sup>68</sup> OPCV manual op cit (n52) 24.

This definition has been subject to Court scrutiny and there is now established jurisprudence on what constitutes a victim. For example, four clear criteria have been elicited from Rule 85: The victim must be a natural person; he or she must have suffered harm; the crime from which the harm ensued must fall within the jurisdiction of the Court; and there must be a causal link between the crime and the harm suffered.<sup>69</sup> The Chamber will accordingly analyse:

- i. Whether the identity of the applicant as a natural person appears duly established;
- ii. Whether the events described by each applicant constitute a crime within the jurisdiction of the Court;
- iii. Whether the applicant claims to have suffered harm; and
- iv. Most crucially, whether such harm appears to have arisen “as *a result*” of the event constituting a crime within the jurisdiction of the Court.<sup>70</sup>

The standard of proof required by victims to prove their victimhood is lenient as the Court recognised the difficulties facing victims in substantiating their claims. Victims are therefore only required to satisfy the elements of Rule 85 on a *prima facie* basis before the commencement of the trial.<sup>71</sup>

Jurisprudence has also established two types of victimhood: direct and indirect victims. ‘First, “direct” victims: those whose harm is the result of the commission of a crime within the jurisdiction of the Court. Second, “indirect *victims*”: those who suffer harm as a result of the harm suffered by direct victims.’<sup>72</sup> Harm suffered by an indirect victim ‘may include the psychological suffering experienced as a result of the sudden loss of a family member or the material deprivation that accompanies the loss of his or her contributions.’<sup>73</sup>

### (iii) Registry’s Role in Victim Participation:

Responsibility for victim participation lies mainly with the Registry – the administrative organ of the Court. Rule 16 of the RoPE enumerates the responsibilities of the Registrar relating to victims and witnesses. Among others, the Registry’s responsibilities include: providing notification to the victims, assisting them with legal advice, and organising their legal

<sup>69</sup> ICC-01/04-101-tEN-Corr op cit (n63) at 79.

<sup>70</sup> *Situation in Uganda*, ICC-02/04-101, Pre-Trial Chamber II, 10 August 2007, at 12.

<sup>71</sup> *Prosecutor v Lubanga*, ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, at 99.

<sup>72</sup> *Prosecutor v Lubanga*, ICC-01/04-01/06-1813, Trial Chamber I, 8 April 2009, at 44.

<sup>73</sup> *Ibid* at 50.

representation. Rule 92 contains more information about the notifications the Registry must provide the victims including notifications about the status of the investigation, confirmation of charges hearings, proceedings in court such as hearings, decision delivery dates, submissions and motions and the success of victim applications. The RoR expand further on the role of the Registry in victim participation. Chapter 3 Section 1 is dedicated to the responsibilities of the Registrar towards witnesses and victims who appear before the Court.<sup>74</sup> Section 2 governs victims' participation and reparations. The provisions require the Registry to ensure confidentiality of communications,<sup>75</sup> maintain a secure electronic database for victim information,<sup>76</sup> make the initial assessment of the victim's application before passing it on to the Chamber,<sup>77</sup> take measures to ensure protection and security of victims,<sup>78</sup> and facilitate withdrawals of victim applications.<sup>79</sup>

#### **(iv) Establishing Bodies to Assist Victims:**

The legal texts of the ICC also set up a number of bodies mandated to work with victims. None of the legal texts contain a full list or description of the bodies and their mandates, so they must be looked at together in order to grasp the elaborate architecture of the victim participation scheme.

The Registry implemented their responsibilities enumerated in the RoPE by establishing several bodies such as the Victims Participation and Reparations Section (VPRS),<sup>80</sup> the Public Information and Documents Section (PIDS)<sup>81</sup> and an independent office called the Office of Public Counsel for Victims (OPCV).<sup>82</sup>

The RoC and the RoR provide further instruction about the constitution and role of the OPCV. For example, Regulation 81 of the RoC declares the OPCV will be independent of the Registry, specifies the minimum qualification of counsel, and lists the tasks the OPCV will be responsible for. The RoR expands on this by providing for the appointment of members of the Office,<sup>83</sup> the independence of members of the Office,<sup>84</sup> the information to be shared

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<sup>74</sup> Regulations 79 – 96*bis*.

<sup>75</sup> Regulation 97.

<sup>76</sup> Regulation 98.

<sup>77</sup> Regulation 99.

<sup>78</sup> Regulation 100.

<sup>79</sup> Regulation 101.

<sup>80</sup> Regulation 86(9) RoC.

<sup>81</sup> Pursuant to Rule 13(1) RoPE, Regulation 5*bis* RoR.

<sup>82</sup> Regulation 81 RoC.

<sup>83</sup> Regulation 114.

between Registry and OPCV,<sup>85</sup> and reporting on the administrative issues by OPCV to Registry.<sup>86</sup>

The *Rome Statute* also establishes two bodies pertinent to victims. Article 43 of the Statute instructs the Registry to set up a Victims and Witnesses Unit in order to provide protective measures and assistance for witnesses and victims who appear before the Court. A Trust Fund for Victims (“TFV”) is also established in Article 79 of the *Rome Statute*. It declares that the TFV shall be established by the Assembly of States Parties, and shall be for the benefits of victims of crime within the jurisdiction of the Court and of the families of such victims. The RoR provides more instruction about the TFV, requiring cooperation between the Registry and the TFV. On direction of the Chamber and after consultation with the victims and/or their legal representatives, the Registry is to provide the TFV with information from the victims. Further, they are to provide general advice and information of a non-confidential nature relating to victims. Where an order for reparations is made, the Registry is to provide the TFV with victims’ application information in order to implement the order.<sup>87</sup>

As will be discussed further, the numerous bodies related to victims and their lack of clear mandates make the victims participation system complicated and at times, overly bureaucratic.

#### **(v) The Victim Participation Application Procedure:**

The RoPE, RoC and RoR all have provisions relating to the procedure that victims must take in order to apply to participate. Rule 89 of the RoPE provides that in order to present their views and concerns to the Court, victims shall make written application to the Registrar who shall forward the submission to the Chamber. The Registrar shall also provide the application (with necessary redactions) to the Prosecution and Defence who are entitled to respond. The Chamber on its own initiative or on application by Prosecution or Defence may accept or reject an application, or can make a collective decision regarding numerous applications in one decision. Rule 89(1) then states that ‘[t]he Chamber shall [...] specify the proceedings and manner in which participation is considered appropriate’, thus giving the Chamber flexibility and discretion regarding the modality of participation. Rule 91 gives Chambers the power to modify a previous ruling under Rule 89. This flexibility was shown when the Kenya Chamber dramatically altered the mode of victim participation in the Kenya trials in their 3 October

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<sup>84</sup> Regulation 115.

<sup>85</sup> Regulation 116.

<sup>86</sup> Regulation 117.

<sup>87</sup> Regulation 118.

2012 Decision (discussed in depth further on).

The RoC adds to Rule 89 by determining the substance of victim application forms.

Regulation 86 requires that standard forms should contain as far as possible the following information:

- a. The identity and address of victim (or address for communication);
- b. Evidence of consent of victim or situation of victim (if application is being made on their behalf);
- c. A description of the harm suffered resulting from a crime within the jurisdiction of the Court;
- d. Description of the incident (location, date, identity of perpetrator if possible);
- e. Supporting documentation;
- f. Information as to why the personal interests of the victim are affected;
- g. The stage of proceedings the victim wishes to participate in and relief sought; and
- h. Information on the extent of their legal representation and their financial means to pay for a legal representative.

The RoR then contributes even more detail regarding the victim application process.

Regulation 104 refers to Regulation 86 of the Court and further says that application forms to the extent possible, must be made available in the language(s) spoken by the victims and in a format that is accessible. Of critical importance, sub-section 2 allows for the Registry to propose amendments to the standard application forms on the basis of, inter alia, experience in using the forms and the context of specific situations. As will be seen through this minor dissertation, alteration to the application form has occurred, quite dramatically in the Kenya 2 proceeding.

The RoR permits the Registry to establish and maintain contact with the victims and prepare guidance booklets and other materials as well as providing education and training in order to assist victims in completing the application forms.<sup>88</sup> They mandate the Registry to ensure safe methods for submission of applications, and require that applications be received by the seat of the Court, or a field office of the Court.<sup>89</sup> The Registry is to provide the Chamber with

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<sup>88</sup> Regulation 105.

<sup>89</sup> Regulation 106.

access to the applications for participation,<sup>90</sup> as well as applications for reparations.<sup>91</sup> As will be seen, the Registry designated much of this work to the VPRS.

#### **(vi) Victims' Legal Representation and Common Legal Representation**

The legal texts of the Court lay down a system for the legal representation of victims. Rule 90 of the RoPE declares that victims are free to choose their counsel. However, in order to ensure effectiveness of the proceedings, the Chamber may request the victims to group together and be represented by a Common Legal Representative ("CLR"). This CLR can be chosen by the victims, or can be selected by the Registry. The RoC provide guidelines for the Chamber when requesting the victims to choose a CLR. It expands on RoPE Rule 90 requiring the Chamber to consider the views of the victims and local traditions, and provides a review mechanism for the Registrar's choice of CLR.<sup>92</sup> Regulation 80 permits the Chamber to appoint a CLR from the OPCV, while Regulation 82 provides that for a CLR to withdraw, they must seek the leave of the Chamber.

It is interesting to note that the first provision on Legal Representation in the RoR (Regulation 112) is much more expansive in the 2013 amended version than the original 2006 version. The 2006 Regulations simply state that the Registry may provide victims with a list of counsel, and their CV upon request. The 2013 amendment is much more detailed, requiring the Registry to provide the list of qualified counsel, inform victims of its ability to select a Common Legal Representative on their behalf (on the request of the Chamber), and organise a selection process for a CLR. The Registry is further required to inform victims of any potential 'grouping' of victims, and to take appropriate measures such as outreach to ensure that victims understand such information. They also may consult victims regarding their preference regarding legal representation. Sub-section (2) requires that where Registry is requested to choose a CLR under Rule 90 of RoPE, the following considerations must be taken into account:

- a. The preferences of participating victims and applicants for participation in respect of legal representation and their views on common legal representation;
- b. The particular circumstances of the case and the characteristics of the victims concerned;

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<sup>90</sup> Regulation 110.

<sup>91</sup> Regulation 111.

<sup>92</sup> Regulation 79 RoC.

- c. Any legal representation hitherto provided to victims;
- d. The competencies, expertise and experience in representing victims possessed by any other qualified counsel who have expressed an interest in acting as common legal representatives of victims; and
- e. Potential or actual conflicts of interest.

It is clear that when the 2006 Regulations were drafted, little was known about the process of appointing legal representatives of victims. It is only through time and experience that further guidelines found their way into the Regulations as an amendment.

The RoPE states that victims who lack the means to pay for the CLR may receive financial assistance from the Registry.<sup>93</sup> The RoR elaborates on this. Regulation 113 requires the Registry to inform about and supply a relevant form to victims seeking financial assistance. When determining whether to grant financial assistance, the Registry must consider *inter alia*: the means of victims, factors in Article 68(1) of the *Rome Statute* (age, gender, health, nature of crime suffered), any special needs of the victims, the complexity of the case, the possibility of asking OPCV to act and the availability of *pro bono* legal advice and assistance.

Rule 91 of the RoPE allows for Legal Representatives of Victims to participate in the proceedings unless the Chamber is of the opinion their intervention should be confined to written observations or submissions. Subsection 3 requires that should the Legal Representative wish to question a witness, they must make an application first to the Chamber. The Chamber may allow the question(s), deny the application, or ask the questions themselves on behalf of the Legal Representative.

### **(vii) Reparations**

Another crucial provision in the *Rome Statute* regarding victim participation is Article 75: ‘Reparations to Victims’. Article 75 declares that the Court shall establish principles relating to reparations including restitution, compensation and rehabilitation.

As the Kenya 2 trial was discontinued, reparations are beyond the discussion of this minor dissertation. Even before the Kenya 2 trial was discontinued, the Chamber had avoided making decisions about reparations, preferring to wait and see how the case progressed.<sup>94</sup> The

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<sup>93</sup> Rule 90(5).

<sup>94</sup> *Prosecutor v Muthaura and Kenyatta*, ICC-01/09-02/11-498 at 2.



2012 Revised Strategy in Relation to Victims also chose to breeze over the issue citing the degree of uncertainty and lack of precedents as reason to revisit the issue in the future.<sup>95</sup>

### **(viii) Summary**

As can be seen, the legal texts of the ICC contain only the foundations for the victim participation scheme and offer very little detail in the modalities of how victim participation operates. The provisions that do purport to regulate certain aspects of victim participation were open to interpretation, and as will be seen further, have been flexibly applied in order to cater for different case's circumstances.

## **C. Bodies of the ICC relating to victims**

Following the above description of the ICC legal texts and the victim pertinent bodies they create, it is useful to look at how the bodies are currently organised and how they have carried out their mandates.

### **(i) Registry**

The Registry is one of the four organs of the ICC. It is a neutral body that provides judicial and administrative support to all of the other organs of the Court. Crucially, it helps administer the victim participation scheme and is the umbrella body for the majority of victim-related bodies. It also administers the Court's legal aid scheme (in consultation with the chambers) which is essential for regular and effective communication between victims and their legal representative(s).<sup>96</sup>

The Registry is currently undertaking a major restructuring exercise called the ReVision project. It commenced in January 2014 and is expected to take around 18 months to complete. It will be discussed in the 'Broader Issues' section of this thesis.

