



The Nexus between Justice and Victim Involvement: A Comprehensive Analysis of the ICC's Approach

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Abstract

This paper examines the concept of Victim Participation in the International Criminal Court (ICC) and its impact on international justice. Victim Participation, enshrined in the Rome Statute, grants victims a role in ICC proceedings, departing from earlier international tribunals. The paper discusses the rise of Victim Rights globally and its challenges, including a growing number of participation applications. It addresses concerns about balancing victim claims, accused's fair trial rights, and evidence protection. While emphasizing the importance of Victim Participation, the paper underscores the vital role of Victim Participation in the ICC, providing a platform for victims' voices to be heard and contributing to the Court's credibility and success and for a more systematic approach to ensure fairness and maintain the ICC's credibility.

Keywords: Victim Rights; Victim Participation; ICC: International Criminal Court

Abbreviations: ICC: International Criminal Court.

Introduction

The International Criminal Court (ICC) has a comprehensive system of justice that recognizes the rights of victims. The Court recognizes victims as genuine parties in its proceedings, notwithstanding the fact that their rights are conditional on the promises of a fair and impartial trial. It is a rather new system that has been introduced in International Criminal Proceedings, through the Rome Statute, yet it has been accepted in a hesitant manner by the international committee. However, given the grave crimes that have been committed in this century which are unimaginable to such an extent, that it had to be textualized in the Rome Statute's preamble, [1] this concept of Victim Participation's introduction was extremely essential. This statute has placed the utmost importance on the victims, and as a result has

placed a rather broad and inclusive rights for the victims who are willing to go forward before the ICC. This has resulted in the inclusion, for the first time ever, in international criminal law, for the victims to have the capacity to voice the opinions about questions pertaining to their personal interests, the validity of a case, and the decision to sanction an investigation as enshrined in Article 68(3) of the Rome Statute. This paper will discuss and analyze the scope of this section and question how it will influence the sentencing and the penalty all the while clarifying the roles of the victims and the right, in the ICC. Additionally, the paper will present arguments which aim to ensure a fair trial.

Victim's Right

Before going ahead with the concept of victim participation, it will be essential to understand the term 'victim' as per the Court. Rule 85(a) of the ICC Rules of

Procedure and Evidence outlines the concept of Victims. The ICC Chambers has used a different interpretation to this concept. However, it is essential that the person needs to have been harmed directly or indirectly and the harm needs to be linked to the offense which is charged against the accused [2]. The author feels that the phrasing may suggest that, in theory, any individual can be regarded by the Court to have suffered because of these crimes which falls under the Court's purview and if the situation can be shown to the Court that these aforementioned actions are what caused the harm to occur.

Recognizing the victims' rights is one of the most significant improvements achieved by the international criminal justice system. In addition to being a new phenomenon, in the international field, and an innovative practice, these rights confront the Court with a major difficulty that it has already had to face in earlier sessions. The clause has been praised as a major accomplishment in that it departs from the conventional approach and instead includes a component of victim justice as part of the fair trial requirement in the ICC Statute. Contrary to what is known about the criminal tribunals that preceded the ICC, particularly the military tribunals in Tokyo and Nuremberg, there was no precedent for the incorporation of victims' rights, as we find in the Rome Statute, in their legislation, in their practise, or in any case law. Since the victims were not regarded as a legitimate and integral part of the process, they were not given their own place and were limited to testifying as witnesses in these tribunals [3].

This concept of Victim Participation, however, is not a new notion in the domestic field. Many countries, which follow the civil law system, allowed for victim participation. Victims in these countries are allowed to join the trials as a "subsidiary prosecutor" [4]. In these nations, the victim has the right to request investigative measures, analyze the prosecution's case against the defendant, make statements, offer evidence, question witnesses, and deliver closing arguments [5]. It's inclusion in the Rome Statute is therefore a remarkable feature and will guarantee that victims' interests, Since victims' interests should be given the highest priority in international criminal justice, its incorporation in the Rome Statute is notable and will guarantee that they are taken into consideration. Additionally, the involvement will aid in the restoration of victims' dignity and the discovery of facts and evidence that may be utilized in court. The victim's right fall under mostly three separate categories which are right to protection, participation and reparations.

