



# The Potential Rights of Victims

## CHAPTER 4

*This chapter discusses the potential rights of victims to participate and receive reparation before the ICC, and the right to protection of victims and witnesses.*

*“Millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”*

### 4.1. Introduction

The States Parties to the ICC are “mindful that (...) millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”, as is stated in the Preamble to the Rome Treaty. Therefore, they have established the ICC “to stop impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”. Victims have often expressed their demand for justice to be done, as an integral part of any transitional justice process. By means of the ICC’s public criminal procedures the whole world will learn the truth about what happened.

*Victims know that individual therapeutic intervention is not enough. They need to know that their society as a whole acknowledges what has happened to them. Truth means the end of denial and silence.*

(Latin American Institute of Mental Health and Human Rights, Chile)

Recognising the suffering as well as the strength of victims, the ICC has incorporated a number of special, potential rights for victims. In its regulations the ICC grants victims four potential rights:

- i. the right to *participate* in the proceedings;
- ii. the right to be kept *informed* of developments in the trial;
- iii. the right to obtain *reparations* for their injury; and
- iv. the right to be *protected* when they appear before the Court.



***“The awareness is growing that redress and reparation for victims is an imperative demand of justice”***

The first three rights are novel at the international level. No other international tribunal has provided victims with such rights. At the national level the notion of victims’ rights in criminal law procedures does exist, especially in countries with a judicial system founded on *civil law* (such as France and the DRC). In countries based on *common law* (such as the United Kingdom and Uganda) this is less known. In these countries victims do not participate in criminal law proceedings but may act through civil law procedures to sue offenders and claim compensation for harm done.

*The victim’s perspective may be perceived in many societies as a complication, an inconvenience and a marginal phenomenon. However, the awareness is growing that redress and reparation for the victims of human rights is an imperative demand of justice.*

(Prof. Theo van Boven, former UN adviser on Reparation of Victims)

Survivors of crimes under the Rome Statute may certainly benefit from participation with and redress from the ICC, but only if their needs of protection, safety and psycho-social well-being are secured by the Court. This is essential as victims might otherwise experience new trauma.

## **4.2. Which victims have the rights under the Rome Statute?**

In every serious violent conflict there are many victims that suffer from casualties, deaths, torture, loss of property, land or income. When crimes of genocide, war crimes or crimes against humanity are committed, then the ICC may be authorised to investigate and prosecute those who bear the greatest responsibility for these crimes.



