

Victims' rights to participate and seek reparation before the ICC

This booklet seeks to provide victims of the 2007-8 post-election violence in Kenya with information about the International Criminal Court (ICC).

It tries to answer some of the main questions raised by victims and seeks to clarify the ICC's mandate and limits so that victims may better understand its role in the Kenyan context.

This booklet aims to inform victims of their rights to participate in ICC proceedings where eligible, and the possibilities of seeking reparation. It also seeks to enable victims to make an informed decision on whether they want to engage with the ICC. The booklet gives a general overview of the ICC's mandate in relation to victims and then highlights how victims' rights before the ICC are being exercised in the specific context of Kenya.

This joint Kituo cha Sheria-REDRESS publication is an updated and extended version of an earlier Booklet issued by Kituo cha Sheria and the Civil Peace Service / Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH. Kituo Cha Sheria and REDRESS wish to convey their gratitude to the Civil Peace Service / GIZ, funded by the German Federal Ministry for Economic Cooperation and Development (BMZ), who have provided funding and professional input for the first and second editions of this booklet.

We are grateful to Humanity United and The John D and Catherine T MacArthur Foundation for their support enabling this publication.

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1. The ICC in a nutshell

1.1 What is the ICC's mandate and what are its limits?

The ICC is a permanent criminal court governed by an international treaty, signed in Rome in 1998 and entered into force on 1 July 2002. The Rome Statute and its Rules of Procedure and Evidence deal with:

- prosecuting alleged individual perpetrators over the age of 18; for
- genocide, crimes against humanity, and war crimes (and aggression after 2018).

The ICC only has jurisdiction over individuals and not armed or criminal groups, States or companies. It is a Court of last resort, acting only where the State is unable or unwilling to investigate crimes itself. While the ICC is mandated to prosecute all perpetrators, no matter what their rank, in practice, it is likely to focus on those who have had a leading role in committing international crimes. Where there have been massive and widespread crimes, low-level alleged perpetrators, such as police officers or low ranking soldiers, may best be prosecuted and tried before national courts.

The ICC is located in The Hague in the Netherlands, although it may also sit elsewhere. It has field offices in Uganda, the Democratic Republic of the Congo, the Central African Republic, Ivory Coast and Kenya. There are 122 “States Parties” to the Rome Statute (as of June 2013).

What are the implications of the ratification of the Rome Statute for Kenya?

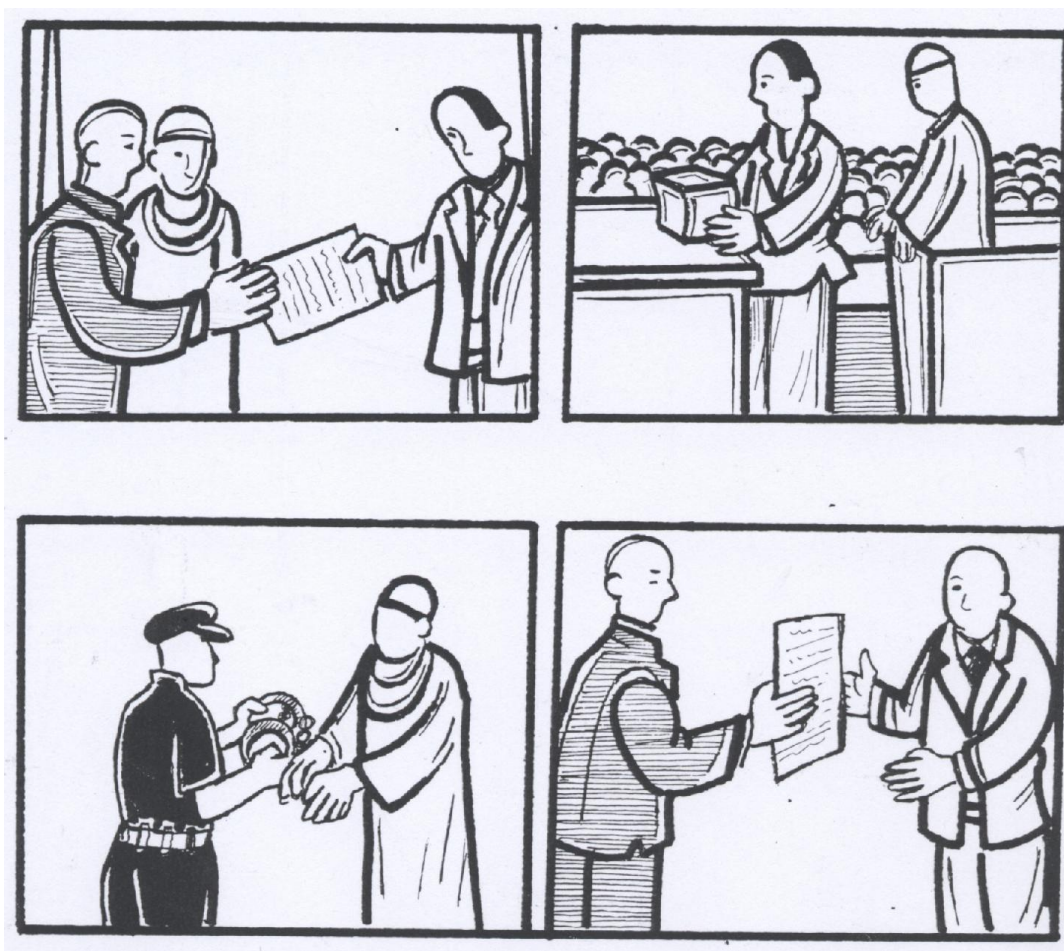
Upon ratifying the Rome Statute, Kenya agreed to abide by the terms of the Statute. Accordingly Kenyan authorities are obliged to:

- cooperate with the ICC Prosecutor and other organs of the ICC;
- protect victims and witnesses from any harm;
- execute ICC arrest warrants against any person, even if they are sitting heads of State or Ministers.

