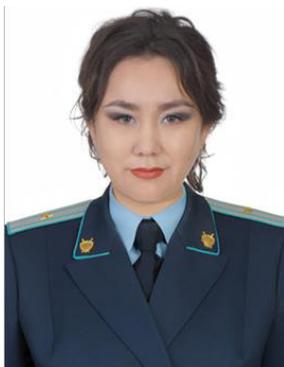


ХАЛЫҚАРАЛЫҚ ҚҰҚЫҚ ЖӘНЕ САЛЫСТЫРМАЛЫ ҚҰҚЫҚТАНУ
МЕЖДУНАРОДНОЕ ПРАВО И СРАВНИТЕЛЬНОЕ ПРАВОВЕДЕНИЕ

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**IS THERE THE BALANCE BETWEEN THE INTERESTS OF VICTIMS
AND THE RIGHTS OF THE ACCUSED IN PROCEEDINGS BEFORE THE
INTERNATIONAL CRIMINAL COURT?
(СОБЛЮДЕН ЛИ БАЛАНС МЕЖДУ ИНТЕРЕСАМИ ЖЕРТВ ПРЕСТУПЛЕНИЙ
И ПРАВАМИ ОБВИНЯЕМОГО В ПРОЦЕДУРАХ МЕЖДУНАРОДНОГО
УГОЛОВНОГО СУДА?)**

Түйін. Мақалада Халықаралық қылмыстық соттағы айыпталушының және жәбірленушінің құқығы талданады. Әлі де ресми құқықтық мәртебесі жоқ жәбірленуші құқығының құқықтық қорғалуының жеткіліксіздігі мәселесі баса айтылады. Қазіргі таңда қылмыстық жәбірленушіге қысым жасалып отыр, өйткені жәбірленушінің мәртебесі куәгердің мәртебесіне теңестіріліп отыр.

Түйінді сөздер: Халықаралық қылмыстық сот (ХҚС), қылмыстық жәбірленушінің құқығы, айыпталушының құқығы, Билікті асыра пайдалану және қылмыстық жәбірленуші үшін сот әділдігінің негізгі принцип декларациясы, ХҚС Римдік статуты, ХҚС дәлелдеу және процедура ережелері.

Аннотация. В данной статье анализируется соотношение прав и интересов жертв преступлений и обвиняемых в Международном уголовном суде. Подчеркивается проблема недостаточной правовой защищенности прав жертв преступлений, которые до их пор не имеют официального правового статуса. В настоящее время статус жертв приравнивается к статусу свидетелей, что ущемляет позиции жертв преступлений.

Ключевые слова: Международный уголовный суд (МУС), права жертв преступлений, права обвиняемого, Декларация основных принципов правосудия для жертв преступлений и злоупотребления властью, Римский статут МУС, Правила процедуры и доказывания МУС.

Annotation. This article analyzes the correlation of rights and interests of victims of crimes and accused in the International Criminal Court. There is the underlining of the problem of insufficient legal protection of the rights of victims of crimes, who still do not have an official legal status. At present the status of victims is equated with the status of witnesses, which gives negative impact on the position of victims of crimes.



Key words: the International Criminal Court (ICC), the rights of victims of crime, the rights of the accused, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the Rome Statute of the ICC, the Rules of Procedure and Evidence of the ICC.

Introduction

Since the time of the recognition of criminal legal protection of human rights the rights of the accused has been a central focus for many legal reforms during all times, while victims' rights were relegated to the background. Only with the creation of the International Criminal Court (ICC)[3] the situation has been changed.[1, 137-164] Society began paying attention to the interests of victims, giving them legal status of full participants in criminal proceedings.[2] Victims are no longer passive participants in criminal proceedings, and to date more than 5000 individuals, aggrieved by an offence, obtained the legal status of crime victims before the ICC.[2]

If on the one hand, it can be noticed that there are positive changes for the victims interests, the same could be not be true for the rights of accused. Some researches concern that the Statute of ICC (Statute)[3] does not clear establish the procedural model of criminal justice and the Rules of Procedure and Evidence of the ICC (RPE)[4] has the ambiguities in the provisions, which negatively affect on the rights of accused, leading to a violation of the rights of them.[1]

Nevertheless, one should accept that another part of scholars are convinced that these changes do not fully meet the expectations of the victims, while the rights of accused meet higher standards of satisfaction. The greater participation of victims in the criminal proceedings does not always improve their opinion about the system of criminal justice and, apparently, does not make them emotional, psychological and financial benefits to which they are calculated.[8] Actually, victims are almost excluded from the criminal process and granted only a limited benefits from the international criminal justice.[7]

Consequently, the questions now arise, at least from the discursive and logical point of view: Whether there is the balance between the interests of victims and the rights of accused in proceedings before the ICC? Could these improvements of the level of protection of victim's interests negatively impact on the rights of accused? Is there a mechanism which balances their rights?