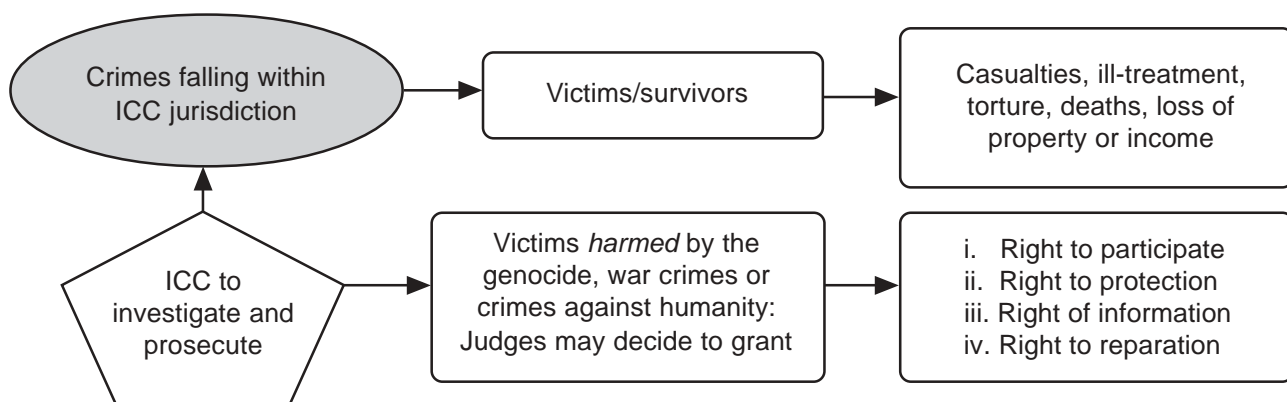
*See also Chapter 3.*

Who among all the victims of conflicts is entitled to enjoy the special victims’ rights of the ICC? The answer is: Only those individuals whose *personal interests are affected by crimes within ICC jurisdiction* are regarded as “victims under the ICC definition” (ICC Rule 85). In addition, in cases when property dedicated to certain purposes (e.g. religion, education, art, science or charitable and humanitarian purposes, or historic monuments or hospitals) is harmed,



these organisations or institutions who owned that property may also be considered victims and they may apply to the Court.

However, it is important to note that it is up to the Judges of the ICC to decide whether individuals or organisations are actually entitled to the victims' rights of the Rome Statute. The Judges decide on the basis of information on the application form, filled in by the victims. That is why we speak of *potential* rights: the Judges decide whether to grant the actual rights to a victim or not. This procedure is visualised as:



*A decision of the Judges that somebody is not a victim according to the Rome Statute does of course not mean that that person has not suffered! It is solely a judicial judgement related to the requirements of the Rome Statute. The person concerned is perfectly right to regard herself or himself as victim/survivor, capable of healing and rebuilding her or his life.*

### **What types of harm are considered by the Judges?**

It will be up to the Judges to formulate the rules interpreting the types of harm that they take into consideration. This is not specifically laid down in the Rome Statute but it is expected to include

- physical harm to a person's body;
- psychological harm, by which a person's mind is affected because of what she or he has experienced or witnessed;



- material harm, by which goods or property have been damaged or lost.

### ***The difference between victims and witnesses***

Witnesses are those persons who are called by the Prosecution or the Defence to give *testimony* to the Court. This means that they must answer questions of the Prosecutor or the lawyer of the accused. Thus, *victims* may be *witnesses*, as can others, such as experts, persons who saw a crime committed, or relatives of a suspect.

### **4.3. The right for victims to participate**

It is important that victims enjoy their right to participation in Court proceedings in a manner that is empowering them, not merely as “passive” witnesses. The independent Prosecutor conducts himself foremost as a party in the case, engaged in a struggle with the accused. This does not automatically coincide with the interests of the victims. By participating on their own behalf through legal counsel, victims can share their legitimate concerns and add substantial information, apart from the Prosecutor’s evidence and line of arguments.

It is then the role of the Judge to direct the Court proceedings and listen to all the statements of witnesses, the legal representative of the victims, defence of the accused and, of course, the Prosecutor. Thereafter, the Judges will issue their decisions.

#### ***Examples of how victims may participate through legal counsel:***

- by submitting observations to the Court about whether a particular situation falls under the jurisdiction of the ICC;
- by making representations where the Prosecutor seeks permission from the Judges to begin an investigation;
- by providing observations where the Court confirms the charges being brought against the accused;



- by participating in the proceedings of the Court, for example by making opening and closing statements or by questioning witnesses, the accused and experts providing testimony;
- by presenting views and concerns where personal interests are affected;
- by asking the Court to take special gender-sensitive measures, especially when the victim has suffered from sexual violence; these might include, among others, hiding the identity of the victim or refraining from asking the victim to face the accused;
- by appealing against (a limited number of) Court order(s), including those involving reparations.

### ***How does this work in practice?***

#### ***A. When to apply?***

Victims may apply to present their views and concerns before the Court *at any stage of the proceedings*, thus even from the earliest stages, e.g. when the Prosecutor is still investigating a specific situation.

#### ***B. The Standard Application Form***

Victims may apply to participate by filling out the *Standard Application Form for Participation*. This form is distributed by the Victims Participation and Reparation Section (VPRS) of the Registry in the two working languages of the Court: English and French. However, when unable to use these two languages, victims may submit the application form in their own language.

