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Realizing Victims' Rights in International Criminal Law: A Critical Case Study Analysis

KRUTARTH VYAS¹ AND SAKSHI CHAPLOT²

ABSTRACT

Over time, the rights of the victims have become more visible in international law. They have changed their position from the almost invisible ones in the cases of the Nuremberg and Tokyo Tribunals to main ones in the International Criminal Court (ICC) and mixed tribunals. The ICC and hybrid tribunals' decisions are the most recent manifestation of this change which in its turn reflects a paradigm shift in international justice from the emphasis on states to the victims' rights. This text is concerned with the issue of victims' rights of participation, protection, and reparations in international criminal proceedings, and it wonders how far tribunals such as the ICTR, ICTY, ICC, and ECCC have put these rights into practice. The research uses a case study approach with the analysis of landmark judgments such as Akayesu (ICTR), Lubanga (ICC), and the Duch trial (ECCC) to sketch out the normative outline of victims' rights and highlight the practical difficulties in their enforcement. The paper tries to analyze that, even though international criminal law has come a long way to the point where victims are recognized as the holders of rights, the law enforcement is still far from being consistent and largely appears as a symbolic gesture. Therefore, to allow for the real participation of the victims in international justice, further reforms are indispensable.

I. INTRODUCTION

The position of victims in the context of international criminal law (ICL) has been noticeably changed over the last few decades. Post–World War II tribunals such as Nuremberg and Tokyo initially did not provide for victims' legal participation and, in fact, victims were invisible characters in the courts, only being considered witnesses without any rights.³ The primary aim of these tribunals was to punish the offenders and highlight the crimes committed historically, rather than to address the damage done to the victims.⁴

The creation of ad hoc tribunals in the 1990s, particularly the International Criminal Tribunal

¹ Author is a Student at Institute of Law, Nirma University, India.

² Author is a Student at Institute of Law, Nirma University, India.

³ *Charter of the International Military Tribunal*, art. 19, Aug. 8, 1945, 82 U.N.T.S. 279; *Charter of the International Military Tribunal for the Far East*, art. 13, Jan. 19, 1946, T.I.A.S. No. 1589.

⁴ M. Cherif Bassiouni, *Introduction to International Criminal Law* 691–92 (2d ed. 2013).

for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), was a turning point in the recognition of victims' rights. Although they did not formally establish victim participation, these bodies played a significant role in acknowledging the crimes committed with extreme consequences for the victims, especially with respect to sexual violence and genocide. A case in point is the decision in *Prosecutor v. Akayesu*, wherein the ICTR went on to set the benchmark by first identifying rape as a constitutive element of genocide, thereby the first step to the recognition of victims' rights within international law framework.⁵ Along the same lines, judgments of ICTY progressively recognized the extent of trauma that victims of war crimes and crimes against humanity suffered, notwithstanding the fact that their statutory framework did not grant participation rights.⁶

The establishment of the International Criminal Court (ICC) in 1998 is the landmark after which the greatest change could be seen. The Rome Statute marks the point at which it becomes a groundbreaking development in ICL as it explicitly provides for victims, rights both to participation and reparations.⁷ For the first time victims were no longer just observers, but they were given the opportunity to take part in the proceedings and influence them as well as seek redress of their grievances. The ICC's procedural setup has made it possible for thousands of victims to be able to give their views and concerns through their legal representatives such as in the case of *Prosecutor v. Lubanga Dyilo*, the first completed trial of the Court.⁸

The position of victims in tribunals like the Extraordinary Chambers in the Courts of Cambodia (ECCC) has also changed drastically. The ECCC established a "civil party" mechanism that allowed the victims to engage directly with the proceedings besides the prosecutors, thus, the mechanism mirrored the features of both international and civil law in terms of traditions.⁹ Still, these rights' implementation has not been devoid of controversies. Detractors maintain that the limitations in resources, the complexity and length of procedures, and the necessity to strike a balance between the rights of victims and those of the accused frequently result in tokenism rather than actual portrayal of participation.⁸

Nevertheless, the acknowledgment of victims' rights in ICL marks an ideological change from

⁵ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment 731–34 (Sept. 2, 1998).

⁶ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment ¶¶ 163–86 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

⁷ Rome Statute of the International Criminal Court arts. 68, 75, July 17, 1998, 2187 U.N.T.S. 3.

⁸ *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision Establishing the Principles and Procedures to Be Applied to Reparations (Aug. 7, 2012).

⁹ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/1004/006 (Oct. 27, 2004) (Cambodia). ⁸ Clara Sandoval, *Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the ICC on Victims' Rights*, 11 J. Int'l Crim. Just. 505, 506–07 (2013).

a victim-centered stance of justice. It embodies the change in international human rights law and transitional practice as well, where victimization accounts and testimonies are recognized as crucial inputs in the accomplishment of both accountability and reconciliation.¹⁰

A. Review of Literature

1. Surveying the Rise of Victims' Rights under International Law (and at the International Criminal Court)¹¹ - Author: T. Markus Funk

Through his detailed account, Funk charts the changing landscape of the rights of the victims; from the ancient days when the rights were clearly enshrined in the customary codes, through their obscurity in modern criminal justice to their revival in international law. One of the most important contributions of the ICC, as described by Funk, is the provision of direct victims' participation and reparations which, therefore, allows the integration of restorative justice into international proceedings. While acknowledging the ICC's innovative role, Funk conveys some doubts about its success. In particular, he mentions a number of delays, high costs, and modest results in the first cases, e.g., Lubanga and Katanga. The paper locates the ICC within the victimology landscape of the day, noting the court's potential to change the victims' status from being mere witnesses to becoming active in the justice processes. Notably, Funk illustrates the conflict between the idealized victim-centric justice and the Court's frailties, hence, he is supporting the call for reforms that would empower the victims by giving them a substantive role. The piece is an indispensable primer on the promises and difficulties in the international criminal law which is enforcement of the victims' rights.

