

The International Criminal Court: A New Role for Victims in International Criminal Proceedings

By Fiona McKay¹

Criminal lawyers in a legal system based on the common law tradition such as Israel, the United States or the United Kingdom, are not used to seeing victims in a courtroom other than as witnesses or observers. For them, the idea that victims could be active and independent participants in criminal proceedings, permitted to address their views directly to the judges, and that a criminal court can award reparation to victims is inconceivable. Such a role for victims, more familiar in domestic legal systems based on the civil law tradition and with a truth-seeking rather than an adversarial approach, is one of the innovations in international criminal justice brought by the International Criminal Court (ICC).

The active role of victims is but one of the new features of the ICC, which opened its doors in the Hague in 2002. Heralded as a great achievement with which States started the new century determined to make a clean start and leave behind the genocides and atrocities of the twentieth century, States concluded negotiations of the Rome Statute, the treaty establishing the ICC, in 1998.² The ICC was given the mandate to bring to justice individuals suspected of responsibility for war crimes, crimes against humanity and genocide.³ As a permanent institution that now has 99 States Parties (it is a treaty body and not a UN institution), it is already reshaping international law and justice.

The ICC is a product of developments in international criminal justice that can be traced from the Nuremberg trials of Nazi leaders after World War II to the international criminal tribunals for the former Yugoslavia and Rwanda, established in the 1990s and still trying individuals in relation to the conflict in the Balkans and the Rwandan genocide. Further special "mixed" or "hybrid" tribunals were established to deal with atrocities committed in East Timor, Sierra Leone and Cambodia. States created the ICC as a permanent institution to act as a court of last resort that could step in where countries failed to bring to justice those responsible for war crimes, crimes against humanity and genocide.

The ICC's jurisdiction is not unlimited, however. Since the treaty establishing the ICC came into force only on 1 July 2002, the Court has temporal jurisdiction only over acts committed after that date. Further, the Court may only act where either the State where the alleged crime was committed or the State of nationality of the accused is a party to the Rome Statute or has accepted the jurisdiction of the Court in respect of the particular crime. The only exception to this rule is where the UN Security Council refers a situation to the Court. In addition, a case must pass various tests of admissibility. It must be of sufficient gravity to justify the ICC's intervention, and not already under investigation or prosecution by a State possessing jurisdiction. This last point relates to one of the fundamental principles underlying the ICC's creation, the principle of complementarity: States have the primary obligation to investigate and prosecute these crimes, and only where they prove to be unable or unwilling to do so, will the Court step in.

¹ Chief, Victims Participation and Reparations Section, Registry, International Criminal Court. The views expressed herein are those of the author alone and do not necessarily reflect the views of the International Criminal Court.

² The Rome Statute came into force after the number of States Parties reached 60, in accordance with Article 126 of the Statute.

³ The crime of aggression is included in the list of crimes within the Court's jurisdiction in Article 5 of the Statute, but the Court will not exercise jurisdiction over this crime until States have agreed on a definition and a trigger mechanism.

As of July 2005, the ICC Prosecutor, Luis Moreno Ocampo, is conducting three investigations: in Uganda, the Democratic Republic of Congo (DRC) and Sudan (Darfur). So far, he has not made use of his power to launch an investigation on his own initiative (*proprio motu*). The "situations" of Uganda and DRC were referred to the Court by the governments of those countries in January and April 2004. The Darfur situation was referred by the UN Security Council in March 2005.⁴ In each case, the ICC Prosecutor decided to open an investigation after carrying out an initial analysis.⁵

The new court is breaking new ground in several respects. Among the most significant are advances in defining crimes of sexual violence and the creation of the conditions in which they can be effectively investigated and prosecuted, and in the principle of complementarity already mentioned, which seeks to establish a new relationship between national and international jurisdictions. Another important innovation is the role given to the victims in the Court's proceedings, which permitted them to participate directly and to apply for reparation.

Participation of Victims in ICC Proceedings

Under the Rome Statute, victims are permitted to present their views and concerns directly to the ICC's Judges at various stages of the proceedings.

A key element of victims' participation is their potential role in the Court's decision whether or not to initiate an investigation or, later, a prosecution in a particular situation. In the ICC, victims do not have the right to trigger an investigation,⁶ but they are afforded an opportunity to give their views to the Pre-Trial Chamber when it is considering whether or not to authorize the Prosecutor to launch an investigation using his *proprio motu* powers, or reviewing a decision of the Prosecutor not to investigate or prosecute.⁷ Similarly, although victims are not listed as one of the parties able to challenge the jurisdiction or admissibility of a case, they are given the right to submit observations to the Judges where the Court is considering such matters.⁸

Victims may also ask to put their views to the Court at other stages of the process where their interests are affected.⁹ One such stage is likely to be the hearing to review the charges on which the Prosecutor intends to seek trial (known as the confirmation of charges hearing).¹⁰ This raises interesting questions regarding the role of victims in proceedings of the ICC, since it clearly has implications for the Prosecutor; any questioning of the charges he lays out is likely to be perceived as a challenge to his prosecutorial strategy.

The legal texts provide relatively little guidance on how victims' participation is to be managed. Article 68.3 of the Rome Statute provides that the Court will permit them to intervene "at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." The Rules of Procedure and Evidence (RPE) mention the possibility of opening and closing statements and oral or written participation in hearings, and lay out some conditions for where victims' representatives wish to question a witness. The RPE also contain some elements

⁴ The three ways in which the ICC's intervention may be triggered are set out in Article 13 of the Rome Statute: the Court may exercise jurisdiction if a situation is referred by a State Party or by the UN Security Council or if the Prosecutor initiates an investigation *proprio motu* on the basis of information received.

