

A LUXURY VICTIMS CANNOT AFFORD

Meaningful Participation at the International Criminal Court



Abstract

Under Article 68(3) of the Rome Statute of the International Criminal Court victims are able to present their views and concerns to the Court as long as this is not prejudicial to, or inconsistent with the rights of the accused and a fair and impartial trial. In Kenya, 327 victims were accepted to participate in the Ruto et al., case and 229 victims are currently participating in the Kenyatta case. These figures are expected to increase prior to the trial's commencement. Victim participation can be compared somewhat to the *partie civile* system in continental jurisdictions. However, in general, many common law countries allow victims to present their views and concerns to the court at sentencing stage, through either oral or written victim impact statements.¹ At the ICC, victims can present their views and concerns directly to the judges through their legal representative (lawyer) in order to ensure that their voices are heard and their interests are taken into account during the proceedings. This is called

'victims' participation in proceedings'. The participation of victims in proceedings offers victims the unique opportunity to be directly involved in the ICC process, even when they live far away.

The ad-hoc tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were criticised for treating victims merely as sources of information within the criminal process, or strictly as witnesses. Article 68(3) attempts to remedy these problems. The ICC, being a judicial institution, does not have the mandate to assist victims in any other way, for example with livelihood concerns etc. Instead, the ICC Trust Fund for Victims has a dual mandate, the first of which is to assist victims in situation countries via discrete projects; the second is related to the implementation orders in the case of a conviction. The Trust Fund for Victims (TVF) is yet to commence its operations in Kenya. What this paper argues is that experience shows that justice is often not the primary concern of victims and most are plagued with more

¹ Section 329C. (1) of the Kenyan Criminal Procedure Code, for example, states: "If it considers it appropriate to do so, a court may receive and consider a victim impact statement at any time after it convicts, but before it sentences," However, in practice this provision is rarely exploited in Court by the prosecution or the victims.

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immediate concerns, such as medical care, livelihood assistance, psycho-social support, education etc. The reality is that victims cannot meaningfully participate in the ICC proceedings unless these immediate needs are met, either before the proceedings or concurrent with them. However, the Kenyan government has yet to take full responsibility for the needs of victims and it should take urgent steps to correct this.

Note on Methodology

The author² has been meeting and working with the victims of the post-election violence in various contexts; therefore the assertions/observations made here are based on both one-on-one meetings with specific victims, and on group meetings with victims carried out over a period of two years. No attempt has been made to quantify any data obtained, and instead the report is based upon a qualitative assessment of the needs of victims, specifically those participating as victims before the International Criminal Court.

Introduction

The post-election violence in Kenya was marked by gross violations of laws and of fundamental human rights. Crimes such as murder, rape, grievous assault, forced displacement, looting and destruction of property (perpetrated both by armed militia and state security forces) were rife during the month and a half that violence enveloped the nation, resulting in an estimated 1,133 deaths, and over 650,000 people displaced.³ Several gaps have been identified in the provision of services, support and assistance to victims of the 2007/08 election-related violence.⁴ Initiatives geared toward immediate action to stop the violence and to restore fundamental rights and freedoms formed the first agenda item of the Kenya National Dialogue and Reconciliation (KNDR) Agreement signed in February 2008. One of the mechanisms established to implement this agenda item was the Commission of Inquiry into the Post-Election Violence (also known as the Waki Commission after its chairman, Justice Phillip Waki). Through the commission's recommendations a special tribunal to investigate and prosecute the perpetrators of the violence was to be established

within a specified time frame, failing which the matter was to be referred to the International Criminal Court. The second agenda item of the KNDR agreements was to secure immediate measures to address the humanitarian crisis, and to promote reconciliation, healing and restoration. The measures indicated in the agreement were both comprehensive and positive⁵. However, its implementation has so far been wanting, and has to a large part been frustrated by the cavalier approach the state has taken to the very serious needs – basic, medical and socio-economic – of the victims.

Following the election-related violence, there have been a few attempts to alleviate the plight of victims, with particular emphasis on internally displaced persons (IDPs). However, initiatives to coordinate efforts to assist the victims have so far made little progress, highlighting a lack of political will to compensate victims of the post-election violence. Even less has been done for those who were forcibly displaced and dispersed among other host communities, as well as victims of rape and police violence, who continue to suffer in relative obscurity. In addition there have been allegations of bias in the resettlement of IDPs. The number of victims who have benefited from support initiatives and/or assistance provided by non-governmental organisations or development agencies is unclear. The restoration of livelihoods amongst the victims of the 2007/08

⁵ Some of the specific action steps under agenda item number 2 of the KNDR agreements included amongst others:

- I. With Respect to Immediate Measures to Address the Humanitarian Crisis: the KNDR committee agreed that the Government would provide assistance to the victims of the violence and displacement as follows:
 - a) Assist and encourage displaced persons to go back to their homes or other areas and to have safe passage and security throughout
 - b) Provide adequate security and protection, particularly for vulnerable groups, including women and children in the camps.
 - c) Provision of basic services for people in displaced camps:
 - Ensure that there is adequate food, water, sanitation and shelter within the affected communities – both those in displaced camps and those remaining in their communities.
 - Provide medical assistance with a special focus for women, children, people living with HIV and AIDS and the disabled, currently in displaced camps.
 - Ensure all children have access to education. This will involve reconstruction of schools; encouraging return of teaching staff and provision of teaching materials, and assistance for children to return to their learning institutions.
 - d) Ensure that victims of violence in urban areas are not neglected in the implementation of the above.
 - e) In order to promote food security, displaced farmers should be assisted to return to their farms. All farmers affected by the crisis should be assisted and encouraged to safely resume their farming activities.
- II. With Respect to Immediate Measures to Promote Reconciliation, Healing and Restoration:
 - a) Joint peace rallies should be convened by all leaders of parties to promote peace and reconciliation.
 - b) Ensure that the freedom of expression, press freedom and the right to peaceful assembly are upheld.
 - c) Counselling support should be provided to those affected communities.
 - d) Development of a national resettlement programme
 - e) The law on registration of persons should be reviewed to remove the emphasis on ethnicity.
 - f) Establishment of a Truth, Justice and Reconciliation Commission that includes local and international jurists.

² Anushka Sehmi is the Case Manager for the Legal Representative for Victims in *The Prosecutor v. Uhuru Muigai Kenyatta*. The views expressed in this article are entirely her own and do not necessarily reflect the views of Common Legal Representative for victims

³ For a clearer indication of figures please refer to the Commission of Inquiry into the Post-Election Violence (CIPEV) Report, 2008

⁴ See for example, *Elusive Justice- A Status Report on Victims of the 2007-2008 Post-Election Violence*, a joint report by the Kenyan Human Rights Commission (KHRC) and the International Commission of Jurists, ICJ-K,

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election-related violence is critical, especially as most of them were self-reliant before the violence took place. Resettlement for those who do not want to return to their prior places of residence, as well as providing quality education for their children, is also a priority in relation to the victims' needs. In addition, a large number of victims require medical and psychosocial care. Individuals irreversibly scarred or maimed (both physically and psychologically) by the violations inflicted upon them during the election-related violence have yet to receive adequate or comprehensive care. These needs go to the core of the victims' dignity, which must be restored as an essential component of the justice that is sought.

Who are the victims of the post-election violence?

The post-election violence in 2007-2008 affected all but two provinces in Kenya, including both urban and rural parts of the country⁶. The Waki Commission estimates that approximately 600,000 people were displaced, with a possible 1,300 people killed. However, for purposes of victim participation at the ICC, only a discrete victim category can apply to participate in the two on-going Kenya cases. The Pre-Trial Chamber II in its decisions of 23 January 2012⁷ decided that the following crimes occurred in the areas specified below on these specific dates:

CASE ONE (Ruto et al)	Nandi Hills Town	30 December 2007 to 2 January 2008	<ul style="list-style-type: none"> • Murder • Forcible Transfer • Persecution (only as Murder and Forcible Transfer)
CASE TWO Kenyatta	Nakuru	24 January 2008 to 27 January 2008	<ul style="list-style-type: none"> • Murder • Forced Displacement • Rape • Other Inhumane Acts • Persecution: (Including
	Naivasha	27 January 2008 to 28 January 2008	<i>Murder, Forced Displacement, Rape, and Other Inhumane Acts)</i>
			<ul style="list-style-type: none"> • Murder • Forced Displacement • Rape • Other Inhumane Acts • Persecution: (Including
			<i>Murder, Forced Displacement, Rape, and Other Inhumane Acts)</i>

	WHERE?	WHEN?	WHAT CRIME/S?
CASE ONE (Ruto et al)	Turbo Town	31 December 2007	<ul style="list-style-type: none"> • Murder • Forcible Transfer • Persecution (only as Murder and Forcible Transfer)
	Greater Eldoret Area	1 January to 4 January 2008	<ul style="list-style-type: none"> • Murder • Forcible Transfer • Persecution (only as Murder and Forcible Transfer)
CASE ONE (Ruto et al)	Kapsabet town	30 December 2007 to 16 January 2008	<ul style="list-style-type: none"> • Murder • Forcible Transfer • Persecution (only as Murder and Forcible Transfer)

Therefore, there is now a narrowed scope in each of the cases before the ICC. For victims of the 2007/08 post election violence, this means that only those victims of the crimes for which the accused are charged will be eligible to participate in either case during the trial process. The reason for this is that these victims were directly affected by the specific crimes that happened within those specific areas during the dates identified in the Confirmation of Charges decisions, and only they can best illustrate their interest in the cases. As a result, victims who do not fall into one of the categories above will not be able to participate at the trial phase of the proceedings. They will remain as victims of the Kenya 'situation', and their participatory rights before the ICC remain very limited. Unfortunately, the majority of the victims of the post-election violence belong to this category.