### **(ii) Victims Participation and Reparations Section (VPRS)**

VPRS are the first point of contact that victims have with the ICC. They are mandated to assist victims in applying for participation and reparations and to manage all the relevant documents and databases. Even prior to this, they are responsible for locating and identifying potential victims, providing them with relevant information on participation and their rights,

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<sup>95</sup> ASP 11<sup>th</sup> Session, *Report of the Court on the Revised Strategy in Relation to Victims: Past, Present and Future*, ASP11/40, 46-48.

<sup>96</sup> ASP8/45 op cit (n2) at 59.

provide them with the material they need to apply for participation, assist with filling out the application forms and follow up on incomplete forms, provide training and support for intermediaries and legal representatives, and organize field missions.<sup>97</sup> To give an example of the quantity of work they receive, in 2013 alone they received 2051 applications for participation and 2044 applications for reparations.<sup>98</sup>

VPRS further conducts extensive research into victim's rights, including the role of victims in national legal systems.<sup>99</sup> With this knowledge, they help advise the Court about policy related to victims, and advise the Public Information and Documents Section ("PIDS") on the preparation of victim-related material.<sup>100</sup> VPRS was responsible for creating the standard application form used for victims to register for participation, and they also published an information booklet to accompany the form to assist victims in applying, a manual for lawyers, civil society and academics institutions to provide clear guidance on ICC proceedings, and are constantly updating training materials and programmes to educate and train intermediaries and others involved in the victim participation process.<sup>101</sup>

### (iii) Office of the Public Counsel for Victims (OPCV)

Following Regulation 81 of the RoC, the OPCV was established on 19 September 2005. The tasks enumerated in Regulation 81 include: providing general support and assistance such as legal research and advice to victims and/or their legal representative; appearing on behalf of victims in court when appointed by the Court, and advancing submissions on behalf of victims (if they are not yet represented). Regulation 81(2) declares that the Office is independent of the Registry except for administrative purposes, and it follows that its members do not receive instructions from anybody in relation to the fulfilment of their mandate.<sup>102</sup> Its members are bound by the *Code of Professional Conduct for Counsel* before the ICC.<sup>103</sup>

The purpose of establishing the OPCV was to create an in-house capacity that was

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<sup>97</sup> See OPCV Manual op cit (n52) and ASP 13<sup>th</sup> Session, *Report on Activities and Programme Performance of the International Criminal Court for the Year 2013*, ASP13/19, 162. ("ICC 2013 Report")

<sup>98</sup> Ibid at 161.

<sup>99</sup> ASP 3<sup>rd</sup> Session, *Report on participation of and reparations to victims*, ASP3/21, 2.

<sup>100</sup> Ibid at 3.

<sup>101</sup> Ibid at 6

<sup>102</sup> OPCV manual op cit (n52) 32.

<sup>103</sup> Ibid.

complementary to, but would not duplicate, the role of external lawyers.<sup>104</sup> OPCV staff can potentially act in two functions: they can directly represent victims (including acting as their common legal representative) such as in the *Prosecutor v Gbagbo* trial,<sup>105</sup> or they can be seconded to external counsel, such as in the Kenya proceedings.<sup>106</sup> The OPCV has developed internal measures to prevent conflicts of interest arising from their dual role.<sup>107</sup>

The OPCV has been involved in every situation and case before the Court, either through the provision of legal advice, or through direct representation of victims. In 2013 alone, they assisted 42 external legal representatives and provided legal advice and/or research to counsel on 600 occasions.<sup>108</sup>

The OPCV also undertakes outreach activities, and have participated in several conferences and seminars on victims' issues and in several publications. Of particular importance is the 2010 (updated in December 2013) 'Representing Victims Before the International Criminal Court: A Manual for Legal Representatives' publication. The 210-page manual includes introductions to the ICC and victim participation, jurisprudence relating to victim participation, and an explanation of practical issues relevant for the representation of victims before the Court. The Manual is a useful tool to assist external counsel who may not have international criminal law experience or who have not worked with victims, as they can consult the manual rather than requesting OPCV assistance which would further burden the OPCV's resources.

In the September 2004 Report on Participation of and Reparations to Victims, the Court reported that the OPCV should be introduced to the ICC with a budget of €310,000 which would provide, at a very modest level, legal assistance to the victims of the two cases anticipated by the Prosecutor.<sup>109</sup> To show the increased costs associated with the influx of cases, the proposed budget for the OPCV for 2015 is €1,527,900.<sup>110</sup> This budget purports to cover staff (including specialist and temporary staff), travel, training, and other associated

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<sup>104</sup> ASP 8<sup>th</sup> Session, *Report of the Court on Legal Aid: Legal and Financial Aspects of Funding Victims' Legal Representation Before the Court*, ASP8/25, 43.

<sup>105</sup> *Prosecutor v Laurent Gbagbo*, ICC-02/11-01/11.

<sup>106</sup> ASP 12<sup>th</sup> Session, *Report of the Court on the Implementation in 2013 of the Revised Strategy in Relation to Victims*, ASP12/41, 34.

<sup>107</sup> *Ibid* at 48.

<sup>108</sup> ICC 2013 Report op cit (n94) 156.

<sup>109</sup> ASP3/21 op cit (n96) 10.

<sup>110</sup> ASP 13<sup>th</sup> Session, *Report on Budget Performance of the International Criminal Court as at 30 June 2014*, ASP13/8, Annex: Table 39.

expenses.<sup>111</sup>

#### (iv) Trust Fund for Victims

The Trust Fund for Victims was established in September 2002 by the Assembly of States Parties in accordance with Article 79 of the *Rome Statute*. While it is administered by the Registry, it is an independent office and is supervised by a Board of Directors who act on a *pro bono* basis. The TFV has two major roles: first, to help implement reparations as awarded by the Court (either on an individual or collective basis), and second, to organise and finance projects for the benefit of victims (physical and psychosocial rehabilitation or material support), irrespective of a guilty verdict.<sup>112</sup>

The TFV gets its funding through two sources: fines, forfeitures and awards of reparations ordered by the Court against convicted persons, and voluntary contributions made by governments, international organisations and individuals.<sup>113</sup>

Current TFV projects include vocational training, counselling, reconciliation workshops, and reconstructive surgery. These projects have occurred in the Democratic Republic of Congo and Northern Uganda.<sup>114</sup> The TFV has set aside funding for future projects in the Central African Republic, and recently announced that assessment missions in Kenya and Cote D'Ivoire are foreseen in 2014-2015.<sup>115</sup>

#### (v) Victims and Witnesses Unit

Article 43(6) of the *Rome Statute* provides for the creation of a Victims and Witnesses Unit within the Registry. The main purpose of the VWU is to provide protection, assistance and security for victims and witnesses who interact with the Court.<sup>116</sup> This protection extends to people who may be affected on account of any testimony such as witness's family members.<sup>117</sup> Tasks they undertake include:

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<sup>111</sup> Ibid.

<sup>112</sup> *About us*, Trust Fund for Victims, available at <http://www.trustfundforvictims.org/about-us> last accessed 30 January 2015.

<sup>113</sup> OPCV manual op cit (n52) 357.

<sup>114</sup> *Programmes*, Trust Fund for Victims, available at <http://www.trustfundforvictims.org/about-us> last accessed 1 February 2015.

<sup>115</sup> *List of Decisions*, Trust Fund for Victims, Board of Directors 11<sup>th</sup> Annual Meeting, 18-20 March 2014, available at

[http://www.trustfundforvictims.org/sites/default/files/media\\_library/documents/pdf/Board\\_Meeting\\_DECISIONS\\_18\\_20\\_March\\_2014\\_FINAL.pdf](http://www.trustfundforvictims.org/sites/default/files/media_library/documents/pdf/Board_Meeting_DECISIONS_18_20_March_2014_FINAL.pdf), last accessed 6 February 2015, at 10.

<sup>116</sup> ASP12/41 op cit (n103) at 19-20.

<sup>117</sup> Rule 17(2)(a)(i) RoPE.

- Psycho-social services;
- Preparation for travelling to The Hague or a place where video-link could occur for the purpose of testifying before the Court;
- Familiarising victims and witnesses with courtroom procedures;
- Preparation for court appearance;
- Court Protection Programme;
- Special fund for relocations; and
- Protection assessments.

The VWU has psychologists specialising in trauma caused by sexual and gender-based violence, and they are frequently referred witnesses from the Office of the Prosecutor's Gender and Children Unit.<sup>118</sup>

#### (vi) Other Bodies and Actors

##### Legal Representatives and Common Legal Representatives

Legal Representatives and Common Legal Representatives of victims are external counsel who represent victims at the ICC and are hired on an *ad hoc* basis. Rule 90 of the RoPE provides that victims may choose their own legal representative, or when the Chamber deems it suitable, the Chamber may appoint or ask the victims to select a Common Legal Representative. Victims and the Chamber may only select legal counsel from the list of external counsel as maintained by the Registry. The relationship between external counsel and the Court is complicated. Some are paid by their clients (the victims) while others are funded by the Court's Legal Aid.

##### Field Assistants

Victims' field assistants support the legal representative of victims in the situation country. Their purpose is 'to facilitate the communication of the views and preoccupations of victims and assist a counsel to fully represent the views and concerns of victims before the Chamber.'

<sup>119</sup> Field assistants generally have an established relationship with the victims in question, possess a background in outreach or victim support and familiarity with the work of the

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<sup>118</sup> ASP12/41 op cit (n103) at 20.

<sup>119</sup> ASP 12<sup>th</sup> Session, *Registry's single policy document on the Court's legal aid system*, ASP12/3 at 62.

Court.<sup>120</sup> They should also speak the local languages in order to communicate more effectively with the victims.<sup>121</sup> They work on an *ad hoc* basis, and are paid an hourly rate rather than a yearly salary. Their pay is deducted from the investigation budget that is dedicated to the victims' team.<sup>122</sup>

The Kenya 2 trial was supported by four field staff who are all native Kenyans. All four are qualified lawyers although they are technically not permitted to perform legal work as they are hired as field assistants.

### **Counsel Support Section (CSS)**

CSS is part of the Registry and supports external counsel working at the ICC such as Defence Counsel and Victims Representatives. Importantly, CSS is in charge of managing the legal aid system on behalf of the Registrar<sup>123</sup> and therefore control the budget related to field activities. They are in charge of funding the field missions and the victims' team and field staff must seek prior approval from CSS before making any expenditure.

### **Public Information and Documentation Section (PIDS)**

PIDS is a body of the Registry that is responsible for the great majority of ICC outreach work. Outreach work is necessary 'in order to ensure that victims and affected communities receive timely, accurate, consistent and relevant information regarding participation in the proceedings, on-going judicial proceedings and reparations.'<sup>124</sup> PIDS works closely with other bodies of the ICC as well as external bodies such as NGOs and legal societies to promote knowledge and understanding of the *Rome Statute* and the ICC.<sup>125</sup> Outreach work is critical for victim participation as it allows victims to make informed decisions about whether to apply to participate, and it manages expectations of such participation.

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<sup>120</sup> Ibid at 64.

<sup>121</sup> *Prosecutor v Katanga and Chui*, ICC-01/04-01/07-1328, Trial Chamber II, 22 July 2009 at 17.

<sup>122</sup> ASP12/3 op cit (n116) at 63.

<sup>123</sup> ASP 12<sup>th</sup> Session, *Report of the Registry on the Comprehensive Review of the Legal Aid System of the Court*, ASP12/21 at 26.

<sup>124</sup> ASP11/40 op cit (n92) at 16.

<sup>125</sup> Ibid.

**Other Bodies**

There are a number of other bodies that have more discrete roles to play in victim participation. They include the Field Operations Section, Security and Safety Section, Court Management Section and Information Technology and Communications Section. The Office of the Prosecutor may also have a large involvement when their witnesses are also classified as victims of the case.

## 4. The Kenya 2 Trial

### A. Introduction

A case study of the Kenya 2 proceedings provides a number of opportunities to examine how various provisions of the ICC legal texts are translated into practice. For example, as the first ICC *proprio motu* investigation, the Kenya situation was the first situation to exercise Article 15(3) of the *Rome Statute*. Article 15(3) allows for victims to make representations to the Pre Trial Chamber (“PTC”) regarding the potential investigation, and this was put into practice with the PTC organising a VPRS mission to Kenya to seek representations from victims. While this mission was deemed successful by the VPRS, it highlighted a number of problems regarding security, logistics and managing expectations of victims.

Once an investigation was authorised and charges were confirmed, Trial Chamber V then utilised Rules 89 and 91 of the RoPE to dramatically alter the modality of victim participation in order to suit the circumstances of the situation in Kenya. They arranged common legal representation, and passed the responsibility for victim classification to the CLR, rather than the Chamber. The 3 October 2012 Decision showed how flexibly the Chamber can apply provisions relating to victim participation modalities, and also identified how little detail the ICC legal texts and jurisprudence provide for victims’ legal representatives. The Kenya 2 CLR and his field team were mandated to run a new and fairly unguided victim participation process, and were forced to rely on trial and error in the field. This new system introduced the risk of self-determined victimhood which will be addressed in the final part of this minor dissertation.