⁵ A fourth State referral was received from the Central African Republic in January 2005, but the Prosecutor has yet to complete his initial analysis.

⁶ See footnote 3. Victims, like anyone else, may present information to the Prosecutor with a view to persuading him to start an investigation on his own initiative under Article 15 of the Rome Statute, but do not have the right to seize the Court as such.

⁷ See Article 3 of the Rome Statute and Rule 92.2 of the Rules of Procedure and Evidence.

⁸ Article 19.3, Rome Statute.

⁹ Article 68.3, Rome Statute.

¹⁰ Article 61, Rome Statute and Rule 92.3, RPE.

designed to ensure that interventions made on behalf of victims do not overwhelm the proceedings: for instance, victims may be asked to group together and have common legal representation. Ultimately, it will be for each Chamber to give directions and to determine how much time and latitude they will give to victims' legal representatives.

In sum, while the legal texts provide some clues as to how victim participation might be used and how it might be regulated by the judges, it will be of great interest to see how victims use this possibility and what rulings the Court delivers in its first cases.

Reparation

The Rome Statute gives the Court the option to award reparation to the victims of the crimes under the Court's jurisdiction. Article 75 of the Statute provides that the Court shall establish principles relating to reparation, and in a particular case may proceed to make an assessment of the harm done to victims, and may make an order of reparation directly against a convicted person. There is also a trust-fund for victims, which will both assist the Court to implement reparations awards against individuals convicted by the Court and raise funds separately for use to benefit victims of crimes and their families. The RPE outline a procedure for victims to request reparation and a framework for the Court to deal with their applications.¹¹

The elaboration of the ICC's reparations regime mirrored developments elsewhere in relation to the right to reparation. As the Rome Statute was being negotiated, under the umbrella of the UN Commission on Human Rights, a set of internationally-applicable basic principles and guidelines on the right to reparation for serious violations of human rights and international humanitarian law were being developed in parallel.¹²

Based on his wide-ranging study in order to identify relevant principles, Special Rapporteur Theo van Boven proposed a framework for agreeing standards on reparation and how the right could be realized. Van Boven identified five main forms of reparation: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.¹³

As the principles evolved, other issues emerged, including the definition of a victim, how victims of violations should be treated, the right to a remedy, what must be done to ensure access to justice, and the right of access to information concerning available remedies and reparation. The development of these principles, together with certain creative decisions of human rights bodies and in particular the Inter-American Court of Human Rights, also engendered a new sense that the approach to reparation should be flexible and appropriate to the local context, and that options such as collective awards to communities and symbolic orders should be considered.

All of these developments influenced the approach to reparation that is seen in the Rome Statute and the RPE. Article 75 of the Statute defines reparation as "including restitution, compensation and rehabilitation." While many aspects of the ICC's approach remain to be determined through its practice, some of the broad lines are already apparent. For instance, collective awards, likely to be more realistic and appropriate than individualized awards in many situations before the Court, are already contemplated, as are efforts to consult victims and local communities on what form of reparation is appropriate in any given context. Other difficult issues, such as the basis on which to determine who should be within the scope of any

¹¹ Rules 94 to 99, RPE.

¹² "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," adopted on 19 April 2005 at the UN Commission on Human Rights in resolution 2005/35.

¹³ Van Boven's framework formed the basis of the principles as adopted.

reparations awards and the level and form of awards, remain to be tackled by the ICC's Judges.

Prospects and Challenges

The challenges involved in making the legal provisions relating to victim participation and reparation before the ICC a reality are considerable. The issue of how to manage the expectations of victims is particularly tricky, especially as it may be necessary to explain to them that, even though they suffered terrible atrocities, they do not qualify as a victim before the ICC at a particular point because the crime allegedly committed against them is not included in the charges brought by the Prosecutor. Other challenges arise from conditions on the ground in the places where the Court is intervening: how to inform victims of their right to participate in proceedings in such a way that they can make an informed decision on whether or not to put their views to the Court, how then to instruct their legal representative so that he or she can convey what they wish to say to the Court, in circumstances where many victims are illiterate, in inaccessible locations, afraid of further violations, and wary of strangers, and how to protect victims from reprisals in situations where a conflict is still ongoing or the security situation remains precarious. Another problem is how to avoid abuse of the provisions allowing access to the Court for victims by unscrupulous or politically-motivated actors who will seek to manipulate or exploit victims. These challenges are not for the Court to face alone, and NGOs, lawyers and community leaders in the places where the ICC is currently investigating are already grappling with them. Facing them will require cooperation between local actors and the Court itself.

The thinking behind the innovative provisions on victims in the Rome Statute was that the direct involvement of victims in the proceedings would help to avoid problems encountered in previous international criminal tribunals, where a sense of alienation among victims had limited the impact those tribunals could and should have had on the communities affected by the crimes with which they were dealing. There was a desire to show that justice is not only about prosecution, but also about hearing the voices of the victims and addressing their suffering. These provisions have now to be tried and tested, and the challenge is to make them work in a way that achieves their purpose. As the ICC progresses through its first few cases, international criminal law will clearly be expanded in this area as well as in others; it is up to non-state actors, the States Parties and the Court itself to make sure that the foundations laid in the legal texts live up to the aspirations of its drafters.