



## *THE RIGHTS OF VICTIMS IN UNITED STATES CRIMINAL PROCEEDINGS AND AT THE ICC*

This paper explains the participation rights of victims in US criminal proceedings compared to victims at the International Criminal Court (ICC). The participation of victims in criminal proceedings is a highly debated topic in the US and at the ICC. The debate involves balancing the interests of the victim and his or her right to participate in the criminal proceedings with the concerns that victim participation could prejudice the rights of the defendant and thus the outcome of trial.

Therefore, this paper examines the basic arguments for and against victim participation. In addition, it gives an overview of the victims' rights movement in the US. Furthermore, it compares the current level of victim participation in the US and at the ICC.

### Background of the Victims' Rights Movement in the US

Until the late 1950s victims of crimes in the US had no voice in criminal proceedings. However, the movement that began in the 1960s has advanced rights of victims at both the state and federal level. These advancements include greater enforcement of existing rights afforded victims, allowing victims to speak during sentencing and establishing compensation programs.

In 1982, the first serious efforts were made to amend the US Constitution on behalf of crime victims with the establishment of The President's Task Force on Victims of Crime. This Task Force submitted a report on victim participation prompting Congress to create an Office of Victims of Crime within the Justice Department. However, actual amendments to the US Constitution did not follow immediately. Therefore, to build political momentum for change, supporters of victims' rights worked to promote advancements at the state level.

Advocacy for the rights of victims and the successes of the victims' rights movement are due in part to groups such as the National Organization for Victim Assistance (NOVA).<sup>1</sup> This group, founded in 1975, is the oldest national group of its kind in the victims' rights movement. Its mission is to promote rights and services for victims of crime and crisis everywhere.<sup>2</sup>

NOVA was instrumental in advocating for the creation of victim compensation programs in the US. In the early 1980s, only 27 programs existed in the US, but by the mid 1990s, fifty state programs were in existence as well as programs in the District of Columbia and the US Virgin Islands.

Compensation is set up by the state, usually through an agency such as a Crime Victims' Board. This agency is designated to provide financial relief to victims of crime who suffer physical injury as a direct result of a crime. In addition to NOVA, online resources such as the website for the Office for Victims of Crime provide links to victims support programs, eligibility for compensation programs and a compensation program directory.<sup>3</sup>

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<sup>1</sup> National Organization for Victim Assistance (NOVA), available at <http://www.trynova.org/about/>.

<sup>2</sup> *Id.*

<sup>3</sup> Office for Victims of Crime, available at <http://www.ojp.usdoj.gov/ovc/welcome.html>.





NOVA also advocated for courts to consider the impact of crime on victims at sentencing. In the 1980s, only a handful of jurisdictions considered the impact of the crime on the victim, but by the mid 1990s, almost every state allowed victims to participate in sentencing. An impact statement is either read by the victim or submitted to the court in writing at the time of sentencing.

Through the work of groups like NOVA, advancements in the rights of victims were made throughout the 1980s and continue now. In 1982, California passed the California Crime Victims' Bills of Rights and was one of the first states to enact legislation eventually codifying a compensation program for victims of violent crime.<sup>4</sup> By the end of 1994, twenty states had passed legislation protecting the rights of victims and by the end of the decade, over thirty states offered protection to victims.<sup>5</sup>

Groups like NOVA promoting the rights of victims at the state level led Congress to enact the Victims of Crime Act of 1984.<sup>6</sup> The Act established a Crime Victims' Fund to distribute criminal fines and penalties to victims' compensation and assistance programs. Further, this Act was amended in 2004<sup>7</sup> to improve notification of proceedings progress and the enforcement of victims' rights.

