

Legal Aid for Effective Victim Legal Representation in Kenya's Post-Election Violence: Lessons from the International Criminal Court

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Abstract: The International Criminal Court's legal aid scheme pays court-appointed victims' lawyers. Yet, whether ICC or domestic legal proceedings can provide better victim satisfaction goes beyond the question of whether external or internal legal representation is more effective in protecting victims' rights. In circumstances where guilt is difficult to prove, as in the ICC's Kenya cases, victims' interests may be better satisfied by pursuing compensation from local courts. This paper therefore argues that post-election violence victims' interests may be satisfied by legal aid to support domestic compensation claims. Although numerous victims participated in the Kenya cases, non-confirmation of charges against the former Police Commissioner, withdrawal of the *Muthaura and Kenyatta case*, and declining to conduct reparation hearings after vacating charges in the *Ruto and Sang case*, culminated in widespread victim dissatisfaction. The paper contrasts the victims' plight in the Kenya cases with fortunes of victims who participated at the ICC with those of the *CAVI Police Shooting case* and *COVAW Sexual and Gender Based Violence case* which effectively proved more satisfying for some victims. The question is whether legal aid for victims' representatives before domestic courts may enhance the effectiveness of local responses to atrocity crimes. Although the comparatively successful recent domestic suits illustrate advantages of pursuing constitutional-based compensation claims, as opposed to punitive-contingent reparations before the ICC, these test cases require upscaling. Notwithstanding the 'Kenyan Trial Approach's' significant impact on ICC evolution, to vindicate victims' rights, the Trust Fund for Victims may consider donating to Kenya's Victim Protection Fund so as to supplement PEV victim compensation. Kenya's Legal Aid Act requires reforms to support indigent victims, particularly those suffering abuse of power.

Keywords: Atrocity victims, common legal representative for victims, compensation, human rights, positive complementarity, post-election violence, reparations.

1. INTRODUCTION

This paper compares the International Criminal Court's¹ effectiveness with those of domestic trials for obtaining compensation for post-election violence (PEV) victims. Recently, Kenyan courts awarded compensation to PEV victims for state liability. This occurred in *Citizens Against Violence (CAVI) & 14 others v Attorney General & 3 others*,² and *Coalition on Violence Against Women (COVAW) & 11 others v Attorney General & 5 others*.³ By contrast, in 2016, despite terminating the *Ruto and Sang case* and vacating the charges, the ICC merely gave the prosecution liberty to 'start afresh, by laying new charges at a more convenient time in the future'.⁴ ICC

reparations are contingent on criminal convictions which demand higher standards of proof, among other hurdles.⁵ Therefore collapse of the *Kenya cases* denied PEV victims an opportunity to present their claims at reparations hearings.⁶ Where are the PEV victims' grievances more likely to receive redress? Before the ICC or locally? This paper argues that despite the latter forum having greater merits, without legal aid PEV victims' claims are less likely to succeed.

Section 2 sketches the ICC's inquisitorial function of seeking the truth through realizing the victim's entitlement to participate at appropriate stages throughout the proceedings for purposes of enhancing the Court's assessment of harm inflicted on mass atrocity victims. However, because prosecuting mass atrocities even at the ICC is onerous, section 3 shows that some PEV victims sought local remedies, whether from the executive, judiciary or legislature.⁷ Ultimately, representatives determine which victims are members of the appropriate constituency, whether within the ICC

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¹International Criminal Court Statute of Rome 1998, The Statute entered into force on 1st July 2002. <http://www.icccpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf> accessed on 1 July 2022.

²*Citizens Against Violence (CAVI) & 14 others v Attorney General & 3 others* [2020] eKLR (the *Police Shootings case*).

³*Coalition on Violence Against Women (COVAW) & 11 others v Attorney General & 5 others* [2016] eKLR See <<https://www.justiceinitiative.org/litigation/coalition-violence-against-women-and-others-v-attorney-general-kenya-and-others>> 2 July 2022.

⁴Decision on Defence Applications for Judgments of Acquittal, 5 April 2016 Trial Chamber V(a), *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* <<https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-01/11-2027-Red>> accessed on 28 June 2022. (*Ruto and Sang case*) 113 paras 140.

⁵Charles Khamala, 'Victims and Witnesses Protection in the Ruto and Sang case: Implication on Secondary Victimization' in Francis Nyawo and Joseph Wasonga (eds.) *International Criminal Justice since the Rome Statute* (Law Africa 2019) 107-133.

⁶L. Juma and C. Khamala, 'A Dynamic Interpretation of the International Criminal Court's Performance in the Kenya cases' (2017) *Lesotho Law Journal*, 25, 2, 39-73.

⁷Internally Displaced Persons and Affected Communities Act no. 56 of 2012.

or locally. Section 4 illustrates that if the ICC appoints an internal common legal representative from the Office of the Public Counsel for Victims (OPCV), a trial may proceed more expeditiously and risks of prejudicing suspects through multiple victims' cases are reduced. However, such representative may provide views and concerns of victims' that are less authentic. Conversely, section 5 shows successful domestic victim compensation claims. These awards were secured on grounds of state breaches of constitutional duties. Yet, at the ICC: 'Common legal representatives will have to take instructions from their clients for meaningful representation. There is a jostling of making awards in so-called "collective basis" to provide meaningful reparations'.⁸ Instead, an ICC judge Christine Van Wyngaert recommends that if victims find satisfaction of immediate basic needs such as housing, medical treatment or education, to be more meaningful, then such restorative justice goals may be more conveniently pursued by a Victims Reparations Commission which is a separate institution from the ICC. The paper agrees that the role of the ICC's Trust Fund for Victims⁹ therefore requires rethinking.¹⁰ Section 6 concludes that victim compensation claims, whether predicated on state complicity or on non-prosecution of PEV suspects, currently have relatively higher chances of attaining victim satisfaction than does awaiting reparations contingent upon renewal of the Kenya cases before the ICC by a Common Legal Representative for Victims (CLRV). The provision of legal aid for local victims' counsel can address important questions amid renewed debate about justice for PEV victims.