Victims' Right to Dignity

The right to dignity is nowadays accepted as "the highest human right" – "the source of rights". The Preamble to the UN Universal Declaration on Human Rights (UDHR) states that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Furthermore, Article 1 of the UDHR

⁶ See Commission of Inquiry into the Post-Election Violence, 2008
⁷ See Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373 and ICC-01/09-02/11-382-Red

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states that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”⁸ This brings us to the question of rights. More often than not civil and political rights are prioritised, and there is often a failure to deliver economic, social and cultural rights within a legal framework. As C. Chinkin, a professor of international law at the London School of Economics argues, “violations of economic and social rights post-conflict exacerbate earlier violations creating a double injustice for victims. Victims may be less willing to participate in transitional justice mechanisms (such as the ICC), as either witnesses or victims, hampering prosecution efforts.”⁹

Factors that may prevent victims from applying to participate before the ICC, or prevent them from meaningfully participating include poverty; unemployment; lack of medical assistance; the need to obtain food and/or shelter; the need to take care of sick family members; child care needs; and a lack of transport to attend relevant meetings. In this context, further attention has to be paid to the more vulnerable members of a victim community, such as women, and especially victims of sexual violence (male and female). Many of the female victims who attend meetings have to attend with their children or babies, making it difficult for them to concentrate on the issues at hand.

Moreover, if the social and economic rights of victims are ignored this could be an obstacle to long-term reconciliation within communities, and peace. Furthermore, failure to address these rights could become a cause for renewed conflict. Indeed, if the cycles of poverty and marginalisation are not addressed, we

may run the risk of seeing the same victim populations either being victimised again or manipulated by political leaders who take advantage of their weak social and economic position. In fact one interesting assertion behind the cause of conflict is that perpetrators of international crimes believe that they themselves have been victimised and aim to avenge the harm that they have suffered.¹⁰ In Kenya examples are not difficult to find. The Waki Commission found that “the post-election violence was more than a mere juxtaposition of citizen-to-citizen opportunistic assaults, but were systematic attacks on Kenyans based on their ethnicity and their political leanings. Attackers organised themselves along ethnic lines, assembled considerable logistical means and travelled long distances to burn houses, maim, kill and sexually assault their occupants, because these people were of particular ethnic groups and political persuasion.”¹¹

The Commission pointed out that one of the causes behind the conflict was the feeling of historical marginalisation among certain ethnic groups, arising from perceived inequities concerning the allocation of land and other national resources, as well as access to public goods and services. These grievances, in turn, are often manipulated by the political class to order to galvanise support. In 2007 and 2008 this had tragic consequences. The Commission highlighted that many Kalenjins argue that the violence was a product of longstanding anger over land distribution following independence. They argue that land was alienated by the colonial government and then unfairly parcelled out to Kikuyus and other groups whom the Kalenjin view as outsiders.¹² Narratives from victims themselves are telling, with many references made to the “removal” of certain tribes from specific areas.¹³ Therefore, it is likely that if the causes of conflict and the restoration of victims’ social and economic rights are not addressed the cycle of violence will continue.

The role of the legal representative of victims, amongst others, is to convey to the Court the “views and concerns” of victims. The victims can provide their own voices to the criminal process, and one that is

⁸ The Protection of Economic, Social and Cultural Rights Post- Conflict, Professor C. Chinkin, available at www2.ohchr.org/english/issues/women/.../Paper_Protection_ESCR

⁹ Ibid, p.4

¹⁰ For example, see ‘Eroding the Myth of Pure Evil- When Victims become Perpetrators and Perpetrators Victims, A. Smeulers, in “Victimological Approaches to International Crimes: Africa, R. Letschert, R. Haveman, A. Brouwer and A. Pemberton, 2011, who argues that past victimhood is such a powerful motivating factor has often been abused by political entrepreneurs, as shown by several examples in history. Political rhetoric in which past victimhood is combined with an alleged new threat is particularly effective to motivate people, as we have seen in 1994 during the Rwanda genocide.