## Victims' Rights in US State and Federal Courts

The court system in the US is divided between federal and state courts. Today, many of the fifty states and the federal government have adopted amendments to existing law providing greater rights and protection to victims of crime. Protections shared at state and at the federal level include the right of victims to be informed about the legal process, the right of victims to be present during the criminal proceedings and the right of victims to be notified of all judicial proceedings. A victim is not be barred from attending the trial unless the Court finds good cause, such as that the presence of the victim will violate the defendant's due process rights.

In the US, the police are called to investigate after a crime is committed. A potential victim is interviewed by police and gives his or her statement. In a criminal proceeding, the case is given to the District Attorney who represents the state where the crime was committed, not to the lawyer for the victim.

After the investigation stage, the victim no longer participates and becomes a passive spectator free to attend the arraignment and possible trial. The victim is not a party to the proceedings and has no formal legal representation. However, he or she has the right to be informed about the criminal proceedings and have notice of all scheduled court appearances. Further, if the defendant is convicted, the victim has the right to be informed of any appeals filed by the defendant and the date of release or parole.

In addition, the victim may have the opportunity to participate in some state or federal courts if a grand jury is used to issue an indictment. If a grand jury is called, a victim may be called to testify. Similarly, a victim may

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<sup>4</sup> State of California, Victim Compensation and Government Claim's Board, available at <http://www.vcgcb.ca.gov/victims/rights.aspx>.

<sup>5</sup> Victims' Rights - US Constitutional Protection for Victims, available at <http://law.jrank.org/pages/2281/Victims-Rights-U-S-Constitutional-protection-victims.html>.

<sup>6</sup> Victims of Crime Act of 1984, available at <http://law.jrank.org/pages/11121/victims-crime-act-1984.html>.

<sup>7</sup> The Crime Victims' Rights Act of 2004, available at <http://www.usdoj.gov/usao/eousa/vr/cvra/index.html>.





act as a witness for the prosecution at trial. However, absent the possibility of being called as a witness by the prosecution the victim has no active role at trial.

However, because of the victims' rights movement, victims may read or submit impact statements to be considered at sentencing. These statements describe how the crime committed has affected the victim. At sentencing, the victim is not dependent on the prosecution calling him or her as a witness; instead, he or she has a guaranteed right to speak. The difference between reading an impact statement and testifying at trial is that an impact statement is read to the judge, not the jury. In this scenario the guilty verdict has already been issued by the jury.

Also, victims may be eligible for compensation available through state funds. This advancement in victims' rights, allows the funds collected from fines paid by defendants to be distributed to deserving victims of crimes. These funds are available in each state and require victims to fill out relevant forms to assess their eligibility. Most states have a body that reviews and distributes compensation funds and grants to eligible victims.

### Victims' Rights at the International Criminal Court

At the ICC, victims have the opportunity to participate in a limited capacity and are represented by counsel. A major element of the victims' participation at the ICC is the Court's recognition of certain individuals as victims. The Court has developed a process for such recognition which then permits victims to participate at certain stages of the proceedings when their personal interests are affected.<sup>8</sup>

The Rules of Procedure and Evidence (RPE) outline the procedure for victim participation at the ICC.<sup>9</sup> In order to participate, a victim must submit a written request to the Registrar.<sup>10</sup> The Office of the Registrar will submit this request to the proper Chamber, which then decides on the arrangements for the victim's participation in the proceedings.<sup>11</sup> The Chamber may reject the application if it does not consider the applicant to be a victim within in the meaning of the statute; the applicant is able to reapply in the future.<sup>12</sup> RPE 85(a) which defines a "victim" as natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court. This definition was interpreted in the Lubanga case as meaning that the victim must have suffered a direct harm allegedly perpetrated by the defendant or suspect.<sup>13</sup>

In the Lubanga case, the Office of the Prosecutor (OTP) argued before the Pre-Trial Chamber that questioning the determination of a victim as a victim as defined by the statute. The OTP argued that this finding that an

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<sup>8</sup> International Criminal Court, Rules of Procedure and Evidence (RPE), Rule 68(2), available at <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rules+of+Procedure+and+Evidence.htm>.

