



fidh

New ICC Judges Must Ensure the Meaningful Participation of Victims in Criminal Proceedings

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Introduction

The participation of victims in legal proceedings is a cornerstone of the Rome Statute system and allows victims to present their 'views and concerns' where their personal interests are affected. The Statute and Rules of Procedure and Evidence (RPE) of the International Criminal Court (ICC) provide little guidance in terms of the practicalities of victim participation, leaving it to the ICC judges to decide in each case how to translate it into practice. Thus, judges of the ICC play an instrumental role in setting out the modalities of victim participation in each case before the Court. The practice of the ICC to date has been far from consistent with differing modalities of participation for victims in different cases. Indeed, there continues to be a serious level of ambiguity relating to the procedural rights of victims with Chambers deciding the participatory rights of victims on a case-by-case basis. This has been problematic as in some instances the participatory rights of victims in proceedings have been very limited. Furthermore, it has resulted in uncertainty for victim communities, whose rights are different depending on which Chamber is apprised of a particular case. The ICC Trial Chambers have generally been more generous in relation to victim participation. Although the most recent case law of the ICC Pre-Trial Chambers on victims' procedural rights at the confirmation of the charges stage – adopted in the *Ongwen* case (Uganda) – provides victims with greater procedural clarity and aligns itself with the case law of the ICC Trial Chambers, it is time to achieve the harmonisation of the procedural rights of victims at different stages of the proceedings. This is crucial in order to ensure the equitable treatment of victims participating in all cases before the Court.

At the nineteenth ICC Assembly of States parties (ASP), scheduled to take place in December 2020, six new judges will be elected for a non-renewable term of nine years to join the ICC's bench. Before the actual elections, the twenty nominated candidates will be able to present their background and defend their vision of the ICC judge's position and role during public virtual round tables that are scheduled to take place from 3 to 6 November 2020.

Similar to the twelve judges who will remain on the bench, the six new judges are expected to be highly qualified and to possess qualities such as high moral character, impartiality, and integrity. They must distinguish themselves with their relevant experience and expertise. It is of utmost importance to FIDH that they have proven experience and legal expertise on victims' rights, either in domestic or international criminal proceedings, and demonstrate their willingness to respect and fulfil the rights afforded to victims under the Rome Statute system.

1. The need for strengthened and meaningful victim participation at the ICC

As is well known, the inclusion of broad participatory rights for victims in criminal proceedings at the ICC stemmed from the need to address the invisibility of victims in other international criminal trials – most notably, those at the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY). In addition to contributing to strengthening the Court's credibility and legitimacy, the recognition of victims' rights pays tribute to the centrality of victims' experience and their potential to contribute to the justice process. It also underlines that respect for the rule of law plays a central role in rebuilding societies and that having members of the communities individually engaged with rule of law processes can significantly contribute to social reconstruction.¹

Thus, for victims justice is not merely a verdict but an opportunity to be engaged in the *process* of justice and to provide their views and concerns. Broadly, the established practice at the Court under Article 68(3) of the Rome Statute has allowed victims' representatives to: 1) attend and participate in hearings; 2) file written submissions; 3) make opening and closing statements; 4) call witnesses; 5) submit and challenge evidence with the permission of the judges; 6) gain access to confidential submissions by the parties and the evidence; and 7) to be notified of issues or proceedings which could affect the victims.

