

Journal of Criminal Law and Criminology

Volume 100
Issue 4 *Fall*


Article 9

Fall 2010

Book Reviews

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Recommended Citation

Book Reviews, 100 J. Crim. L. & Criminology 1689 (2010)

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BOOK REVIEW

RESTORATIVE JUSTICE FOR VICTIMS OF WAR CRIMES

JULIET S. SORENSEN*

T. MARKUS FUNK, *VICTIMS' RIGHTS AND ADVOCACY AT THE INTERNATIONAL CRIMINAL COURT* (Oxford University Press 2010). 227 PP (not including appendices and index).

The establishment of the International Criminal Court (ICC) in 2002¹ was a watershed moment in the history of human rights and international criminal justice. As demonstrated by the ad hoc tribunals that continue to address atrocities committed in Rwanda and the former Yugoslavia, the international community recognized that certain states were unable or unwilling to prosecute “the most serious crimes of concern to the international community as a whole,”² and that a permanent court was essential to adjudicate those crimes.

However, the new ground staked by the ICC was not limited to its existence. The Rome Statute of the International Criminal Court (Rome Statute) accorded rights to victims of war crimes never before enshrined in international treaties or local laws. Specifically, victims of a crime were accorded the right to participate in all stages of the investigation and prosecution of that crime, including proceedings before the Pre-Trial Chamber³ and the Trial Chamber.⁴ Moreover, the Rome Statute expressly provided that victims are entitled to various remedies, including

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¹ The Rome Statute entered into effect on July 1, 2002. Rome Statute of the International Criminal Court, art. 126, Jul. 17, 1998, 2187 U.N.T.S. 90 (1998).

² *Id.* at pmb1.

³ *Id.* at art. 15.

⁴ *Id.* at art. 19, art. 68.

reparations.⁵ As T. Markus Funk explains in his important new book, *Victims' Rights and Advocacy at the International Criminal Court*, the philosophy of the ICC regarding victims contrasts sharply with prevailing theories of criminal justice in twentieth century America, in which the victim's role was secondary and achieving the broader societal objective of crime control became the justice system's *raison d'être*.⁶

In his book, Funk first offers a fascinating overview of different Western theories of justice and what role, if any, victims of crime play in those schools of thought. He then provides a concise and insightful summary of the events and institutions that led to the founding of the International Criminal Court. Funk's discussion of the organization of the ICC includes valid criticisms and constructive suggestions for improvement. The final portion of the book is a manual for victim representatives on how to best represent their clients at various stages of the proceedings before the ICC. This last section is a break in tone and perhaps purpose from the earlier sections of the book, which are a valuable read for any practitioner and student of international justice, human rights, and history.

Funk traces the development of victims' rights under international law, addressing both criminal justice theories in general and certain criminal codes in particular. Funk notes that theories of criminal justice in the West have gradually drifted far away from a "restorative" approach, in which an attempt is made to restore to the victim that which was wrongfully taken.⁷ However, as the role of the central government became larger and more powerful in Western societies, restorative justice lost out to the theories of justice focusing on (1) the perpetrator, including punishment, rehabilitation, and deterrence from committing future crimes; and (2) how to reduce crime in and right the wrong to society, as opposed to an individual victim.⁸ This focus on society and the needs of the defendant continues to play a significant role in the treatment of crime and punishment in the United States.⁹ By contrast, victims have long received greater recognition in other countries and under international law: for example, the Inter-American Court on Human Rights, founded in 1979 and located in Costa Rica, held in a 1988 opinion that family members have the fundamental right to know what happened to their loved ones, reflecting historical legacy of civil wars and state-sanctioned disappearances in numerous Latin American regimes

⁵ *Id.* at art. 75; *see also* T. MARKUS FUNK, *VICTIMS' RIGHTS AND ADVOCACY AT THE INTERNATIONAL CRIMINAL COURT* 225 (2010)

⁶ FUNK, *supra* note 5, at 24.

⁷ *Id.* at 24–25.

