The Rights of Victims in U.S. Criminal Proceedings  
and at the International Criminal Court

Gina Kim  
August 30, 2018

I. Introduction

This winter, more than 150 victims testified at the trials of Larry Nassar, the former Olympics gymnastics doctor who sexually abused women for decades. Although it was the judge’s decision, she felt free to do this due to the longstanding efforts to increase victims’ participation in criminal trials. In the late 1960s and early 1970s, law-and-order conservatives, feminists, and civil rights activists focused on the inability of the criminal justice system to protect the rights of victims. This unlikely alliance of three social justice movements formed the foundation for the modern victims’ rights movement in the U.S.¹ The movement sought to expand the rights of victims to be notified of criminal proceedings, participate in the trials, and receive reparations for their loss. The efforts have been largely successful. Since 1982, 32 states have passed victims’ rights amendments to their constitutions, and all states have passed statutes affording such rights.²

While the concern for victims had to emerge over time as a movement in the U.S., such concern was strongly expressed during the early negotiation stages for the Rome Statute which established the International Criminal Court (ICC). Non-governmental organizations, especially those representing victims of sexual and gender-based violence, were eager to ensure through the Statute that the Court played an active role in protecting and promoting the rights of victims. As a result, the ICC became the first international criminal tribunal with a charter which enumerated specific rights for victims to actively participate in its proceedings. These rights include the right to be notified of the progress in proceedings, the right to be present at and testify during trials, and the right to receive compensation.

The comprehensive extent of rights afforded to victims at the ICC and the trajectory and accomplishments of the victim’s rights movement in the U.S. share notable characteristics. However, the two also differ in terms of the nature of the process of expanding such rights and the resulting extent of rights afforded to victims. This paper will thus compare the two sets of courts by examining the purpose, process, and the extent of victims’ rights – in particular, the right to be notified, to participate in trials, and to receive reparations. We are making this comparison because of a widespread impression that victims’ rights provisions at the ICC make it fundamentally different from courts in the United States.

II. Comparison of victims’ rights at U.S. Courts and at the ICC

Purpose

This section will examine the motivation and purpose behind expanding victims’ rights at U.S. courts and at the ICC. Both U.S. courts and the ICC expansion of victims’ rights stemmed from a shared empathy for victims. Such empathy naturally led to a belief that victims should be provided with an opportunity to tell their stories at authoritative judicial proceedings. The process of truth-telling is important to reaffirm to victims that the crimes that have happened are not their fault. Such reaffirmation is especially important for victims of sexual and gender-based violence. Feminists both in the U.S. and in the Rome Statute negotiations recognized the importance of victims’ truth telling and ferociously fought for these rights to be fulfilled.

Separately, in the U.S., law-and-order conservatives initially advocated for the expansion of the rights of victims. Law-and-order conservatives argued that the Supreme Court’s due-process revolution of the 1960s resulted in the “criminal minority” having more rights than the “victimized majority.” In their view, the balance has been lost and must be restored by expanding the rights afforded to victims. This “restore-the-balance argument” became the starting point for the modern victims’ rights movement in the U.S.

Process

Despite the fact that victims’ rights protection in both systems stemmed from an empathy for victims, the nature of the process of establishing these rights differed. In the United States, the concern for victims produced a slow but accelerating movement involving the adoption of legislation and practices to protect and promote their rights. For example, at the federal level, Congress passed the Crime Victims’ Rights Act in 2004. At the state level, constitutional amendments reforming victims’ rights passed in 32 states since 1982. All states have passed statutes affording such rights.

On the other hand, at the ICC, the same drive to protect victims was strongly expressed in the early drafting stages of the Court’s Statute. Human rights organizations, particularly those advocating for the rights of victims of sexual and gender-based violence, actively participated in the negotiation process to include strong provisions for the rights of victims. The resulting Statute currently provides a powerful opportunity for victims to actively and independently participate in criminal proceedings. Further sections will elaborate on the specific content of these rights.

Victims’ rights: right to notification

In the U.S., a victim’s right to be notified during the course of the criminal proceedings has been expanded through legislative reform. At the federal level, the Crime Victims’ Rights Act ensures victims “the right to reasonable, accurate, and timely notice of any public court proceeding, involving the crime or of any release or escape of the accused” as well as “the right to be informed

---

3 Garvin.
in a timely manner of any plea bargain or deferred prosecution agreement.” In California, the Marsy’s Law campaign\* successfully passed the state’s Victims’ Bill of Rights which include “the right to reasonable notice on the arrest, charges filed, extradition, pretrial disposition, parole or other post-conviction release proceedings.”

The ICC Statute established a Victims and Witnesses Unit that is responsible for informing victims of their rights under the Statute and the Rules of Procedure and Evidence, and of its existence, functions, and availability. The Court must also notify victims of, among other things, the decision of the Prosecutor to initiate an investigation or prosecute, the decision of holding confirmation charges hearings, and proceedings before the Court including the date of hearing and any postponements thereof. The Victims and Witnesses Unit is responsible for ensuring that victims are aware, in a timely manner, of the relevant decisions of the Court that may have an impact on their interests.

