

## Positioning participatory rights of victim of crime under International Criminal Law

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### Abstract

This paper explores the recognition of victims' rights in an international armed conflict, tracing it chronologically from the ad hoc tribunals to the modern day international criminal courts and several United Nations document duly recognizing the rights and justice for victims. It also throws light on the debate of "Peace swapped with justice" to "Justice swapped with Peace" in the due course of the development of International criminal jurisprudence. In this article, the author shall firstly, analyses if the victims were given the right to participate in the International Military Tribunals; secondly, shall look at the international law that inspired the drafters of "Rome statute" to enable the victims to participate and lastly, shall look at the provisions under the "Rome statute" that enable the victims to participate.

**Keywords:** ad hoc tribunals; international criminal law; victims right; United Nations; justice.

### Posicionamento dos direitos participativos da vítima de crime à luz do Direito Penal Internacional

### Resumo

Este artigo explora o reconhecimento dos direitos das vítimas num conflito armado internacional, traçando-o cronologicamente desde os tribunais ad hoc até aos modernos tribunais penais internacionais e a vários documentos das Nações Unidas que reconhecem devidamente os direitos e a justiça das vítimas. Também lança luz sobre o debate de "Paz trocada com justiça" para "Justiça trocada com paz" no devido tempo do desenvolvimento da jurisprudência penal internacional. Neste artigo, o autor analisará, em primeiro lugar, se as vítimas tiveram o direito de participar nos Tribunais Militares Internacionais; em segundo lugar, analisará o direito internacional que inspirou os redactores do "Estatuto de Roma" a permitir a participação das vítimas e, por último, analisará as disposições do "Estatuto de Roma" que permitem a participação das vítimas.

**Palavras-chave:** tribunais ad hoc; direito penal internacional; direito das vítimas; Nações Unidas; justiça.

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## Posicionamiento de los derechos participativos de la víctima del delito en el Derecho Penal Internacional

### Resumen

Este trabajo explora el reconocimiento de los derechos de las víctimas en un conflicto armado internacional, siguiendo un rastro cronológico desde los tribunales ad hoc hasta los actuales tribunales penales internacionales y varios documentos de las Naciones Unidas que reconocen debidamente los derechos y la justicia para las víctimas. También arroja luz sobre el debate de «Paz intercambiada con justicia» a «Justicia intercambiada con Paz» en el debido curso del desarrollo de la jurisprudencia penal internacional. En este artículo, el autor analizará, en primer lugar, si las víctimas tienen derecho a participar en los Tribunales Militares Internacionales; en segundo lugar, examinará el derecho internacional que inspiró a los redactores del «Estatuto de Roma» para permitir la participación de las víctimas y, por último, examinará las disposiciones del «Estatuto de Roma» que permiten la participación de las víctimas.

**Palabras clave:** tribunales ad hoc; derecho penal internacional; derechos de las víctimas; Naciones Unidas; justicia.

## Positionnement des droits participatifs des victimes d'actes criminels en droit pénal international

### Résumé

Cet article explore la reconnaissance des droits des victimes dans un conflit armé international, en suivant la chronologie depuis les tribunaux ad hoc jusqu'aux cours pénales internationales modernes et plusieurs documents des Nations Unies reconnaissant dûment les droits et la justice pour les victimes. Il met également en lumière le débat entre « la paix échangée avec la justice » et « la justice échangée avec la paix » au cours du développement de la jurisprudence pénale internationale. Dans cet article, l'auteur analysera tout d'abord si les victimes se sont vues accorder le droit de participer aux tribunaux militaires internationaux ; ensuite, il examinera le droit international qui a inspiré les rédacteurs du « Statut de Rome » pour permettre aux victimes de participer et enfin, il examinera les dispositions du « Statut de Rome » qui permettent aux victimes de participer.

