

POLICY BRIEF

Reflections on Victim Participation before the International Crimes Division in Uganda

September 2019

SUMMARY

A relatively novel concept in the international criminal justice system, victim participation breaks new grounds in Uganda, where victims are traditionally confined to an evidentiary role as witnesses. The International Crimes Division (ICD) within the Division of the High Court is currently the only court in Uganda that recognizes the unique character and position of victims of crimes in legal proceedings. The ICD's Rules of Procedure and Evidence (RoPE) allow for victims to wholly participate in a criminal trial. They are, however, not elaborate enough to lay down the procedure to be followed by victims in order to participate in the Court's proceedings. In practice, implementing victim participation provisions brings about a number of challenges which, if unaddressed, are likely to further harm the victims by causing undue frustration.

Drawing from data collected through interactions with victims of gross human rights violations, close monitoring of the Thomas Kwoyelo trial before the ICD and in-depth analysis of the RoPE, this policy brief highlights some of the challenges met so far in implementing victims' right to participate.

This policy brief advocates for strengthening the normative framework for victim participation in criminal proceedings, and fostering the relation between the ICD and victims of international crimes. Concrete measures include developing clear guidelines for victim participation before the ICD and adopting legislation to protect witnesses and victims. It further urges all stakeholders to start devising practical ways of fulfilling the ICD's mandate with regard to reparations, an aspect key to restorative justice and central to durably address victims' needs.



BACKGROUND

It has been almost ten years since Thomas Kwoyelo was arrested and is standing trial. His trial before the ICD is the first ever to experiment victim participation in Uganda, drawing from the Rome Statute of the International Criminal Court (ICC). This right is meant to ensure that, beyond the fight against impunity, criminal proceedings fulfill reconciliation and restorative functions. The right to participate is meant to provide victims with an opportunity to tell their story, face the accused person in the dock and take an active part in unveiling the truth about traumatic events.

In the Ugandan context, the ICD's RoPE only loosely mention victim participation across a few provisions (Rule 48 on reparations and Rule 51 on the Registrar's functions in relation to victims and witnesses). While a novel concept under Ugandan criminal law, no guidance is provided as to how victim participation is to be practically implemented in a common law adversarial system. Neither guidelines nor a strategy on victim participation have been adopted so far, leaving the Court to resort to *ad hoc* and unpredictable measures as the proceedings go forward.

In legal terms, this situation is posing challenges of legal certainty and heightened tensions between the rights of the victims to participate and the rights of the accused. On the ground, the lack of clarity about victims' participatory rights incurs the risk of them losing interest in the process. Already, the hopes and engagement in the Kwoyelo trial initially expressed by the victims of serious human rights violations in the Acholi region are fading away.

As fatigue is growing amongst victims,¹ arising from a lack of direct involvement and protracted proceedings, there is a real risk of rendering victim participation meaningless. More so, it could contribute to further harming the victims if badly implemented.

¹ ASF, "Fatigue among the victims Regarding the case of Thomas Kwoyelo", 15 May 2019. <https://bit.ly/2Un7WNP>.

As a first of its kind, the Kwoyelo trial will set precedents. Failure in correctly implementing the right to victim participation will thus have impact beyond this trial, questioning its very relevance in ICD proceedings.

With the start of the trial phase after the confirmation of charges in August 2018, there is an urgent need to fix the current lacunae in the procedures for victims to participate, from their registration to their actual intervention in the proceedings and reparations. The latter aspect is particularly crucial for victims,² most of whom still deal with the consequences of the conflict.

Reinstating ASF's commitment to meaningful victim participation, this policy brief reviews a number of challenges as to what such a right entails, and provides a number of recommendations to address them.