<sup>9</sup> *Id.*, Rule 68(2).

<sup>10</sup> *Id.*, Rule 89(1).

<sup>11</sup> *Id.*,

<sup>12</sup> *Id.*, Rule 89(2).

<sup>13</sup> Pre-Trial Chamber I, Decision on the Application For Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 2, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04, January 17, 2006, pp. 21-24, available at <http://www.icc-cpi.int/iccdocs/doc/doc183441.PDF>.





applicant is a victim is the same as determining the guilt of the defendant. The OTP argued that by determining if the applicant is a victim the Pre-Trial Chamber was denying the right to a fair trial to the defendant.<sup>14</sup>

The Pre-Trial Chamber asserted that its determination of whether the victim was within the definition in the RPE was not the same as determining the guilt of the defendant. Instead, the finding of the applicant to be a victim as envisaged in the RPE only determined that the victim had been injured but not by whom.<sup>15</sup>

Once victims are identified, they are represented by legal counsel and may be asked to choose one legal representative.<sup>16</sup> Although in the US, class action lawsuits are civil in nature, the ICC uses group representations in criminal proceedings for many of the same reasons it is used in US civil courts. Specifically, the use of group representation allows for a more efficient trial. The relevant Chamber may ask for such group representation because the crimes before the ICC tend to produce thousands of victims and thus group representation limits the number of participants and may reduce the production of repetitive evidence.

At the time of writing, Trial Chamber II in the Case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui has asked that victims be represented by two legal teams. The victims would be divided among former child soldiers and all other victims.<sup>17</sup> In this case, the Court found that by categorizing the victims the trial will be more efficient and the victims will be better represented.

Once victim status is established, the relevant Chamber may ask for the views of the victims on a variety of issues, may allow the victim, through counsel, to question the defendant and it may permit the victim to participate in the investigative stage of the proceedings.<sup>18</sup>

Further, the establishment of victim status may be reviewed at each stage in the proceedings. In the Lubanga case, Trial Chamber I decided that participation of the victims is reviewed at each stage and the initial recognition of being a victim within the meaning of the Statute does not guarantee participation at all stages in proceedings. The Court may also require a victim to show that his or her interests are affected in order to participate in a particular manner. This process of reviewing the status of victims allows the Court to function efficiently.<sup>19</sup>

The importance of victim identification and participation is linked to the direct impact such participation may have on the rights of the defendant. Therefore, during each stage of the proceedings the Court is weighing the

<sup>14</sup> Prosecution's Reply to the Observations of the Legal Representatives VPRS1 and VPRS6 following the Prosecution's application for leave to appeal the Decision on the Application of Participation in the Proceedings, February 2006, available at <http://www.icc-cpi.int/iccdocs/doc/doc183474.PDF>.

<sup>15</sup> Pre-Trial Chamber I, Decision on the Application For Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 2, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04, January 17, 2006, pp. 23-43, available at <http://www.icc-cpi.int/iccdocs/doc/doc183441.PDF>.

<sup>16</sup> RPE, Rule 90(1), (2).

<sup>17</sup> Trial Chamber II, Order on the Organization of Common Legal Representation of Victims, ICC-01/04-01/07, July 22, 2009, available at <http://www.icc-cpi.int/iccdocs/doc/doc715762.pdf>.

<sup>18</sup> RPE, Rules 91(1), (2), (3) and (4), and 93.

<sup>19</sup> Defense Submissions on the Review of the Status of Victims participating with the Court, May 11, 2007, available at <http://www.icc-cpi.int/iccdocs/doc/doc266099.PDF>.





rights of the defendant and the rights of the victim at all times and will ensure that both parties are fairly represented.

Moreover, a victim may not be permitted to participate if such participation would unfairly prejudice the defendant in such a way as to render null and void the presumption of innocence until found guilty. In addition, if a victim's attendance at the trial would be unfairly prejudicial to the defendant such attendance may be reduced or limited to protect the rights of the defendant.

