

ACCESS

Victims' rights before the International Criminal Court Victims' Rights Working Group Bulletin • Issue 25 • Winter-Spring 2014 –2015

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Participation before the ICC Some perspectives from the inside



Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial... Art 68(3) of the Rome Statute Photo © ICC-CPI

Under the Rome Statute victims have the right to present their 'views and concerns' at stages of the proceedings where their interests are affected and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Victim participation is an important part of the ICC Statute and it is designed to help ensure that those most affected by the crimes are able to engage with the Court. So far, about 10,000 victims have participated in proceedings, and many more continue to reach out to the Court each day.

This vast experience of victim participation in the ICC's first trials provides an important lens through which the system may be analysed. A number of proposals have been put forward to ameliorate the system of victim participation. These proposals have been taken up by the Registry¹ and the Judges,² as well as several working groups within the Assembly of States Parties such as the Study Group on Governance³ and through the joint facilitation on Victims, Affected communities and the Trust Fund for Victims and on Reparations of the Hague Working Group.⁴ Civil society and various expert initiatives have also made recommenda-

tions.⁵ Among some of the proposals being considered are:

- keeping the system largely the same, though with efforts made to make it work more smoothly;
- revising the individual application process implemented in the early cases in favour of more collective approaches; or
- as implemented in the Kenya cases, replacing the application phase with a simpler registration process. In the *Ruto & Sang* and *Kenyatta* cases, only those victims who wish to participate in person have to fill in a detailed application form.

The scope of victims' participation in the ICC's first trials has also come under scrutiny. The jurisprudence of the Court has recognised victims' and their legal representatives' ability to question witnesses, challenge evidence but also to appear in person before the Court.

This Special Edition of the ACCESS Bulletin brings to the table the views of former Judges of the ICC and victims' legal representatives – who have first-hand experience of the victim participation system. We asked them what they thought about



In the Bemba case, over 5,000 victims are participating in the trial. Here participants arriving at an ICC information meeting in CAR © ICC-CPI

the victim participation process and what impact victim participation was having on the court proceedings. We also asked how they thought the system could be improved. Read on in this Bulletin to see what they said. •

¹ ICC, Report on the Review of the System for Victims to Apply to Participate in Proceedings, 5 November 2012, ICC-ASP/11/22; The Registry's ReVision project also considers possible changes affecting the participation of victims in the proceedings, Registry, *Basic outline of proposals to establish Defence and Victims Offices*, October 2014, on file with the authors.

² Victim participation features amongst the issues considered by the judges in their review: *Lessons Learnt: First Report to the Assembly of States Parties*, 23 October 2012, ICC-ASP/11/31/Add.1, and the Working Group on Lessons Learnt – composed of ICC Judges- is currently considering ways to render the application process more efficient.

³ Report of the Bureau on the Study Group on Governance, 22 November 2011, ICC-ASP/10/30.

⁴ Report of the Bureau on Victims and affected communities and the Trust Fund for Victims and Reparations, ICC-ASP/11/32, 23 October 2012; The Report identifies the 'unsustainability of the current system for victims to apply to participate in proceedings as the most pressing major concern and proposed to focus the work of the facilitation on this topic', para. 24, which refers to the findings of its earlier July report.

⁵ VRWG Submission on the importance of victims' participation, 8 July 2013 and VRWG submission on *Making Victims participation effective and meaningful*, June 2014, both available on www.vrwg.org; Independent Panel of experts report on victim participation at the International Criminal Court, Based on the Panel's meeting and consultations held in The Hague on 24-27 April 2013, <http://www.redress.org/downloads/publications/130711%20panel%20report%20FINALfor%20dissemination.pdf>; *Expert Initiative on promoting effectiveness at the International Criminal Court*, May 2014, on file with the authors, also referred to in the background document to the Retreat on Strengthening the Proceedings at the International Criminal Court, Glion, Switzerland, 3-5 September 2014, available at https://www.eda.admin.ch/content/dam/eda/en/documents/dfa/dfa_aussenpolitik_voelkerrecht_Background_Document_ICC_Retreat_en.pdf

Interview with Judge Elizabeth Odio Benito



Judge Elizabeth Odio Benito (Costa Rica) served as a Judge of the International Criminal Court from 11 March 2003 to 31 August 2012. She sat on the bench of Trial Chamber I which heard the first trial before the ICC against Thomas Lubanga Dyilo. He was found guilty, on 14 March 2012, of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities in Ituri, Democratic Republic of the Congo. Lubanga Dyilo was sentenced, on 10 July 2012, to a total of 14 years of imprisonment. 129 victims

participated in the proceedings represented by two teams of external lawyers and the Office of Public Counsel for Victims. Photo© ICC-CPI

In your view what does the participation of victims bring to the proceedings before the ICC?

For me, the participation of victims in international justice proceedings is crucial. The Rome Statute was an important turning point for international criminal justice: it recognised that victims had the right to access such justice and gave them the place they deserve in these kinds of proceedings. Such proceedings are indeed not just about accused persons or individual criminal responsibility; they are also about the human beings who were killed, tortured, raped, etc. If one talks about international crimes - of 'atrocities that shocked the conscience of humanity' – victims have to be included.

In practice, victims also play a different role from the one of the Office of the Prosecution. While in some instances their participation can help the Prosecutor's case, victims and their counsels do not necessarily focus on bringing elements to prove the guilt/innocence of an accused. Participating in the proceedings gives them the opportunity to



Victims legal representatives in the *Lubanga* case © ICC-CPI

state what happened to them and it is important that they are able to express their views and concerns before the Court.