⁸ *Id.* at 26–28.

⁹ *Id.* at 30.

in the twentieth century.¹⁰ It was this tradition upon which the ICC based its explicit recognition in the Rome Statute for victims' rights.

The book reminds us that the atrocities of World War II put the international community on notice of the need for a war crimes court and paved the way to the eventual establishment of the ICC.¹¹ The United Nations General Assembly took the first steps in 1948 with the Convention on the Prevention and Punishment of the Crime of Genocide.¹² While the United Nations Security Council gridlock caused by the Cold War temporarily derailed the effort to establish a permanent international criminal court, a series of United Nations treaties and conventions made clear that the international community remained willing to seek redress for war crimes and their victims.¹³ These included, among others, the United Nations Charter itself, enacted in 1945;¹⁴ the Universal Declaration of Human Rights, enacted in 1948;¹⁵ and, significantly from the perspective of this book, the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, enacted in 1985.¹⁶

The ICC opened for business on July 1, 2002, after sixty nations ratified the Rome Statute, and since then, three state parties to the Rome Statute—the Republic of Uganda, the Democratic Republic of the Congo, and the Central African Republic—have referred situations occurring on their territories to the court. The Security Council also has referred the situation in Darfur, Sudan.¹⁷ In addition, the court granted the Prosecution authorization to open an investigation *proprio motu* in the situation of Kenya.¹⁸ Funk briefly discusses the 1998 Rome Conference that led to the founding of the ICC, and acknowledges the primary challenge that faced its participants: how to reconcile a nation's legitimate interests in sovereignty

¹⁰ Velasquez-Rodriguez Case, Judgment of July 29, 1988, Inter-Am Ct. H.R. (Ser. C) No.4 (July 29, 1988).

¹¹ FUNK, *supra* note 5, at 33; *see also* Charter of the International Military Tribunal, art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 279.

¹² G.A. Res. 260 (III), U.N. Doc. A/810 (Dec. 9, 1948)

¹³ FUNK, *supra* note 5, at 9.

¹⁴ U.N. Charter, art. 111.

¹⁵ G.A. Res. 217 (III), U.N. Doc. A/777 (Dec. 19, 1948).

¹⁶ G.A. Res. 40/34, U.N. Doc. A/40/53 (Nov. 29, 1985); Funk, *supra* note 5, at 38.

¹⁷ Sudan is not a state party to the ICC. *See* The States Parties to the Rome Statute, INT'L CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ASP/states+parties> (last visited Oct. 15, 2010).

¹⁸ On March 31, 2010, a majority of a Pre-Trial Chamber of ICC judges approved the ICC prosecutor's request to open an investigation into Kenya's 2007 post-election violence. *ICC: Judges Approve Kenyan Investigation*, HUMAN RIGHTS WATCH (Mar. 31 2010), <http://www.hrw.org/en/news/2010/03/31/icc-judges-approve-kenyan-investigation>.

with the international rule of law.¹⁹ The agreement reached at the Rome Conference gave the court jurisdiction only where national jurisdictions were unable or unwilling to effectively investigate and prosecute, serving as a complement to national courts.²⁰ The agreement was based on the need for the ICC as shown by the civil conflicts of Rwanda, Yugoslavia, Sierra Leone and elsewhere, in which atrocities were committed wantonly in spite of existing national systems of criminal justice. This “principle of complementarity” continues to be regarded with suspicion by the United States and others for whom national sovereignty is paramount.²¹ To date, the United States has signed but not ratified the treaty, and forcing the issue in the Senate—given the slim chances of two-thirds of that body voting in favor of ratification—does not appear to be on the agenda of the current administration, although the current administration has expressed its support and intention to cooperate with the ICC.²²

While Funk mentions the substantive role of the United States at the Rome Conference, noting that the U.S. negotiation team was instrumental in defining “war crimes” and “crimes against humanity,” as well as excluding drug trafficking from the statute and reserving that crime for prosecution by sovereign nations,²³ he generally avoids wading into the debate over America’s participation in the ICC apart from this brief discussion.²⁴ Although Funk’s preference to focus on victims’ rights is understandable, the absence of any discussion of the last administration’s rejection of the United States’ signature of the Rome Statute treaty²⁵ and the future of the United States’ treatment of the ICC is apparent, particularly

¹⁹ FUNK, *supra* note 5, at 12.

