9 Victims' Rights and Due Process

Károly Bárd

9.1 Victims Rediscovered

George Fletcher in his *Grammar of Criminal Law* observes that in Western languages those harmed by crime are called victims. The English term derives from the Latin *victima*, the word for sacrificed animal. The Germans use the noun *Opfer*, we Hungarians the term *áldozat*, the Russians speak about *zhertva*.[1] Jan van Dijk, a leading victimologist, reinforces the notion that the term was used for many centuries only for sacrificed animals. It was only during the Reformation that the term was extended to human beings in theological texts. As van Dijk observes, the term "victim" was used as the name of Jesus Christ, the Crucified One, who through his victimhood redeemed mankind. It was in the 17th century that the term was extended to "ordinary" human beings: first to those who suffered from disasters and later to those harmed by crime. In the sense used of Christ, victims are the innocents who take upon themselves the sins of others. Victims forgive the sinners; they give up their right to take revenge. Van Dijk makes reference to the Western sociological tradition going back to Dürkheim that stresses the functionality of criminality. Criminality reinforces moral cohesiveness through punishing the offender. This view – as interpreted by van Dijk – assumes that victims will refrain from retaliation. With this, victims make a considerable sacrifice to the community.[2]

The transfer of criminal law into the sphere of public law, the notion that by crime it is society that is harmed, made way for an institutional framework for the new status for victims and society's expectations. The once powerful actor in the criminal process was silenced and the victim was seen solely as one of the witnesses assisting the authorities that prosecute the wrong done to the public.

The insignificant role assigned to victims was reflected in criminal science. When victims first appeared in criminological research they were pressed into the traditional etiological approach and blamed for their behavior. The victim's conduct was seen as one of the factors explaining crime just like poverty or the excessive alcohol consumption of

1 G. P. Fletcher, The Grammar of Criminal Law: American, Comparative, and International 121 (2007).

2 J. van Dijk, *Free the Victim: A Critique of the Western Conception of Victimhood*, 16 Int'l Rev. Victimology 1, at 1-9 (2009).

the parents.[3] Also, substantive criminal law doctrine (*Strafrechtsdogmatik*) has paid for a long time almost no attention to the victim.[4]

It was in the early 1980s that victims' needs began to be recognized on both the national and international levels and a move towards a more victim-centered criminal justice was advocated. The reasons for rediscovering victims are manifold. Following the failure of the rehabilitative (treatment) model, return to the classical school of criminal law in the form of neo-classicism was advocated. Neo-classicism does not necessarily imply a call for more severe sentences, as proven by the example of the Nordic countries in Europe. Also, in the United States, the first movements towards "commensurate deserts" theory, according to which "the criterion for deciding the amount of punishment is retrospective: the seriousness of the violation the defendant has committed"[5] called merely for proportionality with prison sentences reserved only for graver crimes.[6] Later though, the call for proportionality came to be accompanied by a demand for retribution and tougher penalties. Thus the victim-centered justice system seemed to be a viable, credible and humane alternative to neo-classicism.[7]

Sebba, however, points to the relation between the re-emergence of the retributive theories on the one hand and the claim for strengthening the victims' position in the criminal process on the other. Recalling his paper published in 1982 he designs two models of the criminal justice system. In the Adversary-Retribution Model victims play a key role at the trial and at the sentencing stage; the trial, which follows the common law model, is a contest between the defendant and the victim, and the adequate sentence to fit the crime depends primarily on the degree of injury caused to the victim. The Social Defense-Welfare Model by contrast is dominated by the State. It is the State that cares for the protection of society by incapacitating or rehabilitating the offender; at the same time it will care for the interests of the victims by compensating them.[8] Although the resources and expertise available to the state would favor the Social Defense-Welfare

3 *See, e.g.*, the work of Hans von Hentig, one of the pioneers of victimology. H. von Hentig, The Criminal and his Victim (1948).

4 M. C. Meliá, *Opferverhalten und objective Zurechnung* [Victim behaviour and objective liability] 111 Zeitschrift für die gesamte Strafrechtswissenschaft 358 (1999). But Meliá's review of the literature reveals that in the 1990s when scholars started to pay more attention to victims, research was confined to the question of how the victims' contribution would affect the degree of the perpetrators' criminal responsibility.

5 A. von Hirsch, Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals 10 (1987).

6 *Id.*, at 12.

7 Some argue that victimology that stressed the need for victim participation in the criminal process and victim restitution was in fact a response to the jurisprudence of the Warren Court, which "established a number of new protections for criminal defendants." *See* D. Levine, *Public Wrongs and Private Rights: Limiting the Victim's Role in a System of Public Prosecution*, 104 Northwestern Univ. L. Rev. 335, at 340 (2010).

8 L. Sebba, *Will the "Victim Revolution" Trigger a Reorientation of the Criminal Justice System?*, 31 Israel L. Rev. 379, at 384-385 (1997).