Whose responsibility is it to provide justice?

It is critical to underline that the role of the International Criminal Court (ICC) is complementary to the Kenyan justice system. The primary responsibility in providing justice and reparation to victims of the violence lies with the Kenyan authorities. Despite the fact that post-election violence from December 2007 to February 2008 took place in many regions of Kenya, as yet only few perpetrators have been held to account.

Understandably, due to the limited progress at the national level in bringing perpetrators to justice, many Kenyans turn to the ICC with high expectations and this can easily lead to frustration.



1.2 When can the ICC investigate and prosecute?

There are only three instances in which the Prosecutor can intervene:

- if the United Nations (UN) Security Council refers a “Situation” to the Prosecutor (Darfur and Libya); or
- if a State Party voluntarily refers a “Situation” to the Prosecutor (Central African Republic, Democratic Republic of Congo, Uganda, Mali);
- If the ICC Prosecutor decides to open an investigation using his *proprio motu* power to do so (on his own initiative), such as in Kenya and Ivory Coast.

Who and where can the Prosecutor investigate?

The ICC respects local courts; it is the first international criminal court to recognise that justice should be done at the national level first. The ICC will only judge persons if the national authorities are unable or unwilling to investigate and prosecute persons locally.

The ICC can only investigate crimes under its jurisdiction. It can investigate:

- crimes committed on the territory of a State Party (such as Kenya since 15 March 2005); or crimes committed on the territory of a State which has accepted the Court’s jurisdiction (Ivory Coast); or crimes committed anywhere by a national of such a State, if a situation is referred to it by a State party or an investigation is initiated by the Prosecutor *proprio motu*;
- crimes committed in a Situation “referred” to the Prosecutor by the UN Security Council.

Is anybody immune from the Court?

The Court is very clear that the Statute applies equally to all persons without any distinction based on official capacity of any kind. Anyone, even a President, can be held to account for international crimes within its jurisdiction. The Statute also emphasises the criminal responsibility of commanders and other

superiors for acts committed by subordinates. There cannot be amnesty for international crimes including crimes against humanity.

1.3 What are the main organs of the ICC?

The ICC is an independent institution with impartial judges. Their decisions are guided by the Rome Statute and the Rules of Procedure and Evidence.

The ICC is composed of **four main organs** which play a different role in the ICC process: the Presidency, the Judicial Divisions, the Office of the Prosecutor and the Registry.

- The Presidency is responsible for the overall administration of the Court, with the exception of the Office of the Prosecutor. It is comprised of three ICC judges, elected by fellow judges for a term of three years.
- The Judicial Divisions consist of eighteen judges organised into the Pre-Trial Division, the Trial Division and the Appeals Division. The judges of each Division sit in Chambers which are responsible for conducting the proceedings of the Court at different stages.
- The Office of the Prosecutor is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions. The Prosecutor has the power to begin an investigation at her own instigation, without a referral from the State Party or the United Nations Security Council. The Office is now headed by the Prosecutor, Mrs. Fatou Bensouda (The Gambia), who was elected in June 2012 by the States Parties for a term of nine years.
- The Registry is responsible for the non-judicial aspects of running the Court, headed by the Registrar. The Registrar has set up specific units of direct relevance to victims:

- Victims and Witnesses Unit (VWU) to provide protective measures and security arrangements, counselling and other assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony;
 - Victims Participation and Reparations Section (VPRS) to assist victims seeking to participate and/or claim reparation, undertaking a first review of their applications to participate to ensure that they are complete, and requesting additional information from applicants as necessary before transmitting them to the ICC Chambers.
 - Public Information and Documentation Section (PIDS) with an Outreach Unit;
 - Counsel Support Section deals with legal aid, providing financial assistance to those who lack sufficient means to pay for their legal representation (in the form of common legal representation in the case of victims).
- The ICC is also composed of other entities such as the:
- Office of Public Counsel for Victims to ensure effective representation of victims in the proceedings
 - Office of Public Counsel for Defence.

These are fully independent offices although they are related to the Registry for administrative matters.

- A Trust Fund for Victims has also been established by the Assembly of State Parties to the Rome Statute. This is an independent body that complements the work of the ICC and deals with reparation and assistance to victims in the form of projects.

1.4 What are the stages of ICC investigations and proceedings?

The ICC process takes time. For example, *Thomas Lubanga*, a Congolese rebel leader, was sentenced more than 6 years after the ICC issued his arrest warrant (though this is currently on appeal).



The stages of the proceedings are:

- Preliminary Examination: In this phase the Prosecutor decides whether or not to open an investigation;
- Investigation: The Prosecutor examines facts and evidence, and applies to the Pre-Trial Chamber for an arrest warrant or summons to appear if there are reasonable grounds to believe an individual committed an alleged crime;

- Pre-Trial: The Judges will hold a hearing and will confirm charges if there are substantial grounds to believe the alleged crimes were committed, sending the case to trial;
- Trial: The judges will hear and evaluate evidence brought by the Prosecutor and Defence. At the end of this process the accused is either acquitted, or found guilty, and if so, sentenced. If a person is convicted, reparations can be awarded to victims of the crimes for which the accused was found guilty.
- Appeal: The judgment on guilt, sentencing or reparations can be challenged by either party. At the end of this stage an appeal judgement is given.

2. Victims' rights before the ICC

2.1 Who is a victim?

The ICC Rules of Procedure and Evidence define the victim as:

- An individual having suffered direct or indirect harm as a result of the commission of a crime within the ICC's jurisdiction; and
- Organisations or institutions having suffered direct harm to property dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes, as a result of the commission of a crime within the ICC's jurisdiction.