2. The Victims of Victim Participation in International Criminal Proceedings¹² - Author: Charles P. Trumbull IV

This article is a critical inquiry to the idea that those in harm's way to take part in international criminal proceedings would indisputably be advantageous. Problematic as it seems, the Rome Statute of the International Criminal Court (ICC) which is a landmark represents a step change in granting participatory rights to victims under Article 68(3). Trumbull, then, proceeds by explaining that their involvement is more likely to cause extra expenses than to reap any benefits.

He writes that the participation may not only slow down the whole process but also cause courts

¹⁰ Pablo de Greiff, *Justice and Reparations*, in *The Handbook of Reparations* 451, 452–54 (Pablo de Greiff ed., 2006).

¹¹ Funk, T.M., 2015. Surveying the Rise of Victims' Rights under International Law (and at the International Criminal Court). *Eyes on the ICC*, 11, p.3.

¹² Trumbull, C.P., 2007. The victims of victim participation in international criminal proceedings. *Mich. J. Int'l L.*, 29, p.777.

to be overwhelmed with administrative tasks and to even sometimes bias defendants' rights. While seeming more provocative, he argues that victim participation may be at the same time a cause of other categories of victims to be harmed—specifically those whose cases may be not pursued due to lack of prosecutorial resources, and potential future victims that may be impacted by inefficiencies in deterrence.

To show the conflicts between the ideals of restoring justice and the nature of the adversary in the international trial, the article draws parallels with civil law systems. Finally, Trumbull calls for a re-assessment of victim participation by implying that the present models are more inclined to bringing about “victims of victim participation” rather than the actual justice.

3. The Protection and Rights of Victims under International Criminal Law¹³ - Author: Michael Bachrach

Bachrach's paper is a first step to tracing problems of victims' rights changes in international criminal law context and pointing out that these rights were recognized by the post-World War II tribunals and later international instruments. In this regard, he underlines that earlier situations, such as the Geneva Conventions and the Genocide Convention, didn't give much importance to victims' needs since they were mainly concerned with preventing crimes against humanity. Bachrach underlines the significance of the later movements, particularly the U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the van Boven Principles, as the most important sources which extended the ideas of restitution, compensation, and reparations. In addition to this, he explains that the respective tribunals of the ICTY and ICTR began to engage in victim protection activities to some extent, the Rome Statute of the ICC being the turning point in the introduction of direct references to victims in the different parts of the text. In the end, Bachrach is of the view that the protection of the victim could only be achieved by institutional commitment as well as international cooperation, which should be constant.

4. Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Right to Participate¹⁴ - Author: Jo-Anne Wemmers

One relevant point from the Wemmers' research is the changed model that the author uses in order to analyze the organizational concepts of the ICC as to the participation of victims instead of focusing on the text of the Rome Statute. This research is grounded in the psychology of

¹³ Bachrach, M., 2000. The protection and rights of victims under international criminal law. In *Int'l L.* (Vol. 34, p. 7).

¹⁴ Wemmers, J.A., 2010. Victims' Rights and the International Criminal Court: Perceptions within the Court Regarding the Victims' Right to Participate. *Leiden Journal of International Law*, 23(3), pp.629-643.

organizations and is very illuminating in terms of all the internal views that eventually will decide how victims' rights will be applied. The author comes across as rather analytical in showing the structured way in which the court tries to include the victims as a "legal discourse," which is the most visible way, and thereby through the lawyers of the victims who speak out their concerns on questions of law. Importantly, at the same time, though this participation is voluntary, authorities are thereby eliminated the option to deny victims access to a voice. However, it is the decision-makers who still maintain control. This is quite different from the "emotive" nature of participation that is characteristic of domestic common law courts. Though the nature of notification receives high appreciation, it is not viewed as a form of participation. The research, however, points to a gradual evolution where the courts' rulings are increasingly recognizing victim representatives as having the right to consultative status, entitling them to question witnesses and present evidence, which is a clear departure from mere expression.

5. The Gap between the International Criminal Court and Victims: Criminal Trial Reparations as a Case Study¹⁵ - Author: Yidou Yang

Yang 2023 study delves into the disconnect that still exists between the International Criminal Court (ICC) and the victims, with special emphasis on the reparations in the criminal trial. Saying that the rights given to the victims for a limited participation in the trial and the chance to apply for reparations after the sentence, are not enough, the paper goes on to explain that the core legal framework of the ICC is designed for retributive justice rather than restorative justice. This results in the system's preference for punishing the perpetrators over compensating the victims for the harm caused. The author state that the process of getting a fair compensation is still a challenge due to the existing limitations. These restrictions are enforced from aspects of the victim's legal identity and the internal operational issues within the ICC itself. Hence, the current compensation system of the ICC is structured in such a way that it is a barrier to the provision of effective reparations, which implies that the court's design has not fully appropriated its restorative potential.