Model it seems that preference is given to the Adversary-Retribution Model. Practice shows that the resources available to the State are far from unlimited. Further there is increasing skepticism towards "state-sponsored expertise as reflected by the anti-professionalization movement."[9] Finally, the Adversary-Retribution Model seems to be in line with current criminal policy trends that stress "retribution and compensation, rather than rehabilitation or social control."[10]

Thus the "trendy" Adversary-Retribution Model is justified partly by the idea of retributive justice and the presumed desire of victims for retribution. Even so, the model reflects a more humane approach than the pure "just deserts" criminal policy. First because not all victims demand harsh punishment, and second because the just-deserts ideology in the name of solidarity with victims aims exclusively at increasing sentences, disregarding victims' genuine interest in participating actively in the criminal process.

Also, the call for more efficient enforcement of collective rights might have contributed to the rediscovery of the victims. Victims of individual crimes might be defined as representatives of marginalized minority groups. Punishing the guilty and giving victims the right to be heard serves the liberty interests of the entire group and restores the dignity of the collective.[11] This approach shares the basic assumption of Herbert Packer's Crime Control Model which I shall discuss briefly later: the criminal sanction is morally justified and effective. Also a number of feminist scholars view criminal law as an appropriate means for reducing the subordination of women.[12] Also "left-leaning" scholars have reassessed their position as concerns the morality and the usefulness of criminal law. Traditionally they have viewed criminal law as a tool that serves the preservation of capitalist society, therefore in line with Packer's Due Process Model they have advocated for limiting the use of criminal sanctions and strengthening defendants' fair-trial rights. However, from the late 1970s they began to view criminal law as an instrument that protects the socially weak and thereby strengthens their position.[13] From this inevitably followed the demand for increasing the efficiency of crime control and weakening defendants' due-process guarantees.

As a response to the increase in organized crime and the brutal methods employed by criminal organizations, measures aimed at protecting victims and witnesses have been introduced in numerous jurisdictions beginning with the 1980s. The 1985 Council of Europe Recommendation on the status and rights of victims explicitly calls upon member states to pay particular attention to the need for protective measures for victims of

9 *Id.*, at 386.

10 *Id.*, at 387.

11 *See* G. P. Fletcher, With Justice for Some: Protecting Victims' Rights in Criminal Trials (1996).

12 M. Sorochinsky, *Prosecuting Torturers, Protecting "Child Molesters": Towards a Power Balance Model of Criminal Process for International Human Rights Law*, 31 Mich. J. Int'l L. 157, at 180, 181 (2009).

13 *Id.*

organized crime.[14] The 1997 Recommendation on witness intimidation devotes a separate section to measures to be taken specifically in relation to organized crime. At the same time the Recommendation makes an attempt to reconcile protective measures with defendants' due process rights.[15]

The rediscovery of victims' protection was enhanced also by the fact that in the course of the 1980s the world community has become ever more aware of the large-scale brutal state-sponsored human rights violations committed in dictatorial regimes. This might also explain that the first global international document addressing victim needs and rights, in addition to crime victims, makes mention of victims of abuse of power.[16] Although the UN Declaration uses cautious language, it fails to clearly distinguish between "ordinary" and state-sponsored criminality. This might have contributed to the fact that justifiable claims of victims of state-induced crimes were automatically interpreted as being valid in case of victims of "ordinary" crimes as well. No doubt victims of large-scale and state-induced criminality have the right to have impunity ended. Perhaps from their right to see the guilty punished, one can even deduce their right to participate in the fight against impunity. However, as I will explain later, in the case of "ordinary" crime when criminality is a deviation from the norm and the justice system takes reasonable measures to prosecute offenders and is not trying to shield them, victims' right to take part in the fight to end impunity makes little sense, if any. Or what is worse it may be abused for justifying curtailment of defendants' due-process rights.

The fact that after the end of the Cold War the establishment of a permanent international criminal court has become a realistic objective may have contributed to increased solidarity with victims and recognition of their needs and rights. The Rome Statute was adopted in 1998 and the International Criminal Court (ICC) was set up to try perpetrators of the gravest international crimes. The mission of the ICC is to end the impunity of perpetrators of mass-scale human rights violations, thereby restoring victims' dignity.

Recognition of victims' rights and needs in legal documents has also been reflected in the change in the general attitude of public opinion towards victims. As indicated earlier, until the end of the 1970s victims have been ignored by criminal law scholars, and when victims first appeared in criminological research they were rather seen as one of the factors inducing others to criminal conduct and therefore blamed for their behavior. The indifference or hostility of scholars was sanctioned by the layman's verdict. The naïve belief

14 Recommendation No. R(85)11 of the Committee of Ministers to Member States on the Position of the Victims in the Framework of Criminal Law and Procedure (Adopted by the Committee of Ministers on 28 June 1985 at the 387th meeting of the Ministers' Deputies).

15 Recommendation No. R(97)13 of the Committee of Ministers to Member States concerning Intimidation of Witnesses and the Rights of the Defense (Adopted by the Committee of Ministers on 10 September 1997 at the 600th meeting of the Minister's Deputies).