¹¹ Ibid footnote 5, Executive Summary, viii

¹² Ibid footnote 10, p.57

¹³ Ibid 11

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Post-election violence leads mother to prostitution

Jane Ochieng³⁰ lived in Naivasha in 2008 and earned her living by selling fish in the area. On 27 January 2008, she states that the estate she lived in, with her husband and her two young children, was invaded by the Mungiki³¹. They were allegedly armed with machetes and were seeking out those from the Luo tribe. According to her they were shouting that “the Luos and their presidential candidate must see fire”. Their home did not offer much resistance from the marauding gang, who quickly broke in. Jane, pregnant at the time, states that she was able to hide her children with a neighbour; however she did not escape. The gang of four raped her in turn and in the presence of her husband. Jane states that it broke her spirit as she was raped while still pregnant and up to date still suffers from flashbacks relating to the incident. Her home was razed to the ground, and she and her husband took shelter at a make-shift IDP Camp. Jane states that as a result of the insecurity at the time, she was unable to seek the necessary treatment from the hospital, and still suffers from gynaecological problems related to her violation. Neither was she able report the incident to the police. After Jane and her family left Naivasha, her husband abandoned her, leaving her to fend for herself and her, now, three children.



In terms of her status as a participating victim before the ICC, Jane states that she wanted to participate because she wanted “the world to know the truth about what happened to her”. However, since 2008 things have taken a turn for the worse for her. In the area where she is now located, her skills as a trader are not much use. Jane has serious medical needs for her physical injuries that include fistula and ulcers sustained during the gang rape, and suffers from post-traumatic stress. In addition, she has to feed and educate her children by herself after her husband abandoned her. Sadly, this has led her to the only source of income that can cover all these costs - prostitution. Jane was never compensated as an internally displaced person by the government, nor has she received any medical or psycho-social support, except on an ad-hoc basis from community-based organisations that are struggling with the finite resources that they have. Jane states that when her lawyer, representing her before the ICC, came to visit, she was unable to attend, as there was no one to take care of her children, and she simply could not afford to miss one day of ‘work’ to speak with her lawyer. At the moment Jane’s greatest fear is contracting the AIDS virus from her clients, and she is very worried about who will take care of her children if she contracts HIV and passes on.

³⁰ The names of the four individuals mentioned in this report have been changed in order to protect their identities as victims participating before the ICC. Certain facts related to where the violations took place have also been altered for the same reasons.

³¹ Mungiki are an outlawed gang of criminals/ religious sect

distinct from those of the prosecution and the defence. The Preamble of the Rome Statute recognises that “during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”. With victim participation at the ICC, it was hoped that victims would be able to have a voice within the criminal process and articulate issues that resonate most with them. Thus, they would not be treated as passive actors within the process, or just as witnesses. At the confirmation stage approximately 600 victims were accepted to participate at the International Criminal Court. The number is expected to rise as the trial commences and the modalities for victim participation are established. Article 68(3) of the Rome Statute of the International Criminal Court states that: “where the personal interests of the victims are affected the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate

by the Court and in a manner which is not prejudicial to, or inconsistent with the rights of the accused and a fair and impartial trial.”¹⁴ The question is: how will victims be able to participate in the proceedings before the ICC while their basic needs such as housing and medical assistance remain unmet? Is the participation of victims in the process meaningful if their dignity is not first restored and their social and economic rights upheld? Indeed, how will victims be able to participate in a meaningful manner if they continue to eke out a meagre existence almost five years after the violence ended? The victims are unable to afford the transport costs associated with meeting their lawyers. Most of those who attend meetings with their lawyers report that they are no longer able to support themselves because they literally have to “start from scratch” in areas where they are perceived to be “outsiders”.

¹⁴ Article 68(3), Rome Statute of the International Criminal Court

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Struggling to survive after Post-Election Violence



John Omondi, another victim participating at the ICC, was in Nakuru on 24 January 2008 when the Mungiki invaded the estate where he was living. John witnessed his children being assaulted by the Mungiki and the death of fellow neighbours who were “hacked and slashed to death”. He and his children survived the assault, unlike many others who perished, and took refuge at a nearby IDP camp. John states that as he ran for safety, he saw the ground stained with blood and the bodies of those who were not so lucky to escape, the sight of which still haunts him today. At the time John was a businessman and had small work premises. . Both his home and work area were burnt to ashes during the violence.

John and his family were forced to move to another part of Kenya, and he has not been able to recover from the loss of his life’s work and earnings. John states that he has to literally start from scratch, and work has been very difficult to find. As a result, one of his children was forced to leave school due to lack of school fees. The others did not go back to school and have to take on odd jobs to help with the household costs. John states that his children all suffer from trauma resulting from their own ordeal and what they witnessed and John too, often has nightmares. He says that he wanted to participate at the ICC because he wants to be compensated for what happened to him and his family, and to make sure that such events never happen again. John is keen to know how his legal representative and the ICC can assist him, because to him it seems like the Kenyan government does not care about him, and others like him, who were forced to flee Nakuru and Naivasha in 2008.

