

Victims at the Heart of International Criminal Justice

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This is the sixth in a series of articles on the International Criminal Court (ICC). The Rome Statute creating the ICC entered into force on July 1, 2002 and the court is now in its 20th year. To mark the occasion, The Wire is publishing a series of articles evaluating its performance over the past two decades. See also: [Part 1 \(Afghanistan\)](#)| [Part 2 \(Powerful states staying above the law\)](#)| [Part 3 \(Rohingya crisis\)](#)| [Part 4 \(Palestine\)](#)| [Part 5 \(Sexual and gender-based violence\)](#)

On 30 August 2021, London-based human rights lawyers, representing hundreds of victims of civil war in Yemen, [submitted evidence](#) of torture and killings of at least 140 victims, including children, to the ICC. This is in order to initiate a formal investigation into the US-backed war crimes and crimes against humanity allegedly committed by Saudi Arabia. On August 12, 2021, [Sudan signed an agreement with the International Criminal Court \(ICC\)](#) to provide justice for victims of war crimes and crimes against humanity in Darfur. In another part of the world, lawyers representing families of victims have urged the ICC to [pursue its investigation into the 'war on drugs' campaign in the Philippines](#), terming it as the last hope for justice.

Last month, [families of victims](#) reportedly called on the International Criminal Court (ICC) to prosecute Myanmar junta leaders for the killings, torture and illegal detention perpetrated on anti-coup protesters. Myanmar's shadow National Unity Government (NUG) is reportedly gathering evidence of crimes perpetrated by the junta in at least 200 cases, to show the ICC the gravity and scale of the crimes committed.

These powerful narratives and demands for accountability bring the role of victims in International Criminal Justice into focus.

International standards on victims' rights

Recognising the role and interests of victims is one of the most significant strides made by International Criminal Justice in the 21st century. Criminal law has traditionally focused on investigation, prosecution, conviction and punishment of the accused. Into this, victims' perspective was often considered a dilution of traditional criminal law, distraction, complication, molly-coddling, hindrance and an avoidable inconvenience.

To understand the importance of victims' role and place, we would need to unpack why victims and survivors engage with the legal system in the first place – to know the fate of their loved ones; to narrate their experiences; to speak for the dead, the injured and the disappeared; and to demand justice and accountability.

Under international law, 'victims' have a very specific definition and a whole body of rights, as explained below. This is why the present article uses the term 'victim' rather than 'survivor' or 'aggrieved person'. Victims are defined as persons who have suffered harm, individually or collectively, as a result of the commission of a crime.

The term 'victim' includes family members and dependents of the direct victim; a person would be considered 'victim' even if the perpetrator was not identified or prosecuted. 'Harm' includes physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights.

Victims' rights were spelt out in several instruments of the United Nations. A significant one was the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power – referred to as the Victims' Declaration (1985). This declaration laid down the definition of 'victims of crime' and spelt out their rights, such as access to justice and fair treatment, restitution (including return of property), compensation and assistance (social, legal and medical).

In 2005, the UN General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law – referred to as the Van Boven/Bassiouni Principles. This acts as an international Bill of rights for victims.

While the 1985 principles focused on crimes within domestic law, the 2005 principles focused on crimes in international law. Victims' right to remedies, right to reparations for the harm suffered, the treatment of victims with respect and dignity, and a duty of states to investigate and prosecute crimes, form the core of the latter set of principles. As predecessors to the ICC Statute, these laid the foundation for the treatment of victims by International Criminal Justice system.

[Also read: Disclosing the Identity of Rape Victim Remains a Grey Area in the Justice System](#)

The Rome Statute's expanded role for victims

During the Nuremberg and Tokyo tribunals held in the post-World War II context, or in the International Criminal Tribunal for former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) established in the 1990s, there was no explicit inclusion of victims' rights in law or in practice; victims were not considered as having legitimate interests, and needing their own space and voices to be heard by the judges. As in many national legal systems, in these international tribunals too, victims' role was often limited to being prosecution witnesses.