How did the participation of victims impact the proceedings in the *Lubanga* case?

I think it is important to stress that in the *Lubanga* case, victims, or their participation in the proceedings never jeopardised the rights of the accused to a fair trial nor the proceedings themselves. Their participation enriched my work as a Judge. At the end of the *Lubanga* proceedings, I re-read carefully a number of times the documents submitted by victims' legal representatives and what the victims themselves had said. It assisted me in making my mind on the conviction. We had some problems in the *Lubanga* case with regards to the way some proceedings relating to victims were conducted but it does not mean that the participation of victims as a whole was negative. To the contrary, I felt that it was positive.

What do you think are essential elements to ensure effective victims' participation in the proceedings?

Victims need to clearly understand their rights and how to participate. In that regard, I think the Registry needs to reinforce its work in the field and in particular outreach. Outreach can play an important role in providing victims with information about their rights and how to use them. Sharing of information should be done as early as the investigation stage and the Office of the Prosecutor and the Registry need to work together so that victims are informed and organised well before the process to apply in the proceedings is started. I think this could also save time and money.

How could the system be made more efficient? What do you think of some of the changes being put forward?

I am aware that some criticisms are being made in relation to the efficiency of the victims' participation system. I am also aware that some changes are being proposed. However, I think that we need to be clear about what some of the changes that are being proposed are really about: budget and the challenges that the Registrar is facing in

processing applications from victims. This is very concerning.

Yes, it is an expensive system and everyone should make an effort to better organise the participation of victims. Changes may be needed to improve the system. However they should not be done only with a view to save money and should not jeopardise the substantive rights of the victims. For example, I agree that it can be important to organise victims in groups to facilitate their participation. However, while collective approaches may be a good way forward, one has to be careful to ensure that some victims are not left out and that different views and interests can still be represented. I also think that the approach that is being implemented in the Kenya cases, whereby victims' applications are not individually scrutinised by the parties and the Chamber is not the way to go. For me, it will damage the system and could open the door to the participation of victims who are not victims of the crimes charged in the case.



Trial Chamber I in the *Lubanga* case © ICC-CPI

It is also important to exercise caution with regards to the appointment of victims' legal representatives. I understand that there are plans to move the representation of victims exclusively to a unit within the Registry, with little choice for the victims on who their counsel will be. This is a disaster as far as I am concerned and not the correct approach. While counsels based in The Hague are very competent I think it is better for victims' counsels to be close to the victims, close to the facts. In my view, it should also be up to victims to choose a counsel they trust; one should not be imposed on them. Here as well, a lot of the changes proposed appear to be thought through with financial considerations in mind. It pains me to say— and I say so with the greatest respect — that many current judges also take such an approach. This is sad.

The Rome Statute was to change the paradigm of international justice after Nuremberg and the ad hoc Tribunals. The step forward it took in recognising a role for victims should be maintained. In that regard, now more than ever, the Court needs the support of civil society to accomplish the goals of the Rome Statute. •

Victim participation in the Lubanga case

Interview with Judge Adrian Fulford



Adrian Fulford served as a Judge of the International Criminal Court from 11 March 2003 to 31 August 2012. He presided over the first trial before the ICC against Thomas Lubanga Dyilo. Photo © ICC-CPI

What were the key rights granted to victims and their lawyers in the Lubanga case?

In the *Lubanga* case, victims were given full rights to 'express their views and concerns' during the course of the proceedings, as recognised in the Rome Statute. That meant that whenever an issue arose that related to the particular interest of a victim, her/his counsel was able to deal with the issue, either by questioning witnesses or advancing submissions. In the case of a few participating victims, they gave evidence in person.

How did victim participation contribute to the proceedings?

We only allowed victims to participate if the intervention was not going to be a duplication of contributions by others. They had to add something. Applying that test, I believe that they did participate reasonably significantly by way of submissions and questioning. My view is that this was not in any sense tokenistic, it was substantive participation. The questions raised by victims' legal representatives were on relevant issues; they supplemented the material that was presented to the Chamber by the prosecution and the defence. After witnesses had been asked questions by the Parties, victims were allowed to question witnesses on issues that had not been dealt with by the parties. I would not have allowed these questions to be asked if they did not relate to something appropriate for us to consider. They also made brief and focused submissions on a large number of legal issues we had to consider; they were not repetitive and raised different points.

I cannot speak for other cases but as far as the *Lubanga* trial was concerned, it would be inappropriate to say that victims' participation delayed proceedings. I kept a very careful check on the extent to which victims and their legal

representatives were able to participate whilst ensuring their rights were fully fulfilled and I felt that it was entirely proportionate.

What is required to ensure effective and meaningful victim participation in the proceedings?

The opportunity to participate meaningfully is first and to a very large extent dependant on the quality of the representation provided to the victims. The best protection for participating victims is to ensure that they are represented by good, competent, counsel, able to take their instructions and to sufficiently investigate the matters which victims want to raise. The mixture of counsel we had in the *Lubanga* case with both OPCV and counsels in private practice was good. We had the benefit of some focused and extremely helpful submissions and questions.