The Kenya 2 trial also identified some broader issues relating to victim participation including:

1. Managing expectations. What to do when the prospects of a successful prosecution are weak and the chances of reparations are minimal;
2. The bureaucratic and logistical difficulties of having numerous ICC bodies related to victims;
3. Which modality of victim participation to use;
4. Re-traumatising victims. Making victims re-tell their trauma when they face classification issues such as being considered ‘situation victims’ but not ‘case victims’; and



5. The risk of the Kenya 2 model turning victim participation into nothing more than mere tokenism by allowing effective ‘self-determined victimhood’.

These will be discussed in the final part of this minor dissertation.

## B. The Kenya Post-Election Violence

On 27 December 2007, a presidential election was held in Kenya. Three days later, the leader of the Party of National Unity (“PNU”) Mwai Kibaki was declared victorious. Observation missions and independent reports pointed out procedural irregularities with the election, and cast serious doubt as to the legality of the appointment of Kibaki as President.<sup>126</sup> Anger over the election result soon turned violent and affected regions all over the country including Nairobi, Nyanza Province and the Rift Valley Province. According to the Kenyan National Commission on Human Rights, the violence was predominantly perpetrated by supporters of the two rival political parties of the election – the Party of National Unity (Mwai Kibaki), and the Orange Democratic Movement (“ODM”) lead by Raila Odinga. The political parties in Kenya largely run along ethnic lines. The PNU draws on the Kikuyu, Embu and Meru communities, while the ODM enjoys support from the Luo, Luhya and Kalenjin people.<sup>127</sup> There was also a large alleged involvement of the security services (the regular and administrative police) as well as the General Service Unit in the violence following the election.<sup>128</sup> The Kenyan government attributed at least 123 deaths to the police, although the Office of the High Commissioner for Human Rights (“OHCHR”) believes the figure is higher.<sup>129</sup>

Although the election was the trigger for the violence, it should be noted that long standing disputes over land rights, economic and social inequalities, and a culture of impunity provided the background for tension in the country.<sup>130</sup>

The violence lasted for around a month, peaking immediately after the election, mid, and end of January.<sup>131</sup> It was estimated that at least 900 women were raped, 1300 people were killed<sup>132</sup>

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<sup>126</sup> UNCHR, ‘Report from OHCHR Fact-finding Mission to Kenya 6-28 February 2008,’ available at <http://www.ohchr.org/Documents/Press/OHCHRKenya-report.pdf> (“OHCHR Report”) p5.

<sup>127</sup> Ibid 7-8.

<sup>128</sup> Kenya National Commission on Human Rights, ‘On the Brink of the Precipice: A human rights account of the post-2007 election violence,’ August 2008, available at: [http://www.knchr.org/Portals/0/Reports/KNCHR\\_REPORT\\_ON\\_THE\\_BRINK\\_OF\\_THE\\_PRECIPICE.pdf](http://www.knchr.org/Portals/0/Reports/KNCHR_REPORT_ON_THE_BRINK_OF_THE_PRECIPICE.pdf);

<sup>129</sup> OHCHR Report op cit (n123) p11.

<sup>130</sup> Ibid 5-7.

– including 74 women and 11 children - and 3,561 suffered serious injuries such as shootings by the police or beatings and machete wounds by other perpetrators.<sup>133</sup> The Kenyan Red Cross estimated that 268,330 people were internally displaced, as well as 12,000 who fled over the border to Uganda.<sup>134</sup> The Kenyan National Dialogue and Reconciliation later put the internally displaced persons figure at 600,000. Further, an estimated 41,000 homes were destroyed, and numerous businesses and crops were looted.<sup>135</sup>

Between 8-10 January 2008, the then head of the African Union, President John Kufuor visited Kenya and decided to create a Panel of Eminent African Personalities to assist in bringing peace to Kenya. The panel was headed by former UN Secretary General Kofi Annan, and also included the former Tanzanian President and former First Lady of South Africa. With their assistance, the Kenyan Government and the Opposition leaders agreed on a framework to address the post-election violence – the Kenya National Dialogue and Reconciliation.<sup>136</sup> This involved the establishment of an Independent Review Committee to review the election process, a Truth Justice and Reconciliation Commission, and a Commission of Inquiry to investigate the factual circumstances surrounding the post-election violence. On 28 February, the two leaders of the opposing political parties signed a power sharing agreement and agreed to set up a Commission of Inquiry into the Post Election Violence (“CIPEV”). CIPEV, also referred to as the ‘Waki Commission’ after the Chairman Judge Philip Waki, ran for five months and produced a 529-page report. Of crucial importance was the Commission’s recommendation of the set-up of a Special Tribunal to prosecute those most responsible for orchestrating the crimes committed in the post election violence. Judge Waki handed Kofi Annan a sealed letter containing the names of those the Commission considered most responsible for the crimes. The list was handed to Annan on the condition that should a Special Tribunal not be agreed to and signed in Kenya within 60 days (and then 45 days more to make it into law), the list should be handed to the International Criminal

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<sup>131</sup> Ibid p8.

<sup>132</sup> Figure obtained from the Kenyan National Dialogue and Reconciliation. The OHCHR puts the figure at 1220, while the Commission of Inquiry into the Post-Election Violence (“CIPEV”) recorded 1133.

<sup>133</sup> CIPEV, ‘Report of the Commission of Inquiry into the Post-Election Violence,’ 15 October 2008, available at:

[http://www.kenyalaw.org/Downloads/Reports/Commission\\_of\\_Inquiry\\_into\\_Post\\_Election\\_Violence.pdf](http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf)) pp248, 384.

<sup>134</sup> UNSC, ‘Briefing by the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator,’ 25 February 2008, S/PV.5845, 2.

<sup>135</sup> OHCHR Report op cit (n123) p8.

<sup>136</sup> Ibid p5.

Court.<sup>137</sup>

In July 2009 following inaction from the Kenyan government to set up a Special Tribunal, Kofi Annan handed the sealed list of names to the Prosecutor of the International Criminal Court – Luis Moreno Ocampo. Four months later on 5 November, Ocampo informed the President of the ICC of his intention to submit a request in respect of Kenya under Article 15(3) of the Rome Statute – a *proprio motu* investigation. The matter was designated to Pre-Trial Chamber II the following day. On 23 November 2009 the Prosecutor published a notice on the ICC website stating his intention to make a request under Article 15(3) in respect of ‘alleged crimes committed in Kenya during the post-election violence of 2007-2008’ and informing victims of those crimes that they had 30 days in which to make representations to the ICC. Three days later, the Prosecutor filed an official request to commence an investigation. Before deciding upon the request, the Pre-Trial Chamber II issued an ‘Order to the Victims Participation and Reparations Section Concerning Victims’ Representations Pursuant to Article 15(3) of the Statute’ (“VPRS Order”), which included directions that the VPRS visit Kenya in order to:

1. Identify the community leaders of the affected groups to act on behalf of those victims who may want to make representations;
2. Receive victims’ representations;
3. Conduct an assessment of whether the conditions of Rule 85 of the Rules has been met (the definition of ‘victim’); and
4. Summarise victims’ representations into a report.

The purpose was to assess victims’ responses to a potential investigation into the PEV. It is indicative of the importance placed on victim participation that the Court would rely on such information is assessing whether to authorise an investigation in the matter.

The report was filed on 15 March 2010 (Corrigendum on the 18<sup>th</sup>), and two weeks later on 31 March 2010, Pre-Trial Chamber II authorised the investigation into the situation in Kenya.<sup>138</sup>

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<sup>137</sup> ‘ICC should prosecute the masterminds of the post-election violence in Kenya’, Human Rights House, 1 November 2008, available from: <http://humanrightshouse.org/noop/page.php?p=Articles/9056.html&d=1> last accessed: 2 February 2015.

<sup>138</sup> *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19.

### C. Implementing Article 15(3): Receiving Representations from Victims about the *Propio Motu* Investigation in Kenya

#### (i) VPRS's first mission to Kenya

The VPRS Order required the VPRS to receive, assess and present victims representations to the Chamber by 21 December 2009. It is useful to describe how the VPRS undertook this task, and the problems they faced in carrying out their mandate.

First of all, the enormity of the task was underestimated by the PTC in setting their deadline for the VPRS to undertake its work. Without knowing what they faced in Kenya, the VPRS could not file a comprehensive report in 11 days time. On 21 December, the VPRS applied to the Chamber for more time. The Chamber obliged and extended the period until 15 March 2010.

Although the dates are redacted, it is clear the VPRS visited Kenya some time between December 2009 and March 2010. PIDS joined on this mission, and their objective was to 'assess the conditions in Kenya relevant for outreach activities and to make representations in accordance with Article 15 of the Statute and Rule 50 of the RoPE.'<sup>139</sup> At this point, there had been no contact with victims in Kenya as the Prosecutor had chosen not to have direct contact with victims on the basis that to do so 'would pose a danger to the integrity of a future investigation or to the life or well-being of victims and witnesses.'<sup>140</sup> As the Registry had also not visited Kenya, the VPRS operations were starting from scratch. This increased the importance of discretion, as no security assessment had been made, nor did they want to give the impression that a Prosecutorial investigation had started.<sup>141</sup>

The VPRS determined that it would identify community leaders representative of the range of victim communities, make contact with them (sometimes through intermediaries) and explain to them that they may make representations to the Chamber, and how to do so.<sup>142</sup> Recruiting intermediaries naturally presented risk as it is not always easy to ascertain who is trustworthy and can genuinely represent the voices and interests of the victims. The Report of the Court

<sup>139</sup> *Situation in the Republic of Kenya*, Public Redacted Version of Report Concerning Victims' Representations (ICC-01/09-6-Conf-exp) and annexes 2-10, 29 March 2010, ICC-01/09-6-Red, 8 ("VPRS report").

<sup>140</sup> *Situation in the Republic of Kenya*, Request for Authorization of an Investigation Pursuant to Article 15, 26 November 2009, ICC-01/09-3, 112.

<sup>141</sup> VPRS Report op cit (n136) 9, 10.

<sup>142</sup> Ibid 9.

on the Strategy in relation to Victims: Past, Present, Future, highlighted the essential nature of field presence such as intermediaries and the importance of the ICC making special efforts to discern who could faithfully speak on behalf of the victims.<sup>143</sup>

### **Meeting victims**

The VPRS began the mission by contacting NGOs in Kenya. In general, they sought more Western oriented NGOs that were well funded.<sup>144</sup> They met with the organisations in private and provided information about the ICC, and the specific role victims would play in the proceedings.<sup>145</sup> The selected NGOs then went about contacting grass-roots organisations that had already established contact with victims, or had the potential to do so.<sup>146</sup> Consultants were used to ‘map’ the victims ie. to locate the geographical locations of victims in order to determine where the VPRS should visit. Missions to these locations were then organised so that VPRS could speak directly to victims.

While on these missions, the VPRS received 406 victim representations in total. Only 10 of these were determined to be outside the ambit of a ‘victim’ according to the Rule 85 assessment. 76 representations were made by representatives of victim communities and 320 were by individual victims.<sup>147</sup> It was very difficult for the VPRS to give the Chamber an accurate idea of the complete number of victims interested in participating as the size of the victim groups varied from 10-10,000 people, and some people made representations as part of a group and as an individual.<sup>148</sup> For this reason, future missions should ensure that victims only make representations either individually or as part of a group, and should alert the victims that making representations as both risks the effectiveness of the mission. Providing the Chamber with a more accurate figure of the anticipated number of interested victims would provide further guidance for the Chamber in considering what modality of victim participation to implement. Further, there is doubt about whether receiving representations from victims’ groups representatives can be at all accurate in situations such as Kenya where the victims were displaced and dispersed around the country. Affected regions now consist of people from all over the country who suffered different crimes at the hands of different perpetrators

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<sup>143</sup> ASP11/40 op cit (n92) para 82.

<sup>144</sup> Personal interview with Mikel Delagrange of the VPRS, Den Haag, 25 July 2014.

<sup>145</sup> VPRS Report op cit (n139) 14.

<sup>146</sup> Delagrange interview op cit (n144).

<sup>147</sup> *Situation in the Republic of Kenya*, Public Redacted Version Of Corrigendum to the Report on Victims' Representations (ICC-01/09-17-Conf- Exp-Corr) and annexes 1 and 5, 29 March 2010, ICC-01/09-17-Corr-Red at 2, 23 (“VPRS Corrigendum”).

<sup>148</sup> *Ibid* at 35, 36, 38.

and it would be near impossible to collectively represent their opinions. This issue is addressed in further detail in the 'Broader Issues' chapter of this minor dissertation.

One problem faced by the VPRS was that they did not know what the scope of the case would be as an investigation had not yet begun. Therefore they were not completely sure of what to be discussing with victims.<sup>149</sup> This meant they had to be particularly careful about managing the expectations of victims, and ensuring they were aware that an investigation had not yet begun. Nevertheless, they were able to collect valuable information about the status of victims and their attitudes towards the ICC and the investigation of the PEV. They found that overwhelmingly, the victims responded very positively towards a potential ICC investigation, and were grateful of the opportunity to be heard.<sup>150</sup> Reasons they supported an ICC investigation included: to deter future violence, particularly around the electoral cycle; a lack of faith in the Kenyan justice system; and a general desire for justice to be done.<sup>151</sup> The most common comment made by victims was the desire for proceedings to run expeditiously. They stressed that the trial should be completed by the time of the next election (2013).<sup>152</sup> In hindsight, perhaps victims should have been better warned about the complicated nature of international prosecutions, and the protracted nature of proceedings.

