

Comment on OTP Environmental Crimes Policy submitted on 16 March 2024
“The Environment and the ICC Legal Framework concerning Victims”

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In this document I present my opinion on an issue that, although not explicitly raised in the consultation, may become relevant: the environment and the ICC legal framework concerning victims.

Firstly, I address the question of whether the environment can qualify as a victim and provide two lines of argumentation:

a) The environment can, indirectly, appear within the framework of victims through organisations and institutions dedicated to its protection, in accordance with the literal interpretation of Rule 85(b) ICC Rules of Procedure and Evidence (RPE).

b) If certain conditions are met, the environment could be declared a victim directly, given the trend towards recognizing legal personality to nature or its elements.

Secondly, I expound on the implications of admitting the environment, or organisations in charge of protecting the environment, as victims in proceedings before the ICC. Here, I argue that this way of proceeding could render harm to the environment visible, even in the absence of a charge of crimes against the environment.

FIRST POINT: CAN THE ENVIRONMENT QUALIFY AS A VICTIM BEFORE THE ICC?

There are two avenues for the environment to appear within the victim legal framework of the ICC. The first avenue is more plausible than the second.

a) First avenue: an organisation or institution dedicated to the protection of the environment is recognized as a victim.

Rule 85 RPE contains the definition of victim. Paragraph (a) deals with victims who are 'natural persons', a concept that the ICC has equated with 'human beings'.¹ Paragraph (b), however, refers to entities of an abstract nature:

“Victims may include organisations 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”.

There is an immediate equivalence between the definition of victim in Rule 85(b) RPE and protected buildings in Articles 8(2)(b)(ix) and 8(2)(e)(iv) of the Statute. Rule 85(b) RPE can therefore capture the phenomenon of crimes against cultural objects, but otherwise, the legislative framework of the ICC presents an asymmetry with respect to other crimes not directed against persons: this is the case for both the crime of aggression and the crime against the environment. Neither the State (subject of the crime

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¹ Pre-Trial Chamber I, *Situation in the DRC*, Public redacted version of the “Decision on the application for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, ICC-01/04-101-tEN-Corr (17 January 2006) para. 80.

of aggression) nor the environment lend themselves immediately to being encompassed by Rule 85(b) RPE.²

Regarding the environment, however, it is possible to argue that organisations or government agencies whose purpose is to preserve or protect the environment may be considered as entities dedicated to scientific or charitable purposes, given that the conservation of nature can fall within those broad parameters.

The criterion that the harm must be caused to their 'property' should not be an obstacle, as it is common for national legal systems to declare that natural resources are owned by the State.

In such cases, the victim would be the organisation or institution, and not the environment *per se*. This avenue would represent a way for the environment to be taken into account for participation and reparations purposes, albeit indirectly.

b) Second avenue: the environment is recognized as a victim.

The environment itself does not lend itself directly and unequivocally to being recognized as a victim if one adheres strictly to the wording of rule 85(b) RPE. However, there have been two legal innovations, one within the ICC (the *Lubanga/Ntaganda* Reparations Principles) and the other outside the ICC (the recognition of legal personality of nature or its elements by some jurisdictions), which open the possibility for the environment to qualify as a victim within the ICC framework.

The first jurisprudential innovation is the broad interpretation that the ICC has applied to Rule 85(b) RPE in the principles applicable to reparations. According to the principles identified in *Lubanga* by the Appeals Chamber, rule 85(b) RPE refers to 'legal entities' in a general sense:

"Reparations can also be granted to legal entities, as laid down in rule 85 (b) of the Rules of Procedure and Evidence. These may include, *inter alia*, nongovernmental, charitable and non-profit organisations, statutory bodies including government departments, public schools, hospitals, private educational institutes (primary and secondary schools or training colleges), companies, telecommunication firms, institutions that benefit members of the community (such as cooperative and building societies, or bodies that deal with micro finance), and other partnerships."³

The *Lubanga* principles of reparations were endorsed in the cases of *Katanga*⁴ and *Al Mahdi*.⁵ The principles set forth in *Ntaganda*, which have been confirmed in the last reparations order belonging to the *Ongwen* case,⁶ reproduce the same logic:

"As provided for in rule 85(b) of the Rules, legal entities must have sustained direct harm and they must be an organisation or institution whose property is dedicated to religion, education, art or science or charitable purposes, a historical monument, hospital, or other place or object for humanitarian purpose. Legal

² See Gillett, Matthew, *Prosecuting Environmental Harm Before the International Criminal Court* (Cambridge University Press, 2022) p. 212.

³ Appeals Chamber, *Lubanga* Amended Reparations Order, ICC-01/04-01/06-3129-AnxA, para. 8 [Lubanga Reparations Principles].