16 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Adopted by the General Assembly at the 96th plenary meeting (29 November 1985)).

in the existence of a "moral world order," the belief that the world is just, suggests that the harm suffered by victims is the consequence of their earlier sins. Victims therefore may not claim solidarity. By now our attitude has changed dramatically. As formulated by Safferling: all wish to present themselves as victims and those who succeed in finding or inventing for themselves a victim role may definitely count on social recognition.[17]

9.2 Victims in International Criminal Proceedings

As a result of the victimological movement those harmed by crime or their relatives have acquired the right in many jurisdictions to address decision-makers and inform them of the impact the crime has had on their lives. This was a novelty more in common-law jurisdictions since in the civil law system victims traditionally have had the right to make observations and to express their views in addition to giving evidence as witnesses. As a reaction to intimidation of and violence against witnesses and victims by members of criminal organizations various protection schemes were set up in numerous jurisdictions. However, "taking part in the fight against impunity" requires more than protection: it calls for participatory rights.

In this respect the Statute of the ICC is certainly the milestone, Fletcher rightly celebrates the ICC as the triumph of victims' rights.[18] The Nüremberg trials were heavily criticized for ignoring victims' need to speak up; the trials have thus "either by design or unwittingly, participated in the conspiracy of silence, particularly about the nature and meaning of the survivors' Holocaust experiences."[19] The International Criminal Tribunal for the former Yugoslavia (ICTY) was primarily concerned with the protection of victims. In contrast, the ICC Statute and the Rules of Procedure and Evidence (RPE), in addition to providing for protection, also guarantee participatory rights to victims. According to Article 68(3) of the Statute

> [. . .] where the personal interests of the 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 and in a manner which is not prejudicial to or inconsistent with the rights of the accused in a fair and impartial trial.

17 Ch. Safferling, *Die Rolle des Opfers im Strafverfahren – Paradigmenwechsel im nationalen und internationalen Recht?* [The role of victims in criminal procedure – Paradigm change in domestic and international law] 122 Zeitschrift für die gesamte Strafrechtswissenschaft 87, at 88 (2010).

18 G. P. Fletcher, *Justice and Fairness in the Protection of Crime Victims*, 9 Lewis & Clark L. Rev. 547, at 556 (2005).

19 Y. Danieli, *Reappraising the Nüremberg Trials and their Legacy: The Role of Victims in International Law*, 27 Cardozo L. Rev. 1633, at 1641 (2006).

True, in international criminal trials, the multiple tasks these trials are expected to accomplish – strong empathy with victims, the need for protecting their lives and physical integrity as well as victims' participatory rights – place defendants' fair-trial rights under considerable stress.[20] With a view to the egregious nature of the crimes they try, judges might be tempted to apply guarantees that may prevent with more "flexibility" than is the case in "ordinary" trials the conviction of the actually guilty.

International courts are also expected to produce a reliable historical account of the events in the context of which the horrible crimes have been committed, but the standard of proof for historians is lower than for judges. What can be established with sufficient reliability as a historical fact might be insufficient for establishing guilt beyond reasonable doubt. In the non-guilty verdict, courts do not necessarily establish facts; the verdict only establishes what cannot be established: the individual's guilt beyond reasonable doubt. Thus in their effort to give an official account of history and to duly consider victims' traumatic narratives international courts might consciously or unconsciously lower the evidentiary standards.

As noted the Statute of the ICC provides victims with broad participatory rights. Though they are not parties to the proceedings they may raise their "views and concerns" and "the judges at the ICC have given a quite broad interpretation of victims' rights."[21] The risk that victim participation may curtail defendants' rights is perceived even by those who praise the drafters of the ICC Statute for having recognized victims' needs. In a lecture given in 2006 by Van den Wyngaert, about (among other subjects) international courts' contribution to writing history, she stated that for the victims it makes a difference if their history is narrated by journalists only or if this is recorded in judicial proceedings. "Judicial proceedings help to turn the victims' story into the official narrative."[22] Clearly in the absence of participatory rights, victims will not be in a position to effectively contribute to history writing.

However, in a subsequent paper van der Wyngaert pointed to the practical difficulties of reconciling victims' participatory rights with the rights of the accused in spite of the clear language of Article 68(3) of the ICC Statute, which says that victims may present their views and concerns in "a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial tribunal." She observes that it would be unfair if defendants had to counter, in addition to the Prosecutor's accusations, the allegations of Victims' Legal Representatives as well. However, she argues, victim participation would be pointless if they were denied the opportunity to present incriminating

20 M. R. Damaska, *The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals*, 2 N. C. J. Int'l Law & Com. Reg. 365, at 366 (2011).

21 Ch. Van den Wyngaert, *Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 Case W. Res. J. Int'l L. 483 (2011).

22 Ch. Van den Wyngaert, *International Criminal Courts as Fact (and Truth) Finders in Post-Conflict Societies: Can Disparities with Ordinary International Courts Be Avoided?*, The American Society of International Law Proceedings 64 (March 29 - April 1, 2006).

evidence. Van der Wyngaert also notes that the ICC jurisprudence says that victims are not under the obligation to disclose potentially exonerating evidence in their possession and rightly observes: "how can victims have a right to tender incriminating evidence without a corresponding duty to disclose exculpatory material?"[23]