While on this visit to Kenya, the VPRS began receiving applications from victims for participation. They found out that some victims were sending their applications to the Prosecutor's office, and then requested the Prosecutor's office to forward them to VPRS. The Prosecutor's office ignored this request, and this highlights the confusing status of victim participation at that point in time.<sup>153</sup> It also shows that inter-organ communication problems jeopardise the effectiveness of victim participation.

Nevertheless, the VPRS considered their first visit to Kenya as successful and they expressed appreciation to the Chamber for enabling the opportunity to conduct such a visit.<sup>154</sup> They declared that should an investigation be authorised, they would immediately organise for a

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<sup>149</sup> Delagrange interview op cit (n144).

<sup>150</sup> VPRS Corrigendum op cit (n143) 51.

<sup>151</sup> Ibid 4.

<sup>152</sup> Ibid 118.

<sup>153</sup> Ibid 27.

<sup>154</sup> Ibid 145.

security assessment for participants, and would begin locating and training intermediaries and legal representatives.<sup>155</sup>

## (ii) Kenya Authorisation Decision

On 31 March 2010, Pre Trial Chamber II issued its Decision Authorising an Investigation into the Situation in Kenya.<sup>156</sup> They considered the investigation should cover potential crimes against humanity committed between 1 June 2005 (when the *Rome Statute* entered into force in Kenya) and 29 November 2009 (when the Prosecutor requested authorisation for an investigation).<sup>157</sup> Judge Kaul dissented to the majority as he believed the crimes committed in Kenya did not amount to crimes against humanity.<sup>158</sup>

This Decision showed the importance of the victims' representations as they were cited numerous times in substantiating the elements of the alleged crimes. In order to determine whether to authorise an investigation, Pre Trial Chamber II needed to find that there was a reasonable basis to believe that crimes against humanity within the jurisdiction of the Court had been committed. The requirements of: an attack directed against any civilian population; a state or organizational policy; the widespread nature of the attack; and a nexus between the individual acts and the attack, were all supported by victims representations,<sup>159</sup> and the PTC used victims' representations to hold that acts of murder, rape and other forms of sexual violence, forcible transfer of a population, and other inhumane acts causing serious bodily injury were committed against civilians.<sup>160</sup> The PTC also referred to victims' representations when determining the temporal scope of the case, finding that crimes were committed against civilians even before the PEV of December 2007.<sup>161</sup>

## (iii) Summoning the Accused

On 15 December 2010, the Prosecution submitted two applications to PTC II for summonses for six accused. They divided the applications in two as the evidence they had collected had shown there were two different cases: three accused in each. The two applications were summonses for:

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<sup>155</sup> Ibid 147.

<sup>156</sup> ICC-01/09-19.

<sup>157</sup> Ibid 207, 209, 211.

<sup>158</sup> Ibid dissent attached.

<sup>159</sup> Ibid 42-57.

<sup>160</sup> Ibid 57-66.

<sup>161</sup> Ibid 204.

1. William Ruto, Joshua Sang, Henry Kosgey.<sup>162</sup>
  - Ruto and Kosgey were prominent leaders of the Orange Democratic Movement political party while Sang was a journalist and radio host accused of inciting violence.
2. Francis Muthaura, Uhuru Kenyatta, Mohammed Hussein Ali.<sup>163</sup>
  - All were prominent members of the People's National Unity political party and/or Government of Kenya officials.

On 8 March 2011, the PTC summonsed Muthaura, Kenyatta and Ali to appear at the ICC in one month's time.<sup>164</sup> The Kenya situation was therefore separated into two trials: the Kenya 1 trial of Prosecutor v Ruto, Kosgey and Sang, and the Kenya 2 trial of Prosecutor v Muthaura, Kenyatta and Ali. Several weeks later, the Government of Kenya challenged the admissibility of both the trials.<sup>165</sup> On 30 May 2011, the Pre-Trial Chamber determined that the cases were admissible.<sup>166</sup> This was upheld on appeal.<sup>167</sup>

#### D. Applying the Original Victim Participation Scheme

The legal texts of the ICC set up a basic application system for victims to participate in the proceedings. Following these provisions, the VPRS published a booklet that acts as a guide to victim participation. It explains how the ICC works, how victims can apply to participate, and what form their participation can take (participation, representation, reparations). The booklet explains that in order for the Chamber to consider a person a victim, they will take a two-step process:

1. Is the applicant a victim?
  - Has the person suffered harm – physical, mental, material loss?

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<sup>162</sup> *Situation in the Republic of Kenya*, Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 15 December 2010, ICC-01/09-30-Red2.

<sup>163</sup> *Situation in the Republic of Kenya*, Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 December 2010, ICC-01/09-31-Conf-Exp and its Annexes.

<sup>164</sup> *Prosecutor v Muthaura, Kenyatta and Ali*, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-01.

<sup>165</sup> ICC-01/09-02/11-26 and annexes (Kenya 2); ICC-01/09-01/11-19 (Kenya 1).

<sup>166</sup> ICC-01/09-02/11-96 (Kenya 2) ICC-01/09-01/11-101 (Kenya 1)

<sup>167</sup> ICC-01/09-02/11-274 (Kenya 2), ICC-01/09-01/11-307 (Kenya 1).



- Did the harm result from a crime that the ICC has the power to deal with?
  - Is there a clear causal link between the crime and the harm suffered?
2. If the person is a victim, are they entitled to participate at the particular stage of the proceedings?
- Victims must apply to participate at each stage of the proceedings ie. pre-confirmation, trial stage, appeal stage, reparations.
  - Is the person a victim of the case or the situation?
  - Are the victim's personal interests affected at the particular point in the case?
  - Do the judges think it is appropriate for the person to participate at that particular point?

The guide explains that an application form is available from the VPRS and can be downloaded from the ICC website. The VPRS makes itself very contactable by providing phone, fax and email contact details.

#### **(i) The Original Application Form**

The original application form designed by the VPRS and used in the Kenya proceedings is eight pages long. It requires personal information such as names, age, address, number of dependents, ethnicity, occupation, languages, contact details and proof of identity. The form then seeks information about the alleged crime(s). They ask for:

- What happened to the victim?
- When and where did it occur?
- Who does the victim believe is responsible?
- What effect did the crimes have on the victim?

The form asks the victim whether they wish to appear in person at the ICC and whether they are seeking reparations. They ask what form of reparations the victim seeks and to whom the benefits should go. It warns victims that their application form will be viewed by Prosecution, Defence and the Chamber and asks whether they request to remain anonymous. A signature or a thumbprint is also required.

While the form contains only basic questions, it is nevertheless burdensome on victims and the ICC to complete and process it. The reparations section seems to raise hopes that a victim will get specific individual reparations of their choice, and while there has yet to be a finalised

reparations decision at the ICC, it seems very unlikely that specific individual reparations would ever feasibly be awarded.

In the early stages of the Kenya 2 proceedings, the victim application process was fairly chaotic. Self-appointed legal representatives were downloading forms from the ICC website and sending them in to the ICC – including to Prosecution. VPRS spent months trying to organise the applications, assess them, and send them on to Prosecution, Defence, and finally to the Chamber for determination.<sup>168</sup> Such a process was described as ‘long and cumbersome’ by former Judge Christine Van Der Wyngaert. She cites the lengthy application forms (plus supporting evidence), the translation of such application forms into a working Court language, and the frequent redactions as problems facing the Court utilising this participation system.<sup>169</sup>

## **(ii) First Decision on Victims’ Participation**

On 30 March 2011, Judge Ekaterina Trendafilova sitting as a single judge issued the ‘First Decision on Victims’ Participation in the Case.’<sup>170</sup> This applied solely to the Kenya 2 trial. The Single Judge declared that the decision to set in advance the framework for victims’ participation was to ensure predictability and expeditiousness of the proceedings.<sup>171</sup> The fact the decision was rendered showed that the victim participation system in the Kenya proceedings required clarity.

The single judge held that circumstances in Kenya warranted a flexible approach to victim identification. This was due to the nature of the PEV which involved looting and forced displacement rendering many victims homeless and without documentation.<sup>172</sup> The decision declared that there was going to be a deadline for victims’ applications in order to give the Chamber enough time to consider them. The deadline was set for 8 July 2011.<sup>173</sup>

The Single Judge then set out her expectations for VPRS including that the VPRS distinguish between applications for reparation and participation,<sup>174</sup> ensure that applications are submitted at the earliest possible time,<sup>175</sup> ensure applications are filled out completely with all pertinent

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<sup>168</sup> Delagrangé interview op cit (n144).

<sup>169</sup> Wyngaert op cit (n44) 481-482.

<sup>170</sup> ICC-01/09-02/11-23.

<sup>171</sup> Ibid at 1.

<sup>172</sup> Ibid at 7-8.

<sup>173</sup> Ibid at 11.

<sup>174</sup> Ibid at 14.

<sup>175</sup> Ibid at 17.

information,<sup>176</sup> and make the initial rule 85 assessment (definition of victims).<sup>177</sup> The Single Judge required that VPRS take into consideration Pre-Trial Chamber III's ruling in *Prosecutor v Jean-Pierre Bemba Gombo* as regards the requirements to be met for the purpose of a Rule 85 assessment. This includes whether (1) the victim applicant is a natural person an organisation or institution, (2) a crime within the jurisdiction of the Court appears to have been committed, (3) the victim applicant has suffered harm, and (4) such harm arose 'as a result' of the alleged crime within the jurisdiction of the Court.<sup>178</sup>

Judge Trendafilova then recognised that to this point, victims had largely chosen their own representatives. She declared that where they had not already done so, the OPCV would act as their legal representative.<sup>179</sup> However, she noted that as it was likely that a large number of victims would wish to participate, the VPRS should take appropriate steps with a view to organising common legal representation.<sup>180</sup> Such an approach had already been encouraged by the Court which had stated in its 2009 Report of the Court on Legal Aid that the biggest cost driver for victim participation was not the amount of victims participating, but the number of legal teams representing them.<sup>181</sup> The Hague Working Group of the Bureau encouraged the Court to appoint one legal team for victims per trial in order to save costs.<sup>182</sup>

Although not altering the already practiced victim participation scheme in any dramatic way, this First Decision on Victims introduced the idea of common legal representation to the Kenya 2 case, and instigated the services of the OPCV. The Registry interpreted the Single Judge's instructions to the VPRS as falling under Rule 90(3) of the RoPE. While Rule 90 allows for two avenues of appointing a common legal representative: firstly by being appointed by the victims (Rule 90(2)), and secondly, being appointed by the Registry (Rule 90(3)), the Registry noted that the Single Judge did not request the victims to choose their own legal representative, and therefore interpreted it as being their role.<sup>183</sup> This was to be the fifth instance at the ICC that common legal representation was to be organised.<sup>184</sup>

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<sup>176</sup> Ibid 18, 19.

<sup>177</sup> Ibid 20, 21.

<sup>178</sup> Ibid at 6 quoting Pre-Trial Chamber III, *Fourth Decision on Victims' Participation*, ICC-01/05-01/08-320, 33-78.

<sup>179</sup> Ibid 23.

<sup>180</sup> Ibid 24.

<sup>181</sup> ASP 8<sup>th</sup> Session, *Report of the Court on legal aid: Legal and Financial Aspects of Funding Victims' Legal Representation Before the Court*, ASP8/25, 76.

<sup>182</sup> ASP 8<sup>th</sup> Session, *Report of the Bureau on Legal Aid for Victims' Legal Representation*, ASP8/38 at 27.

<sup>183</sup> *Prosecutor v Muthaura and Kenyatta*, Legal framework and experience to date on common legal representation, 5 August 2011, ICC-01/09-02/11-214-Anx1, 3-5.

<sup>184</sup> Previous cases Appointed CLRs immediately before trial in *Lubanga*, *Katanga* and *Bemba* and also prior to the confirmation of charges in *Bemba*.

In August of 2011, the Registry sought expressions of interest from counsel for the position of Common Legal Representative. The call stated that the position would be for the pre-trial period which would last a couple of weeks, and if charges were confirmed, the relegated Trial Chamber may review the role for the period of the trial.<sup>185</sup>

In the Single Judge's Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings,<sup>186</sup> Her Honour appointed Mr Morris Azuma Anyah as the Common Legal Representative of the victims of the Kenya 2 trial.

On the 23<sup>rd</sup> of January 2012, the Decision on the Confirmation of Charges were rendered for both Kenya investigations.<sup>187</sup> In the case against Kenyatta, Muthaura and Ali, the charges against Kenyatta and Muthaura were confirmed while the Pre Trial Chamber determined that there was insufficient evidence to commence a trial against Ali.<sup>188</sup>

## **E. Implementing Rules 89 and 90 of the RoPE: Altering the Victim Participation Modality.**

### **(i) Impetus for Change**

It soon became clear that the original victim application system required assessment and possible reform. The 10<sup>th</sup> Session of the Assembly of States Parties noted with concern the backlog of processing victim applications and requested the Court to review its procedures.<sup>189</sup> The resulting 2012 Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings described the system as unsustainable and declared it was necessary to improve the process.<sup>190</sup> The Report announced that the Court was experimenting with different application methods<sup>191</sup> and analysed six possible modalities for victim participation,<sup>192</sup> although it conceded that the Court needed more time to consider the options.<sup>193</sup>

The Report of the Court on the Revised Strategy in Relation to Victims: Past, Present, Future,

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<sup>185</sup> *Prosecutor v Muthaura et al*, ICC-01/09-02/11-214-Anx4.

