



**Implications of Victim Participation in International Criminal Proceedings for the Victims'  
Understanding of Justice**

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## 1. Introduction

While international criminal proceedings generally involve numerous victims of the gravest crimes recognized by the international community, the role of the victims<sup>1</sup> themselves in prosecuting and punishing the perpetrators raises some concerns. Victims as human beings inevitably form certain expectations based on their personal understanding of justice. The aim of this analysis is to address how the role of victims of mass atrocities in international criminal proceedings affects their understanding of the notion of justice in terms of their satisfaction with the outcome. The obstacles and adverse effects of this model are worth exploring. In theory, victim participation ought to strengthen the role of victims in pursuing justice before international tribunals. However, this power cannot be exercised without respective limitations. Specifically, the emphasis is put on the implications of the victims' role as participants in the International Criminal Court (ICC) system for their sense of justice in comparison with their role as witnesses within the International Criminal Tribunal for the Former Yugoslavia (ICTY) framework.<sup>2</sup> Namely, I seek to prove that the victim participation in the criminal proceedings impacts the victims and their sense of justice. Next, the existing victim participation framework under the ICC is not substantially better than the role of victims as witnesses for the victims in terms of their satisfaction with the outcome<sup>3</sup>. Finally, the existing victim participation model is not suitable for all cases that fall within the jurisdiction of international criminal tribunals.

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<sup>1</sup> The term "victims" will be used hereafter in reference to persons who have suffered harm in general; "victim participants" are individuals with participatory rights.

<sup>2</sup> Since the ICTY preceded the ICC, it would be useless and unfair to point out potential shortcomings of the ICTY framework in comparison with the ICC. This review will rather be a critical assessment of both approaches to the status of victims in criminal proceedings based on both similarities and differences between the two systems.

The individuals can have a dual role before the ICC, acting both as witnesses and participants. For the purposes of this analysis, implications of the dual role for the individuals assuming it will not be discussed.

<sup>3</sup> Satisfaction with what is for the Tribunal to decide, including sentences and proven charges for committed crimes are not assessed for the purposes of this analysis.

In retrieving the information and relevant findings, I used primary sources, scholarly articles, and studies, in addition to conducting interviews. The interviews were conducted in my mother tongue, whereas the paper includes relevant parts I translated from Croatian to English. It is important to emphasize that expectations of individuals and potential effects on their mental condition as well as satisfaction with their contribution to justice cannot be generalized. Therefore, my conclusions are drawn from the aforementioned sources analyzed within the scope of two cases, namely the *Prosecutor v. Lubanga (ICC)*, and *the Prosecutor v. Kvočka et al. (ICTY)*.

The practical component of this project is a set of recommendations on victim participation in international criminal proceedings addressed to victim associations, support groups, NGOs, and other actors collaborating with victims of mass atrocities included in Annex I of the paper.

## 2. Victim Participation under the Rome Statute and Victims as Witnesses before the ICTY

### 2.1 Victim Participation before the International Criminal Court (ICC)

According to the Rules of Procedure and Evidence of the ICC, only individuals who have been harmed as a consequence of one of the crimes under the ICC Statute will be considered victims with participatory rights in the proceedings.<sup>4</sup> Unlike witnesses who are summoned to answer specific questions in the interests of one of the parties to a case and the Court, victim participants who take part in the proceedings willingly in order to present to their views and concerns to the Court. Also, participants decide on what they want to communicate during all stages of the proceedings when the judges render it appropriate to do so. Furthermore, victims who have been granted participatory rights in the proceedings always have a right to legal representation. The appointed legal representative is generally the one who appears before the Court on behalf of the participants, therefore the victim participants do not have to appear in person.<sup>5</sup> The Court further distinguishes between a victim of the situation and a victim of a case. This status mainly depends on the stage the victim participates in. Namely, the Court in the Preliminary Examination Stage or the situation phase still deliberates on whether to initiate an investigation. It subsequently carries out the investigation by considering the situation as a whole rather than identifying potential perpetrators. Victims whose interests are influenced by the situation might be authorized by the Pre-Trial Chamber I to participate in this stage. Nevertheless, the situation phase generally does not include numerous judicial proceedings, thus the power of victims to state their views and concerns during this phase might be limited in the first place. Victims of the case, on the other hand, are individuals who participate in

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<sup>4</sup> For the purposes of this analysis, the term “victims” refers only to individuals. Organizations and institutions that might be allowed to participate will not be considered.

<sup>5</sup> Booklet - Victims Before the International Criminal Court A Guide for the Participation of Victims in the Proceedings of the Court (International Criminal Court), 9-10.

specific cases during a pre-trial, a trial, or an appeal phase after an alleged perpetrator has been identified. Furthermore, the roles of witnesses and victim participants before the Court are not mutually exclusive.<sup>6</sup> However, this analysis does not encompass the issues concerning the dual role of victims as witnesses and participants at the ICC. Thus, only their additional contribution as a third party to the proceedings is discussed.

It is a discretionary power of the Court to determine the scope of victims' participatory rights in expressing their views and concerns. Moreover, provisions of the Rome Statute do not provide for clear definitions determining and limiting the role of victims in the proceedings before the Court. However, Regulations of the Court provide some additional guidelines for victim participation and legal representation of the victim participants.<sup>7</sup> The judges shall define the participatory rights on a case by case basis. The only explicit requirement is the duty to secure that the participatory rights of victims do not interfere with the fair trial rights of the defendant. A legal representative who is acting on behalf of the victims might be allowed to: attend and take part in the proceedings before the Court; deliver opening and closing statements; communicate observations to the judges while they are still deliberating on whether or not to continue with an investigation or a case; share their views with the judges while the Court is deciding on the charges to be brought against the accused; question witnesses, experts, or the accused who is testifying.<sup>8</sup>

## 2.2 The Prosecutor v. Thomas Lubanga Dylio

Thomas Lubanga Dylio was convicted by the ICC for the war crimes of enlisting and conscripting of children under the age of 15 years and using them to participate in hostilities.