In order to protect victims and witnesses who after making testimonies return to their communities that still have not recovered from violence, international courts are more prepared to grant anonymity, considerably constraining the defense right to confront witnesses. But one may argue that the absolute right to freedom from torture or the right to life are sufficiently strong to justify a limitation of the defendant's right to confrontation. We may also argue that the overall fairness of the proceedings can be maintained since in international trials there is normally sufficient supporting documentary evidence. Thus the danger that the conviction will be based decisively on anonymous witness testimonies is relatively low. We should also bear in mind that the procedural rules followed by international tribunals to counterbalance the possible curtailment of defendants' rights at some points set higher fair trial standards than required by international human rights law. The ICC Statute explicitly prohibits drawing inferences from the defendant's silence, and also the reversal of the burden of proof [Article 67(1) *g)* and *i)*] whereas the jurisprudence of the European Court of Human Rights (ECtHR) indicates that neither of these rules is absolute.[24] As to the privilege against self-incrimination the ICTY took a unique position in that it extended the privilege to providing writing samples as well. In the *Delalic et al.* case it ruled that compulsion to provide writing samples conflicts with the *nemo tenetur* principle.[25]

It is disquieting that measures taken by international tribunals constraining defendants' rights are "imported" into national criminal procedure whereas

a. they might not be justified when trying "ordinary' crimes; and
b. guarantees counterbalancing the curtailment of certain right of defendants might be absent.

9.3 THE VICTIM PARTICIPATION MODEL

It was almost fifty years ago that Herbert L. Packer published his article "Two Models of the Criminal Process."[26] Although Packer himself stressed that he construed his models based on shared values of American society of the 1960s, his essay has become a required reading for comparative lawyers. The fundamental proposition of Packer's Crime Control

23 Van der Wyngaert, *supra* note 21, at 488.

24 *John Murray v. the United Kingdom*, ECtHR, Application no. 18731/91, judgment of February 8, 1996; *Salabiaku v. France*, ECtHR, Application no. 10519/83, judgment of October 7, 1988.

25 *Prosecutor v. Zejnil Delalic, Zdravko Mucic also known as "Pavo", Hazim Delic, Esad Landzo also known as "Zenga"*, Case no. IT-96-21-T, ICTY, Trial Chamber, judgment of November 16, 1998, at Para. 96.

26 H. L. Packer, *Two Models of the Criminal Process*, 113 U. Pa. L. Rev. 1 (1964).

Model (CCM) is that effective, speedy prosecution of crimes will guarantee human freedom. If the criminal justice system is not sufficiently effective, law-abiding citizens become victims of unlawful invasion of their interests, and their liberty "to function as members of society" is considerably diminished. The model is based on the basic assumption that criminal law and criminal sanctions are effective.

The Due Process Model (DPM) in contrast is based upon a skeptical attitude towards the usefulness and morality of the criminal sanction. The DPM sets out from the primacy of the individual and the limitation on official power because it is assumed that power is always subject to abuse. Since the criminal process may culminate in sanctions that intrude drastically into the individual's liberty, the process and its operation with maximum efficiency must be prevented through defendants' due process rights.

Though Packer's essay, which later appeared as Part II of his book, *The Limits of Criminal Sanction*[27] was mostly well received, it was criticized by some from the very date of its publication. In light of recent developments in laws of criminal procedure, and particularly the trend towards recognizing participatory rights of victims, it is argued that in order to understand the operation of the criminal justice systems and to disclose their value-choices Packer's two models are no longer adequate. In addition to the CCM and the DPM a third model, the Victim Participation Model (VPM) has to be construed.

The value underlying the VPM is victims' dignity, respect for victims, and their right to fairness. The advocates of the VPM claim that by respecting their dignity, by recognizing their fairness rights, victims' freedom will be broadened. However, most scholars discussing the VPM are of the view that the model will in effect result in a move from the DPM towards the CCM. Through the call for respecting victims' dignity and reference to their right to truth, which then is translated into the state's duty to punish, the basic assumption of the CCM that criminal sanction is useful and desirable is reinforced. By using powerful rights language, increasingly punitive criminal policy is easier to justify. As Sorochinsky observes, even without abandoning due process guarantees – and I would add even without granting victims involvement in the criminal process – the powerful rights language employed by the victims' rights movement and taken over by politicians succeeded in having much more repressive substantive criminal laws adopted.[28]

But claims for respecting victims' right to truth/punishment as a rule not only result in more suppressive substantive criminal laws but also in calls for the limitation of defense rights. Basch, by quoting passages from the judgment in the *Bulacio* case,[29] proves that the Inter-American Court of Human Rights (IACtHR) views certain due process guarantees as impediments to the victims' right to "learn the truth about what happened." Thus the IACtHR calls upon national judges to "direct the process in such a way that undue delays

27 H. L. Packer, The Limits of Criminal Sanction (1968).
28 Sorochinsky, *supra* note 12, at 179.
29 *Case of Bulacio v. Argentina*, Inter-Am. Ct. H.R., Series C, No. 100, judgment of September 18, 2003.

and hindrances do not lead to impunity, thus frustrating adequate and due protection of human rights."[30] Sorochinsky rightly concludes that "the duty to punish doctrine by domestic criminal courts may restrict the constitutional rights of defendants,"[31] and also that the message of *Bulacio* is that, when balancing between victims' "right to truth" and the rights of the accused, courts are required "to limit, where necessary, the due process rights of the accused."[32]

In the context of trials conducted by international tribunals for the most horrible crimes Damaska has observed that "the greater the emphasis placed on the need to repress crime, the more rules favoring the defendant are seen as obstacles frustrating the realization of justice."[33] Apparently the IACtHR expects national courts to view defendants' due process rights as impediments, to be set aside.