II. THE GROWTH OF VICTIMS' RIGHTS IN ICL

Victims' rights in ICL have come a long way through a slow and sometimes patchy journey. At the early stages, the emphasis in international criminal law was on the identification and prosecution of the offenders, while victims were not acknowledged as a separate group with rights and interests.

¹⁵ Yang, Y., 2023. The Gap between the International Criminal Court and Victims: Criminal Trial Reparations as a Case Study. *Laws*, 12(4), p.72.

A. Early Post–World War II Tribunals

The first examples of international criminal law are the post–World War II military tribunals, such as Nuremberg and Tokyo, that dealt with the major war criminals who were responsible for the threefold offences of crimes against peace, war crimes, and crimes against humanity. These tribunals had a revolutionary effect in the area of the international legal framework concerning individual criminal accountability, however, they did not acknowledge the victims in any official capacity, nor did they grant them any rights or provide them with any access.¹⁶ The ideological underpinning of the tribunals was based on the retributive justice model that mainly revolved around the punishment of agents rather than the recognition of individuals or providing them with reparations.¹⁷

On the one hand, victims were the main source of evidence and they could only do so if they corroborated the charges made by the prosecution. The victims, however, were not allowed to disclose their suffering or ask for restitution in the meantime, nor were they capable of having a say in the judicial decisions rendered.¹⁸ The IMT Charter did not contain any provisions related to victim participation or reparations, and the performance of the court was under the full control of the states, thus highlighting the state-centric character of international criminal justice.¹⁹

The Tokyo Tribunal had almost the same structure. The tragic stories from Asia did not hinder the board from narrowing its focus to prosecute the “major war criminals of the Far East only,” thus ignoring individual victim experiences.²⁰ The point, as made by Antonio Cassese, was that the early tribunals perceived the state as the only subject of the international legal order, while the pain of individuals was, even then, invisible in law.²¹

In point of fact, those Nuremberg and Tokyo proceedings made a first step and a significant one at that, in assigning crimes against humanity the status of offenses against all human beings, and hence they opened the way for subsequent victim-centred developments, albeit in a roundabout manner.²² Their later role as a source of criticism and reform, especially in terms of the argument that justice without victim recognition is fundamentally incomplete, is their

¹⁶ *Charter of the International Military Tribunal*, art. 19, Aug. 8, 1945, 82 U.N.T.S. 279.

¹⁷ Antonio Cassese, *International Criminal Law* 7–8 (3d ed. 2013).

¹⁸ M. Cherif Bassiouni, *Introduction to International Criminal Law* 691–92 (2d ed. 2013).

¹⁹ *Id.* at 700–02.

²⁰ *Charter of the International Military Tribunal for the Far East*, art. 13, Jan. 19, 1946, T.I.A.S. No. 1589.

²¹ Cassese, *supra* note 2, at 9–10.

²² *Id.* at 12.

historical heritage.²³

B. The Human Rights and Transitional Justice Influence

The ascent of international human rights law in the latter part of the twentieth century had a deep effect on the idea of justice. Some of these changes were seen in the Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966), which were new concepts of justice that the punished should be only the offenders not the recognition of the harm suffered by individuals.²⁴

The 1985 U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was a milestone document that for the first time enumerated the rights of victims to access justice, get redress, and receive fair treatment.²⁵ This event impacted the establishment of the later international and hybrid criminal institutions, indicating the change of "victimoriented" approach. In the same way, the van Boven Principles (2005) spelled out the different ways of reparations for victims of gross human rights violations were set forth—restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.²⁶

While these were happening, the transitional justice systems such as the truth and reconciliation commissions in Latin America and South Africa also brought forward the idea of victims' voices, recognition, and societal healing as integral parts of justice.²⁷

C. The Ad Hoc Tribunals: ICTY and ICTR

The 1990s marked a new era for international criminal justice through the foundation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994. Both tribunals were set up by the United Nations Security Council and were the reaction of the international community to the severe violations of human rights committed in Europe and Africa.

As far as the crime prosecution is concerned, these tribunals were very successful, but at the same time, they gave victims very little involvement. Victims were not allowed to participate in the process, and in addition, they could neither take the initiative to claim reparations, nor be

²³ Bassiouni, *supra* note 17.

²⁴ *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810 (Dec. 10, 1948); *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171.

²⁵ G.A. Res. 40/34, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (Nov. 29, 1985).

²⁶ Theo van Boven, *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, U.N. Doc. E/CN.4/2005/59 (Dec. 21, 2005).

²⁷ Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* 42–45 (2001).

granted even the slightest rights since the only role they were assigned was that of witnesses for the prosecution.²⁸ On the other hand, the tribunals made a significant contribution to the acknowledgment of victims' suffering in law, especially through their rulings on sexual violence, genocide, and crimes against humanity.

ICTY in the case of *Prosecutor v. Furundžija* recognized sexual assault as one of the means of torture and at the same time asserted that in sexual violence, the offender's humanity and dignity were also victims of international humanitarian law besides the perpetrated offense.²⁹ At the same time, the ICTR in the case of *Prosecutor vs. Akayesu*, first time ever, determined that sexual violence could be a cause of genocide if the offenders had an intent to destroy the specific group to which the victims belonged.³⁰ These precedents changed international law's representation of victims: no longer only as witnesses but also as human beings whose suffering was the very manifestation of crimes committed.