Victims are defined in a broad manner. Individuals include direct victims as well as indirect victims such as the family or dependants of the direct victim and "persons who have suffered harm in intervening to assist victims in distress or to prevent victimization".

To participate in the proceedings at Pre-Trial or later, victims must show that the harm, injury, loss and damage suffered are related to the charges against the accused. The harm, both direct and indirect, injury, loss and damage include:

- physical harm including making a person unable to bear children;
- moral damage resulting in physical, mental and emotional suffering;
- material damage, including lost earnings and loss of property;
- lost opportunities, including those relating to employment, education, social benefits, social status or legal rights;
- costs such as for legal experts, medical services or social assistance.

2.2 Can victims participate in the ICC proceedings?

Yes. The ICC Statute and the Rules of Procedure and Evidence recognise a right of victims, under certain conditions, to participate in ICC proceedings.

When can victims participate in the ICC proceedings?

When the personal interests of victims are affected, the ICC may allow victims to present their views and concerns at stages of the proceedings deemed appropriate. However, victims may only do so if it does not affect the rights of the accused and a fair and impartial trial.

The Rules of Procedure and Evidence also provide for victims recognised as participants to be informed of the developments in the proceedings which affect their interests.

What are victims of a situation vs. victims of a case?

The ICC distinguishes between **victims of a “Situation”** and **victims of a “Case”**:

- a) A situation covers all the possible crimes under investigation;
- b) A case refers to the specific facts relating to a suspect or accused person.

This differentiation is important in relation to victims’ rights to participate in appropriate proceedings. There are limited opportunities for victims of a situation to participate as this process only covers the period when the Court is deciding whether to open an investigation and the period when the Court is conducting an investigation.

What are the conditions for a victim to participate?

For ICC judges to authorise a victim to participate, the conditions are:

- a) that the person is considered a “victim”;
- b) that his or her interests are affected;
- c) that there are grounds to believe that the victim suffered harm directly linked to the specific crimes prosecuted by the Court, or that he or she suffered harm in intervening to assist direct victims, or to prevent their victimisation.

For example, a victim in the *Kenyatta case* must show that she or he has suffered harm as a result of one of the crimes for which Mr Kenyatta is on trial.

The judges will also assess any possible impact there could be on a fair trial for the accused.

How can victims participate in the ICC proceedings?

The procedure for participation is not the same in all cases as the practice before the Court is evolving. This is a brief description of how victims have applied and participated in the cases in early DRC and the Central African Republic cases, and at the Pre Trial stage of the Kenyan cases. However, **this system has changed significantly for the trial phase in the Kenyan cases** (see Section 3.2 below).

In order to participate in proceedings victims complete an application form provided by the ICC Field Office and send it back through the staff of the Victims Participation and Reparation Section and/or ICC Field offices.



The form has to include sufficient information to meet the above conditions and must contain a proof of the victims' identity. Completing the application form and providing the necessary documents is complicated and requires extreme accuracy.

The parties (Prosecution and Defence) are entitled to make observations on the victims' applications, after which the ICC judges will decide whether to grant victim status, for each individual.

This is the approach that was used before the confirmation of charges hearings in the Kenyan cases. The Judges ended up recognising 327 victims as participants in the *Ruto, Sang and Kosgey case*, and 233 victims as participants in the *Kenyatta, Muthaura and Ali case*. **As mentioned, a new approach has been set out for the Trial phase (see Section 3.2 below).**

What does participation actually mean?

Once a victim has been recognised as a participant, he or she has certain rights under the ICC Statute:

- a) Victims have the right to present their views and concerns when their personal interests are affected. Depending on the stage of the proceedings, this might be through attending hearings, making written observations or statements; questioning a witness, expert or the accused;
- b) Victims have the right to be informed of the development of the proceedings;
- c) Victims have the right to receive appropriate protection measures.

Do victims participate in person? Do they appear before the judges?

If a victim is eligible to participate, it does not mean he or she will participate in person. In most cases, victims participate through a legal representative who attends hearings, makes written submissions and conveys the views and concerns of the victims throughout the proceedings. In some cases, a small number of victims may be allowed to appear in person before the judges. For example in the *Bemba case*, a small number of victims travelled from Central African Republic to The Hague to testify in the trial. A few victims also addressed the judges via video link to present their views and concerns.

What happens if the application to participate is rejected?

Victims do not have the right to appeal decisions before the ICC (except decisions on reparation). However, if a victim's application has been rejected, he or she may be able to file a new application at a later stage of the

proceedings if she or he has additional information to support the application or if the scope of the proceedings changes.

2.3 Can a victim be a witness?

A witness is someone who has knowledge about a crime or significant event through their senses (e.g. seeing, hearing, smelling, touching), and can help prove aspects of the crime or event.



Usually when a crime is committed a victim can also be a witness of the crime. However, in the ICC process the victim and the witness refer to two distinct categories that may overlap. The victims who qualify to participate in the ICC proceedings present their views and concerns, which is not evidence but will inform the judges on some issues; and hence they are not automatically witnesses. Expressing views and concerns is different from providing evidence; it does not make the victim a witness.

Being a witness means giving evidence and testifying before the ICC in person, and being questioned by the parties. This might have an impact on the determination of the conviction or acquittal.

However, a victim will also be a witness if she or he testifies. Her/his testimony will be given under oath with the parties being allowed to question him or her. Victims participate in their own right during the proceedings; whereas witnesses are called, at a specific time, by the Prosecution, the Defence or the Chamber.

2.4 Victims' right to legal representation

In order to participate and seek reparation before the ICC, victims will generally be represented by a common legal representative appointed by the Court.

Under the ICC's Rules of Procedure and Evidence, the Registry is mandated to assist victims in obtaining legal advice, organising their legal representation and providing legal representatives with adequate support, assistance and information. In addition, the Office of Public Counsel for Victims may help obtain legal representation.

