

The Procedural Rights of the Parties during International Criminal Proceedings With the Emphasis on the International Criminal Court

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Abstract

The respect of the rights of the victim and the accused can be considered as an important issue of any criminal proceeding. However, the balance of the rights of both parties is undoubtedly more important. In the present article, those rights are discussed in the light of the basic principles and rules recognized in the Statute of the ICC and other instruments. The main goal of the writer is to highlight those principles and rules and to show how the competing rights of the parties can be respected without any contradiction. In order to achieve this aim, the legal basis and results of any principle or rule have been discussed thoroughly. As a whole, it could be said that the writers of the Statute and the rules of procedure of the International Criminal Court have done their best to create a balance between the rights of the victim and the accused. The highest point of this balance is the principle of equality of arms.

Keywords: victim, accused, International Criminal Court, publicity, equality of arms, court proceedings

1. Introduction

There are some basic principles and rules which preserve the rights of the victim and accused during the proceedings in the international criminal court. Those principles and rules are rooted in natural law and are accepted by all civilized legal orders around the world. One of the most principles in this respect is the principle of publicity. Fair trial and the transparency of jurisdiction are two results of the principle. However, the principle of publicity is not an absolute one. There are some exceptions to the principle. The participation of victims in the court proceedings is also an important right of the victim. By virtue of this right, the right of defense and exercising a fair trial are guaranteed. Victims may also attend the trial sessions as witnesses. In addition, the right to have legal counsel is recognized for them. The participation of legal counsels in the court proceedings is a very essential element of a fair trial.

The right to silence, the right to be heard by the court at the pre-trial and trial stages and the right to a fair trial including the assistance of learned counsel, adequate time and facilities for the defense preparations, cross-examine prosecution witnesses and examine one's own witnesses constitute the most essential rights of the accused during the criminal proceedings. The position of the accused is based upon the presumption of innocence. Another constituent element of the right to a fair trial is the principle of equality of arms. It means the balance between the powers of the Prosecutor and the defense rights. The integrity and acceptability of the international criminal justice process depends upon a fair balance being struck between the competing rights of individuals suspected of violations of international humanitarian and human rights law and the rights of the prosecution in investigating and prosecuting those suspected of committing such violations, on behalf of the victims and the international community.

2. The Principle of Publicity

Publicity is one of the basic principles in criminal procedure, which is also an essential element of the bundle of rights of a fair trial. It secures the transparency of jurisdiction, by making the functioning of the judicial power controllable, and it also provides a right for the accused person to an impartial and well- controlled judgment on their case (Hager, 2015, pp. 199-214).

The right to a public hearing in both civil and criminal cases is expressly guaranteed both by article 14(1) of the International Covenant on Civil and Political Rights and by article 6 (1) of the European Convention on Human Rights, although the press and public “may be excluded from all or part of” a trial for certain specified reasons, namely, in the interest of morals, public order or national security in a democratic society, in the interest of the parties’ private lives, or where the interest of justice otherwise so requires (OHCHR, 2002). Traditionally, in inquisitorial criminal justice systems, unlike adversary models, criminal trial process, from preliminary investigation to final judgment, were wholly secret. Nowadays, the principle of publicity of hearings is recognized as an element of the right to a fair trial in all systems of criminal procedure, including inquisitorial one.

However, inquisitorial criminal trial process is dominated by the preliminary investigation phase, during which witnesses are called and evidence is gathered. This phase is not a public hearing (Dammer et al, 2006, p. 1). Arguably, some inquisitorial criminal justice systems place less emphasis on the accused’s fair trial rights, even though fair trial guarantees are contained in the European convention on Human Rights (Hodgson, 2002, pp. 781-791).

In General Comment No.13, on article 14 of the International Covenant on Civil and Political Rights, the Human Rights Committee emphasized that “the publicity of hearings is an important safeguard in the interest of the individual and of society at large”. Apart from the “exceptional circumstances” provided for in article 14(1), “a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons” (CCPR, 2007).

The principle of publicity means that trials taking place in secret are contrary to article 14 (1), such as in the case of eight former Zairian parliamentarians and one businessman whose trial- among other shortcomings- was not held in public and who were sentenced to fifteen years’ imprisonment, with the exception of the businessman, who received a five- year prison sentence (GADR, 1986).

