

## **“Contributions of Victims Procedural Rights to Gender Justice in International Criminal Law”**

*Dhruv Jaiswal*  
*Amity Law School,*  
*NOIDA*

### **INTRODUCTION**

Throughout the 19th century, there were progressive advancements in addressing sexual and gender-based offences within the framework of international law. The Rome Statute represents the final stage of this evolving process, reaching its highest point with its acceptance. The latter was accountable for setting up fundamental benchmarks and establishing the International Criminal Court (ICC). The Statute includes an exhaustive enumeration of war crimes that encompass sexual and gender-based offences, making it the pioneering text in the realm of international law to address such crimes. The list of crimes against humanity linked to gender and sexuality has been expanded to include the definition of "sexual slavery, forced prostitution, forced pregnancy, forced sterilisation, or any other form of sexual violence of comparable gravity." This expansion also include discrimination based on gender. This was done in addition to the crime of rape, which was listed in the roster. Victims' prerogatives and rights "lato sensu" and victims of crimes against women "stricto sensu" were significantly advanced as a result of this move, which ensured that victims would be protected, given the opportunity to participate, and compensated for their losses.<sup>1</sup>

In an effort to eliminate the impunity that is associated with gender-based offenses, the Statute system was thought of as a potentially significant step forward. When seen from a theoretical perspective, the Rome Statute represented a tremendous step forward for combating the gender and sexual based crime. The current PhD thesis offers a comprehensive backdrop of the aforementioned growth of the way in which these offenses are handled. Furthermore, it offers an elucidation of the procedure that led to the formation of the International Criminal Court (ICC) and highlights the advancements that were achieved via the implementation of the Rome Statute regarding sexual and gender-based offences and the individuals affected by these offences. The backdrop offers a contextualization of the expectations that form the basis for the functioning of the International Criminal Court for the examination and legal pursuit of sexual and gender-based offences falling under the Court's jurisdiction. Furthermore, it enables the understanding of these expectations. Without a doubt, it was expected that the International Criminal Court would ensure that it fulfilled its mission in accordance with the requirements of the Rome Statute.<sup>2</sup>

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<sup>1</sup> WILMET, Marie Anne Frédérique, *Contributions of victims' procedural rights to gender justice in international criminal law : the case of the extraordinary chambers in the courts of Cambodia*, Florence : European University Institute, 2023, EUI, LAW, PhD Thesis - <https://hdl.handle.net/1814/75678>

<sup>2</sup> Chappell, Louise. (2016). *Governing Victims' Redress and Gender Justice at the International Criminal Court*. 10.1017/CBO9781316481493.021.

There was an expectation that the Court would conduct a thorough investigation into sexual and gender-based offences and successfully prosecute and punish the perpetrators. By avoiding flaws and appropriately defining, investigating, and prosecuting violence against women in settings of armed conflict, the International Criminal Court would put an end to the impunity of those who perpetrate such crimes and aid to the prevention of such crimes. On the other hand, it does not seem that the needed motivation to tackle the gender and sexual violence that is envisaged in the Rome Statute has been conveyed in its totality to the practice of the International Criminal Court.

The International Criminal Court is responsible for the investigational process and, when necessary, prosecution of "individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity, and the crime of aggression." The adjudication of sexual and gender-based crimes is an integral part of the operations of the ICC, which is also known as the Court. Whether or whether these offenses are adjudicated in a manner that is both appropriate and effective is dependent, among other things, on the judges of the court. In accordance with the Rome Statute (Statute), the judges are chosen by the Assembly of States Parties (Assembly). These judges come from a wide variety of geographical origins and legal systems, and they possess varying degrees of specialized knowledge, including gender-competence.

