

“The right of victims to a fair trial: fiction or reality? Comments on ICC and STL practice”

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Supranational Criminal Law Lectures Series

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T.M.C. Asser Instituut, The Hague

On 7 June 2017, Dr. Kinga Tibori-Szabó and Megan Hirst provided a lecture at the Asser Institute in The Hague in the context of the [Supranational Criminal Law Lecture Series](#), in cooperation with the [Coalition for the International Criminal Court](#) (CICC) and the [Grotius Centre for International Legal Studies of Leiden University](#).

Kinga Tibori-Szabó currently works at the Kosovo Specialist Chambers in The Hague and was previously a member of the Legal Representative of Victims (LRV) team at the Special Tribunal for Lebanon. She previously worked for the Defence at the International Criminal Tribunal for the Former Yugoslavia. Megan Hirst is a barrister at Doughty Street Chambers in London and has worked on victims' participation issues in the Registries of the International Criminal Court and the Special Tribunal for Lebanon, as well as in an LRV team in the *Prosecutor v. Dominic Ongwen* case. They are the editors of '[Victim Participation in International Criminal Justice - Practitioners' Guide](#)', expected to be published by [T.M.C. Asser Press](#) in the summer of 2017.

After a welcoming introduction from Dr Christophe Paulussen, Senior Researcher at the Institute, the speakers took the floor to share their views on the issue of victims' entitlement to procedural fairness guarantees in the context of international criminal proceedings before the [International Criminal Court](#) (ICC) and the [Special Tribunal for Lebanon](#) (STL).

The seminar began with Hirst introducing to the audience what Tibori-Szabó and she hoped to achieve through the publication of their book. They wished to outline a comparative perspective to assist practitioners working at the tribunals in the field of victims' participation to have access to the participation scheme of other tribunals with a view to draw important lessons from each other's experiences and develop best practices that can replace practices that do not work. They observed the practice of the ICC and the STL through a particular lens, finding that there was often a tendency to talk about practice related to victims' participation in terms of what is or is not acceptable for victims, but there is no tendency to address the issue in terms of *rights*. They therefore engaged into a study as to whether or not it can be argued that victims have a right to a fair trial.

While international human rights law recognises and defines the notion of fair trial as the collection of those minimal procedural guarantees the defendant is entitled to demand, the question for those who deal with victims before international criminal proceedings rests on whether there exists an equivalent right or collection of rights for victims.

Hirst argued that there must be a right to a fair trial for victims even if these are involved in the proceedings as participants and not as parties, and even if they do not have any possibility to seek reparations. The contention is founded primarily on two reasons: firstly, once victims are permitted to participate in the process, meaning and content must be given to such permission or this would be void of any significance, and secondly, if we were to ask ourselves whether the most basic guarantees should extend to victims, it would be rather difficult to argue that they should not. She illustrated a model scenario where the right to an impartial tribunal was not guaranteed: permitting a biased member of a tribunal to decide over a victim's case would not be acceptable, and this already amounts to recognising that there are minimum standards which must be applied to victims' participation as well.

The question then would be, what are these minimum guarantees? Hirst and Tibori-Szabó outlined four primary areas of victims' participation modalities the review of which assisted them in determining whether the practice of tribunals such as the ICC and the STL ensures effective victims' participation. Such modalities were introduced as: a) the LRVs' possibility to access the case file and the evidence adduced in its entirety; b) the ability to make submissions; c) the possibility to appeal adverse decisions, and d) the right to have access to legal aid.

Hirst performed an analysis of these categories of guarantees from the perspective of the practice of the ICC, outlining the provisions enshrined in the Court's instruments and the case law developed on the matter. She highlighted the mixed nature of the record of the Court, encompassing both areas which have developed greatly and areas where victims' participation remains unclear and other areas where there may even be a risk of setting back the progress made by the Court.

Tibori-Szabó then took the floor to address those same modalities from the perspective of the STL. The tribunal permits a scheme of participation for victims which is in some respects similar to that of the ICC. The main difference rests on the fact that victims' numbers in the *Ayyash et al.* case are more manageable than the numbers of victims involved in certain cases before the ICC. The premise creates an expectation of a more practicable victims' participation scheme before the STL.

During the lecture, Tibori-Szabó engaged in an analysis of the four modalities introduced by Hirst and provided their assessment through a comparison of the language employed in the Statute and the Rules of Procedure and Evidence with the jurisprudence developed. The emerging picture is that the victims' participation scheme provided for in the instruments is based on judicial discretion and remains to some extent similar to that envisaged by the ICC, while the case law developed by the judges greatly simplified the mechanisms of participation of victims and rendered the scheme more workable.

The modalities addressed by Hirst and Tibori-Szabó are those that deserve to be seen as fair trial guarantees. They observed: "if we are too scared to call these modalities 'rights', fearing to encroach on the rights of the accused, we can then call them 'guarantees'. Limiting judicial discretion would increase legal certainty for the legal representation of victims. The more legal certainty a legal representative has, the less symbolic and the more meaningful victims' participation becomes".

A video of this lecture can be viewed on the Asser Institute's International Crimes Database, see [here](#).