

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA

Public Redacted Version

**Of Report Concerning Victims' Representations (ICC-01/09-6-Conf-Exp) and
annexes 2 to 10**

Source: Victims Participation and Reparations Section

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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1. Background

1. This report is submitted to Pre-Trial Chamber II in compliance with the Chamber's "Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute" of 10 December 2009.
2. On 5 November 2009 the Prosecutor informed the President of his intention to submit a request in respect of the Republic of Kenya under article 15(3) of the Rome Statute.
3. On 6 November 2009 the Presidency assigned the situation in the Republic of Kenya to Pre-Trial Chamber II.
4. On 23 November 2009 the Prosecutor published a notice on the ICC website stating his intention to make a request under article 15(3) in respect of "alleged crimes committed in Kenya during the post-election violence of 2007-2008" and informing victims of those crimes that they had 30 days in which to make representations to the ICC.
5. On 26 November 2009 the Prosecutor filed a request pursuant to Article 15 of the Rome Statute, seeking authorization for "the commencement of an investigation into the situation in the Republic of Kenya in relation to the post-election violence of 2007-2008".
6. On 10 December 2009 Pre-Trial Chamber II issued its "Order to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute", which included orders that:
 - (a) all victims' communications received by the Court in relation to the Prosecutor's request be submitted directly to the VPRS; and that
 - (b) the VPRS implement procedures for receiving, assessing and presenting victims' representations and report to the Chamber on the steps taken in this regard by 21 December 2009.

7. From [REDACTED] until [REDACTED] staff of the VPRS and PIDS undertook a joint mission to Kenya.
2. **Overview of steps undertaken to implement the Chamber's order of 10 December 2009**
8. The mission to Kenya was planned by VPRS and PIDS upon learning of the Prosecutor's intention to submit a request in respect of the Republic of Kenya under article 15(3) of the Statute. The objective of the planned mission had been to assess the conditions in Kenya relevant for outreach activities and for victims to make representations in accordance with article 15 of the Statute and Rule 50 of the Rules of Procedure and Evidence. Following the Chamber's Order of 10 December, [REDACTED], the primary objective of the mission became an assessment of how the Order might be implemented and, so far as possible, to initiate steps to implement the Order.
9. In considering how to implement the Chamber's Order, the Registry was guided in particular by the following factors:
 - (a) The Prosecutor had chosen not to have direct contact with victims, on the basis that to do so "would pose a danger to the integrity of a future investigation or to the life or well-being of victims and witnesses".¹ Therefore nobody had yet attempted to make direct contact with victims on behalf of the Court.
 - (b) In its Order, the Chamber ordered the VPRS to "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 (collective representation)", and to "receive victims' representations (collective and/or individual)". The Registry understands from this that it is expected to undertake a targeted communications strategy, including taking steps to:

¹ Request for authorisation of an investigation pursuant to Article 15, ICC-01/09-3, 26 November 2009, para. 112.

- identify community leaders representative of the range of victim communities;
- make contact with such community leaders, whether directly or through intermediaries; and
- explain to them that they may make representations to the Chamber, as well as how they can do so.

The Registry understands that it is to explain to community leaders that:

- the process of making representations to the Court is strictly voluntary; and that
- the victims they represent may make either collective or individual representations, or both.

- (c) In its Order, the Chamber further ordered the VPRS to “conduct an assessment ... of whether the conditions set out in rule 85 of the Rules have been met”, and further specifies that the conditions set out in rule 85 “should be assessed on the basis of the intrinsic coherence of the information given by the victim(s)”. The Registry understands from this that it should establish appropriate means for assessing whether persons providing representations fulfill the conditions either of paragraph a or of paragraph b of rule 85. However, that given the limited nature of this proceeding, such assessment need not reach the standard established by Chambers in determining whether persons are entitled to participate in proceedings. The VPRS will establish procedures to enable such determinations to be made, including the use of templates and checklists as necessary. Should the Chamber wish to have more information on the approach being taken by the VPRS in this regard, a report detailing that approach could be prepared by the Registry.
- (d) The Chamber emphasized that the VPRS should “clarify in all activities and contacts with community leaders of affected groups or victims ... the purely voluntary nature of such possible representations ...”. The Registry would

like to inform the Chamber that it has taken every opportunity to emphasize this point in all of its exchanges in Kenya to date, and will continue to do so.