In addition to trial participation, victims are also eligible for compensation. The ICC is the first international court with the authority to order an individual to pay reparations to another individual. Article 75 of the Rome Statute allows the Court to establish principles for reparations for victims, which may include restitution, indemnification and rehabilitation.

To apply for reparations, victims are required to fill out a written application with the Registry.<sup>20</sup> The Victims' Participation and Reparation Section is responsible for publishing information on reparation proceedings. These proceedings take place after a defendant has been declared guilty. The Court may order that reparation be paid through the Trust Fund for Victims (TFV). The TFV is an independent body set up by the Rome Statute and overseen by the Court's Assembly of States Parties.

The TFV advocates for victims and their families by working with local, national and international groups, governments, UN agencies and NGOs to develop and establish fund programs in affected communities. These programs offer victims physical, material or psychological assistance. These programs are necessary to allow communities and victims to rebuild their lives.<sup>21</sup> The Trust Fund also provides grants to establish programs in deserving communities affected by crimes within the jurisdiction of the Court.

## Comparison Between Victims' Participation in US Courts and at the ICC

Victims in the US and the ICC are not viewed as third party participants. Instead, victims in both systems are offered rights and given a voice in the proceedings to varying degrees. Both the US and the ICC offer many of the same protections to victims including the right to be informed about the legal proceedings, have the right to attend proceedings and the right to receive monetary compensation.

However, there are many differences between the levels of victim participation in each system. For example, at the ICC a victim is represented by legal counsel, may participate at all stages of the proceedings and may be asked for his or her views on any issue by a Chamber. Further, victims at the ICC may have the opportunity, through counsel, to question defendants.

Whereas in the US, victim participation is limited; victims actively participate only when reading or submitting an impact statement used at sentencing. For the most part, a victim may not participate during the trial except as

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<sup>20</sup> RPE, Rule 94.

<sup>21</sup> International Criminal Court, Trust Fund for Victims, available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Trust+Fund+for+Victims/>.





a passive observer unless called to testify. However, the victims' rights movement has increased resources to ensure that victims' rights to be present and informed on the criminal proceedings are enforced.

In addition, the victims' rights movement has established monetary compensation for victims either by restitution payments or with eligibility in assistance programs. These funds are collected from fines paid by defendants and distributed to eligible victims by compensation boards set up by each state. These Boards also offer information on applying for grants as well as support networks.

One major difference between victims at the ICC and in the US is the audience to which the victims are speaking. In the US, the victims' rights movement has evolved to focus on actions taken by the victim in criminal proceedings. This is evident by allowing the victim to speak at sentencing. Therefore, it is a logical prediction that continued participation of victims in US court will eventually allow victims to speak directly to the jury. In that case, a jury will not have the same sophistication as a judge and may be swayed by possible emotional and "heartstrings" arguments presented by the defense.

Therefore, a victim who participates beyond acting as a witness may present a heartstrings, instead of legal or factual, argument; these may complicate the rendering of an unbiased verdict. This could cause an increased number of mistrials called because of improper evidence given to juries. Alternatively, judges may have more evidence to examine and weigh during the pre-trial phase and further clog US courts, due in part to greater participation by victims.

Whereas victims at the ICC, whether as witnesses or through legal representation, may present arguments to a Trial Chamber composed of judges. In this case, judges are less likely to be swayed by heartstrings arguments presented by victims unlike jurors in US courts. Further, as an officer of the court, counsel is less likely to present emotion or inflammatory evidence and instead focus on factual and legal arguments. Moreover, judges at the ICC are well prepared with an understanding of the legal process to weigh the arguments presented by victims and those presented by counsel.

Therefore, the use of jury trials in US state courts may limit further direct participation of victims because of the potential prejudicial effects. However, federal courts do not use juries and may have greater ease in accommodating further legislation protecting and advancing the rights of victims in trial.