2. CONVICTION AS A PREREQUISITE TO ICC REPARATIONS

2.1. Substantive Crimes under the Rome Statute

Most domestic criminal justice systems are ill-equipped to effectively respond to mass atrocities. African states are particularly fragile. The 1998 Rome Statute is an ambitious attempt by the international community to provide legal redress to the victims of such crimes. However, to qualify for reparations, the Statute burdens the prosecution to first establish beyond reasonable doubt that an accused person is

individually criminally responsible for a crime within its jurisdiction. Victims comprise affected persons who are invariably anxious to clarify whether the magnitude of harm inflicted, was attributable to a senior political or military suspect's commands.¹¹ For example, commanding attacks on an entire village would attract higher reparations, than if direct harm is imputed to a physical perpetrator.

2.2. The International Criminal Court as a Victim's Court

The ICC model incorporates a *partie civile* principle from European continental law's inquisitorial systems. It facilitates victim participation throughout the criminal trial process, so as to enable the Court to measure the degree of harm suffered by victims. However, the ICC's limitation is that victim-participants only become entitled to receive reparations from the TFV if an offender is convicted.¹² Unsurprisingly therefore, several problems arise from the ICC's hybrid structure which incorporates a victim participatory regime throughout its proceedings. Some scholars have analysed its common law-civil law dichotomy and illustrated their respective approaches for balancing retributive and restorative justice.¹³

3. THE KENYAN SITUATION

3.1. Without Parliamentary or Civil Compensation

I have argued elsewhere that the international community may impute negligence liability for the Kenya police's 'failure to protect' the PEV victims.¹⁴ Remarkably, emerging jurisprudence in Kenya's *Police Shootings case* and the *SGBV case* now imposes constitutional liability, *inter alia*, for police failure to provide information and prosecution failure to give an effective remedy. This suggests that it is no longer necessary for PEV victims who possess evidence of the police's commission of brutality or omissions amounting to complicity, to rely on the goodwill of philanthropists for compensation. They may claim damages from the state for breach of their constitutional rights.

Until recently, Kenya's response to crimes against humanity perpetrated during PEV was for the most part administrative, rather than legislative or judicial. Yet no

⁸Christine Van den Wyngaert, 'Victims before the International Criminal Court: Some Views and Concerns of an ICC Judge' (2011) *Case W. Res. Journal of International Law*, 44, 475-496, 491.

⁹Rome Statute (n 1) Article 75(2).

¹⁰Wyngaert (n 8) 495.

¹¹Rome Statute (n 1) Article 28.

¹²Ibid Article 75(3).

¹³Wyngaert (n 8).

¹⁴Khamala (n 5) 126.

assistance has been given from the Kshs 10 billion (US\$ 9.8 million) which President Uhuru Kenyatta offered for 'restorative justice'.¹⁵ Therefore, there was little precedent for how to compensate mass atrocity victims in future. One victim of previous episodes of trespass to land during the 1990s was able to identify his tortfeasor and obtained judicial repossession of his land.¹⁶ To provide comprehensive reparations for forcible mass displacement, in 2012 Parliament enacted the Internally Displaced Persons and Affected Communities Act.¹⁷ However, the courts have construed beneficiaries of the enabling legislation narrowly. It defines an 'internally displaced person' as:

[A] person or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, large scale development projects, situations of generalized violence, violation of human rights or natural or human made disasters, and who have not crossed an internationally recognized state border.¹⁸

In *Joseph Kibiwot Melly and 14 others v Ministry of Interior and Coordination of National Government & 5 others*,¹⁹ the petitioners sought to stay payment of disbursement by the government from being made to a discreet list of persons masquerading as genuine PEV victims. Their petition sought copies of registers of IDPs registered at Nandi County and an account of the beneficiaries of money and any land allocated for resettling the IDPs in Nandi County. However, Eldoret Judge S. M. Githinji held that the petitioners fell outside the 'internally displaced person' legal definition. Although possibly affected by the PEV, they failed to prove that they had fled or left their homes or places of habitual residence as a result of or in order to avoid the effect of armed conflict. Clearly, problems of proving 'who done it' resulted in failure to identify not only specific aggressors, but even that harm was caused by the PEV, generally.

¹⁵Human Rights Watch, 'ICC: Kenya Deputy President's Case Ends' *ReliefWeb* 5 April 2016. <<https://reliefweb.int/report/kenya/icc-kenya-deputy-president-s-case-ends>> accessed 28 July 2022.

¹⁶*Adrian Gilbert Muteshi v William Samoei Ruto & 4 others* [2013] eKLR.

¹⁷IDPA (n 7).

¹⁸Section 2, *ibid*.

¹⁹*Joseph Kibiwot Melly & 14 others v Ministry of Interior and Coordination of National Government & 5 others* [2018] eKLR.