In this form victims need to provide the following information:

- personal information (name, date of birth, etc.);
- information on the incident, event or alleged crime that forms the basis for application (what happened, where and when, were there other victims or witnesses?);
- information about the harm suffered;



- indication as to which stages the victim would like to participate in (Preliminary Examination stage, Pre-Trial stage, Trial stage, or Appeal stage);
- information about the need for legal representation;
- information about the victims' security and possible need for protective measures.




---

*Applying for participation is not the same as requesting reparation. To request reparation you need to fill in a different form (see next paragraph for further information).*

---

### **C. Help in completing the Standard Application Form**

Instead of filling out the form by yourself it is advised to contact a NGO, a religious or community representative, a lawyer or other expert to assist in filling out the Application Form. Victims may also contact an ICC field office. In many regions of the countries in which the ICC operates, the VPRS has contacted and trained organisations and individuals to help with the form.

The information that victims provide in the Application Form, together with all accompanying documents (e.g. a copy of identity card or passport) should be sent to the VPRS at the ICC or (if already established) to the ICC field office in the country concerned. The VPRS registers the Application Forms in a secure database. Only authorised staff of the Court has access to the information provided. VPRS will forward the information to the Judges who will then decide on the request.

Once a victim has been accepted as a participant in a particular situation or case, she or he will be notified about that decision. From then on the victim will be kept informed of developments at each stage of the proceedings, including the dates of hearings, the final decision of the Court and any possible appeals. It is likely that these notifications will be sent to their legal representatives. If a victim's application is rejected by the Judges for any reason, the victim will be notified as well. She or he may apply again to participate at a later date.



#### **D. Legal representation of the victim**

Victims can choose a legal representative to represent them, whether or not they travel to the Court in The Hague. This must be a person with extensive experience as a criminal lawyer, judge or prosecutor, and be fluent in either French or English. The ICC will help victims to find a legal representative and will be able to provide financial assistance for poor victims.

When many victims have applied for participation, the Judges may ask victims to choose a *common legal representative*. If the victims are unable to appoint one, the Judges may ask the Registrar to appoint one or more shared legal representatives. The VPRS is responsible for assisting victims with the organisation of their legal representation before the Court.



---

*As already stated, the victim's potential right to participation as enshrined in the ICC Treaty is new. There is little experience as to how broad the respective provisions will be interpreted by the Judges. Because of the complicated and still uncertain procedures it is important that victims organise themselves into victims' groups. Together they can then draft a good strategy and make maximum use of their potential right to participation.*

---

#### **The Victims Participation and Reparation Section (VPRS)**

The different functions of this section of the Registry with regard to victims' participation are:

- i. Cooperate with NGOs, intergovernmental organisations, and states, to facilitate the access of victims to the Court;
- ii. Contact with lawyers, bar associations and NGOs in order to assist victims in obtaining their legal representation;
- iii. Assist victims in obtaining legal advice and facilitate the ability of victims to apply to participate or to request reparation.
- iv. Participate in training for the legal representatives of victims;
- v. Establish databases and standard forms to facilitate the presentation to the Court of victims' requests for participation and reparations;
- vi. Cooperate with the Victims and Witnesses Unit and the Office of the Prosecutor to ensure confidentiality and protection of victims with regard to Court proceedings.

### *The Victims Trust Fund is created for the benefit of victims*

Besides the VPRS, the Court has also established an Office of Public Counsel for Victims. This office is responsible for providing support to victims' legal representatives and, in some circumstances, representing victims directly before the Court.

#### **4.4 The right to reparation**

Victims have the potential right to obtain reparation from the ICC, including restitution of property and compensation for losses. This right to reparation, as contained in the Rome Statute, is new for international criminal tribunals. As it is a new procedure it is difficult to predict precisely how it will work. Difficult questions are involved, such as: who among the victims is to be compensated, how much compensation is to be rewarded, what kinds of harm are to be covered, how is harm to be quantified, how are different kinds of harm to be compared and compensated, and how should compensation be distributed. These questions have to be carefully considered and in the first cases it will become clear how the Judges interpret the provisions.