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<sup>6</sup> ICC, Victims before the International Criminal Court A guide for the participation of victims in the proceedings of the ICC, < [https://www.icc-cpi.int/about/victims/Documents/VPRS\\_Victim-s\\_booklet.pdf](https://www.icc-cpi.int/about/victims/Documents/VPRS_Victim-s_booklet.pdf)> accessed 6 June 2020, 14.

<sup>7</sup> "Regulations of the Court - International Criminal Court" (2018) <[https://www.icc-cpi.int/resource-library/Documents/RegulationsCourt\\_2018Eng.pdf](https://www.icc-cpi.int/resource-library/Documents/RegulationsCourt_2018Eng.pdf)> accessed June 6, 2020, Chapter 4(3), and Chapter 5.

<sup>8</sup> Ibid.

Subsequently, he was sentenced to 14 years of imprisonment. In this case, 146 individuals were granted the status of a victim with participatory rights, whereas 129 victims were allowed to participate in the trial. Moreover, two teams of legal representatives along with the Office of Public Counsel for Victims represented the victims who took part in the trial. The participants obtained a right to present submissions and to examine witnesses on certain issues. Three witnesses were summoned by the legal representatives, while 13 items of evidence out of 368 in total were submitted on behalf of victim participants in the proceedings. In addition to the set amount of collective reparations for the defendant's liability, the Trial Chamber II invited the Board of Directors of the Trust Fund for Victims to consider allocating an additional amount for implementing collective reparations and to communicate with the Government of the Democratic Republic of the Congo to examine how the Government could make its contribution to the reparations procedure.<sup>9</sup>

### **2.3 Victim Witnesses before the International Criminal Tribunal for the Former Yugoslavia (ICTY)**

The ICTY recognizes victims as a survivor or victim witnesses whose testimonies constitute a basis for establishing the facts of respective cases heard by the Tribunal. The victims, therefore, appear before the Tribunal merely to testify for the purposes of fact-finding having no participatory rights in the proceedings. Furthermore, witnesses are questioned during two different stages. During the investigation stage, investigators talk to multiple witnesses in order to ascertain what happened. Some of those witnesses are subsequently summoned to testify during the trial stage. Individuals to testify before the judges are chosen by the prosecution and the defense. In certain instances, the judges are also allowed to invite witnesses

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<sup>9</sup> International Criminal Court, 'Case Information Sheet - Situation in the Democratic Republic of the Congo; The Prosecutor v. Thomas Lubanga Dyilo' ICC-01/04/01/06.

to testify. Testifying before the Tribunal involves one of the three methods including oral testimony, depositions, and written declarations. Individuals are generally called to orally testify in the courtroom. They are questioned in person unless exceptional circumstances prevent them from being physically present. In that case, witnesses can be questioned through a video-conference link. Testifying through a deposition is another exception to oral testimonies. A witness gives a deposition either in The Hague or in another location in the presence of a Court representative, the prosecution, and the defense. The non-requesting party has the right to cross-examine the witness. The deposition is recorded, at least on audiotape. Under certain circumstances, the Tribunal might accept a written declaration as evidence if there is an authorized official to witness such a declaration. Written declarations do not necessarily exempt a witness from being summoned for subsequent questioning. Witnesses are first subjected to direct examination conducted by the side that called the witness. Next, the opposing side cross-examines the witness by asking questions relevant to the case. The witness can be asked questions subsequently during the re-cross examination in regards to concerns raised during the cross-examination. The judges can also question the witness at any point during his or her testimony. Discussed methods are the only means that victims recognized by the Tribunal can use for their stories to be heard during the proceedings.<sup>10</sup>

## **2.4 The Prosecutor v. Kvočka et al. “Omarska, Keraterm & Trnopolje Camps”**

In April 1992, Serb forces took control of Prijedor, and started removing the non-Serb, Muslims, and Bosnian Croats from positions of responsibility, and broadcasting anti-Muslim

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<sup>10</sup> “Rules of Procedure and Evidence” (July 8, 2015) <[https://www.icty.org/x/file/LegalLibrary/Rules\\_procedure\\_evidence/IT032Rev50\\_en.pdf](https://www.icty.org/x/file/LegalLibrary/Rules_procedure_evidence/IT032Rev50_en.pdf)> accessed June 6, 2020, Rule 90; ICTY, “Witnesses FAQs”, <<https://www.icty.org/en/about/registry/witnesses/faq#:~:text=What%20is%20the%20role%20of%20victims%20and%20witnesses%20in%20proceedings,the%20majority%20of%20the%20information.>> accessed on 6 June 2020, paras 1-11.



and anti-Croat propaganda. The Croats and Muslims showed resistance to which the Serbs responded with attacks. To prevent their efforts to resist, the Serbs started interrogating any non-Serb who could be a threat and arresting particularly any persons exerting an authority, or exercising some kind of power. Also, women, children, and elderly were separated from the men. Ultimately, this resulted in establishing the Camps of Omarska, Keraterm, and Trnopolje by the Serbs where the non-Serb members of the population from the region were detained. The detainees in the camp were tortured, beaten, sexually assaulted and raped, psychologically, and physically abused, confined in inhumane conditions. Some of the detainees were murdered. The camp of Omarska was closed in August 1992.<sup>11</sup> Furthermore, 50 witnesses called by the prosecution, like in other cases before the ICTY, had a key role in fact-finding which lead to the convictions of all five of the accused. Namely, Miroslav Kvočka, Dragoljub Prcać, Milojica Kos, Mlađo Radić committed the crimes of persecutions on political, racial, or religious grounds, and murder and torture, and Zoran Žigić committed the crimes of persecutions on political, racial, or religious grounds, and torture and cruel treatment.<sup>12</sup>