- (e) Finally, the Chamber also drew attention to its duty to ensure that proceedings are carried out in an expeditious manner. The Registry has therefore made every effort, in planning and taking steps to implement the Order, to ensure that the Chamber may receive the representations from victims as quickly as possible. The Registry notes from the outset that its ability to do so has been hampered by several factors. First, the fact that the Registry was starting its operations in Kenya from scratch since most of the relevant parts of the Registry had not previously operated or developed contacts there. Second, the security context means that every step must be taken with great caution and only after having appropriate advice on how to avoid putting people at risk. [REDACTED].

3. Overview of the mission to Kenya

10. A conscious decision was taken for this mission to be made in a discreet manner.

This was considered necessary:

- In order to avoid the presence of ICC staff in Kenya being misconstrued as indicating that an investigation has begun or is a *fait accompli*.
- Because no prior assessment of the extent and nature of security risks had been conducted. It therefore was considered best to take a cautious approach so as to minimize the chance of inadvertently increasing any such risks.

11. The team met [REDACTED] with relevant interlocutors from the following groups:

[REDACTED]

A complete list of the organizations and individuals met during the mission is provided in Annex 1.

12. There were significant concerns about the safety of persons seen to be engaging with the ICC (set out in more detail below). [REDACTED]

13. In addition, time constraints limited the number of organizations and individuals with whom it was possible to meet. Significant further scope exists for discussions with other key actors such as [REDACTED]
14. Most of the organizations or key individuals contacted were met in private meetings. At these meetings information about the ICC was provided to participants, with a particular focus on the current proceedings in respect of the Situation in the Republic of Kenya pursuant to article 15, and the specific role of victims in these proceedings. Input was sought on a variety of questions relating to outreach and the role of victims. Finally, on [REDACTED] invitation-only information sessions with a more structured format were held in order to share information and hold discussions with groups of organizations and individuals which might provide a channel to victim communities and assist victims to make representations to the Chamber. The VPRS and PIDS team sought input on how the Chamber's order of 10 December might best be implemented. During these meetings presentations were made regarding ICC proceedings in general, the role of victims in ICC proceedings, and the specific role of victims pursuant to article 15(3) of the Statute. Discussions were held to gather input from participants on a range of questions relating to how the opportunity for victims to present representations to the Chamber might be safely and effectively realized for any victims who might choose to do so.
15. The Registry considers that gathering information on the above was a necessary first step in implementing the Chamber's Order. The following sections of this report set out the information which was received from those organizations and individuals met during the mission, as well as from written sources consulted by the VPRS and PIDS.

4. Conditions in Kenya relevant to the Registry's implementation of the Chamber's Order

4.1. Existing perceptions about the Court

16. Information and views gathered indicated that Kenyans are very familiar with the existence of the ICC and the possibility that the ICC Prosecutor might investigate crimes committed in Kenya.² Discussions suggested that there is a high degree of trust in the ICC as a fair and impartial judicial institution.

17. It also appears that Kenyans are curious to learn more about the ICC. A series of impromptu interviews carried out for PIDS by [REDACTED] in some areas where violence occurred revealed some frequently asked questions:

- How will the ICC protect victims and witnesses who are vulnerable to threats and/or attack?
- Will victims be able to receive compensation for what they have lost?
- How long would investigations and trials take? Would they be concluded before the 2012 elections?
- What are the crimes which the ICC might consider investigating in Kenya?
- How are trials conducted at the ICC? How do ICC judges reach their judgments?
- Does the ICC have a police force? How will it apprehend suspects?

A more comprehensive list of frequently asked questions from Kenya is provided as Annex 2 to this report.