Victims are free to choose whether to be legally represented. In practice it is best to have legal representation because ICC's proceedings are complicated and there are often a large number of victims.

While victims are also free to choose a legal representative, the judges can request groups of victims to choose a common legal representative to represent their interest. If they fail to do so the ICC can choose one on their behalf and may be able to provide some partial or full financial assistance when victims cannot afford to pay.

A group of victims with the same common interests would participate in the ICC process through a Common Legal Representative/Lawyer. For example in Kenya, it was decided that only one legal representative will represent victims in each case. The lawyers' costs are being covered by the ICC Registry.

Victims' legal representatives attend hearings in the Lubanga case (DRC) @ICC-CPI



2.5 Victims' right to protection

Who is eligible?

The ICC Statute provides that the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. This includes measures to be taken by the Prosecutor in investigations and prosecutions. It also includes measures that the judges can order to protect victims who participate.

The ICC statute underlines the need for such measures in the particular situation of victims of sexual violence or when the victim is a child.



What form can protection take?

These measures may include: protective accompaniment, witness and victim support measures of a psychological and practical nature as well as concealing the victims' identities and locations in proceedings, or providing a summary of the information given by a victim if the disclosure of this information may put the victim at risk. For example, victims' applications to participate are not disclosed to the general public to protect their identities. In the Kenya case, the identity of victims who will register with the registry will in principle not be disclosed to the accused.

When a victim appears in person to present views and concerns, or testifies as a witness, the defence is informed of his or her identity (but not the general public). However, the ICC may also order a closed hearing, the witness may only be partially visible using curtains, or voice distortion may be used so that the general public cannot identify them. In extreme cases, the Court can decide to relocate a witness to another country.

These measures must not interfere with the accused's right to a fair trial.

How is protection provided?

Within the Registry, the Victims and Witnesses Unit is mandated to provide protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses.

Given the number of victims who participate in ICC proceedings and the need for States to cooperate and support the ICC in view of its resource constraints, it is important to recall that there is also the responsibility of Kenya to adopt protection measures.

Every victim has to carefully consider the risks involved, and must make an informed decision about whether he or she wants to participate in ICC proceedings. An assessment of risks, threats, and contingency plans should be done. Discretion and caution about who knows of the victims' involvement in ICC proceedings is critical.



2.6 Victims' right to reparation

Under the ICC statute, victims of crimes for which an accused has been convicted can receive reparation for the harm suffered. It is for the Court to decide on reparation, either ordering a convicted person to make appropriate reparation or for reparations to be made through the ICC Trust Fund for Victims (TVF).

To date the ICC has not established general principles relating to reparations. These may be developed on a case-by-case basis. There has been one decision relating to reparation so far, in the case against Thomas Lubanga, where on 7 August 2012, Trial Chamber I established principles on reparation that are applicable to that case. While these may not apply in other cases, it provides key elements:

Who can apply for reparation?

Victims may apply for reparations at any time in the proceedings by filing a written application with the Registry. The Victims Participation and Reparation Section has prepared standard forms which are available online and at ICC field offices.

This form must contain certain types of information. This includes the identity and address of the applicant, a description of the injury, loss or harm, the location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or

harm. A description of property that the victim wants returned; or specific injuries or harm that might need to be addressed through rehabilitation or other services should be included (eg. loss of education with corresponding education fees paid; specific medical, psychosocial or other treatment or therapies, etc.).

ICC judges also have the power to order reparation for victims that have not applied.



Who can be a beneficiary?

In the *Lubanga case* the ICC judges decided that reparation should not be limited to the relatively small group of victims that participated in the trial or those who applied for reparations.

Reparation may be granted to case victims:

- Direct victims, who suffered harm resulting from the crimes for which the accused has been convicted;
- Indirect victims, including family members of direct victims, along with individuals who intervened to help the victims or to prevent the commission of these crimes.
- Legal entities, such as NGOs or hospitals.

The ICC Chamber recognised that priority might be given to vulnerable victims, including victims of gender-based violence or severely traumatised children.

What forms can reparation take?

Although monetary compensation is common as a form of reparation, reparation can also take the form of restitution such as return of property, rehabilitation such as medical and psychological care as well as legal and social services, satisfaction and guarantees of non-repetition, such as public acknowledgment, search for the disappeared and identification of remains, and commemoration or activities aimed at education and at preventing the recurrence of similar crimes.

Reparation can be individual or collective, material or non-material, to address harm suffered by communities and groups of victims.

Not all victims will get reparations ordered by the court at the end of a trial. The trial may last a number of years and it may also take a long time for reparations disbursements or programmes to be designed and implemented.

In the *Lubanga case*, the judges decided that reparation would tend to be collective in the form of programmes or projects benefitting victims.

What is the difference between reparation and assistance?

Under international law, reparation must be adequate, effective and prompt. It should also fit the gravity of the violations and harm suffered by the victim. Reparation is linked to a justice process and acknowledges of the harm and suffering experienced by the victims.

Assistance, humanitarian or development initiatives are broader. They are not specifically linked to the harm suffered and beneficiaries are not limited to victims of specific crimes. This means that humanitarian and development projects would not acknowledge the harm experienced and the victims as such. However victims may benefit from assistance projects providing services to affected communities, such as medical treatment, psychosocial counselling, skills training, education or income generation.

What is the role of the Trust Fund for Victims (TFV)?

The TFV is an independent institution foreseen in the ICC Statute that was established in September 2002.

It has dual a mandate:

- 1) *Provide assistance to victims* independently of trials, through projects aimed at physical or psychological rehabilitation or material support for the benefit of victims and their families.

The TFV implements assistance projects towards ICC situation victims and their families to provide them with physical rehabilitation, material support, and/or psychological rehabilitation. Benefitting from assistance projects is not limited to the victims participating in the ICC proceedings.

