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THE INTERNATIONAL CRIMINAL COURT: CHALLENGES OF VICTIM ASSISTANCE, PARTICIPATION AND REPARATIONS

CHRIS TENOVE

SUMMARY

- The International Criminal Court (ICC) was designed to be more victim-focused than previous tribunals, promoting elements of restorative and retributive justice.
- Victims have the right to be heard as legal participants at the ICC, and can receive material assistance and reparations. The operationalization of these programs, however, is under evaluation there are indications it is unworkable.
- To address the challenge of reparations, the ICC should seek to clearly define its relationship with victims and better understand the impact of assistance programs.

BACKGROUND

Part of the ICC's innovative approach to justice is that it treats victims' interests differently than previous international criminal tribunals. Substantively, the Court provides reparations and assistance to the purely retributive justice of previous tribunals. Procedurally, it gives victims the right to be participants, making it possible to include their perspectives and interests in certain Court processes.

Such programs are seen as particularly important in situations where victims are distant from The Hague, the Dutch city where the ICC is headquartered, and where governments are unable or unwilling to provide them with meaningful redress. These conditions have existed in the first 7 countries — all African — where the ICC has intervened. If the ICC is to have a meaningful restorative impact in Africa, however, these programs should be practical, well-

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implemented, and appropriately supported. Alternatively, the ICC could disabuse victims of their expectations for meaningful participation and resort to functioning as a purely retributive Court.

VICTIM-FOCUSED PROGRAMS OF THE ICC

At the ICC, perpetrators are investigated, prosecuted, and punished because of harm done to their victims.¹ Indeed, it is the severity, quantity and context of harm that define certain acts as international crimes. Moreover, the suffering of victims has served as moral and political impetus for state and non-state actors to create international laws and institutions. Despite the centrality of victims to international criminal justice, however, tribunals have rarely emphasized their well-being, or sought to include their perspectives in decision-making.

The International Military Tribunal at Nuremberg, for example, concentrated on perpetrators and their rightful punishment. While victimization figured prominently in testimony, victims themselves were an afterthought and rarely given the opportunity to tell their stories (Dembour and Haslam, 2004). Similarly, the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY) provided no role for victim participation other than as witnesses. These tribunals eventually improved their outreach programs so affected communities would at least be informed of the tribunals' work, but many criticized them for failing to promote victims' interests (Orentlicher, 2008).

These criticisms, as well as the rising importance of victims' rights in domestic criminal systems, led civil society organizations and sympathetic states to promote victim-focused provisions during the creation of the ICC (Schabas, 2007; Schiff, 2008). As a result, the Rome Statute — the founding treaty of the ICC — contains two novel rights for victims at international criminal tribunals: the right to legal participation and reparations. The Statute also ordered the creation of a Trust Fund for Victims, a body that would provide material assistance to victims and help implement reparations. Consequently, some have argued that the ICC goes beyond the strictly

¹ The term "victim" has political and legal consequences, especially in situations of mass conflict where many individuals are both victims and perpetrators of crimes (Baines, 2009; Hirsch, 2010). In this paper I use the term "victim" to refer to those who have been harmed by acts defined as violations of national or international law.

retributive justice of previous international criminal tribunals and also promotes restorative justice (Funk, 2010; Musila, 2010).

This backgrounder briefly describes the ICC's approach to legal participation, assistance and reparations. Despite their potential importance for victims, these programs have met serious operational challenges. Moreover, some parties of the Rome Statute, especially the leading donors of the ICC, are concerned about the cost of these programs and may seek their curtailment or reform.² Given these challenges and pressures, the Court and its supporters need clarity about what the ICC should seek to achieve for victims within its existing legal framework as well as about the diverse impacts that participation, assistance and reparations could have on victims, their communities, their states and the Court itself.

VICTIM PARTICIPATION IN COURT PROCEEDINGS

The Rome Statute's Article 68(3) establishes a general right of victims to present their "views and concerns" at different stages of Court proceedings, provided this does not undermine a fair trial or the rights of the accused. To participate, an individual has to show that he or she suffered harm (physical, emotional or material), and that it can be causally linked to an alleged crime under the ICC's jurisdiction. Individuals complete standardized forms, often with the help of civil society organizations, which are reviewed by ICC staff and judges. If applications are successful, victims have the right to participate in pre-trial, trial and appeals proceedings at the discretion of the judge. This can include access to court records, the opportunity to make opening and closing statements, questioning witnesses or the accused, and providing testimony.

Due to the mass nature of crimes prosecuted by the ICC, however, it is possible to have hundreds or even thousands of possible victim participants.³ For reasons of cost and logistics it is therefore impossible for each victim

² 121 countries have ratified the Rome Statute and become States Parties. These include Canada, most members of the European Union, and most African states, but not major powers such as the United States, China, and Russia. Parties fund the ICC according to the size of their economies, using the same funding formula as the United Nations. The total budget for the ICC in 2012 is €111 million (for more see Resolution ICC-ASP/10/Res.4).

³ According to Judge Van den Wyngaert (2012), the ICC has received 9,910 applications for participation since the Court was created. Of those applicants, roughly a third were allowed to participate in proceedings thus far.

to participate directly or have their own legal representative, so judges have the power to appoint “common representatives” for groups of victims. Victims’ lawyers can come from outside the Court or from the ICC’s Office of Public Counsel for Victims (OPCV).