As a result, the "judicial culture" of the Court is formed by the makeup of the bench and the dynamics of adjudication. This culture may be described as being on a continuum that ranges from judicial activity to judicial reticence. One of the ways in which this is expressed is in the adjudication procedure of the SGBC. Although there are encouraging indications of progress in the overall work of the International Criminal Court (ICC) after more than twenty years of its existence, there remains a substantial amount of opportunity to develop judicial approaches to the Special Group for the Prevention of Crime (SGBC) in order to achieve non-discriminatory justice results. The report titled "Judicial Approaches to Sexual and Gender-Based Crimes at the International Criminal Court: Structural Shortcomings, Critical Improvements and Future Possibilities of Intersectional Justice" delves into the ways in which the ICC's legal provisions regarding SGBC are interpreted and applied by judges.

The phrase "gender-based violence" has been defined in many diplomatic reports. The Committee report on the Elimination of Discrimination which was against women, a United Nations treaty body responsible for overseeing CEDAW, defined gender-based violence as this perpetrated against a woman solely on the basis of her gender or that impacts women more severely than males, in one of its 1992 general recommendations. actions that cause bodily, psychological, or sexual pain or suffering, threats of such actions, coercion, and other forms of loss of liberty are all included within this phrase, according to the suggestion<sup>3</sup>. Let it be known right off the bat that there is a clear gender gap in the perpetrators and victims of gender-based

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<sup>3</sup> Grewal, K.K. International Criminal Law as a Site for Enhancing Women's Rights? Challenges, Possibilities, Strategies. *Fem Leg Stud* 23, 149–165 (2015). <https://doi.org/10.1007/s10691-015-9286-4>

violence. While males do commit 3 out of every 4 cases of this kind of violence, the majority of victims are women. So, it's easy to assume that women and girls are the primary targets of "gender-based violence."

The Beijing Platform for Action (BPfA), developed during the Fourth UN World Conference on Women in 1995, clearly defined "violence against women" as any gender-based violence that affects or is likely to injure women physically, sexually, or mentally. This includes acts, threats, coercion, or arbitrary loss of liberty, regardless of whether they occur in public or private settings. Violence against women encompasses physical, sexual, and psychological harm that takes place inside the family, such as domestic violence, sexual abuse of girls within the household, violence connected to dowry, marital rape, female genital mutilation, and other harmful traditional practices. It also involves violence that happens outside of marriage and is tied to exploitation. This covers physical, sexual, and psychological violence that happens in the wider population, such as rape, sexual abuse, sexual harassment, and intimidation at work, educational institutions, and other venues. Additionally, it involves the trafficking of women and forced prostitution. Lastly, it encompasses physical, sexual, and psychological violence that is either carried out or permitted by the state, regardless of where it happens. The Beijing Platform for Action explicitly states that violence against women include infringements against the rights of women in armed conflict scenarios, such as organized rape, sexual enslavement, and coerced pregnancy. The definition of the BPfA encompasses the practices of forced sterilization, forced abortion, coercive or forced use of contraception, prenatal sex selection, and female infanticide. The Beijing Platform for Action acknowledges the specific vulnerabilities of various groups of women, including women who are part of minority communities, elderly and displaced women, indigenous, refugee, and migrant women (including women migrant workers), disabled women, women living in impoverished rural or remote areas or in detention, destitute women, girls, and women living in poverty.

A definition of gender-based violence was recently developed as part of the Convention on the Prevention and Combating of Violence against Women and Domestic Violence that was held by the Council of Europe<sup>4</sup>. Article 3 of the Convention defines gender-based violence against women as violence that is directed at a woman because she is a woman or that affects women disproportionately (where the word "women" also includes girls under the age of 18). This definition applies to violence that is committed against women because of their gender. On the other hand, "violence against women" is defined and understood as "a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological, or economic damage or suffering to women, whether in the public or private sphere; this includes coercion, threats of harm or suffering, or the willful restriction of liberty." This definition encompasses all instances of violence against women, regardless of whether they are committed in public or private life.

