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# **How the International Criminal Court is balancing the right of victims to participate with the right of the accused to a fair trial**

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# Introduction

- Six years after the coming into force of the Rome Statute, the ICC now faces the practical challenges of determining legal issues in accordance with its unique system that draws on both civil and common law traditions.
- An innovative feature of the Rome Statute is the right given to victims to:
  - obtain reparations for the harm suffered; and
  - participate in the proceedings.
- The legal instruments of the Court also codify internationally recognised fair trial rights and guarantees of the defendant.
- Under the Rome Statute, the right of victims to participate must be exercised in a manner that is not prejudicial to or inconsistent with the fair trial rights of the accused.

# Introduction

- A number of victims have applied to participate in the proceedings of the Court in both situations and cases.
- Three suspects have been surrendered from the DRC and are now before the Court.
- For the first time in the history of international criminal proceedings the defence will not only have to respond to the Prosecution but will also have to deal with submissions made by victims.

# Statutory provisions governing the rights of the defence

## **Article 66 Rome Statute -Presumption of innocence**

- Everyone is presumed innocent until proven guilty before the Court.
- The Prosecutor bears the onus of proving the guilt of the accused beyond reasonable doubt.

## **Article 67(1) Rome Statute – Minimum guarantees**

- Right to a public hearing
- Right to a fair hearing conducted impartially
- Right to be tried without undue delay
- Right to adequate time and facilities within which to prepare defence
- Right to legal assistance

# Legal provisions governing victims

## Definition of victims

- The Rome Statute does not define who a victim is. Definition is provided in Rule 85 of the Rules of Procedure and Evidence.

**Rule 85(a) – RPE :** Victims means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court

**Rule 85(b) – RPE :** Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

# Legal provisions governing victims

## **Article 68(3) Rome Statute – Right to participate in the proceedings**

- Right to present views and concerns at stages of the proceedings deemed appropriate by the Chambers *where the personal interests are affected* and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

## **Rule 89 RPE – Application process**

- In order to present their views and concerns, victims shall make written application to the Registrar who transmits them to the relevant Chambers.
- The Chamber may reject the applications if it considers that the person is not a victim or that the criteria set forth in article 68(3) are not otherwise fulfilled.

## **Rules 90 to 93 RPE – Right to legal representation**

- A victim is free to choose a legal representative.
- Common legal representatives may also represent groups of victims

# Jurisprudential developments related to victims' participation

**Applications by victims to participate have raised two main issues for the consideration of the Chambers:**

1. Whether the applications process constitutes a separate and distinct process from the rest of the proceedings;
2. Whether the procedural status of victim should be granted once the criteria of Rule 85 are met, without determining if the personal interests of the applicant are affected.

# Jurisprudential developments related to victims' participation

**A review of the recent decisions issued by Pre-Trial Chambers I and II with regards to victims' applications for participation in the proceedings in the situations in DRC and Uganda show that the Chambers have made the following determinations:**

1. There is a procedural status of victim in relation to situation and case proceedings before the Pre-Trial Chamber.
2. The situation and pre-trial stage of a case are appropriate stages for victims' participation.
3. Personal interests of victims are generally affected by the outcome of the investigation of a situation and the pre-trial stage of a case.
4. An assessment of the personal interests is only carried out for the determination of the specific set of procedural rights attached to the procedural status of victim.



# Jurisprudential developments related to victims' participation

## Determinations of Pre-Trial Chambers I and II (contd)

4. It is with regards to the determination of the modalities of participation that the Chamber must ensure that they are not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
5. The fact that natural or legal persons may be entitled to the procedural status of victim is not , *per se*, prejudicial to the defence.
6. Applications process is prior, distinct and separate from the determination and exercise of the modalities of participation.
7. The applications process is not related to questions pertaining to the guilt or innocence of the suspect or accused.
8. The 17 January 2006 decision (PTC I in the DRC situation) established that applicants only have to demonstrate that the elements of Rule 85 are met *prima facie*.

# Issues raised by the Defence

**The defence, through the Office of Public Counsel for the Defence (OPCD), raised the following issues in reaction to the Pre-Trial Chambers' findings.**

1. The Chamber erred in finding that the application process was separate from a determination of the modalities of participation and that therefore the simple act of recognising applicants as victims (Rule 85) is not *per se* prejudicial to the defence.
2. Procedural safeguards as to whether the applicants meet the requisite criteria to participate as victims need to be imposed in order to prevent abusive, fraudulent or false claims. No sanction exists for false statements by applicants.
3. According victims a “permanent procedural status” at the investigation stage would create a fundamental imbalance, particularly since the Defence does not have such a permanent procedural status.
4. An abstract determination on the propriety of participation denies the parties the right to present concrete submissions on the applications.

# Issues currently under appeal

## **PTC I and II have granted leave to appeal on the following issues:**

1. Whether article 68(3) of the Rome Statute can be interpreted as granting a “procedural status” of victim at the investigation stage and the pre-trial stage of a case.
2. Whether Rule 89 and Regulation 86 provide for an application process /procedural status of victim that is distinct and separate from the procedural rights attached to such status.
3. What are the specific procedural features of the applications process?