This mandate of the TVF is directed at responding to the urgent needs of victims and their communities. As of early 2013, the Trust Fund is funding assistance projects in DRC, Uganda and hopes to start activities in Central African Republic, these could include specific projects rehabilitating helping child mothers and victims of widespread rape for instance.

- 2) *Facilitate and implement reparations* ordered by the ICC

The TVF receives money either using funds traced and seized from the convicted person, or through voluntary contributions made by States, as well as by private donations.

The Fund can be tasked to disburse money, or put into place actual projects to ensure reparation once ordered by a Chamber. The fund can also provide a back-up where the accused has insufficient funds of his own.

In the *Lubanga case*, the ICC judges have left it to the Trust Fund to identify the beneficiaries of reparation, determine the form reparation will take, and propose a reparations plan to the Chamber, focusing on collective reparation. The judges recommended that the TVF appoint a multidisciplinary team of experts to provide assistance in the preparation and implementation of a reparations plan.

3. Victims' rights and the ICC in Kenya



3.1 General Information on the Kenyan Situation and Cases

How did the ICC intervene in Kenya?

On 15 March 2005, Kenya ratified the ICC Rome Statute. This gave the Court jurisdiction over war crimes, crimes against humanity, and genocide committed by Kenyan nationals or on Kenyan territory after the date of entry into force of the ICC Statute for Kenya (1 June 2005).

On 26 November 2009, the ICC Prosecutor requested authorisation to open an investigation in relation to the crimes allegedly committed during the 2007-2008 post-election violence in Kenya in which around 1,300 people were allegedly killed. This was the first time that the Prosecutor had invoked his powers to begin an investigation at his own instigation, without a referral from the State Party or the United Nations Security Council.

On 31 March 2010, the ICC Pre-Trial Chamber II authorised the Prosecutor to open an investigation into alleged crimes against humanity committed between 1 June 2002 and 26 November 2009 (the date the Prosecutor filed the request for authorisation to start an investigation) in Kenya.

In February and March 2011 respectively, the Kenya Government requested the UN Security Council to halt ICC proceedings on Kenya and challenged the admissibility of the cases. It argued that the cases should be dealt with in Kenya rather than before the ICC. Both initiatives were rejected.

Who were identified as alleged perpetrators?

On 8 March 2011, Pre-Trial Chamber II summoned *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* to appear before the Court, as it found reasonable grounds to believe that they committed the crimes alleged by the Prosecutor.

On 7 and 8 April 2008, the six defendants made their initial appearance before the Court in The Hague.

Why were some charges declined and when will the trial start?

On 23 January 2012, the ICC Judges declined to confirm the charges against *Ali and Kosgey*. In Kosgey's case, the Chamber found that the Prosecutor relied on one anonymous and insufficiently corroborated witness. In Ali's case, the Chamber found that there was not sufficient evidence to connect the Kenya Police to attacks carried out in the areas where perceived Orange Democratic Movement supporters resided.

The Court confirmed the charges against *Muthaura, Kenyatta, Ruto and Sang* for alleged crimes against humanity committed during post-election violence in 2007-2008 in Kenya and committed them to trial.

On 9 July 2012, Trial Chamber V set the dates for the commencement of the trials in *Ruto & Sang* and *Muthaura & Kenyatta*, for 10 and 11 April 2013 respectively. The defendants are not in the custody of the Court.

On 7 and 8 March 2013, following a request by the accused, Trial Chamber V postponed the start of the trials. It set the provisional start of trial to 9 July 2013 in the *Muthaura and Kenyatta case* and to 28 May 2013 in the *Ruto and Sang case*. At the time of writing, following a request for postponement by Mr. Ruto, the new date for the *Ruto and Sang case* had been set for the 10th of September, 2013.

Why was the case against Mr. Muthaura dropped?

On 11 March 2013, the Prosecution notified the Trial Chamber that it was withdrawing all charges against Mr. Muthaura for lack of sufficient evidence. It indicated that it was unable to gather enough evidence in light of a number of security issues affecting witnesses. On 18 March 2013, the Trial Chamber authorised the Prosecution to withdraw the charges against Mr. Muthaura.

3.2 Victims' rights in the two Kenyan cases

How many victims have been authorized to participate at the pre-trial stage of the two cases?

There are currently only two cases in the context of the post-election violence before the ICC for which victims can participate.

Victims will need to fall within the scope of one of the two cases to qualify as case victims. The scope relates to specific crimes (incidents), locations and time periods. Only victims linked to the specific incidences covered in the prosecutor's case will be able to participate in the proceedings.

At end of May 2013, the Pre-Trial Chamber granted victim status to:

- 223 persons in the *Kenyatta* case
- 327 persons in the *Ruto and Sang* case

How can victims participate at Trial?

On 3 October 2012, the Trial Chamber set out a new procedure for victims wishing to participate in the Kenya trials. The Chamber considered that a significantly different approach was needed due to the large number of victims and unprecedented security concerns.

What is different for victims wishing to participate in the Kenya cases?

Only those wishing to appear in person in Court must submit a detailed application:

The Trial Chamber made a distinction between direct individual participation from participation through a common legal representative ('CLR') or, in other words – individuals who wish to appear in person before Court and those who only wish to be recognised as 'participants' in the proceedings.

For those who do not wish to appear in person before Court, an individual application will no longer be necessary. However victims who wish to will be able to register with the Registry.

What is the difference between direct individual participation, registration and general participation?

The Trial Chamber made a distinction between:

a) *Direct individual participation:*

Victims who wish to appear in person before the Court to present their views and concerns will need to follow the general application procedure. They may be able to present their views and concerns in person or via video-link.