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FROM THEORY TO PRACTICE: VICTIM PARTICIPATION IN THE KWOYELO CASE AT THEICD

Participation in the proceedings

When the Kwoyelo trial started in April 2016, the Court appointed two Victim Counsel who had no previous experience with the representation of victims of crimes of an international nature. **Neither were the Counsel provided with adequate means to fulfill their mandate.** When the trial started, the Counsel had never interacted with the vic-

² See ASF, A beggar has not choice: victims' perspectives on a reparations framework for Uganda, 2017. <https://bit.ly/2KxqyWR>.

tims' communities, and no procedure to register those willing to participate was in place. A few CSOs, including ASF, provided technical support to help the ICD establish a registration form and bridge the gap between the victim lawyers and their potential clients. However, the lack of intermediaries to facilitate the lawyers' interactions with victims' communities, as in place for example for ICC Victim Counsel, highly complicates their task.

The right for victims to participate in the proceedings was formally granted by the Court on November 2016. Throughout the pre-trial phase, 93 victims applied. Their applications were only reviewed in late 2018, after the charges against the accused were confirmed. In a ruling of November 14th 2018, the Trial Panel found 25 applications to be eligible, requested further information for 38 and rejected 30. The 38 incomplete applications were resubmitted before the Court in February 2019, and are now awaiting the Court's decision. Crucially, the ruling of November 2018 enumerates the criteria according to which the applications have been assessed, but does not provide individual reasoning for rejection. The application process remains open.

This cumbersome process is illustrative of **the ICD's reactive approach to victim participation**. The lack of strategy stands out, for instance, in the inconsistency observed between the pre-trial and trial stages. While Victim Counsel were allowed to make interventions during pre-trial hearings with no formally registered victims to represent, they have so far not been allowed to express their clients' views during the trial phase. In March 2019 the Court for instance denied a Victim Counsel's request to cross-examine an expert witness,³ and further instructed that any application to participate in the proceedings should be formally made to the Court. This, by far, is the most manifest decision by the Court with regard to the procedural participation of Victim Counsel in the

trial. But the question remains open as to whether this applies to all aspects of participation such as the right to make submissions or to respond to submissions of other parties.

In this regard, Status Conferences could constitute a relevant tool. The RoPE state that they are used among others to discuss protection of victims and witnesses (Rule 34(1)) and "facilitate the fair and expeditious conduct of the proceedings" (Rule 31(4)). At the ICC, Status Conferences have been used to determine a broad range of issues ahead of hearings with the parties, including Victim Counsel. The ICD could adopt a similar practice to address the modalities of participation.



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Besides the challenges faced by their legal representatives, **the victims themselves expressed frustration when it comes to their participation in hearings**. In that respect, holding hearings at the Gulu High Court, as a way to bring the trial closer to victims' communities, has not met its purpose. First, the hearings often last for several days in a row, making their presence difficult. Second, witness protection often induces restrictions on the audience's attendance. This latter issue has been partially mitigated by broadcasting hearings outside the court, using face and voice distortion and facilitated by NGO Refugee Law Project.⁴ Although screenings may help in informing victims about the ongoing proceedings, there remains a lot still to be done for victims,

³ See ASF, Trial observation report from the Kwoyelo case, 11-14 March 2019 (Day 4) <https://bit.ly/31gGiUF>.

⁴ See ASF, Trial observation report from the Kwoyelo case, <https://bit.ly/2Md1giv>.

through their counsel, to become active participants.

The prospect for reparation

In a 2017 perception study among victims' communities in Northern Uganda,⁵ ASF highlighted how reparations stand high on their list of priorities in comparison to either truth-seeking or prosecution. While acknowledging that the role of the ICD is limited to court-ordered reparations, these are yet to be made effective and meaningful. In this regard, there are a number of issues to clarify.

First, **it is important to elucidate at an early stage whether or not victims who did not participate in the proceedings will be entitled to apply for reparation in the event of a conviction.** Guidance as to how to deal with applications for reparations could be drawn from the ICC's experience. In the *Lubanga* case, the Appeals Chamber confirmed that victims who did not get the opportunity to participate in the trial phase may subsequently apply to participate in the reparations phase.⁶ Such a principle contributes to alleviate the urge for victims to apply for participation as a way to obtain reparations. Transposed at the ICD level, it would help the Victim Counsel to focus their limited resources on their representation strategy. In turn, victims who feel their participation could entail reprisals, would still have an avenue to access reparations.