It is then up to the Chambers to make sure that victims' statutory rights are upheld in a meaningful way. It is a shared responsibility: 1) of the judges to ensure that opportunities to participate are really given force and 2) of LRVs to ensure that they really understand what victims' interests are and communicate them in a meaningful way. Outside of the courtroom, any relevant security concerns also have to be addressed.

How can victims usefully contribute to the evidence of the case?

It seems to me that the two key elements in that regard are 1) to ensure that victims are adding to the understanding of the Court as regards the case before it, rather than repeating material already dealt with and 2) if victims identify additional areas in the case that the Chamber ought to consider then the opportunity should be given to them via their legal representative to develop their points.

That is exactly what happened in the *Lubanga* case. On different days, on different issues, the legal representatives of victims applied to question witnesses and make submissions. Almost all these applications were granted.

How can the proceedings be brought closer to victims?

Obviously, within the relevant affected areas, the court needs to do as much as possible to ensure victims are aware the proceedings are taking place. I tried to take the *Lubanga* case (part of it) to the Democratic Republic of the Congo (DRC) but the government of the DRC did not support the initiative and thought it may destabilise that part of DRC. I believe the Court should sit in country, in a way that is economically feasible and to the extent that security permits. Another tool Chambers can use is making use of technology such as video link testimony. In the *Lubanga* case, we had some incredible video link evidence from DRC. I believe it enabled individuals in the DRC to participate in the proceedings with little inconvenience to them and more importantly without having to leave the DRC for a significant period of time thus reducing security risks.

What are your views on some of the approaches and changes proposed to the participation system? Is it time to harmonise?

Obviously, inconsistency creates uncertainty and that is regrettable. However, sometimes, that is inevitable as the court finds its way. I am cautious about suggesting that there is one formula that would necessarily apply to all cases. However, I would be very surprised if the opportunity does not arise for the Appeals Chamber to resolve, to the extent that they should be resolved, the different approaches adopted by Chambers.

We were lucky in the *Lubanga* case that the number of participating victims was relatively speaking very small. You could end up with cases where participating victims run into thousands or tens of thousands. The way of dealing with participating victims in these circumstances could be completely different from dealing with only tens or hundreds of victims. However, I have reservations that the framework in the Kenya cases, in which victims only have to register, will lead to any form of meaningful involvement. The Kenyan model also raises serious issues in relation to verification of the legitimacy of each registered victim. At least the sifting procedure followed in *Lubanga* and other cases ensures that on a prima facie basis the judges have selected those who fall properly into the category of potential victims of the crimes alleged against the accused.

In addition, the Registrar is also contemplating significant changes. As I understand the proposals, a core recommendation is that every victim shall in future be represented by in-house counsel. If implemented, these arrangements critically undermine a key element of choice in this context: the opportunity for – arguably the right of – victims to express their views and concerns through the advocate of their election. For instance, perhaps someone from within their community who has a real understanding of the context and the circumstances in which the crimes occurred.

I do not shrink from recognising the difficulties when there are mass applications to participate, but I do not believe that the right response or the proportionate answer is simply to emasculate the process, and to reduce the whole idea to what may well become little more than a symbolic gesture. The managerial and financial problems that accompany significant victim participation in individual trials should not be an excuse for partially or substantively abandoning the whole project.

I hope that the court will do everything possible, within the confines of the accused's rights to a fair trial and while ensuring that proceedings do not last for an undue length of time, to ensure that victims' right and opportunity to participate in proceedings will be preserved. It is an incredibly important part of the Rome Statute framework. •

Victim participation in the Katanga/Ngudjolo case Interview with Judge Bruno Cotte



Judge Cotte served as a Judge of the International Criminal Court from 1st June 2008 until 31 May 2014. He presided over the second trial before the ICC in the case against Mathieu Ngudjolo Chui and Germain Katanga. Mathieu Ngudjolo was acquitted on 18 December 2012. On 7 March 2014, Mr. Katanga was found guilty, as an accessory, of one count of crimes against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging) committed on 24 February 2003 during the attack on the village of Bogoro, in the Ituri district of the DRC. He was sentenced to 12 years in prison. 366 victims, represented by two legal representatives (LRVs), participated in the trial proceedings. Photo © ICC-CPI

Can you tell us a bit more about victims' participation in the Katanga and Ngudjolo trial?

In February 2009, the Chamber set out the process it would follow to review new victims' applications for participation in the trial proceedings of the case. Over 300 applications were received. The Judges then had to ensure that each application met the legal conditions for participation in the proceedings. These reviews and analysis can take time, and can contribute to putting pressure on the proceedings, however we had to ensure the authenticity of the applications, and take precautions with regards to applications made on behalf of deceased victims as well as to the role and legitimacy of intermediaries. We also had to address the Defence's concerns with regards to a possible lack of transparency. In that regard, a positive development was the fact that almost all participating victims later agreed to lift their anonymity towards the parties.

In the end, 366 victims were recognised as participants in the trial proceedings – a relatively small number. We recognised the possibility for their legal representatives to make opening and closing statements. In addition, they attended every hearing, public or closed. They were also able to question witnesses, experts and the accused. I indeed felt that it was without doubt a way for them to express the 'views and concerns' of the victims. LRVs were also able to present evidence and to challenge the admissibility of the evidence presented by the Parties. For me, it seemed necessary to allow victims to share with the Chamber information that they possessed on whether a piece of contested evidence was admissible, inadmissible or irrelevant.



