



Strathmore University

Law School

**PARTICIPATORY RIGHTS OF VICTIMS OF MASS CASUALTY INCIDENTS: THE
CASE FOR AN ICC-MODEL IN REDEFINING VICTIMS' PARTICIPATORY RIGHTS
IN KENYA**

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By

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DECLARATION

I, **JOHNY WAMBUA KITHEKA**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:



Date: 10th February 2025.

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:



Mr. Patrick Nzomo.

Date:



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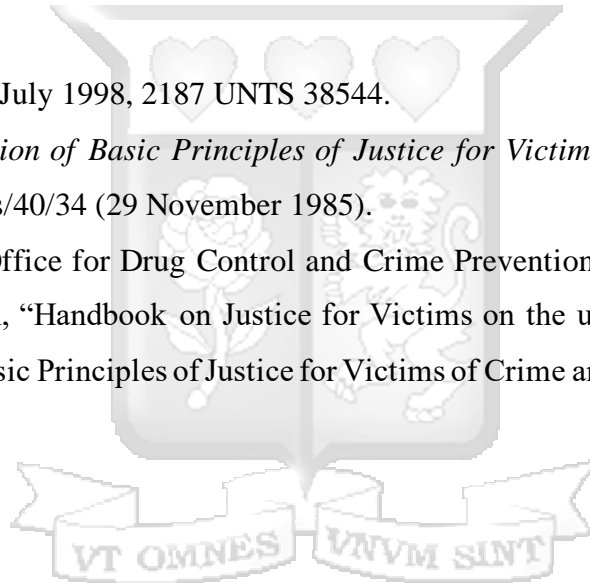
LIST OF LEGAL INSTRUMENTS

Kenyan Legal Instruments

1. *Constitution of Kenya* (2010).
2. *Criminal Procedure Code* (Cap. 75 Laws of Kenya).
3. *The Criminal Law (Amendment) Act* (Act No. 5 of 2003).
4. *The Criminal Procedure Code (Amendment) Act* (Act No. 11 of 2008).
5. *The Criminal Procedure (Plea Bargaining) Rules*, Legal Notice 47 of 2018.
6. The Victim Protection (General) Regulations, 2020.
7. *Victim Protection Act, 2014* (Act No. 17 of 2014).

UN Official Documents

1. *Rome Statute*, 17 July 1998, 2187 UNTS 38544.
2. UNGA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN A/Res/40/34 (29 November 1985).
3. United Nations Office for Drug Control and Crime Prevention: Centre for International Crime Prevention, “Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power” 1999.



LIST OF CASES

Kenyan Cases

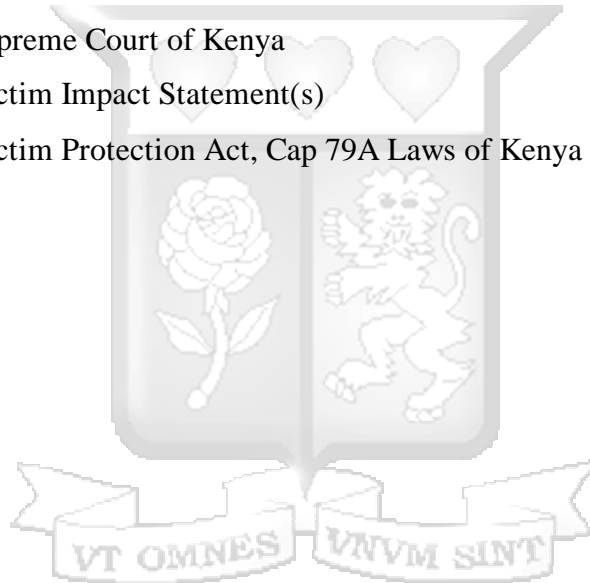
1. *Gideon Mwiti Irea v DPP & 7 Others* (2015) eKLR.
2. *Joseph Nduvi Mbuvi v R* (2019) eKLR.
3. *Lendrix Waswa v Republic* (2020) eKLR.
4. *Leonard Maina Mwangi v Director of Public Prosecutions & 2 others* (2017) eKLR.
5. *Mary Kinya Rukwaru v Ragunathan Santosh and another* (2014) eKLR.
6. *Patrick Mugambi v R* (2017) eKLR.
7. *R v Director of Public Prosecution & another; Ex Parte Chege* (2023) ECLR.
8. *R v Leliman and 4 others* (2018) eKLR.
9. *R v Paul Mwangi Macharia* (2013) eKLR.
10. *R v Perry Mansukh Kansngara and 8 others* (2020) eKLR.
11. *Veronica Gitahi and Another v Republic* (2016) eKLR.

ICC Cases

1. *Prosecutor v Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd Al-Rahman (“Ali Kushayb”), The Situation in Darfur*, ICC Pre-Trial Chamber, “Decision on the Requests of the OPCD and the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor” (2008).
2. *Prosecutor v Jean-Pierre Bemba Gombo, The Situation in the Central African Republic*, ICC Trial Chamber, “Decision Pursuant to Defence Application for Appropriate Prior to Commencement of the Trial Scheduled for 22 November 2010 (2010).
3. *Prosecutor v Katanga and Ngudjolo Chui, The Situation in the DRC*, ICC Pre-Trial Chamber, “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements” (2008).
4. *Prosecutor v Thomas Lubanga Dyilo, The Situation in the Democratic Republic of Congo*, ICC Appeals Chamber, “Appeals Judgment” (2008).
5. *Prosecutor v Thomas Lubanga Dyilo, The Situation in the Democratic Republic of Congo*, ICC Pre-Trial Chamber, “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6” (2006).

LIST OF ABBREVIATIONS

1. AC Appeals Chamber
2. CoK Constitution of Kenya, 2010
3. CPC Criminal Procedure Code, Cap. 75 Laws of Kenya
4. ECCC Extraordinary Chambers of the Courts of Cambodia
5. ICC International Criminal Court
6. PBA Plea Bargaining Agreement
7. PEV Post-Election Violence
8. PTC Pre-Trial Chamber
9. RS Rome Statute
10. SCORK Supreme Court of Kenya
11. VIS Victim Impact Statement(s)
12. VPA Victim Protection Act, Cap 79A Laws of Kenya



ABSTRACT

In the context of evolving victims' rights to participate in criminal proceedings, it has become pressing to strike a balance between their right to participation and the need for speedy trials. This issue becomes even more critical in an adversarial criminal justice system, such as Kenya's, where the process has traditionally been limited to the participation of the Prosecutor and the Defence. Enacting the Victim Protection Act, 2014 (VPA) in Kenya has brought with it an extensive array of rights accorded to victims during the criminal justice procedure. Against this backdrop, this study seeks to explore the concept of victimhood, the challenges posed by mass casualty incidents in ensuring victims' participatory rights, and the inadequacies of Kenya's current legal framework in addressing these issues. Anchored on John Rawls' Justice Theory, the study employs a doctrinal research methodology, drawing insights from primary sources such as statutes and case law, as well as secondary sources including scholarly works and journals. The significance of this research lies in its potential to influence legal practices, procedures, and policymaking, mostly in Kenya, especially when dealing with victims of mass casualty incidents. Ultimately, this study finds that borrowing aspects from the International Criminal Court's approach will help fill some of the gaps in Kenya's framework. These include broadening the understanding of victimhood and the definition of a victim and expanding victims' rights under the VPA to allow for active engagement, such as challenging evidence while safeguarding the accused's right to a fair trial.



TABLE OF CONTENTS

DECLARATION	ii
ACKNOWLEDGMENTS	iii
LIST OF LEGAL INSTRUMENTS	iv
LIST OF CASES	v
LIST OF ABBREVIATIONS	vi
ABSTRACT	vii
CHAPTER ONE: INTRODUCTION	1
1.0 Background	1
1.2 Research Questions	4
1.3 Research Objectives	4
1.4 Hypothesis	5
1.5 Significance of the study	5
1.6 Theoretical Framework	6
1.7 Literature Review	8
1.7.1 The Participatory Rights of Victims of Mass Casualty Incidents	8
1.7.2 Participation of Victims of Mass Casualty Incidences in Kenya: A Case for the Adoption of the ICC Model	10
1.8 Research Methodology	14
1.9 Limitations	15
1.10 Chapter Breakdown	15
CHAPTER TWO: PARTICIPATORY RIGHTS OF VICTIMS OF MASS CASUALTY INCIDENTS IN KENYA: AN EVALUATION OF THE CURRENT LEGAL AND INSTITUTIONAL FRAMEWORKS	17
2.1 Introduction	17
2.2 The Legal Framework for Victim Participation in Kenya	17
2.2.1 The Constitution of Kenya, 2010 (CoK)	17
2.2.2 The Criminal Procedure Code, Cap. 75 Laws of Kenya (CPC)	18
2.2.3 The Victim Protection Act, Cap. 79A (VPA)	19
2.2.4 The Victim Protection (General) Regulations, 2020	20
2.2.5 Analysing the shift of Victim Participation and the application of the existing framework in Kenyan Courts	22
2.3 Institutional Framework	24
2.4 Analysing the Legal and Institutional Frameworks on Participatory Rights of Victims of Mass Casualty Incidents in Kenya	25

2.4.1 Salient Features Regarding Victims' Participatory Rights	25
2.4.2 Gaps in the Legal Framework	25
2.5 Conclusion.....	27
CHAPTER THREE: THE LAW AND PRACTICE OF PARTICIPATORY RIGHTS OF VICTIMS OF MASS-CASUALTY INCIDENTS BEFORE THE INTERNATIONAL CRIMINAL COURT (ICC)	28
3.1 Victimization and the Concept of Victimhood in International Criminal Law	28
3.2 The Notion of Justice.....	30
3.3 The International Criminal Court and Victim Participation.....	32
3.3.1 The ICC in Focus	33
3.3.2 Mass Victim Participation and Undue Prejudice	35
3.4 Conclusion.....	36
CHAPTER FOUR: VICTIM PARTICIPATION IN MASS ATROCITIES: ANALYSIS AND REFORM STRATEGIES FROM THE ICC MODEL FOR THE KENYAN LEGAL SYSTEM	37
4.0 Introduction	37
4.1 Analysing areas of reform and Possible strategies for reform thus far.....	37
4.2 Weaving Insights from the ICC into the Kenyan Victim Participation Framework	39
CHAPTER FIVE: RESEARCH FINDINGS AND CONCLUSION	41
5.1 Research Findings	41
5.2 Recommendations	42
5.3 Conclusion.....	42
BIBLIOGRAPHY	43
Articles	43
Book Chapters	43
Case Law	44
Dissertations	45
Legal Instruments	45
Internet Sources	46
UN Official Documents	46

CHAPTER ONE: INTRODUCTION

1.0 Background

In the aftermath of mass casualty incidents, where multitudes of lives are disrupted, and communities are left grappling with the repercussions, the pursuit of justice takes center stage. A key tenet of the criminal justice system is the protection of the right of victims to participate in proceedings. Kenyan courts have applied the Victim Protection Act, 2014 (VPA), leading to the development of jurisprudence in this area.¹ Such developments include the transition of victims from mere watchers of the brief to taking up more active roles in the proceedings. This transition presents unique challenges, particularly where certain scenarios such as mass casualties, are not explicitly provided for.² The scope of a ‘victim’ within the legal framework is seen to leave out key categories of persons where more emphasis has been on ‘victims of crime’.³

The scope of the term “victim” is constantly evolving and demands a broad understanding. In Kenya, this encapsulates not only the person against whom the offense was committed,⁴ but also “a witness to the act of actual or threatened violence, death, or infliction of physical bodily harm”.⁵ This definition implies that the term victim refers to “a person who has suffered personal harm as a direct result of the offense”; a primary victim.⁶ However, a victim also includes a person who was at the time the offense was committed, a member of the primary victim’s immediate family.⁷ The immediate family include the victim’s spouse, children, parent, grandparent, stepchild, stepsister, stepbrother, or stepparent, and where the victim is a child, the guardian.⁸ This definition is also wanting since it leaves out key categories of persons such as dependants of the primary victim, those who have suffered mentally from the acts in question, and those who have suffered harm in attempting to intervene to assist victims in distress.⁹

¹ *Lendrix Waswa v Republic* (2020) eKLR.

² *R v Director of Public Prosecution & another; Ex Parte Chege* (2023) EKL.R.