To explore these arguments this article is divided into two parts.

First of all, to clearly analyse the balance between the interests of victims and the rights of accused we have to understand the nature of conflict between them, so it is necessity to apply to the procedural status of the accused and the victims set forth in the Statute. This point will be briefly discussed in the part one.

The second part critically examines balance between the rights of accused and the interests of victims. Similarly, in this part certain issues were highlighted as major challenges to achieve the balance between the interests of the prosecution and defence. Primarily, one of the most striking features of this problem is the provisions of the Article 68 of the Statute will critically discussed. Next issue is concern that there is no distinction between the rights of victims and the rights of witnesses who have to have different procedural statuses and, respectively, different scope of the rights.

Finally, the right to participate in the proceedings before the ICC will analyzed from two angles providing approaches to reach the balance and how it succeed. In light of this, in conclusion the capacity of this debate will be summarised and concluded.

The nature of conflict and brief review of the scope of the rights of accused and victims' interests

Before turning to the discussion about the balance between the rights of

accused and the interests of victims, it should be considered from the point of view about the nature of conflicts between interests of them. This requires consideration of the brief introduction of the scope of the rights of accused and victims appearing in the international criminal justice.

It is generally accepted, that the identity of the accused as the identity of the victim reflects the nature of the criminal process, affecting its construction. [8] Being a party to the prosecution and the defence, they have a range of rights and obligations established in the Statute and RPE, which in turn are oriented with the achievement in criminal proceedings set of interests.

The peculiarity is that the specified feature has originated from opposites, different procedural orientation of victims and suspects or accused. First of all, this distinction could be seen in the purpose of criminal proceedings. The Statute of ICC clearly provides that ICC is established to exercise its jurisdiction over persons for the most serious crimes of international concern, affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation. [3] Secondly, the definition of victim given in the RPE, where it is natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court. [4]

This definition is more clearly revealed in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. [9] According to Paragraph 1, “victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. This means that victims suffered harm such and their fundamental rights were broken by actions of accused. This underlines the main conflict between interests of a person who suffered harm and a person who committed a crime.

It could be seen that the victims are viewed as mere instruments in the search for the truth since they are the main source of the criminal charge that lead to a natural pattern of the conflict between interests of the victims and the accused.

So what are the basic interests of the victim and the accused? Heather Strang has divided the basic needs of victims before the criminal proceedings into five points [10]:

1. making their voice heard;
2. participating in the handling of the case that concerns them;
3. being treated with respect and fairness;
4. obtaining information on the progress and outcome of the case concerning them;
5. obtaining economic and emotional redress.

While with the establishment of ICC these basic interests have attempted to apply in the provisions of ICC, the set of rights of the accused was firmly placed in the international criminal proceedings. As it was noticed by K. C. Kamlasabayson, “a person who is suspected or accused of a crime enjoys several constitutional and legal protections”. [11] It is debatable how much the accused can “enjoy” their rights because initially the accused takes a defensive stance, as this person is prosecuted and exposed by the criminal law enforcement mechanism. However, from the traditional point of view the rights of the accused consists a collection of rules and statutes that protect a person accused of criminal offense.

In general, in addition to the general rights available to all parties involved such as the right to a fair trial, the accused has a number of specific rights. These are



contained in the right to:

1. be presumed innocent;
2. be informed of the accusation;
3. adequate time and facilities;
4. to defend oneself and to have the assistance of counsel;
5. to test witness evidence;
6. to the free assistance of an interpreter,
7. the privilege against self-incrimination;
8. to appeal;
9. to compensation for wrongful conviction;
10. the protection against double jeopardy. [12]

Currently, in many states with a democratic system and the rule of law, criminal procedure puts the burden of proof on the prosecution. It is up to the prosecution to prove that the defendant is guilty beyond any reasonable doubt, as opposed to having the defendant prove that s/he is innocent; any doubt is resolved in favour of the defendant. Similarly, all such jurisdictions allow the defendant the right to legal counsel and provide any defendant who cannot afford their own lawyer with a lawyer paid for at the public. [13]

It is a matter of the nature of conflict and brief review of the scope of the rights of accused and victims' interests that lead to critically understanding whether the balance between the same categories of rights in proceedings before the ICC is.

Are the rights of accused and the interests of victims balanced in proceedings before the ICC?

