



## THE RIGHTS OF VICTIMS AND INTERNATIONAL CRIMINAL COURT: A PRELIMINARY STUDY

**Dr. Santosh K Upadhyay** (Assistant Professor, Law Centre II, Faculty of Law, University of Delhi)

**Dr. Neetu** (Assistant Professor, Campus Law Centre, Faculty of Law, University of Delhi)

### INTRODUCTION

The protection of victim has emerged as a new topic of any criminal justice administration system. Traditionally, this situation was not there and the focus of any such administration was mostly revolved around accused. The inherent logic that accused must be granted some rights and protection to ensure free and fair trial was the edifice around which the castle of most criminal processes were built. These processes were considered basically an operation between prosecutor (state) and the accused, and it did not take into account the victim's position or interest.

The need of protection of victims was slowly recognised and the corresponding provisions were incorporated in some domestic jurisdiction. At the international level also, the International Criminal Court (hereinafter mentioned as ICC) has also incorporated some provisions to protect victims from any adverse consequences. This paper is an attempt to understand these measures of victim's protection at ICC. When this Court was established, various models were contemplated. One purpose of ICC is to provide redress to the victims of atrocities, it is an obvious expectation that ICC should have provisions for the extensive protection of the victims.

The Rule 85 of the ICC Rules of Evidence defines Victim for the purposes of ICC Statute. It states that victim means “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court” and it may include “organisations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art, science or charitable purposes” and other places and objects like, historical monuments, hospitals of historical importance or of humanitarian purposes.<sup>1</sup> This is the inclusive definition and thus, have open space to further include other objects of like character.

In this background, the study is a modest attempt to understand the rights of victims in ICC in respect of three heads: victim protection, victim participation and victim reparation.

### I. Protection of Victims

Victim protection is difficult and demanding task in the international criminal jurisdiction. Considering the nature of crime and the position of ICC, there is a need to develop a thorough victim protection mechanisms. Many factors related to the victims like age, gender, health, nature of crime (particularly sexual crimes) and his or her vulnerability need to be taken into account. The need for the protective measures goes even beyond this minimal necessity. Most of the crimes, as well as the circumstances in which the ICC operates, are such that victims are very anxious and may refuse to collaborate unless substantial protective measures are taken. To coerce a person to appear and give evidence before a court is not a realistic option. Therefore, there is need to have wider umbrella of protective measures under ICC to complete the prosecution in fruitful manner.

The Rome Statute, its Rules of Procedure and Evidence and the Regulations of the Court and of the Registry contain provisions for victim protection. These provisions attempt to ensure protection and participation of victims in the proceedings without any fear of retribution or suffering of further harm. Article 68(1) of the Rome Statute obliges ICC to take all necessary steps for safety and privacy of victims.<sup>2</sup> Further, Article 68(2) is an exception to the principle of public hearings as mentioned in article 67. Thus, the Chambers of the Court may, to protect victims, conduct any part of the proceedings in camera. They can also allow the presentation of evidence by electronic or other special means. Such

<sup>1</sup> ICC, Rules of Procedure and Evidence, Rule 85.

<sup>2</sup> ICC Statute, article 68(1)

measures are generally implemented in the case of a victims of sexual violence or a child. The ICC may also order such procedures in other cases also after considering the whole facts of the case.

The ICC Statute under Article 43(6) also talks about establishment of a Victim and Witnesses Unit within the Registry.<sup>3</sup> The unit is to provide security, counselling and other appropriate assistance to the victims who appear before the Court. It also provides protection to those who are at risk on account of testimony given by such witnesses. The Unit is composed of the staffs that have expertise in trauma, including trauma related to crimes of sexual violence. The mandate of Victims and Witnesses Unit (hereinafter mentioned as VWU) consists of protecting and supporting those victims who appear before the Court.

The VWU is a neutral service provider and does not differentiate between prosecution and defense. The unit does not identify witnesses or victims on its own and it acts upon referral or request. One can request the services of the VWU at all stages of proceedings, from pre-trial/investigation to post-trial. In this regard, the VWU has developed protocols and cooperation agreements with a number of national and international partners.