Moreover, the ad hoc tribunals developed certain instruments for victim and witness protection, such as confidentiality, pseudonyms, and the possibility of withdrawing part of the trial from the public viewing.³¹ Nevertheless, both tribunals' exclusionary policies toward victim participation resulted in the criticism that victims were mostly marginalized from the justice process. The views of Bassiouni and Roht-Arriaza in their theories on the matter are that the tribunals' institutional separation from the victim turned out to be an inevitable consequence of an antagonistic model in which only prosecutorial efficiency was taken under consideration while inclusiveness was set aside and transposed in international criminal justice.³²

D. The Rome Statute and the International Criminal Court

The founding of the International Criminal Court (ICC) through the 1998 Rome Statute marked a radical change in how those affected by the crimes were treated within the scope of international criminal law. The Statute not only recognizes victims as the people who have a stake in justice but also integrates their rights all over the legal framework.

The Rome Statute, in its Article 68(3), allows the victims the right to be heard in different phases of the court proceedings while, at the same time, Article 75 empowers the Court to issue

²⁸ Statute of the International Criminal Tribunal for the Former Yugoslavia, arts. 22–23, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, arts. 21–22, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

²⁹ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment ¶¶ 163–86 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

³⁰ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment ¶¶ 731–34 (Sept. 2, 1998).

³¹ ICTY Rules of Procedure and Evidence, Rule 75; ICTR Rules of Procedure and Evidence, Rule 69.

³² Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and Practice* 177–79 (1995).

orders for reparations which may include restitution, compensation, and rehabilitation.³³ Such measures move on to actual procedural and substantive empowerment rather than mere symbols of recognition that an international court has given them for the first time.

This was a significant step that was opened up by the push from the civil society, human rights groups, and state delegates' protests at the time of the Rome Conference, indicating a convergence of global opinion towards victim-centered justice.³⁴ The ICC's method has been recognized as the most vivid example of restorative justice, which aims to not only sanction the guilty but also restore and acknowledge the victim's loss.

The Court's first decisions helped to clarify the extent of victims' rights even more. In the Prosecutor v. Lubanga Dyilo case, ICC set out the rights and limits of victim participation and went further to instruct that compensations be given to the communities in the Democratic Republic of Congo which had suffered collectively.³⁵ In the Prosecutor v. Katanga case the Court gave both individual and group compensations, thus, setting up the precedent of direct payout from the Trust Fund for Victims to the victim for their relief.³⁶

Although some ground has been covered in the meantime, a number of practical and structural issues are still there. Victim involvement for instance has often been hampered by lack of funds, slow procedures and difficulties in handling thousands of victim applications.³⁷ There is also a persistent struggle between the goals of providing victims with genuine opportunities for involvement and maintaining the accused's rights to a fair trial. The perspectives of experts like Sandoval and McGonigle Leyh are that the ICC's format is at risk of turning presence into mere symbolism rather than a tool for real empowerment if the strength of institutional capacity is not improved.³⁸

E. Contemporary Developments and Ongoing Challenges

The change of victim participation was not limited to the ICC only. Different types of hybrid tribunals as well as regional mechanisms have been experimenting with various models that place victims at the center of the processes. The concept of 'civil party' was born with the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC) in 2003,

³³ Rome Statute of the International Criminal Court arts. 68, 75, July 17, 1998, 2187 U.N.T.S. 3.

³⁴ William A. Schabas, *An Introduction to the International Criminal Court* 338–40 (5th ed. 2017).

³⁵ Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on Reparations (Aug. 7, 2012).

³⁶ Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment on Reparations (Mar. 24, 2017).

³⁷ Mariana Pena & Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?*, 7 Int'l J. Transitional Just. 518, 523 (2013).

³⁸ Clara Sandoval & Leonie McGonigle Leyh, *Victims' Participation and Reparations at the International Criminal Court: A Critical Analysis of Key Developments of 2018–2019*, 19 J. Int'l Crim. Just. 313, 317–18 (2021).

which allowed victims to participate in the case as co-complainants besides the prosecution—the blending of international and civil law was a wonderful example of the two legal systems' collaboration.³⁹ This new method gave access to thousands of Khmer Rouge regime victims to participate collectively, submit evidence, and file claims for reparations.⁴⁰

Also the Special Court for Sierra Leone (SCSL) adopted strong measures for the protection of the witnesses and implemented several outreach programs, which may be termed a practical standard to be followed for the safeguarding of victims in a fragile post-conflict area.⁴¹ Some other hybrid bodies such as the Special Tribunal for Lebanon (STL) and the Kosovo Specialist Chambers have also included procedural rights for victims, which is in line with the international community that justice must be the ones who have suffered the most directly.⁴²

However, the enforcement of victims' rights across tribunals is still fragmented and inconsistent. Among other issues, lack of money for activities, limited prosecutorial scope, and political interference usually restrict the realization of reparations and participation. In underresourced areas, many victims are plagued with various bureaucratic obstacles when it comes to seeking justice or being compensated for their suffering.⁴³

Besides, the struggle to reconcile victims' rights with defendants' rights is a challenge that international courts constantly deal with. On the one hand, giving too much prominence to victim participation may have the effect of delaying the proceedings and violating the due process, on the other, the lack of inclusion diminishes the legitimacy and the restorative nature of the court.⁴⁴ Among others, the ICC measures that are being implemented now such as the simplification of procedures for applications and the enhanced Trust Fund for Victims indicate the organization's willingness to solve this problem which combines opposing priorities.⁴⁵

In general, the route Nuremberg through the ICC and hybrid tribunals to rest of the world International Criminal Court has reflected a major change in international criminal law from a

³⁹ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, NS/RKM/1004/006 (Oct. 27, 2004) (Cambodia).

