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LEGAL STATUS OF AN INDIVIDUAL IN INTERNATIONAL LITIGATION

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The article is devoted to the theoretical and practical issues of the legal status of an individual in international courts and tribunals. The author investigates how natural persons participate in international litigation in order to understand the evolving status of an individual in the international legal order in general. The approach is based on inclusive participation, and an overall tendency to widen *locus standi* and *locus standi in judicia* is stressed. The author analyses the status of a claimant, a defendant, other participants, such as witnesses and victims, covering different international jurisdictions, in which an individual has a procedural role – human protective mechanisms, administrative tribunals, international criminal tribunals – and even addresses the International Court of Justice case law (in which an individual formally has no access to any procedural status) in order to unveal and prove the humanization of international procedural law.

Keywords: access to justice; applicant; defendant; individual; international courts and tribunals; litigation; *locus standi*; participant; party; procedural status; victim; witness.

ПРАВОВОЙ СТАТУС ИНДИВИДА В МЕЖДУНАРОДНЫХ СУДАХ

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Рассматриваются теоретические и практические аспекты правового статуса индивида в международных судах и трибуналах. Автор предлагает взглянуть на то, каким образом физические лица участвуют в международных судебных инстанциях, для понимания эволюции статуса индивида в мировом правопорядке в целом. Подход, представленный в статье, базируется на концепции инклюзивного участия. Подчеркивается всеобщая тенденция расширения *locus standi* и *locus standi in judicia*. Автор анализирует статус заявителя, ответчика, иных участников (таких как свидетели, жертвы), охватывая различные международные юрисдикции, где индивид имеет процессуальное положение (правозащитные механизмы, административные трибуналы, система международной уголовной юстиции), и даже обращается к практике Международного суда ООН, где формально индивид не может участвовать в процессе, для раскрытия и обоснования общей гуманизации международного процессуального права.

Ключевые слова: доступ к правосудию; заявитель; ответчик; индивид; международные суды и трибуналы; судебное разбирательство; *locus standi*; участник; сторона; процессуальный статус; жертва; свидетель.

Introduction

The status of an individual in international legal relations is quite an ambiguous and controversial issue, even in its semantics. The very essence of this discussion is rooted in the adherence to either naturalist or positivist legal schools [1].

The classics of the 19th and the early 20th centuries did not presume any international legal personality of an individual. A natural person was totally objectified in *international* law. Oppositely, for H. Grotius and his contemporaries it was not of any paradox to assume

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that an individual had a position in international law [2, p. 70, 74].

In the late 20th century the fact of *possessing* rights and obligations by individuals is not an issue of debates. However, what still remains disputed is the source of these rights and duties. It seems quite proved that in international relations, a natural person possesses, at most, derivative legal capacity [3, p. 104]. Rights and obligations are conferred by main actors – states and, to some extent, international organizations, and "they have lopsided position in international community" [4, p. 150].

In the 21st century the post-modern world presents its new challenges, and a response to many of them, as it seems, can be a *human-oriented approach*, which can be a compromise to opposite scholar views on the very essence of law and order. "Humanization" of all spheres of international life becomes inevitable and obvious, it evolves to a strong tendency. Naturally, the status of an individual shall be at the center of schoolars' and practitioners' attention.

It was H. Kelsen who defined "a subject" of international law through the ability to exercise the procedural capacity required to bring a claim before an international judicial entity. The capacity to act is the decisive criterion of legal personality (P. Dupuy) [5]. Some authors suggest an individual is an object when it acquires international rights and a subject when it exercises them [6, p. 283]. Some consider these are artificial notions and there is no need to draw special difference between them [7].

We rely upon a frequently cited provision of the outstanding ICJ Opinion in Reparation for Injuries (1949) that "a subject of international law... capable of possessing international rights and duties... has capacity to maintain its rights by bringing international claims" [8]. Moreover, it is helpful to draw difference not only between active and passive sides of personality, but also consider "statics" (the eligibility to be involved) and "dynamics" (the procedural status, its realization in proceedings) of participation in litigation.

One can argue there is nothing reinterpreted in, for example, a well-known position of D. R. Higgins [9], while saying that *participation* not an *attribution* is a real status. Participation concept is rather widely accepted now. We, further, would like to explore how the system of international law in its different litigation procedures involves an individual. It can help to reveal the regularities and rules of such *inclusive participation*. In the given article we try to assess the status of an individual through a functional approach to one of the issues of legal capacity of international legal subjects. We state that what really gives an impulse to evolving international personality of an individual is his/her ability to participate in international litigation, to protect his/her rights and legal interests, to stand as a party, to witness, to seek for compensation, to expertise, thus, being involved and included in different roles in international legal relations having procedural rights, duties, guarantees, safeguards correspondig to the status. Functional approach derives from the Reparations for Injuries Opinion of ICJ as early as in 1949: "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the needs of the community" [8], and then goes even further: to a real necessity of the evolving system of international law and order to have an individual "in" with a variety of statuses.

On some notions and methodology

The legal status of an individual in litigation is somehow a broader issue than the access of an individual to justice. However, access to justice is broader than access to judiciary.