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<sup>11</sup> “Judgment in the Case The Prosecutor against Miroslav Kvočka, Milojica Kos, Mlađo Radić, Zoran Žigić and Dragoljub Prcać: (Omarska/Keraterm/Trnopolje) (2001)

<[https://www.icty.org/x/cases/kvocka/cis/en/cis\\_kvocka\\_al\\_en.pdf](https://www.icty.org/x/cases/kvocka/cis/en/cis_kvocka_al_en.pdf)> accessed June 6, 2020, 1-9.

<sup>12</sup> International Criminal Tribunal for the Former Yugoslavia, ‘Case Information Sheet - “OMARSKA, KERATERM & TRNOPOLJE CAMPS” (IT-98-30/1) KVOČKA et al. The Prosecutor v. Miroslav Kvočka, Dragoljub Prcać, Milojica Kos, Mlađo Radić & Zoran Žigić.’

### 3. Arising Concerns and Limitations on the Participation of Victims and Involvement of Witnesses<sup>13</sup>

#### 3. 1 Statutory Provisions and Legal Concerns as Factors Limiting the Role of Victims

This chapter addresses four specific issues, including the concerns related to the concept of a common legal representative (CLR) representing victim participants before the ICC, and victim witnesses testifying in the ICTY proceedings in their personal capacity, respectively; threats to rights of the defendant in criminal proceedings in the context of victim participation; the presentation of evidence through submissions by the victim participants, and testimonies of victim witnesses; and goals and objectives of ad hoc criminal tribunals.

Victims participants have a right to choose a legal representative to present the case on their behalf before the Court. Where numerous victims are involved, the Trial Chamber may in cooperation with the Registry appoint a common legal representative or representatives in order to secure the effectiveness of the proceedings. Namely, the Registry can provide a list of prospective representatives for the participants to choose, or it can propose one or more candidates for the position. Moreover, the Chamber may impose a time limitation on the selection process. In case participants fail to select one or more representatives, the Chamber can order the Registrar to select one or more common representatives.<sup>14</sup> The common legal representative model includes a simple registration procedure that allows the victims to participate while reducing the number of submitted applications for participation. Such a mechanism is indeed likely to promote the efficacy of the proceedings in terms of including a large number of victims within a reasonable time period.<sup>15</sup> Nevertheless, it could be argued that

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<sup>13</sup> Neither respective fair trial rights of the defendant, nor the punishment theories and purposes are discussed. Hereafter, victim witnesses before the ICTY refer to witnesses called by the prosecution unless indicated otherwise.

<sup>14</sup> ICC Rules of Procedure and Evidence” (2013) <<https://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf>> accessed June 6, 2020, Rule 90

<sup>15</sup> Anni Pies ‘A Victim’s Right to a Fair Trial at the International Criminal Court? Reflections on Article 68 (3)’ (2015) JICJ.

the initial idea of an individualized approach to enable the victims to be heard would be undermined through collective representation. Submissions of numerous victims would be merged into a single written document communicated to the Court by an appointed representative. Also, the selection of a common representative to represent the victims might be at issue concerning transparency of the process and adequacy of the candidates. Next, it can be argued that safeguards such as anonymity of the witnesses and imposing special safety measures for testifying might constitute a threat to a fair trial. Such safeguards are often necessary where vulnerable victims, most often women and children, are involved. However, the defendant might claim that the omission of material facts like identity could undermine his or her chances to prepare his or her defense. This model clearly creates a series of issues that exist even without the conflict of victims' and the defendant's rights. Another aspect of victim participation in criminal proceedings is through presenting evidence. The Trial Chamber grants permission for presenting evidence where a victim's testimony actually impacts their personal interest and is relevant to the case and establishing the facts. The main concern regarding this manner of victim participation refers to the equality of arms, particularly, the duty of the prosecution and the defense to inform the opposing side. The duty of victims in this context has not been regulated by the Court which creates space for ambiguities from the start. Also, the fact that disputed cases often involve conflict and post-conflict zones represents an additional burden concerning the presentation of evidence. Specifically, access to such zones tends to be poorly regulated which increases the risk of obtaining unreliable and false evidence and might put the defendant in an unequal position compared to the victims. Furthermore, it can be argued that CLR might act as second prosecutors due to a lack of understanding of the notion of a fair trial. This might be at issue concerning victims' views and concerns presented during the trial. For instance, the defense could claim that the CLR included victim applications in their final oral submissions to the court while omitting relevant details from the form that

was given to the defense. Also, the defense could assert that the form has not been properly reviewed. Consequently, the defense could assert a violation of the right to information and disclosure of evidence. While no specific provisions on the scope of views and concerns that are presented exist, the defendant should have a possibility to access information used against him considering that even facts falling within the scope of views and concerns might be crucial to the final judgment.<sup>16</sup> Furthermore, it is also crucial to consider the unique character of ad hoc criminal tribunals. The ICTY was established to process crimes committed during the period of ethnic conflicts in the 90s in the territory of former Yugoslavia.<sup>17</sup> The main aims of imposing punishment within ad hoc judicial mechanisms, such as the ICTY, are promoting peace and reconciliation, protecting the society, and terminating impunity. Therefore, it is implied that ad hoc tribunals have different functions compared to permanent courts since ad hoc tribunals address specific situations.<sup>18</sup>

### 3.2 Safety of Victims Involved in the International Criminal Proceedings

Individuals who take part in the proceedings brought before international criminal tribunals are often exposed to dangers arising from ongoing conflict. Conflict situations are likely to substantially affect the direction of the proceedings before its very beginning. Consequently, conflicts often restrict the potential role of individuals, acting in capacity either of a witness or a victim participant.

