The Place of Victims Before the International Criminal Court

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WHO?
- Eligibility requirements pursuant to rule 85 of the Rules of Procedure and Evidence

WHEN?
- Stages of the proceedings at which victims’ participation can take place. Nature and confines of victims’ involvement in the proceedings:
  - General participation scheme pursuant to article 68(3) of the Statute;
  - Specific proceedings at which victims’ participation can take place.

WHAT?
- Range, nature and substance of the rights of victims as non-party participants
Rule 85 of the Rules of Procedure and Evidence

Definition of victims

For the purposes of the Statute and the Rules of Procedure and Evidence:

(a) ‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art science or charitable purposes, and to their historic monuments, hospitals and otherplaces and objects for humanitarian purposes.
Eligibility Criteria

- Natural persons or legal entities
- Harm
- Jurisdiction
- Causal link
RULE 85(a) First Criterion
Natural Persons

ISSUES:

• Identification requirements;

• Deceased persons;

• Disappeared persons.
**RULE 85(b) First Criterion**

**Legal Entities**

Legal entities as victims – a novelty at the international level?

### Concerns and intentions of the founding fathers.

1) Victim definitions lacking reference to juristic persons:
   - ICTY, ICTR, SCSL, STL.

2) Approaches Recognizing Legal Entities as Victims (Damaged Persons) at the international level:
   - **recognition in the legal framework** of other international(ized) adjudicative bodies (ECCC, East Timor’s hybrid court), bilateral and multilateral institutions (Ethiopia-Eritrea Claims Commission, Iran-USA Claims Tribunal, UNCC), as well as regional human rights bodies (IACtHR, ECtHR, Bosnia and Herzegovina’s Human Rights Chamber);
   - **case-by-case acknowledgement** – PCIJ, ICJ, African Commission for the Protection of Human Rights;
   - **legislative proposals and activities** – by the International Law Association in the Draft Declaration of International Law Principles on Compensation for Victims of War (Substantive Issues), as well as in the Draft Model Statute of an *Ad Hoc* International Compensation Commission.
**RULE 85 Second Criterion**

**HARM**

### WITH REGARD TO NATURAL PERSONS:

Both **direct** and **indirect**, but **personal** to the individual. According to the ICC’s jurisprudence, the harm may be material, physical and emotional (mental) - physical and psychological suffering, injuries, trauma - as well as economic loss and substantial impairment of fundamental rights.

<table>
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<tr>
<th><strong>Pecuniary damages</strong> – nature and compass. Explicit reference by the ICC Chambers to the IACtHR and ECtHR.</th>
<th><strong>Non-pecuniary damages</strong> – physical, emotional, psychological damages. ICC’s interpretation similar to IACtHR’s, ECtHR’s’ ICTY’s and ICTR’s.</th>
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<td>* Pecuniary damages in regard to deceased – recognized by the IACtHR, ECtHR, UNCC.</td>
<td>* Non-pecuniary damages in regard to deceased – recognized by IACtHR, ECtHR, UNHRC, Bosnia and Herzegovina’s Human Rights Chamber.</td>
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“Spiritual” damage? (See the separate opinion of Judge Cançado Trindade to the IACtHR’s judgment in the case of *Moiwana Community v. Suriname*, Judgment on the Merits and Reparations of 15 June 2005, Series C No. 124).
RULE 85 Second Criterion
HARM

WITH REGARD TO LEGAL PERSONS:

Limitations:

1) direct harm;

2) harm to property which is related to religion, education, art, science or charitable purposes, and to their historic monuments, hospitals, other places and objects of humanitarian purposes.

Non-pecuniary damages?

ICC lacks jurisprudence.
ECtHR – entitlement to non-pecuniary damages should be evaluated on a case-by-case basis (Comingersoll S.A. v. Portugal, Application № 35382/97, Judgment of 6 April 2000).
**RULE 85 Third and Fourth Criterion**

**JURISDICTION. Conditions:**
1) The alleged events from which the harm ensued must be crimes referred to in articles 5(1)(a) – 5(1)(c) and defined in articles 6 - 8 of the Statute (jurisdiction *ratione materiae*).
2) The crime must have been committed within the timeframe laid down in article 11 of the Statute, that is, since 1 July 2002 (jurisdiction *ratione temporis*).
3) The alleged events must meet one of the two alternative conditions embodied in article 12 of the Statute:
   - the crime must be committed on the territory of a State Party to the Statute or a State which has made a declaration provided for in article 12(3) of the Statute (jurisdiction *ratione loci*) or
   - the crime must be committed by a national of a State Party or a State which has made a declaration provided for in article 12(3) of the Statute (jurisdiction *ratione personae*).

**CAUSAL LINK. Issues:**
- Could any person who has suffered from a crime under the ICC jurisdiction be accorded victim status irrespective of any nexus with the subject-matter of the pending proceedings or only persons who have sustained harm as a result of crimes which are the subject-matter of a situation or case before the Court?
- Should the causal link requirement be applied uniformly or flexibly throughout the proceedings; does its threshold vary depending on the different procedural stages?
CLASSES (GROUPS) OF VICTIMS

- **Victim-applicants**: rules 89 and 92 of the Rules, regulations 86 and 87 of the Regulations of the Court;
- **Victim-participants**: article 68 (3) of the Statute, rule 89 of the Rules, regulation 86 of the Regulations;
- **Victims of a situation and victims of a case**;
- **Victims applying for reparations** – article 75 of the Statute, rules 94, 95 and 96 of the Rules;
- **Victims who have communicated with the Court**;
- **Victims with disclosed identity and anonymous victims**;
- **Affected groups**;
- **Victims of unlawful detention?** (article 85 of the Statute).
When?