Legal status is a wide concept. The legal status of an individual in litigation depends strongly on the procedural role it plays. We will define how different and multifaceted nowadays in contemporary international law a procedural status in an international litigation can be. An individual can play different procedural roles in contemporary international litigation standing as a complainant (applicant) and as an accused ("a defendant" actually is more preferable for it covers a suspect beforehand and then a convicted or pleaded not guilty, and due to the peculiarities of the international criminal procedure a suspect and an accused sometimes are not so clearly divided, as in International Criminal Tribunal for the former Yugoslavia (ICTY), or a suspect also undergoes a procedure of investigation by a judicial authority, e. g., pre-trial chamber in International Criminal Court (ICC)). Apart from being a party, an individual can participate actively in other procedural roles: a victim, a representative, a defender, an expert, a witness, an interpreter, etc. A general notion for them can be *participants of litigation*. Participants can be those who take interest in the results of a case (e. g., a victim) and those who do not (e. g., a defender), who assist justice technically (e. g., an interpreter) and in substance being a source of information, data, analytical assessment (e. g., a witness, an expert).

As regards the legal status of parties, it forms an indispensable element of realizing the principles of equality, due process, transparency and legal certainty. As regards other participants (other than parties), their clearly defined status is also an important precondition, a means and one of the procedural goals in administration of justice. So, anyone involved in a litigation, possesses some rights and duties, defined competence and is capable to fulfill some functions,

and, therefore, shall have his/her rights and interests protected and guaranteed.

However, "a legal status" shall not be limited to a procedural status (*locus standi in judicia*). The latter is another element, following *jus standi* and forming all together a full and real access to justice as not only getting to justice but also obtaining it. In practice, giving or expanding a procedural role of an individual, an international judiciary institution sometimes substitutes the lack of locus standi of an individual. Therefore, in the article, where it is necessary, we slightly concern the problem of *locus standi* of an individual before international judicial forums.

Legal dictionaries give the following definition to "litigation": it is an action brought in court, a judicial contest and even any dispute, any resort to a court to resolve a legal matter. Litigation is usually attributed to the concept of "judiciary". Quasi-judicial mechanisms are based on the same criteria of formal rules, defined procedure, etc., and – not the least – "a spirit of justice" and are aimed at the enforcement of the rights of individuals. Thus, the article conceptualizes international litigation as a formal (strictly defined) international public law based procedure within a judicial or quasi-judicial institution or mechanism (for the purpose of enforcing the rights and/or invoking responsibility). The concept is quite broad, contemporary international legal order has a variety of juridical mechanisms to bring an action, to stand before or participate in it for individuals, at the universal and – mostly – at regional levels. The examples used in the article are not exhaustive, but, in our opinion, are among the most debated, or, oppositely, unduly lack researchers' attention.

"The individual" is defined in different ways and as a whole includes every human being, or natural person, or even groups of persons (e. g., minority group, collective victims) as long as they do not form a legal entity (e. g., non-governmental organization, corporation, etc.) [10, p. 281]. Some peculiarities of their status before international tribunals and quasi-judicial mechanisms of different *ratione materiae* where they can seek justice, or, be prosecuted and brought to justice, or, appear in any different status (international criminal justice, administrative tribunals, human rights protection system, environmental claims, judicial organs of regional integration organizations) will be further explored.

Pre-history of the issue before the mid 20th century

The international legal system came a very long way to the creation of international courts, and even a much longer one – to the creation of the system of the protection and enforcement of human rights and interests. Some less than 90 years ago the Permanent Court of International Justice called upon "some definite rules creating individual rights and obligations enforceable by the *national* (italics by *T. M.*) courts" [11].

However, as early as in the 1880s, such bodies as the European Commission of the Danube and the Central Commission for the Navigation of the Rhine dealt directly with individuals. Limited rights were also given to individuals under the Conventions of 8 September 1923, between the United States of America and Mexico establishing a General Claims Commission. It was a transitional status in procedure: the governments filed the documents concerning the dispute, however, these governments appointed individuals to place their claims before the Commission.

Independent procedural capacity was given to individuals by Articles 297 and 304 of the Treaty of Versailles of 1919 (the nationals of the Allied Powers could bring personal actions for compensation against the German state; they could use a government agency for that, however, it was not mandatory). Under the provisions concerning the protection of the minorities in the 1919 Peace Treaties, it was possible for individuals to apply directly to an international court in particular instances. Similarly, the Tribunal created under the Upper Silesia Convention of 1922 decided that it was competent to hear cases by the nationals of a state against that state [12, p. 189].

Under the Articles 4 and 5 of the Hague Convention XII of 1907, individuals were given direct access to the International Prize Court [13]. In this regard, the Regulation No. 7 and the Advisory Opinion No. 15 are interesting and prove that the elements of admission of international legal personality of an individual in terms of rights attribution and access to justice had already formed before World War II. After that one more element evolved – international accountability[1].

Individuals belonging to any of the Central American Republics according to the Treaty of 1907, could bring an action in the Central American Court of Justice against a Government for the violations of treaties or conventions and other cases of international character. The Court, which had been in operation for a decade, examined 5 cases, one of which was claimed admissible and was decided in favor of the state. A specific feature was that there was no requirement for a treaty to form a basis for a claim, and individuals could refer to violations of an internal obligation. Thus, the Court treated individuals as having capacity to bring international claims but that capacity was not specifically linked to individuals as substantive right-bearers [14, p. 64].