³ *R v Director of Public Prosecution & another; Ex Parte Chege* (2023) EKL.R.

⁴ Section 329A *Criminal Procedure Code* (Cap. 75 Laws of Kenya).

⁵ Section 329A *Criminal Procedure Code* (Cap. 75 Laws of Kenya).

⁶ Section 329A *Criminal Procedure Code* (Cap. 75 Laws of Kenya).

⁷ Section 329A *Criminal Procedure Code* (Cap. 75 Laws of Kenya).

⁸ Section 2, *Victim Protection Act* (Act No. 17 of 2014).

⁹ UNGA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN A/Res/40/34 (29 November 1985).

Under the VPA, the victim has a right, in so far as is reasonable, to be heard and to respond to evidence adduced in court before any decision affecting them is taken.¹⁰ A victim also has such right to adduce evidence that has been left out in the proceedings.¹¹ This is further reinforced by the right to be informed of the evidence that both the prosecution and defense intend to rely on.¹² This interconnected web of rights has been argued to be the precursor to a victim's right to participate actively in proceedings.¹³

Before the enactment of the VPA, victims in Kenya had limited participatory rights in the criminal process, primarily relegated to the role of witnesses. This was evidenced in cases like *R v Leliman and four others*, where the court acknowledged that victims were mere “silent observers,” only visible in court through an advocate watching brief, without the right to actively participate. Similarly, in *R v Paul Mwangi Macharia*,¹⁴ the court put forward the opinion that criminal jurisprudence recognizes on one hand, the state as the complainant and on the other, the accused as the defendant. However, with the enactment of the VPA, victims were granted significant participatory rights, transforming them from passive bystanders into active participants. Post-2014 jurisprudence, as seen in *Gideon Mwiti Irea v DPP & 7 Others*,¹⁵ recognized victims as active participants with a valid interest in the proceedings marking a clear transition towards a more victim-centered criminal justice system.

Currently, the law provides this recourse to ‘a’ victim, and while an assumption can be made that this applies in plurality as well, the jurisprudence in Kenyan courts has shown that this is a contentious issue.¹⁶ This gap is severely exposed by scenarios involving a multitude of victims and the current legal framework offers little guidance in this regard. Instead, the possible assumption that the definition of ‘a’ victim extends instances of mass casualties suppresses the views of such victims in two ways. One example is the use of victim's counsel, which assumes that the victims' needs are homogeneous.¹⁷ Second, the victims are altogether excluded from participating in the

¹⁰ Section 4, *Victim Protection Act* (Act No. 17 of 2014).

¹¹ Section 13, *Victim Protection Act* (Act No. 17 of 2014).

¹² Section 9 (1), *Victim Protection Act* (Act No. 17 of 2014).

¹³ *Leonard Maina Mwangi v Director of Public Prosecutions & 2 others* (2017) eKLR.

¹⁴ (2013) eKLR.

¹⁵ (2015) eKLR.

¹⁶ *R v Perry Mansukh Kansngara and 8 others* (2020) eKLR.

¹⁷ *R v Perry Mansukh Kansngara and 8 others* (2020) eKLR.

proceedings due to an apprehension of occasioning undue delay in the proceedings. It has also been contested that having increased victim participation contradicts the traditional adversarial system where the proceedings primarily involve the State against the accused.¹⁸ The International Criminal Court outrightly frowns upon the exclusion of victims from participating in the proceeding. However, while the ICC also utilizes a Common Legal Representative for the victims, victim participation is encouraged to the highest permissible extent, including as victim-witnesses.

This research work contends that to adequately promote justice in mass casualty incidents, the legal framework and practices in an adversarial system, like Kenya, must be reevaluated to strike a balance between the need for a speedy trial and serving the unique needs of each victim. This study begins by seeking to expand the understanding of a ‘victim’, followed by an examination of the developments in victims’ roles within the courtroom. This will be informed by an assessment of the ICC in order to ascertain what classes of victims can and ought to be considered in situations of mass casualty incidents. This comparison will also aid in understanding the extent to which victim participation rights can be expanded. Lastly, it explores solutions such as increased use of Victim Impact Statements (VIS) and the introduction of Criminal Class Actions. The study will also explore notions of justice from a victim’s perspective seeking to rely on restorative justice. Restorative justice in this sense would encompass a framework to try and revert the victims to any semblance of normalcy they enjoyed before the acts in question.¹⁹ These recommendations would thus provide a balance between the victims’ right to be heard and the overarching urge for a speedy trial ensuring that justice is served for all.

1.1 Problem Statement

The ideal situation within Kenya’s legal framework, particularly under the Victim Protection Act (VPA), would be one where the rights of all victims are fully recognized, and where their participation in the judicial process is seamlessly integrated with the imperative of ensuring a speedy trial. In this scenario, the category of individuals entitled to the rights of a victim would be comprehensive, ensuring that no relevant group or individual is excluded, and victims would play

¹⁸ Moynihan S, ‘The Voiceless Victim: A Critical Analysis of the Impact of Enhanced Victim Participation in the Criminal Justice Process’ SAS Open Journals, 2015, 25.

¹⁹ Robins S, ‘To live as other Kenyans Do: A Study of the Reparative Demands of Kenyan Victims of Human rights Violations’ *International Center for Transitional Justice*, 2011.

a meaningful role in the justice system, particularly through the use of victim impact statements and appropriate mechanisms such as criminal class actions. However, the reality is that while the VPA has broadened the role of victims and their advocates in courtrooms, the legal framework remains inadequate in several respects. Notably, it excludes crucial categories of individuals who should qualify as victims. Additionally, the balance between victims' participatory rights and the need for expedient trials is yet to be effectively struck. The issue becomes especially magnified in cases of mass casualty incidents. The evolving jurisprudence emanating from Kenyan courts shows attempts to expand judicial protections for victims, but gaps remain. As a consequence, the failure to realize this ideal leaves certain victims marginalised, hinders their full participation in the judicial process, and complicates the achievement of justice, particularly where multiple victims are involved. Without comprehensive reform, including more frequent use of victim impact statements and the establishment of a framework for criminal class actions, the pursuit of justice remains incomplete.

1.2 Research Questions

This study will purpose to answer the following questions:

1. Are Kenya's legal and policy frameworks adequate to address the participation rights of victims of mass casualty incidents?
2. How does the International Criminal Court protect the participatory rights of victims of mass casualties?
3. Based on a case study of the International Criminal Court model, what are the possible areas of reform, and what strategies could be adopted in Kenya?
4. What are the possible recommendations that could be put forward for the Kenyan context?

1.3 Research Objectives

This study aims:

1. To evaluate the adequacy of the legal and policy frameworks to address the plight of victims of mass casualty incidents in Kenya's criminal justice system.
2. To analyse how the International Criminal Court protects the rights of victims of mass casualty incidents.

3. To analyse areas of reform and possible strategies for reform from the International Criminal Court applied to the Kenyan context.
4. Based on the findings and lessons from the International Criminal Court, recommend possible solutions for the Kenyan context.

1.4 Hypothesis

The hypothesis of this study is that adoption of the ICC model would help bridge the gap in the participatory rights of victims of mass casualty incidents in Kenya's criminal justice system. The study also presupposes that the ICC model would help strike a balance between the participatory rights of victims and the accused's right to a fair and speedy trial.

1.5 Significance of the study

The evolution of the role of victims in the criminal justice system has seen discourse arise surrounding the potential burden it may impose on the already burdened accused. It has been argued that the inclusion of active roles for victims defeats the presumption of innocence and shifts the burden of proof in a criminal trial; a burden that should always rest on the Prosecution or State.²⁰ However, proponents of having more involved victims have argued that their inclusions serve neither purpose but is an expression of their right to be heard.²¹ Most importantly, it is directed toward the proper purpose of the justice system; justice. It is therefore clear, that these competing interests arise from the inherent nature of the criminal process seeing as the subject matter on trial is the accused(s)' and the victim(s)' lived realities.

This study holds significant importance as it addresses the crucial issue of defining and expanding the understanding of categories of victims within an adversarial criminal justice system, emphasizing the context of Kenya. The study seeks to fill a lacuna in the Kenyan criminal justice system by attempting to evaluate the integration of the voices of victims of mass casualties in proceedings. The study aims to help strike a balance between the victims' right to be heard and the imperative of a speedy trial. Lastly, this research contributes valuable insights into legal discourse

²⁰ Coleman M, 'The tension between the presumption of innocence and victims' participation rights at the International Criminal Court' 20(2) *International Criminal Law Review*, 2020, 371-393.

²¹ Coleman M, 'The tension between the presumption of innocence and victims' participation rights at the International Criminal Court' 380.

and policymaking, potentially influencing the evolution of legal practices and procedures concerning victims' rights in Kenya and beyond.

1.6 Theoretical Framework

This study is anchored on the justice theory by John Rawls which posits that "each person is to have an equal right to the most extensive basic liberty compatible with that of others."²² It is premised on various principles found within Rawls' ideas of "*the original position*" and "*the veil of ignorance*".²³ The "veil of ignorance" is a key feature of the "original position." It requires that the individuals involved in choosing the principles of justice do so without any knowledge of their own specific characteristics or circumstances. The purpose of the "veil of ignorance" is to remove any personal bias or vested interest that could influence the decision-making process.

When applied to a criminal trial, this approach means that the rights of the victims must be carefully balanced against those of the accused.²⁴ This is aimed at ensuring neither party faces undue prejudice. In this study, these rights specifically include the right to be heard and to a speedy trial respectively.²⁵ Rawls's theory also posits that a level of inequality (*the difference principle*) is permissible only if it benefits the least advantaged members of society.²⁶ Critics argue that this principle may not go far enough in addressing systemic inequalities and could potentially allow for significant disparities as long as they benefit the least well-off.²⁷

However, in this study, the main objective is to level the playing field by according the voice of victims sacred protection seeing as traditionally, the criminal trial has focused primarily on the prosecution as against the accused.²⁸ Therefore, the theoretical framework adopted still remains

²² Rawls J, 'A Theory of Justice,' *Harvard University Press*, Cambridge Massachusetts, 1971, 302.

²³ Rawls J, 'A Theory of Justice,' 118.

²⁴ Kipkosgei J, 'Challenges in Implementing the Victim Protection Act, 2014' Published LLM Dissertation, University of Nairobi, 2020, 8.

²⁵ Article 50, *Constitution of Kenya* (2010).

²⁶ Choptiany L, 'A critique of John Rawls's Principles of Justice' 83(2) *University of Chicago Press*, 1973, 147.

²⁷ Choptiany L, 'A critique of John Rawls's Principles of Justice', 147.

²⁸ Kipkosgei J, 'Challenges in Implementing the Victim Protection Act, 2014' Published LLM Dissertation, University of Nairobi, 2020, 8.

relevant to this study and shall be utilized to further the research. This is because equality would mean achieving justice for victims within the criminal justice system.²⁹

When balancing competing rights, Rawls' framework suggests that when rights conflict, as in the case of victims' participation versus the accused's right to a speedy trial, the resolution of such conflict should be guided by fairness and be to the benefit of the least advantaged.³⁰ In this context, fairness might require that certain procedural accommodations be made to allow victims to participate fully without unduly delaying the trial. For example, victims could be provided with the opportunity to present their impact statements or participate through alternative means that do not necessitate extensive delays. Simultaneously, safeguards should be implemented to ensure that the accused's rights are not compromised, such as strict timelines for pre-trial proceedings and ensuring that victims' participation does not interfere with the accused's right to a fair defense.

The liberty principle affirms that every individual has an equal right to basic liberties, which are inviolable and cannot be sacrificed for social or economic gains.³¹ In the context of this research, this principle underlines the importance of protecting the fundamental rights of both victims and the accused. Victims of mass casualties have a right to participate in the justice process, seeking closure and ensuring that their voices are heard. This participation is a crucial aspect of their liberty, reflecting their inherent dignity and the societal recognition of their suffering.

The difference principle, which allows inequalities only if they are to the advantage of the least privileged, provides a basis for considering the rights of the accused.³² In criminal justice, the accused persons are often in a vulnerable position, facing the full weight of the state's prosecutorial power. Ensuring a speedy trial is essential to prevent undue harm to the accused, such as prolonged incarceration or the stigma associated with unresolved criminal charges.