⁴⁰ Prosecutor v. Kaing Guek Eav alias Duch, Case No. 001/18-07-2007/ECCC/TC, Judgment ¶¶ 633–39 (July 26, 2010).

⁴¹ William A. Schabas, *The Special Court for Sierra Leone: Achievements and Legacy*, 2 Afr. J. Legal Stud. 1, 12–14 (2008).

⁴² Guido Acquaviva, *New Paths in International Criminal Justice? The Kosovo Specialist Chambers and the Special Tribunal for Lebanon*, 16 J. Int'l Crim. Just. 195, 201–03 (2018).

⁴³ Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years* 112–15 (2008).

⁴⁴ Trumbull IV, *The Victims of Victim Participation in International Criminal Proceedings*, 29 Mich. J. Int'l L. 777, 784–85 (2008).

⁴⁵ Int'l Criminal Court, *Report on the Review of the Trust Fund for Victims* (ICC-ASP/19/16) ¶¶ 14–20 (Dec. 1, 2020).

system where the main focus was on persecuting the offenders to one which tries to empower the victims that are left with no choice but to face the world.

III. CONCEPTUAL FRAMEWORK OF VICTIMS' RIGHTS IN INTERNATIONAL CRIMINAL LAW

The recognition of victims' rights in international criminal law (ICL) rests on three closely linked features - participation, protection, and reparations. Together, these pillars symbolise a change to the tray tradition of punishment by a more restorative and inclusive model of justice that aims to recognize, enable and compensate the victims of the most heinous crimes of international concern. The framework for these rights is the blending of criminal, humanitarian and human rights law, in particular as implemented in the Rome Statute of the International Criminal Court (ICC) and supported by international case law and United Nations instruments.⁴⁶

A. The Right to Participation

The right to participation is among the most avant-garde characteristics of the ICC framework, which helps to distinguish it from previous international tribunals. Article 68 (3) of the Rome Statute entitles victims to allow them to specify their "views and concerns" to the court at those stages of the proceedings where the judges consider it necessary and their personal interests are affected.⁴⁷ This section reflects a major change in the prosecutorial model of Nuremberg, Tokyo, ICTY, and ICTR, as in that model, victims had the least engagement and could only exhibit themselves as witnesses.⁴⁸

Victims' involvement in the ICC can happen in different modes. These include the submission of evidence, representation through legal counsel, and the right to make written or oral statements during the hearing of the case.⁴⁹ The court prefers the group representation format, with members of the group representing the common interests of the victims legally and discussing the same with the court to ensure efficiency and feasibility.⁵⁰

ICC decisions have undeniably helped to flesh out the concept of the right. The Hague Tribunal in *Prosecutor v. Lubanga Dyilo* observed that participation should have a direct impact on the

⁴⁶ William A. Schabas, *An Introduction to the International Criminal Court* 337–41 (5th ed. 2017).

⁴⁷ Rome Statute of the International Criminal Court art. 68(3), July 17, 1998, 2187 U.N.T.S. 3.

⁴⁸ Antonio Cassese, *International Criminal Law* 7–8 (3d ed. 2013).

⁴⁹ ICC Rules of Procedure and Evidence, Rule 89.

⁵⁰ Mariana Pena & Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?*, 7 Int'l J. Transitional Just. 518, 520 (2013).

proceedings while respecting the rights of the accused and not compromising the trial's speed.⁵¹ Likewise, in *Prosecutor v. Katanga*, the Court identified the possibility of victims' participation encompassing the sentencing and reparations phases, indicating the main functions of staging both procedural and substantive in that instance.⁵¹

However, these acknowledgments of right still confront practical problems to some extent. The large number of victims in mass atrocity situations, as a rule, slows down the proceedings and strains resources. Trumbull and Sandoval, two of the critics, maintain that participation, while having a strong symbolic value, may be a mere token if it is not accompanied by real decisionmaking power or material benefits.⁵² The fact remains, though, that the right to inclusion has thoroughly changed the design of international criminal justice and has now become the concept of victims being not only onlookers but also key figures in the struggle for justice.

B. The Right to Protection

The second mainstay of the rights of victims is the right to protection, which covers both the victim's physical safety and psychological comfort. This is the result of a demand for safeguards, arising from the fact that victims and witnesses in international criminal proceedings are frequently subjected to oppression, reprisals, and the infliction of traumatic experiences related to their cooperation.

Protection initiatives were first introduced by the ad hoc tribunals. The ICTY and ICTR Regulations (Articles 21–22 and 22–23, respectively) gave the green light for setting up the Victims and Witnesses Units (VWU) whose main functions would be to carry out actions for the protection of the concerned groups through secrecy, limited access to hearings, and relocation.⁵³ Subsequently, these initiatives were formalized and further developed under the ICC framework.

Pursuant to Article 68(1) of the Rome Statute, the ICC must "take all necessary steps to safeguard the safety, physical and psychological well-being, honor and privacy of victims and witnesses."⁵⁴ Additionally, this responsibility covers providing staff qualified to handle gender

⁵¹ Id Note 34. ⁵¹ Id Note 35.