3.2. Reparations under International Law

Notwithstanding difficulties constraining individual citizens from identifying perpetrators of mass atrocities, Kenya did not establish special criminal tribunals to prosecute PEV suspects.²⁰ Furthermore, as individuals are not parties to the UN Charter,²¹ they lack legal standing to seek reparations from the International Court of Justice. Neither do they possess standing before the African Court of Human and Peoples' Rights.²² Given domestic inaction, in 2009 the ICC's Chief Prosecutor Luis Moreno-Ocampo invoked his *proprio motu* jurisdiction²³ to initiate investigations against persons bearing greatest individual responsibility for crimes against humanity. In 2012, the ICC confirmed cases against four suspects. However, Brigadier Hussein Ali, the former Commissioner for Police was one of the two suspects whose cases were not confirmed. Meanwhile, Kenyan authorities charged a few physical perpetrators with serious ordinary crimes, such as murder, robbery with violence, and assault, before local courts.²⁴ Subsequently, both the Party of National Unity (PNU) and Orange Democratic Movement (ODM) cases were terminated, with new prosecutor Fatou Bensouda lamenting lack of cooperation from domestic authorities. Despite failing to achieve retribution and in turn reparations, at least the prosecutions catalyzed structural transformation by way of comprehensive constitutional and electoral reforms.

Perhaps sensing futility internationally, so far two dozen victims have pursued constitutional compensation claims for injury and loss arising from PEV incidents. Interestingly, these domestic suits were not lodged against the physical perpetrators, but against state agencies for police brutality and failure to investigate or prosecute known perpetrators of primary

²⁰Charles Alenga Khamala, *Crimes against Humanity in Kenya' Post-2007 Conflicts: A Jurisprudential Interpretation* (Wolf Legal Publishers 2018) 119-122.

²¹Article 92, UN Charter, <<https://www.icj-cij.org/en/charter-of-the-United-Nations>> See also Statute of the International Court of Justice <https://legal.un.org/avl/pdf/ha/sicj/cj_statute_e.pdf> accessed on 1 August 2022.

²²The African Court on Human and Peoples' Rights, adopted in Ouagadougou, Burkina Faso, on 9 June 1998 and entered into force on 25 January 2004. <<https://www.achpr.org/afchpr/#:~:text=The%20Protocol%20on%20the%20Establishment,protective%20mandate%20of%20the%20Commission.&text=The%20seat%20of%20the%20Court%20is%20Arusha%2C%20Tanzania>> accessed on 1 August 2022.

²³Article 15, Rome Statute (n 1).

²⁴*Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, 23 January 2012, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Situation in the Republic of Kenya. <https://www.icc-cpi.int/courtrecords/cr2012_01006.pdf> accessed on 29 July 2022.

violence. This paper thus seeks to compare the frustrated search for conviction or reparations through a common legal representative before the ICC, with the successful pursuit of domestic compensation for victims through suits against the state.

4. THE 'KENYA TRIAL APPROACH' TO VICTIM REPRESENTATION BEFORE THE ICC

In the situation in Kenya in what became known as the 'Kenya trial approach',²⁵ ICC Trial Chamber II adopted a proactive role in the organization of victims' representation, finding:

it appropriate to request the Victims Participation and Reparations Section ("the VPRS") to: (1) identify, to the extent possible, the community leaders of the affected groups to act on behalf of those victims who may wish to make representations; (2) receive victims' representations (collective and/or individual); (3) conduct an assessment, (of) whether the conditions set out in Rule 85 have been met; and (4) summarize victims' representations into one consolidated report with the original representations annexed thereto.

Luc Walleyne observes how, following orders from the single judges of the Pre-Trial Chambers, the VPRS started to organize the victims' application process. Representation was operationalized by, for example, drafting application forms, putting victims in contact with local partners through local intermediaries, and collecting and controlling the forms. The VPRS also started to screen the applications and decide on their merits, submitting to the Chambers for approval only selected applications. Further, the VPRS screens by selecting candidates for common legal representation from applications received after a 'call for candidates' circulated among the List of Counsel before the ICC.²⁶ However, the OPCV has sometimes promoted itself as offering a better and cheaper alternative than external counsel. Alarming, Walleyne reports of more frequent tensions with external legal teams, which has led some

counsel to avoid seeking the support and advice from the OPCV. Externals see the OPCV as the legal representative of groups of victims having a conflict of interests with their own clients, or even as a rival.²⁷ He concludes that:

[R]epresentation of all victims in all situations under investigation by a small number of counsel based at The Hague is an extremely difficult if not impossible task. This explains why some Chambers have appointed external assistants based in the field to mitigate the difficulties experienced by the OPCV to have access to the victims.²⁸

However: 'This is a strange situation, because it means that, ultimately, the external counsel become the assistants to the OPCV, despite (the fact) that the OPCV was created and established to provide external counsel with assistance'.²⁹ The Office of the Prosecutor represents the international community's interest, which is a collective good and therefore diverges from an individual victim-witness's personal interest. Moreover, Walleyne laments the anomaly that a suspect whose limited resources are deployed in researching and answering a specific claim laid in the charges as framed may then be challenged to respond to multiple claims from multiple victim-witnesses. As Judge Wyngaert explains, this is consequential because the Trial Chamber has wide latitude to recharacterize the charges at any time before judgment, therefore, an accused risks 'being beaten with a fresh stick' offered by a victim-witness. Collateral effects arising from increased likelihood of conviction include victim-vulnerability.

5. COMPARATIVE DOMESTIC SATISFACTION

5.1. Counsel's Role while Representing Victims in Criminal Courts

Kenya is a signatory and has ratified numerous international instruments. The Constitution validates the enforcement of the country's international obligations, including its commitment to the Rome Statute, UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victim's Declaration) and the Malabo Protocol. These treaties

²⁵Luc Walleyne, 'Victims' Participation in ICC Proceedings: Challenges Ahead' (2016) *International Criminal Law Review*, 16, 995-1017, 1005; See also Charles A. Khamala, 'External and Internal Common Legal Representation of Victims at the International Criminal Court: Beyond the "Kenyan Trial Approach"' (2020) *African Yearbook on International Humanitarian Law*, 59-191.

²⁶Ibid 1006.

²⁷Ibid 1007.

²⁸Ibid 1009.