18. On some issues it appears that unrealistically high expectations already exist about what the ICC can achieve in Kenya. It is clear that the Kenyan population is not yet familiar with the principles and procedures by which Court operates, and

² Anecdotal information gathered from meetings suggests strong community support for the ICC's involvement. These views appear to be supported by two opinion polls which put support for the ICC's involvement at 68% (Synovate Research/Steadman Group, July 2009) and 52% (Gallup, August 2009) respectively.

that there are a number of widespread misapprehensions about how the situation in Kenya is being dealt with. Some key examples of these are:

- The belief that ICC investigators are already conducting investigations and that the current proceedings are aimed at the collection of evidence;
- The belief that arrests are imminent and will be effected by the ICC Prosecutor himself;
- The expectation that the ICC will prosecute large numbers of suspects, including persons bearing various levels of responsibility for a wide range of crimes.³
- The desire of many victims to give evidence about their experiences (albeit under secure conditions), and the belief that most or many victims and eye-witnesses will have a chance to testify at the ICC.
- A belief that the ICC will be in a position to provide comprehensive protection measures to all victims and witnesses who are at risk.

These misapprehensions have been contributed to by a media sector which is relatively ill-informed about the ICC but which garners a high level of trust from the population.

19. In addition to these general challenges, it is clear that significant confusion exists relating to the rights and roles of victims in ICC proceedings. As in other common law countries, Kenyan law envisages a victim's principal roles in the criminal justice system as those of complainant and witness. The recent introduction of a system of victim-impact statements for use in sentencing⁴ may have increased opportunities for victims' voices to be heard but has not significantly changed the fact that victims interact with Kenyan courts through prosecutors, rather than directly or in their own right. As a result, the roles of

³ It is possible that Kenyans may expect the Court to deal with crimes which occurred before 1 June 2005 (when the Rome Statute entered into effect for Kenya) and crimes other than those defined in articles 6, 7 and 8 of the Rome Statute (such as electoral fraud).

⁴ Kenyan Criminal Procedure Code, Part IXA (sections 329A to 329F), introduced in 2003.

victims before the ICC – including the possibility of making representations to the Chamber under article 15(3) – are not only unfamiliar to Kenyans, but may be counterintuitive to those who have some knowledge of the Kenyan justice system. Significant efforts will be required to educate Kenyans, including civil society and lawyers, on these issues.

20. On the specific question of victims' representations under article 15(3), the VPRS notes that most of those met were not aware of victims' rights to make representations. Those who were aware of victims' rights in this regard were confused as to the nature of the information which should be included in victims' representations and also as to which part of the Court would receive the representations. It appears that some representations may be sent (or have already been sent) to the Office of the Prosecutor. The VPRS has made a request to the Office of the Prosecutor that any communications in relation to the article 15 procedure received by it should be transmitted to VPRS, in accordance with the Chamber's Order.

4.2. Nature of the victim populations and their relationships with civil society and lawyers

21. Preliminary discussions concerning the characteristics of victim populations in Kenya revealed a complex picture. A range of self-characterized "victim" or "survivor" populations exist, including many who suffered harm as a result of periods of violence which fall outside the jurisdiction of the Court. VPRS has focused its attention on those victim populations who appear to have suffered harm due to political violence of 2007-2008.⁵ While the VPRS has not yet been in a position to comprehensively map the victim population in Kenya, some of the characteristics of that population are clear:

⁵ VPRS notes that the Rome Statute was ratified by Kenya on 15 March 2005 and came into effect for Kenya on 1 June 2005.

- The victim population is very large. For example, estimates of those who lost property and/or were displaced during the peak of violence in the post-election period are given in hundreds of thousands.
- The victim population is spread geographically across various, though not all, parts of Kenya. Large numbers of victims can be expected to be found in those areas which experienced the most intense violence during the pre- and post-election periods, including locations in Western, Nyanza, Rift Valley, Central, Coast and Nairobi Provinces.
- Victim groups are strongly divided along ethnic and political lines.
- While the victim population does include some wealthy and educated Kenyans, its majority is composed of poorer and less-educated people, many living in slums within Nairobi or otherwise outside the capital. Some victims remain displaced, including in camps for Internally Displaced Persons (IDPs).
- The characteristics and situations of victim groups vary to some extent according to the type of violence from which they suffered: for example whether it was violence which was spontaneous, planned, retaliatory, or effected by the police. For example, the groups which suffered from these respective types of violence seem likely to have differing ethnic and geographical characteristics.
- Some victim groups are relatively well organized and have their own systems for advocacy and representation. This is clearest in the case of certain parts of the IDP population.
- Other categories of victims are unorganized. This may be because they are geographically isolated from others with whom they may share common experiences or concerns. Or, even more significantly, it may be because the nature of the violence they suffered leads them to remain silent about their experiences. Unorganized victim groups include victims of excessive force by the police and victims of sexual violence (men, women and children). They

may also include internally displaced victims living among heterogeneous IDP populations.