However, the implementation of participatory rights of victims before the ICC continues to be problematic on two fronts.

a) Narrow interpretation of victims' participatory rights

Firstly, in certain cases victims' participatory rights have been interpreted overly narrowly by ICC judges, negatively impacting the value of such participation. For example, most recently a number of Legal Representatives for Victims (LRVs) in the Afghanistan situation requested that victims be allowed the right to appeal, in exceptional circumstances, decisions which negatively affect their established rights to truth, justice, and reparations. In this particular instance, the ICC Pre-Trial Chamber failed to authorise the Prosecutor's request to commence investigations in Afghanistan, stating that such investigations would not be in the interests of justice and essentially extinguishing all hope of attaining justice for victims of crimes against humanity and war crimes in Afghanistan. Furthermore, in a 12-page decision rendered in March 2020 authorising the Prosecutor to investigate the situation in Afghanistan, the ICC Appeals Chamber held that victims could not be termed as a 'party' to the proceedings and were therefore not allowed to appeal the decision in their own right. The Appeals Chamber further argued that the inability to appeal the decision of the Pre-Trial Chamber not to open an investigation in Afghanistan had no bearing on victims' rights to an effective remedy.²

The narrow manner in which victims' rights are interpreted at the early stages of proceedings is extremely problematic: victims should be able to appeal decisions where either the Court or the Prosecutor fail to undertake or authorise investigations, thereby hampering victims' rights to truth, justice, and reparations.

Furthermore, victims must be able to complain about the excessive length of certain preliminary examinations, with those in Afghanistan, Palestine and Colombia being prime examples. This was recently emphasised by Pre-Trial Chamber I in the Myanmar/Bangladesh situation.³

1. See in particular FIDH report, "Five myths about victim participation in ICC proceedings", December 2014, page 6, available at: <https://www.fidh.org/IMG/pdf/cpi649a.pdf>; and also, FIDH, "Victims' Rights Before the International Criminal Court : A Guide for Victims, their Legal Representatives and NGOs", April 2007, especially chapter I: available at: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/Victims-Rights-Before-the->

2. ICC Appeals Chamber, 'Reasons for the Appeals Chamber's oral decision dismissing as inadmissible the victims' appeals against the decision rejecting the authorisation of an investigation into the situation in Afghanistan', No. ICC-02/17 OA OA2 OA3 OA4, 4 March 2020: https://www.icc-cpi.int/CourtRecords/CR2020_00807.PDF.

3. ICC Pre-Trial Chamber I, Request under Regulation 46 (3) of the Rules of the Court, ICC-RoC46 (3) -01 / 18-37, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19 (3) of the Statute", 6 September 2018, paragraph 84: https://www.icc-cpi.int/CourtRecords/CR2018_04203.PDF.

ICC judges play an important role at the preliminary examination phase, a role that should aim to vindicate the rights of victims rather than limit their participation on issues that affect their fundamental rights.

The rights of victims have also been interpreted narrowly at the trial phase – for example in the *Ongwen* case (Uganda) the Single judge, on several occasions, refused to allow victims to present their views and concerns in court in person, including during the closing statements. The Single judge stated that the views and concerns of the victims could be presented as meaningfully by the Legal Representatives for Victims as by the victims themselves.⁴ This not only illustrates the narrow manner in which victims' rights have been interpreted by the Chamber and Single Judge, but also points to the inconsistency in the Court's jurisprudence on this matter, as victims were allowed to present their views and concerns in both the *Bemba* (CAR I) and *Ntaganda* (DRC) cases.⁵ Although lawyers for victims play an important role in bridging the gap between victim communities and the Court, it is always preferable where possible to allow victims to present their views in their own words, especially as the Statute provides for such, and previous ICC chambers have allowed, such interventions.⁶

b) Differing stances to victims' procedural rights

As a consequence of differing judicial decisions, **there have been numerous interpretations and implementations as to how victims may apply to participate in proceedings, including the modalities of participation at the pre-trial, trial, and reparations stages⁷, and how and by whom victims will be represented.** For example, in the Kenya cases, the legal representatives of victims (LRVs) were based in Kenya and did not have to apply to participate in ICC proceedings. In the *Ongwen* case (Uganda), victims are represented by two teams, including one team from the Office of Public Counsel for Victims (OPCV). In the *Yekatom and Ngaïssona* case (CAR), victims are represented by five LRVs. Furthermore, there have been differing approaches as to whether LRVs are allowed to question witnesses during the trial proceedings and what the scope of such questioning should be – resulting in further confusion as to the role of victims in proceedings.