The Judges of Trial Chamber II travel to Ituri © ICC-CPI

How did the Chamber ensure that victims' participation was efficient and useful for the proceedings?

The Chamber sought to give life to the statutory provisions relating to victims and to give them full force while respecting the rights of the Defence. We wanted to allow victims to participate effectively in the proceedings and to ensure that their right to participate would not be an empty shell. We examined closely the meaning and scope that it was appropriate to give to the wording of Article 68. We then recalled that if we were to allow victims and their LRV to play an active part in the proceedings, their intervention would have to contribute to the establishment of the truth and respect equity and impartiality principles.

In addition, the Chamber indicated that LRVs – through their questions- should not appear as second prosecutors, which was a strong concern from the Defence teams. We also ruled on the appropriate moment for LRVs' interventions in order to ensure such interventions would add value to the proceedings. Defence counsels originally reacted however the proceedings normalised fairly quickly. In almost all instances, LRVs used their ability to intervene without the need for us to call them to order.

We also reduced the number of legal representatives to two to ensure that they would have a place that was truly useful in the proceedings. This facilitated interventions that were targeted and focused. In my view, victims had two competent counsels who understood that their interventions had to go straight to the point and be limited to issues relating to victims' interests. I think that it is important for victims' legal representatives to play their role to its full extent while not exceeding it.

How did victim participation contribute to the proceedings?

Some of the points raised by LRV were interesting to us, and had not been raised by other parties. Some of their questions were merely requests for clarification but others proved to be helpful for the establishment of the truth. For example, the LRV for child soldier victims asked questions that the Chamber may not have thought to ask.

The Chamber also underlined that the participation of victims could greatly assist the Judges to better understand contentious issues in light of their knowledge of the locations and

their socio-cultural background. In that regard, the LRV for the main group of victims clearly had knowledge of the field that we did not yet have; he intervened on occasions to bring factual additions based on his own knowledge of the locations and of the people concerned. This was really helpful to the Chamber.

Finally, the Chamber found that it was also important to hear the LRVs on legal and procedural questions. Without generalising, their interventions on such issues were sometimes very useful. For example, during the final phase of the proceedings, the written conclusions from the LRVs developed arguments relating to the qualification of the crime of enrolling children or using them in hostilities which were useful to us as judges. I found the observations made by LRVs interesting and well researched; I listened with interest to their final pleadings.

What was the experience regarding victims' participation in person?

In the *Katanga* case, one of the victims' LRV requested that four of his clients be allowed to testify before the Chamber. This had been anticipated in an earlier decision from the Chamber and the request was granted. In the end, the two victims who testified played their role and I think it was important that victims called by the LRVs were heard by the Chamber. This added value and these victims contributed to the Chamber's better understanding of what victims in this case felt and had lived through. However I was somewhat surprised that, despite the fact that the possibility for them to call some victims was clearly recognised by the Chamber, LRVs seem to have faced difficulties in that regard - only two victims ended up testifying and none from the 'child soldiers' group.

Should the Chamber's visit to the field be replicated in other cases?

Trial Chamber II indeed travelled to Ituri during the trial. I believe that it would be very helpful for Chambers to travel to the location where the crimes allegedly took place before the opening of the substantive hearings but also afterwards. It would really assist it to understand some of the testimonies delivered by witnesses. With regards to the role of victims during that field visit, it was evident to us that LRVs would be present, on an equal footing with the parties. They and their assistants were thus allowed to take part and their interventions were important to allow some points to be clarified.

Today, there are a variety of approaches to the way victims apply to and participate in proceedings. Is it time to harmonise?

Each Chamber proceeded to give its own analysis of the Statute and Rules in relation to some issues and in particular victims' participation. This is something that struck me. I can understand that there are varied approaches as every case will be different. However I believe that over time, and to ensure better legal certainty, it will be necessary to see a core procedural framework emerge in relation to the participation of victims (but not on this only). Without confining Judges within overly strict rules, it may be useful to have a more precise framework while leaving sufficient margin of appreciation to the Judges. There is a need for common reflexion in order to harmonise practices and if necessary consider possible changes to the texts. However we have to ensure that such changes do not reduce the scope of intervention from victims. •

Interview with Judge René Blattmann



Judge René Blattmann (Bolivia) served as a Judge of the International Criminal Court from 11 March 2003 to 31 August 2012. He sat on the bench of Trial Chamber I, which heard the first trial before the ICC against Thomas Lubanga Diylo. Photo © ICC-CPI

How did you approach the participation of victims as a Judge?

Our chamber was composed of three judges from different geographic areas but also from different law families. In my region it is common for victims to participate in proceedings; looking at issues relating to the participation of victims in the *Lubanga* case was thus something that felt somewhat familiar to me. I also knew that victims' participation was one of the pillars of the Rome Statute and took it as an integral part of my function as a Judge of the ICC.

When our Chamber started to discuss how to implement victims' right to participate in the proceedings, our views differed; I had to dissent on some issues. The majority's view was that the Statute does not limit the Chamber's jurisdiction to the crimes attributed to the accused and charged by the Prosecution. My opinion was that the Trial Chamber has the competency to determine whether a person is a victim only when linked to the fact and circumstances found within the charges presented by the Prosecution and confirmed by the Pre-Trial Chamber, and must stay within this framework in its consideration of victims. The decision was appealed and reversed which I believe set the right precedent.

What did victims and their LRVs contribute to the proceedings?