Seen in this light, the integration of victims' rights within the Rome Statute of the ICC is nothing short of revolutionary. The International Criminal Court (ICC), established through the Rome Statute, is a judicial institution of a permanent nature that is capable of prosecuting individuals for war crimes, crimes against humanity, genocide and the crime of aggression. Given the impetus provided by the principles and standards on victims' rights, the ICC Statute integrated an expanded role for victims, circumscribed by and balanced with rights of accused and the need for a fair and impartial trial.

In the ICC Statute, victims' rights fall within three main categories: right to protection (from threat, intimidation, coercion and duress), participation (in the proceedings) and reparations (to repair the harm caused). Related rights include right to legal representation, and right to notification and publicity of proceedings which are pre-conditions for an effective participation.

Protection of victims and witnesses

Protection is an important aspect of victims' rights in international criminal law. A strong legal regime of protection that is implemented rigorously will encourage more and more victims to come forward and engage with the legal proceedings, and testify to the serious crimes committed. Given the scale and gravity of the ICC crimes, victims are bound to be in large numbers in each case.

Since the ICC's investigation includes the role of political, military and civilian leaders for serious crimes, the suspects have adequate clout to threaten, intimidate or coerce victims and other witnesses into silence. Thus, victim protection is crucial for the pursuit of justice in the ICC.

Protection of the victims and witnesses is a joint responsibility of all organs of the ICC. A Victims and Witnesses Unit (VWU) has been established within the ICC's Registry as a specialised unit to address the issue of victims' protection. It determines the nature of threat to the victims and implements protective measures accordingly. It coordinates with field-based personnel for providing protection to victims. A victim support programme addresses issues of psychological support, social, economic and legal assistance to victims.

Thus far, testimonies of victims and witnesses have formed the backbone of all ICC trials. Although elaborate mechanisms have been put in place to protect victims, challenges remain in the actual implementation. In the early years of the ICC's functioning, controversies arose between the Office of the Prosecutor (OTP) and the VWU about

responsibilities for protecting victims and witnesses. The differences and tensions between the two organs of the court surfaced during the trial of Thomas Lubanga who was accused of war crimes including the use of child soldiers in Democratic Republic of Congo (DRC).

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In this case, the OTP made a mass referral of 24 witnesses to the VWU for protection measures just before the trial commenced, which the trial chamber termed as “excessively late.” This created a backlog of assessments within the VWU, and delayed other trials where too victims and witnesses needed protection.

The OTP also did “preventive relocation” of its witnesses on its own accord without involving the VWU which has the actual expertise in protection. This was due to a disagreement between the OTP and the International Criminal Court Protection Programme (ICCPP) about the involvement of the latter. Litigation over this disagreement led to considerable delays during hearings on confirmation of charges for Germain Katanga and Ngudjolo Chui.

While these instances may be brushed off as “teething problems” of a fledgling institution, the cracks in the ICC’s protection programme became evident when reports of rampant “witness interference” emerged.

Witness interference is an umbrella term that consists of attempts to scuttle processes of justice through threats and intimidations, reprisals resulting in grave injury or killing of the witness, tutoring/coaching, bribing and inducing a witness to give a favourable testimony, and disclosing and publicising the identity of protected witnesses.

The collapse of the case against Uhuru Kenyatta – the President of Kenya – at the ICC was largely attributed to his non-cooperation with the court and his witness interference. Kenyatta was summoned to appear in the ICC in 2011 and face serious charges of crimes against humanity, such as murder, forcible transfer of population, rape, persecution and other inhumane acts during the post-election violence in Kenya in 2007-08.



Kenya's President Uhuru Kenyatta flanked by his Deputy William Ruto addresses the nation at State House in Nairobi, Kenya. Credit: Reuters

In 2014, the ICC Prosecutor was forced to withdraw the serious charges against him due to a lack of evidence, after key prosecution witnesses withdrew their testimonies. Though the Prosecutor's withdrawal did not foreclose the possibility of bringing charges against him once again, if other sufficient evidence surfaced, it caused a major embarrassment to the ICC as a whole, and the victim and witness protection programme in particular.

