

About Kituo cha Sheria's Peace Justice and Reconciliation Project (PJRP)

The Peace Justice and Reconciliation Project (PJRP) of Kituo cha Sheria was designed in cooperation with the Civil Peace Service/German Development Service (DED/CPS) to support the participation of Kenyans in the proceedings of the different Transitional Justice Mechanisms. The PJRP identifies Internally Displaced Persons (IDPs) and other post 2007/8 general election violence victims as key focus groups for the intervention and works closely with them in promoting peace, justice and national reconciliation in Kenya.

The intervention of the ICC is one justice option for Kenya. As part of the PJRP initiative, Kituo cha Sheria informs and assists victims who decide to participate in the ICC procedure and to apply for reparation.



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We care for Justice



THE ICC IN KENYA VICTIM'S PARTICIPATION AND REPARATION IN "THE HAGUE"

INFORMATION FOR VICTIMS OF VIOLENCE

THE ICC IN KENYA

VICTIM'S PARTICIPATION AND REPARATION IN "THE HAGUE"

INFORMATION FOR VICTIMS OF VIOLENCE

Information for victims of 2007/08 Post Election Violence in Kenya: Victim's participation and reparation in "The Hague".



This Booklet aims at enabling victims to make informed decisions if he/she wants to participate in this kind of justice process.

This Booklet aims at clarifying the mandate and the limits of the ICC so that victims may better understand what is going on.

This Booklet aims to inform victims about their rights within the ICC-proceedings and the possibilities of seeking reparations.

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Priscilla Nyokabi
(Executive Director)

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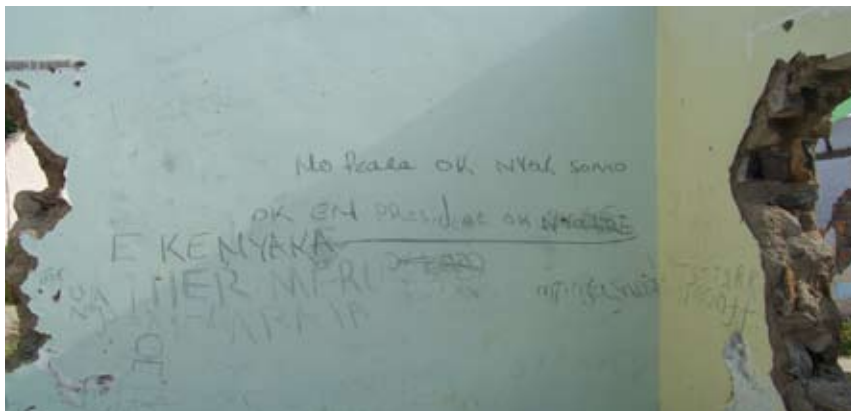
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Graffiti on one of the buildings damaged during the Post Election
Violence in Kisumu

Part 1:

ADDRESSING MISCONCEPTIONS

Many Kenyans tend to show unrealistically high expectations concerning mandate and outreach of the ICC and this can easily lead to frustration and denial.

Section A: In brief - Understanding the ICC Intervention:

- ▶ The ICC intervention is selective.
- ▶ Only some of the masterminds of Kenya's Post Election Violence will face charges and trials in The Hague.
- ▶ None of the so called "low level perpetrators", meaning individuals of groups involved in displacement, rape or looting or police officers having used illegal means of violence will be prosecuted by the ICC.
- ▶ Most perpetrators stay unpunished unless the Kenyan police, prosecutors and judges prosecute those criminals in Kenya.
- ▶ Crimes to be heard in court are few!
- ▶ Ocampo cannot arrest perpetrators; he needs the Kenyan police to do so.

Section B: In brief: Understanding Victim's Participation/ Reparation:

- ▶ A victim has to carefully consider whether he/she wants to participate in the ICC proceedings.
- ▶ Only very few victims will testify in The Hague.