The principle of publicity is also guaranteed in international criminal proceedings, although there are some exceptions to the principle. Rule 79 (A) in the identical versions of the Rules of Procedure and Evidence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia also refers to the possibility of the Trial Chamber going into closed session for reasons of public order or morality, safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75, or for the protection of the interests of justice. However, “the Trial Chamber shall make public the reasons for its order” (Rule 79(b)). The Statute of the International Criminal Court also refers to the right to a public hearing. According to article 67, paragraph 1 of the Statute, “in the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute.”

The Statute prescribes public and oral hearings in the presence of the accused for the important stages of a proceeding (articles 61(1), 63, 64(7), 67(1) of the Statute). This concerns the confirmation hearing and the trial itself. The importance of the principle of a public and oral hearing is confirmed by the narrow conditions under which proceedings in camera are permissible (Roben, 2003, p. 529). According to article 64(7) of the Statute, ‘The trial shall be held in public’. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.’ Article 68(2) provides that: ‘As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.’ Thus, the ICC hearings are generally open to the public, unless the Chamber orders a closed session.

In a nutshell, the ICC system of criminal procedure concerning the principle of publicity is mainly derived from adversary system, although the special features in the ICC trial process, including some exceptions to the principle, make it a sui generis model in respect of the principle of publicity.

3. The Participation of Victims in the Court Proceedings

In anticipation of the negotiations over the Rome Statute, France and New Zealand Submitted draft language on ‘the right of victims’ including a provision designed to greatly increase the participation of victims in court proceedings.

However, they faced opposition from a number of powerful delegations, including those of Australia, the United Kingdom and the United States, who argued that the prosecutor should be the sole voice of victims (Benedetti et al, 2013, p. 153). The idea that victims should participate in proceedings raised red flags for many diplomats and lawyers, who anticipated myriad political and legal complications. But the French delegation refused to back down, and sought support from several influential victim-oriented NGOs and a coalition of states, including common law countries from Africa and South America. After a series of debates, the French prevailed and the Rome Diplomatic Conference accepted Article 68(3), the statute's major provision on victims (HRC, UC Berkeley, 2015, p. 18). It reads:

“where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.”

Such participation is voluntary and enables victims to express an opinion independently of the Prosecution or the Defense and offers them the opportunity to present their own concerns and interests; Victims participating in proceedings may also, in some circumstances, lead evidence pertaining to the guilt or innocence of the accused; they may also challenge the admissibility or the relevance of evidence presented by the parties; lastly, victims can seek reparation for the harm they have suffered (ICC, 2011, p. 35).

In addition, Article 15 (3) of the Statue provides that “victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence” regarding the reasonableness or otherwise of proceeding with an investigation. Under Article 19, victims may also make submissions in proceedings with respect to jurisdiction or admissibility. But there cannot be a cause of action for the victims or a right to challenge the core function of the Court which is to take on crimes of concern to the international community. Victims can neither refer a situation to the Prosecutor nor do they have standing before the Pre-Trial Chamber for the review of the Prosecutor's decision not to proceed with an investigation. Victims may, of course, submit information to the Prosecutor in order for him or her to initiate an investigation on that basis (Roben, 2003, p. 547).

4. The Right of Victims to Have Legal Counsel

Once victims are accepted as participants in ICC cases, lawyers to represent them are normally appointed by the court or with the court's assistance, although victim participants may retain their own counsel for advisory purposes, if they can afford it (HRC, 2015, p. 25). Rome Statute Art. 90 (1) provides that victims can choose their common legal representation, but if they cannot agree, the court can override that right.

If the Court considers it appropriate, victims may present their point of view directly to the judges at various stages in the proceedings. Such participation is generally through a legal representative (that is, a lawyer) who presents their views and concerns to the court, since criminal proceedings are quite complex (ICC, 2011, p. 36).

It should be noted that the right to have legal counsel applies not only to choose a legal representative, but also to access to his/her assistance in the most appropriate way. Regarding the special nature of international crimes, the participation of legal counsels in the court proceedings is a very essential element of a fair trial.

5. The Victim's Rights as a Witness

Most witnesses of international crimes are the individuals who were victims of those crimes. They are called “victim witnesses”. In the case of victim witnesses, the problem of coercion, post-traumatic stress disorder, or any number of other factors play into the reliability of any previous statement just as much as it could influence the current testimony (Rutledge, 2003-2004, p. 180). There are a number of protective measures that can be granted to witnesses who appear before the Court and other persons at risk on account of testimony given by a witness. The foundation of the Court's protection system is good practices which are aimed at concealing a witness' interaction with the Court from their community and from the general public. These are employed by all people coming into contact with witnesses (ICC, 2011, p. 40). A last resort protective measure is entry into the Court's Protection Program (ICCPP) through which the witness and his or her close relatives are relocated away from the source of the threat (ICC, 2011, p. 40). Witnesses who were victims of sexual assault and rape enjoy certain rights reserved solely to them.