In 2016, the case against William Ruto, the deputy President and Joseph arap Sang, the radio broadcaster during post-poll violence from the same context was terminated after the trial chamber found the prosecution's evidence against them weak. This was because victims and witnesses who initially testified in court subsequently stopped cooperating with the Prosecutor due to threats, intimidation, bribery, inducement or fear of reprisals.

In October 2016, the case of Bemba et al from the situation in the Central African Republic was the first instance of the ICC handing over a conviction for witness interference. Jean Pierre Bemba and four of his associates were found guilty of a laundry list of crimes related to interfering with defence witnesses – furnishing them with testimonies in favour of Bemba, abusing ICC Detention Centre's privileged phone line, using coded language in phone communications to camouflage the plan to bribe and tutor witnesses, distributing telephones to witnesses and transferring money to witnesses through third parties.

Bemba was sentenced to an additional year of imprisonment and a fine of €300,000 (over and above the punishment handed over for previous conviction for war crimes and crimes against humanity). What is shocking is the amount of witness interference they were able to indulge in, from the ICC's Detention Centre right under the nose of the Victims and Witnesses Unit of the ICC!

It is not surprising that the OTP's strategic plan for 2016-2018 stated that in "almost all cases of confirmation of charges and of trial, there has been an obstruction to justice, particularly witness tampering". A briefing paper by the Open Society Justice Initiative on Witness Interference finds that there has been 'witness interference' in eight of the nine trials that were pending during the time of the study in 2016. It further observed that patterns of witness interference at the ICC were not "spontaneous or opportunistic" but indicated "well-coordinated and broad network of perpetrators".

The saga of witness interference at the ICC is far from over. Paul Gicheru, a Kenyan lawyer, surrendered to the ICC in November 2020 in response to an arrest warrant issued against him for witness interference in the Kenyan situation in 2013. This was in relation to the ICC cases of Uhuru Kenyatta, William Ruto and Joseph Sang, which were terminated. Charges against Gicheru were confirmed by the ICC judges on July 15, 2021. The case is pending before the court. The ICC's long arm of justice is at work, albeit slowly.

In a related move, last month, the current ICC Prosecutor, Karim Khan, was allowed by the pre-trial chamber of the ICC to recuse himself from the case as he had represented Ruto, the deputy President of Kenya, in the ICC case related to the 2007 post-election violence in Kenya.

Also read: Can Judges Dispense Gender Justice While Expressing Views That Go against It?

Victims' participation in the ICC proceedings

Victims' participation in the proceedings has been given utmost importance by the Rome Statute, in an attempt to make a paradigm shift from criminal proceedings in domestic law, and to recognise victims as important stakeholders in the criminal justice system. It is a unique feature of the Rome Statute, made possible through the concerted efforts of the global community, especially non-governmental organisations and various victims' groups at the stage of formulating the legal framework for the ICC.

Within the legal framework, victims may make representations giving their views, concerns and expectations directly to the ICC judges. The Victims Participation and Reparations Section (VPRS) of the ICC Registry is mandated with the responsibility of facilitating this process. If a victim or a victim's group lacks financial resources to engage the services of a legal representative, the Registry may provide financial assistance. Legal representation of victims and assistance to victims' lawyers is facilitated through the Office of Public Counsel for Victims. Victims' participation in the proceedings is distinct from a victim's role in testifying before the ICC as a witness.

The status of victims within various stages of the ICC proceedings remains ambiguous. However, by observing the practice at the ICC, one can deduce that victim participation is evident in stages including the following: when the Prosecutor requests the pre-trial chamber to authorise the commencement of investigation; when the court deals with challenges to ICC's jurisdiction and the admissibility of a case; when hearing is held for confirming the charges of a suspect; when a suspect is arrested and produced before the ICC for trial; during trial; and in hearings for reparations.

As compared to national legal systems, including in India, where the victims are mostly kept in the dark about the status of the case and the Prosecutor's arguments in court, as the Prosecutor has no obligation to inform them anything regarding the case, the ICC's provisions are a giant leap towards a victim-centric criminal justice system.