[1]However, before that some norms on pirates functioned.

An individual as a claimant/an applicant in international litigation

Human rights protection mechanism. As long as individuals are given the right to claim before international judicial and quasi-judicial bodies, the number of cases has been rising by hundreds [15, p. 799]. Certainly, the systems allowing an individual to stand in a procedural capacity of a claiming party vary greatly in their procedural rules, legal nature, and the scope of jurisdiction. There is no universal judicial mechanism for human rights protection as in regional systems. However, quasi-judicial mechanisms evolve and count today up to 9 treaty and 2 institutional ones. Not all of the regional systems grant direct access to an individual. Therefore, a natural person lacks *locus standi* before e. g., Inter-American Court of Human Rights (having an increasing importance in the region and creating new procedural opportunities for natural persons even in the lacuna of direct access). By comparison, the European Court of Human Rights is still the most cited example of a successful regional system of human rights protection (though criticised a lot, too). The African system is also developing quite actively, giving individuals direct access to international judicial protection, although the protection in the frames of the Commission is still more effective. The procedure of considering individual complaints was also set up by the Organization of American States. However, almost all regional systems give a possibility for an individual to present his/her interests before a court in some other capacity, or indirectly.

Quite a wide range of human rights treaties and mechanisms provide for complaint procedures for individuals now[2]. Thus, a *status of a complainant* is given to a person. It should be underlined that this status is not given to any association, or entity, or body. These kinds of quasi-judicial procedures are available only for individuals [16].

The spectrum of rights and obligations is the same for all treaty-based mechanisms, as well the procedure and criteria of admissibility. However, the term given in different treaties to bring a claim varies from 6 months to 5 years. At the same time, exhaustion of the domestic remedies is a commonly applied requirement, becoming a commonly recognized principle for all procedures. To lodge a claim is not a complicated task, as the procedure has been simplified, so that almost every individual can technically do it. However, it is actually far from "everybody". The issue of admissability of a claim[3] (i. e., a kind of a prerequisite of substantial and procedural legal character) is not analysed in this article. Once a claim is accepted as admissable and a person is given a status of a claimant, his/her legal status is equal. Generally, to be a claimant, he/she shall be a directly concerned person, a direct victim. The only question remaining open is why, in order to get a status allowing to trigger the system of protection regarding *inalienable* rights, shall this right be demolished? One of the requirements to be satisfied for a person to claim a violation under the International Covenant on Civil and Political Rights (ICCPR) is that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent. In E.W. v. the Netherlands the Dutch citizens alleged that the Netherlands had violated the right to life provided by the Article 6 of the ICCPR by agreeing to deploy a cruise missile fitted with nuclear warheads on the Dutch territory. The UN HR Committee found that the preparation of the deployment or the actual deployment of nuclear weapons did not place the authors in a position to claim to be a suffering person whose right to life was violated or under an imminent prospect of violation [17]. In this course, many authors believe that the individual complaint mechanisms need some reform to widen the status of a claimant, because the existing ones limit individuals and do not give a real opportunity to protect everybody who needs this protection. Moreover, some doubt that the existing mechanisms can be called effective when, in order to be protected, the right shall be expressly violated. V. Wijenayake and M. Mendis state, "that the so-called victim requirement debilitates the complete realisation of the objects and purposes of the ICCPR… the HRC's concept of victimhood should expand to include persons who are alienated from its current framework due to reasons of poverty, disability, political persecution etc. <…> extending the HRC's jurisdiction to cases in the nature of "actio

[2]The nine "core" treaties and corresponding mechanisms are: the International Covenant on Civil and Political Rights (CCPR – Human Rights Committee); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Committee against Torture – CAT); the International Convention on the Elimination of All Forms of Racial Discrimination (Committee on the Elimination of Racial Discrimination – CERD); the Convention on the Elimination of All Forms of Discrimination against Women (Committee on Elimination of Discrimination against Women – CEDAW); the Convention on the Rights of Persons with Disabilities (the relevant Committee – CRPD); the International Convention for the Protection of All Persons from Enforced Disappearance (CED); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (the relevant Committee not in force); the International Covenant on Economic, Social and Cultural Rights (CESCR); the Convention on the Rights of the Child and its Optional Protocols (CRC is the most universal instrument, however, individual communicatins procedure are not still in force). As well, under the United Nations Secretariat, complainant can consider submitting a complaint before the Human Rights Council Complaint Procedure (previously known as 1503 procedure) and the mandate-holders (special rapporteurs and working groups) of the Human Rights Council. Moreover, complainants can consider submitting also complaints before the organizations forming part of the wider United Nations family such as the International Labour Organization and the United Nations Educational, Scientific and Cultural Organization.