First, although most children's testimony must be corroborated, this requirement is waived for testimony by children who are victims of sexual assault. In fact, the testimony of any victim of sexual assault does not require corroboration (Rutledge, 2003-2004, p. 181). Additionally, defendants are prevented from alleging the victim's consent if the victim was either "subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression" or "reasonably believed that if the victim did not submit, another might be so subjected, threatened, or put in fear (Rutledge, 2003-2004, p. 181).

Protective measures do not affect the fairness of trial. They are used to make witnesses safe and comfortable. They apply for both referring parties, the Prosecution and Defense equally. All parties are bound by confidentiality and respect to protective measures, yet even when protective measures are applied, witness can still be questioned (ICC, 2011, p.40).

6. The Rights of the Accused

Protecting the rights of the accused for the duration of the entire proceeding, pre-trial to sentencing remains one of the primary purposes of the rules of procedure and evidence (Rutledge, 2003-2004, p. 181). The statute regards the accused as a subject of the proceedings. The accused necessarily is the object of the court's criminal jurisdiction and certain infringements of his personal freedom and bodily integrity. But the Statute ensures that the accused has active and passive procedural rights that allow him or her to influence the proceedings (Roben, 2003, pp. 542-543). In fact, a crucial element of the Court's admissibility test is the interpretation and application of the "rights of the accused", which are contained in Article 67 of the Rome statute (Ghadimi, 2015, p. 18).

The position of the accused is firmly rooted in the principle of fair trial (article 67 of the Statute) that flanks the presumption of innocence (article 66). Equivalent protection is afforded to persons subject to an investigation (article 55 of the Statute). Furthermore, the Statute contains a number of human rights guarantees applicable to the criminal proceedings. Among them is the right to personal freedom that is protected by the strict standards for any arrest procedure in the interest of personal freedom (Roben, 2003, p. 543). For this purpose, an arrested person is brought promptly before the competent judicial authority in the custodial state, which determines whether the warrant is indeed for the arrested person, whether the person was arrested consistently with due process and whether the person's rights have been respected (ICC, 2011, p. 20).

Article 67 guarantees the accused the right to a fair trial. This right contains several elements which are specifically important to the defense before International Criminal Tribunals. The most important of these rights are: the assistance of learned counsel, adequate time and facilities for the defense preparations, cross-examine prosecution witnesses and examine one's own witnesses (Roben, 2003, p. 543). The right to be heard by the court at the pre-trial and trial stages and the right to silence are also two important rights of the accused.

At the trial, the accused's right to be heard is pervasively guaranteed. At the pre-trial stage, the accused's right to be heard by the Court is guaranteed through standing to challenge the major decisions of the prosecutor in court (Pre-Trial Chamber) (Roben, 2003, p. 543).

The "right to silence" is relatively new within the international forum. While it has long existed in many common law traditions, the right is not generally recognized within the civil system. Defendants are expected to freely divulge their side of the story and defendant's silence can usually be used against him/her in the court's analysis of the facts presented. In the international community, the right to silence is incorporated into the tribunal's statutes: the accused cannot "be compelled to testify against himself or to confess guilt" (Rutledge, 2003-2004, p. 182).

The right to silence in the International Criminal Court means that the accused should not be compelled to testify or to confess guilt and they can remain silent, without such silence being a consideration in the determination of guilt or innocence (ICC, 2011, p. 23).

7. The Principle of Equality of Arms

The term equality of arms originated in modern European procedure in the context of Article 6 of the European Convention on Human Right, although the roots of this legal concept date back long before the adaption of this convention. It is said to be an expression of the ancient principle of *audi alteram partem* or *audiatur et altera pars* or, to put it simply, 'hear the other side' (Fedorava, 2012, p. 1). The equality of arms doctrine is not always uniformly defined by academics, but in essence the term implies that both parties to a dispute begin the proceedings on an equal procedural footing with an equal chance of winning their case (Ghadimi, 2015, p. 20).

Being a constituent element of the right to a fair trial, the principle of equality of arms is a “lens through which the requisite procedural fairness in any criminal proceedings can be ascertained” (Tony, 2002, p. 438). It should be noted that “two related but distinct considerations interact within the concept of equality of arm:

- (1) Formal equality: ensuring equality between two equally situated parties; this corresponds to ‘a level playing field’ where the advantage of one party would lead to an unfair outcome; and
- (2) Material equality: the idea that a state should ensure some level of equality between the stronger and a weaker party (through, for example, a legal aid system).” (Fedorava, 2012, p. 11).