⁵² Charles P. Trumbull IV, *The Victims of Victim Participation in International Criminal Proceedings*, 29 Mich. J. Int'l L. 777, 784–85 (2008); Clara Sandoval, *Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the ICC on Victims' Rights*, 11 J. Int'l Crim. Just. 505, 507–08 (2013).

⁵³ Statute of the International Criminal Tribunal for the Former Yugoslavia, arts. 22–23, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, arts. 21–22, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

⁵⁴ Rome Statute, *supra* note 2, art. 68(1).

and rearing-sensitive cases, primarily when the subjects involve sexual violence and crimes against children.

One of the mechanisms established to bring these protections into practical effect is the ICC's Victims and Witnesses Unit (VWU) set up under Rule 17 of the Rules of Procedure and Evidence as the unit responsible for risk assessments, provision of psychological support, and protective relocation, etc.⁵⁵ In the same vein, the tribunal's verdicts in *Prosecutor v. Akayesu* and *Prosecutor v. Furundžija* were instrumental in sensitizing the requirement for gendersensitive modes, the tribunals acknowledging the specificity in the vulnerabilities of sexual violence victims' cases.⁵⁶

Nonetheless, the right to protection should not be taken as a standalone absolute right. There is the necessity to balance it with the accused's right to a fair and public trial, as stipulated by Article 67 of the Rome Statute.⁵⁷ This balancing issue has been a topic of discussion, especially in instances where the extent of protective measures (such as anonymous testimony) leads to transparency and cross-examination rights being jeopardized. Based on the foregoing, researchers have made the point that a context-based proportionality approach should be adopted, with the emphasis on victim protection not being executed at the cost of procedural fairness.⁵⁸

In the end, the gradual improvement in protective measures is the signal of international criminal procedure coming to terms with the fact that the most basic form of justice for victims is the safety and dignity that they get throughout the process.

C. The Right to Reparations

The right to reparations is the most visible manifestation of justice from the victims' point of view as it deals with both the material and spiritual side of the victims as a result of international crimes. Reparations aim not only at compensation but also at restoration of the victims' and affected communities' living standards and dignity.

According to Article 75 of the Rome Statute, the ICC can decide on the extent and the type of reparations, which might involve restitution, compensation, and rehabilitation.⁵⁹ With the help of the Trust Fund for Victims (TFV), reparations may be provided either by the Court directly

⁵⁵ ICC Rules of Procedure and Evidence, Rule 17(2)(a).

⁵⁶ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment 731–34 (Sept. 2, 1998); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment 163–86 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

⁵⁷ Rome Statute, supra note 46, art. 67.

⁵⁸ Fergal Gaynor, *Ensuring Fairness to Accused Persons and Victims before the International Criminal Court*, 16 J. Int'l Crim. Just. 112, 116–17 (2018). ⁵⁹ Rome Statute, supra note 46, art. 75.

from those who were convicted or through the Fund, a separate organization formed under Article 79 to carry out awards and provide support to victims in situations where there is no order made for reparations.⁵⁹

In Prosecutor v. Lubanga Dyilo case, the first reparations of the ICC were issued, the Court gave the decision to award collective reparations to child soldiers who were forcibly recruited in the war and highlighted the principles of non-discrimination, inclusivity, and rehabilitation.⁶⁰ In the case of Prosecutor v. Katanga, the Court's decision was overturned to include individual and collective measures such as education, housing, and psychological care programs along with reparations.⁶¹ These decisions had a role in the development of the legal framework for reparations in international criminal law, which was the balancing act of giving victims both a symbolic acknowledgment and material recompense.

Besides ICC, international instruments such as the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation (2005) identify five main categories of reparations, i.e., restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, which are now considered standard by the international community.⁶²

Still, the problem of implementation remains at the center of the scene. Limited financial resources, long-time proceedings, and logistical problems in finding victims have substantially delayed the full implementation of reparations orders. Experts like Bachrach and De Greiff condition the success of reparations on them being context-sensitive and they even go as far as to call local customs and community engagement as being essential ingredients to legitimacy and long-term impact.⁶³

Consequently, reparations are the ultimate recognition of the victims' rights in international criminal law—going beyond the stage of legal symbolic acts to the stage of material restoration. When combined with participation and protection, they constitute the three pillars of the justice system, which not only claims to be accountable but also to be human-healing.

IV. CASE STUDY-BASED ANALYSIS

A case study-focused method sheds light on the practical application of international criminal law concerning the rights of victims. In this part, the court decisions, namely, Prosecutor v.

⁵⁹ Id. art. 79.

⁶⁰ Supra, note 34.

⁶¹ Supra, Note 35.

⁶² U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

⁶³ Michael Bachrach, *The Protection and Rights of Victims under International Criminal Law* 4–6 (2014); Pablo de Greiff, *Justice and Reparations*, in *The Handbook of Reparations* 451, 453–55 (Pablo de Greiff ed., 2006).

Akayesu (ICTR), Prosecutor v. Lubanga Dyilo (ICC), and ECCC Civil Party Proceedings (Kaing Guek Eav alias Duch), are presented and discussed to understand how far and how effectively the victims' rights to participation, protection, and reparations have been enforced.