The fact is that victims emphasise the need for economic support. The Human Rights Centre at Berkeley Law School conducts research on war crimes and other serious violations of humanitarian law and human rights worldwide. It has conducted three population-based surveys of particular note in the Central African

Republic, Uganda and Cambodia regarding victims’ views on accountability and justice.¹⁵ In these surveys victims made interesting assertions, In the Central African Republic (CAR), respondents stated that peace was their main priority, followed by concerns over livelihood activities (work) and money. In Uganda,

¹⁵ See, ‘After the First Trial: A Population-Based Survey on Knowledge and Perception of Justice and the Extraordinary Chambers in the Courts of Cambodia (June 2011). Transitioning to Peace: A Population-Based Survey on Attitudes About Social Reconstruction and Justice in Northern Uganda (December 2010). Building Peace, Seeking Justice: A Population-Based Survey on Attitudes about Accountability and Social Reconstruction in the Central African Republic (August 2010)’. Available at <http://www.law.berkeley.edu/hrc.htm> See Notification and Request for Re-notification by 5 December 2011, 31 October 2011, ICC-01/09-02/11-362 filing by Legal

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respondents' priorities have shifted from peace and security (in 2007) towards sustenance and fulfilment of basic needs, such as food (28%), agriculture, including access to land and inputs such as seeds or fertilisers, (19%), education (15%), and healthcare (13%). Surveys carried out in Cambodia highlighted that while justice is important for the population, its priorities were jobs and services to meet basic needs, including health and food, as well as improvements in the country's infrastructure, such as electricity, roads, and schools. In fact, although the population viewed accountability as important and expressed a desire to see former Khmer Rouge tried and punished, their priorities were basic socio-economic needs rather than justice. Some victims in Kenya have also asserted that prosecutorial justice is not their priority. It is easy to see why: if a victim, who was previously self-sufficient, now has to resort to prostitution in order to feed her children, the possibility of a remote justice somewhere in the Netherlands is not going to be a priority. Victims who have been raped and sexually assaulted have received little or no medical or psycho-social support except on an ad-hoc basis by non-governmental organisations. In this context, how can victims provide meaningful contributions to the two cases currently before the ICC, given their more pressing needs? The Legal Representative for Victims in the Kenyatta case has submitted a filing informing the Chamber that two of the victims that he represents have passed away (presumably due to medical conditions).¹⁶

Essentially the problem lies in the fact that most transitional justice mechanisms do not follow a victim-centred approach. Traditionally, criminal processes support a perpetrator-centred perspective, where the victim's role is confined to being the sufferer of a particular harm. On the other hand, a victim-centred approach would place the victim at the centre of any transitional justice mechanisms. Simon Robins, who has conducted research on the need for a victim-centred approach in both Nepal and Timor Leste,¹⁷ argues that it is usually the case that "typically both the goals and mechanisms of transitional justice are delineated by local elites (often those who were themselves involved in the conflict that preceded the transition) and supported by an international community remote from the context and from indigenous understandings."

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In the Kenyan context, attempts to establish a special tribunal to prosecute the mid to lower level perpetrators of crimes during the post-election violence have failed on a number of occasions. The onus now clearly lies on the ICC to provide Kenyans with some semblance of accountability for the 2007-2008 post-election violence. Indeed, it can be said that the Kenyan government has made minimal efforts to ensure justice for the victims of the post-election violence.¹⁸ Earlier this year, Director of Public Prosecutions Keriako Tobiko appointed a team of special prosecutors to handle the over 5,000 pending post-election violence cases. However, only 24 post-election violence suspects have been convicted out of the 6,081 cases presented by the police to the task force for review.¹⁹ This in itself is a damning assessment of the government's commitment to getting justice for the victims. However, the ICC is not without its problems, given that it is only bringing charges against four accused persons. In the context of victim participation in Kenya, the Court has also been criticised.²⁰ Too often decisions are taken by the various organs of the Court and the judges without consulting the victims, compounding their general sense of disempowerment. Therefore, justice is rendered from above, without taking into consideration the needs and concerns from the ground. Timor Leste experienced conflict after

¹⁸ Human Rights Watch point out that four years after the onset of Kenya's 2007-2008 post-election violence...Kenya's Government has done little to ensure the prosecution of perpetrators in all but a handful of the 1,133 or more killings committed during the violence. See 'Turning Pebbles,-Evading Accountability for Post-Election Violence in Kenya', December 2011.