⁴ Trial Chamber II, *Katanga* Reparations Order, ICC-01/04-01/07-3728-tENG (24 March 2017) para. 30.

⁵ Trial Chamber VIII, *Al Mahdi* Reparations Order, ICC-01/12-01/15-236 (17 August 2017) para. 41.

⁶ Trial Chamber XI, *Ongwen* Reparations Order, ICC-02/04-01/15-2074 (28 February 2024), para. 77. Trial Chamber IX, in *Ongwen*, has only extended the *Ntaganda* principles slightly related to 'Types and Modalities of Reparations' and 'Child Victims', see paras 78-86.

persons or entities 'may include, *inter alia*, nongovernmental, charitable and non-profit organisations, statutory bodies including government departments, public schools, hospitals, private education institutes [...], companies, telecommunications firms, institutions that benefit members of the community [...] and other partnerships'.⁷

According to this jurisprudential line, the legal entity that has suffered harm can take any designation (such as a statutory body, partnerships, companies, etc.). Another important development is that, the environment, of elements thereof, has been awarded legal personality in several parts of the world⁸ in what appears to be a growing trend of giving rights to nature. Since the ICC has been amenable to accepting the domestic legal registration of the entity as valid,⁹ nature or those natural elements that have been recognized as legal persons in their domestic context could satisfy the first part of the victimhood test: to be a legal entity, regardless of the denomination.

However, the effect that the *Lubanga/Ntaganda* Reparations Principles' interpretation has on the second limb of the victimhood test of rule 85(b) RPE is uncertain: it is unclear if the property harmed as a result of a crime within the jurisdiction of the Court must still be dedicated to religion, education, art or science, charitable or humanitarian purposes. On its face, it would seem odd to open the type of legal entity to include, for example, a telecommunication firm, but limit the purposes to which its property can be dedicated exclusively to non-profit goals.

In this context of uncertainty, the *Lubanga/Ntaganda* Reparations Principles open the possibility of two interpretations concerning the second limb of rule 85(b) RPE, one strict, and one liberal:

- Strict interpretation

A 'strict' reading of the *Lubanga/Ntaganda* Reparations Principles would require that the harm resulting from a crime within the jurisdiction of the Court sustained by the legal entity, whatever its denomination, had to affect its property "dedicated to religion, education, art, or science or charitable purposes" and the like pursuant to rule 85(b) RPE. In that case, it would be hard to argue that the environment meets this second criterion since it simply exists without a deliberate design or intended function.

Yet, there could be certain scenarios where elements of the environment may qualify as a victim even under this strict reading. This is because there may be natural areas designated by humans, such as national parks, protected forests, natural heritage sites or biodiversity hotspots that, arguably, fulfil a goal. Most commonly, this goal would be that of conservation, that can be understood as fulfilling the science and non-charitable purposes criteria. In such cases, the natural area could potentially qualify directly if it had been recognised as a legal person. If it was not a legal person, the organisation or institution in charge of its management/protection could qualify instead

⁷ Trial Chamber VI, *Ntaganda* Reparations Order, ICC-01/04-02/06-2659 (8 March 2021) para. 32, citing in the last part the *Lubanga* Reparations Principles and the *Al Mahdi* Reparations Order [*Ntaganda* Reparations Principles].

⁸ E.g. Ecuador, Bolivia, New Zealand, Spain and Colombia, among others.

⁹ See e.g. Pre-Trial Chamber III, *Bemba*, "Fourth Decision on Victims' Participation" ICC-01/05-01/08-320 (12 December 2008), para. 56 "the Single Judge will consider any constitutive document in accordance with the law of the CAR", that is, the State in question. See also Trial Chamber VIII, *Al Mahdi*, "Public redacted version of 'Decision on Victim Participation at Trial and on Common Legal Representation of Victims'" ICC-01/12-01/15-97-Red (8 June 2016) para. 24 "The Chamber will consider any document as evidence of the establishment, creation or registration of the organisation/institution".

under rule 85(b) RPE, provided the rest of the test (harm to the property and a causality link with a crime within the jurisdiction of the Court) were present.

The Registry's victim application forms for organisations in the *Al Hassan, Yekatom & Ngaïssona*, and *Abd-Al-Rahman* cases¹⁰ seem to be open to this latter possibility: the forms allow a variety of denominations for the legal entity (from NGO to partnership);¹¹ they, nevertheless, require to declare the purpose of the property harmed (in principle, all non-profit);¹² and, most importantly for current purposes, under the 'types of harm', the forms list, among others, loss or damage to property in the form of "land, such as agricultural land, farming land" and "environmental damage, such as water sources".¹³

- Liberal interpretation

A liberal reading of the *Lubanga/Ntaganda* Reparations Principles concerning rule 85(b) would allow the dissociation of the legal entity from the predetermined set of purposes its property must be dedicated to. Under this liberal interpretation, any legal person that has suffered direct harm to its property as a result of the commission of a crime within the jurisdiction of the Court would meet the victimhood test.