**Mots clés :** tribunaux ad hoc ; droit pénal international ; droits des victimes ; Nations Unies ; justice.

## 国际刑法对犯罪被害人参与权的定位

### 摘要

本文探讨了国际武装冲突中对受害者权利的承认，按时间顺序，作者追溯了从特设临时法庭到永久的国际刑事法院以及联合国关于承认受害者权利的几份历史文件，为国际刑法学发展过程中，“以和平换正义”VS“以正义换和平”的争论提供了研究线索。本文中，笔者首先分析受害人是否享有参加国际军事法庭的权利，其次，审视曾经促使《罗马公约》允许受害人参与的国际法；最后，反思《罗马公约》中，有关受害人参与的具体条款。

**关键词：**特设法庭；国际刑法；受害者的权利；联合国；司法正义

## Positionierung der Partizipationsrechte von Verbrechenopfern im internationalen Strafrecht

### Zusammenfassung

In diesem Beitrag wird die Anerkennung der Rechte von Opfern in internationalen bewaffneten Konflikten untersucht und chronologisch von den Ad-hoc-Tribunalen bis zu den heutigen internationalen Strafgerichten und mehreren Dokumenten der Vereinten Nationen, in denen die Rechte und die Gerechtigkeit für die Opfer gebührend anerkannt werden, nachgezeichnet. Er beleuchtet auch die Debatte von „Frieden gegen Gerechtigkeit“ zu „Gerechtigkeit gegen Frieden“ im Laufe der Entwicklung der internationalen Strafrechtsprechung. In diesem Artikel wird der Autor erstens analysieren, ob den Opfern das Recht auf Teilnahme an den internationalen Militärtribunalen

zugestanden wurde; zweitens wird er sich mit dem internationalen Recht befassen, das die Verfasser des „Römischen Statuts“ dazu inspirierte, den Opfern die Teilnahme zu ermöglichen, und schließlich wird er sich mit den Bestimmungen des „Römischen Statuts“ befassen, die den Opfern die Teilnahme ermöglichen.

**Stichworte:** Ad-hoc-Tribunale; internationales Strafrecht; Opferrechte; Vereinte Nationen; Justiz.

## Introduction

International Criminal Law in the second half of the twentieth century has been much more about “punishing the perpetrators for their crimes” or “identifying the categories of International crimes”. Deliberations over the rights of the victim were not a recurrent theme of the International Criminal Law. Paying the reparation costs or rehabilitation of the survivors of the holocausts, genocides etc. was much of the responsibility of the governments of the Nation-States or the civil society organizations. This responsibility was not taken over by the Ad hoc tribunals. Even the victims had no opportunity to express their views and concerns or reflect upon the harms they suffered. They were merely seen as prosecution witnesses’ and could perform no other role. They did not have any kind of mechanism to participate in the proceedings.

With the [United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#) rights to the victims were given recognition. This inspired the drafters of Rome statute to incorporate the provisions that would enable the victims to actively take part in the proceedings before ICC. It was also an opportunity to rectify the mistakes made by non-recognition of the victims during the proceedings of the International Military Tribunals.

In this article, the author shall *firstly*, analyses if the victims were given the right to participate in the International Military Tribunals; *secondly*, shall look at the International law that inspired the drafters of “Rome statute” to enable the victims to participate and *lastly*, shall look at the provisions under the “Rome statute” that enable the victims to participate and seek clarification at several stages, if any. This indeed a discussion on the rights of victims but this will also throw light on the developing jurisprudence of criminal justice on an international platform. Till World War II all primary powerful countries looked at it from the geo-political angle of procuring peace in the region but with significant changes in the notion and value given to Human rights the global view changed towards Justice. This phenomenon represents the global debate from moving “Justice swapping with Peace” to “Peace swapping with Justice”, this paper will also explore a minute facet of this debate from a macro view.

## Role of victims in the International Military Tribunals

It has been roughly estimated that there were around [six million victims of the holocaust](#). They were victims of the brutal and inhumane crimes committed by the Nazis. In order to punish the criminals of holocaust International Military Tribunal of Nuremberg (IMTN) was established through a charter (Heller, 2011). The impact on the survivors of the holocaust is still being felt. However, victims were not given any participatory mechanism during the proceedings of IMTN to voice these experiences and the harms suffered. The proceedings were carried on largely on the basis of the documentary evidence. Hence, the latter eliminated the role of the victims in the trial (Yael, 2006). In the aftermath of the holocaust, several movements for reparation of the victims began. But all movements were either initiated by civil society organizations, or the governments. In the charter in no way there was recognition of the right of the victims to receive reparation cost (Yael, 2009).