Efforts must be made to fully integrate victims into the ICC proceedings. The role of the presiding judge during trial is therefore essential for meaningful victim participation. The presiding judge can play a positive role, notably by:

- implementing guidelines for the systematic questioning of witnesses by victims' legal representatives;
- allowing victims to present their views and concerns in person in line with the established jurisprudence of the ICC; and
- determining the scope and parameters of the type of evidence that victims may present.

4. ICC Trial Chamber IX, 'Decision on Legal Representatives of Victims Request to Present Views and Concerns in Person', ICC-02/04-01/15-1655 04-11-2019 1/5 EK T, 4 November 2019: https://www.icc-cpi.int/CourtRecords/CR2019_06636.PDF.

5. See in particular in the Lubanga case (DRC), ICC Trial Chamber I, 'Order issuing public redacted version of the "Decision on the request by victims a/ 0225/06, a/0229/06 and a/0270/07 to express their views and concerns in person and to present evidence during the trial"', ICC-01/04-01/06-2032-Anx, 9 July 2009, paras. 17, 25-27: <https://www.icc-cpi.int/pages/record.aspx?uri=707345>; in the Bemba case (CAR I), ICC Trial Chamber III, 'Decision on the supplemented applications by the legal representatives of victims to present evidence and the views and concerns of victims', ICC-01/05-01/08-2138, 22 February 2012, especially para. 20: <https://www.icc-cpi.int/pages/record.aspx?uri=1341474>; and 'Second order regarding the applications of the legal representatives of victims to present evidence and the views and concerns of victims', No. ICC-01/05-01/08-2027, 21 December 2011, especially paras. 12-15: <https://www.icc-cpi.int/pages/record.aspx?uri=1274199>; in the Kenyatta and Ruto et al case (Kenya), ICC Trial Chamber V, 'Decision on victims' representation and participation', ICC-01/09-02/11-498, 3 October 2012, paras. 55-57: <https://www.icc-cpi.int/pages/record.aspx?uri=1479387>; in the Ntaganda case (DRC), ICC Trial Chamber VI, 'Public redacted version of "Decision on the request by the Legal Representative of the Victims of the Attacks for leave to present evidence and victims' views and concerns" (10 February 2017, ICC-01/04-02/06-1780-Conf)', ICC-01/04-02/06-1780-Red, 15 February 2017, especially at para. 10: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-02/06-1780-Red>.

6. For an overview of the promises and the reality of victim participation at the ICC preliminary, trial and reparations phases, see FIDH "Victims at the center of justice" compilation of practitioners' articles on victims' rights, December 2018: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/victims-at-the-center-of-justice-reflections-on-the-promises-and-the-reality>.

7. For more information on the different approaches taken by ICC Judges at the reparations stage, in the Lubanga (DRC), Katanga (DRC) or Al Mahdi (Mali) cases, see in particular "Five Procedural Takeaways from the ICC's" 18 July 2019 Lubanga Second Reparations Judgment, Marissa Brodney and Meritxell Regué, in *EJIL:Talk!*, 13 September 2019: <https://www.ejiltalk.org/five-procedural-takeaways-from-the-iccs-18-july-2019-lubanga-second-reparations-judgment/>.

Given the ambiguity in the Statute as to the exact modalities of victim participation, ICC judges play a crucial role in vindicating the rights of victims before the Court.

2. The crucial role of ICC Judges and the 2020 elections

The above illustrates the important role that ICC judges play in actualising the rights afforded to victims under the Rome Statute system. The six new judges that are to be elected during the next session of the Assembly of States Parties, scheduled to take place in December 2020, will play a crucial role in this respect.