²⁹ Kipkosgei J, 'Challenges in Implementing the Victim Protection Act, 2014' Published LLM Dissertation, University of Nairobi, 2020, 8.

³⁰ Rawls J, 'A Theory of Justice,' 118.

³¹ Rawls J, 'A Theory of Justice,' 171.

³² Rawls J, 'A Theory of Justice,' 65-73.

While Rawls' concepts of the "*original position*" and the "*veil of ignorance*" are influential, they are not without criticism. Some argue that the "*veil of ignorance*" is overly idealistic and disconnected from the realities of human nature and societal complexities.³³ Critics suggest that people cannot fully detach themselves from their identities and circumstances, and thus the "*original position*" may not accurately reflect how decisions are made in real-world scenarios.³⁴ Despite these critiques, this theory remains a powerful tool for thinking about justice and fairness.

These concepts challenge us to consider what a just society would look like if we had no preconceived notions or biases about our own place within it. By focusing on fairness and equality, these concepts provide a compelling framework for evaluating the principles that should guide the organization of society, ensuring that the rules and institutions are just for everyone, regardless of their position.

1.7 Literature Review

1.7.1 The Participatory Rights of Victims of Mass Casualty Incidents

"It is the victims and affected communities who determine whether or not justice has been done: victims are the Court's *raison d'être*."³⁵ Hoven and Scheibel³⁶ utilise this very powerful introduction when assessing justice for the multitude of victims involved in a trial of mass crimes, an introduction that captures the purpose of victim participation. The key question addressed in their work is how to reconcile restorative and retributive elements of justice in trials of mass crimes.³⁷ They rely on primary data from victims and practitioners of the Extraordinary Chambers in the Courts of Cambodia (ECCC) to paint a picture of what the following terms mean in their specific contexts: victims, justice, and restoration. The results indicate that victims perceive inherent significance in a punitive criminal justice system and advocate for penalties that explicitly acknowledge the wrongdoing committed.³⁸ However, their hopes for justice go beyond sentencing

³³ Choptiany L, 'A critique of John Rawls's Principles of Justice', 147.

³⁴ Choptiany L, 'A critique of John Rawls's Principles of Justice', 148-149.

³⁵ Hoven and Scheibel, 'Justice for victims in trials of mass crimes: Symbolism or Substance?' 21(2) *International Review of Victimology*, 2015, 162.

³⁶ Hoven and Scheibel, 'Justice for victims in trials of mass crimes: Symbolism or Substance?' 162-163.

³⁷ Hoven and Scheibel, 'Justice for victims in trials of mass crimes: Symbolism or Substance?' 163-164.

³⁸ Hoven and Scheibel, 'Justice for victims in trials of mass crimes: Symbolism or Substance?' 178-181.

and focus on the need for a combination of retributive and restorative justice approaches when designing victims' participation.³⁹

The author describes victims giving regard to international criminal trials as individuals who have experienced significant trauma and loss due to mass crimes. Victims express a broad understanding of justice that extends beyond mere legal outcomes, such as the conviction of an accused. They seek recognition, the opportunity to share their stories, and a sense of psychological relief from their experiences.⁴⁰ This work will be essential to my research as I analyze the interpretation of who a 'victim' is. It will further aid in the attempts to balance victims' participatory rights with the need for a speedy trial. It is arguable that the work is specific to the ECCC but as a first primary source-based work involving victims of mass incidents, it holds valuable insight into the psyche of such victims. Lastly, the objectives of this study position the ICC as a benchmark. Recognizing that its jurisprudence draws significantly from precedents set by ad hoc tribunals, such as the ECCC, this work remains especially relevant.

Within an adversarial criminal justice system, the emphasis has always been on the State prosecutor and the accused. Moynihan⁴¹ has put forward the position that due to this fact, magnifying the role of a victim in an adversarial system does not work well and that to solve the apparent clashes, an auxiliary prosecution (to act as victim counsel) is necessary. The introduction of a victim prosecutor alongside the public prosecutor raises concerns about violating the defendant's due process rights. However, it has also been argued that an auxiliary prosecutor would present the victims' submissions objectively after consulting with the public prosecutor and defense counsel. Her findings are based on an analysis of adversarial systems in general with specific reference to the Anglo-American situation. Therefore, this work does not acknowledge the development within Kenyan jurisprudence post-2014 when the VPA was enacted. However, the positions taken in this work reflect the practical realities of victim participation in multi-casualty incidents in Kenya, where auxiliary prosecution mechanisms are utilized.⁴² There is also

³⁹ Hoven and Scheibel, 'Justice for victims in trials of mass crimes: Symbolism or Substance?' 178.

⁴⁰ Hoven and Scheibel, 'Justice for victims in trials of mass crimes: Symbolism or Substance?' 174.

⁴¹ Moynihan S, 'The Voiceless Victim: A Critical Analysis of the Impact of Enhanced Victim Participation in the Criminal Justice Process' *SAS Open Journals*, 2015, 25.

⁴² *R v Perry Mansukh Kansngara and 8 others* (2020) eKLR.

an apprehension within Kenyan courts that the active involvement of victims' counsel could lead to a situation of secondary prosecution; a prosecution within a prosecution.⁴³ This has contributed to the slow realisation of victims' participatory rights.

1.7.2 Participation of Victims of Mass Casualty Incidences in Kenya: A Case for the Adoption of the ICC Model

Undoubtedly, the heart of this research work is in attempting to strike a balance between the competing interests of the accused and the victims. Therefore, Mugambi's work on "Reconciling the conflicting rights of victims and defendants at the ICC" is of invaluable insight.⁴⁴ Mugambi's work is anchored on three key premises: first, it is a fundamental principle of international law that every defendant has the right to a fair trial. Second, it is currently a generally accepted position that, at least in some capacity, victims should participate in criminal proceedings. Lastly, the rights will conflict as they are inherently adverse parties.⁴⁵ For Mugambi, allowing victim participation reflects a practical recognition that the interests of victims and prosecutors may not always align.⁴⁶ Conventionally, in International Criminal Law (ICL), where the interests conflict, the due process rights of the defendant must trump the alleged victims' right to participate.⁴⁷ Despite this, the latter's rights have grown and are recognized on almost equal footing as the other parties to the criminal process. The current research will build upon the existing literature to further the discussion, drawing on the compelling premises established in the referenced work. Mugambi's work is primarily focused on the International Criminal Court and will inform this study's assessment of victim participation at the ICC. It will also help in identifying possible lessons and drawbacks from the ICC.

The next predominant problem sought to be aired is the question of whether any undue prejudice may be occasioned upon either the accused or the criminal process if victims in their multitudes are allowed to participate actively in the process. Judge Bartels seeks to address the general notion

⁴³ *Lendrix Waswa v Republic* (2020) eKLR.

⁴⁴ Mugambi J, 'Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court' 26(2), *Saint Louis University Public Law Review*, 2007, 249-308.

⁴⁵ Mugambi J, 'Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court' 249-250 .

⁴⁶ Mugambi J, 'Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court' 257.

⁴⁷ Mugambi J, 'Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court' 250.

of prejudice, undue prejudice, and mere inconvenience.⁴⁸ Bartels posits that “since the very nature of a criminal trial involves the bringing of incriminating evidence, the presentation of evidence (be it by victims) as such cannot be seen as prejudicial.”⁴⁹ While the work tends to be more specific to the ICC and the Rome Statute, it is insightful on general principles of criminal law especially in matters of procedure and evidence in an adversarial system.⁵⁰ Therefore, reliance is placed on this work in so far as the principles and ideas are applicable or contentious for the scope of the study.

Robins⁵¹ in his examination of the experiences of victims of the 2007/2008 Post-Election Violence (PEV) in Kenya, investigates the necessity of restorative justice for those affected. A central argument of that study is that compensation serves as the most effective means of addressing the injustices suffered by victims, as it remains the most frequently sought form of reparation. Crucially, the rationale was that “compensation was not intended to replace the loss or injury” but to provide redress for income generation opportunities occasioned by the loss. Therefore, it is on these findings that the study proposes the utilization of ‘*The Criminal Class Action*’ which is also underpinned by theoretical findings of restorative justice customized for the criminal justice system. In this regard, Zimmerman and Jaros⁵² highlight the difficulties of implementing such a proposal by arguing that, “unlike civil class actions, criminal class action settlements lack procedures to hear victims’ claims.”⁵³ In response to this, this study points to the fact that victims (in Kenya) have been accorded a myriad of rights that aid in promoting their right to be heard.⁵⁴ This has been improved by mechanisms such as Victim Impact Statements (VIS).⁵⁵ However, these usually come in at the tail end of the criminal trial, therefore a more nuanced approach to victim participation would need to be explored.

⁴⁸ Bartels R, ‘Balancing Prejudice: Fair Trial Rights and International Procedural decisions relating to Evidence’ in Perez-Leon-Acevedo J and Nicholson J (eds), *Defendants and Victims in International Criminal Justice: Ensuring and Balancing Their Rights*, 1st ed, Routledge, New York, 2020, 43.

⁴⁹ Bartels, ‘Balancing Prejudice,’ 48.

⁵⁰ Bartels, ‘Balancing Prejudice,’ 48-50.

⁵¹ Robins S, ‘To live as other Kenyans Do: A Study of the Reparative Demands of Kenyan Victims of Human rights Violations’ *International Center for Transitional Justice*, 2011.

⁵² Zimmerman A and Jaros D, ‘The Criminal Class Action’ 159 *University of Pennsylvania Law Review*, 2011, 1385.

⁵³ Zimmerman and Jaros, ‘The Criminal Class Action’ 1391.

⁵⁴ Section 4, *Victim Protection Act* (Act No. 17 of 2014).

⁵⁵ Section 329C (1) *Criminal Procedure Code* (Cap. 75 Laws of Kenya).

The authors propose several solutions to enhance the criminal class action process while maintaining prosecutorial discretion and improving victim participation. First, they suggest that prosecutors and courts should “coordinate overlapping settlements before a single federal judge.”⁵⁶ This approach would streamline the process and ensure that victims receive comprehensive compensation. Additionally, the authors emphasize the importance of “involving representative stakeholders in settlement discussions through a mediation-like process.”⁵⁷ This involvement would give victims a voice in negotiations and help address their concerns more effectively.

Kemph,⁵⁸ argues that VIS are significant on four grounds. First, he argues that VIS provide information that would otherwise be left out of the proceedings. Second, they provide benefits to the victim who was left out of the prosecution’s case as an acknowledgment of their suffering and importance. Third, VIS aids in rehabilitating the offender by emphasizing the “human costs” of crime. Finally, they bring about an element of fairness in the sentencing. This study intends to build on this research and advocate for increased use of VIS to aid victims’ involvement in the criminal justice system in Kenya.

Furthermore, while most scholars have argued that the purpose of championing for increased victim participation is to ensure justice is realized, doubts exist as to the soundness of the institutions tasked with realizing these goals. For example, matters of registration and admission of victims to the trial, reparations, and security of these victims. Windridge assesses the rights of defendants and victims before the African Court of Justice and Human and Peoples’ Rights (ACJHPR).⁵⁹ The ACJHPR is yet to become functional, however, its International Criminal Law section will enjoy similar functions to other ICL tribunals. The work presents important insights into the requisite institutional solidity to adequately balance the rights of the accused and the victims. Because the ACJHPR is not yet functional, the work theorizes *what* role institutions should play and *how* they should play it. It provides an ideal, a utopia against which this study can

⁵⁶ Zimmerman and Jaros, ‘The Criminal Class Action’ 1454.

⁵⁷ Zimmerman and Jaros, ‘The Criminal Class Action’ 1385

⁵⁸ Kemph M, ‘Reconsidering the Use of Victim Impact Evidence’ 31 *Geo Legal Ethics*, 2018, 673.

⁵⁹ Windridge O, ‘For Better or Worse: The rights of defendants and victims before the African Court of Justice and Human and Peoples’ Rights’ in Perez-Leon-Acevedo J and Nicholson J (eds), *Defendants and Victims in International Criminal Justice: Ensuring and Balancing Their Rights*, 1st ed, Routledge, New York, 2020, 32.

compare its hypothesis and findings. This also includes facilitative functions for the court registry and the introduction of a victim trust fund.