- ▶ Victims participate in most cases through a legal representative.
- ▶ Witnesses who testify in The Hague have to be called by a party.
- ▶ Participation means that a victim can send views and observations to the judges or challenge the information given by the accused.
- ▶ Through notifications victims can influence the opinion of the judges.
- ▶ Only few victims will get reparations by court order.
- ▶ The ICC protects witnesses that are related to the cases (few).
- ▶ Victims may be protected by the ICC or Kenyan authorities.



A spent cartridge recovered by one of the Post Election Violence victims

Part 2: THE INTERNATIONAL CRIMINAL COURT

Section A: Summary of the ICC

What is the International Criminal Court?

- ▶ It is a **permanent international criminal** court.
- ▶ Created to end impunity and to bring justice to victims.
- ▶ Founded 1998 in Rome, established 2002.
- ▶ Has 114 member states (October 2010), the so called State Parties.

Where is the ICC located?

- ▶ The ICC is located in **The Hague** in the Netherlands, which is in Europe. It runs **field offices** in Uganda, Democratic Republic of Congo and Central African Republic.
A field office will be opened in Kenya.

Who can be prosecuted and charged by Ocampo and his team?

- ▶ **The masterminds of mass atrocities:** only perpetrators of the “most serious crimes of concern to the international community as a whole” can be accused.
- ▶ Only individuals can be tried and prosecuted, not states or companies.

Which are the “most serious crimes” the Prosecutor is allowed to investigate?

- ▶ **Genocide.**
- ▶ **Crimes against humanity.**
- ▶ **War crimes.**
- ▶ **Crime of aggression** (after 2018).

Cases for the ICC: place of crimes?

- ▶ Competent for crimes committed on the territory of a state party (such as Kenya since 2005).
- ▶ Competent for Kenyans who commit such a crime outside of Kenya.
- ▶ Competent in case of **referral of the UN Security Council** (Sudan).
- ▶ Competent when a non member state refers these crimes to the ICC (Uganda).

What is the Rome Statute?

- ▶ It is the founding treaty, the Constitution, of the ICC.
- ▶ States having signed and ratified the Rome Statute fall under its jurisdiction.
- ▶ States having signed and ratified are bound to oblige the Courts orders and rulings.
- ▶ Kenya ratified the Rome Statute in March 2005.

This implies that:

- ▶ Kenyan authorities are obliged to cooperate with the ICC Prosecutor (Ocampo) and other bodies of the ICC.
- ▶ Kenyan authorities are obliged to protect victims and witnesses.
- ▶ Kenyan authorities are obliged to execute ICC arrest warrants against any person, even if the wanted person is a sitting head of State or a Minister.

Relationship between the ICC and national courts?

- ▶ National courts are responsible for the conviction of perpetrators.
- ▶ The ICC investigates and prosecutes only if states or national court systems are unable or unwilling to do so.
- ▶ Kenyan prosecutors, investigators, and judges have not started to prosecute the relevant suspects of Post Election Violence.

Main principle: No amnesty – no immunity!

- ▶ No amnesty for a crime qualified as crimes against humanity, war crimes and genocide.
- ▶ No immunity: no person can be exempt from prosecution because of his or her current / former position (example Sudans President Omar al-Bashir).

Structure of the Court:

- ▶ The ICC is governed by the Assembly of State Parties (ASP).
- ▶ The ICC has four offices: Presidency, Registry, Judicial Division, Office of the Prosecutor. All offices are independent.
- ▶ The REGISTRY is responsible for Victims Participation & Reparation, Witness Protection and Outreach Campaigns.

Stages of the ICC process:

1. Preliminary examination: (collection of information).
2. Pre Trial Stage (collection of evidence).
 - ▶ Pre-Trial-Chamber II for Kenya.
 - ▶ Investigation, arrest warrants, confirmation of charges.
3. Trial Stage (evaluation of evidence).
4. Appeal Stage (reviews the decision of Trial chamber).

Section B: Victims and Witnesses

Who is a victim?

