

THE PARTICIPATION OF VICTIMS IN THE INTERNATIONAL CRIMINAL COURT AND THE QUESTION OF REPARATIONS

Paper presented at the seminar 'International Justice: the challenge for Africa' organized by the Institute for War and Peace Reporting, Goethe Institute, 31st October 2006

By Godfrey M Musila¹

South African Institute for Advanced Constitutional, Public, Human Rights and International Law

1. Introduction: the ICC and Africa in context

It is perhaps a platitude, but relevant and necessary to state that the African continent has been engulfed in numerous conflicts for decades now. From West Africa, to the Horn of Africa, to Central and Southern Africa, no region seems to have been spared varying degrees of conflict.² Progress has been made in recent years however with many countries previously affected effecting transition to relative peace. In these societies and Africa as a whole, justice is a real challenge. Nowhere is this more evident than in the Sudan where the Darfur conundrum persists, the Democratic Republic of the Congo (DRC), Uganda, Sierra Leone and Rwanda. In particular, Darfur and the seemingly intractable Northern Uganda conflict speak to the necessity for approaches that transcend the traditional strictures of international justice.³

¹ LLB (Hons) (Nairobi), LLM (Pretoria), PhD (Candidate) International Criminal Law (University of the Witwatersrand, Johannesburg)

² Literature on the question of conflict in Africa is massive. See for example various in Malinda S Smith (ed) *Globalising Africa* (2003); John Reader *Africa: A Biography of the Continent* (1997); Paul J Magnarella 'Preventing interethnic conflicts and promoting human rights through effective legal, political and aid structures' 23 *Georgia J Int'l & Comp Law* 327. On the security dimensions in conflict situations and various publications see generally Institute of Security Studies at <<http://www.iss.org.za>>

³ The question on transitional justice in post conflict societies has attracted much comment in academic literature. See for instance Kritz, NJ 'Coming to terms with atrocities: a review of accountability mechanisms for mass violations of human rights' (1996) 59 *Law & Contemp. Probs.* 127; Landsman, S 'Alternative responses to serious human rights abuses: of prosecution and Truth

While mechanisms established at the international level and a mélange of national initiatives have restored a measure of peace and addressed in varying degrees of satisfaction the question of justice in some countries, a definitive formula, to the extent that such can be found, remains elusive.⁴ It was thus no surprise, perhaps, that the adoption of the Statute of the International Criminal Court (ICC Statute) was celebrated far and wide as a major score for international justice.⁵ Some even speculated, wrongly so, that the search to fix once and for all the question of impunity especially in Africa was over. Two things are laudable though about the ICC - the fact that it establishes a permanent mechanism to foster the existing framework of international justice, and its proposition on victims. In addition to keeping its guns trained on impunity, most of the praise must be reserved, as was the case, for its innovative provisions on how the ICC, and by extension the international criminal justice system generally should begin to deal with victims in ways hitherto unknown,⁶ at least at the international level and what rights must be enjoyed by them in the system. In this, as discussed later lies the challenge.

2. A few thoughts on the notion 'justice'

commissions' (1996) 59 *Law & Contemp. Probs.* 817; Henrard, K 'The viability of national amnesties in view of the increasing recognition of individual criminal responsibility at international law' (1999) 595 *DCL Journal of international law* 628

⁴ A number of varying mechanisms have been used: the International Criminal Tribunal for Rwanda (ICTR) jointly with the Gacaca courts in Rwanda, the TRC in South Africa; the TRC and Special International Court and TRC in Sierra Leone; the Mat-Oput (and perhaps the ICC) in Uganda, just to mention but a few glaring examples

⁵ See for instance See Emily Haslam 'Victim participation at the International Criminal Court: A triumph of hope over experience?' in Dominic MacGoldrick, Peter Row & Eric Donnely (eds) *The Permanent International Criminal Court: Legal and Policy Issues* 315-334 at 316

⁶ The concept was not entirely new for some domestic systems which, at least in part, afford victims certain rights beyond their traditional role of witnesses