Generally speaking, they added value by representing the voice of those who have suffered from the crimes and contributed to the establishment of the truth. They applied to introduce evidence, they questioned witnesses and advanced submissions. Victims' participation was also very important in some more specific instances. For example, in the *Lubanga* case, the LRVs requested that sexual crimes should also be included although they were not charged. Throughout the trial, victims and witnesses referred to sexual crimes but these were not reflected in the charges. The request allowed us to consider the possibility of including these crimes and drew attention to the issue. While ultimately such crimes were not added to the charges (they exceeded the facts underpinning the charges of that case), the request from legal representatives for victims was still an important contribution.

Victims' counsels also, on a lot of occasions, clarified aspects of what had happened in the conflict in Ituri. Trial Chamber I never went to the Democratic Republic of the Congo (DRC) and the participation of victims was also to some extent a way of bringing DRC to us. I think it was also good to hear directly from victims and their representatives what they were expecting, what they needed.

How did you as a Judge, ensure victims' participation was effective?

I think it is important to check victims' applications to participate thoroughly to avoid problems later. For example in the *Lubanga* case, the Chamber has withdrawn the right of six dual status witnesses to participate, as a result of the Chamber's conclusions as to their reliability and accuracy, which highlights the needs for such screening. In addition, there is a risk that victims' participation could duplicate the Prosecution's role if the Judges do not set the parameters for such participation. In order to be effective, victim's participation must not endanger the rights of the accused to fair, impartial and efficient proceedings. I think that in the *Lubanga* case we found the ways to avoid that danger and victims' role did neither conflict with, nor duplicate the role of the Prosecution. In my opinion the rights of the defence were also protected.

Victims participation did not delay the proceedings either. If the *Lubanga* case went longer than what we had anticipated it was for different reasons such as the failure of the Prosecution to present documentation we had requested, or to disclose to the Defence the names of some persons despite an order from the Chamber to do so. The participation system also has a cost but in my view it is very important that the persons directly affected by the crimes are present in the proceedings to defend their position. Of course, there are some dangers in allowing victims to participate but if their right to do so is balanced with the rights of the defence - which I think was the case in our Chamber - then it is a very positive element of the proceedings.

How could the Court be made more accessible to victims?

The Court is a Court of last resort and ideally, international crimes should be tried in the countries where they have been committed. Perhaps, one way to bring proceedings closer to those affected by crimes would be to have local hearings.

However, this requires a lot of efforts from a logistical point of view. One thing we tried in the *Lubanga* case, which I think was quite successful, is the use of video links. This should be used more frequently. It is not as expensive as bringing the whole court to the field and my personal impression was that, while it is not the same as having the witness or victim in front of you, it still gives a great impression of what the persons is saying to the Judges. Of course, the possibility for victims to come The Hague can also help closing the gap.

Is it time to harmonise the various approaches to the way victims participate in the proceedings? What way forward do you see?

The Court is still young and fine tuning is to be expected. I anticipate that it will need to continue to adjust before it finds the most effective framework. At the same time, it is difficult for the Judges to come up with a unified framework. We tried

to do so while I was still at the Court but that was not possible at the time in light of various Judges' prior involvement in decisions relating to the issue.

The debate surrounding the participation of victims in the proceedings is unlikely to go away. There are two legal systems at play and the tension will continue to exist. However, the Rome Statute does not suggest that the ability for victims to participate in the proceedings is a favour to be granted by the Judges. It recognises it as a right. Not implementing that right is not an option. I believe that the Court will ultimately find its way and come up with a unified approach. In the meantime, the input it receives from civil society will be helpful. •

Interview with Paolina Massidda Principal Counsel, Office of Public Counsel for Victims



Paolina Massidda is the principal counsel of the Office of Public Counsel for Victims at the ICC. She is the Common Legal Representative of victims in the Gbagbo and Blé Goudé cases and has represented thousands of victims in various ICC proceedings. © ICC-CPI

What does the participation of victims add to the proceedings before the ICC?

The participation of victims in ICC proceedings allows those individuals most affected by the crimes to have a say about what happened to them, their families, and their communities and to seek to hold responsible those who victimized them. Victims can provide insight into the events but also into the cultural, political, and ethnic background surrounding these events thus helping the Court to fully understand the reasons behind what happened in a specific country. Victims also bring an important human component to the proceedings allowing the public, and sometimes the judges, to remember that individuals suffered from “the most serious crimes of concern to the international community” which are the essence of the proceedings before the ICC. The ICC proceedings are a platform where the Prosecutor can argue that legal provisions have been violated and deserve punishment. However,

the reference to laws that have been violated has less impact than statements by victims telling their own stories.

Can you give specific examples when – in your opinion - victim participation has positively contributed to the proceedings?

In the *Lubanga* case, gender crimes committed within the framework of the crime of recruitment of children under the age of 15 was completely neglected by the Prosecution. Victims' interests were clearly affected by this choice and the legal representatives decided to trigger a specific procedure for the requalification of facts before the Trial Chamber. Ultimately, in the judgment, the Chamber recognised that component. Again in the *Lubanga* case, victims' contribution was essential in helping the Chamber understand the origin of Congolese names which had become an issue during some witnesses' testimonies. In the *Bemba* case, several victims appeared in person before the Chamber to tell their stories without taking the oath. This appearance allowed the Chamber to appreciate better the suffering of the victims. In the *Laurent Gbagbo* case, the legal representative was able to provide the Prosecution with important information in relation to the extent of the victimisation suffered by specific communities during the post-electoral violence in 2010 – 2011, therefore contributing to the confirmation of charges.