The safety of individuals is a twofold concern in this context. Firstly, victims are likely to be reluctant to take part in the proceedings against powerful individuals because they are

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<sup>16</sup> Anni Pies 'A Victim's Right to a Fair Trial at the International Criminal Court? Reflections on Article 68 (3) ' (2015) JICJ.

<sup>17</sup> ICTY, "The Conflicts" (*The Conflicts / International Criminal Tribunal for the former Yugoslavia*) <<https://www.icty.org/en/about/what-former-yugoslavia/conflicts>> accessed June 6, 2020.

<sup>18</sup> William A.Schabas, "Sentencing by International Tribunals: A Human Rights Approach", DJCIL, Vol. 2 (1997), 461, 502.

afraid, traumatized, or threatened. Secondly, even if victims decide to become involved in the proceedings, their safety cannot be guaranteed, especially in the process of gathering relevant information that could serve as evidentiary material later in the proceedings. While the two systems guarantee certain measures of protection during the proceedings, it is highly impractical to monitor victims outside of the court. Next, both investigators and victims can face serious obstacles in collecting information. Conflicts imply a lack of resources, inability to assess the accuracy and credibility of gathered data, risk of misrepresentation, and absence of objectivity in investigating a situation.<sup>19</sup> Risks to safety have arisen in both cases. The issue of safety remains after one's active involvement in the proceedings. In the case of ICTY, protection measures were sufficient and effective when the proceedings were ongoing. However, following the conclusion of proceedings, protection provided by the court ceases to exist. This is specifically problematic in communities such as Prijedor where the crimes have been committed since no state mechanisms for protection exist.<sup>20</sup>

### **3.3 Views and Concerns of Victim Participants before the ICC, and Testimonies of Victim Witnesses before the ICTY**

Witnesses in the ICTY proceedings, especially those who were victims themselves, had a key role in deciding respective cases. Even though some things could have been better in this context, the impact victim witnesses had in the ICTY framework is considerable as it has been initially defined in the Statute and Rules of Procedure. Victims before the Tribunal, unlike in the ICC system, could not participate in other stages of the proceedings other than the trial.<sup>21</sup> It is crucial to note that these considerations cannot be generalized.

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<sup>19</sup> Elisabeth Baumgartner, "Aspects of Victim Participation in the Proceedings of the International Criminal Court" [2008] *International Review of the Red Cross* 426 <<https://international-review.icrc.org/articles/aspects-victim-participation-proceedings-international-criminal-court>> accessed June 6, 2020, 426.

<sup>20</sup> The interviewee is an ICTY victim witness who will hereafter be cited as the Respondent Z.

<sup>21</sup> The following analysis is limited to the participation of victims in *Lubanga* in the trial stage.

### A. Testifying before the ICTY

Overall, ICTY victim witnesses were aware of how important their contribution has been to securing justice. Firstly, it was important, to tell the truth. Some of them were confident and took pride in what they have done for justice, urging others to do the same.<sup>22</sup> Regarding the ability to share one's story through testimonies, Respondent Z considered that the questions that have been asked were sufficient and adequate. Only a small number of ICTY victim witnesses stated they had not been given an opportunity to tell their full story.<sup>23</sup> The process of cross-examination of witnesses by the defense, however, might represent an issue. Moreover, cross-examining the witnesses can be painful for the victims. The defense often asked questions referring to irrelevant details in order to provoke a reaction that could make them seem unstable, and ultimately undermine the credibility of a witness.<sup>24</sup> Considering the possibility of present victims' views and concerns in the ICC system, Respondent Z was indifferent comparing it to their experience before the Tribunal. Particularly, neither personal remarks that were not related to the proceedings, nor emotions were relevant. Therefore, it was not appropriate to express them before the Court.<sup>25</sup> The Pilot Study results are consistent with this claim. Namely, the interviewees emphasized the historical significance of their testimonies, along with the importance of recording the facts for future generations.<sup>26</sup> Next, the interviewees recommended other potential witnesses at the time to stay objective and exclude their biases while testifying.<sup>27</sup> ICTY victim witnesses had some concerns as regards other witnesses,

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<sup>22</sup> Kimi King and others, *Echoes of Testimonies A Pilot Study into the Long-Term Impact of Bearing Witness before the ICTY* (University of North Texas (UNT) and the Victims and Witnesses Section (VWS) at the International Criminal Tribunal for the former Yugoslavia (ICTY) 2016) 110.

Interviewees are fact witnesses from Bosnia and Herzegovina, Croatia, Serbia, and Kosovo. The Study is applicable to the work performed by the ICTY in general, therefore answers in respective cases might vary.

<sup>23</sup> Ibid, 14, 10 out of 270 interviewees.

<sup>24</sup> According to Respondent Z.

<sup>25</sup> According to Respondent Z.

<sup>26</sup> King (n 22), 110, 61 out of 270 interviewees.