<sup>186</sup> *Prosecutor v Muthaura et al*, ICC-01/09-02/11-267 at 91.

<sup>187</sup> ICC-01/09-02/11-382-Red (Kenya 2) and ICC-01/09-01/11-373 (Kenya 1).

<sup>188</sup> ICC-01/09-02/11-382-Red.

<sup>189</sup> Resolution ICC-ASP/10/Res.5, paragraph 49.

<sup>190</sup> ASP 11<sup>th</sup> Session, *Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings*, ASP11/22 at 72.

<sup>191</sup> *Ibid* at 75.

<sup>192</sup> *Ibid* at 73.

<sup>193</sup> *Ibid* at 74.

reiterated that the Court must adapt to the unique aspects of each case and situation.<sup>194</sup> ‘The Court must constantly monitor and adjust strategies and messages in order to respond not only to judicial developments but also to local dynamics. To do so requires from the entire Court system immense flexibility, creativity and, at times, speed.’<sup>195</sup> ICC Judge Christine Van Den Wyngaert criticized the individualised approach to victim participation whereby applications were sent to Registry, Defence, Prosecution and then Chambers for individual determination. She warned of the overwhelming number of applications and unsustainability of the procedure,<sup>196</sup> citing the example of the *Katanga* trial which required one third of the Chamber’s support staff working on the victims’ applications for several months before the hearing on the merits even began.<sup>197</sup>

With a backlog of victims’ applications to be processed, security concerns facing victims in the situation country, and the likelihood of large number of potential victim applicants, it was in the best interests of Trial Chamber V to alter the existing modality of victim participation in the Kenya situation.

### (ii) The 3 October 2012 Decision

On 3 October 2012, Trial Chamber V issued its landmark ‘Decision on Victims’ Representation and Participation’ (“3 October 2012 Decision”). The new victim participation scheme that it introduced was revolutionary and significantly departed from established practice in an attempt to make the victim participation process simpler.<sup>198</sup>

The decision began by declaring that it aimed to establish the procedure as well as the modalities for the participation of victims in the Muthaura and Kenyatta case.<sup>199</sup> This had previously been done in the Single Judge’s First Decision on Victim Participation in the Case, so it was clear that this subsequent Decision would introduce a new scheme tailored to the developments of the case.

Trial Chamber V acknowledged the applicable law and jurisprudence of the Court regarding victim participation, however, noted that the established application procedure under Rule 89

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<sup>194</sup> ASP11/40 op cit (n92) at 80.

<sup>195</sup> Ibid at 83.

<sup>196</sup> Wyngaert op cit (n44) 483.

<sup>197</sup> Ibid at 493.

<sup>198</sup> ‘Q&A: ICC Decision of Victims’ Representation and Participation in the Kenya Cases’, Redress, 18 October 2012, available at: <http://www.vrwg.org/home/home/post/39> last accessed 2 February 2015.

<sup>199</sup> 3 October 2012 Decision op cit (n8) at 1.

of the RoPE, was no longer appropriate in the circumstances of the case.<sup>200</sup> It stated that the large number of victims involved, the unprecedented security concerns they faced and other difficulties<sup>201</sup> made filling out the detailed application form difficult and sometimes impossible for the victims.<sup>202</sup> They therefore declared that only victims who wished to present their views individually (either in person or via videolink) would have to go through the procedure under Rule 89 of the RoPE, while all other victims could participate through a much simpler procedure – by participating through a Common Legal Representative. The registration process through a CLR would be considerably less detailed and onerous, and applications would not be subject to individual assessment by the Chamber.<sup>203</sup> Trial Chamber V contended that ‘no victim will be excluded from participation solely because of administrative difficulty in complying with the formal requirements...’<sup>204</sup>

### **Legal justification for the new system**

Trial Chamber V justified creating this new system by interpreting Rule 89 of the RoPE in light of Article 68(3) of the *Rome Statute*. Article 68(3) authorises victims to participate in the proceedings, while Rule 89 facilitates it by creating an application procedure. However, rather than focussing on the specific process described in Rule 89, Trial Chamber V concentrated on its purpose: to ensure that the conditions for participation in Article 68(3) of the Statute are met. They declared that in conducting their analysis of the RoPE, they placed primary importance on the letter as well as the object and purpose of 68(3), and therefore they would interpret Rule 89 in a manner it considered to be most consistent with 68(3). This is supported by Articles 51(4) and (5) of the *Rome Statute* which state that in the event of a conflict between the Statute and the Rules, the Statute shall prevail.<sup>205</sup> The Chamber clearly considered that under the circumstances, in order to effectively carry out the purpose of Article 68(3), Rule 89 would have to be applied flexibly and a different system of victim participation application implemented.

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<sup>200</sup> Ibid 22.

<sup>201</sup> *Prosecutor v Muthaura, Kenyatta and Ali*, Redacted First Decision on the Prosecutor’s Request for Redactions and Related Requests, 12 July 2011, ICC-01/09-02/11-165-Conf-Red, at 66.

<sup>202</sup> 3 October 2012 Decision op cit (n8) 23

<sup>203</sup> Ibid 24.

<sup>204</sup> Ibid 31.

<sup>205</sup> Ibid 21, 22.

The Chamber further found that this new system would be in the interests of the victims,<sup>206</sup> and would not prejudice the rights of the accused and a fair and impartial trial.<sup>207</sup>

### Specifics of the new system

Firstly, the Chamber ordered that the procedure for victim participation would be based on common legal representation with both an appointed CLR and the OPCV acting on the CLR's behalf.<sup>208</sup> This combination had been previously suggested by the Court which declared that:

“There are strong policy reasons for retaining the involvement of both external lawyers and in-house counsel in the representation of victims. External and in-house lawyers each bring unique elements that cannot be provided by the other, and the best solution is to ensure that each is able to make its own appropriate contribution, whilst avoiding duplication.”<sup>209</sup>

The 3 October 2012 Decision determined that the CLR would be responsible for direct contact with the victims and would be based in Kenya,<sup>210</sup> while the OPCV would be situated in The Hague, representing the CLR in day-to-day proceedings.<sup>211</sup> It is interesting to note, however, that in the Kenya 2 case, the successful CLR candidate had much more court room experience than the OPCV representative and it is curious as to why the CLR was required to have at least 10 years experience in the court room when they are hardly required to be there.

Next, the Chamber ordered the Registry and OPCV to determine the detailed arrangements of the CLR scheme and submit a joint proposal on the division of responsibilities and effective function of the common legal representation.<sup>212</sup> This consultation procedure was highly ineffective and resulted in the two bodies submitting separate submissions to the Chamber, conceding that they could not agree on a joint proposal.<sup>213</sup> This was an example of the conflict of interests and fragmentation between various victim-related bodies.

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<sup>206</sup> Ibid 29-32.

<sup>207</sup> Ibid 33-38.

<sup>208</sup> Ibid 40.

<sup>209</sup> ASP 9<sup>th</sup> Session, *Updated Report of the Court on legal aid: Legal and financial aspects of funding victims' legal representation before the Court, the comparison between internal and external counsel*, ASP9/9 at 9.

<sup>210</sup> 3 October 2012 Decision op cit (n8) at 41, 59.

<sup>211</sup> Ibid 42.

<sup>212</sup> Ibid 44.

<sup>213</sup> *Prosecutor v Muthaura and Kenyatta*, OPCV's Proposal on the Division of Responsibilities and Effective

Victims who did not wish to appear directly before the Court would no longer need to apply or even register under the new scheme. However, if they did wish to register, they could do so by providing their names, contact details and information about the harm suffered to the Registry who would enter this information into a database.<sup>214</sup> The purpose of the registration was to provide a channel through which victims could formalise their claim of victimhood, establish a connection between the victim and the CLR, and assist the Court in communicating with the victims.<sup>215</sup>

The 3 October 2012 Decision also described the process for victims who did wish to appear directly before the Court. A request must first be submitted by the CLR with an explanation as to why they should appear. The victim must then apply to the Registry under the normal Rule 89 procedure, and the Registry would then submit to the Chamber for determination.<sup>216</sup>

Regarding the selection of the CLR, the Chamber directed the Registry to submit a recommendation considering the candidate's knowledge of the details of the case, and their willingness and ability to live in Kenya. The Registry was also authorised to consider the 'general criteria for the selection of common legal representatives under rule 90(3) of the RoPE.'<sup>217</sup>

The Chamber elaborated slightly on the division of responsibilities between OPCV and the CLR, holding that the OPCV attend public hearings on behalf of the CLR, while the CLR may make representations in person at critical junctures such as opening and closing statements.<sup>218</sup> They held that the questioning of witnesses will be done by the OPCV on behalf of the CLR (except where CLR has been authorised to appear in person),<sup>219</sup> and will be conducted in a neutral form.<sup>220</sup> The CLR may file responses to documents (by Prosecution, Defence and the Chamber) but must first demonstrate that the subject matter at issue is directly related to the

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Functioning of the Common Legal Representation System, ICC-01/09-02/11-507, and Registry's Proposal on the Division of Responsibilities and Effective Functioning of the Common Legal Representative System, ICC-01/09-02/11-508.

<sup>214</sup> 3 October 2012 Decision op cit (n8) 48.

<sup>215</sup> Ibid 49.

<sup>216</sup> Ibid 55-56.

<sup>217</sup> Ibid 60.

<sup>218</sup> Ibid 70.

<sup>219</sup> Ibid 74.

<sup>220</sup> Ibid 75.



interests of victims.<sup>221</sup> Should the CLR wish to present evidence on behalf of the victims they may submit a discrete application to the Chamber.<sup>222</sup>

The 3 October 2012 Decision further stated that it was not applicable to reparations as they would be addressed at a later stage of the proceedings as necessary.<sup>223</sup> Sadly as the case was discontinued, no further rulings were made on reparations.

### (iii) Aftermath of the 3 October 2012 Decision

#### Appointing a CLR

On 8 October 2012, the Registry asked the Common Legal Representative for the victims of the Kenya 2 trial, Mr. Morris Anyah, whether he wished to be considered to continue in the position. On 12 October, Mr Anyah filed a notification declaring that he did not wish to continue in the position, as 'he would not be able to apply the full measure of his legal abilities and experience on behalf of the victims at trial, given the prescription in the Decision that the advocacy inside the courtroom be undertaken on a day-to-day basis by the OPCV.'<sup>224</sup> What he in fact meant was that he could not relocate to Kenya as he had just been appointed lead counsel for Charles Taylor in his appeal at the Special Court for Sierra Leone, in The Hague.

On 12 October 2012, the Registry sought expressions of interest by counsel interested in the position of Common Legal Representative for either of the two Kenya cases.<sup>225</sup> The Call for Expressions of Interest was sent to all the counsel on the Registry's List of Counsel (under Rule 21(2) of the RoPE) and to the Law Society of Kenya.<sup>226</sup> The Call required that applicants have at least 10 years relevant experience (in international or criminal law and procedure) and be fluent in either English or French. Applicants were required to provide a CV and to respond to the listed selection criteria.<sup>227</sup> 40 counsel applied, however, only 30 included all the requisite information in their application. The 30 were reduced to 13 after a review of the applications. The selected 13 were then asked to provide answers to two follow-up questions regarding their proposed approach to legal representation of victims, and these answers short-listed the candidates to five counsel who were then interviewed over the telephone. The

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<sup>221</sup> Ibid 71.

<sup>222</sup> Ibid 76.

<sup>223</sup> Ibid 2.

<sup>224</sup> *Prosecutor v Muthaura and Kenyatta*, Notification by the Victims' Legal Representative, ICC-01/09-02/11-503.

<sup>225</sup> *Situation in the Republic of Kenya*, Call for expression of interest: Common legal representatives for victims in the Kenya Cases, ICC-01/09-02/11-517-Anx1.

<sup>226</sup> *Prosecutor v Muthaura and Kenyatta*, Recommendation for the position of Common Legal Representative of Victims, ICC-01/09-02/11-517 at 11.

<sup>227</sup> ICC-01/09-02/11-517-Anx1 op cit (n225).

Selection Panel consisted of the ICC Deputy Registrar, Registry staff members, and a representative of the Special Tribunal for Lebanon.<sup>228</sup> The selectors were faced with competing criteria as regards their recommendation of CLR. For many victims it is important to have a lawyer of their choice or from their community or country to represent them as they have knowledge of the context in which crimes were committed and the conditions in which they live.<sup>229</sup> However, such lawyers may be unfamiliar with the Court's judicial practices and may not have the background or training that enables them to work optimally in a multicultural setting, or with victims.<sup>230</sup> Lawyers familiar with the ICC and international criminal law and victims may have the relevant judicial experience, but may not be able to communicate and relate to the victims as effectively.