²⁹Ibid 1009-10.

incorporate victims' rights, into Kenyan domestic law by dint of Chapter I of the Constitution which provides that:

- (5) The general rules of international law shall form part of the law of Kenya.
- (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.³⁰

The ICC's broad definition of victims closely resembles the definition in the Victim's Declaration that:

States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.³¹

In addition, Kenya has ratified the Malabo Protocol.³² It requires that the country:

[S]hould periodically review existing legislation and practices to ensure...responsiveness to changing circumstances....enact and enforce....legislation proscribing acts.....promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.³³

The guarantee of fair hearing rights requires Parliament to enact 'legislation providing for the protection, rights and welfare of victims of offences'.³⁴ Moreover the right to a fair hearing is non-derogable.³⁵ Kenya's Supreme Court has interpreted the victim legal representative's mandate under the Victim Protection Act,³⁶ in *Joseph Lendrix Waswa v Republic*.³⁷ It held

that the Act, the Constitution and international law all support the right of victims to be represented by counsel in court. Thus counsel watching brief may not only make submissions at the close of the prosecution case on whether there is a case to answer; final submission should the accused be put on his defence; on points of law should such arise in the course of trial, and upon application at any stage of the trial for the consideration by the Court, but may even be allowed to ask questions of the witnesses.

5.2. Compensating Police Shootings Victims for Human Rights Violations

CAVI & others v AG & others was filed in the High Court at Nairobi in February 2013. The petitioners include 13 survivors of or relatives of victims of police shootings and two organizations: the Citizens Against Violence and the Independent Medico-Legal Unit. They sued the Attorney General, the Director of Public Prosecutions, the Independent Policing Oversight Authority and the Inspector General of Police.

On 27 July, 2020, Judge Fred Ochieng (as he then was) held the government liable for failing to protect and address the concerns of Alice Atieno Ochieng, Hudson Bob Libabu Lumwaji and Tobias Wanga Odhiambo who alleged that they or a relative of theirs were victims of police shootings in the PEV that wrecked Kenya. Ochieng testified in 2018, while Lumwaji and Odhiambo testified in 2019.

Judge Ochieng determined that the other 12 petitioners in the case had failed to prove that the government was liable for any injuries they suffered or the deaths of any of their relatives.³⁸ He heard that Alice Atieno Ochieng (not related to the judge), PW1 the ninth petitioner, was shot at as she returned home on 28 December, 2007. However, she did not see who shot her. Her evidence was that her landlord told her it was the police who shot her. The landlord did not testify in court to corroborate Ms. Ochieng's hearsay. The judge observed that Ms Ochieng reported the shooting at a police station in May 2008 and got a medical report stating she had a gunshot wound. Altogether 'the totality of the evidence tendered in respect of PW1 is that she did not identify the person who shot her. In the circumstances, there is no basis

³⁰ Article 2(5) and (6), Constitution of Kenya (The Government Printer 2010).

³¹ Article 19, The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 November 1985. <https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.29_declaration%20victims%20crime%20and%20abuse%20of%20power.pdf> accessed 2 June 2022.

³² Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights adopted on 27 June, 2014. <<https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>> accessed 2 June 2022.

³³ Article 20 (n 30).

³⁴ *Ibid* Article 50(9).

³⁵ *Ibid* Article 25(c).

³⁶ Victim and Witness Protection Act No. 17 of 2014, L.N. 43/2015.

³⁷ [2020] eKLR.

³⁸ Tom Maliti, 'Kenyan Court finds Government is Liable for Harm Suffered by Three Victims of Police Shootings', 8 October, 2020 <<https://www.ijmonitor.org/2020/10/kenyan-court-finds-government-is-liable-for-harm-suffered-by-three-victims-of-police-shootings/>> accessed 29 July 2022.

upon which the court could reasonably conclude that it is a police officer who shot the ninth petitioner’.

Judge Ochieng heard from Lumwaji that his daughter was shot and killed on 31 December, 2007. Furthermore, when he went to report the matter to the police, he was informed that an inquest had been opened into his daughter’s death.

In effect, the issue about that particular incident was already being handled by the police. However, the police failed to provide this court with any information concerning the status of the inquest. The State has an obligation to expeditiously and effectively investigate any incident in which there is suspicion that the state agents had used either excessive force or lethal force.

Consequently, Judge Ochieng therefore held that the Attorney General and the Inspector General of Police ‘violated the rights of’ Ms. Ochieng and Mr. Lumwaji, ‘to information and remedy’. The judge further held that the 12th petitioner, Mr. Odhiambo, ‘tendered sufficient evidence to show that it is the police who shot him. The police action was unlawful and brutal. It violated his Right to Security of the Person’. The Court also found ‘that the police failed to discharge their obligation to investigate and to prosecute the perpetrators of the unlawful shooting of the 12th petitioner’.

5.3. Compensating Sexual and Gender-Based Violence Victims for Human Rights Violations

The effectiveness of the roles played by domestic victim legal representatives to claim victims’ rights, is further illustrated by *COVAW & 11 others v Attorney General & 5 others*³⁹ lodged in February 2013 at the High Court in Nairobi, seeking compensatory relief for a select constituent of PEV sexual and gender based violence victims and survivors. Their petition claimed that:

The Kenya government failed to properly train and prepare the police to protect civilians from sexual violence while it was occurring; In the aftermath of the violence, the police refused and/or neglected to document and investigate claims of SGBV

(sexual and gender-based violence), leading to obstruction and miscarriage of justice; The government denied emergency medical services to victims at the time; and, the government failed to provide necessary care and compensation to address victims’ suffering and harm.

In their evidence ‘[t]he survivors detailed a range of harrowing accounts from the 2007-2008 post-election violence: incidents of individual and gang rape, forced circumcision, and other forms of sexual violence, which resulted in severe physical injuries, psychological and socio-economic suffering, and other serious health complications’.⁴⁰ Although COVAW’s suit was brought on behalf of eight SGBV survivors, drawn from three geographical locations: Nairobi, Kericho and Kisumu, only four claims succeeded as explained below.