¹⁹ See 'Post-Election Suspects may fact International Law', 18 August 2012, the Standard Newspaper

²⁰ See for example, 'Victims Participation in the ICC Cases is Crucial', by J. Gondi, 15 October 2012, The Star; KPTJ Submission to the Office of the Prosecutor of the International Criminal Court, 22 October 2012; Comment on the Victims Decision of Trial Chamber V, available at <http://humanrightsdoctorate.blogspot.it/2012/10/comment-on-victims-decision-of-trial.html>

¹⁶ Representative for victims in the Muthaura et al., case who stated that two victims who were participating in the case passed away.

¹⁷ See S. Robins, 'Challenging the Therapeutic Ethic: A Victim-Centred Evaluation of Transitional Justice Process in Limor-Leste', S. Robins, The International Journal of Transitional Justice, 2012, 1-12, and 'Towards Victim Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Post conflict Nepal', S. Robins, in The International Journal of Transitional Justice, Vol 5, 2011, 75-98 i

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The onus now clearly lies on the International Criminal Court to provide Kenyans with some semblance of accountability for the 2007-2008 post-election violence. Indeed, it can be said that the Kenyan Government has made minimal efforts to ensure justice for the victims of the post-election violence.

the departure of the Portuguese in 1974, which led to fighting between the socialist and nationalist parties. In Timor Leste the need expressed by the greatest number of victim families (61%) was for economic support.²¹ The practice of enforced disappearances in Nepal during the ten years of conflict (1996 - 2006) was amongst the worst in the world. Both sides of the conflict, the Nepali security forces and members of Communist Party of Nepal (Maoists, CPN-M), the latter to a lesser extent, were responsible for acts of enforced disappearance. In Nepal, studies showed that 'compensation' was the term employed most consistently to articulate needs for reparation, reflecting the priority of economic support. Although these studies are merely anecdotal, the similarities between the needs expressed by the victims in Kenya are undeniable.

Should the ICC be doing more to address these issues? Granted, the Court is a judicial institution and not a humanitarian organisation. However, the Court does not exist in a vacuum, and perhaps the Trust Fund for Victims (TFV) should step in to assist the most vulnerable victims. The TFV has a dual mandate to implement both Court-ordered and general assistance to victims under the ICC's jurisdiction. In relation to reparations - the TFV is responsible for implementing court-ordered reparation awards against a convicted person when directed by the Court to do so. The TFV is also tasked with undertaking general assistance - for example using voluntary contributions from donors to provide victims and their families, in situations where the Court is active, with physical rehabilitation, material support, and/or psychological rehabilitation. In relation to its first role, the Court may order money and other property collected through fines or forfeiture from a convicted person to be transferred to the TFV for the

implementation of reparations awards. The TFV can also complement such resources through voluntary contributions from donors. The TFV general assistance is supported solely by voluntary contributions. It should be implemented before the conclusion of the trial, and is not limited to victims participating in proceedings before the Court. It can be implemented once the Trust Fund Board has notified the Court of the necessity to provide assistance to victims, and where this does not affect the fairness of trial, as stipulated in Regulation 50 of the TFV regulations.

On the website of the TFV²², it is stated that this mandate "serves as a very immediate response to the urgent needs of victims and their communities who have suffered from the worst crimes in international law." In Kenya, this proves otherwise - and the response of the TFV for victims has been anything but "immediate". The Prosecutor of the International Criminal Court was authorised by Pre-Chamber II to open investigations in Kenya on 31 March 2010²³. The TFV has yet to begin its operations in Kenya; meanwhile the victims continue to suffer. Also important to note is that it may be the case that the TFV will not assist the victims participating in the two cases, but rather the victims of the Kenya situation. Although this is laudable in terms of reaching out to all the victims of the post-election violence in Kenya, those participating in the cases should not be forgotten either. The Court should also consider collaborating with other actors and humanitarian agencies that are willing to assist the victims of crimes that fall under the jurisdiction of the ICC. The ICC should use its standing as the only permanent international criminal court to lobby and seek out partner organisations, both international and local, that are able to assist the victims across the various situations under the Court's jurisdiction. It has to be understood that the Court does not operate in

²¹ See S. Robins -ibid footnote 16, who states that when victims are consulted about needs arising from violations, they will necessarily seek to see their most urgent demands noted, making explicit the impossibility of attempting to disentangle the impacts of past serious crimes and the continuing violation of the social and economic rights of the poor.

²² <http://www.trustfundforvictims.org/>

²³ 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

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Shattered future, hounded from their home – Grace’s story



Grace Maina used to live in Kapsabet prior to the post-election violence. Immediately after the 2007 election results were announced a gang of young Kalenjin men attacked her home, where she was sleeping with her husband and her four children. She states that the youth poured paraffin over the entire house and ordered them to “leave to Nyeri since they had voted for Kibaki”. The family were extremely afraid to leave the shelter of their home for fear of what awaited them outside, but as the structure caught alight, she and her children had no choice but to follow her husband to safety via a window they managed to break. Once outside, Grace’s husband was attacked with machetes by the gang, who left him for dead, and then ran away into the darkness. Grace and her children had no option but to run and hide in a nearby forest. The next day they learnt that the police had found her husband and managed to take him to hospital. However, his injuries were so severe that he is now physically disabled and need to be assisted on a daily basis. The family have never returned to their home area to date.