A. Prosecutor v. Akayesu (ICTR)

The case of Prosecutor v. Akayesu, which was judged by the International Criminal Tribunal for Rwanda (ICTR), is the point at which international criminal law began to recognize victims' suffering comprehensively. Jean-Paul Akayesu, the mayor of Taba commune, was found guilty of genocide and crimes against humanity, which included rape and other forms of sexual violence, due to his involvement in the 1994 Rwandan genocide.⁶⁴

This verdict was pioneering as it set the new definition of sexual violence as one of the genocidal acts, the very first time an international court identified rape as a method deliberately used for exterminating an ethnic group.⁶⁵ The Court therewith indicated that sexual violence could be the case of genocide if the perpetrator had the intention of destroying the group in question, wholly or partly, thus widening the concept scope of victims in international law.

The standpoint of victims' rights, Akayesu was relevant not only for delivering the judgment that recognized gender-based harm but also for its insistence on protection and respectful treatment of witnesses throughout the proceedings. The ICTR implemented the use of closed sessions, granting anonymity, and providing psychological support to ensure the safety of victims, especially survivors of sexual violence.⁶⁶ Through these steps, the institution extended acknowledgment that the rights and security of victims were part of the justice system.

Yet, the controversy had as its outcome some structural problems with the situation of the victims. They did not have the right to legal representation and hence were not allowed to be involved in the case in any other way except by giving their testimonies. The Tribunal did not foresee the payment of reparations, thus even though the victims' pain was recognized by the court, they had no way to receive it.⁶⁷ So, while moral and legal recognition in Akayesu was overlaid with the problem of acknowledgment and enforcement, it reflected the need to have institutional mechanisms that show the recognition into actual remedies.

B. Prosecutor v. Lubanga Dyilo (ICC)

Prosecutor v. Thomas Lubanga Dyilo, the ICC's first completed trial, can be considered as the

⁶⁴ *Supra*, Note 56.

⁶⁵ *Id.* 731–34.

⁶⁶ ICTR Rules of Procedure and Evidence, Rule 69; Rule 75.

⁶⁷ Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and Practice* 177–78 (1995).

basis of the enforcement of victims' rights under the Rome Statute. Lubanga, who was leading a militia in Congo, was sentenced in 2012 to imprisonment for the crimes of recruiting and using child soldiers in the Democratic Republic of Congo.⁶⁸

One of the aspects that highlight the importance of Lubanga is the practical implementation by the ICC of victim participation and reparations, as set forth in Articles 68 and 75 of the Rome Statute. More than 120 victims were allowed to take part in the case through the legal representatives whom they had chosen to represent them, and thus, they were able to express their opinions and concerns not only at the oral hearing but also during the stage of sentencing.⁷⁰ This way of participation became a symbol of the profound change of the legal principles under international criminal justice that had now accepted victims not only as witnesses but also as stakeholders to be engaged in the adjudication process.

Moreover, on that occasion, the Court issued its first ever reparations order entailing the aspects of inclusiveness, gender equality, and collective restoration as guiding principles. The Chamber declared that reparations should be commensurate with injuries and could, therefore, be presented in the form of collective works embodying such as psychological recovery, education and social integration programs, etc. The reparations were carried out through the Trust Fund for Victims (TFV), which was instrumental in providing the required support to the affected communities.⁶⁹

Problems, however, remained. The whole process for reparations took many years because the resources available were limited and, in particular, there were problems identifying eligible beneficiaries. There were some detractors who thought that the ICC's model, while symbolically transformative, was still cumbersome administratively and financially reliant on donor contributions rather than on direct enforcement against perpetrators.⁷⁰ Yet, Lubanga paved the way for the concretization of victim-centered justice as a living law by outlining methods to harmonize participation and procedural fairness.

C. The ECCC Civil Party System: Prosecutor v. Kaing Guek Eav alias Duch

The Extraordinary Chambers in the Courts of Cambodia (ECCC) is one of the most innovative attempts to incorporate victims directly into international criminal proceedings. The ECCC, which started its work in 2003 with the aim of prosecuting the top leaders of the Khmer Rouge

⁶⁸ *Supra*, Note 34. ⁷⁰ *Id*

⁶⁹ Int'l Criminal Court, *Trust Fund for Victims: Report to the Assembly of States Parties* (ICC-ASP/19/16) ¶¶ 14–20 (Dec. 1, 2020).

⁷⁰ Mariana Pena & Gaelle Carayon, *Is the ICC Making the Most of Victim Participation?*, 7 Int'l J. Transitional Just. 518, 523–24 (2013).

regime, went beyond the traditional framework that only recognized the prosecution by introducing a “civil party” concept, whereby victims were legally recognized as parties involved in the case alongside the prosecution.⁷¹

In *Prosecutor v. Kaing Guek Eav alias Duch*, the leader of the S-21 detention center was found guilty of crimes against humanity and war crimes, with almost 4,000 individuals allowed to take part in the case as civil parties.⁷² This trial was an instance of a level of engagement with the collective victim group never before seen, where victims had the opportunity to submit their evidence, interrogate the witnesses, and claim reparations.

The stance of the ECCC marked a departure from the common-law system as it drew heavily on the civil law tradition and restorative justice concepts, which were dealt with in the community’s acknowledgment. Restorative justice in Duch was delivered through different symbolic and collective forms, including memorials, educational programs, and public acknowledgment of the inflicted harm.