Rise of the Rights

The Tokyo, Yugoslavia, Nuremberg tribunals did not include the victim's rights in any spectra and their interests

were discarded. They were only permitted to serve in the capacity as prosecution witnesses. The ICC was established to make perpetrators of mass crimes responsible to their victims, which they were failing to do. Hence the rise of the Victim Rights. It arose mostly due to the lack of attention being paid to the victims who were continuously being ignored and marginalized along with the Victim Right's movement, which I believe played the biggest role in persuading the drafters to enshrine such a right in the Statute.

In the 1960s, the victim rights movement was started with the intention of raising awareness of victims' experiences and advocating for victims' rights, "for an enhancement of the role and rights of crime victims during the criminal justice process" [6]. Over the past few decades, the movement has gathered ground, with nationwide and international success. In recent years, the movement has had the most influence in nations with law systems which follow the common law. In comparison to countries with civil law jurisdictions, victims' rights have often been much less protected in these nations. In truth, most civil law regimes have traditionally granted victims significant participating rights. In countries such as Argentina, the victims have the option to get themselves a "victim-prosecutor" to act on their behalf as well [4]. The victim-prosecutor is permitted to submit statements, offer evidence, cross-examine witnesses, evaluate the evidence against the defendant, review suggestions to the investigating judges, and make closing remarks [4].

Common law on the other hand makes both the parties go against each other, without allowing any sort of third party, in this context, the Victims, to have a say. They only have a role of a witness. This system is hugely unfair. The victims are the ones who are the most affected and yet they do not have the power to help their case. They are the one most affected yet, they can't consult the prosecutor, have says in their own pleas. This leaves them feeling more vulnerable and helpless when they are already in such a traumatic situation. They are being rendered helpless, speechless, and disheartened, which only makes their suffering seem worse. The addition of victims' rights in the Rome Statute of the ICC is nothing short of momentous in this perspective.

Even in the domestic level in the US and the UK the demand for victim rights and their right to be heard at public proceedings and having some influence in their prosecutions has been met with a huge success. The domestic achievement of the victim rights movement spurred victim rights organizations to undertake worldwide efforts and resulting in the rights being conferred by the UN in the Basic Principles of Justice for Victims of Crimes and Abuse of Power. In addition, these principles encouraged States to take up steps to facilitate victims' ability to obtain justice by "taking measures to minimize inconvenience to victims,"

and “avoiding unnecessary delay in the disposition of cases” [7]. The UN Commission on Human Rights also adopted guidelines like this to provide equal and effective justice to all victims and make sure they are repaid for the harm that was caused to them. This might have been the much-required catalyst for the growth and increase the importance of this right as it is further enshrined in the Humanitarian law which only strengthens the rights of the Victims and help them in their participation.

Access to the Rights of Participation

The ICC’s founding articles’ extensive wording on victim involvement shows that the framers planned to provide judges significant leeway in developing the Court’s victim participation system. This would allow them to form case laws as per their convenience and when required. However, this may also question the notion of a fair trial and reduce it to a privilege.

Now, given the flexibility of the courts, the author feels that, the issue of clogging is bound to happen. As a result, the Court and the protection of the defendant’s right to a fair prosecution are seriously threatened by the volume of petitions that are filed for victim rights. Which is in fact true, as per the statistics received from the ICC, 12,000 applications were filed up until April 2013 [8]. Even though this record is from almost a decade ago, rest assured, these numbers have only gone up.

Resources from the Court’s and the necessary teams and offices are expended in an excessively high rate throughout the application procedure. The job of assessing hundreds of application forms, often while a trial is still in progress, substantially hinders the defense since it diverts resources from trial strategy and the preparation of the case to the assessment of applications. One perfect example would be the case of *The Prosecutor v Jean-Pierre Bemba* [9]. The Bemba case dealt with the charges of Crimes against Humanity and War Crimes. This resulted in multiple applications coming through and has had the highest number of participants. By setting a strict deadline for submitting participation requests, the Trial Chamber tried to solve the problem of applications clogging the system. The prosecution stage of the trial, when the defence was completely preoccupied with the everyday preparation of the ongoing cases and investigations, caused the defence to continuously struggle since they had to deal with a significant number of applications [9]. Considering the Bemba [9] experience, other court chambers have adapted their strategies, establishing in advance structures for victims’ participation that ensure consistency and efficiency of procedures [10]. However, the issue of applications overloading the system still exists.