Before considering this problem, however, it should be emphasised that there are different points of views about balancing the rights of accused and the interests of victims. One of the famous saying, relating to this issue, belongs to William Blackstone, who said that it is "better that ten guilty persons escape than that one innocent suffer." [14] This is general reflection of modern criminal procedure based on the assumption of primacy of the rights of the accused. As advocates of this conception claim that any balancing between these two competing interests must be premised on the primacy of the rights of the accused. Moreover, this statement was related to the context of the ICC Statute. [1]

However, another part of scholars has taken a different view. Mikhail Cheprasov, for example, believes that in any criminal proceedings should be shown the presence of the prosecution and the defence in an equal footing, which will ensure a fair balance between the rights of the accused and the interests of victims. [8]

From the common understanding, the meaning of a balance arises from the equality of two or more categories regarding to each other. Based on the review of scope of the rights of the accused and the interests of victims, described above, we can see that there is a numerical superiority of the rights of accused over the interests of victims. Perhaps, it is just a numerical dominance but not a qualitative superiority. It is interesting to see in the proceedings of ICC.

Referring to the basic documents regulating the activities of the ICC, which is the Statute and RPE, it is possible to see that while the interests of victims and respectively their rights are reflected only in two articles, the rights of accused completely filled the text of the Statute of ICC. Furthermore, these two articles are not directly related to the interests and the rights of victims. The Article 55 of the ICC Statute sets out rights of persons during an investigation, but it is generally apply to all participants of criminal proceedings and the rights of victims were not specifically stated there. It could be noticed, that only the Part 1 of this Article could be applicable to the interests of victims, while the second Part is related again to the rights of the accused or the suspect.

According to the Part 1, a person have the right to not be forced to be testified against himself or to confess guilt; shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment; the right to a free assistance of a competent interpreter if a person does not understands and speaks the language of the proceedings. [3] As it is seen in this part there is only the general context of the right to participation in the proceedings.

However, the most striking is the Article 68 which provides protection of the victims and witnesses and their participation in the proceedings. It has been considered, that the measures of protection are extremely essential for victims and witnesses. They want to feel safe which should be secured by authority during the investigations or the proceedings since usually due to their testimony criminals are incriminated. The judicial mechanism has to provide these rights of victims and witnesses which forms an integral part of the proceedings. [15] These positions are reflected in the above Article. The Part 1 of Article states that “the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.” [3] But at the same time, there is the surprising exception which states that “These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”. While the second part of this exception could be accepted since a fair and impartial trial is the main principle of the proceedings, the first part is very unclear since, how it was described above, there the conflicts between interests of the accused and victims. How it was proved above, this conflict arose from opposites, different procedural orientation of victims and the accused. The accused is not interested in obtaining evidence or testimony from victims, and over against victims are interested in incrimination for the accused. It is likely that this provision may be interpreted as a violation of the rights of accused and lead to acknowledgment the illegality of the criminal proceedings.

Moreover, this norm as “These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial” permeates throughout the text of above Article and next Article 69. Particularly, the Part 3 of Article 68 imposes this restriction on the provision of the views and concerns of victims when it may conflict or prejudice with the rights of the accused. Noticeably, that this is talking about the right of victims to participate in the proceedings since they have formal right to present and consider their views and concerns at stages of the proceedings. In reality this right is bounded by possibility of appropriateness identified by the Court and in other words by the desire of the accused.

The Part 5 of Article 68 establishes not less important provisions where the disclosure of evidence or information pursuant may lead to the grave endangerment of the security of a witness or his or her family. According to this Part the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. But such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

The Article 69 providing questions about evidence is moving the same direction. So, the Part 2 of this Article casts doubt on the possibility of giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts if they prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. It is plausible to assume, that necessity to provide recorded testimony of a witness by means of video or audio technology or the introduction of documents and written transcripts is explained by the vital rights of victims of witnesses to health and life. There are a numerous of examples when victims or witnesses had been assaulted by the accused expressed in



intimidation, use of physical or moral force or even cause death. [16]

One additional fact about the balance between the rights of accused and the interests of victims may be noted, that the provisions ICC have the lack of distinction between the procedural status of victims and witnesses, while the status of the accused is clearly provided. It is obviously shown in the provisions of RPE and some provisions of the Statute of ICC. For instance, as it was described above the Article 55 of the Statute does not make any distinction between the rights of witnesses and victims ignoring the fact that they have the different procedural statuses and so there are should be different capacity of rights. Undoubtedly, victims must to have more procedural rights[2] to let them to be full participants of proceedings since the adversarial principle constitutes the basis of the proceedings.