- However even where victim groups are relatively organized, representative structures may often be very informal. This may make it difficult to be certain of which persons or organizations represent particular groups.
- It is likely that some victims or victim groups are also themselves responsible for violence against others.

22. It was repeatedly emphasized to the VPRS and PIDS team that it is very important that the process of collecting representations must not favour or disadvantage any particular ethnic or political group, and neither must it be *perceived* as doing so. In order to be sure that different victim groups are given the opportunity to provide representations to the Court, the Registry is convinced that efforts will be required to properly map the various groups. Further, such mapping exercise should include identifying community representatives or others who might assist each group to provide representations to the Court if they should wish to do so, in order to be confident of correctly identifying trustworthy individuals who are leaders of those communities.

23. Just as the victim population is complex, so too is its relationship with civil society. Kenyan civil society is large and relatively sophisticated. Many organizations from various sectors⁶ have been working with victim populations in various capacities. These organizations range from small, unfunded grassroots groups to sophisticated, well-resourced international agencies. [REDACTED]

[REDACTED]

24. In addition to organizations from the sectors mentioned above, a number of lawyers are active in working with victims of the violence. [REDACTED]

⁶ Including but not limited to the human rights, humanitarian, development, peace-building and reconciliation, and religious sectors

4.3. Security conditions

25. The clearest message received during the Kenya mission was that there exist serious and well-founded fears for the security of those who contact the ICC, or who are even *thought* to have had contact with the ICC. There was overwhelming agreement that persons with knowledge or evidence about serious crimes have been and will continue to be harassed, intimidated, and even killed.

26. The existence, extent and seriousness of this threat were explained by the following factors:

- The existence of an entrenched culture of impunity which enables those responsible for crimes to threaten, attack or kill potential witnesses without a fear of sanction.
- The existence of a highly sophisticated state-controlled apparatus for surveillance and repression which enables suspects from within state institutions to identify and take action against potential witnesses or others who may speak out.
- The fact that in many cases victims and those suspected of having directly perpetrated violence were drawn from the same community and continue to live side by side.

27. The incidence of threatened or actual violence against victims, witnesses and those advocating their interests has been well documented. Two of the best known examples are:

- In March 2009 two human rights defenders who had recently given information on extra-judicial executions to Special Rapporteur Philip Alston were shot dead in Nairobi.
- On 16 October 2008, the day following the release of the Waki Commission Report, a police whistleblower who had testified about police killings to the Kenya National Commission on Human Rights was shot dead despite having been placed in the Commission's protection program.

A list of documents and reports which detail threats and attacks against human rights defenders and witnesses, along with copies of those documents and reports, are attached to this report as annexes 3 to 10.

28. A Witness Protection Act was adopted in 2006⁷ and came into legal effect on 1 September 2008.⁸ However it is yet to be implemented in practice. In any event the Act is widely regarded as an unacceptable solution because it gives responsibility for witness protection to the state, despite the fact that in many cases it is the state's own agents who are suspected of initiating threats and violence against witnesses. Some proposals have been made⁹ for amendments to the legal regime in order to allow for a protection mechanism which is independent of government. However it is not yet clear whether such proposals will be accepted or in what form.

29. [REDACTED]¹⁰

30. It is therefore clear that very real threats to victims and witnesses do exist.
[REDACTED]

31. Finally, even at this point and without a security assessment, it is clear that the ignorance and confusion surrounding the work of the ICC have the potential to compound existing security threats. Current misconceptions, such as the belief that an investigation has already been authorized, or that all ICC staff traveling to Kenya must be there to gather evidence or effect arrests, only serve to further heighten the risks to those who have contact with the Court. It therefore appears that the risks to those who interact with the Court at this stage would be mitigated by improving Kenyans' understanding of the Court's work.