The question arises how to deal with this issue. The court in its power, right now is failing to address this issue. For eg. A two-tier method was chosen in situations involving a comparable case in Kenya (*The Prosecutor v Kenyatta*), which exempted the chamber and the parties from having to review each victim participation application. The Trial Chamber decided to employ a split model: participation through a Common Legal Representative, for which just a straightforward registration procedure with the Court’s Registry was necessary, with the CLR being able to examine eligibility, personal involvement, submitting opinions and concerns directly. This entailed the necessity of complete identification of the parties and a thorough application [11]. The Chamber believed that the distinction was required to protect the needs of the accused for a fair trial by significantly decreasing the number of applications for review, while still allowing the participation of victims who, out of security issues, would not be capable or willing to undergo the comprehensive application procedure [12].

The court tried implementing a workable solution and yet failed. It tried to impose strict deadlines and group the applications. These only denied fair justice to the victims. Setting a deadline excludes victims who have never been able to apply or who lack the resources and ability to complete the requirements, which goes against the fundamental purpose of the provision. There are deadlines that restrict the victim from aggressively asserting any participatory rights or even the right to a fair trial in question. The two-tier model is more practical and less resource expensive, but also collectivises the participation process. Only the CLR will engage with the individual victim at some time throughout the proceedings, notwithstanding the vast amount of victim participants who select the registration route. This involvement is essential for giving individual victims a personal perspective as they work to get justice. The victim will be scarcely seen as a participant.

Exercise of the Right

Once a certain stage of proceedings is met and are deemed acceptable, the procedure for the victim rights can be exercised, but in a certain manner “which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial” [13].

The Office of the Prosecutor may use the right to participate at any time throughout the Court’s proceedings. There are clauses that specifically mention the rights of victims. Such as, during the inquiry phase, victims may provide the prosecutor with information *proprio motu*, in line with article 15 (3). When the Prosecutor presents a request for authorization to investigate, they may also offer their views before the Pre-Trial Chamber. If the jurisdiction

of the Court or the admissibility of the case is contested, victims may offer their views throughout the process or trial stage as such, in line with article 19 (3) [1]. Finally, victims may appeal a remedies order during the reparations stage in line with Article 82(4) [1].

Now arises the issue that comes in the inquiry or investigation stage. Several groups of victims will be present at various phases. At the investigation stage there will be the victims of the situation, the second stage will have victims of the facts, who will be charged by the prosecutor against the alleged crimes. And last not least, the third group will become those who have directly become the victim of the guilty person and have demonstrated that the circumstances leading to the accused's conviction has caused them harm [14]. The prosecutor mostly focuses on the last group and the justice provided to the former two groups will always be considered unjust compared to the last one, and understandably so.

Nonetheless, victims should always file their petitions at the start of the inquiry, before the stage of the proceedings in which they intend to exercise their claims. However, this becomes difficult due to the lack of transparency, which is something the court needs to work upon and publicize their investigation to a certain extent, especially where it is needed most by the victims.

However, the case-by-case approach which the court takes in dealing with this issue to ensure fair trials is effective, yet the right's become a privilege after a certain point. Depending on the use of prosecutorial independence in each unique situation, they could be allowed. It may be a sign of a privilege if the decision of the victims' rights is left to the discretion of the judiciary, if those rights rely on the particular facts of the case, are only partially given, and are subject to conditions set by a Chamber [15]. Although the Court appears to be dedicated to the notion of fair treatment for all, it is uncertain what exactly the parameters of this idea of fairness may be since the judiciary's discretion ultimately determines the set of legal "rights" and, thus, the nature of participation. A fundamental set of participatory rights that are consistently provided would need to be identified if there were a universal element of fairness that applied to all participants in order to increase the consistency of the Court's approach [16,17].

The Issues with Victim Participation

One of the most obvious issues caused by the ICC's participation structure is striking a balance between victim claims as well as their other interests in criminal proceedings. It might be argued that these involvements conflict with the accused's right to a fair trial and disrupt the balance between

the prosecution and defence. This pertains to protective measures and their potential influence on the right to be heard, primarily in the context of witness protection. However, it might also be a relevant issue concerning victim participation in legal proceedings. Additionally, it goes against the prosecutor's desire to protect the evidence and include the victims as witnesses. Furthermore, the public's participation in a public hearing that offers a thorough evaluation of the administration of justice may be thwarted by victim involvement, especially if it comes with the stipulation of protective measures [18].