Grace states that she desperately wants to support her two daughters to start their secondary education. She has very strong views on the need for women to be self-sufficient and her dream would be to make sure that her two daughters are able to earn their own living. However, Grace still lives in an IDP camp in deplorable conditions as she waits to be resettled in a home that is ostensibly still being built. For Grace it is imperative that all those involved in the post-election violence be arrested and prosecuted. She is not happy with the way the ICC has conducted the cases so far. In terms of victim participation, she states that the process has not been of great value as she has not been “involved and her experience has not been recorded”. It is her hope that at the end of the ICC process she will get back what she lost during the violence. Lastly, Grace says that compared to her life before the violence, she is in great need of many things that she could easily afford previously.

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Most of those who attend meetings with their lawyers report that they are no longer able to find means of supporting themselves due to the fact that they literally have to “start from scratch” in areas where they are perceived to be “outsiders”



isolation and it will often be the case that governments will be “unwilling or unable” to assist victims under their jurisdiction. In conclusion a lot more could be done by the ICC to address the immediate needs and concerns of victims.

The Government of Kenya

Any assistance provided by the Court and other external actors, of course does not remove culpability from the Kenyan government for failing to provide the victims of the post-election violence with any assistance. The initial resettlement initiative conducted by the government was Operation Rudi Nyumbani, which had mixed results in terms of its success. Earlier this year the UNDP (United Nations Development Programme) stated that it was satisfied with the progress made by the government to settle IDPs affected by the post-election violence. However, the UNDP representative did assert that the government should step up initiatives to restore the livelihoods of IDPs through economic activities.²⁴ The UNDP has been funding the Post-Election Violence (PEV) Livelihoods Recovery Project, a joint project with the Government of Kenya.²⁵ The project locations cover Kitale, Molo, Nakuru, Eldoret and Kisumu. Although this is a step in the right direction, most victims are yet to hear of it and it is debatable how much impact this project has had on victim communities as a whole. Furthermore, according to government statistics there are 6,973 IDPs who are yet to be resettled, and are living in 21 camps across the country. On 4 October 2012, the IDP Policy Bill was passed in Parliament and is to be enacted into law²⁶. However, on 20 October

2012, a group of IDPs from a camp in Gilgil issued the government with a two week ultimatum to deal with the resettlement and compensation of all IDPs or risk a national demonstration in Nairobi.²⁷ This illustrates the frustrations of the victims of the post-election violence who have effectively been put ‘on hold’ for four years and left with no choice but to live in tents that were meant to last a maximum of six weeks.

The question of IDP resettlement also ignores the question of those victims who were not displaced in visible IDP camps, but instead moved to their ‘ancestral homes’, or were taken in by relatives. Surely the government should be taking proactive steps to address the concerns of these victims and to provide them with compensation. Failure to do so is already causing conflict within the victim communities, who believe that the government favours victims of a certain ethnicity while ignoring others. A joint report by the International Commission of Jurists (ICJ-K) and the Kenya Human Rights Commission states that the Government of Kenya’s efforts to address the needs of victims have focused almost exclusively on resettlement of Internally displaced persons.²⁸ Kenya also has obligations under international law and the Kenyan Constitution to assist the victims of the violence. In addition, it is hoped that the government will adopt a reparations policy for victims based on international standards. Government assistance to the victims has to be systematic, comprehensive, and above all transparent.

²⁴ See allafrica.com/Kenya:UNDP Satisfied With IDPs Resettlement, 25 June 2012

²⁵ For more information regarding the project please refer to <http://www.ke.undp.org/index.php/projects/the-post-election-violence-pev-livelihoods-recovery-project>

²⁶ See Kenya State to Re-Settle all IDPs by December, 19 October 2012, available at <http://allafrica.com/stories/201210200338.html>

²⁷ See Kenya: IDPs issue Two Week Ultimatum, 20 October, 2012, available at <http://allafrica.com/stories/201210210473.html>

²⁸ See “*Elusive Justice- A Status Report on Victims of 2007-2008 Post-Election Violence in Kenya*”, International Commission of Jurists (ICJ-K) and Kenya Human Rights Commission (KHRC), 2012

²⁹ Kenya is a State Party to the International Covenant on Civil and Political Rights (1966), the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Right of the Child (1989), Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984) and the Rome Statute of the International Criminal Court (1998), as well as the African Charter on Human and Peoples’ Rights (1981), the Great Lakes Pact