This Unit also takes care of the individual protective needs of the victims. It also provides various logistical arrangements and helps victims in tardy immigration procedures just to ensure the timely and secure appearance of witnesses and victims in Court. Rule 87 of the Rules of Procedure and Evidence also provides many measures for the protection of victims. As per this, a Chamber may order for the protection of the victims. This is done by the chamber upon the motion of either prosecutor or defence or after consulting the VWU. The Chamber generally seek the consent of the person for whom the protective measures are sought.

## II. Participation of Victims

Article 68(3) of the Rome statute provided that if personal interests of the victims are affected, the Court may permit their views and concerns to be presented and considered at the stages of the proceedings as determined appropriate by the Court.<sup>4</sup> However, such activities are undertaken in a manner that will nowhere compromise or in way inconsistent with the rights of the accused to fair and impartial trial.<sup>5</sup> Thus, the participation of the victim in any proceedings is mostly depends on the discretion of the concerned chamber because of the facts that the term 'personal interests' have not been defined anywhere and it solely depends upon the subjective assessment of the judges as to appropriateness of the victim's participation.

The other provisions related to the participation of victims in the Court proceedings are contained in Rules 89 to 93 of the Rules of Procedures and Evidence of the Court. Victims can make written application to the Registrar in favour of his participation in the trial.<sup>6</sup> Registrar shall further transmit this copy to the concerned chamber and also to the Prosecutor and defence. However, it is the right of the chamber to decide upon the appropriate way in which the participation is ensured. However, it is the responsibility of the chamber to ensure that this participation should not be the prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial.<sup>7</sup>

The Chamber may reject the application if it considers that the person is not a victim whose crime falls within the jurisdiction of the Court or in situation where appropriate criteria as set up under article 68 (3) is not fulfilled. Individuals who submit applications to participate in proceedings before the Court must demonstrate in their application that they are victims of crimes under the competence of the Court in the proceedings commenced before it. The Victims Participation and Reparations Section of the ICC has prepared a standard form for victims to encourage them to participate in the proceedings.

---

<sup>3</sup> ICC Statute, article 43(6)

<sup>4</sup> Article 68 (3), ICC Statute

<sup>5</sup> Ibid.

<sup>6</sup> Rule 89, ICC Rules on Evidence and Procedure

<sup>7</sup> Article 68 (3), ICC Statute

Other person can also fill the application in the name of the victim if the victim is child or other one suffering from any kinds of disability.<sup>8</sup>

Victims are free to choose their legal representatives who should be equally qualified as the counsel for the defense (this may be a lawyer or person with experience as a judge or prosecutor). S/he should be fluent in one of the Court's two working languages (English or French). There is also a provision of shared legal representative in case of large number of victims. If the victims fail to appoint a shared legal representative, the Chamber may ask the Registrar to appoint one or more shared legal representatives.

The Victims' Participation and Reparation Section is responsible for assisting victims with the organisation of their legal representation before the Court. When a victim or a group of victims may also request financial aid from the court to pay counsel. Counsel may participate in the proceedings before the Court by filing submissions and attending the hearings on behalf of the victims.<sup>9</sup>

There is also a provision for notification to victims or their legal representatives. The Registry, and particularly the Victims Participation and Reparation Section, generally notifies the development in the proceedings to the victims. Specifically, the Section must notify those victims who have communicated to the Court in a given case or situation, against any decisions of the Prosecutor not to open an investigation or prosecution. The purpose of the notification is to enable a victim to file submissions before the Pre-Trial Chamber competent to hear the petition. The same notification also is required before the confirmation of charges hearing in the Pre-Trial Chamber in order to allow the victims to file their submissions and present their views. The decisions of the ICC also then sent to those victims who had participated in the proceedings. The Victims Participation and Reparation Section has wide discretion to use all possible means to give adequate publicity of the proceedings before the Court.