²⁰ *Id.*

²¹ See, e.g., DAVID A. BLUMENTHAL & TIMOTHY L.H. MCCORMACK, THE LEGACY OF NUREMBERG: CIVILISING INFLUENCE OR INSTITUTIONALISED VENGEANCE? 291, 298 (2008).

²² On November 16, 2009, U.S. Ambassador-at-Large for War Crimes Issues Stephen Rapp stated, “Our government has now made the decision that Americans will return to engagement at the ICC.” *U.S. to Resume Engagement with ICC*, BBC NEWS (Nov. 16, 2009, 6:23 PM), <http://news.bbc.co.uk/2/hi/8363282.stm>.

²³ FUNK, *supra* note 5, at 12–13.

²⁴ *Id.* at 14, 55–58.

²⁵ In 2002, the U.S. Ambassador to the United Nations John R. Bolton wrote to Secretary-General Kofi Annan that the United States intended to suspend the U.S. signature to the Rome Statute authorized by President Clinton in 2000. The letter further stated that the U.S. recognized no obligation toward the Rome Statute and requested that its intention not to become a member state be reflected in the UN depository’s status list. See Elizabeth Rudin, *If Not Peace, Then Justice*, N.Y. TIMES MAG., Apr. 2, 2006, at 42. The purpose of this request was to relieve the U.S., as a signatory, of its obligation, not to defeat the object and purpose of the treaty. See David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983, 991 (2008).

given Funk's praise of the U.S. role in Rome Conference negotiations and his discussion of historical theories of justice in the United States.

The book builds a detailed case that the mission of the ICC is not only noble, but also essential to a world that has seen too many acts of wanton violence in the absence of justice. The ICC, however, has arguably achieved scant results thus far, giving skeptics ample grounds for criticism. Funk points out the frustratingly slow pace of the ICC to date, in terms of investigations opened, arrest warrants issued, and cases resolved.²⁶ Not only do victims wonder if their aggressor will ever be brought to justice, but defense counsel complain about the lengthy periods of pretrial detention, and justifiably so: in one case, a Congolese defendant was incarcerated for four years before his trial.²⁷ Given the relatively small caseload of the ICC, the delays in prosecuting those cases that have been charged and in which the defendant is in custody suggest substantial operational difficulties that undercut the court's effectiveness.

Funk also criticizes the fiscal waste of the ad hoc international tribunals, noting that as of March 2009, the cash outlay of the International Criminal Tribunal for the Former Yugoslavia (ICTY) was more than \$1.5 billion, but that in the past sixteen years, the tribunal had only sentenced sixty-one perpetrators.²⁸ This criticism may be a bit unfair, given the start-up costs associated with operating the ICTY, as well as the additional tribunals in the former Yugoslavia such as the Office of the War Crimes Prosecutor for the Republic of Serbia that continue to prosecute crimes associated with the war in the Balkans.²⁹ Nevertheless, \$1.5 billion is a lot of money, and one hopes that a permanent international criminal court will be more fiscally efficient than its temporary predecessors.

Funk notes that the ICC judges are a mix of experienced jurists and individuals with no real criminal justice background, no trial experience—and, in one instance, no law degree.³⁰ Oddly enough, this is permitted by Article 36(3)(b) of the Rome Statute, which contains a vague provision that candidates for ICC judgeships may possess not a law degree, but “competence in relevant areas of international law” or “experience in a professional legal capacity” that is relevant to the judicial work of the ICC.³¹ Funk sensibly suggests that the procedure for selecting judges be

²⁶ FUNK, *supra* note 5, at 69–71.

²⁷ *Id.* at 71.

²⁸ *Id.* at 11.