The International Criminal Tribunal for Rwanda (ICTR) was established to try and punish for the crimes of genocide. As roughly estimated, around 8 lacs to 10 lacs Rwandans were massacred (Westberg, 2011). ICTR is much loudly touted for its achievements. It has been hailed as pioneering International Criminal Justice. Some of the judgements of ICTR are also much celebrated as that of *Prosecutor v/s Akayesu*<sup>1</sup> as for the first time in this case definition of genocide was interpreted. But all this is insignificant for the Rwandans. They do not appreciate the decisions of ICTR in the same manner as is done in other jurisdictions and in the study of International Criminal Law. They hold negative perception towards ICTR as in their perception the tribunal failed to bring justice to the Rwandans. There was neither representation of the victims in the proceedings during trial nor any provision was made for the restitution of the victims. Their role was reduced to being a witness in the court. Even though the ICTRs rules of procedure (Rule 105 and 106) gives right to victims to compensation and restitution. But in reality, these rights were just on paper and could not be implemented due to the hindrances created by ICTR practices (Kamatali, 2006).

The International Military Tribunal for Yugoslavia (ICTY) was different from the above two IMTs. It moved a little bit ahead in defining and recognizing the rights of the victims. Although the rights were recognized in a very limited manner, at least there was the beginning of the participatory approach towards victims in International Criminal Law. It was established

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<sup>1</sup> The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, 2 September 1998

“for the purpose of prosecuting for the serious violations of International Humanitarian Law as committed in former Yugoslavia”. It defined victim under its [Rules of Procedure and Evidence](#) as, “*person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed*”. But there are certain problems with the definition. It only recognizes the primary victim against whom crime was committed but it in no way recognizes the secondary victims who may have suffered indirectly. This then even excludes the parents, guardians, siblings or the relatives of the victim who must have also suffered on account of suffering of the victim. It also gives no recognition to any kind of harm or injury that might have been inflicted during the commission of the crimes. The recognition to the victims in ICTY was not given as the participants, for them to play any role during the proceedings. They were just recognized as ‘victims as witnesses’. But the statute of ICTY took care in extending safety and security measures to the victims as witnesses. This protection was extended not because of their status as victim but received as those victims were witnesses (Garbett, 2016).

### **International Law that prompted rights of victims under the Rome Statute**

Much of the participatory regime under ICC has been inspired by *Declaration of Basic Principles of Justice for Victims of Crime and abuse of power* (United Nations, 1985). It is considered to be Magna Carta of the rights of the victim. It has inspired the jurisdictions all over the World to incorporate within their statutes or enact new statutes to give recognition to the rights of the victims. This declaration gave recognition to two types of victims. The “Victim of Crime” and “Victim of Abuse of Power” (Groenhuijsen, 2014). The former is defined as

Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power (United Nations, 1985, “A. Victims of crime”, par. 1).

The definition is very wide in nature as it encompasses all kinds of harms that a victim might probably suffer as a result of the crime. Also, the definition has not made the victim dependent upon either the accused or the state. Victim is looked at as an individual who has rights independent of other parties to the criminal trial. On the other hand, the victim of abuse of power has been defined as,

Person who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental

rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights (United Nations, 1985, "B. Victims of abuse of power", par. 18).

Addition of this category to the victims has hauled the victimology. Recognition of victims of abuse of power, now even accused of a right in violation of his rights to question the authorities. However, in the present study we are primarily concerned with the former category of victims. The victims of crime have been entitled to four kinds of rights namely, "right to compensation, restitution, access to justice and fair treatment and assistance" (United Nations, 1985). When we shall look at the role of the victim in the Rome Statute, it will be seen that all these rights can be seen in the provisions under Rome Statute.

Theo van Boven, a Special Rapporteur was requested by the "United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities" to provide set of principles for reparations to victims under the International Law. The principles were built on the premise of the 1985 declaration. These principles are referred to as "van Boven Principles". These principles were referred to time again during the drafting meetings of the Rome Statute (Bachrach, 2000).