<sup>27</sup> Ibid, 110, 57 out of 270 interviewees.

particularly related to claims that some witnesses talked for too long, and that more questions should have been asked in a yes or no form. Additionally, there were assertions that testifying should have been limited solely to eyewitnesses, where the overall quality of summoned witnesses should have been better.<sup>28</sup> Other than what has been asked, and presented during the process, Respondent Z did not see what else could have been offered by the witnesses. Witnesses generally felt fairly treated during the trial and considered they had personally contributed to both justice and telling the truth. In general, witnesses felt great personal satisfaction as to their contribution to international justice, in spite of considerable demographic diversity.<sup>29</sup> Some individuals thought that even what has been presented and discussed was too much and that some details should have been omitted from the records.<sup>30</sup>

### **B. Views and Concerns in *Lubanga***

In *Lubanga*, 146 individuals were granted participatory rights in the proceedings. Moreover, the Chamber decided that it would not be in the interests of justice to grant all individuals who qualified for the victim status participatory rights in the trial. Such reasoning follows from the fact that the category of crimes in question was very wide. If all qualified victims had been authorized to participate, issues examined before the Court would have often been unrelated to the harm committed by the defendant. In order to preserve the aforementioned interests of justice at particular stages of the proceedings, the Trial Chamber declared general interest in the outcome of the case insufficient as the ground for granting participatory rights. Potential victim participants had to show the reasons for believing their interests had been affected by the evidence, or the concern then arising in the case, along with nature and extent

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<sup>28</sup> King (n 22), Chapter 7 “Open-ended questions”, 113-114, 50 out of 270 interviewees.

<sup>29</sup> King (n 22), 121.

<sup>30</sup> According to Respondent Z.

King (n 22), Chapter 7 “Open-ended questions”, 113-114, 50 out of 270 interviewees.

of the participatory rights they sought. Finally, the Chamber made decisions on participation on a case-by case-basis taking into account since personal interests depended substantially on the facts of the case. Also, participation should be decided considering the evidence or the issue in question at any point in time.<sup>31</sup> The Chamber further allowed the victim participants to call witnesses and present evidence during this stage of the proceedings.<sup>32</sup>

Victim participants' submissions contradicted and the Prosecutor's case. In particular, the Prosecution charged Lubanga with violations of laws applicable to armed conflicts not being defined as international. On the other hand, victim participants advocated for characterizing the conflict in question as international. The Chamber reaffirmed the victims' claims, which caused the Prosecution to object.<sup>33</sup>

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<sup>31</sup> ICC Trial Chamber I, Decision on Victims' Participation, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo (2008), para 96.

<sup>32</sup> The Prosecutor v. Lubanga (n 9).

<sup>33</sup> CP Trumbull IV, "The Victims of Victim Participation in International Criminal Proceedings" (2008) 29 Michigan Journal of International Law 808

<<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1156&context=mjil>> accessed June 6, 2020  
Originally found in Situation in the Democratic Republic of Congo (Prosecutor v. Lubanga Dyilo), Case No. ICC-01/04-01106-803, Decision on the Confirmation of Charges (Jan. 29, 2007), available at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803-tEN.pdf>.



## 4. Psychological Considerations and Effects of Taking Part in the Proceedings on the Involved Victims

For this chapter, I conducted an interview with Esad Boškailo, psychiatrist MD specialized in trauma and PTSD. The interview was translated from Croatian to English by the author of this paper. The chapter also includes results of the abovementioned Pilot Study referring to relevant answers given by ICTY victim witnesses. Moreover, the answers are used exclusively in support of my main findings obtained through conducted interviews.

It is extremely difficult and challenging for the victims to take part in the proceedings whose subject matter is the harm that has allegedly been committed in violation of their rights and personal integrity. Moreover, individuals who are involved in the proceedings face the risk of retraumatization. Even the experts trained to help the individuals who have gone through trauma are often unable to comprehend the burden of a traumatic experience on persons in its entirety. Furthermore, trauma leads to losing trust in other people, including psychiatrists and other professionals who are involved in the process of recovery. Following the element of lack of understanding, trauma also implies the loss of control which is common to individuals who have been raped. In the context of the proceedings before the court, witnesses might feel afraid of losing control again, and not being strong enough to endure the testifying process. Ultimately, these two factors are decisive in choosing whether to testify or not. It is important to note that these observations can only be made at an individual level, meaning it is not possible to predict one's reactions and the exact effects of actions that have been taken on one's mental condition.<sup>34</sup>

The preparation of witnesses for testifying before the Court consists of two components; the psychological element, and the sense of justice, respectively. The psychological element refers to the potential consequences of testifying, including

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<sup>34</sup> Interview on psychological considerations and effects. The interview was conducted on 17 May 2020.

retraumatization, and recurrence of old symptoms such as insomnia, flashbacks, nightmares, and intrusive thinking. These symptoms do not exclusively result from an action that has been taken, in this case testifying. Even inaction, in this context a decision not to take part in the proceedings, might trigger a series of the aforementioned symptoms. It is important for the individuals who have been harmed to give testimony as soon as possible after the incident has happened. The reason for that is that individuals might not have an opportunity to tell their stories afterward. Also, it is possible for the symptoms to reoccur as a result of inaction in a more severe form than those that have been caused directly by the harm suffered. Consequently, the sense of guilt over not testifying might be more mentally burdensome than the process of testifying itself, however, it is important to note that the exact consequences cannot be predicted.<sup>35</sup>