# Trial Chamber's approach - 18 January 2008 Decision

**As regards the application process, the Trial Chamber has determined that the following criteria have to be met by applicants under Rule 85(a):**

1. The victim must be a natural person;
2. He or she must have suffered harm;
3. The harm results from a crime within the jurisdiction of the Court (not restricted to the crimes listed in the confirmation of charges);
4. There are, *prima facie*, credible grounds for suggesting that the applicant has suffered harm as a result of a crime committed within the jurisdiction of the Court.

In relation to the proof of identity the Trial Chamber went beyond the decision of the Single Judge of PTC in the Uganda situation and determined that unofficial documents could also be accepted as proof of identity

# Trial Chamber's approach - 18 January 2008 Decision

## **In determining the modalities of participation the Trial Chamber made the following conclusions:**

1. In order to participate at any specific stage in the proceedings, a victim will be required to show, in a discrete written application, *the reasons why his or her interests are affected* by the evidence or issue then arising in the case and the nature and extent of the participation they seek.
2. Victims have the right to introduce evidence.
3. Victims have the right to challenge the admissibility or relevance of evidence.
4. Victims may also retain their anonymity but this will affect the weight that will be given to their testimony

# 18 January 2008 Decision – Dissenting and separate opinion

**Judge Blattmann issued a dissenting and separate opinion and made the following statements regarding the criteria to be met by applicants:**

1. In its determination of who is a victim, the Trial Chamber must stay within the framework of the *facts and circumstances found within the charges confirmed* by the Pre-Trial Chamber.
2. In order to determine which applicants will have the right to participate, the Chamber must assess:
  1. Whether the applicant has suffered harm as a result of the crimes charged and confirmed
  2. Whether the applicant's interests are affected
  3. Whether participation by the victims is appropriate at the particular time and stage within the proceedings
  4. Whether their manner of participation would prejudice the rights of the accused to a fair, impartial and efficient proceeding.

# 18 January 2008 Decision – Issues raised by the Defence

**The Defence sought leave to appeal the Trial Chamber decision and raised the following issues:**

1. Modalities for identification for an individual applying to participate as a victim. Applicants should not be allowed to prove their identities using non-official documents.
2. The *prima facie* admissibility of applications. It would be unfair to grant the applicants the status of victims without assessing their credibility.
3. The notion of victim should necessarily imply the existence of a personal and direct harm.
4. The harm alleged by a victim and the concept of "personal interests" under Article 68 of the Statute must be linked with the charges against the accused (also argued by the Prosecution).

# 18 January 2008 Decision – Issues raised by the Defence

## Issues raised by the Defence:

4. Anonymous victims should not be allowed to participate in the proceedings.
5. Victims participating at trial cannot be allowed to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence (also argued by the Prosecution).
6. The evidence of the Prosecutor does not have to be communicated to the victims before trial (The prosecution argued that victims participating at trial should not have a right to access material in the prosecution's possession or control).
7. The Chamber's interpretation of Regulation 56 is inconsistent with the fundamental rights of the accused, particularly the presumption of innocence.



# 18 January 2008 Decision – Issues currently under appeal

## **The Trial Chamber granted leave to appeal the following issues:**

1. Whether the notion of victim necessarily implies the existence of personal and direct harm.
2. Whether the harm alleged by a victim and the concept of “personal interests” under Article 68 of the Statute must be linked with the charges against the accused.
3. Whether it is possible for victims participating at trial to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence.

## **Judge Blattmann**, dissenting, would have additionally granted leave to appeal on the following issues

1. The modalities of identification for an individual applying to participate as a victim;
2. Whether anonymous victims will be allowed to participate in the proceedings;
3. The scope of Regulation 56 of the Regulations of the Court.

# Conclusion

**As the issues are still pending before the Appeals Chamber, there are important practical issues which must be considered.**

- The primary aim of Article 68(3) of the Rome Statute is to grant victims meaningful participation rights. At present, the Trial Chamber's 18 January decision appears to grant wide participation rights by not requiring victims to demonstrate a causal nexus between the charges against the accused and the harm.
- However, once the Chamber recognises the applicant as a victim, in order to present their views and concerns, the Chamber requires the victim to file **discrete** written applications demonstrating how their personal interest has been affected by the issues in the case or the evidence against the defendant.
- The question is-will this delay the process even further? If the answer to this question is yes, then this will also have serious implications for the defendant who is entitled under the Statute to a fair and expeditious trial

# Conclusion

- The reality is also a practical one. The Legal Aid budget for investigations is actually quite limited and is capped. If victims are allowed to the right to call witnesses and lead evidence which may be considered by the Chamber as evidence necessary for the determination of the truth under Article 69(3), this may have potential impact for the defense's budget
- Since the Chambers do not prima facie consider the credibility of the applicants during the application process and does not require corroboration, in order to later challenge credibility the defence would have to do investigations in relation to both victims and prosecution witnesses.
- What of the process of disclosure? Would the victims have an obligation to disclose statements/documents upon which they intend to rely to the defence in advance of the trial? What are the modalities of this disclosure process?

# Conclusion

It is not clear whether the Appeals Chamber will consider the issues in a consolidated appeal. However, any decision taken by the Chambers will have to balance the right of the victims to meaningfully participate in the proceedings as intended by the drafters of the Rome Statute without compromising the rights of the defendant to a fair and expeditious trial.