General victims’ participation scheme:

Article 68(3) of the Statute, rules 89 – 92 of the Rules, regulation 86 of the Regulations of the Court (both at the situation case and at the case stage – see Judgment of the Appeals Chamber of 19 December 2008, DRC; Decision of PTC II of 3 November 2010, Situation in Kenya).

Participation in specific proceedings of limited object and purpose provided for *expressis verbis*:

- Article 15(3) of the Statute, rule 50(1) of the Rules;
- Article 19(3) of the Statute, rule 59 of the Rules;
- Article 75(2) of the Statute, rules 94 - 99 of the Rules.
“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 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.”

Interpretation of notions:

- Personal interests;
- Stage of proceedings;
- Appropriateness;
- Views and concerns;
- Manner or “modalities” - should the manner in which victims can take part in the proceedings be predetermined by the Chamber or should it be evaluated on a case-by-case basis?
Victims’ participation in specific proceedings

- Article 15(3) of the Statute, Rule 50(1) of the Rules
  - Participation confined to **making representations** to the Pre-Trial Chamber concerning the Prosecutor’s request for authorization of an investigation;

- Article 19(3) of the Statute, Rule 59 of the Rules
  - Participation confined to **submitting observations** in proceedings related to challenges of jurisdiction and admissibility;

- Article 75(2) of the Statute, Rules 94 - 99 of the Rules
  - Participation in **reparation proceedings**.
## Rights of victims:

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<th>Rights conferred <em>ex lege</em> and rights granted on a case-by-case basis</th>
<th>“Active” rights and “passive” rights;</th>
<th>Rights which victims may exercise in person and rights which may be exercised via the victims’ legal representatives.</th>
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• Rights conferred *ex lege, inter alia*:
  • *to be notified* of relevant decisions and developments in the proceedings (i.e. of the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to article 53 (rule 92(2)); of the decision of the Court to hold a hearing to confirm charges pursuant to article 61 of the Statute (rule 92(3)); of reparation proceedings before the Court (rule 96);
  • *to make representations* to the Pre-Trial Chamber (regarding the Prosecutor’s request for authorization of an investigation pursuant to article 15(3));
  • *to submit observations* (regarding jurisdiction or admissibility pursuant to article 19(3));
  • *to be informed of their rights and of the relevant decisions* of the Court that may have an impact on their interests (rule 16(2)(a) and (b));
  • *to express their views* related to relevance or admissibility of evidence in cases of sexual violence (rule 72 (2)); views related to the conditional release of a suspect (rule 119(3));
  • *to apply for reparations* following conviction (article 75 (2)).

• Rights granted on a case-by-case basis:
  • *to present their views* upon request by the Chamber (rule 93) with regard to, any issue, *inter alia*:
    • a review of a decision by the Prosecutor not to initiate an investigation or not to prosecute (rules 107 and 109);
    • a decision of the PTC to hold the confirmation hearing in the absence of the person concerned (rule 125);
    • proceedings related to the Prosecutor’s request for amendment of the charges (rule 128);
    • a decision concerning the joinder or the severance of trials by the TC (rule 136);
    • before a TC decides whether to proceed with a decision on admission of guilt (rule 139);
    • the place of the proceedings for the purposes of the confirmation of charges hearing (requested by PTC II, Decisions of 03 June 2011 in the case of the Prosecutor v. Ruto *et al.* (ICC-01/09-01/11-106) and the case of the Prosecutor v. Muthaura *et al.* (ICC-01/09-02/11-102)).
### “Active” rights – exercised by victims on their own initiative, *inter alia*:

- **to present their views and concerns** at any stage of the proceedings determined to be appropriate by the Court (article 68 (3));
- **to make representations** to the Pre-Trial Chamber (article 15 (3));
- **to submit observations** to the Court regarding jurisdiction or admissibility (article 19 (3));
- **to apply** for reparations;
- **to request** protective measures for their safety physical and psychological well-being, dignity and privacy (article 68 (1) and (2) and rules 87 and 88);
- **to request** protective measure for the purpose of forfeiture (rule 99).

### “Passive” rights – conferred to victims:

- **to be notified** in different stages of the proceedings (article 15 (6) in relation to article 53 of the Statute and rule 92 (2) of the Rules; article 15 (3), etc.);
- **to present their views upon request** of the Chamber – article 53 (3), article 56(3) and 57(3) of the Statute, article 75(3); rule 93 of the Rules.
- **to make observations upon invitation of the Court** - on the reports of the expert assessing the damages in reparation proceedings (rule 97(2)).
Rights (continued)

Rights which victims may exercise in person:
- to apply for participation in the proceedings before the Court;
- to apply for reparations

Rights employed via their legal representatives:
- to present their views and concerns pursuant to article 68(3);
- to participate in hearings, to make oral or written observations and submissions (rule 91(2));
- to question witnesses (rule 91);
- to appeal an order for reparations pursuant to article 82(4) of the Statute.
The “right” to tender evidence?

Relevant legal framework:
- Article 64(6)(d) of the Statute
- Article 69(3) of the Statute
- Rule 69 of the Rules
- Rules 91(2)-(4) of the Rules

Relevant jurisprudence:
- **Lubanga case:**
  - Decision on Victims’ Participation of 18 January 2008, TC I, paras. 108-111;
- **Katanga case:**
  - Decision on the Modalities of Victim Participation at Trial, TC II, 22 January 2010, paras. 81 et seq.
  - Judgment of 16 July 2010 on the Appeal against the Decision on the Modalities of Victim Participation at Trial, Appeals Chamber, paras. 37 et seq.
Thank you for your attention!

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