

PARTLY DISSENTING OPINION OF JUDGE OZAKI

1. For the reasons outlined below, I respectfully disagree with the Majority's determination that there are no compelling reasons to modify the system of legal representation of the victims in this case.¹

Continuity

2. At the outset I wish to note, as a general principle, the desirability of continuity of representation, where possible. Ideally such continuity should exist from the very commencement of proceedings before the Pre-Trial Chamber through until the completion of any reparations phase, if applicable. Nonetheless, a chamber has a responsibility to ensure the effectiveness of the system of representation of victims in order to enable them to fully and meaningfully participate in the proceedings, within the legal framework of the Court.² This may necessitate reviewing the system of representation established at the confirmation of charges phase. In this regard, I note that one of the factors expressly considered by the Single Judge of Pre-Trial Chamber II in establishing the system of representation in the present case was the 'limited scope of the confirmation of charges hearing, and by extension the involvement of legal counsel'.³ Following the confirmation of charges by the Pre-Trial Chamber, it was consequently incumbent on the Chamber to review the representation system and consider whether or not that system remained appropriate for the purposes of full trial proceedings.

¹ Decision, para. 28.

² See, in particular, Article 68(3) of the Rome Statute and Rules 90-91 of the Rules of Procedure and Evidence.

³ Pre-Trial Chamber II, Decision Concerning the Organisation of Common Legal Representation of Victims, ICC-01/04-02/06-160, para. 24.

3. Any such review should, however, be done as early as possible during pre-trial preparations. This minimises potential disruption (both to the victims and to the proceedings) and facilitates the important trial preparations of the legal representatives of victims ('LRVs') themselves, including in establishing relationships and lines of communications with their clients and in making submissions on crucial matters, such as the modalities of victim participation to apply for the duration of the trial.

System of Representation

Preliminary remarks

4. My preference for modifying the system of representation in this case should not be interpreted as a reflection on the work of the existing LRVs. Rather, my position derives from a number of general principles which I consider relevant to the determination of victim representation, and which would, in my view, have been appropriate to apply in this specific case.
5. No one system of representation is likely to be suitable across all cases. Multiple factors - including the scope and nature of the case, and the size, preferences and characteristics of the victim group or groups themselves - will significantly impact the determination. I also recognise that victim representation before international courts is a relatively new phenomenon, and currently no systematic comparative study has been conducted of the relative advantages of the different models that have emerged from the Court's jurisprudence to date. Nonetheless, there are, in my view, certain general principles the weight of which should be carefully considered in the context of each case. It is not my intention to exhaustively list those principles here, but rather to identify a few of the more pertinent considerations that influenced my position in this instance.

Proximity

6. The charged crimes in this case are alleged to have occurred in Ituri, in the Democratic Republic of the Congo. While the seat of the Court is geographically remote from the participating victims, it is nonetheless the responsibility of the Court to adopt a system of representation which will bring our work closer to the most affected communities. I consider this to be a particular concern in the present case. Many of the participating victims live in villages that are not easily accessible and do not have means of following the proceedings independently, thereby being reliant on regular, personal contact with the LRVs in order to be properly informed, give instructions to their counsel and participate in a meaningful way.

7. In the victim consultations conducted, while the competence and availability of LRVs are naturally considered to be essential pre-requisites, a significant number of respondents also emphasised the importance of proximity.⁴ Proximity in this sense must be understood as encompassing not just geographic closeness and the accessibility of the LRVs to their clients, including the flow of information, advice and instruction, but also, importantly, the LRVs' understanding of the culture, context, and personal situation of the victims - each being essential to the development of the necessary relationship of trust between the victims and their counsel.

⁴ See e.g. Registry's Interim Report on the organisation of common legal representation, 13 November 2013, , ICC-01/04-02/06-141-Red2, para. 10; Avocats Sans Frontières, Victims' Consultation on the Grouping for their Legal Representation in the Bosco Ntaganda case, November 2013, ICC-01/04-02/06-159-Anx1, page 17 ('[w]hat is remarkable is the proportion of applicants who expect a high degree of proximity from the lawyer'), page 18 ('[s]uch need is also translated by the high number [...] of respondents who expect close proximity to the lawyer to be appointed'), page 21 ('[h]ere again, 61.5% expect close proximity to the lawyer to be appointed'), page 22 ('the often expressed need for proximity is striking'); Registry's Report on Consultations with Victims Pursuant to Decision ICC-01/04-02/06-449, ICC-01/04-02/06-513-Conf-Exp ('Second Consultation Report'), para. 14 ('the victims did have ideas about what they saw as important qualities, and what they wanted from their legal representative. The most frequently mentioned were frequent interactions, the opportunity for individual meetings, regular information, outcomes, being treated as individuals and not just another file, to feel that they are known personally by their lawyer and that their lawyer recognises and understands their daily reality'), see also para. 19.