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<sup>4</sup> Grey, R., McLoughlin, K., & Chappell, L. (2021). Gender and judging at the International Criminal Court: Lessons from 'feminist judgment projects.' *Leiden Journal of International Law*, 34(1), 247–264. doi:10.1017/S0922156520000588

With regard to violence against women or violence based on gender, the definitions that are contained in the texts that were stated earlier are used in the papers that have been accepted at the European level.

## **1.2 VICTIM RIGHTS**

Those are Victims who have endured injury as a direct consequence of any crime that falls within the Court's authority. Any property used for philanthropic, educational, artistic, scientific, or religious purposes, as well as hospitals, historical sites, and other locations and items with humanitarian value, as well as any individual or organization that has suffered direct damage to such property, can be considered a victim.

In the International Criminal Court's Rules of Procedure and Evidence, the term "victim" is defined in great length in Rule 85. When contrasted with other international rules that define victims according to specific criteria, this one is rather broad. Unlike the other criminal courts that came before the ICC—the Nuremberg and Tokyo tribunals as well as the ad hoc tribunals of Yugoslavia and Rwanda—the ICC recognizes victims' rights as an integral aspect of the proceedings, rather than limiting them to the role of testifying witness. The ICC's preparatory committee, which is responsible for establishing the norms of procedure and evidence, was inspired to include victims' concerns into the system by the strong backing of civil society, some academic groups, and certain delegations. As a consequence of differing views on victims' involvement in criminal procedures, a vague normative framework emerged.

An wide meaning of the term "victim" was established by the Preparatory Commission for the formation of the ICC. It summed up four types of victims in its Rules of Procedure and Evidence:

- a) the people who are hurt on a personal level
- b) inadvertently causing harm to the victim's family and dependents Accident victims who were trying to intervene and stop unlawful
- c) Groups of people or entities that are affected collectively.
- d) Victims might be either natural individuals or organizations or entities, according to ICC rule 85 of the Rules of Procedure and Evidence.

A natural person just has to prove "harm," whereas a business or other organization must prove "direct harm." This is the key distinction between the two. Victims who are human beings are labelled as "direct harm" according to this criteria. Because of this difference, victims who are human beings may be categorized as either "direct" or "indirect."

## **1.3 DEFINING VICTIM AS PER ICC**

The ICC recognizes two types of victims, for the purposes of participation in ICC proceedings:

There are individuals who have been harmed as a result of one of the crimes committed by the International Criminal Court. The first section of this pamphlet contains a description of these

offenses. Applicants who are victims on their own should submit their applications by filling out the Application form for participation for individuals. Organizations or institutions, in the event that their property that is devoted to particular reasons (is impaired as a result of one of the crimes committed by the International Criminal Court. Institutions and organizations are required to use a different application form specifically designed for their involvement. Only representatives of an organization or institution who have been properly authorized to do so are permitted to fill out the application form. Children, people with impairments, old people, and those who have been victims of sexual abuse are all examples of potential victims. One may also be considered a victim if they are the recipient of damage as a consequence of a crime that was committed against another individual, such as a member of the family of a person who has been murdered.

The act of participating as a victim is distinct from the act of testifying as a witness. What are the other differences?

The involvement of victims in processes is completely distinct from the potential function of a victim as a witness who is summoned to testify in front of the court for the prosecution, the defense, or the legal representative of the victims.

### **Main differences between being a participant and appearing as a witness:**

#### **Victim as Participant:**

- The victim expresses their own opinions and concerns to the court during their voluntary participation.
- The victims will choose what they wish to say. Participation is permitted at any level of the process when the judges deem it acceptable.
- The right to have legal representation at all times when appearing before the ICC
- Participates through a legal representative; in-person appearance is not required

#### **Victim as a witness:**

- The victim may be called by the prosecution, defense, victim's attorney, or the chamber. Their testimony will be used to forward the objectives of the court and the party calling them.
- Provide testimony and respond to pertinent inquiries to provide evidence.
- invited to speak at a designated time
- Typically lacks a legal representative
- Typically, provide a personal testimony in court. Along with their status as participating victims, victims may also take part in ICC procedures as witnesses. These people in these situations have dual status—that is, they are both witnesses and victims.