Lastly, there is a perception that a victim is ‘worthy of humanitarian support as long as he remains a helpless victim but turns into a danger the moment he seeks to liberate himself.’⁶⁰ This sentence captures Bowman’s assessment of the politics of victim participation in the ICC addressing the general question of whether politically motivated victim participation has an impact on the legitimacy of the proceedings.⁶¹ This scholarly work provides insight into the origins of victim participation in ICL using case studies that include ‘the Situation in Kenya’, the cases of Ruto/Sang and Kenyatta/Muthaurwa.⁶² More useful to this study is the practicality with which Bowman goes about analyzing these and other cases, painting a picture of human biases and interests, political interference, and the overall narrative of the victim as a person, a political person.⁶³ For example, where the State has a vested interest in the outcome of a case, the interests of a victim within the trial system, and the possibilities that arise from a different combination of these variables ranging from justice to politically motivated incentives. In addition to case insight, this work will help ground this study, allowing more practical reasoning, and contrast the research to real situations.

In conclusion, the existing literature surrounding the place of victims of mass casualty incidents is quite informative but lacks in certain areas. This study aims to fill the following gaps: the understanding of what categories of persons constitute victims, active roles for victims of mass casualties weighted against the inherent rights of the accused and further develop the scheme of knowledge. This will primarily be based on an analysis of the ICC and its mode of operation to the extent that it can be transposed to Kenya.

⁶⁰ Bowman K, ‘The Politics of Victim Participation in the International Criminal Court: Does Politically motivated victim participation have an impact on the legitimacy of the proceedings?’ in Perez-Leon-Acevedo J and Nicholson J (eds), *Defendants and Victims in International Criminal Justice: Ensuring and Balancing Their Rights*, 1st ed, Routledge, New York, 2020, 157.

⁶¹ Bowman K, ‘The Politics of Victim Participation in the International Criminal Court’ 142.

⁶² Bowman K, ‘The Politics of Victim Participation in the International Criminal Court’ 154.

⁶³ Bowman K, ‘The Politics of Victim Participation in the International Criminal Court’ 142-159.

1.8 Research Methodology

This study is undertaken through a doctrinal research methodology. It relies on a combination of primary and secondary sources of information. Primary sources include statutes such as the Rome Statute, legislation such as the Victim Protection act, and case law both from the International Criminal Court and from Kenya. The secondary sources include books, scholarly works, articles in reputable journals, published LLM/LLD dissertations, and other credible sources such as investigative journals. These sources are aligned with the topic areas of International Criminal Law, Criminal Law, Philosophy, and Human Rights. They offer insight into concepts surrounding the criminal justice system and provide a blueprint of what the ideal situation should look like. This is contrasted with the practical situation via an analysis of case law and existing discourse around the research area.

Therefore, this is mainly desktop research but empirical data from secondary sources is relied upon to provide insight as to the opinion and position of key players within the criminal justice system. The premises of this work are analyzed deductively with each chapter answering a specific question geared towards proving or disproving the hypothesis. To provide a comprehensive analysis, this research employs a case study methodology focusing on the International Criminal Court (ICC) model. The ICC is selected as a critical case study due to its unique position in international criminal justice, particularly in addressing situations of mass atrocities and grave crimes to the international community. By examining the ICC's institutional framework, procedural mechanisms, and jurisprudence, the research aims to identify best practices that could potentially improve the criminal justice response in the Kenyan context.

This approach allows for an in-depth, comparative analysis enabling the extraction of nuanced insights into effective international criminal justice strategies. The case study methodology will systematically evaluate the ICC's approaches to victim protection, prosecutorial strategies, and transitional justice mechanisms, providing a structured framework for understanding potential improvements in addressing complex criminal justice challenges.

1.9 Limitations

While this research endeavors to provide a comprehensive analysis of the role of victims in the criminal justice system, it is crucial to acknowledge certain limitations that may impact the study's outcomes. Firstly, the scope of this research is confined to the Kenyan legal context, and extrapolating findings to other jurisdictions should be approached with caution. Lastly, this study is undertaken within the timeframe for the author's LLB graduation as such, time might prove a big limitation. However, narrowing the scope of research to the Kenyan context will be helpful in this regard.

1.10 Chapter Breakdown

Chapter one gives the general introduction by indicating an overview of the research topic. It also highlights the background of the problem, lays out the research objectives, and puts forward several research questions that the research seeks to answer.

Chapter two will seek to answer the question of whether Kenya's legal and policy frameworks are adequate to address the plight of victims of mass casualty incidents. It will explore the level of protection accorded to victims of mass casualties within Kenya's current legal and policy frameworks. This chapter assesses the Constitution, the Victim Protection Act (VPA), related statutes, and a historical case analysis of victim participation in Kenyan courts. This will help in determining how well the existing framework caters to the rights and participation of these victims in the judicial process. Special attention is given to how the system balances the right of victims to be heard and the need for a speedy trial, particularly in cases involving large numbers of victims. By evaluating legal gaps and challenges, this chapter set the stage for potential reforms.

Chapter three assesses how an International Criminal Court (ICC) model could help realize the participatory rights of victims of mass casualties in Kenya. Drawing on the ICC's established procedures for victim involvement, such as victim impact statements, the appointment of legal representatives, and active participation in trial proceedings, this chapter explores how these mechanisms could be adapted to the Kenyan context. The aim is to assess the feasibility and benefits of incorporating these practices to enhance representation of victims and ensure their voices are better integrated into the legal process.

Chapter four assesses the areas of reform that exist in Kenya, what possible reforms can be put forward to improve mass victim participation in Kenya following an analysis of the ICC and how these could be weaved into the Kenyan context. This chapter compares how the Kenyan legal system addresses the rights and participation of victims in mass casualty situations, compared to best practices drawn from the International Criminal Court that could be applied in Kenya. Drawing insights from these instances, the chapter offers practical recommendations for reform.

Chapter five seeks to assess the research findings and the possible recommendations that could be tendered to realize the reforms in Chapter Four. This chapter also concludes the study.



CHAPTER TWO: PARTICIPATORY RIGHTS OF VICTIMS OF MASS CASUALTY INCIDENTS IN KENYA: AN EVALUATION OF THE CURRENT LEGAL AND INSTITUTIONAL FRAMEWORKS

2.1 Introduction

This chapter analyzes the existing legislative, policy, regulatory, and institutional frameworks. This analysis determines whether or not the understanding of a victim needs to be altered to include victims of mass casualties. This is premised on the fact that the lack of express recognition of mass casualty victims within the current frameworks presents a gap in the exercise of participatory rights by these victims. It then flows from this perspective that for the criminal justice process to realize its proper purpose, then mass victim participation should be permitted. Proceeding chapters tackle the intricacies of how such participation may be realized and to what extent it should be allowed.

2.2 The Legal Framework for Victim Participation in Kenya

2.2.1 The Constitution of Kenya, 2010 (CoK)

The CoK establishes an essential framework that addresses both “the fair trial rights of the accused” and the participatory rights of victims. Article 50 of the CoK guarantees the right to a fair hearing for every individual, which includes rights such as the presumption of innocence, adequate time to prepare a defense, and the right to legal representation.⁶⁴ Victims’ participatory rights are reinforced under Article 50(9), which mandates parliament to “enact legislation ensuring the protection, rights, and welfare of victims of offences.”⁶⁵ This has been actualized through the Victim Protection Act (VPA), designed to give victims a voice in criminal proceedings which shall be discussed later.⁶⁶ However, when mass casualties are involved, ensuring meaningful participation for numerous victims within the framework of a fair and speedy trial becomes complex.

Further, Article 48 underscores access to justice, affirming that victims should have unhindered access to the judicial system, with any fees imposed being reasonable to avoid impeding justice.⁶⁷

⁶⁴ Article 50, *Constitution of Kenya* (2010).

⁶⁵ Article 50(9), *Constitution of Kenya* (2010).

⁶⁶ *Victim Protection Act* (Act No. 17 of 2014).

⁶⁷ Article 48, *Constitution of Kenya* (2010).

This is particularly crucial in mass casualty incidents, where large groups of victims may struggle with both financial and procedural barriers to participation. The CoK also enshrines fair administrative action ensuring that any actions taken in response to victims' complaints or during trial procedures are conducted in a manner that is lawful, reasonable, and procedurally fair.⁶⁸ This approach ensures that victims' rights are not only acknowledged but also upheld through transparent and accountable processes. However, in cases involving mass casualty victims, the challenge lies in balancing the administrative burden with safeguarding the integrity of both the victims' and the accused's rights.

Being the apex law of the land, the CoK provides the general framework of protection for victims' participatory rights. Constitutionalizing is the fountain from which legal protection of rights flows. In the case of mass casualty victims, it could be argued that they enjoy broad protection under the enclaves of the CoK. However, legislation intended to breathe life into the provisions of the Constitution fails to factor in mass casualty victims, as shall be expounded below.

2.2.2 The Criminal Procedure Code, Cap. 75 Laws of Kenya (CPC)

The Criminal Procedure Code (CPC) of Kenya lays the foundation for how criminal trials should be conducted. Firstly, the CPC emphasizes the right to a fair trial for the accused. The CPC ensures that the accused has the right to legal counsel⁶⁹ and mandates that evidence is taken in the presence of the accused,⁷⁰ thereby ensuring transparency in the trial process. These sections protect the accused's rights by guaranteeing them an opportunity to challenge the evidence and cross-examine witnesses.

Victim participation is addressed in the CPC, albeit in a limited manner. The introduction of victim impact statements marks a significant step toward giving victims a voice in criminal proceedings.⁷¹ Victim impact statements allow victims or their representatives to present the harm they have suffered, and are especially helpful in cases involving mass casualties. The CPC grants judicial officers the discretion to consider these statements before sentencing, acknowledging the pain and

⁶⁸ Article 47, *Constitution of Kenya* (2010).

⁶⁹ Section 193, *Criminal Procedure Code* (Cap. 75 Laws of Kenya).

⁷⁰ Section 194, *Criminal Procedure Code* (Cap. 75 Laws of Kenya).

⁷¹ Part IXA, Section 329A, and Section 329F, *Criminal Procedure Code* (Cap. 75 Laws of Kenya).

suffering of victims.⁷² However, these provisions are primarily procedural and come at the end of the trial process, leaving limited room for broader victim participation during the trial itself.

One key challenge with the CPC is its handling of mass casualty incidents. The CPC does not explicitly provide for enhanced victim participation in cases involving multiple victims, such as those resulting from terrorist attacks or natural disasters. In such cases, victims are often treated as witnesses, rather than as participants with distinct rights within the trial. Section 137D, which discusses plea agreements, requires consultation with victims, but it is limited to specific cases where the prosecution enters into an agreement with the accused.⁷³ The CPC lacks provisions that directly address the complexity of representing the interests of numerous victims in mass casualty cases.

Finally, the balance between ensuring victims' rights and maintaining a fair trial for the accused is a delicate one. While the CPC guarantees that trials must be open and transparent,⁷⁴ victims' participation rights are not fully articulated in the CPC. Although they can present evidence (as victim-witnesses), there are no provisions ensuring that victims, especially those of mass casualties, can meaningfully participate in the judicial process from the investigation stage to the final ruling. Additionally, the CPC does not specify how courts should handle situations where there are multiple victims, leaving it up to judicial discretion to balance the demands of a fair trial with the rights of a large number of victims.

2.2.3 The Victim Protection Act, Cap. 79A (VPA)

The VPA offers an inclusive definition of a victim. According to Section 2, a victim is “any natural person who suffers injury, loss or damage as a consequence of an offence.”⁷⁵ The participatory rights of victims are thoroughly outlined in **Part III of the Act**, with an emphasis on ensuring victims' voices are heard and that they can actively participate in the justice process. Section 19 ensures that victims are kept informed throughout the legal process, granting them the ability to understand the proceedings and any decisions affecting them. Victims have the right to receive

⁷² Section 329C, *Criminal Procedure Code* (Cap. 75 Laws of Kenya).

⁷³ Section 137D, *Criminal Procedure Code* (Cap. 75 Laws of Kenya).

⁷⁴ Section 77, *Criminal Procedure Code* (Cap. 75 Laws of Kenya).