8. In prior cases before the Court it has been found that 'greater geographic proximity between the victims and the [LRVs] is important to ensure that victims can communicate easily and personally with their representative and thus ensure meaningful representation'.⁵ Those same considerations apply here, with additional force given the relatively less accessible locations in which many of the victims in this case reside. The requirement for proximity and confidence is additionally heightened in cases such as the present where the participating victims include former child soldiers and those reporting crimes of sexual violence. One in four of the female victims consulted, for the purposes of the Second Consultation Report, indicated that they cannot provide their opinions in group settings.⁶
9. In this context, I do not consider that contact with members of the LRVs' teams in the field can adequately substitute for the victims having a proximate relationship of the nature described above with the LRVs themselves. As noted by a significant number of victims in the consultation process, proximity requires personal engagement,⁷ and this should be facilitated to the maximum extent possible within the limits necessarily imposed by common legal representation. The work of the field teams should supplement the counsel-client relationship, not replace it. As elaborated further below, ensuring that lead counsel - who will be framing the submissions and, when appropriate, appearing before the Chamber - is the person with whom the victims have a proximate relationship is to the benefit of the proceedings as a whole.
10. It is important to acknowledge the Registry's observation that many of the victims do not have a clear understanding of the structures and

⁵ See *Prosecutor v. Ruto & Sang*, Decision on victims' representation and participation, ICC-01/09-01/11-460, para. 60; *Prosecutor v. Kenyatta & Muthaura*, Decision on victims' representation and participation, ICC-01/09-01/11-498, para. 59.

⁶ Second Consultation Report, ICC-01/04-02/06-513-Conf-Exp, para.21.

⁷ Second Consultation Report, ICC-01/04-02/06-513-Conf-Exp, para. 14.

procedures at the Court and therefore, in providing their views in the Second Consultation Report, did not distinguish between the LRVs themselves and their team - including, in particular, the legal assistants in the field.⁸ This is a significant limitation to the findings from the perspective of seeking to determine whether the correct balance has been achieved under the existing representational system. Nonetheless, it is notable that - even though interaction with the field team was included in the assessment - the Registry still concluded that further adjustment of the representational system would be appropriate 'in order to ensure closer proximity and more continuous flow of information'.⁹ In my view, this finding warrants serious attention. As mentioned above, it is the responsibility of the Court to adopt such procedures as will, to the extent possible, make the work of the Court accessible to the victims and facilitate meaningful engagement.

11. There are a number of ways in which these concerns could, to one extent or another, be addressed, including, as proposed by the Registry,¹⁰ through the appointment of additional team members in the field. In my view, however, there must be fundamental doubts about whether, in a case of this nature, LRVs from the OPCV, who are primarily based at the seat of the Court, constitute the optimum representational model for fully realising the interests discussed above.

Independence

12. In the context of establishing the relationship of trust and proximity, there are reasons why victims may prefer to be represented by counsel who are external to the Court. This includes questions of independence, and, in

⁸ Second Consultation Report, ICC-01/04-02/06-513-Conf-Exp, para. 12 and footnote 16.

⁹ Second Consultation Report, ICC-01/04-02/06-513-Conf-Exp, paras 2, 24 and 26.

¹⁰ Second Consultation Report, ICC-01/04-02/06-513-Conf-Exp, para. 24.

particular, the appearance of independence. This is an important issue for victims, the Court and the LRVs themselves.

13. By way of example, victims' interests may not always be in conformity with those of the Court as an institution, and LRVs who are structurally aligned with the Court may be perceived as having greater conflict in that regard. Moreover, for victims who might not have a full understanding of the Court structure, the receipt of different messages from various organs of the Court - whether directly or through the media - could inhibit victim confidence in LRVs who they view as being aligned with the Court as an institution.

Engagement

14. I mentioned above some of the interests of participating victims in having proximity in representation. I wish to note here the complementary benefits of such proximate representation from the perspective of the Chamber, and the proceedings more generally. There is a risk that the voices of participating victims, and the reality of their situation on the ground, can become filtered out in the relay from a village in Ituri to the courtroom in The Hague. The importance therefore to a chamber of receiving the victims' perspective on the ground as directly as possible through the appointed LRVs must be stressed.
15. In my view, local counsel - by which I mean counsel living and working in the affected region, whether nationals of the situation country or not - should, where appropriate, be afforded the opportunity to lead the representation of the victims. The perspective of these lawyers, including arising from their proximity to and understanding of the victim communities, as well as their diversity of experience, and knowledge of

domestic laws and cultural context, has the potential to greatly enhance the proceedings.

16. Equally, for victims, being able to see the lawyers with whom they have direct interaction representing their views would serve the sense of empowerment which victim participation should aim to facilitate.
17. Finally, I also consider this to be a question of fairness. It is not apparent why - in cases, such as this one, where there is no compelling reason directing otherwise - local counsel should serve only as legal assistants within the LRVs team structure, rather than developing their professional experience as lead counsel before an international court. In my view, it would be of mutual benefit, both to the proceedings and to the local counsel, for victim representation to be led from the ground.

Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki

Dated 16 June 2015

At The Hague, the Netherlands