## 1.4 SCOPE

The problem of criminal activity is present in every nation in some form or another, and it is imperative that measures be taken to regulate and eliminate it for good. Both the rehabilitation of criminals and the imposition of punishment are the primary focuses of the criminal justice system in every country on the planet. In addition to this, it is concerned with the rehabilitation of convicted individuals after their sentences have been completed. The idea of administering justice has expanded the scope of penal reforms, such as the release of criminals on probation or parole, as well as other correctional systems, with the goal of preparing convicted individuals to function as law-abiding members of society once they are released from prison. On the other hand, the victims of criminal acts are practically impossible to remember. In today's society, the aim of the criminal justice system seems to be to determine whether or not the accused person is guilty. As a result, the victim is seen to be only a witness since he or she has a personal interest in seeing that the perpetrator is punished. In the event that the perpetrator is not punished or is only given a little penalty, the victim will become dissatisfied with the criminal justice system itself. Additionally, there is a potential that the offender may breach the law in order to get justice, which would significantly disrupt the existing law and order situation.

It is possible to see a discernible shift in the general crime picture as well as the pattern of criminal activity in the current minute. A fresh set of conditions and events have given rise to the emergence of new types of criminality and criminal behavior. All of these factors have been investigated by the researcher in order to investigate the effect that modern-day crimes have on victims, with a particular emphasis on sexual and gender-based crimes.

## 1.5 OBJECTIVE

The present study revolves around the following objective:

1. First, to investigate the historical roots of international criminal law in perspective to get an understanding of its development;
2. to investigate the sexual and based on gender offenses that are prosecuted by the International Criminal Court.
3. To investigate the precedent-setting decisions that have been handed down by the International Criminal Court
4. Conducts a study of the contemporary developments in victimology on a global scale and offers recommendations
5. To provide recommendations about the operation of the International Criminal Court that will assist in the minimization of sexual and gender-based offenses

## 1.6 HYPOTHESIS

Following are the hypotheses for the present study:

1. Protecting and rehabilitating those who have been victims of criminal activity is essential to the preservation of social harmony and peace.



2. The current victim procedural rights that are in place in the International Crime Court for sexual and gender-based offenses are insufficient.
3. The state is obligated to devise a system that would allow victims of sexual and gender-based crimes to have their complaints addressed.

### 1.7 RESEARCH QUESTIONS

1. To get to this point of development, what phases of growth has international criminal law gone through?
2. In what way are "victim" and "gender" defined in the International Criminal Courts?
3. In what ways is the new criminal environment worsening the effects on victims of crimes based on their gender and sexual orientation?

### 1.8 RESEARCH METHODOLOGY

The majority of the present study is focused on doctrinal analysis. Doctrinal research has been undertaken using descriptive, analytical, and critical research methodologies. Sources of analytical research include books authored by both domestic and foreign authors, articles published in national and international periodicals, as well as reports generated by particular committees and commissions. In addition to the provided documents, a comprehensive analysis is conducted on a diverse array of court judgments pertaining to the subject matter.

### 1.9 LITERATURE REVIEW

The breadth and depth of international criminal law are addressed in "**International Criminal Law**" by **Antonio Casses**. In a nutshell, he contends that human rights law, international humanitarian law, and public international law have all contributed to what is known as international criminal law, making it a mixed-method body of law. The author begins by discussing the concept of international criminal law, outlining its characteristics and principles, and outlining the components of international crimes. The second half of the article covers "substantive criminal law," which includes the types of international crimes, ways to invite criminal culpability (such as aiding and abetting or conspiracy), and admissible reasons and excuses according to international criminal law. In Part III, the author examines the practical application of international criminal law from various angles. These include: the creation of international criminal tribunals; the primacy and complementarity debate; the role of states in implementing international criminal law; the principles that govern international criminal trials, including judge impartiality, the presumption of innocence, the fair trial principle, the presence of the accused during the trial, the stages of the trial, and finally, the appeals and sentence enforcement processes. It is worth noting that this book also sheds light on the concept of "trial in absentia" (allowing it under the Nuremberg IMT charter), which appears to be the sole option when accused offenders of international crimes refuse to appear before any international criminal law authority for trial. The preceding explanation should have made it

clear that this book is structured into three sections, with each section addressing a crucial aspect of the research.