This style of victim participation has been criticized on several fronts. Some fear that many won’t participate because they are unaware of their right to be involved, are unable to complete the complex form, or are frustrated by the slow processes of the Court (War Crimes Research Office, 2009). Others are concerned that victims might not have the opportunity to have a direct encounter with their legal representative, leading to symbolic, rather than substantive participation (Funk, 2010).

Christine Van den Wyngaert (2012), a Belgian judge at the ICC, has also aired concerns about victim participation, arguing they are resource-intensive, slow down proceedings, and may not be meaningful for participants. She notes that the expected costs of victim participation in 2012 were estimated at over €7 million, and questions whether “the participation system set in place is ‘meaningful’ enough to justify the amount of resources and time invested... or whether it would be better to spend those resources and time directly on reparations” (2012: 495). In contrast, Adrian Fulford (2011), presiding judge in the trial of Thomas Lubanga Dyilo (convicted war criminal from the Democratic Republic of the Congo), states that victim participation did not significantly extend the trial and that their representatives made succinct and relevant contributions.

The large numbers of victims pose two key problems for legal participation. First is resources: even if procedures are streamlined, there will still be a considerable cost for the ICC to fund the staff needed to give victims the opportunity to apply and to meaningfully communicate with their lawyers. Second is the challenge of information: when there are large numbers of victim participants, how can a diversity of perspectives be meaningfully included in judicial processes? Not only do victims suffer different crimes, but the same criminal act can impact different victims in different ways. For participation at the ICC to be meaningful, victims’ legal representatives

must be able to advance these diverse interests despite the fact that they are representing entire groups.⁴

In contemplating reform, therefore, the Court must be clear about the desired impact of participation. That impact must include both the effect of victim participation on trials, and the effects on victims and their communities. The various effects of victim participation at the ICC are, to date, poorly understood.

THE CHALLENGE OF ASSISTANCE AND REPARATIONS

An enduring criticism of international criminal tribunals is that, despite multi-million dollar budgets, they do not provide tangible benefits to victims. The Rome Statute addresses this issue by directing the Court to seek reparations for victims (article 75). As with participation, however, the operationalization of victim reparations at the ICC faces numerous challenges.

Central to reparations at the ICC is the Trust Fund for Victims (TFV), created according to Rome Statute Article 79. The TFV assists the reparations process by collecting funds (whether from convicted persons or other sources, including voluntary contributions from states and individuals) and disbursing them to victims on the Court's orders. These reparations will only be granted to victims of crimes for which a person has been convicted. Thus, reparations may come long after victims were harmed, and may exclude those harmed by crimes that the Prosecutor either declined or failed to prove.⁵ Given that the ICC's prosecutorial strategy focuses on a limited number of crimes committed by small groups, many victims are ineligible for reparations.⁶

4 This complex representation requires significant resources, appropriate strategies, and the flexibility to adapt to different contexts. It is nevertheless possible, and in future work I will show how the lawyers for victims in Kenya have advanced diverse interests at the ICC.

5 While it is reasonable that only convicted persons are responsible for restitution and compensation, such a limitation may prove contentious. At the time of writing, the ICC has not yet granted reparations to any victims, though a reparations decision in the case of Thomas Lubanga Dyilo is forthcoming.

6 The TFV has acknowledged this problem and recommended that the ICC act as a catalyst to encourage other national and international bodies to deliver reparations beyond the Court's limitations. See ICC-01/04-01/06 TFV's *Observations in Response to Scheduling Order of 14 March 2012*, para. 8.

The TFV also has a second mandate, which is to provide assistance to victims *prior* to a conviction. Under this provision, people harmed by alleged crimes in the Court's jurisdiction (not only the victims of crimes proven by the prosecution) can receive assistance. Since 2007, the TFV has supported projects in Uganda and the Democratic Republic of the Congo, ranging from reconstructive facial surgery, psycho-social support for victims of sexual violence, and micro-credit loans. With an annual budget of less than €1.5 million to cover activities in all situation countries, however, the TFV's impact has been limited.⁷ Moreover, decisions about how to spend these funds are made by members of the TFV in a process that may be, from the point of view of victims, opaque and arbitrary. Currently there are no formal mechanisms for victims to make their views known to the TFV.

CONCLUSION AND IMPLICATIONS

As an experiment, the attempt to institute victim-focused justice at the ICC can claim both successes and deficits. To date, several thousand victims have been accepted as participants, their lawyers have made numerous submissions in Court processes and some have spoken in The Hague — not simply as witnesses, but as a voice for their fellow victims. Additionally, the TFV has provided critical assistance to several thousand victims in Uganda and the Democratic Republic of the Congo and has suggested helpful guidelines for future reparations. At the same time, there is a widespread call for victims' participation to be reformed to make it yield a greater impact at a lower cost. There is not yet consensus on how that should be achieved, or what that impact should be. While some have benefited from the TFV's assistance, many deserving victims have not.

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⁷ According to a year-old TFV report, there have been over 80,000 beneficiaries of its assistance (Trust Fund for Victims 2011).

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