So far I have demonstrated that the victims' abstract right to truth or justice that is formulated as the state's duty to punish may curtail defendants' due process rights even without providing victims participatory rights in the criminal process. Thus the reference to "victims' rights" in fact strengthens the state's position in the criminal process.

But if victims are provided with participatory rights, defendants' position is further weakened. The exercise of participatory rights presupposes the recognition of the victim status at an early stage of the process. This runs counter to the presumption of innocence, which requires that "the crime not be taken for granted before the end of the process."[34] Victim participatory rights may also violate the principle of equal treatment of criminal defendants. "One defendant may face a victim who seeks mercy, while another defendant may face a victim who seeks a severe sanction. A third defendant may find that the victim is not participating in the criminal process except as a witness."[35]

However, one could argue that these concerns are too academic. Many civil law systems grant participatory rights to victims without jeopardizing evidentiary rules such as the burden of proof or the beyond-reasonable-doubt principle, both originating from the presumption of innocence. Equal treatment of offenders is infringed even without victims' participatory rights since some decide to report the crime while others refrain from doing so. But the fact remains that by granting victims participatory rights the balance between the prosecution and the defense is shifted to the detriment of criminal defendants. As Kent Roach observes, the victims' rights model of the criminal process, at least its punitive type, shows considerable similarities with the Crime Control Model. He adds that in the

30 F. F. Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers*, 23 Am. U. Int'l L. Rev. 195, at 208-209 (2007).
31 *Id.*, at 208.
32 Sorochinsky, *supra* note 12, at 191.
33 M. Damaska, *supra* note 20, at 369.
34 *Id.*, at 374.
35 D. E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 Utah L. Rev. 289, at 298 (1999).

punitive victims' rights model the resistance to granting due process rights is even stronger, "because it is undertaken in the name of the rights of crime victims."[36] For example, once victims acquire autonomous status in the criminal process the exclusionary rule has to be reassessed. Exclusionary rules are meant to discipline officials who fail to comply with the law. However, in the tripolar model, which recognizes victims' fairness rights, it appears "outrageous that regulation of governmental actors should occur at the price of harming the victim's opportunity to have the truth determined in the courts."[37]

Roach attempts to design a model which grants victims participatory rights without worsening the defendants' position. The so-called Non-Punitive Victims' Rights Model shares the skepticism of the Due Process Model as to the efficiency of criminal law and criminal sanctions.[38] Instead, it gives priority to prevention, primarily to its immediate forms such as "target hardening, better lighting, and information exchange among bureaucracies."[39] If prevention fails and a crime is committed the model centers not on retaliation but on reducing harm "through healing, compensation, restorative justice."[40] However, Roach points out that the Non-Punitive Victims' Rights Model also "marginalizes due process rights by encouraging offenders to accept responsibility."[41]

Roach's model is based on the assumption that most victims have no punitive attitudes and are prepared to forgive. However, this is exactly the victim role expected in Western societies so heavily criticized by van Dijk. And van Dijk through analyzing the narratives of several high profile victims demonstrates the conflict between public expectation and the real feelings of victims. Recurrent themes in the testimonies of the victims are "anger towards the offender and related refusal to offer him forgiveness,"[42] "resilience, fantasies of revenge and post-traumatic altruism."[43] True, in the Western conception victims are also presented as helpless, passive and silent individuals, and the Restorative Justice Model's promise is that they will acquire power, autonomy and liberty.[44] However, in practice they are expected to behave also in restorative justice programs in line with the socially construed expectation: "the 'ideal' victim is free of anger and revenge, ready to meet the offender and to accept his apologies and to offer forgiveness in return."[45] Should victims deviate from what is expected of them and express their real feelings of anger and outrage, they provoke condemnation by officials and the public.[46]

36 K. Roach, *Four Models of the Criminal Process*, 89 J. Crim. L. & Criminology 671, at 704 (1999).
37 Beloof, *supra* note 35, at 309.
38 Roach, *supra* note 36, at 707.
39 *Id.*, at 708-709.
40 *Id.*, at 709.
41 *Id.*, at 710.
42 van Dijk, *supra* note 2, at 10.
43 *Id.*, at 12.
44 Roach, *supra* note 36, at 710.
45 van Dijk, *supra* note 2, at 22.
46 *Id.*, at 23.

9.4 JUSTICE FOR VICTIMS VERSUS FAIRNESS TO DEFENDANTS

Understandably victim support activists call for curtailing defendants' due process rights in order to "end impunity" of those factually guilty. It is not surprising that politicians as well are prepared to remove certain guarantees perceived as obstacles to efficient prosecution and strengthening victims' position using the powerful rights language. It is surprising, however, that even international courts – which one would assume are not vulnerable to public pressure – are ready to take part in broadening victims' rights at the expense of lowering due process standards. They do this sometimes by arbitrarily invoking the jurisprudence of other international courts, by clearly misinterpreting the law they should apply, or deviating from their own case-law without openly admitting it. In the closing section of this chapter I will illustrate my claim through the analysis of decisions of the ICC, the Court of Justice of the European Union (CJEU) and the ECtHR.