⁷ Witness Protection Act, 2006, No. 16 of 2006.

⁸ Legal Notice No. 110, 19 August 2008.

⁹ These proposals have primarily been made in the context of the work of the Truth, Justice and Reconciliation Commission (TJRC) which is expected to begin its work in 2010.

¹⁰ [REDACTED]

4.4. Access to media and communications technology

32. It is clear that in Kenya a significant challenge in communicating with victims is the limited access of many victims to media and communications technology.

33. The mission team was informed that members of remote communities and the urban poor have limited access to mobile phones, the internet and television. Access to radio is said to be more widespread, but frequently through a variety of vernacular stations which may be politically aligned. Further, any attempt to use these means of communication or mass media to reach victim communities would be constrained by the security concerns already mentioned.

4.5. Other challenges and lessons learned

34. Several other challenges were encountered during the mission and in its preparation from which lessons must be learned for future engagements in Kenya.

(a) [REDACTED]

(b) [REDACTED]

5. Specific feedback from organizations and individuals met during the mission

35. In addition to the issues addressed above, some views commonly expressed to the VPRS and PIDS team seem to warrant mention in this report.

(a) A number of [REDACTED] organizations met by the VPRS and PIDS team had seen the notice issued by the Prosecutor on 23 November. These organizations made the following comments regarding the notice:

- The notice was inaccessible to most victims, and indeed managed to reach only the educated elite of Kenyan civil society. Not only was it seen by few people, but it was well-understood by even fewer.
- The content of the notice was criticised. The provision of a Hague postal address as a means by which victims could send their representations to the Court was viewed by civil society groups as problematic. [REDACTED] Civil society groups expressed concerns that some victims

may be unaware of the risks involved in sending sensitive information to the ICC through the mail and could thus unwittingly expose themselves to serious risks.

This information provided an important lesson learned, in respect of the need for caution when considering the means by which the Court might seek to communicate with victims.

- (b) A number of those met, including community leaders as well as civil society representatives, expressed their concerns that there is a very real possibility of the falsification of victim representations. In particular it was suggested that those who fear they might be investigated by the Court could seek to use this process as a means by which to prevent the ICC's involvement in Kenya. The real likelihood of such a possibility was difficult for the VPRS and PIDS team to assess, but even the existence of a *perception* that this might occur requires that care is taken to minimize this risk.
- (c) While the VPRS does not wish to anticipate in this report the representations which might be made by victims and groups of victims, it did glean from the mission some indication of the *types* of information which might be included in victims' representations.
 - Firstly, it is clear that many victims may see this process as a means by which to provide evidence to the Court. This may result not only in the provision of information which is not useful for the Chamber at this stage, but could also increase the security risks to those victims. This makes it all the more important that any steps taken to communicate with victim communities be accompanied by clear information regarding the process.
 - Secondly, it is likely that victims will wish to comment not only on whether or not the ICC should investigate crimes committed in Kenya, but also on the temporal scope of such an investigation. It was said that different kinds of violence, allegedly committed by different groups, were committed at varying times. Therefore some believe that the delimitation

of an investigation's temporal scope will not only impact on the number of crimes which might fall within the investigation, but more crucially on the ethnicity of victims and suspects covered by the investigation. There is a concern that a narrowly defined investigation may allow suspects of some ethnic groups to evade scrutiny by the Court, and that this could itself lead to further instability.¹¹ The definition of the scope of any investigation can therefore be expected to form part of victim representations.

- (d) Competing concerns were expressed from those community leaders and civil society members who wish to see the process move quickly, and those who want it to take the time needed in order to ensure that it is thorough and safe. Concerns were expressed that violence will reoccur during the 2012 elections and that for this reason investigations and trials must happen quickly. However others point out that accountability has already taken so long that some more delays would be acceptable in order to ensure a safe and credible process.
- (e) Finally, it seems important to emphasize to the Chamber that despite widespread and very real concerns about security, those met during the mission were unanimous in stating that the process of collecting victims' representations should go ahead, albeit in a careful and secure way.