On 20 November 2012, Trial Chamber V made public their Decision Appointing a Common Legal Representative of Victims,<sup>231</sup> accepting the Registry's recommendation of Mr Fergal Gaynor as the CLR for the Kenya 2 trial. They declared that Mr Gaynor '...has direct relevant experience for the position, demonstrated by extensive previous experience in criminal litigation, and appears to possess both a genuine interest in ensuring meaningful victims' participation and a willingness to work effectively with the OPCV...'<sup>232</sup>

Gaynor had an accumulated 12 years of international criminal law experience, having worked as a trial attorney at the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, and as a legal adviser at the UN International Independent Investigation Commission in Beirut. He also had six years domestic experience – five as a solicitor in the UK and one as a barrister in Ireland. Gaynor also worked as an adjunct Professor in Law at the Irish Centre for Human Rights in Galway, Ireland. He was born in Malawi, raised in Swaziland, and worked for a period in Tanzania, which gave him a familiarity with a range of African cultures. His comprehensive experience in international criminal law, his interest in victim-related work and his willingness to relocate to Kenya made Gaynor a suitable candidate for the position.

Following his appointment, Gaynor attended a number of formal meetings with OPCV, VPRS, CSS and Security. He also spoke at length with Mr Morris Anyah – the previous CLR

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<sup>228</sup> ICC-01/09-02/11-517 op cit (n225) 10-13.

<sup>229</sup> ASP8/45 op cit (n2) at 45.

<sup>230</sup> ASP11/40 op cit (n92) at 35.

<sup>231</sup> ICC-01/09-02/11-537.

<sup>232</sup> Ibid 5.

on the case.<sup>233</sup> On 30 December 2012, he relocated to Nairobi, and began carrying out his mandate of meeting with and representing victims. Heading a completely new modality of victim participation, the CLR and his team had to determine how best to carry out their mandate.<sup>234</sup>

On 1 January 2013, Gaynor had his first team meeting with the Kenya 2 field team. Two members had been retained from Mr Morris Anyah's previous team, and two more had since joined (on the recommendation of the current two team members). At that point, CSS only agreed to fund two full-time field staff. However, due to the enormity of the task – locating, meeting and maintaining contact with thousands of victims, the Kenya 2 team decided they needed four field staff. CSS, however, insisted they only had the funding for two positions and therefore, the field staff would have to all work part-time. Mr Gaynor complained to CSS arguing that it is not acceptable to hire lawyers on a part-time basis for long periods of time, and that there was enough work for each of them to be full-time. Although CSS never explicitly agreed to it, the team members were paid according to the hours they worked which amounted to full time.<sup>235</sup>

In this first meeting, the team discussed their strengths and interests in order to divide up their roles. Finance responsibilities were delegated to some team members, research to others, administration, contact with victims, translations etc. They then discussed their first mission which would take place several weeks from then.

The first mission was to meet with already registered victims. VPRS joined this mission, and played to the congregated victims a video of Mr Morris Anyah and Mr Fergal Gaynor explaining the transition between the CLRs and the new system of victim participation. This was in order to provide continuity for the victims who had already begun participating in the case and also to adhere to the Court's Revised Strategy in Relation to Victims which promotes victims receiving common, mutually reinforcing, coherent messages and information.<sup>236</sup>

Nevertheless, the fact that some victims has already had contact with three sets of parties; the VPRS and the two different CLRs was undoubtedly confusing for the victims and should be avoided in future cases.

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<sup>233</sup> Information collected from personal interviews with Fergal Gaynor (CLR on the Kenya 2 trial ICC) on 21 March, 15 May, 20 June, 30 June, 29 July, 13 August, 7 September, 18 November.

<sup>234</sup> Ibid.

<sup>235</sup> Ibid.

<sup>236</sup> ASP11/40 op cit (n92) at 21.

Although the first few missions were with already-registered victims, there was a backlog of victims who had not yet registered, or met with the VPRS, the field team, or the previous CLR. Missions to meet these victims were then prepared.<sup>237</sup>

## F. Meetings with Victims

There is no manual or guide provided by the ICC for meetings with victims. No legal text provides instructions, and there are no rules or regulations. Therefore, the conduct and structure of missions and meetings are completely left up to the CLR and the field team's discretion. I attended five field missions in Kenya and documented how they were run. The following description is a reflection on the meetings I attended, and have been advised are similar to the majority of meetings conducted by the Kenya 2 trial both before and since.

Generally it is the CLR who will propose a new mission to meet with victims. He will act on the advice of his field staff who may know of an area which has a large amount of interested victims, or an area which has not been visited for quite a while. The field staff will then set about organising financing with CSS, the location, the intermediaries to contact, the venues for the meetings and the accommodation and transport for the team.

The majority of meetings with victims are in Kisumu, Naivasha or Nakuru. The team either meets at Jomo Kenyatta Airport and flies to the location, or meets somewhere in Nairobi and drive there in a rented vehicle (security cleared). Normally there is the CLR, and three field assistants. One field assistant is used as a translator, while the other two carry out administrative tasks. Upon arriving in the location, the team will check into a hotel that has been security cleared by the SSS. Generally, the next day, a rented vehicle will collect the team and will drive out to the venue of the meeting. The venue has been purposefully selected by the field team to be somewhere private, accessible, and owned by sympathisers to the ICC. This is crucial as the Kenya trials have faced unprecedented interference and intimidation of witnesses and people suspected of being involved with the ICC, and therefore discretion is imperative. The field team are crucial in locating these venues as 'Western-looking' ICC personnel such as the CLR draw too much suspicion.

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<sup>237</sup> Interviews with Fergal Gaynor op cit (n230).

Upon arrival at the meeting location, the CLR greets each and every attendee by shaking their hand and thanking them for coming. The victims are very excited to be meeting the CLR and smile, shake his hand, and thank him profusely. The meeting will generally begin around mid-morning and sometimes starts with tea. Often, the victims have travelled many hours by bus or foot to attend these meetings, and require refreshments. The tea includes tea, coffee, and a snack. After the tea, the victims will sit in rows of chairs facing a table at the front where the CLR and translator sit. The CLR stands and greets the victims in their local language. He introduces his name, his position, and thanks them for attending the meeting. The CLR then begins explaining to the victims the current situation of the case in English. Despite being an experienced and sophisticated lawyer, the CLR avoids using complex legal jargon and speaks slowly and clearly. The translator conveys the CLR's message, but often adds in jokes and local expressions to make the victims laugh, and feel at ease. As a bystander who does not speak the local language, it is remarkable to watch as an entire room full of victims laugh and participate in the meeting as though it is a cheery community group rather than that of victims-of-mass-atrocity. The CLR will explain current events in the trial. He will explain (for example) that the defence want the trial to either be held in Kenya or in Tanzania and not The Hague. He will then ask the victims 'Where do you want the trial to be held?' and the victims will chant 'The Hague, The Hague!!' He will explain that the defence want the trial to be run via videolink rather than the defendant attending in person, and then victims will express outrage and insist he must attend in person.

Individuals will put up their hands and will stand to address the CLR. One victim said to him 'If I steal a goat and I am charged by the police, I must attend court to face the charges. Kenyatta is a man too and must also face the court to address his charges.' The CLR will thank the victim and tells him that he will tell the court exactly that. The CLR explains that he will respond to the Court via legal filings everything that the victims tell him. He then opens up the room to general comments and/or stories. The CLR wants the victims to be heard, and he wants content to provide to the Court. The victims start off timidly, but once one person puts up their hand, many others follow suit. It generally starts with men. Quite often they will stand up and tell the CLR of a rumour they have heard about the trial. Or they may seek clarity about something they have read in the newspaper about the trial. Kenyans are incredibly astute when it comes to following the trial. It is frequently on the front page of the newspapers, and Kenyans speak about it daily. The CLR will then answer the victim; either clarifying the point, or dispelling the rumour. He will make sure the victim understands his

response. Then victims start telling their stories. It is usually a male that will tell his story – of injury, displacement and despair. He will ask about reparations. The CLR will begin by sympathising with the victim. He will take down the victim's name (if s/he wishes to give it) and will write down their grievances. He will then explain the difficult situation of reparations. The CLR is very careful here to manage the expectations of the victims. He explains that reparations will only be rewarded if the case is successful, or if the TFV visits and decides to provide general assistance. He warns the victims that the trial has not even begun, and when/if it does, it may take many years. He further warns that there is no precedent regarding reparations. He cannot predict what form they will take. He explains the situation of the TFV alerting the victims that they have not visited or assessed Kenya, and that even if and once they have, any general assistance provided will likely be a community reparation such as a new hospital or school built to benefit the community. He wants the victims to know that unfortunately, it is unrealistic to think they will receive individual compensation for their suffering.

Noticing that the women are remaining quiet, the CLR will then ask for the women to tell their stories. He notices they are still reluctant, so he gives them a more specific reason to speak up. He will say 'I would like to hear about how some women have been affected – does anyone here have a story, perhaps about their children that they would like to share?' He tells the women they can speak in front of the entire group, or if they wish to do it privately, to speak to him after the communal session. Usually a number of women will speak up in front of the group. Their stories almost undoubtedly involve rape, HIV transmission, husbands being killed or abandoning them, and being left homeless with their children. Some women cry, and others just speak in a numb emotionless fashion. Again, the CLR sympathises with them. He will tell them they have suffered unspeakable horrors, and that he will make sure these experiences do not go unforgotten. Addressing the women in this manner reflected the ICC's strategy in relation to victims which encouraged the ICC system to pay special attention to women and children in order to reduce barriers and negative repercussions of their involvement in the proceedings.<sup>238</sup>

The victims collectively may present their opinions and stories for 30 minutes, or they may go on for hours. The CLR does not impose any time restrictions and lets everyone say everything they want to. They then break for lunch, and the CLR informs everyone they can have one-

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<sup>238</sup> ASP11/40 op cit (n92) at 6.

on-one time with him afterwards. The lunch is a piece of chicken, some vegetables, and ugali – a traditional Kenyan dough-like substance.

Once the CLR has eaten his meal he will sit at a table and encourage people to approach him for a one-on-one conversation. People who do not want to speak to him in this manner will go and record their details with the two field staff performing administrative work. If the victim has attended a meeting before, they will have already had their details recorded. If they attended a meeting prior to the 3 October 2012 decision, they may be registered as a victim under the old 8-page VPRS system. If so, they will just be recording their attendance at the meeting, and perhaps receiving a refund for transport costs. The victim may have attended a meeting post-3 October 2012 decision, in which case, their details would have been recorded in a 2 page form designed by the CLR and the field team. This 2 page record is not a registration form. It is merely to collect enough details to establish whether the person is a victim of the case, and to provide contact details. If the person has never attended a meeting the team members will collect their basic information.

#### **G. Work of the CLR other than field missions**

Other than attending field missions and meeting with the victims, the CLR undertakes a lot of work in order to properly represent the victims. This work is undertaken on his own accord – he is not ordered to do it - he does it as he considers it his mandate. He frequently responds to Defence and Prosecution filings (first having to prove to the Chamber that the victims have an interest in the matter) and occasionally files motions on his own accord. He also spends a lot of time making contacts and having meetings with people relevant to the victims. For example, diplomats, government officials and the UN Special Rapporteur for Internally Displaced Persons. He also tries to maintain public interest and awareness of the victims' plight through media. Particularly in the lead up to the UN Security Council vote on whether to defer the trial against Kenyatta for 12 months, the CLR stepped up the amount of television, radio and newspaper interviews to ensure the public did not forget the victims of the crimes. The CLR also attended trainings organised by the ICC, for example, workshops on how to deal with victims without re-traumatising them.<sup>239</sup>

The CLR has also appeared in Court several times. Although the trial was discontinued and never commenced, there were a number of Status Conferences at which the CLR was

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<sup>239</sup> Interviews with Fergal Gaynor op cit (n230).

designated time to advocate on the victims' behalf. Although the OPCV is technically the CLR's representative in The Hague, the CLR attended in person at particularly important junctures.



## 5. Broader Issues with Victim Participation as Highlighted by the Kenya 2 Trial

Having examined why and how Trial Chamber V changed the modality of victim participation in the Kenya proceedings, and then how the Kenya 2 victims' team implemented it in the field, it is appropriate to discuss the success of this particular scheme, and where it falls short. Some of the most prominent problems and issues identified include:

- A. Managing expectations. What to do when the prospects of a successful prosecution are weak and the chances of reparations are minimal;
- B. The bureaucratic and logistical difficulties of having numerous ICC bodies related to victims;
- C. Discerning which modality of victim participation to use;
- D. Re-traumatising victims. Making victims re-tell their trauma when they face classification issues such as being considered 'situation victims' but not 'case victims'; and
- E. The risk of the Kenya 2 model turning victim participation into nothing more than tokenism by allowing effective 'self-determined victimhood'.

### A. Managing Expectations of Victims.

The 2010 Report of the Bureau on the Impact of the Rome Statute system on Victims and Affected Communities found that victims lacked sufficient information about the Court and its procedures and therefore had unrealistic expectations of the process and reparations.<sup>240</sup> It was imperative that the Kenya victims' team ensured that victims were being given the correct information, and that the information was being widely disseminated. This was particularly important in Kenya due to the political astuteness of the Kenyan population who, in general, follow politics, the ICC and the news extremely closely and speak about it on a daily basis. Bias appeared frequently in the media, and rumours spread very quickly. As the CLR could only visit small groups at a time, other means were needed in order to spread correct information about the ICC. In the Cambodia ECCC situation, a weekly television show was used to disseminate information about the trials. Of the 14 million people population, 10 million had access to a television, so this was a very useful forum for providing information.<sup>241</sup>

<sup>240</sup> ASP 9<sup>th</sup> Session, *Report of the Bureau on the impact of the Rome Statute system on victims and affected communities*, ASP9/25, 14.