The word 'justice' is on everyone's lips and may as it often does, denote almost anything. Constitutions pronounce it as an underpinning principle; autocrats mouth it without flinching; by it all manner of activists justify their disparate causes; to its quest in all guises, religions exhort their adherents; in their work, prosecutors claim to pursue it for the collective; and importantly, in its comfort victims seek solace for their woeful plight. These examples disclose that 'justice' like other vulnerable words lends itself to confusion and distortion in our context of moral, political turmoil. By the same token, one finds various theories or 'kinds' of justice. Words which do not always carry with them specific and universal⁷ connotations - distributive justice, social justice, retributive justice, restorative justice, reparative (restitutive) justice are commonly in use.⁸

In an attempt to make sense of all these, it is perhaps not surprising that one finds little instruction, if at all, in the Platonian essentialist claim aptly summarised by Martin Luther King Jr. in all encompassing terms - injustice anywhere is injustice everywhere.⁹ While it is found advisable to eschew for our purposes the philosophical debate commenced by classical greats such as Plato, Aristotle, Saint Ambrose, Saint Augustine of Hippo and others on this contested notion, this paper offers a few insights into justice as conceived within a specific international institutional framework. One commentator has said of justice that it is '... the ligament which holds civilized beings and civilized nations

⁷ For some societies and in certain situations, 'justice' cannot be justice unless it goes beyond punishment while for others, justice is understood in this limited sense

⁸ Some use the term justice in thread broad senses: (1) procedural justice, which is a matter of the fairness of the rules under which society operates and disputes are adjudicated; (2) distributive justice, which is a matter of the fairness of a given society's system of rewards, of its distribution of goods and opportunities; and (3) substantive justice, which is a matter of the institutional order of society as a whole and its justice or fairness. See Robert N Bellah *Habits of the Heart* (1985)

⁹ See Martin Luther King Jr *The Strength to Love* (1963)

together.’¹⁰ This incisive comment speaks directly to the role of the ICC within the international community and is of particular relevance to the quest of justice in Africa. Indeed, the ICC is founded on the belief that there can be no peace without justice.¹¹ The reverse is equally true.¹²

For our purposes, a basic understanding of two ‘kinds’ of justice which dominate discussions on how to deal with the past (and crimes in general) and which are often referred to in contradistinction to each other is imperative. Retributive justice focuses on the determination of guilt for crimes and inflicting deserved punishment (just deserts) on those adjudged to have committed crimes with the hope others will be deterred from similar crimes.¹³ As the next part suggests, this has been the dominant paradigm of the international criminal justice system had with unfavourable consequences for victims.

Although the term restorative justice does not lend itself to easy definition, two conceptions of it are discernible. In its broad sense, it consists of certain values¹⁴ and practices deployed besides or in appropriate cases, within the traditional criminal justice systems based on the retributive model.¹⁵ The common practices or methods used in restorative justice include mediation (Victim-Offender Mediation-VOM) and family & group conferencing.¹⁶ Indeed, the notion of restorative

¹⁰ Comments attributed to Daniel Webster by Russell Kirk in ‘The meaning of justice’ at <<http://users.etown.edu/m/mcdonaldw/LECT457.HTM>>

¹¹ See preamble Rome Statute

¹² Russell Kirk (n 10 above) states that ‘the nature of justice may be apprehended by a mere quondam justice of the peace: for the fundamental purpose of law is to keep the peace.’ in ‘The meaning of justice’ states that ‘the nature of justice may be apprehended by a mere quondam justice of the peace: for the fundamental purpose of law is to keep the peace.’

¹³ See Heather Strang *Revenge: Victims and Restorative Justice* (2002)

¹⁴ Values include personalism, reparation, participation and reintegration

¹⁵ Howard Zehr, *The Little Book of Restorative Justice* (2002)

¹⁶ See generally James Coben & Penelope Harley ‘Intentional conversations about restorative justice, Mediation and the practice of law’ (2004) 25 *Hamline J. Pub. L. & Pol’y* 235

justice is said to be intrinsic to traditional African justice systems that incorporate certain of these elements. Later in this paper, a further brief comment is made with respect to the deployment of these mechanisms in transitional justice situations. In its narrower sense, a more nuanced conception of restorative justice refers to any view of criminal justice that entails enhanced visibility of victims in terms of participation and reparation (without the various methods and practices). Within the context of transitional justice, the South African TRC process was underpinned by this notion.¹⁷ In so far as the ICC proffers these opportunities to victims of international crimes, it must be said to embrace restorative justice. In particular, the ICC Statute pronounces one of its objects to be the contribution to reconciliation of post conflict societies. This paper refers to restorative justice in this narrower sense.