### ICC Jurisprudence in Respect of Victim's Participation

The record of victim's participation in the ICC has been a pathetic history and a vibrant and successful victim participation is still a distant dream. A study of victim's participation in ICC that was conducted by the War Crimes Research Office of American University Washington College of Law (WCRO), described that the ICC system has 'consumed a substantial portion of the Court's resources' while delivering 'largely hypothetical' participation to a 'limited number of victims' making it questionable whether the Pre-Trial Chambers have struck a reasonably effective balance between the restorative goals of the ICC victim participation scheme and the [Rome Statute] drafters' concerns about efficiency and fairness.<sup>10</sup> Christine H Chung finds the reason of this pathetic condition somewhere in the legal texts of the Rome Statute 1998. He observed while commenting upon the Victim's participation:

"The right of participation granted in the Rome Statute therefore was both unprecedented yet consciously bounded. Victims obtained the status of 'participants' but not 'parties'. The RPE specified that at trials, for example, victims could be restricted to written submissions made by their legal representatives and would be permitted to question witnesses or experts or defendants, again through their representatives, only after submitting proposals to the Chamber and obtaining Chamber approval. Victims were curbed from obtaining forms of participation that they enjoyed as *parties civiles* in certain civil law systems. For example, they could not initiate prosecutions or compel the bringing of criminal cases, nor could they routinely obtain the evidence of the Prosecution or defence or call witnesses."<sup>11</sup>

---

<sup>8</sup> ICC website, victim participation, see [http://www.icc-cpi.int/en\\_menus/icc/Pages/default.aspx](http://www.icc-cpi.int/en_menus/icc/Pages/default.aspx)

<sup>9</sup> Ibid.

<sup>10</sup> War Crimes Research Office, American University Washington College of Law, Victim Participation Before the International Criminal Court, 5 (2007), Report.

<sup>11</sup> Christine H chung (2008) "Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?" New York University Journal of International human Rights, vol. 6 (3) pp. 460- 545, p. 465.

Probably, the first chance to interpret the laws of victim's participation that came before ICC was its investigation in respect of situation in democratic republic of Congo. The Pre-Trial Chamber I observed that participation by victims in the investigation was needed because victims are affected in general at the investigation stage. The participation of victims at this stage is needed to clarify the facts and to punish the perpetrators of crimes.<sup>12</sup> This Chamber narrowly interpreted its obligation to disallow victim's participation and opined that any such participation is not per se prejudicial to the right of the accused to free and fair trial.<sup>13</sup>

However, the Court in the case of the Lubanga has observed that to qualify to participate in the case, the victims applicants are required to establish a sufficient causal link between the harm they suffered and the crimes for which the Chamber has issued an arrest warrant.<sup>14</sup> However, this criterion has qualified four victims to get the chance of participation but further on Appeal stage their participation was curtailed in many ways. Further, in the investigation of the situation in Northern Uganda, the single judge trial chamber has talked about the test of 'intrinsic coherence' of the applicants claim to have suffered from the crimes within the scope of ICC jurisdiction.<sup>15</sup>

And the Judge found that only two of forty nine applicants have shown the required intrinsic coherence. Further, in Darfur situation, victim participation was agreed in respect of future defendants because no arrest has been made at the time of start of proceedings. Further, in this process, two stage qualification system envisioned. Thus, even the applicants that have been granted victim status would need to demonstrate, in relation to any future proceeding in which they might seek to participate, that participation would not be inconsistent with the rights of the accused. However, it is important to note that despite all these definitions, requirements set and other mechanisms evolved, the participation of the victims have been very low in the proceedings of the ICC.

### III. Reparation to Victims

Provisions related to the reparation to victims are mentioned in Rules 94 to 98 and article 75 of the ICC Statute. Article 75 of the ICC statute required Court to develop principles in respect of reparation. The reparation under international law has developed as a principle of customary norm that emerged from the state practice to compensate another state for the harms arise from the conduct of the paying state. The Permanent Court of International Justice (hereinafter mentioned as PCIJ) in the well known case of *Charzow Factory* observes that "reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed".<sup>16</sup>

This concept is known as *restitutio in integrum* and has been applied by tribunals in various ways. There are also other principles like, principle of necessity and the principle of causality that govern the cases of reparation. First, in general talks that any reparation should be proportionate to the injury caused that include both the moral as well as material injury, and according to second, the reparation should only address the direct injuries produced by an illegal act.