The second element is a sense of justice. Moreover, it is crucial to acknowledge that one's role in society is not merely that of an individual. By taking an action after going through a difficult period in life, people are able to find meaning after trauma. In this specific context, it is important for the victims to recognize that the perpetrator has been punished for the wrongdoings he or she committed, in addition to recognizing that one is not the only victim. More specifically, a victim is engaged in doing something useful and beneficial to his or her community, which could contribute to healing the existing symptoms of trauma. The first stage of this process might be extremely difficult to handle, however, such deterioration of one's mental condition is often followed by a long - term improvement and mitigation of experienced symptoms. An individual is thus conscious of his or her ability to make a contribution to his or her community, just like he or she did before going through his or her traumatic experience. Thus, the individual is focused on other roles he or she assumes in the society. One of the turning points in coping with trauma is facing the fear of losing control. In particular, victims

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<sup>35</sup> Interview on psychological considerations and effects.

of mass atrocities feel like they have lost control. During the trial, the defense often aims to portray victims witnesses as unstable by using different methods often involving harsh words. If a victim witness feels like he or she is taking the control back, they will be able to conquer the fear of losing it again. According to Respondent Z's opinion, feeling safe is the most important factor in dealing with the loss of control. Particularly, people are not reluctant to fight for what they consider is just. Nevertheless, an issue arises where individuals are not given a choice, and, what is even more important, where persons do not feel safe assuming different roles in the proceedings. Therefore, the key is not to distinguish between possible roles victims could play in the process, including potential participation in the investigatory phase, or the trial. It is rather necessary to identify all advantages and risks of participation, and to leave it to the individual to make his or her own decision, all while making involved persons feeling safe and comfortable with their choices and actions.<sup>36</sup>

When it comes to perceiving the importance of one's role in the court proceedings for one's sense of justice, testifying is a substantial factor in giving them closure. Having closure is a part of the path towards recovery and continuing with one's life. However, the possibilities of people living in the territory of former Yugoslavia to get closure are often limited. In Bosnia and Herzegovina particularly, the obstacles to securing closure are various, mainly related to the consequences of the war. For example, potential witnesses have often been afraid of retaliation resulting from their involvement in the proceedings before the Tribunal in spite of existing witness protection measures. Some of the factors are poor economic situation in the country and the fear of employment termination. Therefore, the fear of retaliation substantially affects one's decision to give testimony. In deciding whether to become involved, individuals consider not only themselves, but also their family, and other members of their community. Also, one of the circumstances to be taken into account is the fact that the crimes were

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<sup>36</sup> Interview on psychological considerations and effects.

processed long after the acts have been committed. Again, this issue is very individual. During the war, most of the victims had nothing to lose. Accordingly, more survivors would probably be willing to seek justice before the Tribunal. On the other hand, after a certain period, people have started new lives, often far away from places where they have suffered harm. In that case, priorities tend to change, and individuals might not feel the need to resort to legal means to fight for what they perceive as just. Threats to personal safety and stability in their new everyday life might prevail over their willingness to secure justice.<sup>37</sup>

Other challenges one could face in fighting for his or her voice to be heard are of social, economic, cultural, and linguistic nature, respectively. In regard to potential social, and cultural challenges, the education of victims is the most powerful tool for overcoming those difficulties. Particularly, the instinct for survival will prevail over other tendencies, even though persons are subconsciously aware of how important it is to secure justice. For example, victims of crimes committed during the war in Bosnia and Herzegovina have not been thoroughly informed of the procedure witnesses before the ICTY underwent to give testimony. However, people are likely to be encouraged to contribute to the process if a public personality coming from the same society and going through similar experience publicly raised awareness of the importance of the truth, and advocated for supporting the survivors in overcoming their fears and sharing their stories in order to establish the truth. Furthermore, potential witnesses might be reluctant to engage in the proceedings if they were socially or economically endangered. In the case of postwar Bosnia and Herzegovina, many potential witnesses had no income which would enable them to access relevant services, such as translation. Even if individuals were receiving their income at the time, the fear of losing it might have prevented them from deciding to participate. This is especially the case in societies like the one in Bosnia and Herzegovina where a patriarchal understanding of a man's role in the family was deeply rooted,

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<sup>37</sup> Interview on psychological considerations and effects.

namely the responsibility of male members to provide for their family. Finally, cultural particularities shape the way members of respective cultures think, and behave. For instance, proceedings before the Tribunal were held in a country other than the territories where the acts to be processed have been allegedly committed. International proceedings thus implied traveling to a foreign country far away from what was familiar to an individual, where a foreign language was spoken.<sup>38</sup> Consequently, such circumstances could make individuals feel unsafe, which could altogether lead to completely new trauma. Apart from the fear of the unknown, one might also worry about his or her image in the public eye. When it comes to human character, the ego is often likely to prevail over individual social action efforts in order to prevent public embarrassment. Also, legal tools for addressing claimed violations of someone's rights are not equally developed, available, or used in all cultures. In the context of Bosnia and Herzegovina, suing someone is usually the last resort in case of a serious violation or offense, whereas in other countries or regions such as the United States of America the concept of litigation in court is more widespread, and accepted as a common means for resolving an alleged violation of rights.<sup>39</sup>

Furthermore, a culture of volunteerism can change the dynamics of victim involvement significantly. Moreover, volunteering activities in Bosnia and Herzegovina at the time were not as developed as in some other societies like the United States. Such engagement facilitates the process of educating people and provides support for those who need it. Facing the consequences brought by a post-war period is a complex process that requires social action to efficiently address all relevant concerns arising in an affected territory or society.<sup>40</sup> Volunteers

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<sup>38</sup> Interview on psychological considerations and effects.

<sup>39</sup> Interview on psychological considerations and effects.

<sup>40</sup> King (n 22), 110, 113-114.