⁷⁵ Section 2, *Victim Protection Act* (Act No. 17 of 2014).

information about the trial, including details of the charges against the offender, the evidence to be presented, and updates on the progress of the case.⁷⁶

Under Section 9, they have the right to be present at trial, either personally or through a representative, and to have their views considered during important stages such as plea bargaining. Their input is also allowed during sentencing, where they can make victim impact statements.⁷⁷ This enables the court to understand the psychological, emotional, and financial impact of the crime on the victim. Additionally, their participation should not prejudice the rights of the accused, ensuring a balance between the victim's participation and the need for a fair trial for the defendant.⁷⁸ Lastly, the Act acknowledges the need for special measures in cases where large numbers of people are victimized, such as opening a special register to document victims in such scenarios.⁷⁹ Glaringly, this is the only provision referencing victims of mass casualty incidents leaving their participation in the trial to an implicit deduction. This is despite the fact that mass victim participation poses a great prejudice to the accused's fair trial rights.

2.2.4 The Victim Protection (General) Regulations, 2020

These Regulations will serve as a crucial complement to the VPA by providing further clarity and operational guidelines on how to implement the provisions of the Act. They detail how victim rights are to be practically protected, ensuring victims' access to information, participation, and necessary support services. In line with Regulation 2, victims are not limited to those directly impacted by the crime but may include representatives or service agencies acting on behalf of incapacitated or deceased victims.⁸⁰ The regulations emphasize the importance of formally registering victims and ensuring that all relevant entities, including victim service agencies, facilitate the recognition and protection of victims.⁸¹ This reinforces the idea that victims can include individuals affected by mass casualty incidents, though not explicitly referred to as such.

⁷⁶ Section 19, *Victim Protection Act* (Act No. 17 of 2014).

⁷⁷ Section 12, *Victim Protection Act* (Act No. 17 of 2014).

⁷⁸ Bartels, 'Balancing Prejudice,' 43.

⁷⁹ Section 6 (4), *Victim Protection Act* (Act No. 17 of 2014).

⁸⁰ Section 2, *The Victim Protection (General) Regulations, 2020*.

⁸¹ Section 7, *The Victim Protection (General) Regulations, 2020*.

The Regulations also stress the right of victims to participate in the judicial process. Victims are entitled to access their case files and receive copies of relevant documents, ensuring transparency and engagement.⁸² This participatory right is important in both individual and mass casualty cases, although the process of handling multiple victims may pose logistical challenges not directly assessed in the regulations. For example, victims are given a role in plea bargaining decisions and may request prosecutorial agencies to apply for the summoning of witnesses.⁸³ Victims also have the right to request information related to their case, which must be provided promptly. For instance, if the information concerns life or liberty, the competent authority must respond within 24 hours.⁸⁴ This ensures that victims are not left in the dark about critical aspects of their cases.

These provisions protect the interests of victims by enabling them to participate meaningfully in the legal process. They ensure a comprehensive assessment of victims' needs, including access to medical treatment, psychosocial support, and legal representation. Regulation 16 outlines the contents of an assessment report, which includes short- and long-term needs, crisis intervention, and protection measures. This Regulation is particularly significant in mass casualty incidents, where large numbers of victims may require urgent and sustained support. The registration mechanism ensures that victims are identified, documented, and can access necessary services, vital in incidents involving mass harm.⁸⁵

The regulations also require authorities to establish databases to record victim requests and ensure timely responses,⁸⁶ which would be essential in managing numerous victims in mass casualty incidents. However, this is yet again implicit when addressing multitudes of victims. It is based on an inference that deduces information based on the assumption that victims of mass casualties are to enjoy the same rights as singular victims. Even if this were an accepted presumption, the two scenarios would be logistically different therefore necessitating an inquiry into the current legal framework to accommodate victims of mass casualty.

⁸² Section 9, *The Victim Protection (General) Regulations, 2020*.

⁸³ Sections 13 and 14, *The Victim Protection (General) Regulations, 2020*.

⁸⁴ Section 3, *The Victim Protection (General) Regulations, 2020*.

⁸⁵ Section 7, *The Victim Protection (General) Regulations, 2020*.

⁸⁶ Section 6, *The Victim Protection (General) Regulations, 2020*.

2.2.5 Analysing the shift of Victim Participation and the application of the existing framework in Kenyan Courts

Pre-2010

Prior to 2010, victim participation in Kenya's criminal justice system was minimal and largely unrecognized by the courts. This period reflected a classical adversarial system where the prosecution and defense were the main actors, while victims were relegated to a peripheral role. As captured by Justice Lesiit in *Republic v Leliman and Four Others*,⁸⁷ victims were "silent observers in court" and typically engaged through advocates holding a watching brief. These advocates, however, "lacked the right of audience and could only channel their concerns through the prosecution, except in specific instances like inquests." This restrictive approach stemmed from the traditional view that the courtroom primarily served as a space for the State to prosecute offenders. Nonetheless, incremental progress began during this era. For instance, the 2003 Criminal Procedure Code (CPC) amendments introduced Victim Impact Statements, allowing victims to voice the impact of crimes during sentencing.⁸⁸ In 2008, plea bargaining procedures were formalized, requiring victim involvement in crafting agreements, a significant step toward recognizing their participatory rights.⁸⁹ This position is further reiterated in the Criminal Procedure (Plea Bargaining) Rules 2018.⁹⁰

2010-2014

The period between 2010 and 2014 marked a transitional phase, driven by the promulgation of the 2010 Constitution of Kenya (CoK) and the enactment of the Victim Protection Act (VPA) in 2014. The Constitution's expanded Bill of Rights emphasized human rights and created room for victims' voices to be heard in the justice system. Article 50(9) explicitly mandated Parliament to enact legislation for the protection of victims' rights, which materialized in the VPA. During this period, courts exhibited a mix of restraint and activism. For instance, in *R v Paul Mwangi Macharia*,⁹¹ Justice Korir maintained that "victims were not considered parties to criminal proceedings and advocates holding a watching brief had no right of audience." However, this position began to shift with the VPA's enactment, as seen in *Mary Kinya Rukwaru v Ragunathan*

⁸⁷ *R v Leliman and 4 others* (2018) eKLR.

⁸⁸ Section 88, *The Criminal Law (Amendment) Act* (Act No. 5 of 2003).

⁸⁹ Section 3, *The Criminal Procedure Code (Amendment) Act* (Act No. 11 of 2008).

⁹⁰ *The Criminal Procedure (Plea Bargaining) Rules*, Legal Notice 47 of 2018.

⁹¹ *R v Paul Mwangi Macharia* (2013) eKLR.

Santosh and Another,⁹² where Justice Kimaru recognized the right of “ALL” complainants to make representations in court. The shift in jurisprudence underscored the courts’ gradual adaptation to the evolving legal framework that expanded victims’ participatory rights.

2014 Onwards

From 2014 onward, Kenyan courts increasingly recognized victims as active participants, aligning with the progressive provisions of the VPA. Justice Korir in *Gideon Mwiriti Irea v DPP*,⁹³ reversed his earlier stance, declaring that victims’ counsel could no longer be passive observers. However, Justice Odunga in a High Court revision,⁹⁴ declared section 9(1)(e) of the VPA unconstitutional to the extent that it required an accused to inform the victim of the evidence he intends to rely on and to have reasonable access to that evidence. Nonetheless, this revision also acknowledged that it was going against various jurisprudence in favor of such rights for the victims,⁹⁵ arguing that where these rights clash with the accused’s the latter take precedence.⁹⁶

The Supreme Court of Kenya (SCORK) acknowledged in *Lendrix Waswa v Republic* that victim participation in Kenyan criminal trials remained a ‘novel concept’.⁹⁷ The SCORK emphasized the need for courts to balance victims’ participatory rights with the accused’s right to a fair trial, cautioning against creating a secondary prosecution.⁹⁸ The court suggested that lessons could be drawn from the International Criminal Court’s victim participation framework to refine Kenya’s approach.⁹⁹ The SCORK highlighted the importance of meaningful contributions by victims while emphasizing safeguards to prevent prejudice against the accused. These safeguards include ensuring that applicants are direct victims and limiting their representations strictly to their views and concerns. While significant progress has been made, challenges persist in defining the extent and scope of victims’ roles, leaving room for further judicial interpretation and legislative refinement.

⁹² *Mary Kinya Rukwaru v Ragunathan Santosh and another* (2014) eKLR.

⁹³ *Gideon Mwiriti Irea v DPP and 7 others* (2015) eKLR.

⁹⁴ *Joseph Nduvi Mbuvi v R* (2019) eKLR.

⁹⁵ *Veronica Gitahi and another v R* (2016) eKLR.

⁹⁶ *Patrick Mugambi v R* (2017) eKLR.

⁹⁷ *Lendrix Waswa v Republic* (2020) eKLR.

⁹⁸ (2020) eKLR.

⁹⁹ (2020) eKLR.

2.3 Institutional Framework

One of the most critical institutions within the framework of victim participation rights is the Victim Protection Board (the Board). The Board is responsible for overseeing the implementation of victim protection measures.¹⁰⁰ Its primary duties include ensuring that victims receive the necessary services, such as legal aid, rehabilitation, and compensation. The Board also manages the Victim Protection Trust Fund,¹⁰¹ which provides financial resources to support victims.¹⁰² It is composed of representatives from key government agencies, such as the Office of the Director of Public Prosecutions, the Judiciary, and other organizations involved in the criminal justice system. This multi-agency approach ensures that the Board operates within a coordinated framework aimed at delivering justice to victims.

The Victim Protection Trust Fund is used to finance medical expenses, psychological care, and legal representation for victims.¹⁰³ It is also intended to compensate victims for the economic losses they may have suffered as a result of the crime.¹⁰⁴ This Fund ensures that victims have access to necessary resources, reducing the financial burden they might otherwise face. The Act also mandates the creation of Victim Service Agencies under Section 25. These agencies, whether government-affiliated or non-governmental, are tasked with providing direct services to victims, including medical treatment, psychological counseling, and legal support. The agencies work in close collaboration with the Board to ensure that victims receive timely and adequate care.¹⁰⁵ By formalizing the roles of these agencies, the Act ensures that victims have access to coordinated support services designed to address their physical, emotional, and legal needs. However, these institutional frameworks are hampered by administrative issues including funding.

¹⁰⁰ Section 31, *Victim Protection Act* (Act No. 17 of 2014).

¹⁰¹ Section 24, *Victim Protection Act* (Act No. 17 of 2014).

¹⁰² Section 31, *Victim Protection Act* (Act No. 17 of 2014).

¹⁰³ Section 24, *Victim Protection Act* (Act No. 17 of 2014).

¹⁰⁴ Section 24, *Victim Protection Act* (Act No. 17 of 2014).

¹⁰⁵ Section 25, *Victim Protection Act* (Act No. 17 of 2014).

2.4 Analysing the Legal and Institutional Frameworks on Participatory Rights of Victims of Mass Casualty Incidents in Kenya

2.4.1 Salient Features Regarding Victims' Participatory Rights

Having explored the legal and regulatory frameworks around victim participation in the Kenyan criminal justice system, it is undoubted that there is a steady trend toward realizing the participatory right of victims of mass casualty incidents within the courtroom. The VPA being the most specific legislation in this regard, provides a robust framework aimed at ensuring the participatory rights of victims within the Kenyan legal system. The VPA provides a broad definition of a victim, encompassing “anyone who has suffered injury, loss, or damage as a result of an offense.” This inclusive approach is particularly significant in mass casualty incidents, as it enables the participation of large groups of victims affected by the same crime. However, challenges arise in practice due to the potential for undue prejudice against the accused and the lack of clear mechanisms to guide the participation of numerous victims.

However, the term “mass victims” appears only once within the VPA.¹⁰⁶ This may lead to an assumption that the rights enshrined within the VPA do include mass casualty victims. Conversely, this could lead to the application of the interpretive principle *expressio unius est exclusio alterius*, suggesting that if Parliament had intended for mass victims to enjoy additional participatory rights under the VPA, it would have explicitly provided for them, especially given its demonstrated willingness to do so in instances it deemed necessary.¹⁰⁷

2.4.2 Gaps in the Legal Framework

Despite these comprehensive provisions, several gaps exist, particularly concerning victims of mass casualty incidents. The VPA and the Regulations only implicitly reference mass casualty situations, without providing clear, specific guidelines for how to manage the logistical challenges of involving large numbers of victims in the judicial process. While the Act provides for a special register to document mass victims, there is no detailed guidance on how their participation should be handled at different stages of the trial, such as during plea bargaining, pre-trial procedures, trial

¹⁰⁶ Section 6(4), *Victim Protection Act* (Act No. 17 of 2014).