If this was the correct reading, any part of nature that has been awarded legal personality and that has been harmed as a result of the commission of a crime within the jurisdiction of the Court, could qualify as a victim without the burden of having to establish that its property (i.e. the elements it is made of) have a specific purpose. As far as the environment is concerned, the liberal reading would be more in line with an ecocentric logic because, as mentioned above, the environment just 'exists' and, unlike edifices, temples, memorials and the like, is not built for a purpose. It is therefore artificial to ask the environment 'what is it made for'.

SECOND POINT: THE IMPLICATIONS OF ADMITTING THE ENVIRONMENT, OR AN ORGANISATION IN CHARGE OF THE ENVIRONMENT, AS A VICTIM IN PROCEEDINGS BEFORE THE ICC

The linchpin of the definition of 'victim' in the legal framework of the ICC is the concept of harm. This is to say that, to qualify as a victim before the ICC, the person (natural or legal) must have suffered 'harm' as a result of the commission of a crime within the Court's jurisdiction. This sets the ICC apart from the definition of 'victim' of the *ad hoc* tribunals. Both the ICTY and the ICTR required the victim to be the object of the crime.¹⁴ By contrast, at the ICC, being the target of the crime is not a requisite to be considered a victim.

In all these tribunals (ICTY, ICTR and ICC), the person against whom a crime has been committed would qualify as a victim. The difference is that, at the ICC, he/she would not be the *only* victim. The spectrum of the concept of victimhood at the ICC is much wider and encompasses natural/legal persons that have been harmed as a result of a crime, even when they were not the intended target. This may happen, for example,

¹⁰ Available here, respectively, *Al Hassan form*, *Yekatom & Ngaïssona form*, *Abd-Al-Rahman form*.

¹¹ Section 12 in all three forms.

¹² Section 11 in all three forms.

¹³ Section 6 in all three forms.

¹⁴ Rule 2(a) of the ICTY Rules of Procedure and Evidence defined 'victim' as "[a] person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed. The ICTR Rules of Procedure and Evidence contained an identical provision.

when the person (not object of the crime) was physically close to the space where it was committed, or because he or she had a relation of proximity with the object of the crime.

For example, let's suppose an individual uses asphyxiating, poisonous or other gases against human beings (contrary to the Rome Statute) and, as a result of this unlawful action, a forest and a river become contaminated. The contamination of the environment is relevant for victimization purposes because there is a causality link between crime and harm, even though ruining the forest and the river was not what the perpetrator was aiming for. If there was a governmental agency in charge of protecting the forest of the river, they could have a claim as victims.

The broader implication of this observation is that the lack of correlation between being the object of a crime and being a victim of such crime under the ICC framework, opens the door for the environment to be considered a victim when it has suffered harm as a result of the commission of whatever crime under the jurisdiction of the Court.

Thus, the dissociation between being the object of the crime and being a victim of the crime, frees the environment from the straitjacket of article 8(2)(b)(iv) of the Statute. This means that harm to the environment can become legally relevant, that is, have a presence in the courtroom for participation purposes and potentially receive reparations, regardless of whether the crime was committed in a non-international armed conflict, and regardless of the level of damage suffered (i.e. widespread, long-term and severe). The latter point is because the ICC legal framework, including its case-law, has not required a specific level of harm to qualify as a victim. To qualify as a victim, harm must just exist, provided it can satisfy the causality link used by the Court (i.e. but/for and proximate cause).

In conclusion, this submission has explored the possibility of the environment appearing as a victim in ICC legal proceedings. It has argued that there is a plausible prospect that an organisation or institution (such as a governmental agency) in charge of protecting the environment could qualify under rule 85(b) RPE. Moreover, the interpretation of rule 85(b) RPE of the *Lubanga/Ntaganda* Reparations Principles, coupled with the growing recognition of nature's legal personhood, opens a new realm of possibilities which includes the direct recognition of the environment, or elements thereof, as a victim.¹⁵ Lastly, this submission has contextualized the relevance of admitting the environment (or organisations that protect it) as victims, namely: allowing its harm to be part of the truth-telling function of participation and a subject of reparations even in the absence of crimes against the environment.

¹⁵ It must be noted that the Colombian Special Jurisdiction for Peace has recognized the River Cauca as a victim of the armed conflict, see <https://www.jep.gov.co/Sala-de-Prensa/Paginas/-la-jep-acredita-como-victima-al-rio-cauca-en-el-caso-05.aspx>.