Interviewees suggested that better information needs to be provided about what to expect or that the interpretation process had been problematic. 17 interviewees stated greater psychological and medical support is needed in advance or during the trial. Clearly, some witnesses felt it was confusing or made it more difficult to testify. 79 interviewees said that preparation for testifying was important.

could educate potential witnesses and other community members on the characteristics of the ICTY system, assist in establishing effective communication in general, raise awareness of relevant issues, and support individuals communicating and appearing before the Tribunal.<sup>41</sup>

In regard to the prevention of secondary victimization, it is unclear how victim participation by itself could facilitate rehabilitation of participating victims. Secondary victimization occurs when the victim suffers from harm that is caused indirectly by the manner in which different actors deal with the victim.<sup>42</sup> Factors that cause secondary victimization include the indifference of the competent actors in the criminal justice system toward victims;<sup>43</sup> the victims' inability to access counseling or medical treatment;<sup>44</sup> intrusive questioning by law enforcement;<sup>45</sup> threats by the defendant before or after trial;<sup>46</sup> harassment or invasive questions during cross-examination;<sup>47</sup> media publication containing details of the crime.<sup>48</sup>

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<sup>41</sup> Interview on psychological considerations and effects.

<sup>42</sup> "Secondary Victimization" (*European Institute for Gender Equality*)  
<<https://eige.europa.eu/thesaurus/terms/1358>> accessed June 6, 2020.

<sup>43</sup> Sonja Snacken, 'Penal Policy, and Practice in Belgium', 36 CRIME & JUST. 127, 188 (2007).

<sup>44</sup> Int'l Fed'n for Hum. Rts. [FIDHI, Victims in the Balance Challenges Ahead for the ICTR (Nov. 2002), available at <http://www.iccnw.org/documents/FIDHrwVictimsBalanceNov2003.pdf>

<sup>45</sup> Criminal Procedure: A Worldwide Study 45 (Craig Bradley ed., 1999): U.N. Office for Drug Control & Crime Prevention, Handbook on Justice for Victims 39 (1999), at 9.

<sup>46</sup> FIDH, (n 44).

<sup>47</sup> FIDH, (n 44), at 8.

<sup>48</sup> Trumbull IV(n 33), 804-806.  
UN Handbook, (n 45), at 34.

## 5. Analysis and Final Remarks

### **5.1 The victim participation in the criminal proceedings impacts the overall sense of justice of the victims**

The first hypothesis is applicable to all individuals who are considered to be victims of mass atrocities the international criminal tribunals deal with. Moreover, those who decided to become involved in the proceedings made that decision in order to, apart from finding a way towards their recovery, contribute to establishing the facts needed to convict and punish the perpetrator who caused their suffering. Even the psychological element alone implies its interdependence with the element of one's subjective sense of justice when considering the impact of involvement on the victims. If a potential victim participant/witness considers or is affected by guilt in deciding whether to participate in the proceedings or not, such deliberation evidently suggests that a person possesses a subjective sense of what is just as opposed to what is not. That sense of guilt has to have its source, being one's personal moral values. Specifically, the perpetrator should be punished for the acts he or she has committed. The second element, being the element of the sense of justice itself indicates such impact without a stretch in interpretation. Acting in accordance with one's understanding of what is just, in that case, depends on one's understanding of his or her role in the community, particularly, on an individual's ability to see oneself as a member of an entire group of his or her peers who have gone through a similar experience.

## **5.2 The existing victim participation framework under the ICC is not substantially better than the role of victims as witnesses for the victims in terms of their satisfaction with the secured justice**

Second, the participatory rights for the victims provided by the ICC framework do not constitute a substantial advancement of the role of victims as mere witnesses in terms of their satisfaction with the final outcome. The absence of participatory rights before the ICTY does not significantly restrict the role of victim witnesses in comparison with victim participants before the ICC. Testimonies of all witnesses before the ICTY constitute the core of obtaining evidence and establishing the truth during the proceedings. Even if such a possibility was available to victim witnesses, it would not necessarily be used. Victim witnesses who have appeared before the ICTY were generally aware of how important their role was in the process. A witness' satisfaction with their own performance during trial depended on their expectations before they testified. Moreover, the questions asked by the prosecution were sufficient to communicate the details they wanted to be heard.<sup>49</sup> In comparison with written submissions of victim participants before the ICC, it could be argued that victim witnesses' testimonies could be more satisfactory for the victims in evaluating their individual contribution to securing justice, especially considering that the majority of evidence before the ICTY has been gathered through witnesses' testimonies rather than other forms, such as documentary evidence. Each testimony thus carries substantial weight in fact-finding. As mentioned, 139 witnesses were called in *Kvočka et al.* The Court in *Lubanga* authorized 146 victims to participate in the proceedings, whereas 129 of them were represented by two legal teams during the trial. Out of almost 400 items of evidence, 13 items were presented by victims participants.<sup>50</sup> Taking these

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<sup>49</sup> According to Respondent Z. In addition, some results of the Pilot Study are included in this assessment. I have referred to this study to point out consistency between the feedback obtained through my interview, and the results of the Pilot Study.

90.7% of the interviewees were satisfied with his or her testimony considering his or her reasons for testifying.

<sup>50</sup> Not considering the testimonies of victims in their capacity as witnesses before the ICC. The focus is on the additional contribution made by victims as participants.



numbers into account, it is difficult to argue that witnesses appearing as individuals before the Tribunal were in a less favorable position compared to victims with participatory rights in *Lubanga* in terms of their opportunity to be heard. Furthermore, it could be argued that victims might be able to say more as witnesses. Presuming that ICTY witnesses deemed the questions they were asked to answer sufficient<sup>51</sup>, victim participants before the ICC might be put in a weaker position as regards their contribution. Firstly, individuals might not be granted participatory rights in the first place. Secondly, victims who assume participatory rights, like in *Lubanga*, are likely to have their concerns merged into a joint submission containing numerous statements, that are subsequently communicated via an agent. Therefore, it is not improbable that the victim participation model fails to meet the expectations of potential victim participants. The feeling of disappointment resulting from such failure could easily have a detrimental impact on one's satisfaction with justice, considering that victim witnesses had not hoped for participation, to begin with.