¹⁰⁷ Keyes J, ‘Expressio unius: The expression that proves the rule,’ 10(1), *Statute Law Review*, 1989.

or sentencing. The framework assumes that victims of mass casualties are treated in the same way as singular victims, which is problematic given the scale of such incidents and the potential for delays in ensuring all victims are adequately heard individually.

Moreover, the legal framework fails to explicitly address the prejudice that mass victim participation could cause to the accused's right to a fair trial, especially in cases involving large numbers of victims. The absence of clear procedural guidelines for handling mass casualties could result in prolonged trials, which may infringe upon the accused's right to a speedy trial, creating potential conflicts between the rights of victims and the accused. The CPC offers some recognition of the need to involve victims in certain stages of the trial process, but it remains limited in scope and is not specific to mass casualty cases.¹⁰⁸

The gaps in the VPA and Regulations, particularly in addressing mass casualty incidents, have several consequences. First, the lack of clear procedural guidelines for managing large groups of victims can lead to inefficiencies in the judicial process. Without a structured approach to handling victims of mass casualties, courts may struggle to balance the administrative burden of managing multiple victims with the need for a fair and speedy trial. This can result in delays in the legal process, ultimately denying victims timely justice and prolonging their trauma.

Second, the implicit assumption that mass casualty victims can be treated in the same manner as singular victims fails to recognize the distinct challenges posed by these cases. In practice, mass casualty cases require more resources, coordination, and support services, which are not fully accounted for in the current framework.¹⁰⁹ This lack of specificity could lead to unequal access to justice for mass casualty victims, as the legal system may be unprepared to handle the scale and complexity of their cases.

Finally, the lack of explicit provisions addressing the balance between victims' participation and the accused's fair trial rights in mass casualty cases could result in a conflict of rights particularly between those of the accused and the victim. If victims' participation significantly delays the trial,

¹⁰⁸ Section 137D, *Criminal Procedure Code* (Cap. 75 Laws of Kenya).

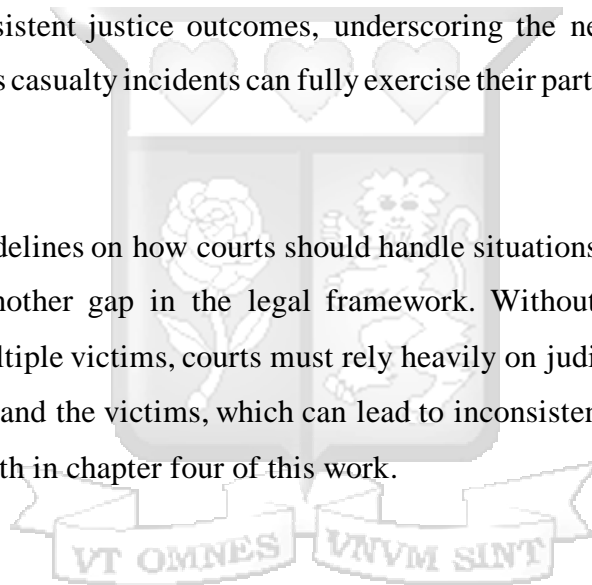
¹⁰⁹ *R v Perry Mansukh Kansngara and 8 others* (2020) eKLR.

this could infringe upon the accused's right to a speedy trial, potentially leading to legal challenges and further delaying justice for both the victims and the accused.

2.5 Conclusion

In conclusion, while both the legal and institutional frameworks discussed provide essential protections for the accused and offer limited avenues for victim participation, they fall short in addressing the specific needs of victims in mass casualty incidents. The procedural mechanisms in place, such as victim impact statements, are insufficient to accommodate the complexity of these cases, and the absence of tailored provisions for multiple victims leaves significant gaps in the legal framework. These shortcomings lead to extended trial durations, restricted victim involvement, and inconsistent justice outcomes, underscoring the necessity for reforms that guarantee victims of mass casualty incidents can fully exercise their participatory rights within the criminal justice system.

The absence of clear guidelines on how courts should handle situations involving large numbers of victims introduces another gap in the legal framework. Without specific procedures for managing cases with multiple victims, courts must rely heavily on judicial discretion to balance the rights of the accused and the victims, which can lead to inconsistencies and inefficiencies as shall be discussed in-depth in chapter four of this work.



CHAPTER THREE: THE LAW AND PRACTICE OF PARTICIPATORY RIGHTS OF VICTIMS OF MASS-CASUALTY INCIDENTS BEFORE THE INTERNATIONAL CRIMINAL COURT (ICC)

3.0 Introduction

Having reviewed the existing frameworks protecting the participatory rights of victims of mass casualty incidents in Kenya, this chapter now turns to assessing whether the ICC approach would help fill the gaps that have been identified. This is achieved by first assessing who victims are and how the concept of victimhood arises in order to determine whether victims of mass casualty incidents can have a direct link to the court proceedings. This is followed by an analysis of how mass casualty victims conceptualize justice before focusing on the ICC's approach in ensuring the various competing interests are balanced out.

3.1 Victimization and the Concept of Victimhood in International Criminal Law

The concept of victimization in international criminal law focuses on two main aspects: primary victimization and secondary victimization.¹¹⁰ Primary victimization refers to the immediate harm a victim suffers as a direct result of a crime.¹¹¹ This includes physical injuries, emotional and psychological trauma, financial losses, and damage to personal property.¹¹² It therefore encompasses the direct impacts on a victim's life caused by the criminal offense. Victims in this stage are deeply affected by the criminal act itself, and the effects can be both long-term and short-term.

Secondary victimization, on the other hand, occurs during interactions with law enforcement, judicial systems, or society.¹¹³ This form of victimization often exacerbates the trauma already experienced by victims. For instance, victims may encounter insensitive questioning by police

¹¹⁰ United Nations Office for Drug Control and Crime Prevention: Centre for International Crime Prevention, "Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" 1999, 4-10.

¹¹¹ Kipkosgei J, 'Challenges in Implementing the Victim Protection Act, 2014' Published LLM Dissertation, University of Nairobi, 2020, 20.

¹¹² UNGA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN A/Res/40/34 (29 November 1985).

¹¹³ United Nations Office for Drug Control and Crime Prevention: Centre for International Crime Prevention, "Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" 1999, 4-10.

officers, experience delays in trial proceedings, or feel neglected during the judicial process.¹¹⁴ Secondary victimization highlights how poorly managed legal processes, or unsupportive societal attitudes can intensify a victim's suffering. Victims may feel further traumatized by the way they are treated after the crime, particularly if they perceive that the legal system is indifferent or dismissive of their experience.

All policymakers should understand the impact of victimization in order to promote understanding of the need for assistance.¹¹⁵ Generally, victims are people who have suffered direct harm from the actions of crime.¹¹⁶ This may include “the person against whom the offense was committed,¹¹⁷ a witness to the act of actual or threatened violence, death, or infliction of physical bodily harm.”¹¹⁸ This category is one of the primary victims and the fact that they can easily trace the causal link between their being and the crime in question, serves to fortify their status as victims.

However, it becomes more difficult to make a case for indirect victims of crime.¹¹⁹ This is because often, the nexus between their victim status and the alleged crime is considered too weak to substantiate victimhood.¹²⁰ Indirect victims may include the primary victim's dependants, those who have suffered mentally from the acts in question, and those who have suffered harm in attempting to intervene to assist victims in distress.¹²¹ Globally, the United Nations has recognized that this category includes both individuals and a collective.¹²² This would form a basis for victims including those of mass casualty incidents to claim participatory rights during criminal proceedings.

¹¹⁴ Kipkosgei J, ‘Challenges in Implementing the Victim Protection Act, 2014’ Published LLM Dissertation, University of Nairobi, 2020, 21.

¹¹⁵ United Nations Office for Drug Control and Crime Prevention: Centre for International Crime Prevention, “Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power” 1999, 4-10.

¹¹⁶ UNGA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN A/Res/40/34 (29 November 1985).

¹¹⁷ Section 329A *Criminal Procedure Code* (Cap. 75 Laws of Kenya).

¹¹⁸ Section 329A *Criminal Procedure Code* (Cap. 75 Laws of Kenya).

¹¹⁹ Mugambi J, ‘Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court’ 262.

¹²⁰ Mugambi J, ‘Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court’ 262-264.

¹²¹ UNGA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN A/Res/40/34 (29 November 1985).

¹²² UNGA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN A/Res/40/34 (29 November 1985).

3.2 The Notion of Justice

This section analyzes how victims and players understand justice in the criminal system. It is based on the types of justice that criminal trials can deliver and may not encompass broader aspirations for peace-building and transitional justice.¹²³ Understanding the notion of justice in mass casualty criminal trials is particularly important because it is usually elusive, variant, and most importantly, deeply personal.¹²⁴ This therefore mandates an exploration of what justice is and what it entails because most victims pursue criminal trial hoping to achieve justice.¹²⁵ It becomes more important to understand justice in the criminal trial process when it is contrasted to a civil suit whose main purpose is to achieve compensatory awards for the injured party.¹²⁶ This begs the main question addressed herein of whether justice should be limited to one conceptual understanding of either compensation, restoration, or retribution.

Victims have been referred to as ‘the *raison d’être* for the courts,’ however, this seems to have become more symbolic than it is reality.¹²⁷ Proponents of victims’ rights to participation have put forward the hypothesis that victims’ involvement in trials helps victims achieve ‘healing, rehabilitation, and empowerment.’¹²⁸ Therefore, there is a growing disparity between what justice is and what conception of justice befits the idea of having victims participate in the criminal trial. The key concern growing within the conceptions of justice is how to reconcile restorative and retributive elements of justice in trials of mass crimes as the two are anchored on polar ideals.¹²⁹

For many, justice is equated with severe punishment for the perpetrators, seeing imprisonment or even death as fitting retribution for the atrocities committed.¹³⁰ This sense of justice goes beyond

¹²³ Hoven and Scheibel, ‘Justice for victims in trials of mass crimes: Symbolism or Substance?’ 167.

¹²⁴ UNGA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN A/Res/40/34 (29 November 1985).

¹²⁵ Hoven and Scheibel, ‘Justice for victims in trials of mass crimes: Symbolism or Substance?’ 162-187.

¹²⁶ Hoven and Scheibel, ‘Justice for victims in trials of mass crimes: Symbolism or Substance?’ 168.

¹²⁷ Arbia Silvana's speech on “Justice for all? The International Criminal Court - 10-year review of the ICC” 14 February 2012 <[Speech by the ICC Registrar, Ms Silvana Arbia at the conference “Justice for all? The International Criminal Court - 10 year r”](#)> Accessed 16 November 2024.

¹²⁸ War Crimes Research Office, ‘Victims’ Participation before the International Criminal Court’ November 2007 <[VICTIM PARTICIPATION BEFORE THE INTERNATIONAL CRIMINAL COURT](#)> Accessed 16 November 2024.

¹²⁹ Hoven and Scheibel, ‘Justice for victims in trials of mass crimes: Symbolism or Substance?’ 182.

¹³⁰ Hoven and Scheibel, ‘Justice for victims in trials of mass crimes: Symbolism or Substance?’ 168.

simple accountability; it often carries an element of wanting the perpetrator to endure some form of suffering that mirrors what the victims themselves have experienced.¹³¹ This perspective of justice as punishment satisfies the need for retribution by helping to restore a sense of moral balance, while also addressing a deeper desire for perpetrators to fully comprehend the gravity of the harm they have inflicted.

Another significant aspect of justice from the victims' perspective is the need for compensation.¹³² Beyond punishment, victims seek acknowledgment of the harm they endured and a sense of validation for their suffering. This acknowledgment often takes the form of symbolic gestures such as memorials or other forms of public recognition, which help them regain their dignity and restore a sense of worth.¹³³ Compensation, whether financial or in another material form, is also a critical aspect, addressing both the personal loss and the socioeconomic burdens that have resulted from the crime.¹³⁴ For many victims, justice includes this financial or symbolic support as a means of addressing not only their trauma but also the ongoing challenges they face in rebuilding their lives.