"International Criminal Law" by **Illias Bantekas** is just another superb work that delves into significant topics related to international criminal law. The book is divided into five sections: Sections I, II, III, IV, and V provide an overview of international criminal law and criminal justice, international criminal law's application, crimes that fall within its purview, and evidence and international criminal procedure. The author's assertion that international criminal law is a combination of public international law and domestic criminal law appears to be accurate given that international crimes are based on international conventions and that the procedures and principles that apply under international criminal law are similar to those that apply under domestic criminal law. The principles of international law, the idea of legal personality, human rights and international criminal law, the various types of criminal involvement and accountability (such as attempt, conspiracy, aiding and abetting, incitement, and the law of command responsibility) and more are covered in the first section. Defences under international criminal law are covered in Part II. Part III covers substantive offences under international criminal law. These include crimes of aggression, war crimes, transnational crimes, crimes against humanity, crimes involving terrorism, transnational crimes including slavery and torture, and genocide. We examine in Part IV the ways in which the work of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for the Former Yugoslavia (ICTR), the International Criminal Tribunal for the Former Yugoslavia (IMT), and the International Criminal Court (ICC) has influenced the evolution of international criminal law. Part V of the book addresses evidence issues before international criminal courts and tribunals and explains how to get victim protection under international criminal law.

The paper "International Criminal Law and Human Rights" by Claire De Than and Edwin Shorts explores the extent to which international criminal law protects human rights. The author persuasively demonstrates how international criminal law, international human rights law, and international humanitarian law are all related to and impact one another. This close relationship is recognised in article 36 of the Rome statute, which specifies that judges must be qualified in "relevant areas of international law, such as international humanitarian law and the law of human rights" or in criminal law and procedure. Part I addresses general issues, Part II goes into detail about particular crimes, Part III talks about personal accountability and impunity, and Part IV looks at human rights in relation to international criminal law. The reader's convenience is the reason for this organisational structure. Mens rea, actus reus, double jeopardy, extradition, asylum, the fulfilment of a state's international responsibility, and the question of whether heads of state may be tried for crimes committed on a global scale are among the concepts of criminal law that are introduced to the reader in Part 1. Part 2 looks at "specific crimes" (such as genocide, war crimes, crimes against humanity, torture, terrorism, slavery, and drug trafficking) in the context of international criminal law. The authors evaluate the current situation of international crimes and provide predictions about how these crimes



will develop in the future. Before coming to a close with the creation of the International Criminal Court (ICC), Part 3 looks at the roles played by the International Criminal Tribunal for the Former Yugoslavia (IMT), the International Criminal Tribunal for the Crimes of Genocide (ICTY), and the International Criminal Tribunal for the Former Yugoslavia (ICTR). Section IV, which covers women's rights under international criminal law, brings the book to a close. In this part, the authors specifically look at SGBV offences in relation to the laws of the ICTY, ICTR, and ICC. Given that this paper links international criminal law to human rights, its importance for my research cannot be understated.