- ▶ A victim is an **individual** who has **suffered harm** as a result of any of the crimes within the jurisdiction of the ICC.
- ▶ **Organizations and institutions** that have suffered harm to their property that is dedicated to charitable purposes like religion, education, art or science **e.g. schools, churches.**

Victims and victims!

The ICC differentiates between two types of victims. This differentiation becomes very important for participation and reparations!!!

- ▶ **Victims of a situation** are all victims of alleged crimes against humanity related to the Post Election violence 2007/08 in Kenya.
- ▶ **Victims of a case** are persons who suffered harm as a result of a particular crime for which someone has been charged by the ICC.

Do victims get reparations?

The likelihood of getting individual reparations is very small. There are many pre-conditions before a *victim of the case* gets reparations:

- ▶ Only **victims of the case** who have suffered directly by accused and prosecuted suspects can receive reparations by court order at the end of a trial.
- ▶ Only **victims of the case** who have applied for participation and reparation may get reparations by court order
- ▶ A **victim of the case** has to get acknowledgement as a victim of the case by the judges. Very few victims will however be acknowledged.
- ▶ When giving an order for reparations, a judge must include a **victim of the case** for individual reparations.
- ▶ **Victims of the situation** do not get reparations from the defendant and/or by court order. Victims of the situation may however benefit from a project funded by the Trust Fund for Victims (see below).

The Trust Fund for Victims (TFV)

- ▶ Is an independent institution.
- ▶ Mobilizes people and funding opportunities for the benefit of victims.
- ▶ **Does not/hardly give money to individuals, but funds projects** aimed at helping victims, such as resettlement programmes, medical support.
- ▶ implements court-ordered compensation.

The TFV has an African representative on the Board, she is Betty Murungi

from Kenya.

Rights of Victims:

Victims before the ICC have rights that have never been granted by any other court. For example:

- ▶ Victims can send information to the Prosecutor and ask him to initiate an investigation.
- ▶ Victims can present their views and concerns to the judges **through a legal representative**.
- ▶ Victims can challenge the admissibility of evidence presented by the parties.
- ▶ Victims can seek reparation for the harm they have suffered (see above).
- ▶ Victims of a case may have more possibilities to participate than victims of the situation.

Who deals with victims?

- ▶ The Registry of the ICC deals with victims
 - Victims Participation and Reparation Unit (VPRS).
 - Office of the Public Counsel for Victims (OPCV).
 - Victims and Witnesses Unit (VWU).
- ▶ Legal Representatives: lawyers.
- ▶ Kenyan non-governmental organizations, such as Kituo cha Sheria.

How can victims participate in proceedings?

- ▶ A victim of Post Election Violence must fill in a form: The standard application for participation and reparation.
- ▶ <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Forms.htm>

- ▶ “HATARI” To fill in such an application-form and to prepare all necessary documents is complicated and requires extreme accuracy!!!

Kituo cha Sheria offers assistance to victims that decide to participate and to apply for reparations.

A copy of the form can be found on the Court’s website or on the website of Kituo cha Sheria:

- ▶ <http://www.kituochasheria.or.ke/>

APPLICATION FORM: It should be returned to the Victims Participation and Reparations Section at The Hague by fax, email, or post using the information below:

International Criminal Court
The Victims Participation and Reparations Section
P.O. Box 19519
2500 CM, The Hague
The Netherlands
Fax: +31 (0) 70 515 9100
Email: vprapplications@icc-cpi.int

Who is a witness?

- ▶ A person who testifies before the ICC in person – such as eye witness, expert witness etc
- ▶ A **witness** is someone who has firsthand knowledge about a crime or significant event through their senses (e.g. seeing, hearing, smelling, touching), and can help certify important considerations to the crime or event.
- ▶ Most witnesses in the Kenyan case will be: **insider-witnesses**.
- ▶ people who have first hand knowledge on the organization of violence during the post election crises.

Are Kenyan witnesses protected?