Second, **there is an urgent need to clarify, at policy level, what victims may potentially expect as reparation in front of the ICD,** if there is anything to be expected. Victims often ask about the modalities of reparations and how they may receive them. In light of the procedural length, some have

suggested that they should get interim assistance for the harm that they suffered while they wait for the Court to make its decision. At the moment, no alternative – whether it be a Trust Fund or something other – is provided in the ICD's legal framework in case the convicted person is found indigent.

Third, the **scope of reparations** foreseen under the RoPE puts strong emphasis on financial compensations, in line with the broader judicial practice in Uganda. Yet financial compensation does not embrace the entire scope of reparations envisaged by victims,⁷ and in line with Rule 48(3) and international standards⁸, victims' views should be sought at the time of determining a reparation order.

Finally, all of the above mentioned issues are likely to keep arising in the **absence of a proper framework on reparations in the country**, however crucial such a framework is for managing victims' expectations and devising concrete reparation measures. In 2016, ASF organised a high-level conference, which led to the elaboration of principles on court-ordered reparations.⁹ Yet, there are still no consistent policy directions from the State. Furthermore, it is clear from the victims' point of view that the reparation framework will have to extend beyond criminal proceedings, highlighting the importance of a Transitional Justice Policy. After its long-awaited adoption in June 2019, the Policy has yet to be enacted by Parliament and implemented.¹⁰

⁵ ASF 2017 (n 2) p.13.

⁶ *Prosecutor v Lubanga*, 'Judgment on the appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', 18 July 2019.

⁷ ASF 2017 (n 2) p.12 ff.

⁸ UNGA, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 2005.

⁹ ASF, *Principles on court-ordered reparations: A guide for the International Crimes Division of the High Court of Uganda*, 2016. <https://bit.ly/2Zz1LI0>.

¹⁰ At the time of writing, the final version has not been made public. See <https://bit.ly/2UhNRRv>.

RECOMMENDATIONS

In line with the complementarity principle, ASF is committed to supporting domestic processes of accountability for international crimes that ensure the meaningful participation of victims and respect the rights of all parties. Such processes must contribute to a holistic approach to transitional justice. Noting the absence of a conducive legal and policy environment to achieve those objectives in Uganda:

► We call upon the **Ugandan Cabinet** to maintain efforts to openly address mass crimes that have been committed on its territory through **publishing the recently adopted Transitional Justice Policy and its implementation plan**.

► We urge the **legislator** to **fast-track the adoption of key instruments** in order to bring the Ugandan framework in line with international standards, including the Witness Protection Bill and a Reparation Framework that offers concrete avenues for victims, as provided for in the draft Transitional Justice Policy.

► We call upon the **Secretariat of the Justice, Law and Order Sector** (JLOS) to devise a proper **victim participation strategy** and ensure sufficient resources for the ICD (including support for victim lawyers).

► We further urge **JLOS** to engage in a **coordinated dialogue with CSOs working on transitional justice**, through reviving their participation in the Plenary that was set up during the formulation stage of the policy.

Furthermore, in order to ensure that victim participation meaningfully contributes to bring justice to the victims of international crimes in Uganda, we urge the **ICD** to:

► **Develop clear guidelines for victim participation at all stages of the trial.**

► **Strengthen and broaden the use of Status Conferences** with the Parties to determine the concrete participation modalities for the victims.

► **Define application procedures for all victims potentially eligible to participate.**

We also recommend the **Victim Counsel** to:

► **Use the experience of victim participation at the ICC and national courts and exchange best practices with other victim counsel.**

Finally, noting the work done by CSOs to cover gaps in the administration of justice in Uganda, we urge **civil society** to:

► **Increase their collaboration to avoid duplicating efforts** in supporting victims and their Counsel as well as the ICD.

ASF SUPPORTS ACCES TO JUSTICE IN UGANDA

With support of the Belgian Development Cooperation, ASF is implementing a program in Uganda aimed at "contributing to sustainable development goals by improving access to justice". The transitional justice component is geared towards fostering the participation of victims of the armed conflict in justice mechanisms.

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