In his work **"The International Criminal Court and National Courts: A contentious relationship," Nidal Nabil Jurdi** delves further into the concept of complementarity. The first place the complementarity concept is mentioned is in the International Law Commission's proposed statute of the ICC (1994), which the author elaborates upon at the outset. While the ICC's jurisdiction is supplementary to that of nation-states, he continues by saying that the two ad-hoc tribunals from the 1990s, the ICTY and the ICTR, have precedence over national courts. The reluctance of nation-states to cede control over their own affairs is well known. So, we had to find a way to strike a compromise between state sovereignty and the need to put an end to impunity for international crimes. Article 17, the source of the complementarity principle's authority, is next examined from a legal perspective. He continues by explaining how amnesties (which exclude a person from criminal prosecution) and pardons (which are issued after a trial and conviction) could work against the complementarity principle. Finally, the author concludes by saying that the court's enforcement mechanism is even less effective than the previous ad hoc tribunals. To back up his assertion, he uses the Darfur referral and the Sudanese government's refusal to comply with the ICC as examples. This book will be very relevant to a highly debated topic within the research framework, namely the concept of complementarity.

The study paper **"ICC and Global Criminal Justice System: Issues & Challenges" by Dr. Sukhwinder Kaur Virk** begins by discussing the jurisdictional procedures described in the Rome Statute, which include the United Nations Security Council, State Parties, and the Prosecutor. It then discusses the concept of complementary jurisdiction. This gives the reader some context for the article's main body, which discusses the obstacles the ICC faces in carrying out its mission. The author points out that the ICC can only investigate when the relevant state is unable to do so for any reason, which means that the concept of complementarity might cause needless delays. Additionally, it is brought to light that the court does not have the authority to carry out arrests or execute anyone, that it does not have jurisdiction over crimes related to hijacking, terrorism, or transnational trafficking, that it does not have jurisdiction over the numerous international crimes that occurred before the statute came into force, and that any role that the UN Security Council is given would give an unfair advantage to the five permanent members of the UN. Additionally, the author has strong opinions on the crime of aggressiveness being kept in a suspended animation state. However, because the court's authority to hear cases involving aggressive offenses has been activated,

this objection is no longer relevant. The researcher may have a better knowledge of the ICC's shortcomings by reading this study.

**Jasmeet Kaur Egan's 2006 PhD thesis from the law school at Panjab University is titled "The Emerging System of International Criminal Law: Issues and Options with Reference to the International Criminal Court."** The seven chapters that make up the thesis examine various aspects of the ICC. The first chapter delves into the origins of international criminal justice, tracing its historical progression from the Nuremberg Trials to the formation of the International Criminal Court in Rome. Chapter II, titled "Rome Statute of ICC," delves more into the reasons for the establishment of the ICC and the cases that are being reviewed by it. In 2006, only four cases were being considered. Chapter III explains the background of individual responsibility in international law and how it has developed, specifically in the context of international criminal law. Chapter IV, headed "Relationship between UN & ICC," discusses the connection between the two organizations, explaining that the ICC is a separate and permanent entity that works in tandem with the UN system. As part of their connection agreement, the International Criminal Court (ICC) and the United Nations Security Council (UNSC) will work together, and the United Nations will give judicial support to the Prosecutor. In Chapter V, we compare and contrast transnational crimes with international crimes. A number of transnational crimes, including drug trafficking, terrorism, money laundering, arms trafficking, cybercrimes, nuclear weapons use, etc., are not covered by the Rome Statute, but the scholar has attempted to draw a line between these four core crimes that are under the ICC's jurisdiction and others. When the ICJ and the ICC have concurrent jurisdiction, problems with jurisdictional authority may arise, as discussed in Chapter VI. As an example, Iraq invaded and occupied neighboring Kuwait for seven months on the false accusation that Kuwait was stealing oil from Iraq. Finally, recommendations and last thoughts are included in chapter seven. The researcher has made several suggestions, including the following: (a) expanding the scope of subject-matter jurisdiction; (b) introducing judicial review of UNSC resolutions and deferrals to ensure that political motivations do not obstruct justice; (c) defining aggression; and (d) bringing municipal laws into line with the Rome Statute. Amnesty or pardon for human rights violators is not permissible under international law, for example. Nevertheless, under municipal legislation, there is no such restriction. Given that different countries are at various stages of legal development, it would be unrealistic to expect universal agreement on all issues.