3. Victims in international law before the ICC

Victims have, at the broad level of international as well as domestic law, operated at the fringes of respective processes. The Nuremberg trials, widely recognised for sowing the seed of contemporary international law, set the ground for how international criminal tribunals have treated victims.¹⁸ Since Nuremberg, issues relating to victims of atrocities have rarely arisen in ICL discourse and processes, except in the programmes of activist NGOs. To start with, the articulated object of the trial was singular and from a victim's point of view, narrowly defined. It is clear

¹⁷ On the South African TRC generally see various in Villa-Vicencio, C and Doxtader, E (eds.) *The Provocations of Amnesty: Memory, Justice and Impunity* (2003); Parker P 'The politics of indemnities, truth telling and reconciliation in South Africa: Ending apartheid without forgetting' (1996) *Human Rights Law Journal*; Atkins, L and Pagan, WP 'Conflict resolution and Democratic Transformation: Confronting a shameful past- Prescribing a human future' 119 *South African Law Journal* (2002) 174

¹⁸ Although structurally and contextually from a different era, the Nuremberg precedent established the foundations for contemporary ICL. The principles that underpin ICL are contained in the Nuremberg Principles adopted by the UN General Assembly. See UN GA Res 95/1 of 11th December 1946

from the mandates of the two military tribunals that the intention of the Allies was never to address the concerns and rights of war victims beyond what the trial of perpetrators could offer.¹⁹ The trial was limited and conducted on this basis, with a preoccupation with overarching concept of international peace and security, understood within the confines of the punitive and deterrent functions of criminal law. The Tokyo trials operated similarly.²⁰

Arising from the lack of attention to victims by the two military tribunals, various classes of WWII victims have had to fight isolated battles in different jurisdictions seek redress. For instance, Jewish victims of the Holocaust have benefited from financial settlements after negotiated bilateral and multilateral agreements with respective states and parties.²¹ Another case related to 'Japanese comfort women'. To give voice to the plight of these women, activists staged the symbolic trials at the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery in 2004, more than 50 years after the fact.²²

The ad hoc International criminal tribunals adopted the Nuremberg minimalist view of justice. Scant mention is made of victims in the Statutes and Rules of Evidence of the International Criminal Tribunal for

¹⁹ See notably the Moscow Declaration of 30th October 1943 signed by Roosevelt, Churchill and Stalin reprinted in Morris & Scharf, Vol 2 (1998) 470 from 38 AJIL (Supp. 1944) See also Bierzanek, at 573 detailing various declarations affirming the intentions of the Allies; Bert VA Roling 'The Nuremberg and Tokyo Trials in Retrospect' in M Cherif Bassiouni & Ved P Nanda A Treatise on International Criminal Law (1973) 590-608 at 593 noting that in the view of the Allies, crimes against peace 'justified all charges'

²⁰ See Nuremberg Judgment in Gabrielle Kirk McDonald & Oliva Swaak-Goldman (eds) Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts Vol II Part 2 Documents and Cases (2000) (McDonald & Goldman) at 671-673

²¹ On Jewish Holocaust claims see generally Michael J Bazylar 'The holocaust restitution movement in comparative perspective' (2002) 20 Berkeley Journal of International Law 11; Michael Bazylar BOOK

²² The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery (2000)

Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL), save in the context of protective measures.²³ Even in their role before the tribunals and SCSL that is limited to that of witnesses, commentators have lamented how badly victims are treated, with most exposed to the indifference of the tribunals and to the dangers associated with testifying in a hostile environment against powerful defendants.²⁴ Of those on the receiving end, rape survivors and victims of sexual violence have been singled out as 'victims' of a 'gender insensitive' process.²⁵ Prosecutor Carla del Ponte aptly summarised the fate of victims generally:

The voices of survivors and relatives of those killed are not sufficiently heard. Victims have almost no rights to participate in the trial process, despite the widespread acceptance nowadays that victims should be allowed to do so. And those remarks apply equally to the Yugoslav Tribunal, where the position of victims is no better, and where the accused have also amassed personal fortunes at the expense of their country and its citizens... It is regrettable that the Tribunal's statute makes no provision for victim participation during the trial, and makes only a minimum of provision for compensation and restitution to people whose lives have been destroyed.²⁶

The provision in the statutes allowing for compensation in limited circumstances has never been used. Agreeing with the Prosecutor that

²³ Protective measures ICTR, ICTY, SCSL

²⁴ See for instance generally, Eric Stover *The Witnesses: War Crimes and the Promise of Justice in The Hague* [2005 University of Pennsylvania Press] which documents the findings from the first study of victim-witnesses who have testified before the ICTY; Mikaela Hekkila *International Criminal Tribunals and Victims of Crime: A study of the Statuses of Victims before International Criminal Tribunals and the Factors Affecting this Status* (2004) 57-136 [Gezeliusgatan, Institute of Human Rights, Abo Akademi University]; Report by International Federation for Human Rights 'Victims in the balance: challenges ahead for the International Criminal Tribunal for Rwanda' at <<http://www.iccnw.org/documents/FIDHrwVictimsBalanceNov2003.pdf>>. Also accessible at <<http://www.fidh.org/afriq/rapport/2002/rw343a.pdf>> (accessed on 10 Oct 2006)

²⁵ Anne M Hoefgen 'There will be no justice unless women are part of that justice: rape in Bosnia, the ICTY and "gender sensitive" prosecution' (1999) 14 *Wisconsin Women's Law Journal* 155; generally Rosalind Dixon 'Rape as a crime in International Humanitarian Law: where to from here?' (2002) *European Journal of International Law* Vol 13 No. 3 697-719

²⁶ See Address to the Security Council by Carla del Ponte, Prosecutor of the international criminal tribunals for the former Yugoslavia and Rwanda to the UN Security Council The Hague, 24 November 2000 (JL/P.I.S./542-e)

the statutes do not empower them sufficiently to address victims' concerns,²⁷ the Judges of the two tribunals had addressed a communication to the UN Security Council, whose response is still awaited.²⁸ It is safe to say that the opportunity to look into the concerns of victims before these tribunals in their capacity as victims has been lost given that both tribunals are in their sunset days.²⁹ It appears that the only forum of recourse left for victims in this regard is the respective domestic courts, once again underscoring the need for a functional domestic system for a healthy system of ICL. The complementarity provisions in the Rome Statute are premised on this fact.

4. The ICC regime

The Rome Statute has normatively shifted the paradigm of international criminal justice system. It departs from the ad hoc tribunals and SCSL in a number of respects. First, the justification for the ICC entails a comprehensive concept of international peace and security, which goes beyond an international order free of impunity and perpetrators of serious international crimes.³⁰ Secondly, linked to its broad objects, it establishes reparations in the concept of international criminal justice.³¹ Thirdly, perhaps most importantly, it recognises and codifies the role of victims qua victims as parties to the international criminal proceeding

²⁷ See del Ponte's note to the SC that '...[the] present system falls short of delivering justice to the people of Rwanda and the former Yugoslavia, and I would invite you to give serious and urgent consideration to any change that would remove this lacuna in our process.' Prosecutor's Address (n 24 above)

²⁸ See recommendation to the SC 'Victims Compensation and Participation' contained in the Judges' Report of 13 September 2000

²⁹ Both tribunals have adopted completion strategies at the behest of the UN Security Council aimed at completing trials by 2008. Pursuant to this, the ICTR has already transferred some indictees for trial before Rwandan Courts. See UN Security Council resolutions 1503 (2003) and 1534 (2004) and Revised Completion Strategy of the International Criminal Tribunal for Rwanda of June 2006 at <<http://69.94.11.53/ENGLISH/completionstrat/s-2006-358e.pdf>>

³⁰ Preamble Rome Statute

³¹ Art 75, 79 Rome Statute

with certain rights by establishing the possibility to participate at all stages of proceedings.³² In summary, it removes victims of gross human rights violations from the fringes of the international criminal justice system its attendant objectification to the centre or at least near the centre of the proceedings by making them a concern for the Court. How effectively it may achieve these ends is a subject that merits a broader inquiry. A few thoughts are shared here on the operationalisation of victim participation and reparations and specific challenges associated with this.