States Parties were able to nominate candidates after a process that concluded on 14 May 2020. Twenty candidates⁸ from around the world were nominated by States Parties and evaluated by the Advisory Committee on Nominations of Judges (ACN), which assessed the qualifications of the 20 nominees and published its conclusions on 30 September 2020.⁹ In addition to having responded to questionnaires sent by the ACN and by civil society,¹⁰ candidates will be able to present their background, expertise, and vision during virtual public round tables due to occur 3 to 6 November 2020.

States Parties will be tasked with selecting judges who are able to distinguish themselves with their integrity, impartiality, and high moral character, as well as with their relevant experience in criminal proceedings and international law. In addition, other more specific expertise can be considered. It is of particular importance to FIDH that elected judges have demonstrated experience and expertise related to victims' rights either in domestic or international criminal proceedings. Through this election process, a third of current ICC judges will be replaced. It will be imperative that the six new judges pay heed to the central role of victims in the Rome Statute system.¹¹

a) Deconstructing the misconceptions around victim participation and its impact on criminal proceedings¹²

In FIDH's experience, only a limited number of experts – having direct experience in supporting victims in judicial proceedings – are acquainted with the object, advantages, and limitations of victim participation in the context of a criminal trial. Therefore, some decisions taken by the ICC regarding victims' rights might have been based on misconceptions or even myths concerning victim participation that need to be deconstructed.

First, victim participation does not constitute a burden to the proceedings nor does it cause delays or supplementary costs. The impact of victim participation on the ICC budget is minimal. As Judge Adrian Fulford, the presiding judge of the ICC's first trial, noted at the outcome of Mr Lubanga's trial (DRC) in 2010:

"The experience of Trial Chamber 1 has been that the involvement of victims has not greatly added to the length of the case. Their submissions and questioning have been focused, succinct and seemingly relevant to the issues in the case. Whether it

8. The list of 20 candidates to the position of ICC judge and their profile is available on the ASP website at the following link: https://asp.icc-cpi.int/en_menus/asp/elections/judges/2020/Pages/Nominations.aspx.

9. Report of the Advisory Committee on Nominations of Judges (ACN), 30 September 2020: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/ICC-ASP-19-11-ENG.pdf.

10. See candidates' responses to the questionnaire of the ACN: https://asp.icc-cpi.int/en_menus/asp/elections/judges/2020/Pages/Questionnaire-Declaration.aspx; and candidates' responses to the questionnaire of civil society: <http://www.coalitionfortheicc.org/judicial-candidates-questionnaires-2020>.

11. For an overview of the ICC judicial election process, see in particular FIDH questions and answers, "Happenings in The Hague: Time to Elect ICC Judges", 6 October 2020: <https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/happenings-in-the-hague-time-to-elect-icc-judges>.

12. For further details, read FIDH, "Five myths about victim participation in ICC proceedings", December 2014: <https://www.fidh.org/IMG/pdf/cpi649a.pdf>.

is said their role has undermined the fairness of the trial will be revealed in closing submissions, but purely from the point of view of time, they have not significantly extended the proceedings. These are early days, but I am cautiously optimistic that their participation can be accommodated effectively in the individual trials.”¹³

Furthermore, in 2015 funds dedicated to staff and activities of the Victims Participation and Reparations Section (VPRS), and the Office of Public Counsel for Victims (OPCV), as well as legal aid for victims - including funds for external LRVs -, represented a mere 4% of the overall ICC budget.¹⁴ However, victim participation at the ICC has been the brunt of the Court’s financial difficulties, as cuts in budget lines and zero-growth policies have affected victim participation inordinately.¹⁵ For example, LRVs have consistently faced budget cuts relating to legal aid, impacting their team composition and ability to represent victims and meet with them in person.