²⁹ See Republic of Serbia, Office of the War Crimes Prosecutor, http://www.tuzilastvorz.org.rs/html_trz/index_eng.htm (last visited Oct. 15, 2010).

³⁰ FUNK, *supra* note 5, at 73.

³¹ “Every candidate for election to the Court shall: (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor,

changed from secret ballot to an open nomination process, with the goal of choosing more qualified judges to sit on the ICC bench.³²

Previous international tribunals have discouraged guilty pleas, perhaps for the sake of the historical record discussed further below.³³ In a break with its predecessors, the Rome Statute permits guilty pleas by defendants,³⁴ but does not permit plea agreements reflecting a reduced sentence in exchange for a defendant's cooperation.³⁵ Funk encourages the use of plea agreements, pointing out the myriad benefits to all of the participants in the proceeding, including but not limited to the victims: a plea of guilty and even a reduced sentence in exchange for cooperation permits victim representatives and prosecutors to focus their efforts on those who refuse to accept responsibility and on investigating and charging new cases, while reducing administrative burdens on the court.³⁶

Funk also includes well-reasoned criticism about the sentencing range and procedure of the ICC. First, Funk recommends that the state parties to the ICC should consider modifying the current statutory language to require mandatory minimum sentences in the case of conviction, or at least if certain aggravating factors are met.³⁷ Funk further suggests that the state parties should consider amending existing procedural rules to provide for a system of sentencing guidelines that would require judges to address all aggravating and mitigating factors and explain their sentencing decisions in a written ruling.³⁸ Finally, Funk argues that the Trial Chamber should bifurcate the guilt and reparations phases, which would result in a clearer record about the court's findings.³⁹ Given that the purpose of the ICC is to punish "the most serious crimes of concern to the international community as a whole,"⁴⁰ serious consideration of these suggestions is worthwhile.

advocate or in other similar capacity, in criminal proceedings; *or* (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court."

Rome Statute, *supra* note 1, at art. 36 (emphasis added).

³² FUNK, *supra* note 5, at 75.

³³ Statement by the President [of the ICTY] Made to Members of Diplomatic Missions (Feb. 11, 1994), reprinted in 2 VIRGINIA MORRIS & MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 649 (1995) (stating that plea bargaining would be inappropriate in a tribunal "charged with trying persons accused of the gravest possible of all crimes."); FUNK, *supra* note 5, at 180.

³⁴ Rome Statute, *supra* note 1, at art. 65(1)(B).

³⁵ FUNK, *supra* note 5, at 181.

³⁶ *Id.* at 181–82.

³⁷ *Id.* at 223.

³⁸ *Id.* at 223–24.

³⁹ *Id.* at 225.

⁴⁰ See Rome Statute, *supra* note 1.

The last and most practical section of the book is a primer on victim advocacy at the ICC. In order to participate in a given proceeding, victims must be accorded official recognition by the court.⁴¹ The road to formal recognition is long, presumably because the ICC hopes to recognize only true victims of war crimes and to weed out imposters or those who may have suffered indirect harm.⁴² Nonetheless, members of the defense bar have complained that the victim recognition process is unfair to the defendant because the standard to qualify as a victim is lower than proof beyond a reasonable doubt—the standard of conviction—and judges are “pre-judg[ing]” aspects of the indictment when reviewing victim applications.⁴³ As Funk points out, however, the higher burden of proof remains intact with respect to the ultimate guilt of the accused, which the victim recognition process does not affect.⁴⁴

Not surprisingly, the Office of Public Counsel for the Defence is concerned that victim representatives do not become back-up prosecutors, or be treated like parties to the trial (as distinguished from participants).⁴⁵ But the ICC must be applauded for incorporating victims into its proceedings. First, they can provide valuable information in the investigative phase. As stated by the ICC Appeals Chamber, “[i]nformation that victims can provide to the Prosecutor about the scope of his investigations cannot but be welcome as it could provide nothing other than assistance.”⁴⁶ Second, testimony by victims who are subject to cross-examination in open court with the defendant present does not undermine the fairness of the proceedings but rather leads to a more complete record

⁴¹ International Criminal Court, Rules of Procedure and Evidence, Rule 85(a), ICC-ASP/1/3 (1994) [hereinafter *ICC Rule of Evidence and Procedure*].