A decision by the pre-trial chamber in Dominic Ongwen's case dealing with crimes committed in Uganda, gives the victims a better legal position to exercise their right to participation. It affirmed the responsibility of the ICC Prosecutor to inform the victims or the VPU of a decision to commence an investigation; this would enable victims to make representations to the court in favour of or against, or share their concerns on the proposed investigation. The ICC has also stated that the participation rights will be available using two criteria – namely satisfying the definition of 'victim' [a person who has suffered harm due to the alleged commission of ICC crime(s)], and the applicant has a 'personal interest' in participating in the proceedings. The latter will be decided on a case to case basis.



Dominic Ongwen, a former senior rebel commander from the Lord's Resistance Army in Uganda, stands in the courtroom of the International Criminal Court (ICC) during the confirmation of charges in The Hague, the Netherlands January 21, 2016. Credit: Reuters

Victims have participated in the proceedings at the stage that an accused is arrested and surrendered to the custody of the ICC, as was the case in Central African Republic, Kenya, Mali, the Democratic Republic of Congo and Uganda. For example, in the case against Uhuru Muigai Kenyatta (Kenyatta) for commission of crimes against humanity in Kenya in post-election violence in 2007-08, 725 victims had been authorised to participate in the proceedings.

In the case of Ali Muhammad Ali Abd-Al-Rahman, who was charged with war crimes and crimes against humanity in Darfur, Sudan, the judges allowed 151 victims to participate in the proceedings. In the case of Lubanga from Democratic Republic of Congo, 146 victims were allowed to participate in the trial, leading to his conviction in 2012.

In the Bangladesh/Myanmar situation, two victims' groups played a key role in the the pre-trial chamber's decision to authorise the commencement of an investigation – victims of massacre in the village of Tula Toli on August 30, 2017, and victims belonging to The Shanti Mohila (Peace Women). Similarly, when the Prosecutor requested the pre-trial chamber to authorise commencement of an investigation in Afghanistan, victim representations on behalf of a large number of victims were submitted in the chamber in January 2018, a majority of who were overwhelmingly in favour of ICC's investigation.

Likewise, in the situations of Georgia and Cote D'Ivoire, victim participation was essential at the pre-trial chamber stage. In the situation of the Philippines, on August 27, 2021, the VPRS released a report based on the fifth victim consultation exercise. Based on 204 victims' representations, the report concluded that families of victims who survived the drug war “overwhelmingly support” the Prosecutor's request for a full investigation into the bloody anti-drug campaign by President Duterte. While the victims and the ICC prosecutor await the decision of the pre-trial chamber on sanctioning a formal investigation into the context, victims' views, concerns and expectations, contained in the report, are likely to weigh in with the judges.

Award of reparations to victims

The ICC Statute provides for reparations to victims of ICC crimes, so that it would help repair the harm caused to the victim and restore their dignity. This is a shift away from retribution. Reparations include restitution (return to status quo ante), compensation and rehabilitation – which may be material in nature – as well as apology and guarantee of non-repetition, which are more intangible but have symbolic importance for victims.

The court may order reparations to be paid through the Trust Fund for Victims – a earmarked fund to which all state parties contribute – used for disbursing to victims. It implements reparation awards against convicted persons, and provides assistance to victims and their families in ICC situations.

Reparations were ordered in the historic case of Ahmad Al Faqi Al Mahdi (Al Mahdi) from Mali, who was convicted for the war crime of destroying historic monuments and buildings dedicated to religion in the city of Timbaktu. The trial chamber ordered reparations of €2.7

million in expenses for individual and collective reparations for the community of Timbuktu. Since Al Mahdi was found to be indigent (and hence unable to pay), a substantial part of the reparations was paid by the Trust Fund for Victims.

Additionally, in the case of Bosco Ntaganda, who was convicted of 18 counts of war crimes and crimes against humanity for crimes committed in Democratic Republic of Congo, the trial court delivered an order of reparations to victims on March 8, 2021. The ICC ordered reparations of \$30,000,000; since Ntaganda was found to be indigent (and hence unable to pay) the reparations, the Trust Fund for Victims was directed to compliment the reparation awards and further indulge in fund-raising for the same. The ICC issued an order for collective reparations, with individualised components. In Lubanga, the ICC ordered collective reparations of US \$ 10,000,000 to the victims.