For some victims, justice also encompasses a search for truth and honor for those who were lost.¹³⁵ Many survivors are not only concerned with their own healing but also seek clarity about the fates of their deceased relatives. Understanding the circumstances of their loved ones' deaths and having those deaths publicly recognized allows them to honor the memories of those they lost. For these victims, justice involves finding closure through truth and preserving the legacy of the deceased through memorials or other acknowledgments that keep their memory alive.¹³⁶ This need for truth and honor provides a form of justice that respects both the living and the dead, allowing survivors to process their grief within a framework that values remembrance.

A further view of justice among victims relates to broader goals of prevention and reconciliation.¹³⁷ For these individuals, justice means not only addressing past harms but also preventing future

¹³¹ Hoven and Scheibel, 'Justice for victims in trials of mass crimes: Symbolism or Substance?' 168.

¹³² Hoven and Scheibel, 'Justice for victims in trials of mass crimes: Symbolism or Substance?' 169.

¹³³ Hoven and Scheibel, 'Justice for victims in trials of mass crimes: Symbolism or Substance?' 170.

¹³⁴ Hoven and Scheibel, 'Justice for victims in trials of mass crimes: Symbolism or Substance?' 169-170.

¹³⁵ UNGA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN A/Res/40/34 (29 November 1985).

¹³⁶ Hoven and Scheibel, 'Justice for victims in trials of mass crimes: Symbolism or Substance?' 170.

¹³⁷ Hoven and Scheibel, 'Justice for victims in trials of mass crimes: Symbolism or Substance?' 171.

atrocities. Establishing a historical record that recognizes the crimes and ensures they are not forgotten becomes a pathway to national healing, contributing to reconciliation efforts that go beyond individual or familial experiences of justice. By creating an enduring acknowledgment of the events, victims believe that society can be protected from similar violations in the future, helping to foster a collective resilience that upholds the value of truth and justice across generations.

3.3 The International Criminal Court and Victim Participation

Historically, victim participation was considered an abomination before the trial courts and victims could only appear before the court as witnesses: either for prosecution or defence.¹³⁸ However, international criminal tribunals have revolutionized this view. On 17 January 2006, the ICC's pre-trial chamber (PTC) issued a broad interpretation of victims' participatory rights, the first time such an interpretation has been developed in international criminal law.¹³⁹ The PTC put forward a four-pronged test for determining whether 'prospective' victims should be allowed to participate in stages of proceedings.¹⁴⁰ This test includes the following ambits: "a) the applicants must be natural persons, b) persons must have suffered harm, c) the crimes in question satisfy jurisdictional questions, and d) there must be a proven causal link between the alleged crimes and the harm occasioned upon the person (nexus)."¹⁴¹

In cases where doubt has arisen over the second requirement as is the case with indirect victims, emphasis must be placed on whether a nexus exists between the alleged victim and the crime in question.¹⁴² Developments in international jurisprudence have relied on various standards including: "sufficient grounds to believe" or "reasonable grounds to believe" that the nexus exists

¹³⁸ Moynihan S, 'The Voiceless Victim: A Critical Analysis of the Impact of Enhanced Victim Participation in the Criminal Justice Process' 25.

¹³⁹ *Prosecutor v Thomas Lubanga Dyilo, The Situation in the Democratic Republic of Congo*, ICC Trial Chamber, "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6" (2006).

¹⁴⁰ *Prosecutor v Thomas Lubanga Dyilo, The Situation in the Democratic Republic of Congo*, ICC Trial Chamber, "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6" (2006).

¹⁴¹ Hemptinne J and Rindi F, 'ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings,' 4(2) *Journal of International Criminal Justice*, 2006, 345.

¹⁴² Mugambi J, 'Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court' 260.

between the accused and the alleged offenses.¹⁴³ This threshold of causality essentially means that for a person to be considered a victim, they need to be sufficiently linked to the harm. This would help balance the need for expanding the concept of a victim and the rights of the accused. However, this has not been without controversy because the existence of *any* “ground to believe” that a causal link exists presupposes that a value judgment concerning the “presumed” existence of a crime has been made. This arguably shifts the burden of proof (proof of guilt regarding the crime) to the accused, who is presumably walking into a trial within a trial.¹⁴⁴

This is the main disconnect between the competing rights of the accused and victims’ participation rights. It flows from the fact that the assessment metric used to grant the latter rights inherently puts the coexistence of the two at odds. Such undue prejudice is exacerbated when a multitude of victims exists.

3.3.1 The ICC in Focus

The ICC’s Rome Statute marks a significant step forward in integrating victims into criminal proceedings by providing them with a legal avenue to participate. Article 68(3) of the Statute affords victims the opportunity to present their “views and concerns at different stages of the proceedings when their personal interests are affected.”¹⁴⁵ This provision enables victims to participate beyond the traditional witness role, shifting towards a more comprehensive framework where they are recognized as stakeholders. However, their participation remains confined to cases where it ‘would not prejudice’ or conflict with the rights of the accused to a fair trial.¹⁴⁶

Victims' roles at the ICC are stratified across various stages of proceedings. During the pre-trial phase, the PTC oversees the preservation of victims' rights and ensures the prosecutor’s investigation proceeds without compromising judicial impartiality.¹⁴⁷ In the *Darfur case*, for

¹⁴³ Mugambi J, ‘Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court’ 260.

¹⁴⁴ Bartels, ‘Balancing Prejudice,’ 45.

¹⁴⁵ Article 68 (3), *Rome Statute*, 17 July 1998, 2187 UNTS (38544).

¹⁴⁶ Article 68 (3), *Rome Statute*.

¹⁴⁷ *Prosecutor v Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd Al-Rahman (“Ali Kushayb”)*, *The Situation in Darfur*, ICC Pre-Trial Chamber, “Decision on the Requests of the OPCD and the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor” (2008).

example, the Appeals Chamber ruled that ‘Article 68(3) does not grant a general right for victims to participate in the investigatory phase unless they demonstrate a specific interest in a matter.’¹⁴⁸ This ruling limits victims' involvement at this stage, making participation highly conditional.

At the trial stage, the ICC's approach has been notably flexible, allowing victims to attend hearings, access court filings, submit evidence, and question witnesses.¹⁴⁹ The *Lubanga case*, among others, has underscored that participatory rights include the ability to tender evidence when it contributes to establishing the truth.¹⁵⁰ However, victims do not possess an unrestricted right to introduce or challenge evidence; they must prove that their ‘personal interests are directly affected by the evidence or issue at hand.’¹⁵¹ This case-by-case approach highlights the ICC's effort to balance extensive victim participation with safeguarding the accused's right to a fair defense, particularly as the defense and the court navigate the complexities posed by large numbers of victims.¹⁵²

An ongoing concern is the perception that victims, through their legal representatives, may act as quasi-prosecutors, potentially creating an imbalance that undermines the rights of the accused. This issue has manifested in both ICC and Extraordinary Chambers in the Courts of Cambodia (ECCC) cases, where defense teams argue that extensive victim participation tips the scales against the accused.¹⁵³ The ICC has attempted to address this by restricting victim questioning to non-prejudicial issues and maintaining a “neutral approach” to questioning, which discourages

¹⁴⁸ *Prosecutor v Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd Al-Rahman (“Ali Kushayb”), The Situation in Darfur*, ICC Pre-Trial Chamber, “Decision on the Requests of the OPCD and the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor” (2008).

¹⁴⁹ *Prosecutor v Thomas Lubanga Dyilo, The Situation in the Democratic Republic of Congo*, ICC Trial Chamber, “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6” (2006).

¹⁵⁰ *Prosecutor v Thomas Lubanga Dyilo, The Situation in the Democratic Republic of Congo*, ICC Trial Chamber, “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6” (2006).

¹⁵¹ Fedorova M, ‘The Principle of Equality of Arms in International Criminal Proceedings,’ Published Dissertation, School of Human Rights Research Series (55) Utrecht University, 1980.

¹⁵² *Prosecutor v Jean-Pierre Bemba Gombo, The Situation in the Central African Republic*, ICC Trial Chamber, “Decision Pursuant to Defence Application for Appropriate Prior to Commencement of the Trial Scheduled for 22 November 2010 (2010).

¹⁵³ Fedorova M, ‘The Principle of Equality of Arms in International Criminal Proceedings,’ Published Dissertation, School of Human Rights Research Series (55) Utrecht University, 1980, 424-425.

combative techniques typically used in cross-examination.¹⁵⁴ The ICC also takes an oversight role to ensure that neutrality - which is primarily based on unbiasedness- is ensured.¹⁵⁵

The ICC encounters specific challenges when victims also serve as witnesses. This “dual status” can create complications, such as conflicts of interest due to victims’ access to confidential case material, which could affect the impartiality of their testimony.¹⁵⁶ Additionally, the ICC imposes limitations to ensure that victim-witnesses do not inadvertently become auxiliary prosecutors. These constraints are intended to protect the defense’s right to prepare adequately and to avoid any perception of bias. A notable achievement in victim participation was the ICC’s recognition of victims’ rights to reparation through both collective and individual means.¹⁵⁷ This approach, supported in various cases,¹⁵⁸ aligns with restorative justice principles, which aim to address victims’ needs for recognition, compensation, and closure.¹⁵⁹ The ICC has allowed for symbolic and collective reparations, such as memorials and psychological support, although limitations in individual compensation persist due to the sheer scale of mass atrocity cases.

3.3.2 Mass Victim Participation and Undue Prejudice

Undue prejudice within the ICC framework takes on a nuanced dimension when considered alongside victims' active participation in trials. Victims may participate by adducing evidence, questioning witnesses, or testifying, all of which are integral to their pursuit of justice. However, these rights must be exercised in a way that does not compromise the fairness of the trial, particularly the rights of the accused. For instance, when victims tender evidence, it must meet the standards of probative value without disproportionately burdening the defense.¹⁶⁰ In the *Lubanga case*, the ICC recognized that while incriminating evidence is prejudicial by nature, it becomes unduly prejudicial when it fundamentally impairs the defense’s ability to respond adequately.

¹⁵⁴ Fedorova M, ‘The Principle of Equality of Arms in International Criminal Proceedings,’ Published Dissertation, School of Human Rights Research Series (55) Utrecht University, 1980, 428 - 432.

¹⁵⁵ *Prosecutor v Katanga and Ngudjolo Chui, The Situation in the DRC*, ICC Pre-Trial Chamber, “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements” (2008).

¹⁵⁶ Fedorova M, ‘The Principle of Equality of Arms in International Criminal Proceedings,’ Published Dissertation, School of Human Rights Research Series (55) Utrecht University, 1980, 430-431.

¹⁵⁷ Fedorova M, ‘The Principle of Equality of Arms in International Criminal Proceedings,’ Published Dissertation, School of Human Rights Research Series (55) Utrecht University, 1980, 440-455.

¹⁵⁸ *Prosecutor v Thomas Lubanga Dyilo, The Situation in the Democratic Republic of Congo*, ICC Appeals Chamber, “Appeals Judgment” (2008).

¹⁵⁹ Hoven and Scheibel, ‘Justice for victims in trials of mass crimes: Symbolism or Substance?’ 182.

¹⁶⁰ Bartels, ‘Balancing Prejudice,’ 51.

Victim-led evidence or testimony could inadvertently lead to undue prejudice if it introduces complexities, such as late disclosure or overlapping with the prosecution's case, which could hinder the defense's right to prepare.¹⁶¹

In this context, “undue” prejudice refers to the disproportionate negative impact on the rights of the accused, particularly the right to a fair trial. While every criminal trial inherently involves some level of inconvenience to the defense, such as the burden of responding to incriminating evidence or the presence of numerous witnesses, undue prejudice arises when these burdens escalate to a level that cannot be justified within the framework of justice.¹⁶² For example, actions such as late disclosure of evidence, introducing new witnesses after deadlines, or admitting evidence requiring excessive time to examine, may impede the defense's ability to adequately prepare and respond, violating the accused's right to have adequate time and facilities for preparation. The ICC's jurisprudence has emphasized the need to assess undue prejudice on a case-by-case basis, considering both the cause of the prejudice and its impact on the accused's ability to organize an effective defense.