⁴² *Id.*; FUNK, *supra* note 5, at 98–102.

⁴³ FUNK, *supra* note 5, at 102; see also Mariana Pena, *Victim Participation at the International Criminal Court: Achievements Made and Challenges Lying Ahead*, 16 ILSA J. INT’L & COMP. L. 497, 510 (2009) (stating that those who would argue that victim participation is contrary to the presumption of innocence disregard “the fundamental principle that a victim is a victim ‘regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted’”).

⁴⁴ FUNK, *supra* note 5, at 102.

⁴⁵ *Id.* at 149; see also Situation in the Democratic Republic of the Congo, Case No. ICC 01/04-01/06-2107: Decision on the Prosecution and the Defence Applications for Leave to Appeal the Decision Giving Notice to the Parties and Participants that the Legal Characterization of the Facts May be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court, ¶21 (Sept. 3, 2009), *rev’d*, Case No. CC-01/04-01/06-T-219: *Appeals Hearing*, 2 (Dec. 8, 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc790248.pdf>

⁴⁶ Situation in the Democratic Republic of the Congo, Case No. ICC 01/04 OA4 OA5 OA6, Judgment on Victim Participation in the Investigation State of the Proceedings, 54 (Feb. 2, 2009).

for the case and for history.⁴⁷

Not only are there high barriers for victims to be recognized by the ICC, but there are also high standards for attorneys to qualify as legal counsel for victims—the same standards, in fact, that must be met for attorneys to qualify as counsel for defendants.⁴⁸ These requirements include established competence in international or criminal law and procedure, a minimum of ten years international or criminal law experience, and fluency in one of the working languages of the ICC.⁴⁹ Although these stringent requirements contrast sharply with the fact that judges on the court do not need to have a law degree, as discussed above, one can take comfort in knowing that victims and defendants are represented by appropriately experienced attorneys.

But herein lies the paradox in this part of the book. Since attorneys must be highly qualified in order to be victim advocates at the ICC, it is doubtful that they need much of the advice dispensed in this section, which any seasoned trial attorney has learned through experience. For example, Funk suggests that victim advocates construct an order of proof to show the evidence supporting each of the elements and how the evidence relates most directly to the victim's case,⁵⁰ that they create a “trial notebook” reflecting witness preparation and evidence,⁵¹ and that they conduct interviews based on a set of basic guidelines, such as the use of an interpreter when the interviewer and subject do not speak the same native language (he also appropriately cautions that victim representatives should expect that witnesses will be cross-examined about their interactions and interviews with the victim representatives).⁵² Funk even includes tips on how to conduct a direct examination,⁵³ a skill that lawyers trained in the United States learn in law school. Based on the qualifications required for their appointment, one can only hope that victim representatives already know how to conduct a direct examination by the time their witness is on the stand.

Nonetheless, for attorneys from civil law countries without a tradition of oral presentations of evidence, as opposed to attorneys from common

⁴⁷ Pena, *supra* note 43, at 501 (“[Victim participation] can lay the foundation for reconciliation in the communities. This is an essential part of the legacy that international tribunals will hopefully leave in the countries torn by conflict where the ICC operates”).

⁴⁸ ICC Rule of Evidence and Procedure 90(6).

⁴⁹ International Criminal Court, Regulations of the Court, Regulation 67, ICC-BD/01-01-04 (2004); FUNK, *supra* note 5, at 94.

⁵⁰ FUNK, *supra* note 5, at 158.

⁵¹ *Id.* at 164.

⁵² *Id.* at 139, 171–73.