On 10 December, 2020 Judge Weldon Korir (as he then was) held the government responsible for a ‘failure to conduct independent and effective investigations and prosecutions of SGBV-related crimes during the post-election violence’.⁴¹ The judge further declared a violation of the four petitioners’ ‘right to life; the prohibition of torture, inhuman and degrading treatment; the right to security of the person; the right to protection of the law; the right to equality and freedom from discrimination; and the right to remedy’. Resultantly, two of the six respondents, namely the Attorney General and the Inspector General of the National Police Service, were ordered to pay compensation of Kshs 4 million (approximately US \$35,000) to each of the successful victims, together with costs of the suit.⁴²

6. ATROCITY VICTIMS’ RIGHT TO ACCESS LEGAL AID

6.1. The Legal Basis for Financial Assistance Paid by the ICC

The procedure for victim participation before the ICC is based on common legal representation. This will include both an appointed CLRV and the OPCV acting on the CLR’s behalf. The CLR thus possesses primary

⁴⁰Kevin Short, ‘Court Delivers Justice for Several Survivors of Post-Election Sexual Violence in Kenya’ *Reliefweb* <<https://reliefweb.int/report/kenya/court-delivers-justice-several-survivors-post-election-sexual-violence-kenya>> accessed on 2 August 2022.

⁴¹Physicians against Violence <<https://phr.org/issues/sexual-violence/program-on-sexual-violence-in-conflict-zones/advocacy/public-interest-litigation/>> accessed on 1 August 2022.

⁴²COVAW SGBV case (n 3) 98, para 171.

³⁹COVAW SGBV case (n 3).

responsibility for being the point of contact for the victims whom he/she represents, to formulate their views and concerns and to appear on their behalf at critical junctures of the trial.⁴³

To expound, the balance that the Chamber must find between the two has a number of objectives. Those objectives include the following in particular:

- (a) the need to ensure that the participation of victims, through their Legal Representative, is as meaningful as possible, as opposed to purely symbolic;
- (b) the purpose of common legal representation, which is not only to represent the views and concerns of the victims, but also to allow victims to follow and understand the development of the trial;
- (c) the Chamber's duty to ensure that the proceedings are conducted efficiently and with the appropriate celerity, and
- (d) the Chamber's obligation under article 68(3) of the Statute.⁴⁴

This is so because 'it is a matter of eminent common sense to prompt a public functionary, who is assigning counsel to clients on legal aid, to consider that it may be best for lawyers to be based in a location that makes them more easily accessible to the clients they represent'.⁴⁵ The ICC Appeals Chamber underlined that:

[V]ictims who lack sufficient financial means do have access to legal aid for legal representation. Nonetheless, such representation is offered free of charge only in relation to the common legal representative(s) which the Court appoints. When, instead, victims elect to appoint a legal representative of their own choice – which, subject to a Chamber's power to trump such choice for the purposes of ensuring the effectiveness of the proceedings, is otherwise legitimate

and provided for under Rule 90(1) of the Rules – they shall cover the related expenses.⁴⁶

Instructively, 'when the Registrar makes decisions in relation to the day-to-day operating of defence counsel or Legal Representatives and their teams, the (Appeals) Chamber...is not supposed to micromanage the...Registrar's responsibility to administer the available legal aid budget'. Consequently:

[T]his means that: (i) in reviewing such decisions, the Chamber must not consider whether it would have made the same decision as the Registrar; (ii) instead, the Chamber must assess (a) whether the Registrar has abused her discretion; (b) whether the Registrar's decision is affected by a material error of law or fact; and (c) whether the Registrar's decision is manifestly unreasonable. The Chamber adds that it will only intervene if counsel can show that the Registrar's decision meets one or more of these criteria.⁴⁷

In the above circumstances, the Court's legal aid scheme may remunerate activities of the Legal Representative. The Registry's prior authorisation of such activities is a pre-requisite for them to receive payment. 'Thus, the Appeals Chamber has to review whether, at this stage of the proceedings, remuneration only of pre-authorised activities of the Legal Representative is adequate'.⁴⁸ Moreover it is only for practical reasons that the Single Judge may disturb the victim's freedom to choose a legal representative.⁴⁹ Accordingly, 'common legal representation can be organised for all victims who have not chosen'. Finally, where any victim or victims lack the necessary capacity to remunerate a CLR chosen by the Court they 'may receive assistance from the Registry, including, as appropriate, financial assistance'.⁵⁰

⁴³ *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* Situation in the Republic of Kenya, 09 October 2012, Trial Chamber V paras. 41-43 and 60; <<https://www.icc-cpi.int/pages/record.aspx?uri=1479374>> accessed on 30 July 2022, cited in Office of Public Counsel for Victims, *Representing Victims before the International Criminal Court: A Manual for Legal Representatives* (International Criminal Court 2019) 242.

⁴⁴ *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* Situation in the Republic of Kenya, Dissenting Opinion of Judge Eboe-Osuji, Trial Chamber V, 23 November 2012, paras. 2-7. <https://www.icc-cpi.int/CourtRecords/CR2012_09724.PDF> accessed on 30 July 2022.

⁴⁵ Ibid

⁴⁶ Ibid 246 citing *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, 3 April 2012 regarding Legal Aid <https://www.icc-cpi.int/CourtRecords/CR2012_05210.PDF> accessed on 30 July 2022.

⁴⁷ Ibid 244. *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Decision on the 'Application of the Victims' Representative pursuant to Article 83 of the Regulations' situation in the Republic of Kenya, para 22 <https://www.icc-cpi.int/CourtRecords/CR2012_05209.PDF> accessed on 30 July 2022.