- ▶ **NO:** The Kenyan government is so far not able to protect witnesses related to the ICC proceedings.
- ▶ **YES:** The ICC protects the witnesses called to testify in a case (= small number of persons).



The International Criminal Court (ICC) in the Hague, Netherlands

Part 3:

THE INTERNATIONAL CRIMINAL COURT IN KENYA

Section A: General Information

Why the ICC intervenes in Kenya -

Kenya is a member state of the Rome Statute. The Pre-Trial Chamber II of the ICC decided that crimes committed during the post election crises 2007/2008 may qualify as crimes against humanity.

Thus, the ICC is competent to investigate in Kenya.

Who may be charged by the ICC?

- ▶ The ICC will not prosecute every person suspected of having committed crimes against humanity in Kenya.
- ▶ The Prosecutor is focusing its prosecutions on those who bear the greatest responsibility for preparing and organizing mass violence in 2007 and 2008.
- ▶ The Prosecutor can only charge those masterminds of violence against whom he gathers enough evidence.

Subject of investigation:

- ▶ Attack against perceived PNU supporters
- ▶ Retaliatory attack (against perceived ODM supporters)
- ▶ Police killings

Alleged crimes against humanity in Kenya?

The listed acts committed as part of a widespread or systematic attack directed against a civilian population:

- ▶ Murder.
- ▶ Rape and other forms of sexual violence.
- ▶ Deportation or forcible transfer of population.
- ▶ Other inhumane acts.

Is the Kenyan government obliged to co-operate with the ICC?

- ▶ **YES.** All State Parties to the Rome Statute are under an obligation to fully co-operate with the Court. Kenya is a State Party since March 2005.

Section B: What Next?

Following the procedure:

The Prosecutor collects evidence to build the cases.

- The Prosecutor submits the charges to the Pre Trial Chambers II.
- The Pre Trial Chambers II will decide whether there is enough evidence for a trial (confirm the charges).
 - Arrest warrants/ summons to appear in court will be issued.
 - Trial takes place.

Without evidence there are no charges and no trial.

Dealing with the other perpetrators:

- ▶ High, middle and low level perpetrators should be tried by the Kenyan criminal justice system.
- ▶ There is a small chance that one or the other perpetrator may be prosecuted and convicted in a foreign country.

Other justice options for Post Election Violence victims?

- ▶ Suing the government or individuals: reparations by court order.
- ▶ Lobbying for a local tribunal/governmental reparation scheme.
- ▶ Filing complaints to complaint bodies.
- ▶ Regional Human Rights Mechanisms.
- ▶ Report to UN.



A grave of one of the unidentified victims of the Kiambaa Church incident in Eldoret

Part 4:

MAHAKAMA YA KIMATAIFA YA KUSHUGHULIKIA UHALIFU (ICC)

Ujumbe kuhusu ushiriki na ridhaa

Mahakama ya Kimataifa ya Kushughulikia Uhalifu (ICC) ni nini?

- ▶ Hii ni mahakama ya kudumu ya kimataifa ya kushughulikia uhalifu.
- ▶ Iliundwa ili kusitisha hali ya kutoshitakiwa kwa wahalifu wakuu na ili kuleta haki kwa wahasiriwa.
- ▶ Ilianzishwa mnamo 1998, na kuanza utekelezaji mnamo mwaka wa 2002.
- ▶ Ina wanachama mataifa 114.

Kuelewa kazi ya Mahakama ya Kimataifa ya Kushughulikia Uhalifu (ICC)- kwa kifupi:

- ▶ Ni wale tu walio na jukumu kuu katika vurugu ndio watakaoshitakiwa na Mahakama ya Kimataifa (ICC).
- ▶ Watekelezaji wengi watabaki bila kuadhibiwa kama polisi wa Kenya, viongozi wa mashtaka (maprosekyuta) na mahakimu hawatawashitaki hawa wahalifu wa kiwango cha kati na kile cha chini.
- ▶ Kiongozi wa mashtaka (Maprosekyuta) wa Mahakama ya Kimataifa ya Kushughulikia Uhalifu (ICC), huchunguza visa vichache tu kuhusiana na mauaji ya umma!
- ▶ Kiongozi wa mashtaka (Prosekyuta) wa Mahakama ya Kimataifa ya Kushughulikia Uhalifu (ICC) ‘Ocampo’ hawezi kuwatia nguvuni waliotekeleza mauaji haya; atahitaji Polisi wa Kenya kufanya hivyo.