3.4 Conclusion

The ICC's approach to victim participation distinguishes between primary and secondary victimization. This highlights the diverse harms victims endure, including the trauma of poor treatment during legal proceedings. Furthermore, the ICC's emphasis on restorative justice, through reparations and symbolic gestures like memorials, demonstrates how justice can address victims' emotional and societal needs. The ICC also models active victim participation at various stages of the judicial process, allowing victims to submit evidence, question witnesses, and contribute to truth-finding. Safeguards, such as managing the dual status of victims who are also witnesses, would ensure impartiality and fairness. Additionally, the ICC's case-by-case flexibility allows it to tailor victim participation to the specific needs of each case. In the next chapter we will assess how by drawing from the ICC's practices, Kenya could create a more balanced and victim-centered justice system that upholds international standards while addressing the unique challenges of mass casualty incidents.

¹⁶¹ Bartels, 'Balancing Prejudice,' 48.

¹⁶² Bartels, 'Balancing Prejudice,' 45-51.

CHAPTER FOUR: VICTIM PARTICIPATION IN MASS ATROCITIES: ANALYSIS AND REFORM STRATEGIES FROM THE ICC MODEL FOR THE KENYAN LEGAL SYSTEM

4.0 Introduction

The ICC's approach to victim participation in cases of mass casualty incidents offers valuable insights for strengthening Kenya's legal framework. As earlier highlighted, by distinguishing between primary and secondary victimization, the ICC highlights the diverse harms victims endure, including the trauma of poor treatment during legal proceedings. Kenya could adopt broader definitions of victimhood to include indirect victims, such as dependents or those who suffer psychological harm, ensuring more inclusive participation. Furthermore, the ICC's emphasis on restorative justice, through reparations and symbolic gestures like memorials, demonstrates how justice can address victims' emotional and societal needs. Kenya could integrate collective reparations and community-based initiatives to promote healing and acknowledgment alongside punitive measures.

The ICC also models active victim participation at various stages of the judicial process, allowing victims to submit evidence, question witnesses, and contribute to truth-finding. Kenya could expand participatory rights to ensure meaningful victim involvement without compromising the accused's fair trial rights. Safeguards, such as managing the dual status of victims who are also witnesses, would ensure impartiality and fairness. Additionally, adopting the ICC's case-by-case flexibility could allow Kenyan courts to tailor victim participation to the specific needs of each case. By drawing from the ICC's practices, Kenya could create a more balanced and victim-centered justice system that upholds international standards while addressing the unique challenges of mass casualty incidents.

4.1 Analysing areas of reform and Possible strategies for reform thus far

As noted by the SCORK a comparative analysis with the ICC's mechanism could be beneficial to enable progression in this regard, however, the analysis in the Waswa judgment on this matter is quite short and limited.¹⁶³ While it had become clearer to the SCORK that victims can participate

¹⁶³ *Lendrix Waswa v Republic* (2020) eKLR.

in the criminal trial, the remaining question was one of degree. The SCORK emphasized the active role of the court in balancing prejudice and the truth-seeking nature of victim submissions to prevent a situation of secondary prosecution.¹⁶⁴

Furthermore, it attempts to lay down some guidelines to safeguard victim participation and the sanctity of a speedy trial for the accused. These include, among other things, that:

*“a) The applicant must be a direct victim...c) The victim’s presentations must strictly [“**emphasis mine**”] be limited to the views and concerns of the victim...”*¹⁶⁵

In the preceding chapter of this work, we have seen how prejudicial it would be for victims of mass casualty incidents who have an indirect link to the alleged crime but have nonetheless suffered harm due to its occurrence or at least the occurrence of the circumstances leading up to the alleged crime.¹⁶⁶ The existing framework as is, effectively excludes key stakeholders with legitimate interests in the proceeding, potentially subjecting them to double injustice. One, in the possibility of a judicial outcome that does not reflect their unique perspective, and two, in being precluded from exercising their constitutional rights simply because precedent does not recognize their class of victimhood.

Further, limiting the scope of victim participation to just their “views and concerns” would lead to a situation that the ICC Appeals Chamber terms as “ineffectual participation”.¹⁶⁷ The previous chapter has shown that victims ought to tender evidence relating to the possible guilt and innocence of the accused. If not for their inherent right, then for the simple fact that evidence adduced in trial that does not relate to the accused’s guilt and/or innocence is irrelevant.¹⁶⁸ The worry in this is that this may occasion undue prejudice on the accused, however, with an active court and the existing framework safeguarding the accused’s rights it would be difficult to envision how it would do so.

¹⁶⁴ *Lendrix Waswa v Republic* (2020) eKLR.

¹⁶⁵ *Lendrix Waswa v Republic* (2020) eKLR.

¹⁶⁶ Chapter 3 of this work.

¹⁶⁷ *Prosecutor v Jean-Pierre Bemba Gombo, The Situation in the Central African Republic*, ICC Trial Chamber, “Decision Pursuant to Defence Application for Appropriate Prior to Commencement of the Trial Scheduled for 22 November 2010 (2010).

¹⁶⁸ Fedorova M, ‘The Principle of Equality of Arms in International Criminal Proceedings,’ Published Dissertation, School of Human Rights Research Series (55) Utrecht University, 1980, 426.

Nonetheless, the concept of undue prejudice has also been debunked in the preceding chapter, arguing that undue prejudice needs to be differentiated from mere inconveniences and normal levels of prejudice that are inherent in a criminal trial against the accused.

4.2 Weaving Insights from the ICC into the Kenyan Victim Participation Framework

One critical insight from the ICC is its comprehensive conceptualization of victimhood. By distinguishing between primary and secondary victimization, the ICC framework recognizes the diverse dimensions of harm that victims endure.¹⁶⁹ Primary victimization addresses the direct physical, emotional, and financial harm resulting from mass crimes, while secondary victimization arises from insensitive or dismissive treatment during judicial processes.¹⁷⁰ In Kenya, while the Victim Protection Act recognizes victims' rights, the ICC's emphasis on preventing secondary victimization could inspire procedural reforms. For example, ensuring that victims are treated with dignity during police investigations, court hearings, and other interactions with the criminal justice system would mitigate secondary trauma.

Further, the ICC's recognition of indirect victims, including dependents of primary victims and those indirectly harmed, also highlights the need for broader inclusion. Kenyan law could benefit from refining its definition of victims to ensure that indirect victims of mass casualty incidents have participatory rights. This aligns with international jurisprudence, which has adopted flexible causality standards to establish victimhood.¹⁷¹ Adopting a similar approach in Kenya would ensure that indirect victims, such as family members of deceased persons or those who suffered psychological harm from mass tragedies, are afforded a voice in judicial proceedings.

The ICC's inclusive participatory rights during trial phases are another area for adaptation. By allowing victims to present their views, submit evidence, and question witnesses, the ICC ensures

¹⁶⁹ Hemptinne J and Rindi F, 'ICC Pre-Trial Chamber Allows Victims to Participate in the Investigative Phase of Proceedings,' 345-348.

¹⁷⁰ Kipkosgei J, 'Challenges in Implementing the Victim Protection Act, 2014' Published LLM Dissertation, University of Nairobi, 2020, 20-21.

¹⁷¹ Hemptinne J and Rindi F, 'ICC Pre-Trial Chamber Allows Victims to Participate in the Investigative Phase of Proceedings,' 345-348.

their involvement goes beyond a passive role.¹⁷² In Kenya, the VPA allows victims to participate in proceedings, however, in practice this has been limited to their ‘views and concerns.’¹⁷³ This is similar to the Rome Statute’s provisions, however, the right has been expanded in the ICC’s jurisprudence to ensure active and meaningful engagement by the victims.¹⁷⁴ For example, victims could be empowered to challenge evidence or contribute to truth-finding efforts, provided their participation does not infringe on the accused’s fair trial rights. Kenya could also draw from the ICC’s oversight mechanisms to ensure that victim participation remains neutral and does not conflict with the principles of equality of arms. Ultimately, this calls for stronger courtroom management by judicial officers to realise this possibility.

The ICC’s approach to managing the “dual status” of victims who also serve as witnesses highlights a critical procedural safeguard.¹⁷⁵ In Kenya, where victims often serve as key witnesses in criminal trials, the ICC’s practices could prevent potential conflicts of interest and ensure impartiality. For instance, restricting victim-witnesses’ access to sensitive case materials and ensuring their testimony adheres to strict impartiality standards would bolster the credibility of proceedings while protecting the accused’s rights.

Lastly, the matter of reparations which is a cornerstone of the ICC’s restorative justice model, remains underdeveloped in Kenya’s framework. While the Victim Protection Act envisions compensation,¹⁷⁶ the ICC demonstrates how reparations can extend to symbolic and collective measures, providing victims with acknowledgment and closure. Establishing a national reparations fund or incorporating reparative mechanisms into judicial rulings could ensure victims receive tangible support .

¹⁷² *Prosecutor v Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd Al-Rahman (“Ali Kushayb”)*, *The Situation in Darfur*, ICC Pre-Trial Chamber, “Decision on the Requests of the OPCD and the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor” (2008).

¹⁷³ *Lendrix Waswa v Republic* (2020) eKLR.

¹⁷⁴ Fedorova M, ‘The Principle of Equality of Arms in International Criminal Proceedings,’ Published Dissertation, School of Human Rights Research Series (55) Utrecht University, 1980, 426.

¹⁷⁵ Bartels, ‘Balancing Prejudice,’ 48.

¹⁷⁶ Section 24, *Victim Protection Act* (Act No. 17 of 2014).

CHAPTER FIVE: RESEARCH FINDINGS AND CONCLUSION

5.1 Research Findings

Having developed this study thus far, this chapter will analyse the findings summarily. Chapter one, the introduction, formulated the possible hypothesis that adopting an ICC approach to the Kenyan criminal justice system would help bridge the gap in the participatory rights of victims of mass casualty incidents in Kenya. This was presupposed to help ‘strike a balance between participatory rights of victims and the accused’s right to a fair and speedy trial.’ Chapter one found that there could be a gap in the Kenyan legal framework regarding the participation of victims of mass-casualty incidents in Kenya.

Chapter two analysed the relevant legal and institutional framework protecting victim participation in Kenya. It also drew a historical account of Kenyan courts’ jurisprudence to show the salient features found in the existing framework. However, it found that there are various gaps in Kenya’s framework including a narrow conception of victimhood, and gaps in the procedural and substantive protection of victim participatory rights that range from inappropriately limiting victim participation to a lack of clear guidelines on the participation of victims of mass casualty incidents.

Chapter three then assessed the ICC’s approach to victim participation to decipher best practices that are lacking in Kenya. This chapter found that broadening the definition of a victim should consider the concept of secondary victimization and the notion of restorative justice. It also found that victims should be able to participate at different stages of the trial to an extent that meaningfully affects the trial including by being able to tender evidence. Lastly, it showed that while victim participation should be made meaningful, it ought to be considered on a ‘case-by-case basis’ through an objective criterion of causality to ensure proper oversight.

Lastly, chapter four applied these best practice approaches from the ICC to the Kenyan context after assessing the applicability of each proposed reform. It found that Kenya can incorporate the following two overarching reforms: expanding the concept of victimhood to encompass secondary victims that are sufficiently linked with the harm, and broadening the scope of victims’ participatory rights to allow meaningful participation during the trial process.

5.2 Recommendations

1. Broadening the scope of the term “victim” in Kenyan law to encompass the concept of Secondary Victimization.
2. Expand victims' rights under the Victim Protection Act to allow for active engagement, such as challenging evidence and contributing to truth-finding efforts, while safeguarding the accused’s right to a fair trial.
3. Adopt oversight mechanisms, similar to the ICC, to ensure victim participation remains neutral and respects the principles of equality of arms. This may necessitate stronger judicial safeguards such as an active court and integrous judicial officers.
4. Implement safeguards for victim participation including victims who also serve as witnesses, such as enforcing strict impartiality standards for their testimony. This may be aided by increased utilization of Victim Impact Statements and Criminal Class Actions.
5. Develop a Reparations Framework that may include establishing a national reparations fund to provide victims with tangible support.

5.3 Conclusion

In conclusion, integrating the ICC’s participatory rights framework into Kenya’s national system would strengthen the country’s ability to address the needs of victims of mass casualty incidents. By expanding the definition of victims, enhancing participatory mechanisms, incorporating restorative justice elements, and safeguarding procedural fairness, Kenya could create a more inclusive and victim-centered justice system. These adaptations would align with Kenya’s existing legal protections and international standards, ensuring justice for victims while maintaining the integrity of criminal proceedings.

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