## Impact of Victim Participation on the Rights of the Defense

Victim participation in criminal proceedings has the potential to prejudice the defendant. Therefore, the participation of victims in criminal proceedings is weighed against the impact such participation will have on the defendant's due process rights. Both US courts and the ICC recognize the due process rights of a defendant; in fact, the list of due process rights offered by the ICC is actually more detailed than that offered by the US Constitution.

The due process rights afforded suspects at the ICC are found in Article 55(1) and the rights afforded accused persons are found in Article 67. These include: the right not be compelled to incriminate oneself or to confess





to guilt;<sup>22</sup> the right not to be subjected to any form of coercion, duress, threat, torture or cruel, inhumane or degrading treatment or punishment;<sup>23</sup> the right to have free assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness;<sup>24</sup> and the right not to be subjected to arbitrary arrest or detention, or to be deprived of liberty without due process.<sup>25</sup>

The due process rights extended to defendants at the ICC are similar to those found in the US. Specifically, the Fifth Amendment rights against self-incrimination and due process; the Eight Amendment right against cruel and unusual punishment and the requirement of all US courts to provide adequate translations for all defendants.

In addition to these rights, defendants at the ICC and before US courts are presumed innocent until found guilty. It is important that evidence presented in court does not unduly prejudice the defendant and find him or her guilty prior to a verdict being given. Therefore, both US courts and the ICC are constantly weighing the rights of the defendant against the rights of victims to participate in criminal proceedings in order to protect both the rights of the defendant and those of the victims.

There are strong arguments for limiting participation of victims in the US and at the ICC. The most important is the due process rights of the defendant at trial. This argument presumes that victims may unduly prejudice a judge or jury against the defendant and affect the outcome of trial thereby denying the defendant of a fair trial. This argument is persuasive because a court must be seen as legitimate in order for its judgments to be respected.

The arguments in favor of victim participation are equally compelling. These arguments do not presume that victim participation is automatically prejudices the defendant. Instead, statements of the victims should not be viewed as those presented by the prosecuting attorney and should not have the same weight. The burden of proving the defendant is guilty rests on the prosecuting attorney only. The victim should be free to present his or her statements and participate in the criminal proceedings because of the alleged injury sustained. Moreover, participation alone does not automatically prove that the defendant caused the victim's injury but only that the victim was injured.

Therefore, in US domestic courts and at the ICC there is a constant struggle with balancing the rights of defendants and victims. This balance is necessary to protect the integrity of the relevant court. Further, if the court is not seen as fair then its judgments will not be respected and it will fail to bring justice to the victims or exonerate the accused.

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<sup>22</sup> RPE, Rule 55(1)(a).

<sup>23</sup> *Id.*, Rule 55 (1) (b).

<sup>24</sup> *Id.*, Rule 55 (1) (c).

<sup>25</sup> *Id.* Rule 55 (1) (d).





## Conclusion

The participation of victims in criminal proceedings is important because of its potential impact on the rights of the defendant and the perceived fairness of the judgment. At this time, changes in the rights afforded victims continue in the US and at the ICC.

The ICC has shown from its inception that it has a strong interest in promoting justice and the rights of victims affected by war crimes, crimes against humanity and genocide. This is evident in the Rules of Procedure and Evidence which give victims a role in the criminal proceedings. These procedures have allowed victims to participate in all trial stages, present evidence, question defendants and will continue to shape the role of victims within the Court.

Today, the US has provided greater protections for victims and increased efforts to protect rights already afforded to them. However, whether the greater importance given to victims in the US will cause the protections and rights to mirror the protections and rights given to victims at the ICC is too early to determine. It is clear that both systems respect the role that victims play and are working to ensure that both the rights of defendants and victims are protected throughout the criminal process.

*Researched and drafted by Lucia DiCicco  
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