5. Challenges faced by the ICC

Die-hard optimists and perhaps those who may be said to be ignorant in the travails of the international criminal justice system are often apt to think, as reflected in some preliminary comments on the ICC, that international tribunals are the panacea to the intractable question of international justice. Far from it, factors intrinsic to the system as well as external ones determine how valuable it can be in this regard, and in particular, how the ICC can advance the cause of victims. First, international criminal courts, including the ICC have limited mandates relating to whom they can prosecute. They can only prosecute a few perpetrators, statutorily restricted to 'those who bear the greatest responsibility' for the crimes in question.³³ Secondly, time is often a factor especially if the mechanism established is ad hoc in nature. The transfer of indicted suspects from the ICTR to Rwanda notwithstanding

³² See art 19(3), relating to proceedings with respect to jurisdiction or admissibility in which a victim may submit observations to the Court; art 68 relating to participation 'at all stages of the proceedings; art 15 on victims participation in prosecutor initiated investigations. See Decision on Applications for Participation in the Proceedings of VPRS 1-5, ICC Trial Chamber 1 decision of 17 January 2006 respecting the investigation stage. The Rules of Procedure and Evidence (RPE) establish procedures for victim participation and representation. See rules 85-93 RPE

³³ See art 1 ICC Statute

initial assessment of inability on the part of the state attests to this. Perhaps the permanency of the ICC solves this. Third, the procedural requirements of formalized justice, including strict adherence to fair trial guarantees of accused, as well as the prosecutorial imperatives to conduct a speedy and effective trial make an international criminal tribunal, as a domestic court, an unfriendly site for victims to contest and exercise their claims to participation and to reparations. In this, as noted above lies the challenge that awaits the ICC as it embarks on substantive work. Talking time is over.

The political context within which the Court was founded and operates is an important dynamic. This may actually determine whether the Court succeeds or fails, or how a specific situation is dealt with. The case of Uganda demonstrates how domestic politics impinge on the Court's work – whether it may assume a certain situation and after that, how to proceed. The Court's relationship within the context of its referral powers and its possible role as an 'enforcement' mechanism is a key one. The situation in Darfur is currently testing the limits of this affiliation.

6. A word on complementarity

International tribunals must be part of a package of mechanisms, both international and national aimed at achieving accountability for gross human rights violations. Because of the limited reach of international mechanisms, one commentator has rightly pointed out, that the future of international law is domestic.³⁴ Within the context of international crimes, this view highlights the centrality of national initiatives geared towards achieving the ends of justice. This view finds support in the

³⁴ Anne-Marie Slaughter & William Burke White 'The future of international law is domestic (or, the European Way of Law)' (2006) *Harvard Journal of International Law* vol 47 no 2 at 327

complementarity facility of the ICC Statute by which the ICC is subordinated to domestic systems save in cases where the state is unable or unwilling to genuinely prosecute alleged perpetrators.³⁵

The ICC cannot be discussed in isolation. There is need to fashion, at the domestic level, mechanisms that respond to the requirements of accountability for international crimes, including appropriate mechanisms to address victims concerns while staying within the normative boundaries of what is permissible the Statute (at least for states parties). Rightly, various transitional justice mechanisms (as will probably be argued by subsequent presenters here present) have their place. Therefore it is important, in grappling with these questions to subject to scrutiny the workings of these mechanisms, their intercourse with the international criminal justice framework as a whole and the ICC in particular. Amnesties laws and other forms of excluding liability (criminal and civil) however administered, achieve particular relevance despite lack of specific stipulations in the Rome Statute.

7. Conclusions

It is clear that the question of justice presents challenges for the African continent. While the ICC and other international tribunals may present options in dealing with atrocities, the main responsibility falls on the states in question. Of course supranational tribunals such as the ICC play an important role and must be supported wholeheartedly, but limitations in what they can achieve necessitate firm domestic action. A search for options to deal with gross violations must be undertaken. Existing national criminal justice systems are a fall back position, but specific domestic contexts such as mass atrocities, and the concerns for

³⁵ Art 17 Rome Statute

victims of crimes now conceived as rights may require more innovative alternatives.