Victims appearing in person or via video-link will need to disclose their identity to the parties (the Prosecution and the Defence). Whether their identity will also be revealed to the broader public will be decided by the Chamber. The final decision on whether someone will appear in person will be made by the judges.

b) *Registration:*

Registered victims who do not wish to appear in person, and are happy to express their views and concerns through a legal representative, are able to register with the Registry through a less detailed process by sending their personal data – including information about the harm

suffered. Such registration is voluntary and will not be subject to the Chamber's individual assessment or the parties' observations.

c) General participation:

The views and concerns of victims who do not register because of their unwillingness or incapacity (for practical or security reasons such as age, physical or mental incapacity, and social pressure) will “nevertheless be voiced, in a general way” through the Common Legal Representative for Victims.

Is participation mandatory? Does it cost money?

The decision to participate by a victim is a voluntary choice and it is free of charge.

How can a victim register?

If a victim decides to participate in the proceedings, she or he should contact the VPRS or a trusted intermediary, such as an NGO linking the ICC with affected communities, who will put them in contact with the Common Legal Representative for Victims (CLR/V) appointed by the judges for the trial stage.

What will happen to victims who were already recognised as “participants” at the Pre Trial stage?

Victims who were already authorised to participate at the Pre Trial stage will be considered as having registered to participate through a Common Legal Representative if they fall within the scope of the charges as confirmed. The Chamber instructed the Registry to review whether all participants at the Pre Trial stage still qualify.

Will all victims who want to appear in person be able to do so?

No. Victims must be expressly authorised by the Chamber to appear in person.

The CLR/V will submit a request to the Chamber on behalf of the victims who want to appear. The request will: 1) explain why these particular victims should be considered as “best placed to reflect the interests of the victims” and 2)

contain a summary of the issues the victims will address if authorised to appear.

The Chamber will make a preliminary assessment on the appropriateness of the participation of the victims and can ask the CLRV to make a pre-selection. The Chamber will “pre-select” a limited number of victims who may be authorised to appear and invite the parties to make observations on the victims’ applications. The Chamber will then make a final determination on which victims will be authorised to appear.

When will victims be allowed to appear in person?

Provided some conditions are fulfilled, individual victims may be invited by the Chamber to present their views and concerns in person at trial including during the opening and closing hearings.



How can victims obtain more information on their right to participate and seek reparation?

Victims can contact the ICC’s Participation and Reparations Section (VPRS) by email at vprsapplications@icc-cpi.int or by phone: from 2pm to 5pm at 0700357469

How will victims be represented? Who will the Common Legal representative represent?

Victims not appearing in Court will be represented through a Common Legal Representation system. In the present case, the victims will be represented through a Common Legal Representative to be based in Kenya and who will be assisted by the Court's in-house Office of Public Counsel for victims ('OPCV').

The CLRV will represent all the victims in a case – regardless of whether they are registered or not.

The CLRV will act as the main point of contact for the victims whom he/she represents, to formulate their views and concerns and will appear on their behalf in key hearings only.

The CLRV will be authorised to make opening and closing statements at trial. The OPCV will act as a link between the counsel and the Chamber in everyday proceedings, by attending hearings on behalf of the CLRV and will act under his or her instructions.

The Victims Participation and Reparations Section (VPRS) will provide the Court periodically with a “comprehensive report on the general situation of the victims as a whole”, including statistics on the victims' population. These reports will be able to assist the CLRV to assess victims' interests by informing him or her on the victims' population, their general situation, the harm suffered, etc.

Who are the victims' representatives and how were they chosen?

On 20 November 2012, the Trial Chamber appointed Mr Fergal Gaynor as CLRV in replacement of Mr. Anyah who represented victims at the Pre-Trial stage for Case 2 (*Kenyatta case*).

On 23 November 2012, the Trial Chamber appointed Mr. Nderitu as new CLRV in replacement of Ms. Chana for Case 1 (*Ruto and Sang case*).

They were appointed after the Chamber instructed the Registry to submit recommendations.

In selecting the candidate, the Registrar was asked to take into account specific criteria, which includes: the candidate's knowledge of the case and of the specific situation of the group of victims; the candidate's willingness and ability to maintain an ongoing presence in Kenya throughout the course of the proceedings.

What is the impact of dropping the case against Mr. Muthaura on victims?

During the status conference on 11 March 2013, the CLRV submitted that a decision by the Chamber to dismiss the charges against Mr. Muthaura should be without prejudice to the right of the Prosecution to bring charges against him in the future, should circumstances change.

On 18 March 2013, the Trial Chamber reminded Mr. Muthaura that protective measures ordered in respect of victims and witnesses shall continue to have full force and effect after the proceedings have been concluded.

Due to the fact that Mr. Muthaura was charged as an indirect co-perpetrator, together with Kenyatta, the scope of the charges is not modified as a result of the decision to drop the case against him.

Similarly the failure to confirm charges against Ali and Kosgey does not impact on victims already accepted to participate, as they were accused of respectively perpetrating the same crimes as in the *Kenyatta and Ruto & Sang* cases.

How will victims and witnesses be protected?

Despite measures to be taken by the ICC at various stages to mitigate the risk for victims, such as concealing identity, it is true that the ICC has limited resources to provide protection to victims participating in the Court proceedings. Victims must be discrete about who they tell and consider appropriate steps to minimise risks to them and their families.

Will victims be able to apply for reparation?

The proceedings regarding reparation are related to conviction. Reparation may be ordered only in relation to the crimes for which the accused was found guilty and only after such a decision is issued. This may take several years.

Will the ICC Trust Fund for Victims assist victims in Kenya beyond the scope of the cases?

Situation victims beyond the scope of the cases may benefit from eventual assistance projects of the TVF. However, as of April 2013, the TVF has not initiated activities in Kenya. As funds are limited, it is not clear whether the TVF intends to do so in the near future.