⁵³ *Id.* at 193.

law countries, this textbook trial advocacy advice is worth studying. Moreover, Funk's primer on how best to represent victims is seasoned with ICC case law and meaningful insights that all ICC victim advocates need to know in order to be effective. For example, although victims are, by article and rule, co-equal "participants" in ICC proceedings, the Trial Chamber evaluates requests to participate in the trial on a case-by-case basis.⁵⁴ To that end, Funk advises victim advocates to prepare narrowly tailored arguments as to why the Trial Chamber should allow them to participate in a particular proceeding.⁵⁵ Funk also discusses the challenges of preparing for complex representation of a group of victims.⁵⁶ While group representation raises a number of potential pitfalls, including potential conflicts of interest, it is also far more efficient than trying to coordinate the representation of numerous victims with multiple counsel, and typically results in better written briefs and oral advocacy to the Trial Chamber.⁵⁷

Funk also makes a valuable suggestion based on the philosophies underlying the Nuremberg, Rwanda, and Yugoslavia tribunals: victim advocates should contribute to "trial records" by offering testimony or documentary evidence that not only contributes to the quantum of proof in a particular case against a particular defendant, but also completes the picture for the history books by showing the international community how the crimes fit into the historic record underlying a particular event.⁵⁸ These "chapeau" or "macro" events related to the offense—for example, that civilians in a given town were attacked by soldiers on a given date—may apply to a number of cases pending before the ICC. The Trial Chamber would make factual findings as to these events that were distinct from the conduct of the particular defendant and the ultimate determination of guilt or innocence in later proceedings. The general factual findings about the event would apply to future proceedings concerning particular defendants charged with acts arising from this event, and—just as importantly—would educate the world community, streamline the proceedings, "and provide future generations with one central source summarizing the macro events occurring at the time of the charged offenses."⁵⁹ Funk asserts that "of all the claimed benefits of international justice, the creation of a historical record, tested in court and subjected to adversarial examination, stands out as most unambiguously invaluable."⁶⁰ This reviewer agrees.

⁵⁴ *Id.* at 90.

⁵⁵ *Id.* at 91.

⁵⁶ *Id.* at 105.

⁵⁷ *Id.* at 109.

⁵⁸ *Id.* at 131.

⁵⁹ *Id.* at 134–35.

⁶⁰ *Id.* at 135.

Funk recommends that a victim advocate compile a “dossier” summarizing victims’ experiences and evidence.⁶¹ This file could include forensic documentation, evidence, and expert reports, and could serve to secure testimony that may not be available in future years.⁶² There are a number of potential bases to incorporate a dossier into the record at various stages of ICC proceedings, and Funk offers a series of helpful suggestions about when and how victim advocates should submit this to the Trial Chamber and the Office of the Prosecutor.⁶³

Finally, Funk encourages victim advocates to develop a theory of the case, articulating how the accused victimized the individual, how the crime affected the individual, and why the court should take additional actions on the victims’ behalf.⁶⁴ Funk further urges victim advocates to request that some of the victims personally address the Trial Chamber at the time of sentencing, in order to “put a human face on the inhumane acts of the convicted perpetrator.”⁶⁵

Are these points obvious to the experienced practitioner? Maybe. But they bear repeating, especially to advocates in a court that seeks to dispense justice for victims of the worst of the world’s crimes.

In spite of a slow start and the challenges it will continue to face, the ICC has great potential to be a means for global criminal justice in a world that has too many times turned a blind eye to atrocities. Victim representatives can help the ICC to reach its full potential even while they “help victims regain some sense of control over their shattered lives.”⁶⁶ Meaningful victim participation is sound public policy in that it creates a complete historic record of victim abuse and, with the appropriate procedural safeguards, does not diminish procedural fairness to the parties. For all of these reasons, T. Markus Funk’s *Victims’ Rights and Advocacy at the International Criminal Court* is a valuable read and resource for those who care about international justice.

⁶¹ *Id.* at 137–38.

⁶² *Id.* at 139.

⁶³ *Id.* at 140–43.

⁶⁴ *Id.* at 152.

⁶⁵ *Id.* at 227.

⁶⁶ *Id.* at 229.