The integrity and acceptability of the international criminal justice process depends upon a fair balance being struck between the competing rights of individuals suspected of violations of international humanitarian and human rights law and the rights of the prosecution in investigating and prosecuting those suspected of committing such violations, on behalf of the victims and the international community. This fair balance requirement enjoins the respect for the basic human rights thresholds in criminal trial that are found in the criminal jurisprudence of domestic legislations and in international jurisprudence at the expense of any other competing end. If the trial at the ICC would not be perceived as the judicial lynching of yesterday’s men of power by a world complicit in their crimes, then the requirements of the principle of equality of arms must adhered to (Osasona, 2014, p.1).

While the concept of equality of arms is not specifically defined or mentioned in the Statutes of any international criminal tribunal or in any international human rights treaty, it is widely acknowledged to be a fundamental element of the right to fair trial principle and a scale through which the requisite procedural fairness in any criminal proceeding can be measured (Tony, 2002, p. 438).

Although one of the requirements of fair trial is the equality of arms of the parties, that principle needs to be interpreted in the light of the structural decisions of the Statute. The fact that the Prosecutor is an organ of the Court thus does not raise questions. With regard to the position of the defense at a hearing in The Hague, an analysis of the provisions of the Statute and RPE for the ICC indicates that the procedural position of the defense is equal to that of the prosecution (Roben, 2003, p. 545). In the other words, the realization of justice in the Court proceedings necessitates a balance between the powers of the Prosecutor and the rights of the accused.

This balance between the powers of the Prosecutor and the defense rights is particularly important given the unique mix of inquisitorial and adversarial elements at play throughout the investigation and trial stages. With this in mind, it is clear that equality of arms does not mean that parties should be given the same privileges; instead it suggests that different rules may be required in order to grant each side with the same opportunity to properly present its case (Caianiello, 2001, p. 390). This inevitably leads to examining whether the court have adequately addressed the unequal positions of the Prosecutor and the defense. The investigative stage of ICC proceedings bears the characteristics closer to an inquisitorial system, with the Prosecutor having the power to select which situations to investigate and pursue to trial. Since the trial is structured as an adversarial proceeding, on order to safeguard the rights of the accused the Prosecutor should not be allowed to benefit at trial from its advantageous position during the investigative stages. The counter-argument to this idea is that the defense may very well be in a position to conduct its own investigations and may not suffer any actual disadvantage (Ghadimi, 2015, p. 21).

It is not enough for the defense to be in a *de facto* equal position with the Prosecutor, to properly guarantee equality of arms it must be shown that there is institutional equality between both sides (Caianiello, 2001, p. 391).

8. Conclusion

The Statute of the ICC contains a number of human rights guarantees applicable to the criminal proceedings. Those guarantees are vital and essential to a fair trial. The right to a public hearing in both civil and criminal cases is expressly guaranteed both by article 14(1) of the International Covenant on Civil and Political Rights and by article 6 (1) of the European Convention on Human Rights, although the press and public “may be excluded from all or part of” a trial for certain specified reasons. The principle of publicity is also guaranteed in international criminal proceedings, although there are some exceptions to the principle. The trial may go into closed session for reasons of public order or morality, safety, security or non-disclosure of the identity of a victim or witness. The right of the victim to participate in the Court proceedings is also of a great importance. Such participation enables victims to express an opinion independently of the Prosecution or the Defense and offers them the opportunity to present their own concerns and interests; Victims participating in proceedings may also, in some circumstances, lead evidence pertaining to the guilt or innocence of the accused; they may also challenge the admissibility or the relevance of evidence presented by the parties; lastly, victims can seek reparation for the harm they have suffered.

Additionally, the right of victims to have legal counsel helps them to respond correctly to technical legal questions and have a full awareness of their rights. In the case of victim witnesses, the problem of coercion, post-traumatic stress disorder, or any number of other factors should be taken into account. Although the respect of the rights of victims is essential to a fair trial especially in the ICC, a crucial element of the Court's admissibility test is the interpretation and application of the "rights of the accused", which are contained in Article 67 of the Rome statute. However, the fairness and acceptability of the international criminal justice process depends upon an appropriate balance between the competing rights of individuals suspected of violations of international humanitarian and human rights law and the rights of the prosecution in investigating and prosecuting those suspected of committing such violations, on behalf of the victims and the international community.

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