Example 1: The decision of the ICC Pre-Trial Chamber (PTC) I on the applications for participation in the proceedings of VPRS 1, etc. (17 January 2006)[47]

In this case the PTC was called upon to rule – among other issues – on the question of whether the Rome Statute and the ICC's RPE accord victims the right to participate in the proceedings at the stage of investigation and if so, what form such participation should take. The PTC invoked the judgment of the Inter-American Court of Human Rights (IACtHR) in the *Blake* case[48] also referring to subsequent IACtHR decisions. However as I will demonstrate, the reference to the *Blake* judgment and IACtHR case-law in general for the purpose of determining the scope of victims' rights in ICC proceedings is inadequate for several reasons.

The PTC quotes the *Blake* case that concerned the abduction and killing of an American journalist by members of the Guatemalan Civil Patrol. In its judgment the IACtHR first declared that victims and their close relatives have the right to a fair trial and – in the PTC's interpretation – may participate in the investigation stage. In fact the IACtHR in *Blake* ruled that victims may also invoke Article 8 of the American Convention on Human Rights. This ruling itself is somewhat surprising since the text of Article 8 of the American Convention is almost identical to that of Article 6 of the ECHR and, as is known, in the "determination of a criminal charge" only defendants may invoke the right to a fair trial.

Reading the facts of the *Blake* case one may suspect that the reason why the IACtHR included victims among the "beneficiaries" of the right to a fair trial was that without

47 *Situation in the Democratic Republic of the Congo. Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 4, VPRS 5 and VPRS 6*, ICC, Pre-Trial Chamber I, decision of January 17, 2006.
48 *Case of Blake v. Guatemala*, Inter-Am Ct. H.R., Series C, No. 36, judgment of January 24, 1998.

doing so it could not have asserted jurisdiction. The Inter-American Commission called upon the Court to find Guatemala in breach of the right to liberty, right to life, but the Court concluded that Mr. "Blake's death, which occurred during his forced disappearance, was an act that was completed [. . .] before the date on which Guatemala accepted the competence of the Court."[49] The only way to find Guatemala responsible under international law was to recognize victims' right to a fair trial. This is what the IACtHR did. Article 8(1) of the Convention, the Court ruled, "recognizes the right of Mr. Nicholas Blake's relatives to have his disappearance and death to be effectively investigated by the Guatemalan authorities; to have those responsible prosecuted for committing said unlawful acts; to have the relevant punishment, where appropriate, meted out; and to be compensated for the damages and injuries sustained."[50] The Court, pointing to the failure of the authorities to effectively investigate *Blake's* disappearance and death, found a violation of Article 8(1) of the Convention.

According to Article 8(1) of the American Convention: "[E]very person has the right to a hearing, with due guarantees [. . .] in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature." Assessing the decision of the IACtHR with some benevolence one could argue that the text can be interpreted as granting victims the right to a fair trial in a criminal case. However, there is no doubt that in the ICC Statute it is exclusively the accused who can invoke the right to a fair trial. Victims may also present their views and concerns [Article 68(3)] but it is the accused who is entitled "in the determination of any charge" to a fair hearing [Article 67(1)]. Thus it is quite problematic that the PTC in determining the scope of victims' rights as laid down in the Statute makes reference to IACtHR jurisprudence, which also recognizes victims as "beneficiaries" of the right to a fair trial.

The reference to *Blake* is also flawed because the IACtHR judgment says nothing about the scope of victims' participatory rights. It only proclaims that victims and their relatives have the right to demand that crimes be investigated and the guilty be punished. From the fact that the verb "investigate" appears in the text one can hardly conclude, as the PTC does, that "victims of human rights violations or their relatives are entitled to take steps during criminal proceedings, from the investigation stage and prior to confirmation of the charges."[51]

True, in the so-called *Street children* case[52] the IACtHR ruled that Article 8 of the Convention requires that victims of human rights violations and their relatives be given

49 *Id.*, at Para. 86.

50 *Id.*, at Para. 97.

51 *Situation in the Democratic Republic of the Congo. Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 4, VPRS 5 and VPRS 6, supra* note 47, at Para. 53.

52 *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*, Inter-Am. Ct. H.R., Series C, No. 63, judgment of 19 November 1999.

the chance to be heard and to act in the proceedings, "both in order to clarify the facts and punish those responsible, and to seek due reparation."[53] However, the judgment does not specify the concrete participatory rights of victims.

The cases that came before the IACtHR and were quoted by the PTC concerned crimes committed by state or quasi-state agents that formed part of systematic human rights violations and which went unpunished. The justice system instead of doing what it should do, *i.e.* trying the cases in an impartial manner, in fact shielded the offenders. Thus the victims' right stressed in the IACtHR in substance is simply the right of victims to a normally functioning justice system. Citing passages from judgments of the IACtHR, which condemn states because their national courts acted as accomplices by preventing that state agents be punished for grave human rights violations is of little help when the question is about the role and rights of victims in "normally functioning" justice systems. It appears even absurd in the context of the ICC that was set up exactly for the purpose of ending impunity and doing justice to victims.