<sup>241</sup> *Ibid* 32.

In Kenya, particularly rural Kenya, radio is the more accessible form of communication, and so PIDS and the victims team set up radio shows providing information about the ICC, and about upcoming meetings with the CLR.

Before the Kenya investigation was authorised, the VPRS needed to ensure that the victims understood the Court's limitations – that is, that not all crimes could be investigated, and that only the most senior and most responsible for the crimes could be charged. Once the investigation was authorised and charges were confirmed, the Kenya victims team then needed to manage the expectations of the victims regarding the length and outcome of the trial and possible reparations (or lack thereof).

As mentioned previously, the victims wanted a speedy resolution of the trial. Many declared they wanted to see it finished before the 2013 Presidential election.<sup>242</sup> The CLR therefore found himself frequently having to explain why the trial was continually being delayed. For a layperson not familiar with court processes, let alone international court processes, it is hard to fathom why it would take so long to even commence a trial. The CLR (through an interpreter) would explain to victims in meetings why the trial had been delayed – whether it was due to a Defence application for a delay, or whether Prosecution had asked for more time to collect more evidence. While the victims nevertheless remained upset and frustrated about the delays, they certainly seemed to be understanding when they were given an explanation from the CLR, and it can only be hoped that they spread this information to others.

In February 2014 when the beginning of the trial was indefinitely postponed, the CLR was faced with a dilemma about what to do regarding the victims. Should he continue trying to find them and register them for a case that appeared to be doomed? Would that falsely raise their hopes and expectations? Should he just sit tight and wait to hear from the Chamber about what would happen regarding the start of the trial? After consulting his team, the CLR concluded that he shouldn't second-guess the victims and their capacity to handle the reality of the situation. He would continue trying to contact them and register them and give them the opportunity to participate. They should be given that opportunity – even though the case appeared to be faltering.<sup>243</sup>

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<sup>242</sup> VPRS Corrigendum op cit (n143) at 118.

<sup>243</sup> Interviews with Fergal Gaynor op cit (n230).

According to the CLR, the attitude towards the ICC had changed over the past 2 years since the new CLR system began. Victims were becoming disillusioned with the ICC and felt betrayed. Their hopes were raised by visits from the VPRS and CLR, yet now the case has been discontinued.<sup>244</sup>

It is incredibly difficult to proffer any suggestions or solutions for how to manage the expectations of victims, other than through providing information about the Court, particularly its limitations. The Report of the Bureau on the Impact of the Rome Statute System on Victims and Affected Communities noted that responsibility for providing this kind of information should not just be the Court's role – but also that of grass-roots civil society.<sup>245</sup> To ease the burden on VPRS, PIDS and the CLR, more time should be dedicated to educating and training NGOs and civil society on the ICC and its limited role and shortcomings so that they can contribute to spreading knowledge about the ICC and managing the expectations of victims.

## **B. The Bureaucratic Difficulties of Having Numerous ICC Bodies/Actors Related to Victims**

As previously discussed, the main victim-related bodies/actors at the ICC include: Victim Participation and Reparations Section (VPRS), Office of Public Counsel for Victims (OPCV), Victims and Witnesses Unit (VWU), Trust Fund for Victims (TFV) and CLRs and their field teams. Many other bodies are involved with victim participation including the Prosecution, the Counsel Support Section (CSS), Public Information and Documentation Section (PIDS), Field Operations Section, Security and Safety Section, and Court Management.

The mandates of each of section are not clearly defined in the legal texts of the Court and it is not always easy to determine which body has particular roles. At the 12<sup>th</sup> Session of the Assembly of States Parties, the Registrar was authorised to reorganise and streamline the Registry's organisational structure.<sup>246</sup> The Registry consequently established a small project team called the ReVision project which is anticipated to finish its work in mid-2015.<sup>247</sup> It has already reviewed the structure of the Registry and has highlighted the overlaps and

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<sup>244</sup> Ibid.

<sup>245</sup> ASP 9/25 op cit (n237) at 19.

<sup>246</sup> See *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Twelfth session, The Hague, 20-28 November 2013* (ICC-ASP/12/20), vol. I, part III, resolution ICC-ASP/12/Res.1, section H, para. 3.

<sup>247</sup> ASP 13<sup>th</sup> Session, *Report on the review of the organizational structure of the Registry*, ASP13/26 at 3.

fragmentation between the bodies related to victims. For example, responsibility for assistance and support to victims and victims' representatives is spread across VPRS, PIDS, OPCV, CLRs, CSS and when reparations are involved, the TFV. They declared that 'this situation of fragmentation and overlaps leads to inefficiency, confusion and uneconomical expenditure of limited resources.'<sup>248</sup> Field operations also involve numerous bodies including PIDS (outreach), Safety and Security Section (field security), Field Operations Section (logistics and support), Victims and Witnesses Unit (operations), General Services Section (logistics) CLRs and field assistants. There are no central headquarters or authority for field operations and 'this results in uncoordinated and therefore often ineffective operations, inefficiency and exposure of the Court to potential risks.'<sup>249</sup>

The OPCV as a body independent of the Registry has the dangerous potential to ignore the decisions of the Registry. For example, when the Registry and OPCV failed to submit a joint proposal about the division of responsibilities and effective functioning of the common legal representation system. The independence of the OPCV meant that neither body truly had to regard the other's proposals and ultimately they had to admit to the Court that a joint submission would not materialise. The ReVision project addressed this issue and has proposed the abolition of the OPCV.<sup>250</sup>

The role and operations of the victim-related bodies in the field are also convoluted. For example, it is not clear whether it is VPRS or the CLR's job to go out and find new victims. While technically it is the VPRS's role to tell victims if they fall outside the scope of a 'case victim' it would be a waste of money and the victims' time to organise a separate meeting to deliver the bad news. Therefore, the CLR and the field team have decided they will just make the determination and declaration themselves.

Further, some victims related bodies have been delegated tasks somewhat unsuitable for their skills and experience. For example, putting the CSS in charge of funding field missions. The field team are the most experienced and knowledgeable about the requirements and costs of running field missions. Yet they rely on the CSS for approval and funding. This has caused countless problems, as the CSS do not have any expressly victim-trained personnel in it, nor have their staff experienced field missions of the type they are providing finance for. They are

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<sup>248</sup> Ibid 7(a).

<sup>249</sup> Ibid 7(b).

<sup>250</sup> Ibid in executive summary.

bound by their legal aid budget and will do their absolute best to abide it. Their decisions are not transparent, not backed up with reasons, are sometimes irrational, and not favourable to victims. For example, they proposed that in order to save money, they would only provide food and water for victims who had ‘travelled a long way’ to get to the meeting. The field team did not know what constituted a ‘long way’ nor did they wish to discriminate between the victims who have already had to take an unpaid day off work to attend the meeting. To only provide food and water to some victims and not to others would cast a terrible impression of the ICC. The food provided is of such a basic standard and would cost so little in the Kenyan currency (coming from a Euro budget) that it would undermine the values of victim participation to suggest that as a method to cut costs.

It is questionable why CSS is in charge of the funding in the first place, as VPRS would be far better suited having participated in and organised many field missions. CSS claims to consult with VPRS about budgeting issues for field missions, but it is not clear how much consideration their recommendations are given. While decisions of the CSS can be reviewed, Judges tend to dislike making Legal Aid review decisions and they suck up many court resources. Therefore judicial review of CSS budget decisions is not a popular avenue to take.

In response to all these issues, the ReVision project has proposed that the Registry creates a single Victims’ Office, consolidating all victim-related functions of the Registry, and merging the OPCV. They suggest the office has its own in-house pool of counsel who would act as CLR’s, and external counsel can support them on an *ad hoc* basis. This new Victims’ Office would not need to rely on Legal Aid.<sup>251</sup> In order to administer such changes, the Regulations of the Court would need to be amended which requires authorisation by the ICC Judges. Draft amendments were submitted to the Advisory Committee on Legal Texts in September 2014 and were then envisaged to be passed on to the Judges for consideration at the end of 2014.<sup>252</sup>

The proposal by the ReVision project certainly seems to make the victim participation scheme more streamlined, accessible, and less bureaucratic. It will be very interesting to see the final report of the ReVision project, and how the Court implements its recommendations.

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<sup>251</sup> Ibid 17(i).

<sup>252</sup> Ibid 19.

### C. Discerning Which Modality of Victim Participation to Use

The ICC is aware that the victim participation scheme requires constant review and simplification. While the States Parties have previously suggested a uniform system, the Report of the Bureau on Victims and Affected Communities and the Trust Fund for Victims, including Reparations and Intermediaries declared that it should remain up to the Judges to choose the modality of victim participation in the case before them, particularly as the number of victims seeking to participate can vary greatly.<sup>253</sup>

In the Report of the Court on the Review of the System for Victims to Apply to Participate in Proceedings, the Court described the various modalities that had been used thus far at the ICC, and proposed further models.<sup>254</sup> In the *Gbagbo* trial, a partly collective application system was used. While each victim signed an individual declaration stating they wanted to participate in the proceedings, the information relating to the crimes and other details were recorded in a collective form.<sup>255</sup> This method required less paperwork, but was criticised by victims' legal representatives and the Office of Public Counsel for Defence as it did not give them enough information to consider the victims' merits, and undermined victims' participation as it did not give them a chance to explain the full extent of their victimhood.<sup>256</sup> The Court acknowledged that this system would not be suitable for all circumstances 'especially where no natural or pre-established groups can be identified and/or where victims are scattered over a wide geographical area.'<sup>257</sup> This is exactly the issue facing the Kenya situation as hundreds of thousands of people were displaced. If one were to visit a village in Kenya now, they would be faced with victims coming from all over the country, who have suffered very different crimes at the hands of different people, and do not possess a common story. Victims of mass-atrocity crimes are not a homogenous community whose interest in participating in the prosecution of those responsible is defined solely by its victim status,<sup>258</sup> and victims possess 'extra-legal identities and perspectives.'<sup>259</sup>

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<sup>253</sup> ASP 12<sup>th</sup> Session, *Report of the Bureau on victims and affected communities and the Trust Fund for Victims, including reparations and intermediaries*, ASP12/38 at 10.

<sup>254</sup> ASP/11/22 op cit (n186).

<sup>255</sup> Ibid 32.

<sup>256</sup> Ibid 35-36.

<sup>257</sup> Ibid 38.

<sup>258</sup> A Werner & D Rudy, 'Civil Party Representation at the ECCC: Sounding the Retreat in International Criminal Law?' 2010, 8 *New Journal of International Human Rights*. 301, 306.

<sup>259</sup> M Mohan & V Sathisan, 'Erasing the Non-Judicial Narrative: Victim Testimonies at the Khmer Rouge Tribunal,' 2011, 2 *Jindal Global Law Review* 37, 48.

Another more extreme option is to use a fully collective application process.<sup>260</sup> This would save enormous amounts of time and would require far less resources from the Registry – particularly in cases with large numbers of victims such as the Kenya case. It was used by the VPRS in their first mission to Kenya when they received representations from community leaders on behalf of the victims. However, this method poses the same problems as the partly collective method, and further would require alteration of the legal texts of the ICC.<sup>261</sup> Security issues and community tension regarding the forming of associations/collective groups could arise, and the OPCV warned that victims of sexual violence would not want to participate in group registration as in many communities it is considered taboo and victims wish to hide these crimes.<sup>262</sup> The Report further considered that this method would require far more work for the Registry and the CLR in the field<sup>263</sup> which is not the most desirable option in Kenya where the security situation was tense.

Even if in a future scenario victims could potentially be located and grouped according to common experience, by dressing them up in ‘singular legal identity’ the ICC would be risking that the victims may not share common views on appropriate punishments or remedies.<sup>264</sup> The individual voice that the victims were promised seems all but extinguished.

This is an enormous problem facing the ICC and it seems that a uniform approach to victim participation is not possible. Judges will continue to have to assess the situation on a case-by-case basis to determine what modality would suit it best. I believe the Kenya system of individual registration through a CLR was the most suitable for the circumstances, although it could benefit from some adjustments. Firstly, increasing the number of field staff would mean far more applications can be considered. Rather than sending the laborious 8 page application form to the Registry and Chamber for consideration, well-trained field staff can make the assessment in around 10-20 minutes in the field. Victims can still have their story told individually, and it won’t be a problem if the victims at the meeting are from different regions and suffered from different crimes. Secondly, a field office with satellite offices would make the registration procedure a lot more accessible for victims. It would save the CLR having to make frequent missions which tie up a lot of the Legal Aid budget. However, it is

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<sup>260</sup> ASP 11/22 op cit (n186) 39-42.

<sup>261</sup> For example, Article 68(3) of the Rome Statute ‘personal interests’, Rule 89 RoPE, Regulation 86 RoC.

<sup>262</sup> ASP11/22 op cit (n186) 44-46.

<sup>263</sup> Ibid 48.

<sup>264</sup> M.E. Wojcik, ‘False Hope: The Rights of Victims Before International Criminal Tribunals’, 2010, 28 *L’Observateur des Nations Unies* 1, 12.

acknowledged that in countries such as Kenya where there is a lot of hostility towards the ICC, a field office is not overly desirable.