[3]Though as professor Y. Tyagi indicates "the procedural jurisprudence has been developed more through cases that were declared inadmissible than through those that passed the admissibility criteria" [15, p. 799].

popularis"" [17]. They suggest that the adoption of *actio popularis* would militate against the limitations of the direct victim requirement, as it permits individuals and organisations to submit communications on behalf of the third parties whose human rights have been violated, and give the example of the African Charter realizing a broader concept of accessability. The authors claim, *actio popularis* would open the doors to victims who have, to date, been excluded from justice due to their socio-economic status by allowing intervenients with better capabilities to represent them.

This position seems to be very tricky because it can become a subject of misuse and open a Pandora's box of undesirable or/and unjustified claims. It also questions the limits and grounds of legal capacity transfer. Of course, one can say it can be a kind of public interest litigation in order to guarantee those inalienable human rights, a call upon universal jurisdiction as for a breach of jus cogens. However, to be a public interest litigation it lacks the official status of a prosecutor who fulfills a duty. To be a kind of individuals' universal jurisdiction to claim it inevitably leads to chaos because of the quantity of applications.

Therefore, it is quite appropriate to consider these requirements not as limits for providing access but as a precondition to effective access. An institution of representation of a person by another one can fully tackle the problem of limited possibilities to realize their status in international forums of some categories of people (disabled, poor, under-educated, etc.). That is why in some instances, like the above-mentioned, there is no need to widen the concept of accessability to unlimited universality. It would be enough and effective to develop the existing procedural status of a complainant and to evolve opportunities to be represented.

Concerning procedural rights and obligations, an individual possesses the right to bring a complaint irrespective of his/her nationality, residence, race, sex and any other grounds. The interests of minors can be represented in accordance with the law as far as all mechanisms give a possibility to bring a claim on behalf of another person. A person has the right to confidentiality (the author of the complaint may request the Committee not to disclose his/her name or the alleged victim's name and/or identifying elements in its final decision, so that the identity of the alleged victim or that of the author does not become public). The claimant has an obligation to be diligent in conducting correspondence with the secretariat, otherwise, if additional requested information is missing for a long time (a year), the file shall be closed. The complainant has a right to comment on the answer of the state for the complaint. It also brings the procedure closer to a litigation.

The status of a complainant is also attributed to a person through some other mechanisms. The complaint mechanisms under treaties are complemented by complaint institutional procedures before the Human Rights Council (Commission on Human Rights previously) and the Commission on the Status of Women. These two procedures, involving political bodies composed of State representatives, are among the oldest in the United Nations system. They have a focus different from complaints under the international treaties, which provide an individual with redress through quasi-judicial mechanisms. Complaints to them focus on more systematic patterns and trends of human rights violations and may be brought against any country.

Administrative disputes. Administrative disputes in international organizations give us examples of another role of an individual (an employee) in international litigation as an Applicant/Appellant/Complainant against internal (labor and equivalent) decisions of international organisations.

In the UN the Internal Justice System has been functioning since 2009. Before that it used to be the UN Administrative Tribunal (since 1949). Now the system of litigating mechanisms comprises the Dispute Tribunal and the Appeals Tribunal. An application may be filed by any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes; any former staff member of the United Nations; and any person making claims in the name of an incapacitated or deceased staff member (Article 2(2) of the Statute of the Appeals Tribunal, Article 3(1) of the Dispute Tribunal).

Certainly, the main question is about who is considered a "staff member" and, therefore, is included by *ratione personae* and has access to justice in the UN internal justice system. The General Assembly resolution 65/251 of 2 March 2011 requested the Secretary General to provide information on the remedies available to different categories of non-staff personnel, such as consultants [18]. The inclusion of individuals with consultant type contracts in the internal administration of justice system would substantially increase the need for additional resources in the Tribunals and legal representation by both respondents and appellants.

An applicant may present a case before the UN Dispute Tribunal in person or seek the representation of a counsel from the Office of Staff Legal Assistance or a counsel authorized to practice law in a national jurisdiction. He/she may also be represented by a staff member or a former staff member of the United Nations or one of the specialized agencies (Article 12 of the Rules of Procedure of the Dispute Tribunal). He/she has the right to be communicated with the copy of a judgment in the language in which the application was submitted, unless he or she requests a copy in another official language of the United Nations, to protection of personal data, and some other procedural rights. An applicant may apply to the Dispute Tribunal for the interpretation of the meaning or the scope of the final judgement, for the revision of an executable judgement on the basis of the discovery of a decisive fact which was, at the time the judgement was

rendered, unknown to the Dispute Tribunal and to the party applying for revision, always provided that such ignorance was not due to negligence [19].

An individual addressing the Administrative Tribunal of the International Labor Organization is called a Complainant. The Statute of the Tribunal sets 2 categories of individuals eligible to access it: an official, even if his employment has ceased, and any person on whom the official's rights have devolved on his death; any other person who can show that he is entitled to some right under the terms of appointment of a deceased official or under the provisions of the Staff Regulations on which the official could rely. Among other rights an applicant can ask for holding oral proceedings (art. 5) [20].