6. Conclusions and recommendations

6.1. Appropriate mechanisms for receiving victims' representations

36. The VPRS has taken the following steps to receive victims' representations in a secure and effective manner, providing that this proposal is consistent with the eventual outcomes of the security assessment proposed above.

- a) [REDACTED] has been asked to carry out a mapping of victim populations including community leaders, community-based organizations and others. A

¹¹ For related-reasons this report consciously avoids use of the common shorthand "post-election violence". This terminology was identified a problematic by some of those met, since it is considered to (by some accounts deliberately) play down the extent of the violence which occurred *before* the 2007 election.

second aim of the mapping will be to identify trusted intermediaries who may assist in communicating with the above.

b) The VPRS has met with the Safety and Security Section of the Registry and with the Victims and Witnesses Unit, which have been requested to arrange for a security assessment to take place as soon as possible. For the reasons explained above there is an urgent need for a comprehensive risk assessment which will address the following issues:

- Security issues in the various locations where victims are principally located;
- Security concerns which might arise out of proposed activities to implement the Order of the Chamber, and the use of various forms of communication;
- Practical options for minimizing security risks carrying out steps to implement the Order of the Chamber by complying with good practices;

The security assessment will encompass risks which might arise for all of those involved in this process: ICC staff, victims, victims' representatives, witnesses, intermediaries and lawyers.

c) Templates are being prepared for the purpose of assisting victims to make individual representations and/or collective representations, and for enabling VPRS to assess whether the conditions in rule 85 are met.

d) Plans are being put in place for further missions to Kenya as outlined in the proposed timetable below.

6.2. Outreach

37. In light of the issues raised above, including the extent of confusion and misinformation in Kenya about the ICC, and the fact that this factor appeared to the mission team to be contributing to security threats against persons who interact with the court, it appears to the Registry that there is an urgent need for information about the Court to be provided in Kenya by PIDS. The Registry therefore proposes to immediately begin providing such information in Kenya.

38. Such information will clarify how the Court operates in general, address identified concerns and respond to frequently asked questions. It will focus on the current status of the proceedings and the procedures involved. It will aim to ensure that the various ethnic and political groups are reached. Any activities will be undertaken in consultation with the VPRS and VWU in order to minimize risks to the security of victim communities.
39. If the Chamber would like further information regarding activities proposed by PIDS, or has concerns regarding such activities, the Registry is at the Chamber's disposal.

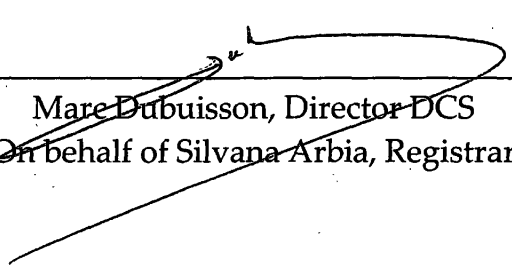
6.3. Proposed timeframe

40. The following timeframe is proposed for the Registry to complete the implementation of the Chamber's Order: [REDACT]
41. VPRS notes that steps (b) to (d) are contingent on the completion of a security assessment which concludes that such activities can be carried out safely. If the security assessment cannot be satisfactorily completed or does not allow for full implementation of the steps outlined above, a more limited approach may have to be devised. Such an approach would need to be developed based on the specific security concerns identified. It would need to strive at ensuring representation from all major victim groups, even if a less stringent assessment of conformity with rule 85 was to be used. In such an event the Registry would be prepared to report to the Chamber on the alternative approach proposed.

6.4. Recommendations:

42. Based on the above considerations the Registry respectfully makes the following recommendations to the Chamber:

- (a) That the Chamber indicates that all representations received from victims will be treated by the Court as confidential.
- (b) That the Chamber grants an extension of time for the filing of the report of the VPRS on victims' representations until 15 March 2010.



Mare Dubuisson, Director DCS
On behalf of Silvana Arbia, Registrar

Dated this 29 March 2010

At The Hague, The Netherlands