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Searching for accountability four years on

John Kamau is a driver who was based in Eldoret at the time of the post-election violence. John was born there 61 years ago and had lived in the area all his life, save for occasional moves to Nairobi and Nakuru for contract work. Prior to the post-election violence he engaged in small-scale farming, keeping dairy cows and growing horticultural crops throughout the year. He is married with six children. During the December 2007 campaigns, rumours of possible attacks had begun to spread throughout the area. Immediately after the election results were announced farm after farm was attacked and many people were killed. John's farm was raided in early January 2008; he was at home with his wife and four of his children. They were ordered by a gang of Kalenjin youth, armed with crude weapons, to leave. The youth attacked him and his children, leaving them with serious wounds. However, they did manage to escape, but without taking any of their possessions. As a result of this, they were forced to take refuge at a make-shift camp and then a few days later left for a camp for the internally displaced in Nakuru. In March 2008 John returned to the farm and found that his entire house had been razed to the ground; the cows were gone; and all the crops had been harvested or destroyed. Since that day he has not been able to return to Eldoret. Now John lives in Nakuru in a makeshift structure on a small plot of land where he and his family all reside.

John states that he has not received any assistance from

the Kenyan Government as he decided to move to a farm, instead of remaining in the IDP camp in Nakuru. He asserts that the IDPs that remained in the camp deleted his name from the initial list of those to be assisted by the government. John states that he needs urgent assistance to construct a house, as during the rainy season his current makeshift structure often leaks and his children suffer from various illnesses as a result. John also notes concerns regarding the transparency of the resettlement process by the Government of Kenya, in that there are a considerable numbers of IDPs who, he alleges, are not "genuine" (i.e. those whose homes were not destroyed, but still moved to the camps) and are being resettled at the expense of other victims. Regarding his participation as a victim before the ICC, John states that the process has less and less resonance for him given the likelihood that he will not receive individual compensation from the Court in the event of a conviction. However, John also feels that victims should be given a greater space to air their views and concerns and should be consulted more regularly on matters that affect them. John is also critical of the ICC as he feels that known perpetrators have not been held accountable for their actions and that more should be done to ensure that all individuals who were involved in the post-election violence face justice. John concludes that he cannot compare his standard of living now to that prior to the post-election violence, and each day is a struggle to make ends meet for him and his family.



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Ongoing struggle; Hoping for a better future for my children

Justine Oloo lived in Naivasha at the time of the post-election violence and earned her living selling fruit and vegetables at the local market. She was in her home on 27 January 2008 when six men broke in “looking for Luos”. They made her and her children lie down on the floor, while her husband fled to safety. She states that the men turned on her, and raped her in turn, in the presence of her children. After the ordeal, with the assistance of her neighbours and children, she was able to reach the hospital, where she stayed for one week, before joining the rest of her family at the local IDP camp. Justine states that she wanted to apply to participate as a victim before the ICC because she and others suffered “and she never wants what happened in 2008 to happen again”. However, life since the cessation of the violence has been an ongoing struggle.



Justine has six children, the youngest of which is a one year old baby. Justine states that after the violence her husband left her for “unknown reasons”, and she now earns a living by selling items at the market. Her violation left her with numerous gynaecological problems. However, she asserts that she does not have enough money to pay for her medication and often she has to forego her medicines to pay her children’s school fees. She states this is always a difficult choice, but in the end she would like her children to have a better future, so she would rather bear the pain than see them idling at home. Even this sacrifice is not enough; her children do not have school uniforms or the necessary books, and are made fun of because they do not have any shoes to wear at school. In addition, she can still only afford to send four of her six children to school. She cannot afford childcare for the two children, so they have to stay at home alone while she is at the market. They all live in a mud house, with a rent of Ksh 500 per month, whereas previously they lived in a two bed-roomed stone house. Justine feels that the IDPs from the Luo community were not given sufficient attention or assistance by the Government of Kenya.

Conclusion

More in depth assessments should be undertaken among the victims of the post-election violence to ascertain their most pressing needs and requirements. The victims of mass atrocities will always have common needs, such as economic assistance, medical care and so on. The fact is that when such violence takes place it is often the case that the already disadvantaged and marginalised populations within a society are most affected. This is an aspect about victims that the International Criminal Court must recognise; therefore more efforts must be

made by the Court to reach out to those who can assist in various capacities. The victims will not be able to make any meaningful contributions to the ICC proceedings, unless their social and economic rights are addressed concurrently. The Court must take into account the realities on the ground and ensure that the TFV response is immediate and caters for the needs of all the victims, not just discrete categories. However, ultimately the responsibility to help the victims lies squarely with the Government of Kenya and it must do more to assist them. Half-hearted economic programmes and resettlement initiatives are, in the end, simply not enough.

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