The World Bank Administrative Tribunal offers almost the same procedure. Any former or current Bank Group staff member can file an application with the Tribunal. In addition, any person who is entitled to claim upon a right of a staff member as a personal representative or by reason of the staff member's death, and any person designated or otherwise entitled to receive a payment under any provision of the Staff Retirement Plan, may also file an application with the Tribunal (Article II.3 of the Statute). Proceedings before the Tribunal are generally conducted in writing, but an applicant (as the other party) may request oral proceedings. Oral proceedings may include the presentation and examination of witnesses or experts, and each party has the right of oral argument and of comment on the evidence given (Rule 17 of the Rules of the Tribunal). An applicant may request anonymity [21].

The problem of all these mechanisms regarding the legal status of a person is the lack of judicial review. The legal status cannot be full and complete and the justice cannot be effective without it. However, there is an indirect participation in the international review of administrative disputes, and the practice of the International Court of Justice (ICJ) in this sphere points out once again the necessity to revise the issue of access of an individual to justice. This issue will be discussed later on in this article while considering indirect access of individuals to an interstate judicial mechanism within the ICJ.

The legal status of an individual as an accused (defendant) in the international system of criminal justice

The other (one of the most prominent achievements of the contemporary international legal system) procedural role for an individual as a party is an accused (a defendant). The first steps to evolve this side of legal personality were taken right after World War II.

The Rome Statute establishing the International Criminal Court and its Rules has provided an accused with the necessary legal status. The ICC treaty contains a detailed list of rights that any accused person shall enjoy, including the presumption of innocence, the right to counsel, to present evidence, the right to remain silent, and the right to have charges proved beyond reasonable doubt. The whole Part 3 of the Statute is devoted to general principles (*nulla poena sine lege*, non-retroactivity, etc.). Persons under 18 are exempted from jurisdiction. Officials are not exempted, no immunities are prescribed in the Statute. The responsibility of commanders and superiors are qualified strictly under the Statute (Article 18). Procedural rights and safeguards during an investigation are prescribed. Generally, procedural rights and guarantees are set forth widely and thoroughly. It (e. g., Article 59) is even questioned for efficiency.

It should be common practice that a basic right formulating the legal status of the accused is the one to be defended and legally represented. There are several possible options regarding the accused: representation by a lawyer of his/her own choice, representation by a lawyer designated and paid by a court, self-representation. In the ICTY's experience there have been very few accused who have chosen the first option (10 %), and only 4 people have chosen self-representation [22, p. 131–132]. However, the right to self-representation and self-defence exists in different legal systems in the world and, therefore, it can be regarded as one of the basic procedural rights of an accused. However, in internatinal courts, namely criminal courts, it seems to be a great challenge for a court and for a community. Starting from the procedural difficulties as "being on task", perception problems and to the very goal of the procedure (to bring peace and reconcilliation to the region, which is less achievable while making the tribunal an arena for explaining the ideas of political agenda) [22, p. 138–139]. This aspect of the legal status of the accused definitely needs to be evaluated in theory and legal documents more thouroughly. Many of the procedural rules are not appropriate to be applied to the self-represented accused and vice versa many of rules regarding the accused do not fit the purposes of self-representation. Namely, in the ICTY they have decided upon a lot of such problems, but it can be applied to a concrete case.

The legal status of a victim

The next category, which is actually very similar in its essence to that of a claimant, is a victim. However, a victim is not a party, but a participant who has an interest in the result of the case.

Victim in an international criminal judiciary. The status of an individual in this procedural role will be explored within the International Criminal Court procedure. The ICC is the world's first permanent,

international judicial body capable of bringing perpetrators to justice and providing redress to victims when states are unable or unwilling to do so. Tribunals (on the Former Yugoslavia, Rwanda), having limited jurisdiction, were exclusively important in the pre-ICC experience. It can be traced how the legal status "is growing" and "widening" with the evolvement of the very concept of the access of individuals to criminal international justice. The role of victims in criminal procedures in tribunals and in the court vary significantly. While in the ICTY and International Criminal Tribunal for Rwanda (ICTR) the role of victims was limited only to giving testimony as witnesses (they could not be provided neither with information, nor with claim reparations, and could not communicate), the ICC is a pioneer in the course: victims can present their communications (opinions) at all stages of the proceddings, can obtain information, can obtain legal representation, etc.

One of the most lauded features of the permanent ICC is its victim participation scheme which allows individuals, harmed by the crimes being prosecuted by the Court, to share their views and concerns in proceedings against the persons allegedly responsible [23]. Victims of international crimes are, for the first time, recognized as having rights as participants in the process and as recipients of reparations [24, p. 189].

One of the main problems with the status of individuals in this judiciary is, first of all, the lengthy process of application for the status of a victim (it can take more than 2 years). The second problem is that of real participation – a legal representative stands for the interests of a group of individuals in the proceedings. A new approach has been elaborated therefore, creating a 2-variant system. Those victims who wish to share their views and concerns personally before the Court are required to go through the individual application procedures established under the ICC's current rules. The remaining victims may simply register as victim participants by submitting their names, contact information, and information regarding the harm suffered to the Registry. The Registry will then automatically enter this information into a database, without any individualized review by the parties or a decision from the Chamber, and the database will be shared with the Court-appointed common legal representative. This kind of reform is the most efficient option for reforming the victim application system, saving valuable time and resources for applicants, the Registry, the parties, and the Chambers.

