The Standing of Victims in the Procedural Design of the International Criminal Court

TATIANA BACHVAROVA

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By

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This book is printed on acid-free paper and produced in a sustainable manner.

In deepest loving memory of my grandfather Panayot for his wisdom and insatiable thirst for knowledge

### **Foreword**

The second recital in the Preamble of the Rome Statute of the International Criminal Court declares that 'during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity'. This is the first of nearly twenty references to victims in the Rome Statute. The first mention of victims is in the lynchpin of the entire Statute, article 15, assuring their right to participate before the Pre-Trial Chamber in proceedings by which the Prosecutor launches investigations *proprio motu*.

The word 'victim' does not appear in the Charter of the International Military Tribunal, which is the first operational instrument of international criminal justice. Nevertheless, victims of Nazi atrocity participated in Nuremberg trial, admittedly to a rather limited extent. They were present as witnesses rather than as genuine parties in the trial. Their contribution was not central to the case for the Prosecution, relying as it did on documentary evidence, films and admissions. In all, there were fewer than forty prosecution witnesses in the great trial. Several were perpetrators themselves, like Höss, the commandant at Auschwitz, Otto Ohlendorf, the head of the Einsatzgrüppen B, and Erich von dem Bach Zelewski, the butcher of Warsaw.

But when the victims testified, their contribution was sometimes quite riveting. They brought a unique and very moving element to proceedings that were often quite tedious. One of the highlights of the trial was the testimony of Marie-Claude Vaillant Couturier. A resistance fighter, she had spent three years in Nazi concentration camps. She stood through much of her testimony, speaking in a manner that was steadfast and determined, forthright and courageous, as the French prosecutor Charles Dubost directed her evidence with brief questions:

We arrived at Auschwitz at dawn. The seals on our cars were broken, and we were driven out by blows with the butt end of a rifle, and taken to the Birkenau Camp, a section of the Auschwitz Camp. It is situated in the middle of a great plain, which was frozen in the month of January. During this part of the journey we had to drag our luggage. As we passed through the door we knew only too well how slender our chances were that we would come out again, for we had already met columns of living skeletons going to work; and as we entered we sang 'The Marseillaise' to keep up our courage.

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We were led to a large shed, then to the disinfecting station. There our heads were shaved and our registration numbers were tattooed on the left forearm. Then we were taken into a large room for a steam bath and a cold shower. In spite of the fact that we were naked, all this took place in the presence of ss men and women. We were then given clothing which was soiled and torn, a cotton dress and jacket of the same material.

She described the brutality of the forced labour, participation in which was the only way to avoid immediate execution:

During the work the ss men and women who stood guard over us would beat us with cudgels and set their dogs on us. Many of our friends had their legs torn by the dogs. I even saw a woman torn to pieces and die under my very eyes when Tauber, a member of the ss, encouraged his dog to attack her and grinned at the sight.

Vaillant Couturier also spoke for those victims who did not survive:

When we first arrived, whenever a convoy of Jews came, a selection was made; first the old men and women, then the mothers and the children were put into trucks together with the sick or those whose constitution 'appeared to be delicate'. They took in only the young women and girls as well as the young men who were sent to the men's camp.

Generally speaking, of a convoy of about 1,000 to 1,500, seldom more than 250- and this figure really was the maximum – actually reached the camp. The rest were immediately sent to the gas chamber.

At this selection also, they picked out women in good health between the ages of 20 and 30, who were sent to the experimental block; and young girls and slightly older women, or those who had not been selected for that purpose, were sent to the camp where, like ourselves, they were tattooed and shaved.

When she had finished her examination in chief, the judge invited the defence lawyers to cross examine. Hanns Marx, who was counsel to Julius Striecher but on this occasion was standing in for Ludwig Babel, the lawyer for the ss, struggled to weaken the testimony with some perfunctory questions but, to the extent that the transcript is a faithful guide, soon gave up the effort in the face of Vaillant Couturier's determined responses.

Several victim witnesses described the horrors of the concentration camps, including Jean-Frédéric Veith, Victor Dupont, François Boix, Alfred Balachowsky, Severina Shmaglevskaya, Samuel Rajzman and Hans Cappelen.