Kuelewa ushiriki wa Wahasiriwa

- ▶ Ni wahasiriwa wachache tu watakaotoa ushahidi kule Hague.
- ▶ Wahasiriwa hushiriki kwa kuwakilishwa na wakili.
- ▶ Wahasiriwa hushiriki kwa kutuma maoni au kwa kupinga kukubalika kwa ushahidi.
- ▶ Ni wahasiriwa wachache tu watakaolipwa fidia kupitia kwa maagizo ya mahakama.
- ▶ ICC inawalinda mashahidi ambao wanahusika na mashtaka.

Taratibu Kuu za Mahakama ya Kimataifa ya Kushughulikia Uhalifu (ICC)

- ▶ Hakuna msamaha rasmi kwa uhalifu dhidi ya ubinadamu.
- ▶ Hakuna ulinzi dhidi ya mashtaka (immunity).

Uhalifu dhidi ya ubinadamu Kenya

Mahakama ilimruhusu kiongozi wa mashtaka (prosekyuta) achunguze uhalifu dhidi ya ubinadamu. Uhalifu huo ni kama ifwatavyo;

- ▶ Mauaji ya halaiki.
- ▶ Kunajisi na aina zingine za vurugu za ngono.
- ▶ Kuhamishwa au kuondolewa kimabavu kwa umma.
- ▶ Vitendo vingine visivyo vya kiutu.

Mhasiriwa ni nani?

- ▶ Mhasiriwa ni **mtu binafsi** ambaye amepata madhara kwa sababu ya uhalifu wowote ulio chini ya mamlaka ya Mahakama ya Kimataifa ya Kushughulikia Uhalifu (ICC).
- ▶ **Shirika au taasisi** ambayo imepata madhara kuhusiana na mali zake zilizotengewa huduma za kikarimu, kutokana na uhalifu ulio chini ya

mamlaka ya Mahakama ya Kimataifa ya Kushughulikia Uhalifu (ICC).

Kutofautisha Wahasiriwa!

ICC inao wahasiriwa wa aina mbili. Kutofautisha huku kunakuwa muhimu sana kwa ajili ya kulipa fidia!

- ▶ **Wahasiriwa kwa jumla** ni wale wahasiriwa wote wa uhalifu unaosemekana ulitekelezwa dhidi ya ubinadamu kuhusiana na vita vya baada ya Uchaguzi vya 2007/08 nchini Kenya.
- ▶ **Wahasiriwa wa kesi:** watu ambao walipata madhara kutokana na uhalifu maalumu ambao kuna mtu ambaye ameshitakiwa na Mahakama ya Kimataifa ya Kushughulikia Uhalifu (ICC).

Je wahasiriwa hulipwa fidia?

Uwezekano wa kupata kulipwa fidia kibinafsi ni wa chini sana. Kunayo masharti mengi kabla mhasiriwa wa kesi aweze kulipwa fidia:

- ▶ Ni **wahasiriwa** waliopata madhara ya moja kwa moja, yaliyosababishwa na mshitakiwa, ambao wanaweza kulipwa fidia kutokana na agizo la mahakama mwisho wa kesi.
- ▶ Ni **wahasiriwa wa kesi** tu, waliotuma maombi ya kutaka kushiriki na kulipwa fidia ndio wanaoweza kulipwa fidia kufuatana na agizo la mahakama.
- ▶ Mhasiriwa ni sharti atambulike na mahakama ili aweze kulipwa fidia.
- ▶ **Wahasiriwa kwa jumla** hawapati fidia kibinafsi kutoka kwa hazina ya udhamini na/ au agizo la mahakama. Bali huenda wakafaidika kutokana na mradi uliofadhiliwa na Hazina ya Kufidia Wahasiriwa.