The PTC claims that the ECtHR shares the position that victims may invoke the right to a fair trial as guaranteed in Article 6(1) of the ECHR and that they may participate in the criminal process prior to the confirmation of the charges.[54] The problem is that all the judgments of the ECtHR invoked by the PTC concern the conditions under which the *partie civile*, i.e. the injured party who pursues a civil action either separately from the prosecution in a civil court, or in the criminal court simultaneously with the prosecution may invoke Article 6 as party to a dispute over a civil right. Therefore the ECtHR judgments say nothing about the status of victims in "pure" criminal proceedings where no claim for compensation is lodged. Invoking Strasbourg jurisprudence in support of victims' rights to ensure the prosecution of alleged perpetrators, as the PTC does, is clearly erroneous. Moreover, it is exactly the opposite of what the ECtHR said in *Perez*, also referred to by the PTC:

> [. . .] the fact is that the Court of Cassation accepts the principle of civil proceedings for purely punitive purposes. [. . .] The Court considers that in such cases the applicability of Article 6 has reached its limits. It notes that the Convention does not confer any right [. . .] to "private revenge" [. . .]. Thus, the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently: it must be indissociable from the victim's exercise of a right to bring civil proceedings in domestic law, even if only to secure symbolic reparation or to protect a civil right such as the right to a good "reputation."[55]

53 *Id.*, at Para. 227.

54 *Situation in the Democratic Republic of the Congo. Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 4, VPRS 5 and VPRS 6, supra* note 47, at Para. 52.

55 *Perez v. France*, ECtHR, Application no. 47287/99, judgment of 12 February 2004, at Paras. 69-70.

Example 2: The CJEU judgment in Pupino[56]

In *Pupino* the CJEU was called upon to deliver a preliminary ruling on how national law is to be interpreted in the light of the Council Framework Decision (FD) on the standing of victims in criminal proceedings.[57] The question was whether the Italian court may ignore provisions of national law if it considers that they are not in line with what is required by the FD. More concretely, if Italian law permits examination of persons below the age of 16 under special arrangements only if the person is the victim of a sexual offense,

a. *may* the court, or
b. is it conceivably *obliged* to extend that provision to young victims of non-sexual crimes with a view to the FD.

In the first case the question is whether the national court is under the obligation to interpret national law in conformity with the FD and what the limits of the principle of conforming interpretation are.

In the second case the question is whether the FD has direct effect and must be given priority over conflicting national law. The answer to the second question under the TEU is obviously negative: framework decisions have no direct effect. This is why the CJEU elaborated on whether the obligation of EU loyal interpretation applies to FDs as well. Through a strange reasoning the Court answered the question in the affirmative, suggesting that out-of-court examination should be extended to cases not envisaged in Italian law. The CJEU first noted that the interpretative obligation of national courts is limited by general principles of law such as legal certainty and non-retroactivity.[58] However, the relevant provisions of the FD do not concern the extent of criminal liability but are of a procedural nature.[59] The Court also noted that the interpretative obligation ceases if national law cannot be applied in a manner that would lead to a result compatible with that envisaged by the FD. "In other words, the principle of conforming interpretation may not serve as the basis for an interpretation of national law *contra legem*."[60]

However, the Court ruled that when determining the limits of the principle of conforming interpretation, the legal system as a whole must be considered.[61] The CJEU made reference to the Opinion of the Advocate General (AG) according to which it is not obvious that Italian law cannot be interpreted in line with the FD.[62] In the Opinion the

56 *Criminal Proceedings against Maria Pupino*, C-105/03, ECR [2005] I/5285.
57 Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ 2001 L 82, at 1).
58 *Criminal Proceedings against Maria Pupino*, *supra* note 56, at Para. 44.
59 The provisions concern the conduct of the proceedings and the means of taking evidence. *Id.*, at Para. 46.
60 *Id.*, at Para. 47.
61 *Id.*, at Para. 47.
62 *Id.*, at Para. 48.

AG invoked a provision of the Italian Code of Criminal Procedure (CCP), other than the one applicable to victims of sexual crimes, that may serve as the basis for examining juveniles under specially protected conditions.[63] According to the invoked rule the court may authorize taking of evidence under special arrangements "where there are reasonable grounds for believing that the witness cannot be heard in open court by reason of illness or serious impediment." [CCP 392(1)]. In the AG's view "other serious impediment" could be interpreted as "including the deterioration in the power of recollection and the psychological stress experienced by children as a consequence of examination at the time of the trial."[64]

Had the CJEU shared the position of the AG it could have settled the case by simply instructing the Italian court to forget the provision applicable to minors and bring the situation under the provision invoked by the AG, which it could have considered as national legislation implementing the FD. But this is not what the Court did. The reason is obvious: the CJEU was aware that the situation the Italian court was faced with could by no traditional means of interpretation (grammatical, systematic or teleological) be brought under the provision invoked by the AG.