### **Rome Statute as an improvement to the International Military Tribunals vis a vis Victim's participatory regime**

As the International conventions and declarations, we saw in the first section paved the way for the participatory regime at international level. Drafters of the Rome statute were much inspired by the 1985 declaration. Simultaneously, there were certain heated debates and France and certain civil Law countries emphasized upon participation of the victims in the criminal proceedings before ICC. During the opening of the Rome Conference, Kofi Annan, then UN Secretary-General emphasized the delegates "overriding interests must be that of the victims and the International Community as a whole" (Moffett, 2014, p. 70).

Recognition of the rights of the victim to participate in the proceedings under the Rome Statute is not novel. As many National jurisdictions have already given recognition. But it is considered to be unprecedented for the International Criminal Court (ICC) as the ad Hoc tribunals as we saw above failed to recognize this right. This recognition reflects that victims' access to justice has been given paramount consideration. It has been seen from the experiences of IMT and national jurisdiction that the prosecutor does not necessarily represent the interest of the victim. The victim is reduced to being a mere prosecution witness. So, giving

autonomy in participation to victims would also give them a chance to present or twist the case from their perspective (Stahn; Olasolo; Gibson, 2006, p. 219). In order to participate in the proceedings, the victim needs to write an application to the Registrar and then the application is transferred to the chambers.<sup>2</sup> For the application to be successful, the victim needs to satisfy that he or she is a victim. A Victim as per these “rules of procedure and evidence” means “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court”.<sup>3</sup>

In the pre-trial phase the participation of the victims can be seen at four stages. *Firstly*, when the prosecutor decides to carry on with investigation based on reasonable justifications. He has to submit to the pre-trial chamber request for authorization of the investigation with any of the supporting materials collected. At this very stage, the victim has been allowed to make representation before the same pre-trial chamber. Such representation of the victim has to be as per the rules of procedure and evidence.<sup>4</sup> It is basically a decision of the victim to initiate investigation. In the case of “*decision on victim’ applications for participation in the Uganda Situation (the single judge decision)*” the court stated that the principle of “personal interests” as enunciated under Article 68(3) also applied to the victims right to initiate the investigation (Cohen, 2009, p. 359).

*Secondly*, when a challenge is made to the jurisdiction of the court or regarding the admissibility of a case. Then the victim is also allowed to submit observations in regard to it.<sup>5</sup> *Thirdly*, when the prosecutor decides either to initiate the investigation or drop it in lieu of absence of sufficient basis. In both the scenarios the “interest of the victim” shall be given paramount consideration.<sup>6</sup> It is an onus upon the prosecutor to respect the “interests and personal circumstances” of the victims. Such interests include their “age, gender, health, nature of crime”.<sup>7</sup>

During the trial phase also, there is participation of the victim in the proceedings. It is the duty of the trial chamber to ensure that protection is extended to the victim during the trial.<sup>8</sup> Also, if the Trial chamber is of the opinion that there is a requirement of more facts in the interests of the victim then the chamber can request for additional evidence from the

<sup>2</sup> Rule 89 of the [Rules of Procedure and Evidence](#).

<sup>3</sup> Rule 85 of the [Rules of Procedure and Evidence](#).

<sup>4</sup> Article 15(3) of the [Rome Statute of the International Criminal Court](#).

<sup>5</sup> Article 19(3) of the [Rome Statute of the International Criminal Court](#).

<sup>6</sup> Article 53 of the [Rome Statute of the International Criminal Court](#).

<sup>7</sup> Article 54(1)(b) of the [Rome Statute of the International Criminal Court](#).

<sup>8</sup> Article 64 of the [Rome Statute of the International Criminal Court](#).

prosecutor.<sup>9</sup> Although these duties of the trial chamber do not effectuate the participation of the victim in the trial phase. The victim can participate at this stage through three ways. The victims are allowed to present their views and concerns during trial proceedings if their interests are being affected. But the terms “views and concerns” are vague in nature. As a result, varying interpretations have been made by the judges, parties and commentators. Due to this there have been certain debates too on the varying interpretations. The landmark judgment to understand the enforcement of victims' participatory rights is the Lubanga case. In this case when the victims applied to participate in the investigation of the situation in the Democratic Republic of Congo. The application was opposed by the prosecutor and argued that investigation is not a proceeding under Article 68(3). However, this argument was rejected by the Pre-Trial Chamber I. The chamber relied upon the drafting history of the Rome Statute and also the decisions of “European Court of Human Rights” and “Inter-American Court of Human Rights”. Both of them helped the chamber to establish that the conventions have been interpreted to support the victims right to participate during investigation of the alleged violation of human rights. Even this right to participate during the investigation was found to be consistent with the aim with which the victims participatory rights were granted under the Rome Statute. They also have advisory rights. The victim's unit with the witness unit can advise the prosecutor on certain matters. The matters are limited to the concerns of the victim as the “security arrangements, counseling, assistance and appropriate protective measures”.<sup>10</sup>