The mass participation, however, inevitably meant that the involvement of the victims also presented numerous logistical and procedural challenges. The court was challenged by the lack of resources, communicating with the victims in an irregular way, and having limited service capacity for reparations. Some of the victims said that they were annoyed with the slow progress of studies and the courthouse saying that reparations are only in symbolic forms since monetary payments are not available according to Cambodian law.⁷³

Nevertheless, the Duch case was one of the best examples where the court hybrid system was able to grant victims their due, and restorative justice became an integral part of the international criminal justice administration. The civil party status is still being considered as a model for upcoming tribunals to combine accountability with reconciliation.

V. CHALLENGES IN THE ENFORCEMENT OF VICTIMS' RIGHTS IN INTERNATIONAL CRIMINAL LAW

Despite extensive normative progress, the execution of victims' rights in international criminal law is still impeded by various structural, procedural, and practical barriers.

⁷¹ Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia, NS/RKM/1004/006 (Oct. 27, 2004) (Cambodia).

⁷² *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment ¶¶ 633–39 (July 26, 2010).

⁷³ Christoph Sperfeldt, *Victim Participation at the ECCC: Between Restorative and Retributive Justice*, 13 J. Int’l Crim. Just. 727, 735–37 (2015).

Institutional and Procedural Barriers

The victim participation model of the International Criminal Court as per Articles 68 and 75 of the Rome Statute is confronted with administrative and logistical issues. The Victims Participation and Reparations Section (VPRS) is overwhelmed with large caseloads, delayed applications, and insufficient field presence, which in turn limits access for victims in remote areas.⁷⁴ Permanent justice mechanisms such as the Extraordinary Chambers in the Courts of Cambodia have also encountered inefficiency, for instance, in their overextended “civil party” model that led to the occurrence of delays and the victims' getting confused.⁷⁵

Financial and Logistical Constraints

The Trust Fund for Victims (TFV), which is essential for the implementation of reparations, is mainly financed by voluntary contributions, resulting in a situation of constant underfunding.³ The implementation of reparation orders in the Lubanga and Katanga cases was postponed for years, thus diminishing their potential and undermining the victims' trust in the system. At the same time, limited means of communication, translation issues, and geographical remoteness have contributed to the victims being even further removed from international proceedings.⁷⁶

Balancing Fairness and Participation

The principal difficulty is that victims' rights have to be put side by side with the accused's right to a fair trial as per Article 67 of the Rome Statute.⁶ Over-participation may lengthen the process or even prejudice the defense, while on the other hand, under-engagement may result in victims' roles being merely tokenistic.⁷ The ICC is still working on the development of these procedures which allow it to maintain this fragile balance.

VI. COMPARATIVE ASSESSMENT AND RECOMMENDATIONS

The implementation of victims' rights seen in various international and hybrid tribunals, reveals the progress made as well as the incoherent nature of victims' rights enforcement. Comparative assessment shows that while the International Criminal Court (ICC) has established victims' rights more formally through participation and reparations processes, the ad hoc and hybrid tribunals such as the ICTR, ICTY, and ECCC have gone further in providing context-specific or limited approaches.

⁷⁴ int'l Criminal Court, *Report of the Registry on Victims' Participation and Reparations Section* (ICCASP/18/17) ¶¶ 20–23 (Dec. 2019).

⁷⁵ Christoph Sperfeldt, *Victim Participation at the ECCC: Between Restorative and Retributive Justice*, 13 J. Int'l Crim. Just. 727, 735–37 (2015).

⁷⁶ Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years* 112–15 (2008).

The Akayesu verdict of the ICTR indicated a significant change in the recognition of sexual violence as a constitutive part of the genocide, however, victims did not have any procedural or reparative rights. Besides, the Lubanga ruling by the ICC marked a move forward for victim participation and collective reparations, achieving the Rome Statute's victim-centered provisions under Articles 68 and 75 in practice. The case of Duch at the ECCC went deeper in the victim judicial process by the integration of civil parties as co-complainants, thus allowing the direct participation of victims in the court proceedings.

On the other hand, each of these structures has its peculiarities if we have to talk about their effectiveness. The ICC's centralized model maximizes participation but it is hindered by delays and bureaucratic complexity. Though the ECCC's extensive civil party system increased inclusion, it showed limitations in financial sustainability. The ad hoc tribunals, while trailblazing in many respects, were mainly procedurally marginalized mistrusting victims. Evaluated together these models indicate a spectrum between participation and practicality with the possibility of increased administrative load accompanying expanded inclusivity.

Recommendations

Increasing Institutional Capacity – By allocating more resources to the ICC's Victims Participation and Reparations Section (VPRS) and the Trust Fund for Victims (TFV), more outreach and efficiency could be achieved.

Optimizing the Procedures – By making the victim application processes simpler and encouraging legal representatives that serve a larger number of victims to share common grounds, significant and manageable participation could be realized.

Linking with Domestic Mechanisms – The establishment of working relations between national courts and truth commissions can bridge gaps in enforcement and provide context-sensitive reparations.

Implementing Sustainable Funding Models – The establishment of mandatory state contributions to the TFV would result in a decrease in the reliance on voluntary donations and in an increase in the delivery of reparations.

Compensating for Rights– Designing future tribunals of this kind is a task where the extent of the victims' participation they get, the protection of their agency and defendants' procedural fairness are maintained simultaneously, thus judicial international legitimacy is preserved.

To sum up, the advancement of victims' rights over time is a clear indication of transition from mere acknowledgment to actual inclusion. The guaranteed realization of such rights, however,

lies on institutional reform, sustainable funding, and procedural clarity—victims not only gaining a voice but truly being healed through international justice in the process.

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