

Sudan Victim Lawyers recount their experiences with the ICC so far

Interview with Attorneys Raymond M. Brown and Wanda M. Akin Brown

How did you come to represent victims from Darfur before the ICC?

We have been interested in international criminal justice for some time. We represented Morris Kallon before the Special Court for Sierra Leone and we jointly teach International Criminal Law at the John C. Whitehead School of Diplomacy and International Relations at Seton Hall University in New Jersey. After one of our lectures, some Diplomacy and International Relations students who had contacts with recently arrived refugees through the Darfur Rehabilitation Project, a U.S. based Darfuran NGO, made contact with us. They asked us if we might be interested in meeting with members of the Sudanese Diaspora to provide information on the International Criminal Court. This is how we came into contact with Darfurians that were interested in the ICC here in the United States.

What are the main challenges you face in representing Darfuran victims?

We initially filed 5 applications in June 2006. We were surprised at how difficult it turned out to be from a practical point of view. The main challenges were in obtaining supporting documents and of-course in dealing with the language barrier. Entire days are spent translating and processing sessions with our clients. There is a massive resource drain even with the use of electronic technologies.

After the first 5 applications, we subsequently filed another 16. All the applications are still pending before the Court and the delay is difficult to explain to our clients. It will soon be a year since we filed the first 5. Moreover, we are not totally satisfied that we will be successful. Based on previous decisions of the Court and observations made by the OTP and OPCD in the Uganda and DRC situations, we are not sure how the Court will determine which victims will be granted rights to participate in the Darfur situation or case.

What selection criteria have you used to determine which victims to represent?

The selection criteria has evolved with the jurisprudence at the Court. When we started working on this there was no juris-

prudence at all. Now there are some decisions which outline the difference between participation in the situation and participation in a case. The process of selection will also evolve as the cases move from one phase to the next. Victims want to participate in cases.

For successful participation the victims' personal interest must have been affected in a particular case. It is not clear what constitutes "personal interest" under article 68(3) of the Rome Statute. Imagine raids on villages: thousands upon thousands of individuals' personal interests are affected. If you select between 5 and 100 victims, how can you forecast that these incidents will match the prosecutors? Our contacts with the investigative arm of the Prosecutor's office have not been particularly fruitful as yet.



Raymond M. Brown and Wanda M. Akin Brown before the Special Court, Freetown, Sierra Leone.

Do you see major impediments to effective victims' participation before the ICC?

Yes, there are a number of serious barriers that need to be addressed.

First there is the issue of legal assistance. Pre-Trial Chamber II, has ruled out the possibility of obtaining legal assistance during the application phase. It has also ruled that there is no unconditional right to legal assistance. It is a conundrum how victims will have access. The mention of providing 'incentives' to victims to be represented by a common legal representative in the recent Uganda ruling also raises issues given the numerous conflicts of

interests that exist. We have found conflicts of interest amongst victims in the Diaspora, let alone conflicts between those in the US and those still in Darfur.

It would appear that this jurisprudence is the beginning of limiting the role of victims.

This brings us to the question of access generally. The impression we have is that the Court's perception of victims is affected by finances, and here perhaps we need to address the ASP. The Court is generally fearful of large numbers of victims. In Darfur there could potentially be millions of victims, but they are fearful of even a moderate amounts of applicants.

As a result there is a failure to provide adequate resources to effectively enable victims to exercise their rights before the Court. The Prosecutor's approach is having a detrimental impact on victims' participation, because the OTP has formally and informally been resistant to victim participation. There is a huge disparity between the resources that have been put forward to support victim participation compared to the size of the interested group. We are not saying that the Court has to fill that gap alone but it certainly needs to be addressed. The Registry has called on its NGO "partners" to help fill the resource gap.

What do you see as the way forward in supporting victims' rights before the ICC given the difficulties that you outlined?

We would like to have discussions with NGO groups about how to contribute to filling the gap mentioned above; how to join forces in supporting the application process. Some areas for discussion include:

1. effective coordination of exiled refugee groups
2. identification, training and protection of intermediaries
3. training of young local lawyers to support cases
4. addressing the needs of intermediaries
5. addressing the fear of large numbers of victims

While the court has a key role to play in enabling effective victim participation, NGOs also have a key role to play, and we would like to work with NGOs more closely in this respect. •