These issue show how debatable to argue about the balance between the rights of accused and the interests of victims. Nonetheless, there are some positive movements in the operation of the ICC which that could prove that there is a delicate balance between these two categories. It is quite interesting to consider this issue from the standpoint of the parties to the right to participate. Participation by victims in international criminal proceedings is one of the innovations made by the ICC. Obviously it is one of the challenges for ICC. This very topical issue has been widely discussed around the world. [13] Some people are worry that victims' participation can endanger defence rights. [17] But others suggest that this measure is not enough to balance the rights of accused and the interests of victims. [2]

Analysed provisions of Statute and RPE allow to state that the ICC is trying to achieve this balance by providing additional rights to victims such as the right to participate in the proceedings before the ICC. This fundamental right of victims to participate in proceedings is found at Article 68 of the Statute. Also a number of provisions in the RPE, as well as those found in the Regulations of the Court and the Regulations of the Registry, govern the victim participation scheme at the ICC. [2] Among them the most important is Rule 89, which governs the process by which victims apply to participate in proceedings before the ICC. Finally, Rules 90 and 91 of the RPE provide the provisions to legal representation of victims.

More efficient balance of rights is observed in Article 82 of the Statute that allows either party to appeal the procedural decision taken in the proceedings before the ICC. It seems the revolutionary idea since this rule embodies the principle of adversarial giving participants the opportunity to influence on the proceedings. Korneliouk Oksana sheds further light on this statement. She emphasizes that the current position of the legislator with respect to judicial proceedings should address questions posed smoothing angles between the interests of the accused and the victim, and not to put the activities of investigation and trial before the interests of these participants. This idea is the new task of the proceedings which should be developed through active procedural activities of the defendant and the victim. [16]

Another side of the issue is that not all attempts are successful due to various circumstances. The described positive changes in Article 82 of the Statute governing victims' right to participate is almost neglected by Article 81 of the Statute governing the questions of appeal against decision of acquittal or conviction or against sentence. Due to this Article the right to appeal these types of decisions belongs only to a prosecutor and the convicted person. The right of victims to participate in this essential procedure is not provided. As it was noticed above in the first part, the right to be heard and the right to participating in the handling of the case that concerns them are very crucial for victims. These rights constitute the procedural status of victims and cannot be violated by court, prosecutor or the accused. [7] Moreover, "hearing victims of crime" is a duty of these organisations and whole society. [18]

Conclusion

The debatable question was analyzed from an angle providing critically approach to find the balance between the rights of the accused and the interests of victims the proceedings before the ICC. But before the issue of the nature of conflict between the interests of the accused and victims, which arose from the purpose of criminal proceedings and reflected on the scope of the rights of accused and victims' interests, was shown as a source of obstructing to reach this balance. Particularly, Article 68 of the Statute was examined as the scope of the most striking contradictory provisions that do not allow to fully implement the interests of victims despite of the target of this Article. The lack of separation of the rights and interests of victims and witnesses was considered as another factor, hindering the achievement of the objective of the given problem. The right of victims to participate in the proceedings was noticed as a positive and challenging movement of ICC. It was critically analyze from the point of view the accused and witnesses.

In addition a number of standpoints of scholars were used for supporting described above positions, which sometimes was dramatically against each other. While one part of them were convinced that the interests of victims does not turn out to be detrimental to the rights of the accused, it is essential that the modes and the boundaries of victim participation in international criminal trials are properly identified in the light of the rights of defendants, another part believed that any conflict between the rights of victims and the rights of defendants has to be the object of a delicate balancing that must be carried out in the knowledge that the overarching purpose of criminal procedure is to reach a finding of guilt or innocence whilst protecting at the highest level the rights of victims. Advocates of this position point out that "in this background when one embarks on balancing the rights of the accused with the rights of the victim in the administration of justice, one could see an imbalance with the scales tilted more in favour of the accused than the victim". [11]

Summarizing the main points of this discussion one can come to the following conclusions:

Thus, despite some legislative measures, adopted by the ICC, to balance the proceedings in terms of providing legitimate interests and the rights of the victim and the accused, a radical revision of criminal procedure policy was not found.

Striking a balance procedural status of the victim and the accused is possible provided the equal importance of their support bodies and officers of involved in criminal proceedings.

It is clear, that the protection of the interests of victims shall not prejudice the rights of the accused. Also ensuring of the rights of the accused should not be at the expense of the legal interests of victims and the interests of justice.

Need to find a compromise so contradictory determinants of criminal proceedings, which is what the legitimate interests of the victim and the accused.

In light of this research, these are at least certain reasons why one should be very cautious with speculating the rights of accused and the rights of victims. To attempt a complete analysis of balancing the interests of victims and the rights of accused in proceedings before the ICC in the scope of this essay would be not only presumptuous but also contrary to the very intention of this work, which is to critically discuss features that has been struck between the interests of these categories.



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