There are a number of challenges posed by the ICC's power to award orders of reparation. For example, reparations are intrinsically linked to individual criminal responsibility, determined by the ICC through a conviction. In other words, reparations will be ordered only against convicted (and not acquitted) persons for the crimes they are convicted of.

For example, Lubanga was convicted for enlisting and conscripting child soldiers and using them in active hostilities as a war crime. He was acquitted of charges related to sexual and gender-based violence. Hence, the ICC's appeals chamber decided that the victims of such forms of violence would be ineligible to receive reparations.

Similarly, Bemba was convicted of sexual and gender-based crimes by the trial chamber, but was acquitted of all charges by the appeals chamber. Thus, there were no court-ordered reparations in that case. The narrow focus of the court on convictions, though it may seem logical, has led victims to be confused and dissatisfied, as to why some victims are eligible for reparations and others are not.

The ICC can award reparations to individual victims as well as to a group or collectivity of victims. No clarity exists on factors that would determine either or both types of reparations.

In Lubanga, the trial chamber was more inclined to award collective (community-based) reparations, taking into consideration limited availability of funds, and the elaborate and time-consuming verification procedures that would be required for individual disbursements. This was affirmed by the appeals chamber.

In Katanga, the ICC's reparation order consisted of a symbolic compensation amount of \$250 per victim along with collective reparations consisting of support for housing, livelihood, education and psychological support. In Al Mahdi, the reparation order consisted of an individual and a collective component. The collective component was to "repair" the loss of cultural heritage and destruction of humanity's shared memory and collective consciousness; the individual component was directed at victims who faced economic loss, loss of livelihood, emotional distress and destruction of ancestors' burial site during the attack on historic and religious buildings.

Al Mahdi also extended an apology that the trial chamber of the ICC termed as “genuine, categorical and empathetic”. The apology carries immense symbolic value to victims and is included within the broader understanding of reparations. To address the issue of victims’ dissatisfaction with his apology, the ICC chamber ordered the Registry to make an excerpt of the video of his apology, and post the same on ICC’s website with the corresponding transcript in primary languages used in Timbuktu.

[Also read: India’s Sustained Benevolent Sexism Has Let Its Women Down](#)

ICC’s treatment of victims and their rights

The ICC, through its legal framework and in its practice, has advanced the discourse on victims’ rights within the system of International Criminal Justice. Its work on issues of protection and participation of victims, and awards of reparations, are exemplary and set inspirational standards for domestic legal systems to follow suit. At the same time, challenges remain on all three facets of victims’ rights.

While the ICC was established to end impunity for the most serious crimes under international law, witness interference results in impunity prevailing over justice and accountability. Needless to say, this weakens the rule of law and adversely affects the credibility of the ICC. Prosecution and conviction of suspects for witness interference, known in legal parlance as “Article 70 cases”, as done in the *Bemba* and *Gicheru* cases, is a resource and time-intensive procedure, but perhaps a necessary one for a deterrent effect in future cases. Strengthening protective measures is a simultaneous activity that is required.

Award of reparations to individuals and collectivities of victims must take into account their wishes and needs instead of being patronising and paternalistic. Victims’ expectations must be managed effectively so as not to disappoint or confuse them.

With a growing number of victims who wish to participate in the ICC proceedings, efforts are on to ensure that modalities are established for effective victim participation, without compromising on the efficiency of the proceedings and the rights of other stakeholders. For example, the right of the accused to fair trial includes the right to an expeditious hearing; victims’ participation may cause undue delay in the proceedings, especially when they are large in number. This is a potential area of conflict that needs to be resolved. At the same time, it is important that victim participation is not reduced to tokenism – as a procedure that is mechanically tick-boxed or perceived as a waste of time and resources.

Despite these challenges, the ICC has undeniably affirmed victims’ agency and autonomy, and marked a distinct place for them at the heart of the International Criminal Justice system.

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