### **5.3 The existing victim participation model is not suitable for all cases that fall within the jurisdiction of international criminal tribunals**

The third hypothesis is that victim participation as it exists before the ICC is not appropriate under all circumstances. Moreover, I would like to raise three points in this regard. Firstly, the goals and objectives of international criminal courts matter. More specifically, it is necessary to distinguish between the ICC as a permanent court, and the ICTY as an ad hoc tribunal to address the aftermath of the war.<sup>52</sup> Thus, even if the victim witnesses had had an opportunity to obtain participatory rights, it would have been highly impractical for them to

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<sup>51</sup> See Chapter 3.3.1

<sup>52</sup> Schabas (n 18).

exercise those rights as a result of, among other obstacles, the lack of resources and access to ones available at the time in Bosnia and Herzegovina.<sup>53</sup>

Secondly, the involvement of the victims as a third party to the proceedings might produce adverse effects. Deducing from the inconsistencies in arguments presented by the Prosecutor and the victim participants in *Lubanga*, respectively, a similar issue could have easily arisen in the case of *Kvočka*. Specifically, victims before the ICTY, such as persons from Prijedor, came from ethnically diverse territories. Since alleged violations have been committed in the context of ethnic conflicts,<sup>54</sup> it could be argued that the chances for contradicting views to arise among victims themselves, and between the victims and the prosecution would be high. Consequently, the prosecution's case could be weakened in terms of the inability to prove the defendant's responsibility as initially sought, leading to a more lenient sentence from the victim's perspective.

Lastly, particularities of respective cases such as cultural characteristics and social circumstances are important. Focusing on the potential of the victim participation model to increase victims' satisfaction with justice, I am emphasizing that the participatory rights cannot be effectively universalized in practice. I am raising this point on the basis of four aforementioned claims in the case of post-war Bosnia and Herzegovina, including a) dissatisfaction with the level of knowledge about the ICTY proceedings, preparation for testifying, and available information;<sup>55</sup> b) open-ended responses encouraging objective testimonies and refraining from personal bias and emotions;<sup>56</sup> c) and differences in ethnically diverse communities such as Prijedor;<sup>57</sup> d) awareness of the significance of testifying; e)

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<sup>53</sup> See Chapter 4, paras 2-8.

<sup>54</sup> ICTY. The Conflicts" (The Conflicts | International Criminal Tribunal for the former Yugoslavia) <<https://www.icty.org/en/about/what-former-yugoslavia/conflicts>> accessed June 6, 2020.

<sup>55</sup> See note 40.

<sup>56</sup> See note 24-26.

<sup>57</sup> See note 10, 19.

satisfaction of victim witnesses with their contribution to justice;<sup>58</sup> f) mentality<sup>59</sup>; g) and not setting justice as a top priority compared to other values in one's life.<sup>60</sup> Drawing from the aforementioned findings and arguments, it is unlikely that an opportunity to participate as a third party in the proceedings would significantly increase the attained level of satisfaction with delivered justice, according to the individual understanding of what is just. Consequently, the right of victims to submit their concerns and considerations is not likely to be applicable to every international criminal case.

Due to gravity and the magnitude of crimes within the jurisdiction of international criminal tribunals, victims of mass atrocities ought to be acknowledged in establishing the truth and punishing the responsible perpetrator. It is evident, however, that a legal framework expanding the role of victims beyond testifying is not sufficient itself to remove the obstacles to justice. I have shown that certain, prevalently non-legal, factors constitute a precondition for effective victim participation. Furthermore, even where the precondition has been satisfied, potential participants might choose other priorities over justice. Finally, ineffective involvement of the victim might produce an adverse effect, therefore leaving victim participants more dissatisfied than they would have been without additional efforts to contribute to securing justice.

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<sup>58</sup> See notes 21;25.

<sup>59</sup> Interview on psychological considerations and effects, see note 36-39.

<sup>60</sup> See notes 36-40.

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Victims before the International Criminal Court A Guide for the Participation of victims in

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## Annex 1

### **Recommendations on Supporting Victims Taking Part in International Criminal Proceedings as Witnesses and Third - Party Participants**

This set of recommendations is addressed to organizations, associations, NGOs, support groups, and other actors whose work encompasses offering assistance to victims and survivors of mass atrocities.

Recommended support is applicable to both witnesses and victim participants in the proceedings.

The following categories have been tailored according to the analyzed findings. Specifically, the focus is on improving the shortcomings pointed out in the main discussion in order to encourage individuals to participate and to increase the effectiveness of the victim participation model.

Recommendations are based on the abovementioned findings. The addressees should consider the following categories in tailoring their services.

- Legal Counselling
  - Basic legal background
  - Legal advice
  - Preparations for the participation
- Psychological Support
  - Preparation for the proceedings
  - Trauma Treatment

- Translation Services
- Cross-Cultural Experts
  - Providing a better understanding of the respective cultural and social context in order to facilitate dialogue, mutual understanding, avoid contradictions and ambiguities that could undermine the overall effectiveness of the participation
- Access to Services and Resources
  - Providing transport for individuals who want to access counseling and other services
  - Making the resources available online
- Raising Awareness
  - Using social media to support and inform target groups on relevant topics
  - Media coverage
  - Organizing workshops and roundtables to educate target groups and discuss important issues