⁴⁸ Ibid 245.

⁴⁹ Ibid, citing Rules 90(1), (2) and (3), International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1. (2000) <<http://hrlibrary.umn.edu/instrree/iccrulesofprocedure.html>> accessed on 25 June 2022.

⁵⁰ Ibid, Rule 90(5).

6.2. The Ugandan Experience

As seen earlier as an independent office the OPCV is tasked with representing victims 'throughout the proceedings, on the instruction or with the leave of the Chamber, when this is in the interests of justice'.⁵¹ Yet where the interests of justice so require, such empowerment to appoint a legal representative of victims, explicitly confers the Chamber with the possibility of appointing counsel from the OPCV.⁵² Consider the *Ongwen* case. Regarding 'counsel from the OPCV (then) representing certain victims participating in the case against Joseph Kony and Vincent Otti and in the situation in Uganda':

[T]he Registry reports that the victims whose applications were transmitted generally agree that one legal representative could represent all the victims participating in the case, and that they would like to be represented by someone from the Acholi region or who speaks Acholi, who will be able to communicate with the victims, and who possesses positive professional and human qualities such as ethical integrity, competence, kindness and sense of caring for the victims.⁵³

The above endorsement of the 'Kenya Trial Approach' was because:

[T]his course of action combines optimally the OPCV's knowledge and experience in the procedure before the Court, which is markedly distinct from national procedures, and the knowledge of the local circumstances and culture of the communities where the participating victims reside, providing for the best possible legal representation of the participating victims, which is in the interests of justice.⁵⁴

In conclusion, contrary to the victims for whom a common legal representative is appointed by the Court, 'victims who individually choose their legal representatives before the Court do not qualify for financial assistance by the Court'. This interpretation follows from the plain language of Rule 90(5) of the Rules. Ultimately 'the scope of legal assistance paid by the Court regarding victims is determined by the Registrar in consultation with the Chamber'.⁵⁵ Therefore the *Ongwen* Trial Chamber rejected the CLRV's request that '[i]nternational standard(s) and comparative experience support the provision of legal aid to victims who participate in criminal proceedings'.⁵⁶ Such interpretation avoids "an inevitably unwieldy system" whereby the Court, when upholding the right of victims to appoint counsel of their own choice, would also be obligated to provide financial assistance to any legal representative appointed by any victims' group, even if this results in dozens of such representatives being part of the legal aid scheme for a single case'. Nonetheless a signed declaration of certification of the correctness of information provided and authorising the Registrar to take all necessary steps to decide on the eligibility for legal assistance paid by the Court normally accompanies a statement of indigence. It further contains 'the engagement from the person to communicate to the Registry any change in his or her financial situation'.⁵⁷ Since 2008, the TFV has been delivering assistance and rehabilitation to victims under the assistance mandate across 18 districts in Northern Uganda, providing services to victims of crimes against humanity and war crimes through a network of local and international non-governmental organizations. The assistance mandate of the TFV is distinct from reparations before the ICC or the payment of compensation to victims which may accrue from the *Ongwen* case, if the accused is convicted.⁵⁸ The Ugandan 'government also quickly provided compensation for the victims by paying a lump sum amount of 5 million Ugandan shillings (approximately US \$1,400) for each of the deceased persons and 3

⁵¹Regulation 81, Regulation 55, Regulations of the Court, Adopted by the judges of the Court on 26 May 2004, Fifth Plenary Session, The Hague, 17-28 May 2004, Official documents of the International Criminal Court ICC-BD/01-01-04. <https://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf> accessed on 8 July 2022.

⁵²Regulation 80 *ibid*.

⁵³*The Prosecutor v Dominic Ongwen*, Situation in Uganda, paras. 16-24. <https://www.icc-cpi.int/CourtRecords/CR2015_22895.PDF> accessed on 30 July 2022, cited in Office of Public Counsel for Victims (n 135) 245-6.

⁵⁴*Ibid*

⁵⁵*The Prosecutor v Dominic Ongwen*, 26 May 2016, paras. 7-13. <https://www.icc-cpi.int/CourtRecords/CR2016_03718.PDF> (*Ongwen's case*) accessed on 30 July 2022, cited in *ibid* 246.

⁵⁶*The Prosecutor v Dominic Ongwen*, 14 November 2016, paras. 1-3. <https://www.icc-cpi.int/CourtRecords/CR2016_25176.PDF> accessed on 30 July 2022, cited in *ibid* 247.

⁵⁷Situation in the Democratic Republic of the Congo, 26 March 2008, 3-4. <https://www.icc-cpi.int/CourtRecords/CR2008_02252.PDF> accessed on 30 July 2022, cited in *ibid*.

⁵⁸'The Trust Fund for Victims Launches New Assistance Projects in Northern Uganda' 3 July 2015 <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1126>> accessed on 1 August 2022.

million Ugandan shillings (approximately US \$850) for those who survived with injuries'.⁵⁹

6.3. Compensation under Kenya's Victim Protection Act

During two months of Kenya's PEV, along with 1,133 people killed, 650,000 (initially underestimated at 350,000) were forcibly displaced, hundreds of thousands were assaulted, 900 raped and billions of shillings worth of property was destroyed.⁶⁰ Although the Kenya government is yet to honor its pledges to compensate victims of historical injustices, in 2014 Parliament enacted a Victim Protection Act (VPA). Under this legislation, "victim" means any natural person who suffers injury, loss or damage as a consequence of an offence.' They have a right to restitution or compensation from the offender. Enforcement of the right to compensation extends to economic loss occasioned by the offence, including loss of or damage to property, loss of user over the property, personal injury, the costs of any medical or psychological treatment and even costs of necessary transportation and accommodation suffered or incurred as a result of an offence. If specific property is recoverable under a right to restitution of which the victim is deprived as a result of an offence.⁶¹