There is a further problem unique to the ICC as a treaty-based agency, namely the member nations' interests in expediting trials and limiting expenditures and expenses. Early victim participation in the investigation phase may also conflict with the Prosecutor's objectives in conducting an objective, unbiased, and confidential inquiry. When giving access to victims, courts must balance these competing interests, particularly when establishing the scope and modalities of involvement. The problem of balancing interests may also be understood in a larger perspective when addressing general features of the aims of punishing and sentencing in international criminal law.

The uncertainty of how to handle victims who are relevant witnesses is another essential problem to consider regarding victim involvement; this issue arises and is particularly evident and relevant in international criminal law proceedings, that it is heavily dependent upon victim testimony. There have been further criticisms, mostly by NGO's and Victim's organizations, that the victim's dignities were not respected when they testify before the tribunals. "If one of the ultimate aims of international justice is to restore victims' dignity, this objective has obviously still not been reached - far from it" [19].

The ad hoc International Criminal Tribunals for the ICTY and ICTR had to deal with the issue of excessive victim instrumentalization by the parties, whereas the ICC will have to deal with the far more difficult dilemma of admitting people to participate in the proceedings as victims who are also potentially important as witnesses. Both the Statute and the Rules permit victims to take part in the trial as witnesses. A person who takes part in the ICC proceedings as a victim may lose their status as a witness, and it is very possible to conclude that their level of participation should not go so far as to preclude them from serving as a witness. However, even if victims can testify as witnesses, their evidence may be somewhat clouded due to their apparent prejudice and the obvious stakes they have in the proceedings' result, particularly with reference to reparations. Thus, it becomes partly clear why the prosecutor is so opposed to early victim participation.

In 2008, the Trial Chamber 1, addressed the matter of victim-witness dual status, stating that their status would depend on whether they were called as witnesses during the proceedings and that witnesses would not be generally barred from participating as victims as this would “be contrary to the aim and purpose of Article 68(3) of the Statute and the Chamber’s obligation to establish the truth” [20]. It also must be proved on a case-by-case basis on “whether the participation by a victim who is also a witness may adversely affect the rights of the defence at a particular stage in the case” [20]. However, the judges did not go into detail on what steps may be taken to protect these rights.

Remedies to Uphold a Fair Trial

Even though the ICC Statute does not mention a stay of hearings, the Court recognizes it as a last-resort procedural option [16]. This conclusion is important as it underlines the need of a fair trial along with the fact that it supports the suspect’s claim to a fair trial. If a victim’s “right to a fair trial” is taken away if a fair trial for the accused is not possible, there can be no distinct right to a fair trial for the other victim parties in the trial [3]. The Chambers should also not interfere in the Prosecutor’s investigation unless absolutely required as this may hinder him from his objectives. Evidence’s can always be presented by the victims themselves.

The main focus of a high threshold is based on the argument of the inability to reconstruct a fair trial despite using every enforcement tool at one’s disposal to assure it. The argument is that postponing legal actions may hinder the administration of justice in any particular instance and jeopardise the overall objectives set in the preamble of the ICC Statute [21]. The requirement to adopt interim enforcement measures is beneficial to all parties involved, and especially for the accused who wants a speedy determination on their case rather than potentially enduring delays [22]. The emphasis on seeking justice has some merit given the Court’s commitment to establishing long-lasting respect for and enforcement of international law. In the Lubanga [23] case, however, the difficult method of imposing sanctions on the Prosecutor—a crucial member of the Court—to ensure adherence to correct conduct—only served to exacerbate the unfair circumstances for the accused. The Prosecutor’s activities caused unnecessary delays, leading to the first decision [23]. Making the accused wait while the different Court organs resolve power struggles through disciplinary actions seems a bit excessive in light of the Prosecutor’s responsibility to safeguard the accused’s right to a fair trial. The reasoning only makes sense when put in the context of the Lubanga case’s political history as the ICC’s first-ever trial. Such situations make the logic easier to comprehend. If the first ICC case resulted in the accused’s release owing to prosecution misconduct, it would not only have been a

serious scandal but also a tremendous defeat for international justice in general.