More generally, in admissibility proceedings before the ICC, victims have provided useful information about their perception of justice at the national level and insight into factual and legal aspects of the challenges they face in accessing such justice.

What role do you see for victims in relation to the evidence presented as part of the proceedings?

Victims can challenge the evidence presented by the parties, but, at trial, they can also tender evidence. In this regard, victims may be in a better position than the Prosecutor to explore specific aspects of the case, such as political

and cultural background and can provide evidence on aspects not presented by the Prosecution.

How could the current framework be made more efficient?

As a matter of principle, the participation of victims has to be recognised by all participants as an important and essential component of fair proceedings. In this regard, some form of uniformity in the modalities of victims' participation is desirable particularly concerning the modalities of access to confidential documents filed in the record of the case. Moreover, logistical difficulties encountered by legal representatives to meet victims are frequently not taken duly into account by Chambers when setting deadlines for submissions. This often renders unfeasible any consultations with clients who reside in remote areas and are not easily reachable and affects their ability to present their views and concerns.



Ms Massidda takes part in a radio interview in Bangui, CAR © ICC-CPI.

The large number of victims seeking to participate, the delay induced by the review of their applications for participation and the subsequent participation of victims are amongst the concerns most often expressed to justify reviewing the framework. The practice of Chambers has given rise to a proliferation of standard application forms. Victims themselves have expressed frustration because of difficulties in filling in different forms, the need to repeat their stories several times to different interlocutors and the long lapse of time between the submission of their application and the decision on their status by the relevant Chamber. To address these concerns, it seems that a unique standardised application form, as comprehensive as possible and easy to fill in, is desirable. Application forms shall not only be easy to fill out, but also allow each victim to provide the Court in a comprehensive manner with specific details regarding the experience he/she suffered from. A short, simple and easy to understand application form would ease the collection process and possibly reduce the need to seek supplementary information.

Another possibility would be to automatically allow victims already authorised to participate in a case to also participate in another case opened within the same situation for the same events but against another suspect. This could for example be considered when two cases are opened relatively contemporaneously or when victims have indicated a wish to participate in all cases opened within a

similar situation.

It is also essential that decisions on the participation of victims in the proceedings are taken by Chambers as early as possible. Timely decisions on modalities of participation will allow legal representatives to adequately prepare for the proceedings and to meet with their clients. Finally, automatic participation in interlocutory appeals of victims already authorised to participate at the preceding stage of the proceedings would shorten the delay for the consideration of such appeals and would avoid unnecessary litigation on participation.

What do your clients hope to achieve by participating in the proceedings?

In my experience, victims expect a careful, independent, fair, transparent, effective and watchful justice. A justice that is both protective and restorative as well as able to establish the truth about the crimes that were committed. When asked, victims mention a multitude of reasons for exercising their right to participate in the proceedings before the Court. The right to the truth seems one of the components of the right to justice for them. In this regard, the interest of victims in the establishment of the facts and the identification of the perpetrators is, in itself, the essence of the right to the truth. Victims thus have a key interest in the outcome of the proceedings which ought to bring clarity to what really happened, and fill the gaps which might persist between the procedural findings and the truth itself. Victims contribute to the search and the establishment of the truth by speaking out and sharing what happened to them. They are also entitled to the recognition of the harm they suffered from as well as of the crimes which generated that harm.

The right to reparations is also one of the essential components of the right to justice for victims. The process of participation can indeed have a cathartic and healthy virtue at an individual level, as well as a restorative virtue at a family, social and community level. In my opinion, if the choice to seek participation in the proceedings is first and foremost an individual step, which allows each victim - mostly through his/her counsel - to convey part of his/her experience and knowledge of the events, that choice can also become a collective step towards bringing communities, neighbours and families together. The courage victims demonstrate through their participation in proceedings can also play a role with regards to achieving reconciliation and set an example to prevent the future commissions of these crimes.

What elements would you say are necessary to ensure that victim participation is meaningful to your clients?

As mentioned above, timely decisions on legal representation and modalities of participation of victims are important. Constant communication with victims is also an essential element to ensure meaningful participation. Victims value the efforts of legal representatives to travel to the location where they reside to meet with them. This allows the legal representatives to have a better knowledge of the places where the events occurred and of the current situation of their clients. Adequate resources to meet with victims regularly are thus essential to fulfil the mandate of legal representation. This includes the presence of personnel in the field who can ensure direct and constant communication with victims in order to be able to collect their views and concerns. •

Victims' participation in the Kenyatta case

Interview with Fergal Gaynor



Fergal Gaynor is the Common Legal representative of victims in the Kenyatta case. He represents an estimated 20,000 victims of the crimes charged in that case. Mr Kenyatta is accused of five counts of crimes against humanity in the context of the 2007-2008 post-election violence in Kenya. Photo © ICC-CPI

In your view, what is victim participation adding to the proceedings before the ICC?

I worked for over 10 years in other international tribunals and I met a lot of victims while working for the prosecution there. However, we very rarely - except perhaps conversationally - asked victims for their views or concerns in relation to where the case was going. That was not the mandate of the prosecution. There was no sense that victims were driving or influencing the process in any way. In contrast, today, victims in Kenya understand that they have a role to play in the proceedings and that they can change their direction to some extent. I think it is really important.