The court may award compensation under the VPA, including financial compensation for expenses incurred as a result of the loss or injury resulting from the offence complained of, which shall be charged from the Victim Protection Trust Fund (VPTF).⁶² The VPTF is established from monies appropriated by the National Assembly as well as those received by the Fund as grants, donations or gifts from non-governmental or non-public sources.⁶³ The Board of Trustees has discretion to make payments out of the Fund for expenses arising out of crime victims' assistance.⁶⁴

6.4. The Quest for Victim Representation and Access to Justice under the Legal Aid Act

By November 2020, Kenya's Director of Criminal Investigations, George Kinoti had received 118 cases

in total registered in November 2020 by complainants and witnesses. Pursuant thereto, he 'reopened the lid into the 2007/2008 Post Election Violence (PEV) cases following claims by victims of new threats against their lives'.⁶⁵ That announcement followed lawyer Paul Gicheru's appearance before the ICC Pre Trial Chamber after surrendering to Dutch authorities.⁶⁶ He was accused of offences against the administration of international justice consisting in corruptly influencing witnesses in cases related to the PEV. The question is to what extent does the DCI's reopening of investigations strategy satisfy PEV victims' interests? Going by the widespread victims' dissatisfaction emanating upon the failed Kenya cases, this paper finds that most PEV victims may receive greater satisfaction from receiving non-conviction-based compensation domestically, rather than from pursuing symbolic remedies which participating in criminal trials may confer. Indeed, this thesis may explain why, soon after Kenya's DCI moved to re-open investigation of the PEV incidents 'Kiambaa survivors called a press conference and denied claims that they appeared before the DCI on Monday because they had been threatened'.⁶⁷ In any event, domestic murder charges against the four persons suspected of burning Kiambaa church were unsuccessful.⁶⁸ Consequently, much more victim satisfaction may accrue if these particular victims are compensated for their losses incurred during the PEV. However, the statutory time limitation bars tort claims against the government brought after one year.⁶⁹ Instead, assuming that sufficient evidence can be produced implicating state officials, then constitutional claims may be lodged going by the CAVI and COVAW precedents. These cases show that where evidence of state acquiesce in victim harm or neglect to inform victims or prosecute suspects is available, the state may be held liable for acts of commission or omission, respectively. This paper recommends that compensation payments may be forthcoming from the VPTF.

⁵⁹Lino Owor Ogora, 'Why Victims "Feel Abandoned" by the Ugandan Government' *International Justice Monitor*, 30, May, 2017 <<https://www.ijmonitor.org/2017/05/why-victims-feel-abandoned-by-the-ugandan-government/#:~:text=The%20government%20also%20quickly%20provided,the%20who%20survived%20with%20injuries>> accessed on 1 August 2022.

⁶⁰Khamala (n 20) 2.

⁶¹Section 23, VPA (n 129). Right to compensation.

⁶²Ibid s 24. Award of compensation by Court.

⁶³Ibid s 27. Establishment of the Fund.

⁶⁴Ibid s 28. Sources of Funds.

⁶⁵Erick Owenga, 'DCI reopens Post Election Violence Cases as Victims Claim New Threats', *Citizen Digital*, 23 November 2020. <<https://citizentv.co.ke/news/dci-reopens-post-election-violence-cases-as-victims-claim-new-threats-963389/>> accessed on 29 July 2022.

⁶⁶Mike Corder, 'Kenyan Lawyer denies ICC Allegations of Witness Tampering', *ABC News*, 6 November 2020 <<https://abcnews.go.com/International/wireStory/kenyan-lawyer-denies-icc-allegations-witness-tampering-74060575>> accessed on 29 July 2022.

⁶⁷Onyango K'Onyango, 'DCI Boss Kinoti duped us, say Poll Violence Survivors', *Saturday Nation*, 28 November, 2020. <<https://nation.africa/kenya/news/dci-boss-kinoti-duped-us-say-poll-violence-survivors-3212284?view=htmlampaccessed>> accessed on 29 July 2022.

⁶⁸Khamala (n 20) 119-120, citing Nakuru High Court HCCR 34/2008, *R v Stephen Kiprotich Leting and three others*.

⁶⁹Government Proceedings Act (Chapter 40 Laws of Kenya).

Currently, there is no provision for legal aid for advocates who represent indigent victims before domestic courts. This gap exists in the statute. Kenya's Legal Aid Act (LAA), defines persons eligible for legal aid to include indigent persons who are resident in Kenya and are either Kenyan citizens, children, refugees, victims of human trafficking, internally displaced persons or stateless persons.⁷⁰ Yet, such aid appears restricted to *accused persons* to the exclusion of victims. Therefore the court only has a duty to not only promptly inform an unrepresented *accused person* of his or her right to legal representation, but also, if substantial injustice is likely to result, promptly inform the *accused* of the right to have an advocate assigned to him or her. The court is also bound to inform the National Legal Aid Service to provide legal aid to such *accused person*.⁷¹ There is need to reform the LAA so as to broaden its scope in order to encompass legal aid for representation of indigent victims.