Given the interdependence of the terms “fair” and “impartial,” it is crucial to guarantee both in order to ensure a fair trial. Only impartially delivered justice may be regarded as really fair [3]. If such issues cannot be addressed through disqualification applications, there is no opportunity to argue for a legally enforceable right to a fair and impartial trial when examining this decision in the context of the fair trial concept provided in Article 68(3) of the ICC Statute. The disagreement concerning the victims’ rights to ask for a judge to be removed from office, even while it does not directly touch Article 68(3) emphasizes the limitations of victim involvement.

Conclusion

The words when spoken by a single victim will illustrate the significance of the victim participation in the ICC. The words of a single victim will help not only one, but an entire group of people. It provides a meaningful forum for the voices of victims to be heard. The ICC was established to make those responsible for mass murder accountable to the victims. The success and credibility of the ICC depend critically on its initiatives to promote victim involvement and highlight victims’ interests. The ICC relies on victims’ wish to testify in order to successfully prosecute offenders and get convictions. Several victims will decide not to take part if they don’t think the Court cares enough about their rights and goals. The Court’s remedial function is made more effective through victim participation. Even if they are limited by the requirements of a fair and impartial trial, these rights should serve as a watershed moment in the Court’s intended international criminal law system. However, the ICC must come up with a more thorough, systematic, and defined strategy toward victim participation if it hopes to uphold its commitment of giving victims’ rights substantial consideration.

References

1. (1998) Rome Statute of the International Criminal Court.
2. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1432.
3. Anni P (2015) A Victim’s Right to a Fair Trial at the International Criminal Court? Reflections on Article. *Journal of International Criminal Justice* 13(5): 951-972.
4. Weigend T (1999) Germany Rules of Criminal Procedure, in CRAIG BRADLEY, “CRIMINAL Procedure: A Worldwide Study. pp: 202-203.

5. (1999) U.N. Office for Drug Control & Crime Prevention, Handbook on Justice for Victims. pp: 39.
6. Sam G (2003) Victims and the International Criminal Court: three major issues. *International Criminal Law Review* 3(4): 345-367.
7. (1985) Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, G.A. Res. 40/34, Annex 4, U.N. Doc. A/RES/40/34.
8. ICC 'Twenty-Third Diplomatic Briefing, Figures from the Registry', 30 April 2013.
9. The Prosecutor v Jean-Pierre Bemba, Case No. ICC-01/05-01/08-1590-Corr.
10. The Prosecutor v. William Samoei Ruto Case No. ICC 01/09-01/11-17.
11. The Prosecutor v. Uhuru Muigai Kenyatta Case No. ICC-01/09-02/ 11-498.
12. SáCouto, Susana, Thompson KC (2014) Regulation 55 and the Rights of the Accused at the International Criminal Courts. *Hum Rts Brief* 21: 17.
13. (2008) Darfur Situation (Pre-Trial Chamber I Decision on the Requests for Leave to Appeal the Decision on the Application Participation of Victims in the Proceedings in the Situation), ICC-02/05-121, pp: 6
14. Paulina VG (2006) The role of victims in International Criminal Court proceedings: their rights and the first rulings of the Court. *Sur. Revista Internacional de Direitos Humanos* 3: 18-41.
15. Newcomb HW (1917) Fundamental legal conceptions as applied in judicial reasoning. *The Yale Law Journal* 26(8): 710-770.
16. The Prosecutor v. Abdallah Banda Abakaer Nourain Case No. ICC-02/05-03/09-410.
17. Baumgartner E (2008) Aspects of victim participation in the proceedings of the International Criminal Court. *International Review of the Red Cross* 90(870): 409-440.
18. Stefanelli v. San Marino, no.35396/97, § 19, ECHR 2000-II
19. (2003) Reporters without Borders, Victims' Guide to the ICC, Reporters without Borders/Damocles Network, Paris.
20. (2008) The Prosecutor v. Thomas Lubanga Dyilo ICC-01/04-01/06-1119, Trial Chamber I Decision on Victims' Participation.
21. (2010) Bemba (ICC-01/05-01/08-807-Corr), Trial Chamber III.
22. (2012) Ruto and Sang (ICC-01/09-01/11-460), Trial Chamber V.
23. (2012) The Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06), Trial Chamber I.