**Victims’ rights: right to participation**

In the United States, a victim’s right to participate in and be heard at criminal trials is mostly restricted to sentencing hearings. The Crime Victims’ Rights Act ensures the victims’ right to “be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.” However, federal case law and state constitutional amendments are seeking to expand this right. In *United States v. Minard* (2017), the Eighth Circuit Court ruled that a judge’s spontaneous expression of sympathy towards a victim during trial “does not reveal bias but rather furthers the policy of encouraging crime victims to participate in the criminal justice process.”\(^4\) Oklahoma’s Constitution also provides victims the right “to be present at any proceeding where the defendant has a right to be present, [and] to be heard at any sentencing or parole hearing.”

On the other hand, the ICC provides an even wider range of victims’ rights to participate in criminal proceedings. The Court permits victims’ “views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court.”\(^5\) The Court also undertakes further measures to facilitate the participation of victims of particular vulnerability. For example, the Court may order that a psychologist be permitted to attend during the testimony of a traumatized victim or witness of sexual violence. The Court also employs technology in which the victim can testify at hearings without having to see the defendant. Further, the legal representative of victims is entitled to attend and participate hearings.

The difference in the scope of a victim’s right to participate in the criminal proceedings at U.S. courts and at the ICC may be, in part, due to the presence of a jury. Criminal trials in the

---

\*Marsy’s Law was named after Marsy Nicholas, who was stalked and killed by her ex-boyfriend in 1983. A week after she was murdered, Marsy’s mother walked into a grocery store and was confronted by the accused murderer. She had not idea that he had been released on bail. Marsy’s family then launched a campaign to expand the rights of victims’ families, particularly the right to be informed of the judicial process affecting them.

\(^4\)“2017 Year in Review: Notable Cases Impacting Victims’ Rights” (National Crime Victim Law Institute, 2018).

\(^5\)Rome Statute, Article 68(3).
United States usually have juries. This leads critics to argue that victims’ participation in trials inappropriately injects emotion and vengeance into the criminal justice system. Critics express concern that jurors will be swayed by emotional statements by victims. On the other hand, the ICC trials are always by judges alone. Supporters of the Court believe that judges are less likely to be emotionally influenced by a victim’s testimony.

*Victims’ rights: right to reparation*

The U.S. Mandatory Victim Restitution Act provides that a victims “may be entitled to an order of restitution for certain losses suffered as a direct result of the commission of the crime for which the defendant was convicted.” Similarly, state constitutions such as those of Rhode Island and Wisconsin also enumerate the right to compensation. However, both at the federal and state level, the right to compensation mostly depends on the successful conviction of the defendant.

At the ICC, a major element of the reparation regime is the Trust Fund for Victims (TFV). The TFV has a two-fold mandate: to implement Court-ordered reparations and to provide physical, psychological, and material support for victims and their families. The second assistance mandate allows the TFV to support victims regardless of a conviction of the alleged perpetrator. For example, following former Congolese Vice President Jean-Pierre Bemba’s acquittal, the TFV decided to accelerate the launch of a program to provide the victims of the actions of his troops in the Central African Republic (CAR) with rehabilitation as well as material support.**

*Controversy, Limitations*

Both at U.S. courts and the ICC, critics express concern that a significant expansion of victims’ rights is prejudicial to the rights of the accused, especially the defendant’s right to a fair and impartial trial. They claim that providing victims with such prominent roles in proceedings will, in effect, result in the defense having to deal with “two sets of prosecutors.” Further, critics of the ICC do not buy the argument that judges will not be emotionally influenced by victims especially because the Statute calls for the Court to be particularly concerned for victims.

While the ICC is a trailblazer in protecting and promoting victims’ rights, this is not to say that the Court’s record is perfect. In 2017, the ICC rejected victims’ claims of intergenerational harm, pointing to the lack of evidence to prove such harm. Critics of this decision argued that the Court’s narrow understanding of transgenerational harm fails to “capture the complexity of psychological responses to trauma” and “reveals the ICC’s strict standards of proof.”

**III. Conclusion**

In developed countries, legal communities have expressed growing concern about the importance of criminal trials to victims and the need to provide them a place in those trials. In the

---

**Jean-Pierre Bemba was charged of war crimes and crimes against humanity committed by his troops at the CAR. The ICC Appeals Chamber acquitted Mr. Bemba of these charges in June 2018.**

United States, this concern has produced a slow but accelerating movement resulting in the passage of legislation and constitutional amendments encouraging victims’ participation in criminal trials. The same impulse was expressed strongly in creating the Rome Statute.

Both the U.S. and ICC provisions about victims are very likely to expand over time through case law. In the U.S., additional state constitutional amendments will be equally important as case law development. At the ICC, the Rome Statute is and will continue to be an adequate baseline for the development of case law on victims’ rights.