6.5. Positive Complementarity can enhance Effective Domestic Prosecution

Lawyer Gicheru's ICC witness tampering trial opened in mid-February 2022. The prosecution closed its case at the end of March, having called eight witnesses. No defence witnesses testified in rebuttal. After receiving closing statements in late June 2022, while considering its judgment, the Court terminated the proceedings in mid-October 2022, following Gicheru's untimely death.⁷²

On 28 October 2022, denouncing 'systematic attacks on the civilian population' Kenya's Director of Public Prosecutions announced that senior police officers shall be prosecuted for murder, rape and torture as crimes against humanity, arising from police repression during post-election violence in 2017. Victims include six-month-old Samantha Pendo, beaten to death by police following a raid in Kisumu. For the first time, the state is using Kenya's International Crimes Act⁷³ to prosecute crimes against humanity.⁷⁴ This domestic decision to prosecute atrocity crimes exemplifies positive complementarity, marking a

departure from the ICC's negative complementarity following 2007 PEV. However, this paper asserts that besides assistance for fragile African countries to fill the security gap created by extreme violence, legal aid may provide useful victim compensation.

CONCLUSION

Notwithstanding that in 2012 the ICC Pre-Trial Chamber confirmed four cases against senior PEV suspects, by 2016 all had ultimately collapsed. Yet conviction is a condition precedent for reparations hearings. Therefore no victim reparations claims were heard by the ICC and all victims who participated in the proceedings remain uncompensated from its TFV. Pemberton *et al.*⁷⁵ therefore root for the ICC victims' right to reparation (reparation assistance) to be achieved through the other elements of reparative justice, both in the immediate aftermath (emergency aid, assistance, health care) and in the longer run (as an element of social and economic development).

By contrast in 2020, three PEV victim survivor's claims were successful in CAVI's *Police Shootings case* and four in COVAW's *SGBV case*. Domestic courts held the state liable for violating victims' constitutional rights through various acts of commission and omission. So far, a total of seven victims have successfully claimed compensation following effective legal representation in domestic cases supported by NGOs. Having evaluated challenges afflicting victims' common legal representation before the ICC, this paper concludes that the Kenyan victims who won compensation at the local level received relatively greater satisfaction. However, sixteen of the domestic claims failed for lack of evidence. For while victims are accorded legal aid before international courts, similar enabling provisions, procedures and avenues are only beginning to receive domestic realization. Complex enabling procedures to facilitate CLR participation in criminal proceedings were improvised in the 'Kenya Trial Approach'.⁷⁶ Still, pursuing reparations which are contingent on criminal conviction is harder to attain since the standard of proof required is one of beyond reasonable doubt. Nonetheless, victim participants may be more motivated to participate in the ICC proceedings since on so doing, they receive assistance from the TFV as well as the CLR and OPCV. Despite

⁷⁰Section 36, Legal Aid Act No. 6 of 2016, Act No. 11 of 2017.

⁷¹Section 43 *ibid.*

⁷²Aggrey Mutambo, 'ICC terminates case against Kenyan Lawyer Paul Gicheru', *The East African*, 14 October 2022 <<https://www.theeastafrican.co.ke/tea/news/east-africa/icc-terminates-proceedings-against-kenyan-lawyer-3985604>> accessed on 6 December 2022.

⁷³No. 16 of 2008.

⁷⁴AFP, 'Kenya charges police with crimes against humanity over 2017 violence' *France24*, 28 October 2022. <<https://www.france24.com/en/live-news/20221028-kenya-charges-police-with-crimes-against-humanity-over-2017-violence>> accessed on 6 December 2022.

⁷⁵A. Pemberton, R.M. Letschert, A.-M. de Brouwer and R.H. Haveman, 'Coherence in International Criminal Justice: A Victimological Perspective' (2016) *International Criminal Law Review*, 16, 2, 339-368, 345.

⁷⁶Khamala (n 25).

an external CLR liaising with the OCPV, the Kenya cases at the ICC were discontinued due to 'troubling incidence of witness interference and intolerable political meddling' which made it impossible for the Court to determine the case.⁷⁷

Realizing rights to the satisfaction of all PEV survivors is hard. Criminal law's retributive goal has largely proved elusive. Instead, a handful of PEV victims, courtesy of assistance from local NGOs, have opted for constitutional claims which require proof on a balance of probabilities before domestic courts. It follows that other PEV victims who possess evidence of police brutality or state omissions are similarly eligible for compensation. The aggrieved PEV survivors may seek damages and enforce payment of compensation from the VPTF. Donor organisations, such as the ICC's TFV, may provide financial assistance for this purpose. Comparatively, Kenya's VPA has proven more effective in providing tangible, rather than merely symbolic, punitive remedies for PEV victims. Victims of police brutality and SGBV comprise special categories of survivors who could either identify their tortfeasors or establish police or prosecution negligence. Yet, two thirds of the claims lodged by some two dozen PEV victims in domestic courts were unsuccessful. This indicates that most victims of PEV atrocity crimes require financial assistance to empower them to investigate, lodge and prove their claims. Furthermore, while elaborate eligibility procedures facilitate collective legal representation before the ICC, domestic courts award individualized, rather than representative, remedies. Although victim voices appear more authentic before domestic courts, narrow constructions of statutory definitions of who constitutes an IDP tend to exclude individuals who cannot produce concrete evidence to substantiate their victimhood statuses. Just like '[i]n the ICC, "victimhood as a legal category – juridified victimhood – is much narrower than that massive base".⁷⁸ The landmark domestic PEV cases were not filed as representative suits. So far, Kenyan courts are yet to award collective remedies to broader victim constituencies such as commemoration or memorialization. As it stands, numerous PEV survivors are each required to lodge and prove individual claims. Given that the LAA makes

no provision for indigent victims, there is urgent need for the Board of Trustees under the VPTF to extend assistance so as to provide legal aid to facilitate representation of indigent Kenyans and IDPs to file claims seeking compensation for losses arising from PEV. Policymakers may therefore consider extending legal aid to victim's representatives of dissatisfied PEV victims who may possess evidence against physical perpetrators of mass atrocity crimes or police brutality or state inaction. Without enhancing the state's capabilities to secure witnesses, victims, and even suspects, latent political will to prosecute senior police suspected of 2017 election repression seems futile.

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