



SOME ARE MORE EQUAL THAN OTHERS: VICTIM PARTICIPATION IN THE ICC

Yvonne McDermott*

At the International Criminal Court (hereinafter, “the ICC” or “the Court”), for the first time in the history of international criminal justice, victims are given an opportunity to present their views and concerns, not only as witnesses, but in all stages of proceedings before the Court. When the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY) were established, participation of victims at an international level was considered unfeasible, given the “tens of thousands” of victims affected by crimes falling within the jurisdiction of the Tribunals. The same issues of efficiency and fairness which are pertinent in relation to the *ad hoc* tribunals are just as relevant, if not more so, in relation to the ICC. If the millions of ICC victims are to be given a voice, this must be done without overburdening the Court in terms of time and financial resources. Ultimately, only a limited number of victims will be able to participate; the selection of those few must be achieved in a manner that is fair to victims and that safeguards against disingenuous applications to participate. Finally, and most importantly, victim participation must not compromise the rights of the accused; it must not interfere with the presumption of innocence or the right to a fair and impartial trial without undue delay,² and it must not endanger the independence and objectivity of the Office of the Prosecutor.³

In the Court’s first actions, it appears that victims are treated “more equally” than other participants in the trial procedure: victims’ participatory rights have essentially trumped those of the Prosecutor and the Defense, and hampered the expediency of trials. This paper will also illustrate that, in spite of the best intentions of the ICC, the elevated treatment of victims in fact ends up disadvantaging victims overall.

Three different elements give rise to this thesis. First, as will be discussed in Part II, the definition of *who* can be considered a victim for the purpose of participation—a definition that remains far from clear but nonetheless has taken up much of the Court’s time—has broadened in scope to such an extent that future participation by victims looks to be even more time- and resource-intensive and ultimately unsustainable. Furthermore, the “two-pronged” approach developed by the ICC, whereby various criteria are assessed at an early stage while others are considered at subsequent later stages, goes against the intentions of the drafters of the Rome Statute, who determined that victim participation should only be permitted when it was certain that it would not be prejudicial to the rights of the accused or to the guarantee of a fair and impartial trial. It will be seen that this two-pronged assessment process has

* YVONNE McDERMOTT, Ph.D. candidate, Irish Center for Human Rights, National University of Ireland, Galway, is grateful to Professor William Schabas and Dr. Larissa van den Herik for their comments on an earlier draft.

¹ Judge Claude Jorda, speaking in Sarajevo on 12 May 2001. ICTY Press Release, *The ICTY and the Truth and Reconciliation Commission in Bosnia and Herzegovina*, JL/P.I.S./591-e, The Hague, 17 May 2001.

² Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 17 July 1998 [hereinafter, “Rome Statute” or “RS”], at articles 66 and 67.

³ RS, at Article 42.

proven inefficient and is ultimately liable to disappoint those whose interests were of primary importance to the judges who devised the approach.

Second, the fact that victims have been allowed to participate in the investigation stage, before an accused has even been identified, is problematic. Part III of this paper demonstrates how allowing victims to participate at this stage jeopardizes the independence of the Prosecutor and infringes on the rights of the accused by causing undue delay, in addition to denying the right of the accused to reply immediately to allegations made against him.

Finally, the modalities of participation, which have been developed to include access to the Prosecutor's documents; the introduction of evidence pertaining to the guilt or innocence of the accused and the raising of points of law stretch far beyond the object and purpose of victim participation rights in the Rome Statute. Part IV of this paper argues that such participation does not fit the statutory limitations of "views and concerns"⁴ and breaches the fundamental criminal law principle of equality of arms.

Article 68(3) of the Rome Statute is the main provision that sets out the framework for participation of victims. This provision is unequivocal as to where the balance should fall between the rights of victims and those of the accused. It states that:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered 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.

In other words, according to the Rome Statute, participation of victims should not in any way dilute or reduce the rights of the accused to a fair and impartial trial.

One specific right guaranteed to the accused under Article 67(1)(c) of the Rome Statute is the right to be tried without undue delay. Nonetheless, speaking at the inaugural meeting of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome in 1998, former UN Secretary General, Kofi Annan, stated that, "the overriding interest must be that of the victims, and of the international community as a whole. ... It must be an instrument of justice, not expediency."⁵ However, "expediency" and "justice" are not mutually exclusive concepts—there can be no justice without expediency, efficiency, and respect for the rights of all stakeholders in ICC proceedings, in particular the right of the accused to a fair trial. In placing an overriding emphasis on the interests of the victims, the ICC could threaten not only the rights of defendants⁶ but also the

⁴ RS, at Article 68(3).

⁵ United Nations Press Release, *UN Secretary General Declares Overriding Interest of International Criminal Court Conference must be that of Victims and World Community as a Whole*, 15 June 1998, available at <http://www.un.org/icc/pressrel/1rom6r1.htm>.

⁶ Alison M. Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 146 (2005). Danner and Martinez warn that a growing international concern for victims' human rights "has proven a more potent influence than worries

role of the Prosecutor—and indeed the entire functioning capacity of the Court.

I. WHO MAY PARTICIPATE AS A VICTIM?

After formulating the Rome Statute to include the participation of victims, a definition of the term “victim” in the Rules of Procedure and Evidence had to be negotiated. The present section examines the elements of this definition, as laid out in Rule 85, and argues that the definition of who may participate as a “victim” has been judicially broadened in scope to such an extent that future participation by victims looks to be even more time- and resource-consuming and ultimately unsustainable. Furthermore, the “two-pronged” approach developed by the ICC goes against the intentions of the drafters of the Rome Statute; it has proven inefficient and is ultimately liable to disappoint those whose interests were of primary importance to the judges who devised the approach.

Negotiating the Definition

The drafting of the definition for the term “victim” saw delegates eager to emphasize the restorative justice⁷ aspect of participatory rights. Many delegates were therefore keen to move away the narrow definition of the term “victim” in the ICTY and ICTR Statutes: “a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.”⁸ The Colombian delegation, in particular, was vociferous about the position of the victims in the *ad hoc* Tribunals, saying, “The victim...was an uninvited guest, a spectator, which exacerbated the conflict.”⁹ During the drafting of the Rome Statute, delegates’ attention was drawn to the definition contained in the United Nations Declaration of Principles of Justice for Victims of Crime and Abuse of Power:

“Victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury,

over potential violations of defendants’ rights”; this cannot be acceptable in a strong and independent ICC.

⁷ According to Zehr, restorative justice “involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.” Howard Zehr, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 181 (Herald Press, 1990).

⁸ Rule 2A, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, “Rules of Procedure and Evidence,” adopted on 11 Feb. 1994, pursuant to Article 15 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted on 25 May 1993 by Security Council Resolution 827; Rule 2A, International Criminal Tribunal for Rwanda, “Rules of Procedure and Evidence,” adopted on 29 June 1995, pursuant to Article 14 of the Statute of the International Criminal Tribunal for Rwanda, adopted on 8 Nov. 1994 by Security Council Resolution 955.

⁹ Proposal by Colombia: *Comments on the report on the international seminar on victims’ access to the International Criminal Court*, PNCICC/1999/WGRPE/DP.37, 10 Aug. 1999.