3.3 What is the scope the two Kenyan cases?

In brief, Case 1 now involves two members of the Orange Democratic Movement (ODM), the opposition party at the time of the elections, and Case 2 involves one member of the Party of National Unity (PNU), the then incumbent party.

Case 1: **The Prosecutor v. William Samoei Ruto** **and Joshua Arap Sang**



Mr Ruto and Mr Sang are being tried jointly in the same trial, for the same charges, albeit at different levels of responsibility.

Charges:

Mr. Ruto and Mr Sang of the ODM are both charged with crimes against humanity of:

- Murder (article 7(l)(a));
- deportation or forcible transfer of population (article 7(l)(d)); and
- persecution (article 7(l)(h)).

Levels of responsibility

Mr. Ruto of the ODM is alleged to be an “indirect co-perpetrator” for crimes against humanity committed against supporters of the PNU. The Pre-Trial Chamber found that he provided “essential contributions” to the implementation of the common plan by way of organising and coordinating the commission of widespread and systematic attacks that meet the threshold of crimes against humanity, in the absence of which the plan would have been frustrated. Mr. Ruto allegedly:

- (i) planned and was responsible for the implementation of the common plan in the entire Rift Valley;
- (ii) created a network of perpetrators to support the implementation of the common plan;
- (iii) directly negotiated or supervised the purchase of guns and crude weapons;
- (iv) gave instructions to the perpetrators as to who they had to kill and displace and whose property they had to destroy; and
- (v) established a rewarding mechanism with fixed amounts of money to be paid to the perpetrators upon the successful murder of PNU supporters or destruction of their properties.

Mr. Sang of the ODM is alleged to have “contributed to the commission” of the same three crimes (murder, forcible transfer and persecution), albeit at a lesser mode of liability, because the Pre-Trial Chamber found that his contribution to the commission of the crimes “was not essential”. He is allegedly responsible to have contributed by virtue of his influence in his capacity as a key Kass FM radio broadcaster. He allegedly contributed in the implementation of the common plan by:

- (i) placing his show Lee Nee Eme at the disposal of the organisation;
- (ii) advertising the organisation’s meetings;
- (iii) fanning violence by spreading hate messages and explicitly revealing a desire to expel the Kikuyus; and
- (iv) broadcasting false news regarding alleged murder(s) of Kalenjin people in order to inflame the violent atmosphere.

What are some of the precise incidents that **Mr. Ruto and Mr. Sang** are being held to account for?

Pre-Trial Chamber II found that there are substantial grounds to believe that:

- Immediately after the announcement of the results of the presidential election and specifically from 30 December 2007 until 16 January 2008, an attack was carried out – following a unified, concerted and pre-determined strategy – by different groups of Kalenjin people, in locations including Turbo town, the greater Eldoret area (encompassing Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town and Nandi Hills town, in the Uasin Gishu and Nandi Districts, the Republic of Kenya. The attack allegedly targeted the civilian population, namely the Kikuyu, Kamba and Kisii ethnic groups, which were perceived as Party of National Unity (PNU) supporters.
- In particular, the violence in the Uasin Gishu District (encompassing Turbo town and the Eldoret area) allegedly resulted in more than 230 people killed, 505 people injured and more than 5,000 people displaced. In the Nandi District (encompassing Kapsabet town and Nandi Hills town), the attack allegedly ended in the death of at least 7 persons and thousands of persons were forced to seek refuge at Nandi Hills police station and in the surrounding areas. A number of houses and business premises were also looted and burned.
- Allegedly, there was a plan to punish PNU supporters in the event that the 2007 presidential elections were rigged, which aimed at expelling them from the Rift Valley, with the ultimate goal of creating a uniform Orange Democratic Movement (ODM) voting block. In order to implement the plan agreed upon, a network of perpetrators has been allegedly established with the purpose of evicting members of the Kikuyu, Kisii, and Kamba communities. The Network was allegedly under responsible command and had an established hierarchy. The network possessed the means to carry out a widespread or systematic attack against the civilian population, as its members had access to and utilised a considerable amount of capital, guns, crude weapons and manpower.

Case 2:

The Prosecutor v. Uhuru Muigai Kenyatta



Mr. Kenyatta of the PNU is alleged to be indirect co-perpetrator of the crimes against humanity of murder, forcible transfer, rape, persecution, and other inhumane acts, allegedly committed against ODM supporters, partly in retaliation against attacks against the PNU supporters.

Charges and level of responsibility

Mr. Kenyatta is accused of being criminally responsible as an “indirect co-perpetrator” for the crimes against humanity of:

- murder (article 7(l)(a));
- deportation or forcible transfer of population (article 7(l)(d));
- rape (article 7(l)(g));
- persecution (article 7(l)(h)); and
- other inhumane acts (article 7(l)(k)).

What are some of the specific incidents Mr Kenyatta is being held to account for?

The Pre-Trial Chamber found that there are substantial grounds to believe that:

- From 24 until 28 January 2008, the Mungiki criminal organisation allegedly carried out a widespread and systematic attack against the non-Kikuyu population perceived as supporting the Orange Democratic Movement (ODM) (mostly belonging to Luo, Luhya and Kalenjin ethnic groups) in Nakuru and Naivasha.
- The attacks in or around Nakuru and Naivasha resulted in a large number of killings, displacement of thousands of people, rape, severe physical injuries, mental suffering and destruction of property.

- Between, at least, November 2007 and January 2008, *inter alia*, Muthaura, Kenyatta and members of the Mungiki, allegedly created a common plan to commit these attacks. According to the alleged plan, it was envisaged at the meetings that the Mungiki would carry out the attack with the purpose of keeping the Party of National Unity (PNU) in power, in exchange for an end to government repression and protection of the Mungiki's interests.
- The contribution of Uhuru Muigai Kenyatta to the implementation of the common plan was allegedly essential. More specifically, Mr Kenyatta's contribution allegedly consisted of providing institutional support, on behalf of the PNU Coalition, to secure:
 - (i) the agreement with the Mungiki for the purpose of the commission of the crimes; and
 - (ii) the execution on the ground of the common plan by the Mungiki in Nakuru and Naivasha.