In general, the status of a victim in ICC proceedings presupposes the following rights and duties of an individual: the right to receive information about the proceedings from a legal representative; the right to access court records, filings, and proceedings via a legal representative. The former in their names exercises the right to make opening and closing statements, to question witnesses, to present evidence. The status is accorded to an individual as soon as he/she becomes registered. This moment is very important as regards the above-mentioned changes in the system of registration. Now much more participants (apart from those who would like to undergo the full procedure of registration) have access to information and all other elements easier and earlier.

The status of victims differs as well, depending on their intention to participate only or to get reparations. Strictly, the status of victims is different from the reparation regime. Victims do not have to participate in preliminary and/or trial phases in order to apply and/or to be eligible for reparation awards. Morever, as the Article 79 (1) of the Rome Statute, Rule 98 of the Rules of Procedure and Evidence, and Resolution 6 of the Assembly of States Parties adopted on 9 September 2005, state, reparations are made "for the benefit of victims of crimes within the jurisdiction of the court, and of the families of such victims". Under Article 75 (2) the Court can make an order specifying appropriate reparations "to, or in respect of, victims". The term "in respect of" should be interpreted to include the families and dependents of victims. However, an important limit to those who can benefit from orders for reparations is that, since they are awarded against individual perpetrators, they are restricted to the victims of crimes for which that individual has been convicted before the Court. The category of victims who may potentially benefit from reparations orders will be to a large extent dependent on the strategy of the prosecutor in terms of the cases, individuals and charges chosen for prosecution. Many victims within a particular situation will fall outside the limited cases selected by the Court for prosecution and will therefore not be able to obtain reparations through court orders (this is the case when the Trust Fund can be helpful) [25, p. 9]. In the doctrine one more problem of identifying victims of an international conflict is underlined: victims of international crimes face much more difficulties in publicizing their fate and consequently "benefiting" from their status as a victim. It is only when potential status givers are aware of the victims' existence that the victim status can be granted [26].

All this concerns mainly a victim's right and possibility to access the court. However, as soon as he/she has access, the status can and does in practice vary greatly. Participation in proceedings, the extent of some procedural rights depend on the attitude of the trial, actually, to the very essence whether interests of victims are triggered automatically in a criminal proceeding against the accused. There are two different examples of cases dealt by the ICC with a different, almost opposite approach to the extent of the victims' interests and therefore their legal status.

In Katanga/Ngudjolo it was held that a victim has a fundamental interest in the determination of facts, the identification of the responsible and the declaration of their responsibility. It makes the figure of a victim centralized in the procedure. It went on defining that procedural rights included the right to legal representation, both anonymous and non-anonymous victims could have access to confidential documents,

to make opening and closing statements, to address the Court with permission, etc. [27]. *It has much in common with the status of a party, therefore, getting an individual closer to the center of justice and making the procedure more victim-oriented*.

In another case in Uganda the Judge determined that notwithstanding the fact that a victim had been granted a general right to participate in the investigation phase, the victim would need to show his particular interest and how it would be affected in a specific proceeding [28, p. 308–309]. In Lubanga case the Trial Chamber also determined a specific procedural capacity of a victim as a participant (acceding, but not a party), ruling that in order to exercise the rights a victim must file a discrete written application to the Chamber, give notice to the parties, demonstrate how their personal interests are affected by the specific proceedings, comply with disclosure obligations and protection orders. The Trial Chamber took a restrictive approach to the status determination. It determined that Article 68(3) required to determine the specific interest of an individual [29]. Then, it is up to a court decision which specific rights shall be granted as regards the participation in the proceedings "beyond basic access to public documents or attendance at public hearings" [28, p. 309].

It shows once again how intertwined and interdependent the issues of substantive access to justice and procedural capacity in international litigation are, and the lack of a defined legal status even for the same categories in the same institutions. As B. L. McGonigle stresses, the issue at stake is a differently oriented approach – criminal law oriented or human rights law oriented, and interpretation of the principle of the right to truth in the frames of one or another [28, p. 312].

And again, one shall be more aim-oriented and functional here: as the Rome Statute determines to define a specific interest of a participant, the status of the latter shall be within this requirement, however, if it deters to gain the ultimate result to such a participant, the Court shall be quite flexible and "sensible" as regards a victim's procedural rights, not only in the course of satisfying requests from a victim, but also in its general course of proceedings and fair trial. Also, one shall not forget about a systematic approach to the trial, balance, and equal and appropriate defence of all parties' and participants rights. So, the right of the accused in the process shall also be taken into consideration and be given a due consideration [28, p. 311–312], e. g. while deciding upon the accessibility to the information, etc.

The legal status of a victim in human rights protection system. Problems of other nature come into light while analyzing the legal status of a "victim" in human rights protection procedures, e. g., in the Inter-American Court of Human Rights, in which no direct access is granted. However, a person whose rights have been presumably violated have indirect access (and appropriate legal status referred to him/her) through the category of "victim". Notwithstanding the different nature of the procedures (criminal and HR-protection) the general tendency has much in common. People suffered get more power to protect their interests and to have an adequate adjudication in international forums.