#### **D. Re-Traumatizing Victims, Particularly Through the ‘Selection Criteria’ of Determining Victim Status**

ICC Judge Christine van den Wyngaert stated that the ‘The whole [victims] system is premised on the idea that victims’ participation in criminal trials avoids secondary victimization and indeed empowers victims.’ She places the burden of proving this on the ICC, and then declares that at this point in time (2012), the jury is still out.<sup>265</sup>

Criminal proceedings in general run the risk that victims will be re-traumatized. By participating in the proceedings either through acting as a witness, or simply being a victim participant, the victim is required to re-live the crimes that were inflicted upon them. In order to register for victim participation (or for the CLR to assess their victim status) at the ICC, the victim must describe the harm they suffered, the date of the crime, any information they have about the perpetrator, and the effects the crime has had on them.

‘The results of a Geneva study on victims supports the idea that experiencing the criminal justice system can be a further source of suffering for victims rather than an opportunity for them to overcome their trauma, and that the symbolic restorative powers attributed to the system might be questioned as not being sufficiently well founded.’<sup>266</sup>

It is therefore imperative that the ICC takes measures to ensure that victims are not faced with re-traumatization, and provide that the restorative powers of victim participation are not purely symbolic.

The ICC is aware of the potential effect of re-traumatization and trains its staff to deal with it. The 2009 Report of the Court on the Strategy in Relation to Victims, declares that:

‘All contact with victims, however brief, should be characterised with compassion and respect. Training in victim awareness will therefore be provided to all staff in contact with victims to ensure high standards, and efforts will be made to pass on good

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<sup>265</sup> Wyngaert op cit (n44) 495.

<sup>266</sup> Rauschenbach op cit(n18) at 448.



practices to legal representatives, intermediaries and others interacting with victims in relation to Court proceedings.<sup>267</sup>

While I was in Kenya, PIDS organised a three-day re-traumatisation workshop for all field staff, intermediaries, and participating NGOs to attend. The workshop ended up being fairly irrelevant as the lady running it was an expert on South American victims and focussed her advice on how to handle South American victims. Cultural differences between South Americans and Kenyans are vast, and it was clear that many of her tips and pieces of advice would not work in the Kenyan situation. This feedback was given to the ICC so that in future their workshops would be more relevant. Nevertheless, it shows that the ICC is aware of the issue, and will take positive action to ensure that victims are treated in a professional and sensitive manner when participating in the ICC proceedings.

One dangerous area of the ICC victim participation procedure that leaves victims vulnerable to re-traumatisation is the assessment of whether the victim is a 'situation victim' or a 'case victim'. Situation victims are victims of crimes committed in the situation country – the PEV in Kenya. However, case victims are the victims of the crimes in the confirmed charges which are generally limited geographically and temporally. Prosecutorial selectivity being inherent in criminal trials means that, inevitably, only a limited amount of victims (case victims) will be able to participate and to receive reparations.<sup>268</sup> Once a victim has recounted the crimes they suffered, they are then classified. After re-living a traumatic experience, the worst thing to happen would be told you are not considered a case victim (in the legal sense). An example of this happened on one of the missions Fergal attended. He interviewed one woman who had been brutally raped and attacked by a group of men, but this occurred on a day outside of the scope of the case, thus rendering her a situation but not a case victim. Being told you are not a case victim because you were raped on the wrong day can only add insult to injury, and it is likely the woman wishes she never got involved with the ICC process. In that same meeting, Fergal interviewed a man who owned a bakery in a village that had been pillaged. The man's bakery was robbed and some bread was stolen. This occurred on a day considered within the case, and thus he was considered a case victim. He was therefore eligible to participate and be represented by Fergal, and receive reparations should they be awarded.

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<sup>267</sup> ASP8/45 op cit (n2) 37.

<sup>268</sup> Wyngaert op cit (n44) 491-492.

In order to reduce the trauma associated with such adverse classifications, it should be made clear from the beginning the difference between case and situation victims, and it should be explained in the clearest possible way why there is a distinction. Victims need to understand that the Court can only deal with specific alleged events, and they often have to limit it to dates and locations in order to make the case manageable. Although this is unlikely to appease a situation victim, knowing why they cannot participate may make it easier to accept.

### **E. Whether Schemes Such as the Kenya 2 Model Risk Reducing Victim Participation to Mere Tokenism Due to the Potential of Self-Determined Victimhood.**

ICC Judge Adrian Fulford stated that:

‘I have reservations that the decision in the Kenya case in which all that was required of the proposed participating victim was a process of registration, with no consideration of the merits of the individual application to participate (in effect, pure self selection), will lead to any form of meaningful involvement.’<sup>269</sup>

He was further concerned that ‘if the Kenya formula is followed, anyone who chooses to register, without more, is treated as a victim. He or she, in reality, may be a perpetrator seeking to hide or to influence the proceeding.’<sup>270</sup>

Firstly, it seems Sir Fulford has overestimated the amount of influence a ‘self’ registered participating victim would have. Victims who simply register with the CLR have the right to participate by attending meetings with the CLR and conveying their message through him/her. If the victim wants to participate individually in the trial by testifying or questioning witnesses either in person or over videolink, they must use the old procedure of applying through the Registry and being approved by the Chamber. This application procedure requires consideration of the identity of the victim and the merits of their application and thus would likely ‘weed out’ perpetrators. Further, when Sir Fulford mentions ‘meaningful involvement’ he has not considered that not all victims want to be directly involved, and may consider attending meetings, being updated about the trial and given the opportunity to speak one on one with the CLR as meaningful. While attending meetings with victims, I witnessed first hand

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<sup>269</sup> Sir Adrian Fulford, ‘Representation for Victims and Defendants’, Chatham House Speech: Memorial Seminar for Sir Richard May (29 October 2014).

<sup>270</sup> Ibid.

how much it meant to the victims to be able to speak face to face with an ICC lawyer, rather than just hearing about the case through the media.

I also believe the CLR and his team do their very best to identify and correctly characterise victims. It is arguable that they are better positioned than the Registry and Chambers to determine the truthfulness of an applicant's story as they rely on face-to-face interactions, rather than just words on a form. The field team are particularly useful in this manner, as they pick up on accents and cultural nuances which may indicate whether the applicant is telling the truth.

## F. Reflections

### Field Staff

'Legal representation of victims involves two equally important elements. One is the representation of the clients' interests before the Court...The second is the contact with the clients, including keeping them informed of developments, taking instructions, and ascertaining their interests in order to be able to represent them effectively before the Court. The second element goes to the very purpose of the participation of victims in proceedings, which, if it is to be meaningful, requires the victims to maintain regular communication with their lawyers'<sup>271</sup>

While this is certainly the case, legal representatives rely heavily on their field staff in order to make this contact with the victims. Having worked in the field, I have seen the incredible value and importance of the local field staff. They speak the local languages, understand the culture, have the contacts, and can create a special rapport with the victims. They are paid less than their colleagues in The Hague, and contribute so much to the victim participation scheme. Their terms of employment are far less favourable than those in The Hague. For example, their role is limited to administrative and practical activities rather than legal work. They are not supposed to be reading or helping the CLR draft court filings, despite all being qualified lawyers. This is a particular shame as the field staff should be considered the backbone for future domestic processes. There are very few people more qualified in Kenya than the current team of field staff to deal with future prosecutions of international crimes.

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<sup>271</sup> ASP 8<sup>th</sup> Session, *Interim report of the Court on legal aid: Legal and financial aspects for funding victims' legal representation before the Court*, ASP8/3 at 9.

Considering the ICC is a court of complementarity and encourages genuine domestic prosecution, it should be promoting the training and support of staff who could handle future situations domestically rather than going back to the ICC. In cases with large amounts of victims, the number of local field staff should increase, and should be the preferred source of employees.

### **Funding of victim participation**

The Kenya 2 CLR system ran on Legal Aid as appropriated by the CSS. As mentioned previously, CSS's decisions were often unfavourable towards victims and lacked transparency. Their decisions should be more transparent, and staff should have experience working in the field and come from a victim related or criminal law background. They should take serious consideration of VPRS consultations, and should make this consideration visible (ie. acknowledging and adopting their suggestions in public reports).

### **Restorative Justice**

There should be a greater focus on the restorative justice function of the Court. Having met with many victims, it is clear that their main priority is not to seek revenge on the perpetrator, but to be given the opportunity to get their lives back together. Countless victims said that all they needed was a small sum of money to rebuild their business so that they could resume their lives, education, and feeding their family. The guilty verdict of the Accused was wanted mostly as a source of being awarded compensation, rather than a sense of justice. It must be noted that the accused at the ICC are often quite removed from the crimes and therefore it is harder for the victims to place direct blame with them. Of course as an institution of law, the ICC's primary focus should be on the legality of actions and elements of crime, but the broader issues of criminal justice such as restorative justice should not be ignored. Greater involvement of the TFV would certainly be appreciated by the victims.

Opinions voiced by victims surveyed in 'Law and emotions' being carried out by the Centre d'étude, de technique et d'évaluation under the aegis of the Centre Interfacultaire en Sciences showed that those victims that receive social support tend to have better perceptions of their situation and see their victimhood as an opportunity and a source of strength, expressing the need to get on with life. They have expressed that the social support they received had a more

positive impact than criminal proceedings.<sup>272</sup> It is therefore arguable that the ICC should have a greater focus on providing social support services to the victims. However, it is noted that the criminal justice system is above all to maintain law and order, and to punish people who have broken the law, rather than the fact they have inflicted trauma as perceived subjectively.<sup>273</sup>

While this may not be in the mandate or budget, the ICC should at least have greater levels of cooperation with organisations that can provide these kinds of social services.

Academics Mina Rauschenbach and Damien Scalia question whether a trust fund should be set up for the purpose of providing victims with a form of reparations immediately after satisfying the victimhood definition, rather than waiting for a guilty verdict. This would in itself pose a number of problems such as the fairness in giving reparations to certain victims while others miss out (ie. case victims but not situation victims), the question of the form of reparations, and how to source funding for such a programme.<sup>274</sup> While I acknowledge these issues, I believe they are surmountable. Having met with victims on five field missions, I was surprised at how little money/material items the victims ask for in order to rebuild their lives. Often they simply ask for replacement tools which were looted or destroyed so that they can get their business back on track. For example, a seamstress may just want a working sewing machine, a welder, a welding machine. Unlike many Western legal systems, the victim (mainly of civil suits) does not seek hefty pay-outs or compensation. They are requesting the bare minimum which really is affordable and reasonable in the circumstances. Again, if the ICC considers this out of their mandate, they could at the very least promote this concept to NGOs and charities who could make it a reality. If the ICC were to make public appeals for donations of tools, equipment and medicine, I am confident there would be a positive response from the international community. At the moment, very few people realise how the victims in Kenya are still suffering and that this suffering could so easily be alleviated.

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<sup>272</sup> Rauschenbach op cit (n18) 446.

<sup>273</sup> Ibid 449.

<sup>274</sup> Ibid 453.

## 6. Conclusion

Victim participation at the ICC is a largely unchartered and continually evolving part of modern international criminal justice. Following an increase in victims' rights in the past 40 years, as well as criticism regarding the failings of the UN *ad hoc* tribunals to provide satisfaction for victims, the drafters of the ICC decided to implement a scheme of victim participation into the Court. With only basic guidance found in the legal texts of the ICC, the Court has had to experiment with different modalities of victim participation and test them in various settings. The Kenya situation presented the Court with unique circumstances: it was the first Prosecutor *proprio motu* investigation, involved unprecedented security risks and potentially hundreds of thousands of victims eligible to participate. This required the Court to create a new and innovative modality to tailor to these circumstances.

The original ICC victim participation application process involved a lengthy application form which would be assessed by the Registry, sent to Prosecution and Defence for consideration, and then on to the Chamber for determination. This process was lengthy, burdensome, and a waste of Court resources. The ICC recognised that for situations with large amounts of victims such as in Kenya, this process would be overly burdensome for all the parties involved. They therefore looked at ways of altering the victim participation scheme. The 3 October 2012 Decision of Trial Chamber V dramatically transformed the victim participation system in the Kenya proceedings. The required amount of paperwork was reduced, and the victimhood status determination was passed to a Common Legal Representative, rather than the Chamber.

This new modality was not without its problems. Critics warned of the risk of self-assessed victimhood, and questioned whether this form of participation would be meaningful to victims. There were also many logistical issues facing this modality of victim participation including insufficient funding for missions and field staff; bureaucracy, overlap and fragmentation of victim-related bodies; realistically managing expectations of the victims; and avoiding re-traumatisation of the victims.

However, under the circumstances of the Kenya situation, the 3 October 2012 Decision modality of victim participation was the most feasible and suitable option. Relieving the burden on the Chamber to assess each victim application freed up many Court resources, and having a CLR placed in the situation country made the ICC more accessible and real to the

victims. The Court is attempting to address issues such as overlapping mandates of victim-related bodies and legal aid issues by restructuring the Registry and forming one super victims unit. It is likely that this will greatly streamline the victim participation scheme at the ICC while still allowing for Judges to exercise their discretion regarding the exact modality to implement in the proceedings before them.

Victim participation at the ICC still has a lot to learn and it will undoubtedly continue to evolve. It is only through trial and error with cases such as the Kenya situation which present new and unique circumstances that the Chambers of the ICC can gain precedent and experience in ascertaining what modalities best suit certain situations. It will be fascinating to watch over future cases how the restructuring of the Registry will effect victim participation, and what lessons the ICC has learnt from the victim participation in the Kenya situation.

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