So far, victims in the *Kenyatta* case have not, in many respects, received anything from the ICC process. This case started with three accused. The cases against two of them have collapsed. The case against the third accused is not in a good shape. The Trust Fund for Victims is completely absent in Kenya. In the meantime, the government of Kenya has sided with the accused. It is thus very important for victims to put forward strong submissions in the case to counter statements and submissions made by the accused or the government that they consider to be untrue.

In your view, how does participation impact the proceedings?

In our case, as far as possible, with every filing, the victims' legal representation team tries to add value to what has already been provided to the Judges. We also put forward the interests of the victims where these diverge from those of the Prosecution. Our strategy can be quite different from

that of the Prosecution. I also don't believe that victims' participation has held up the proceedings - I have not spoken more than three hours in the courtroom over the last 2 years. I don't think that we have cluttered the record with too many filings either. I believe that the submissions made on behalf of the victims have helped the judges to have a more informed view on many areas of law and fact which had been left relatively unexplored in the oral and written submissions of the prosecution and the defence.

What do your clients expect from giving their views and concerns in the proceedings?

I have now met over 1,000 post-election violence victims - over 800 of whom fall within the scope of the charges in the *Kenyatta* case- and I think that they genuinely appreciate the chance to speak with someone related to the ICC; they find these meetings empowering. During these meetings, we make it clear that any victim can ask any question relating to the case. We also ask victims to give feedback on specific issues, which are arising in the proceedings. For example, we asked their views on issues such as the presence of the accused in the courtroom, what should happen if the court finds that the Kenyan government has not cooperated, possible delays in the proceedings, the use of videolink, the venue for the trial... Ultimately, I think that what many victims want is for somebody to listen carefully to what they are saying and to take their views into account. They do not expect the court to always follow their views but certainly seem to appreciate the fact that their views are considered.

Furthermore, contrary to what has been advanced by some, victims' interests go beyond issues relating to reparation. Many victims have expressed an interest in having an accurate and full account of the crimes that were committed against them presented to the court. They want what was done to them to be exposed. In our case, many victims have placed greater emphasis on the emergence of the truth, than on a verdict of guilty. Ensuring that the truth will emerge about what happened to them is very important to them.

How do you see your role in relation to ensuring victims' participation is effective?

To a certain extent, while the roles of the Prosecution and the Defence are clear, the role of the Legal representative for victims (LRV) remains somewhat vague. In my view, it requires a combination of determination and a willingness to represent the interests of victims fully and fearlessly. At the same time, LRVs need to make sure they do not waste the Court's time with submissions which are peripheral, marginal, or with legal research that isn't well carried out. In my opinion, the effectiveness of victims' participation depends a lot on whether the victims' counsel himself is interested in adding value to the proceedings. The choice of counsel thus needs to be right and it is essential that legal representation be properly funded.

In addition, under the framework applicable in the Kenya cases, I'm based in Kenya. I think that this has given me a deeper and more informed understanding of the political, historical, and tribal tensions that are at play. It makes the

representation of the victims much easier if you are immersed in the culture of the country on a daily basis.

What do you think of some of the changes proposed which relate to the legal representation of victims?

There are currently proposals to move the legal representation of victims to an office within the Registry. I do not necessarily see a problem with victims' counsels receiving a direct salary from the court. It would help to reduce the huge amount of paperwork required in order to adhere to the Court's legal aid practices. However it is essential that victims' counsel can maintain complete independence and chose whichever approach he/she feels is necessary to defend victims' interests. It is vital that LRVs be able to defend victims' interests wherever these are being attacked. For example, in the course of my representation of victims in Kenya, I made written submissions on their behalf to the UN Security Council, the UN special rapporteur for internally displaced persons, the Trust Fund for Victims, the Prosecution, and I spoke to the Assembly of States Parties, etc.... I also engaged quite a lot with the press, primarily to counter misleading information. I don't know whether I would have had sufficient freedom to undertake all of these actions if I had been directly employed by the Court. Should an internalisation of legal representation require LRVs to request approval to talk to the media or undertake some of the actions I just described, the independence of counsel would be at risk. Counsel should feel free to do whatever is necessary, within the bounds of the Code of Professional Conduct, in order to fully defend the interests of their clients.

In the Kenya cases, victims can register through a simplified process but also apply to participate in person. What is the potential of that participation framework for ?

The Judges receive a report on the general situation of victims every two months. I think is a positive addition to the proceedings. The report is written by the Victims Participation and Representation Section, which is a neutral organ of the Registry, on the basis of information that we give them.

However, I also think that it would be better if the legal representatives themselves were to write and submit such reports. It would allow for stronger statements to be made that would represent to a fuller extent the seriousness of the needs of victims.

As for the ability of victims to appear in person before the Chamber, I believe it has a huge potential. In our case, we intend to watch very carefully the evidence elicited from witnesses that the Prosecution will call. If we get the sense that certain crimes are not receiving the attention that they deserve we will consider calling victims to give evidence about those crimes. This would depend on what crimes and what geographical areas have already been covered in the Prosecution's evidence. The Chamber may also need to hear from victims about the severe ongoing economic impact of the crimes.

What are the challenges to victims' meaningful participation in the proceedings?