The most recent developments in the given example (the Inter-American Court of Human Rights) are as follows: further jurisdictionalization of the status of victim through the access to the Inter-American Defence Attorney [30], further implementation of the right of a victim to be represented before the Court, to be informed and to get communication to the court, etc.

Actually, the Inter-American Commision did step on behalf of a victim according to the Article 33 of the Rules of Procedure. As the Inter-American Commission represents public interest and safeguards the due application of the Convention, some kind of dualism of roles can be observed, and it "should not act as the "defender" of the victims as such" [30, p. 252]. In this sense the Public defender in the Inter-American Court serves a mission to substitute the capacity of a victim to stand before the court, the Inter-American Defence Attorney is a victim's mediator to justice and is free of charge for this victim, and all communication processes go through this attorney, and two such attorneys are appointed to each and every victim who is not represented in the Court.

The procedural capacity of the Attorney seems to be aimed at the realization of the rights of victims to a fair trial and due remuneration. However, it is not an appropriate mechanism. As soon as the inter-American system proposes the defenders from domestic systems who are officials and nationals of the state-parties, it is in either way a doubtful choice: to have a defender of the nationality of the alleged state or of the nationality of another state. In the first case in which the institution of the Inter-American Defence Attorney was called upon – Furlan case – the issue of the nationality of the Defender arose (the case was against Argentina, and two defenders, Argentinian and Uruguayan, were appointed). The Court adjudicating on the issue of the impartiality of the Attorney with the nationality of Argentina concluded it would not influence the purpose of guaranteeing the human rights of a victim, and even could be of use for the purpose of communication [31].

Nevertheless, one can doubt that such kind of an institution shall be composed of the officials of state bodies (a defender of the nationality of the responding state can be inappropriate for an individual because of the possible doubts in his independence, and the nationality different from the state can contradict the principle of non-interference as long as the attorney is a foreign state official). Even if the appointment of the two defenders of different nationalities balances the situation, this is not the best way to have the victim's interests protected in the proceedings. However, it makes the whole procedure one more step closer to

the real direct access of an individual, so that the categories of "claimant" and "victim" different in nature become closer, the differences are stirred and justice is available in different forms. This example shows how, through the widening of legal status in the procedure, not only the principles of due process and equality are followed, but also the evolving *jus standi* tendency is strengthening.

Individual's interests in the system of the ICJ: in search of a place and a status

The main judicial mechanism in the contemporary international arena is the ICJ, but its competence is strictly reserved to inter-state relations, and traditionally an individual does not have *locus standi* before the Court. However, even an individual can play some role there and his/her interests can be protected. The ICJ has dealt with a number of cases that were based on diplomatic protection: Interhandel, Nottebohm, Barcelona Traction, Elettronica Sicula S.p.A (ELSI), LaGrand, Avena, Diallo.

Recent cases in the ICJ, as mentioned in the doctrine [32, p. 136], have contributed a lot to the human rights sphere. Briefly, the position of the ICJ used to be restrictive in the sense that they did not want to have much in common with the domain of "human rights", different from individual rights. In *Diallo,* nevertheless, the Court observed that "owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, *has subsequently widened to include, inter alia, internationally guaranteed human rights*" [33]. Taking into International Law Comission's (ILC) definition states that "diplomatic protection consists of the invocation by a State of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural… person… with a view to the implementation of such responsibility" [34], it could be regarded as a means to execute an individual's capacity, and a state, therefore, could step as a legal representative of an individual. That could, probably, actualize the issue of the status of individual in the procedure of the ICJ in the future, not the nearest though. As for now, diplomatic protection serves the purpose to protect an individual, but it does not give a person neither any special status in international litigation, nor any rights to present evidence, to be heard, or to be informed about the results, etc.

The possible injustice that could stem from the constraints for the subjects other than states to participate, has been acknowledged by the organs of the United Nations which utilized a special pre-trial procedure allowing individuals to take a more active part in the dispute.

Though an individual has no status of a party to litigation in a universal forum a principle of equal arms plays a great role to equalize, to make an individual closer to the core of justice through different procedural tricks. The principle of equality is of extreme importance to the issue of the legal status of individuals before the Court as, due to its nature, sometimes international law cannot provide equality of arms in the procedure. The recent case of the ILO Administrative Tribunal pended to get an Advisory Opinion of the ICJ of 1 February 2012 is very representative of how the principle is realized in cases when an individual has no direct access to the court. The Court tried to balance the problems of inequality in access by diminishing the unequal position before the Court of the employing institution and its officials. The ICJ determined not to admit oral proceedings since only the institutions concerned (international organization in that case), not individuals, can appear before the Court. However, obviously, an individual, namely Mrs S. Garcia, was the ultimate interested person. Thus, the ICJ obliged the International Fund for Agricultural Development (the respondent) to transmit to the Court any statement Mrs S. Garcia intended to convey to the latter and fixed the same time limits for the filing of the two parties' written statements [35, p. 523].

The equality of the parties before the court, i. e. before the ICJ, which according to the UN Charter and the ICJ Statute does not give an individual access to the court, has been widely discussed for almost 60 years (in the works of L. Gross, R. Shabtai, C. Trinidade, for instance). Judge C.Trinidade stands for direct access of individuals and their full procedural capacity as far as they are given the rights and duties [36]. Mr D. Gallo, on the contrary, doubts if it is the right forum to settle a dispute with the interests of individuals involved, if a forum is not appropriate to this kind of *locus standi in judicio* putting aside the issue of juridical personality and international personality of an individual [35, p. 526].