4. Filling the impunity gap: Other avenues for justice for post-election violence victims?

What is the relationship between the ICC and national courts?

National courts are responsible for the prosecution of those perpetrators not prosecuted by the ICC. The ICC investigates and prosecutes only if states or national courts are unable or unwilling to do so.

Kenyan authorities have an obligation under international law to provide effective remedies to victims of serious violations of human rights committed in the 2007-8 post-election violence; and reparation when crimes were committed by state agents or when the State failed to prevent certain crimes committed by private citizens.

When the Kenyan Government challenged the admissibility of the Kenyan cases before the ICC, the Pre-Trial Chamber ruled that there was no “concrete evidence of ongoing proceedings before national judges” against the accused.

To date only few alleged perpetrators were brought to justice before Kenyan courts. The Kenyan Office of the Director of Public Prosecutions has reportedly initiated new investigations into at least 6,000 cases involving alleged low and mid-level perpetrators. A task force to review those cases was set up in February 2012. However, in August 2012, the task force concluded that most PEV cases were unsuitable for prosecution due to a lack of evidence.

What are victims’ rights in the context of the Kenyan justice system?

Under international law, victims of serious violations of international human rights and humanitarian law have a right to an effective remedy, including reparation.

Whatever the outcome of the Kenyan trials before the ICC, the Kenyan authorities have a primary obligation to investigate alleged crimes committed during the post-election violence and bring perpetrators to justice.

The *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, provides that victims of such crimes must have (a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; (c) Access to relevant information concerning violations and reparation mechanisms.

The current initiative by the Kenyan Government to create an International Crimes Division within the High Court in Kenya will have to respect those principles.

Are victims of the ICC cases protected in Kenya?

The Kenyan authorities have an obligation to protect victims. The Witness Protection Agency, established in November 2009, is tasked to provide protection to witnesses who will testify locally and before the ICC, but it lacks funding to implement its mandate.

What will be the impact of the Truth Justice and Reconciliation Commission (TJRC) process?

The TJRC report was publicly released on the 21st of May 2013. This report covers historical injustices and human rights violations that occurred between 12th December 1963 and 28 February 2008. The TJRC has recommended the establishment of a reparation fund that shall be used to provide reparations to victims of human rights violations and historical injustices. The recommended reparations are material and non-material in nature and shall be granted to individual victims and victim groups. The reparation framework foresees reparations for violations of the right to life and the right to personal integrity, forcible transfer of populations, historical and contemporary land injustices and systematic marginalization. In so doing, it concentrates on extremely vulnerable individuals, groups who have suffered injustice specifically including historical land injustices and individuals who have been victims of violations of the right to life as well as the right to personal integrity.

Other recommendations related to access to justice for 2007-8 post-election violence victims include:

- Prosecution of individuals involved in torture and ill-treatment
- Declaration under article 36(6) of the Protocol to the African Charter on Human and People's Rights on the establishment of the African Court on Human and People's Rights
- Issuance of a public report on the progress of investigations and prosecution of 2007-8 post-election related violence
- Investigation and prosecution of all adversely mentioned persons in official reports on politically instigated ethnic violence or clashes notwithstanding their official or other status. The Director of Public Prosecutions shall also take action in respect to the recommendations of various reports of the Kenya National Commission on Human Rights on ethnic and political violence including its report on the 2007-8 post-election violence.

Fast tracking of the establishment of the International Crimes Division of the High Court by the Judiciary, which shall be responsible for the trial of some of the cases referred to the Director of Public Prosecutions for investigations and prosecution.

Can victims use regional Human Rights Mechanisms or United Nations mechanisms for PEV?

Victims can file complaints before regional human rights mechanisms or UN bodies in relation to the responsibility of States (as oppose to individuals) for human rights violations. Such cases can be taken under certain conditions, notably that the applicant has exhausted domestic remedies in Kenya prior to bringing a case before one of those mechanisms. Domestic remedies must be effective, available and adequate – if they are not, a case could be made that no effective domestic remedy exists and therefore a case could be brought directly to a regional or international body.



Kituo cha Sheria offers assistance to victims in Kenya that decide to participate in the ICC proceedings and to apply for reparations. KITUO gives out information, assists in filling in the form and to collect all necessary documents. For all contact details see outer back page.

REDRESS is an NGO that seeks justice and reparation for survivors of torture and related international crimes. REDRESS, along with others, played a key role in ensuring victims' rights in the Rome Statute. REDRESS conducts advocacy and research in partnership with local organisations to ensure the ICC fulfils its mandate towards victims. REDRESS also facilitates the Victims' Rights Working Group, a network of over 400 national and international civil society groups and experts created in 1997 under the auspices of the Coalition for the International Criminal Court (CICC) and works to ensure that victims' rights are effectively protected and respected, and that their needs and concerns are met throughout the ICC's judicial process. More information on our work is available on our website: www.redress.org and www.vrwg.org

List of common Acronyms

CICC – Coalition for the International Criminal Court
CLRV – Common Legal Representative for Victims
GIZ - Gesellschaft für Internationale Zusammenarbeit
ICC – International Criminal Court
ODM – Orange Democratic Movement
OPCD – Office of Public Counsel for the Defence
OPCV – Office of Public Counsel for Victims
PEV – Post Election Violence
PIDS – Public Information and Documentation Section
PNU - Party of National Unity
TFV – Trust Fund for Victims
TJRC – Truth Justice and Reconciliation Commission
UN – United Nations
VPRS – Victims’ Participation and Reparations Section
VWU – Victims’ and Witnesses Unit