The compensation granted to the victim can come from funds of the accused but also from voluntary funds donated to the Victims Trust Fund (VTF). This independent Fund (though established by the Court) is created for the benefit of victims, and the Court may decide to give victims money from this Fund. The Fund is governed by a Board of Directors, composed of eminent persons. The first members of the Board are: Her Majesty Queen Rania Al-Abdullah of Jordan, His Excellency Dr. Oscar Arias Sánchez from Costa Rica, His Excellency Mr. Tadeusz Mazowiecki from Poland, Madam Minister Simone Veil from France, and His Eminence Archbishop Emeritus Desmond Tutu from South Africa, who represent their respective regions.

The Board of Directors of the VTF has a mandate to provide physical or psychological support, rehabilitation or material support. This can be done at two stages in the procedures: before the Judges issue their final verdict, or afterwards, when implementing the Court's ruling on reparation to victims. If the Board wishes to provide support before the verdict is rendered, the Board will have to notify the Court. The Board



may proceed, unless the relevant Chamber of the Court that is dealing with the situation responds within 45 days (which can be extended) indicating that the planned activity or project would predetermine any issue to be determined by the Court, or prejudice the rights of the accused.

Victims can apply at any stage of the procedures. Victims can apply for reparation by filling out the Application Form for Reparation, delivered by the Victims Participation and Reparation Section. This is a special form, different from the one for participation. At the time of writing this form had not yet been distributed and still needed approval by the Judges.

*The Court can decide to grant individual reparation but will most probably favour collective reparations*

The Court can decide to grant individual reparation but will most probably favour collective reparations, that is, reparations to a whole group of victims. Reparation can be monetary as well as non-monetary, such as reinstatement in a function, provision of new employment, medical and educational services, housing, restoration of reputation, planting of trees, or erecting of memorials.

In order to allow the greatest number of victims to obtain reparation, Court rules require the Registrar to give adequate publicity of the reparation proceedings in the country concerned. Faith-based organisations can assist by assess the needs of victims' groups in their region to the VTF Board. This may help the Board in their decision-making on reparations.

#### **4.5 The role of religious NGOs to counsel and protect victims**

The role of religious leaders in both the protection and rehabilitation of victims and witnesses will be critical in the achievement of justice, particularly in those countries where the ICC is conducting investigations and subsequent prosecutions. The promotion and protection of victims' rights is related to biblical, theological and ethical principles. The protection of the poor, the widow, the orphan and the stranger, images of the marginalised, the excluded, the vulnerable, all point at imperatives that are at the core of religious reflection and action.

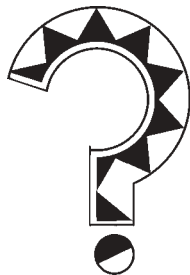


*The promotion and protection of victims' rights is related to biblical, theological and ethical principles*

The ICC will also look to religious leaders and their communities in the development and implementation of reparation programs conducted on behalf of the victims and their families.

Religious institutions may wish to consider choosing local staff to obtain specialised training in helping potential victims to apply for participation in ICC legal proceedings and reparation programs, and to obtain qualified legal representation.

Religious leaders and their communities are also uniquely situated to uphold and carry out traditional approaches to justice and reconciliation for the many victims and perpetrators of violent conflict that the ICC will not be able to assist or prosecute directly. Religious leaders may also consider participating in national NGO coalitions to support the passage of domestic legislation designed to implement the Rome Statute, including its victims' rights. By upholding the rule of law on the secular level, religious communities can help reinforce the highest standards of justice and peace as reflected in their respective faith traditions.



#### **4.6 Key questions**

1. Who may be recognised as a victim by the ICC, and who may not?
2. What potential rights do victims have with the ICC, and how can these be realised in practice?
3. What expectations could be raised among victims of war crimes, particularly about reparations, and what can be done by the ICC and faith-based organisations to avoid disappointments?