Hazina ya Kufidia Wahasiriwa (Trust Fund for Victims)

- ▶ Hii ni taasisi huru ambayo huwahamasisha watu na nafasi za kupata ufadhili kwa manufaa ya wahasiriwa.
- ▶ Taasisi hii si kawaida itoe pesa kwa watu binafsi, bali inagharamia miradi inayolenga kuwasaidia wahasiriwa.

- Inatekeleza kulipwa fidia kulikoagizwa na mahakama.

Haki za Wahasiriwa

ICC inawapa Wahasiriwa haki ambazo hazijawahi kupewa na mahakama nyingine yoyote. Kwa mfano:

- Wahasiriwa wanaweza kutuma habari kwa Kiongozi wa Mashtaka (Prosekyuta) na kumwomba aanzishe uchunguzi fulani.
- Wahasiriwa wanaweza kutoa maoni yao na malalamishi yao kwa hakimu au kupinga kukubalika kwa ushahidi uliotolewa.
- Wahasiriwa wanaweza kuomba kulipwa fidia.

Ni nani anayewashughulikia wahasiriwa?

- Ofisi ya usajili ya Mahakama ya Kimataifa ya Kushughulikia Uhalifu (ICC).
 - Kitengo cha Kushiriki kwa Wahasiriwa na Kulipa Fidia (VPRS).
 - Ofisi ya Mshauri wa Umma kwa Wahsiriwa (OPCV).
 - Kitengo cha Wahasiriwa na Mashahidi (VWU).
- Wakili.
- Mashirika yasiyo ya Kiserikali kama vile Kituo cha Sheria.

Wahasiriwa wanawezaje kushiriki kwenye shughuli za kesi?

- Mhasiriwa wa Vita vya baada ya Uchaguzi sharti aijaze fomu:
- Ipo kwenye mtandao: (<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Forms.htm>)
- Ili kujaza kwenye fomu kama hii-ya kutuma maombi na ili kutayarisha hati zote zinazotakikana, kuna utaratibu mgumu na unahitaji usahihi wa hali ya juu!!!

- ▶ **Kituo cha Sheria kitawasaidia wahasiriwa ambao wataamua kushiriki na kutuma maombi ya kulipwa fidia.**

Hatua kutoka sasa?

- ▶ Kiongozi wa Mashtaka (Prosekyuta) atawasilisha mashtaka kwa mahakama.
- ▶ Kiongozi wa Mashtaka (Prosekyuta) atapeana mashtaka kwa ofisi ya pili ya mahakama.
- ▶ Mahakama itaamua kama kuna ushahidi wa kutosha wa kuanzisha mashtaka.
- ▶ Vibali vya kuwashika washukiwa na vya kuwaagiza kufika mahakamani vitatolewa.
- ▶ Kesi inaanza (pakiwemo na taratibu za ukataji rufaa).

Njia zingine za haki kwa wahasiriwa wa Vita vya baada ya Uchaguzi.

- ▶ Kuishitaki serikali au watu binafsi ili waweze kulipwa fidia.
- ▶ Kuhimiza ili kuwepo na mfumo wa serikali wa kulipa fidia.
- ▶ Kutumia taratibu za Eneo la Africa Mashariki za Haki za Kibinadamu.
- ▶ Kutoa taarifa kwa Tume ya Haki na Maridhiano.
- ▶ Kutuma malalamishi kwa mashirika yanayoshughulikia malalamishi.
- ▶ Mashtaka ya kihalifu kwenye mahakama za nchi.
- ▶ Kitengo Maalumu au Mahakama Maalumu kushughulikia uhalifu dhidi ya ubinadamu.



One of the Internally Displaced Persons (IDP) 'settlement'



The remains of a vandalized house after the post election violence