The court has power to direct reparation costs to the victims. But before passing the order in relation to it, court shall invite representation regarding it from the victims.<sup>11</sup> These reparations aim to undo the harm that has been caused to the victim. Although, the provision for reparation has been made in the Rome statute. But there still lies several lacunae which are role of the victims is very limited, appropriate type of reparations and cooperation of the state parties. But this provision helps ICC to move beyond retributive justice. As these provisions are not punitive in nature but have been introduced with the aim of remedying the harm so caused.

The victim in the Rome Statute has a very limited role in appeal. The victim or his legal representative can appeal only on the ground of being adversely affected by the order of the court regarding reparation.<sup>12</sup> But it is not clear under the provision as to who is the legal

<sup>9</sup> Article 65(4) of the [Rome Statute of the International Criminal Court](#).

<sup>10</sup> Article 68 of the [Rome Statute of the International Criminal Court](#).

<sup>11</sup> Article 75 of the [Rome Statute of the International Criminal Court](#).

<sup>12</sup> Article 82 of the [Rome Statute of the International Criminal Court](#).

representative of the victim for the purpose of appeal under this provision. Normally, parents or guardians or children are considered to be legal representatives. But in this provision a wide ambit has been given and it has considered any organization or person admitted to represent the victim. But it remains a big enigma, if the state is the legal representative of the victim or victim itself (Cassese; Gaeta; Jones, 2002, p. 56).

In order to give the benefit in a larger sense, a Trust Fund for Victims has been established under Article 79. It directs reparation costs to the victims after the final conviction has been reached. Apart from this, the trust has power to use the sources available with it towards the benefit of the victim.<sup>13</sup>

The victim has also been entitled to legal representation. In the case of a large number of victims it becomes difficult & impractical to bring individual representations. So, the victims are represented by a “common group of legal representatives”. Same has been done in the “*Lubanga Case*” before the ICC. In this case there were three groups of legal representatives (Wyngaert, 2011). All the procedural rights ensured to the victim as discussed in the preceding paragraphs help in prevention of secondary victimization of the victim.

## Conclusion

International Military Tribunal for Nuremberg to the permanent International Criminal Court, the rights of the victims have evolved. Till the time of World War II, the focus of the world power was swap justice for peace, but these two ad hoc tribunals came after the aftermath of WWII IMT-FE and IMT-N proved that the Justice is equally important as peace but did little in order to protect victims and their rights. The ad hoc tribunals, the victim had no mechanism to express his or her concerns or views. There was even no right to get information about the proceedings. All the lacunas in the victim jurisprudence were realized and they were rectified under the Rome Statute. The other development at the International arena that helped to develop victim participatory rights before the ICC was “United Nation Basic Declaration of Principles of Justice of Victim of Crime and Victim of abuse of power”. It inspired the Nations all over the world and International community to move towards victim oriented justice. The Rome Statute was greatly inspired by this declaration. Now at the several stages of the criminal procedure before ICC, the victim has been conferred certain rights of participation. Victim has

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<sup>13</sup> Article 79 of the [Rome Statute of the International Criminal Court](#).

right to participate in the pre-trial proceedings as investigation and also in the trial proceedings. Even a registry has been set up to look after the payment of reparation cost to the victims. Also, a unit of victims and witness to ensure the safety and security of the victims. However, there lacks a clarity in the provisions of Rome Statue. So, time and again there have been several interpretations of the provisions. The chambers of the ICC have always picked up the interpretation that is favorable to the victim. The victim jurisprudence under International criminal law is still evolving and has not yet come to it fruition.

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