None of these principles finds specific mention in ICC statute but article 75(1) of the statute gives glimpse of proportionality and causality concept when it states that the Court may determine the scope and extent of any damage, loss or injury in reparation procedures. An expert may be appointed by the ICC to determine the scope and extent of the damages. The strict application of the principle of *restitutio in integrum* appears difficult for the ICC because of various factors. These include: the large numbers of victims and the amount of harm and the lack of fund at the disposal of the ICC.<sup>17</sup>

---

<sup>12</sup> Situation in the DRC, Situation No. ICC-01/04-101

<sup>13</sup> Ibid, Para 57

<sup>14</sup> Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-172-tEN,

<sup>15</sup> Situation in Uganda, Situation No. ICC-02/04-101, Decision on Victims' Applications for Participation. /0010/06, a/0064/06 to a/0070/06, a/0081/06 to 1/0104/06 and a/0111/06 to a/0127/06, para 15

<sup>16</sup> *Charzow Factory* Case PCIJ, series A, no. 17, pp. 47.

<sup>17</sup> [http://www.essex.ac.uk/tjn/documents/paper 1 general principles large.pdf](http://www.essex.ac.uk/tjn/documents/paper%201%20general%20principles%20large.pdf)



The ICC enjoys the power to order perpetrator to pay reparation to the victim. Pursuant to article 75, the ICC may lay down principles for reparation for victims. These principles may include restitution, indemnification and rehabilitation. On this point, the ICC Statute has benefited from all the work carried out with regard to victims, in particular within the United Nations.

The Court may order against a convicted person for failing to give appropriate reparation to the victims or their beneficiaries. This reparation includes the form of restitution, indemnification or rehabilitation. The Court may order reparations to be paid through the Trust Fund for Victims<sup>18</sup> which was set up by the Assembly of States Parties.

There is no strict time framework under which the victim should apply for the reparation and he may apply for the same at any time. There is also no compulsion that demand of reparation must be made from victim side and the ICC when thinks it appropriate may order reparation on its own. Victims, if he wishes to apply for reparations may do so by filing an application with the Registry, which must contain the information laid down in Rule 94 of the Rules of Procedure and Evidence. The Victims Participation and Reparation Section has also prepared a standard forms to make this process easier for victims.

The Victims Participation and Reparation Section is responsible for appropriate publicity of the reparation proceedings. These proceedings can even take place after the accused held guilty by the Court. The Court can grant individual or collective reparation, with respect to a whole group of victims or a community, or both. If the Court decides to order collective reparation, it may order that reparation to be made through the Trust Fund for Victims. Reparation can also be paid to an inter-governmental, international or national organizations.

#### **IV. Conclusion and Suggestions**

The plight of the victim was a driving force for the establishment of the ICC. It was established in the background of the widespread practices of impunity for perpetrators of the most serious international crimes and its consequences on the Thus the ICC Statute that predominantly focuses on the prosecution and punishment of perpetrators, also have provisions to the victims' rights.

However, the ICC's victim's redress mechanisms will have to overcome many challenges. They have to work extensively on how victims can access the ICC. The ICC Prosecutor is mostly involved in such cases where victims are too much in numbers and then it becomes important to be innovative in its approach. The rules for victim assistance at the ICC will definitely help facilitating the search for the truth in serious international crimes. But one should also be careful to protect the right to a fair trial.

Moreover, as a practical matter, it will also be critical to ensure that the rights of victims do not burden the administration of the ICC with bureaucracy, costs and delay. But one should also remain cognizant not to neglect the fact that the ICC has established a high standards of protection of the victims in comparison to many other domestic legal systems. If these rules would be seen to be fair and efficient, they may also become the standard for domestic lawmakers.

In light of this, the study makes the following suggestions.

First, there is a need to take into account the socio economic variations in the status of the victims and the court should remain more prone to take victims causes in a proactive manner.

Second, there should be an enhanced and efficient mechanisms to filter the application if there is a large number of such case.

Third participation, protection and reparation to the victims should be secured in a time bound manner and expeditiously.

---

[api.int/iccdocs/doc/doc1447971.pdf](http://api.int/iccdocs/doc/doc1447971.pdf)

<http://www.vrwg.org/VRWG DOC/2011 Sept VRWG Reparation Paper.pdf>

<sup>18</sup> See Rule 98, ICC Rules on Procedure and Evidence.