Many of the post-election violence victims in Kenya are living in abject poverty. Their first interest is to obtain some form of compensation for what happened to them, either from the Government or from the ICC. They desperately need financial assistance, school fees, small loans to get back on their feet. They want to be able to put food on the table for their children, in a house that doesn't leak water every time it rains. For a huge number of victims, especially those with children and other dependents, receiving a judgment, a conviction is to some extent secondary for now. Ensuring victims' livelihood is a precondition to them being able to truly benefit from their participation in the proceedings.

In that regard, the Trust Fund for Victims has been a big disappointment for victims and has made my work difficult when meeting with my clients. It has a mandate to provide urgent assistance to victims, yet nearly 7 years after the crimes it hasn't assisted a single victim in Kenya, as far as I am aware. Victims are aware of the Fund's mandate and have often put to me questions as to why it is not active in Kenya. Yet, we cannot tell them when the Fund will start its work in Kenya or why it has not done so yet. The Fund's website provides little information in that regard. •

Interview with Judge Fatoumata Dembele Diarra



Judge Fatoumata Dembele Diarra (Mali) served as a Judge of the International Criminal Court from 11 March 2003 to 31 May 2014. She sat on Trial Chamber II which heard the trial of Germain Katanga and Mathieu Ngudjolo Chui. Photo© ICC-CPI

What was your experience in relation to the participation of victims in proceedings?

In the *Katanga and Ngudjolo* trial, the participation of victims was very useful and brought a significant contribution to the establishment of the truth. It gave a general sense of the context surrounding the attack against Bogoro village and was also helpful to better understand the local circumstances, the people, the culture etc... In some instances, it also helped to establish elements that were not anticipated. For example, I remember that one victim testified in relation to the crime of rape. While the testimony did not prove sufficient to establish the rape, it brought up other elements that allowed us to establish the crime of pillaging - the victim had

been used to transfer some of the goods stolen from the population.

It is also important to note that victims had to apply to participate in the proceedings and their applications were reviewed by the Parties and the Chamber. Rule 89 provides a framework which acts as a safeguard in the application process. It also ensures, in my opinion, that victims do not act as second prosecutors. In our case, the role of participating victims was different from the one of the Prosecution. Some came to explain to the Court what they had suffered, what they had seen. Some victims also appeared in person before the Court to testify. I think it was important for them to see that the Court was trying to establish the truth about what had happened to them, that our eyes were not closed to what they had suffered.

How do you see the role of their legal representatives?

In our case, we had two representatives, one for the principal group of victims and one who represented former child soldiers. In that regard, the common legal representation of victims reduces the length of the proceedings and is positive for the efficiency of the process. I think that because victims were represented by only two counsels, they were able to really play a role. LRVs were also able to shed light on some specific elements of the proceedings which was important considering that records in DRC were not well kept and that we did not have the same level of forensic evidence that had been available to the ad hoc tribunals. I felt that the LRVs really measured up to their role.

How did the Chamber's visit to the field contribute to the proceedings?

In our case, we felt that we had to go and verify some of the allegations that were made by witnesses. This is necessary because without the knowledge of the field, we were not always able to assess whether what we heard was the truth. This proved useful. For example, one witness had stated he/she had seen the accused enter the Bogoro Institute from the market place. When we went to Bogoro – the Judges, the Parties and the LRVs – we realised that it was impossible to see the Institute from the market place. It was also not possible to see the market from the Institute. This resulted in the witness being declared unreliable. Another witness had indicated having seen the massacre from his/her house. This also proved impossible once we visited his/her house. However, I don't necessarily think that this should be generalised. In our case, there were specific allegations we wanted to verify. Such a transport to the field is also not easy to organise.

How can the Court be made more accessible to victims?

I think the Registry is doing a lot to ensure no victim is left out of the process. Legal representatives, civil society and

journalists can also play a role in reaching out to victims and ensure they are aware of the court and of their rights. Of course improvements are possible.

For you what are some of the key elements to an effective participation of victims?

I think that the quality of the investigation is crucial; it is essential to an effective participation of victims later on in the proceedings. It is also essential not to give false hope at that stage. Not all the crimes will be prosecuted. Not all the victims of the situation will get the chance to participate in a case. In addition, protection is another element that is important. The current system needs to be reinforced. Relocating victims is not always adapted to the psychological state or needs of the victims.



Me Nsita Luvengika and Me Gilissen, Victims legal representatives in the *Katanga and Ngudjolo* case © ICC-CPI

How can the application process be made more efficient?

I think it is too early to say which system will be best. There are a number of approaches being implemented at the moment and only at the end of these cases will we be able to see whether they were successful. When that time comes, I think that an objective and comparative evaluation will be warranted.

The Rome Statute is an important step forward from the ad hoc tribunals where victims were ignored and only participated as witnesses. It also provides for reparation which is the other side of the coin when talking about international criminal justice. Those who are dissatisfied with the current way victims participate in the ICC's proceedings should make suggestions to improve the system; in doing so, getting rid of or diminishing victims' rights should be out of the question. •

Working Group affiliated organisations include:

Amnesty International • Avocats Sans Frontières • Centre for Justice and Reconciliation • Coalition for the International Criminal Court • European Law Student Association • FIDH • FOCDP • Human Rights First • Human Rights Watch • International Centre for Transitional Justice • International Society for Traumatic Stress Studies • Justitia et Pax • Medical Foundation for the Care of Victims of Torture • Parliamentarians for Global Action • REDRESS • Women's Initiatives for Gender Justice • UCICC • UVF • LIPADHO • SYCOVI



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