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Perhaps the most dramatic testimony in the entire trial was delivered by Avrom Suzkever, a Jewish poet who initially requested, bit unsuccessfully, to address the Tribunal in his native language, Yiddish. Testifying in Russian, one of the official languages, Suzkever described in great detail the anti-Semitic pogrom in Vilno, where he lived. At one point, he told of how his wife had given birth in a ghetto hospital:

In the evening when the Germans had left, I went to the hospital and found my wife in tears. It seems that when she had had her baby, the Jewish doctors of the hospital had already received the order that Jewish women must not give birth; and they had hidden the baby, together with other newborn children, in one of the rooms. But when this commission with Muhrer came to the hospital, they heard the cries of the babies. They broke open the door and entered the room. When my wife heard that the door had been broken, she immediately got up and ran to see what was happening to the child. She saw one German holding the baby and smearing something under its nose. Afterwards he threw it on the bed and laughed. When my wife picked up the child, there was something black under his nose. When I arrived at the hospital, I saw that my baby was dead. He was still warm.

The defense lawyers had no questions for the witness. Suzkever's poignant testimony was filmed and is available on Youtube.

Because of the great transformation in our view of the role that victims are to play in international criminal proceedings – the subject of this wonderful book – we may perhaps be tempted to exaggerate the importance of the testimony at Nuremberg of Vaillant Couturier, Suzkever, and the others. It consumed a bare fraction of the time in the courtroom and is not reflected in any way in the judgment. Perhaps their testimony weighed significantly in the minds of the judges, rather like the dramatic film footage of Nazi atrocity that was screened in the courtroom early in the trial.

There can be no doubt, as Tatiana Bachvarova explains, that witness participation did not become an important feature of atrocity trials until the Eichmann case in the early 1960s. The contrast between those proceedings and the great trial at Nuremberg before the International Military Tribunal has been drawn by many writers. It was the first indication that the pendulum was swinging away from trials based mainly upon documentary evidence and the testimony of perpetrators and experts towards the place they hold today as an important forum for victims. Actually, the *ad hoc* tribunals that were rather hastily established in the early 1990s by the United Nations Security Council were not much of an improvement on Nuremberg. But it was soon recognized

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that in this respect they were somewhat out of step with broad trends within criminal justice in a general sense, recognizing and indeed insisting upon enhanced participation for victims at many if not all stages of the proceedings.

Providing victims with a voice is also a function of other transitional justice mechanisms, such as truth and reconciliation commissions. I vividly recall the testimony of victims at hearings of the Sierra Leone Truth and Reconciliation, speaking before their own communities about the atrocities that had been inflicted upon them. In many instances, especially when sexual and gender-based crimes were involved. This involved matters that are intensely private and unbearably painful to discuss in a public setting. And yet the ability not only to speak about victimization but also to have it acknowledged by neighbours, friends and fellow citizens was an important stage in reclaiming the elements of fundamental human dignity.

Dr Bachvarova's study represents a most important contribution to the academic literature on the International Criminal Court. She has taken a topic that is in a sense well known yet that has received too little attention by scholars. This study, then, develops our understanding of the participation of victims in important ways. It will provide great assistance to judges, lawyers and other practitioners. But it is also, in a very real sense, a tribute to the victims themselves.

William Schabas 1 March 2017

### Foreword

I have known Tatiana Bachvarova for many years. I met her when I served as a judge at the International Criminal Court. On very many occasions I discussed with Tatiana a multitude of subjects on various aspects of the law and human rights.

Tatiana is intellectually gifted with a charismatic personality. She is apt to go at the roots of a subject under consideration with a view to identifying its constituent elements.

I have read her book "The Standing of Victims in the Procedural Design of the International Criminal Court". I evaluate her book as stated below.

In the first place, the book is very well written. The wording used conveys what she wants to say very clearly.

Victims of crimes amenable to the jurisdiction of the International Criminal Court have, compared to other judicial proceedings, unique rights both in the investigatory as well as in the judicial process. To my mind, the subject is analysed in the book in its proper perspective and comprehensively.

The rights of victims before the International Criminal Court are worth examining in detail as they may provide a precedent for other judicial authorities.

In my judgment, the book covers thoroughly every aspect of the subject dealt with. My estimation of the book is high. I recommend its reading by everyone interested in the administration of justice.

Georghios M. Pikis,

Formerly (a) President of The Supreme Court of Cyprus (b) Judge of The International Criminal Court, Appeals Division

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I am immensely indebted to Professor William A. Schabas for the privilege to work under his invaluable supervision, for his inspiring guidance throughout my work, unremitting support and belief in me.

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