Moreover, contrary to the misconception that victims duplicate the role of the Prosecutor and their participation does not add anything to the proceedings, victim participation provides significant benefits both to the proceedings and to victims. As Judge Bruno Cotte observed when delivering the judgment in the *Katanga* case (DRC) in 2014:

“Here, the [Trial] Chamber [II] wishes to commend the contribution made by the legal representatives and their teams throughout the proceedings. In the Chamber’s view, they were able to find their rightful place during the trial and in their own way, by, at times, taking a different stance to the Prosecution, they made a meaningful contribution to establishing the truth in relation to certain aspects of the case. The Chamber extends its gratitude for their contribution.”¹⁶

For this benefit to be optimal, the dynamics of victim participation in the field must be incorporated in any assessment of the participation system and victims’ legal representation. The content and impact of victim participation go beyond the courtroom, which is why it is important to adequately recognise the field aspect of victim participation and dedicate the needed resources for adequate field presence.

b) Expertise and understanding of ICC processes should be victim-centred

One of the key qualities that judges must possess is relevant legal expertise and experience in the handling of complex criminal litigation. Litigation before the ICC often involves multiple actors, complex contextual issues, and various modes of liability. Added to this is the unique feature of victim participation, which is similar, yet very different, to the participation of victims in domestic criminal proceedings – for example as *partie civile*. Furthermore, in many common law jurisdictions there is simply no domestic equivalent of victim participation in criminal proceedings. Due to the nature of crimes such as genocide, war crimes, and crimes against humanity, it is often the case that hundreds if not thousands of victims are eligible for participation in ICC proceedings. ICC judges must therefore be able to balance the right of victims to participate in proceedings with the rights of the defence, as well as the need to ensure the expeditiousness of the proceedings. However, to date such balancing has often come at the expense of victims, with judges experimenting with various applications for participation processes and the issuing of extremely narrow deadlines for the collection and submission of victim application or representation forms.

The election of six new judges at the ICC should be viewed as an opportunity for all the ICC judges to renew their commitment to uphold the rights of victims throughout the Court proceedings

13. Judge Sir Adrian Fulford, “The Reflections of a Trial Judge” (2010), para 20, available at: http://www.iccnw.org/documents/Reflections_of_a_Trial_Judge_ASP_New_York_6_December_2010.pdf.

14. See FIDH, “Five myths about victim participation in ICC proceedings”, December 2014, page 12: <https://www.fidh.org/IMG/pdf/cpi649a.pdf>.

15. See FIDH, “Cutting the weakest link: budget discussions and their impact on victims’ rights to participate in the proceedings”, October 2012, page 5: <https://www.fidh.org/IMG/pdf/cpiasp598ang2012.pdf>.

16. Transcript ICC-01/04-01/07-T-343-ENG, page 4 line 25 to page 5 line 5: https://www.icc-cpi.int/Transcripts/CR2014_02643.PDF.

and to harmonise the procedural rights of victims. As noted above, the procedural rights of victims continue to remain in a state of flux: although there have been some successes towards harmonisation, especially in the process by which victims apply for participation in proceedings, there remains a lot to be done in ensuring that victim participation at the ICC is meaningful. The new ICC judges will play a crucial role in this respect. Therefore, States Parties must ensure that the new judges selected have significant knowledge of victims' rights and are willing to work towards the harmonisation of these rights at the Court in application of a victim-centred approach.

Recommendations

Judges of the ICC must distinguish themselves with their integrity, impartiality, and high moral character. They must display the necessary legal expertise on a wide variety of issues, in particular relating to victims' rights and participation. Therefore:

- States Parties must ensure that judicial nominees are able to illustrate their relevant legal expertise and knowledge of handling complex criminal litigation by responding to questions or providing evidence of judicial opinions, scholarship, and legal practice, including in relation to the participation of victims in proceedings;
- Judges must commit to clarifying and harmonising the modalities of a meaningful participation of victims at all stages of ICC proceedings, in a way that ensures victims' rights are fully implemented;
- States Parties must ensure that elected candidates have the requisite knowledge and understanding of victims' rights at the ICC in order to enable them to make informed decisions relating to victim participation.



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