The Court instead listed the arguments in support of the indirect effect of framework decisions concluding that the principle of conforming interpretation is binding in relation to framework decisions as well: "When applying national law, the national court that is called to interpret it must do so as far as possible also in the light of the wording and the purpose of the framework decision."[65] Thus in addition to using traditional means of interpretation national courts are under the obligation to examine the relevant provision in the light of the loyal interpretation doctrine. But if the conclusion drawn through using traditional means of interpretation on the one hand, and applying the principle of conforming interpretation on the other are conflicting, and national courts are obliged to give preference to the latter – as was the ruling in *Pupino* – then the assertion of the CJEU that "the principle of conforming interpretation may not serve as the basis for an interpretation of national law *contra legem*" is not true. As Mitsilegas rightly observed the CJEU in reality "has re-written the Italian Code of Criminal Procedure" by calling up national courts to extend the protective provisions to all young victims, "although they were not covered by the legislation." The Court in fact conferred "not indirect, but direct effect to the Framework Decision."[66] In its effort to protect victims at the expense of defendants' due process rights the CJEU has rewritten not only the Italian CCP, but also the Treaty on the European Union.[67]

63 Opinion of Advocate General Kokott (*Criminal Proceedings against Maria Pupino*, C-105/03, ECR), delivered on 11 November 2004, at Para. 40.
64 *Id.*, at Para. 40.
65 *Id.*, at Para. 43.
66 V. Mitsilegas, EU Criminal Law 29 (2009).
67 According to Art. 34 of the TEU framework decisions "shall not entail direct effect."

Example no. 3: The ECtHR Grand Chamber judgment in Al-Khawaja[68]

In *Al-Khawaja* the applicant, while working as a consultant physician, was charged on two counts of indecent assault on two female patients. For reasons unrelated to the alleged assault, one of the alleged victims committed suicide before the trial. However, several months after the alleged assault, she had made a statement to the police. A preliminary hearing was held to determine whether the statement of the deceased woman should be read to the jury. The judge at the hearing decided that the statement should be read to the jury at trial, observing that it was crucial to the prosecution to have the statement read out as there was no other direct evidence of what took place during the consultation. He said: "putting it bluntly, no statement, no count one." At the trial, the statement was read and the applicant convicted and sentenced.

The question was if the English court by relying practically exclusively on a statement given by a witness whom the defense had no opportunity to confront and examine was in violation of Article 6 of the ECHR. The Fourth Section concluded that there had been a violation of Article 6(1) read in conjunction with Article 6(3) *d)* (the right to cross-examine the prosecution's witnesses). The Grand Chamber on the contrary found no violation clearly overruling the principles emerging from the Court's earlier judgments.

The right to a fair trial is an unqualified right, which means that in contrast to qualified rights there is no situation that might justify the total deprivation of this right. There is no situation in which the right to a fair trial would have to back down entirely in the face of another right or interest. But this also holds for the components of the right to a fair trial such as the right to be informed of the charges, the right to defense or the right to confront witnesses. This does not mean that certain components of the right to a fair trial may not be limited as long as overall fairness is maintained. But there is an absolute limit to restraining the rights enshrined in Article 6(3). If defendants are deprived *completely* of any of the fairness rights, i.e. if the given right is deprived of its essence, this automatically will result in finding a violation of Article 6. Judges Sajó and Karakaş in their dissent in *Al-Khawaja* rightly observed that "with regard to the right to cross-examine witnesses [. . .] the Court has systematically and consequently drawn a bright line [. . .] in the form of the sole or decisive rule."[69] That is, according to Strasbourg case-law it is a clear-cut violation of the right to a fair trial if the conviction rests exclusively or decisively on the testimony of witnesses whose credibility the defense could not cast doubt on through direct examination. It is this "last line of protection of the right to defense," the dissenters continue, "that is being abandoned in the name of an overall examination of fairness."[70]

68 *Al-Khawaja and Tahery v. the United Kingdom*, ECtHR, Application nos. 26766/05, 22228/06, judgment of 15 December 2011.
69 *Id.* Joint Partly Dissenting and Partly Concurring Opinion of Judges Sajó and Karakaş.
70 *Id.*

Returning to the possible limitation of individual fairness rights, both the degree of the limitation and its justification depend on the nature of the witness' or victim's right that is in conflict with the guarantees safeguarding the accused in the specific case. Restricting the right to confrontation is for instance more easily justified if it serves to secure the witness' or the victim's absolute right[71] or another "strong"[72] right. This was clearly not the case in *Al-Khawaja*. The curtailment of procedural safeguards can least of all be justified with reference to "public interest."[73] But this is exactly what the Court disregarded in *Al-Khawaja*. As noted by Judges Sajó and Karakaş, there were "no clear interests alleged as justification for the handicap of the defense, apart from the ever present interests in ensuring public safety and criminal punishment."[74] I share their conclusion: the fact that the ECtHR has diminished the level of protection without compelling reason "is a matter of gravest concern for the future of judicial protection of human rights in Europe."[75] It is in fact of grave concern that an international human rights court was prepared to get involved in the conspiracy against fundamental due process guarantees.

71 Such as the right to life and the prohibition of torture, inhuman and degrading treatment.
72 Such as the right to liberty and security of person.
73 *See* A. Ashworth, Human Rights, Serious Crime and Criminal Procedure 78 (2002).
74 *Al-Khawaja and Tahery v. the United Kingdom*, *supra* note 68, Joint Partly Dissenting and Partly Concurring Opinion of Judges Sajó and Karakaş.
75 *Id.*