Both of them sound well-reasoned, but I would try to apply the above-mentioned functional approach: as the individual's interests are concerned and less or more considered in the proceedings, a person shall be given a due level of procedural rights and guarantees. In this sense the ICJ practice seems to be relatively effective and for the moment the only possible: in the situation of not going beyond its competence, it follows the right way to preserve the common rules and traditions of the litigation. However, C. Trinidade inquires, and has a very strong position for that, whether this solution (to escape from oral hearings in order to give comparatively equal – *de facto* at least – status), on the contrary, deprived the parties of being heard in full and the Court of revealing the dossier materials at its best. D. Gallo has his own right to say that the Court's activism is not, in itself, a remedy to conceal the fact that the official's interests will be defended and represented depending on the willingness of the organizations to do

so" [35, p. 538]. The truth is that the procedural rules of the Court do not suit anyway the very just and right goal to equalize an individual in his/her procedural capacity to the rights of persons in whose interests *de facto*, though not in whose name *de jure*, the justice is made.

An individual may be called upon to stand as a witness in the ICJ. Another procedural role that a person may serve directly (at least hypothetically, yet) is *amicus curiae*. It is not status of a "party", but of "a friend of the court". According to the Statute of the ICJ, Article 50, "the Court may, at any time, entrust any individual… that it may select, with the task of carrying out an enquiry or giving an expert opinion". Also, Article 51 of the ICJ Statute sets forth that "during the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30" [37].

The status of witnesses and experts is regulated by the Rules of the Court (Articles 57, 62, 64, 65, 71). The Court may, if necessary, arrange for the attendance of a witness or an expert to give evidence in the proceedings. The parties may call any witnesses or experts appearing on the list communicated to the Court. If at any time during the hearing a party wishes to call a witness or an expert whose name was not included in that list, it shall so inform the Court and the other party. Procedural status of a witness and an expert is quite traditional[4]. The growing role for this kind of persons presenting before a court or another judiciary is mostly explained by complicated issues and more and more sophisticated technical and other special nuances of cases due to the progress of humankind and the development of technologies and science. Anyway, it makes a solid ground to claim for the necessity of further academic and normative attention to this category of individuals in proceedings, to the provision of guarantees for their impartiality and correctness, to their involvement according to the best appropriate procedural grounds (so that the expertise is transparent, liable, available for parties, etc.). A lot of fates of peoples and states often depend not on the final assessment of legal matters, but on the correct and profound scientific or another special assessment of the facts.

The evident rise in the involvement of HR-issues into the Court's activity will enhance other forms of participation of an individual in the proceedings (among those accessible now, according to the Statute and the Rules, there is a witness status, for example). It will make the proceeding more transparent, legimately precise and put the individual's participation from the twilight zone to the appropriate level of sound involvement and influence.

Conclusion

As «the right to individual petition is undoubtedly the most luminous star in the universe of human rights» [36, p. 13], the issue of legal status is central in the field of realization or exercise of the capacity of an individual to act in the international judicial sphere.

Clearly defined legal status of an individual is an important part of a fair trial concept, especially in the international context, because these types of courts and other judicial bodies face a range of pratical and procedural difficulties due to the nature of cases and the nature of the courts which make justice realization more sophisticated and the issue of due participation and the defence of rights, or the interpretation part, or witnessing even more difficult and, therefore, requiring formulation and understanding.

Contemporary international law provides an individual with access to a range of universal and regional, general and special, judicial and quasi-judicial mechanisms of the implemention of rights and realization of accountability. The procedural role of an individual varies: a defendant, an applicant (complainant), a victim, an expert and a witness.

The procedural status of an individual in proceedings depends on its role and resembles in some details the corresponding status in national proceedings. However, due to the international level of judiciary (translation and interpretation, travel costs, etc.), there are some peculiarities regarding the rights and duties of an individual. For instance, in many institutions oral proceedings are available only upon demand, collective awards are used, and representation by an advocate or a legal council is obligatory (non-direct access).

The access of an individual to litigation procedures forms an essential part of his/her international capacity. While granting rights and duties is a "passive" side of personality, participation in litigating procedures is an individual's active personality, making him/her subjectivised in international relations. The increase in the human rights protection in the international forum was an essential impulse for the formulation of the concept of an individual as a subject. However, personal access to justice makes the system function inclusively. There should be international remedies to the protection, participation, and involvement. The system of international litigation needs individuals be actively present therein, as well. This would make justice more transparent, more experienced, more profound. Access of individuals to international justice turns inter-national law to its true and core essence which is to be something more than inter-governmental, but to be *jus gentium*, *jus populi*. International law becomes humanitarized.

[4]Actually, expert status is different and not so traditional in some international tribunals and courts. E. g., the International Tribunal for the Law of the Sea may appoint at least two scientific or technical experts chosen in consultation with the disputing parties, to sit with the tribunal but without the right to vote.

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