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The role of victims at the pre-trial stage before the ICC

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Focus

This note addresses first the question of who may be considered a victim within the Statute and the Rules of Procedure and Evidence of the International Criminal Court, and second, which involvement of the victims may be possible before the Pre-Trial Chamber (“PTC”), analyzing both their participation as regulated in specific articles of Part II and Article 68 of the Statute and the formalized participation of Rules 89 to 91 of the Rules of Procedure and Evidence (ICC-ASP/1/3, “RPE”).

The International Criminal Court (“ICC”) is the first international court to allow for the victims’ active involvement in all stages of the proceedings; it may entitle victims to compensation for the harm they have suffered and does not restrict them to their primary role as witness giving testimony in court on the facts of the case. In contrast to being a victim who appears as a witness and has thus an obligation to testify in person answering specific questions before the Chamber, being a victim who is a participant of the proceedings offers the possibility to partake in any stage of the proceedings voluntarily, and to make an own decision about what to submit to the Court. The references in the Rome Statute (“Statute”) to the involvement of victims in the proceedings are manifold. The degree and preconditions of participation may depend on the stages of the proceedings before the Court, which include the preliminary stage, comprising the investigation of a situation, the pre-trial stage before the Pre-Trial Chamber (“PTC”), the trial and appeals stage. The question at hand is limited to the proceedings at the pre-trial stage.

The notion of “victim” has been defined for the purpose of the Statute and the Rules of Procedure and Evidence (“RPE”) to include “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court” (Rule 85(a) RPE). This definition appears to comprise not only the persons who are victims of a crime contained in the arrest warrant in the respective case; it could be read to have a broader scope in that it is independent of a specific accused and hence makes more broadly reference to a crime for which the Court has jurisdiction, that is, the crimes listed in Article 5 of the Statute. Whereas the PTC has found that the victim must have suffered harm directly linked by way of causality to the crime(s) contained in the arrest warrant (ICC-01/04-01/06-172-tEN), the Trial Chamber in the case of *Prosecutor v. Thomas Lubanga Dyilo* found that Rule 85 of the RPE has to be read in the broader sense, being restricted only through the provisions of Articles 5, 11 and 12 of the Statute (ICC-01/04-01/06-1119-tEN, paras. 93 f.). Pertaining to this issue, leave to appeal to the Appeals Chamber has been granted through the Trial Chamber’s decision of 26 February 2008.

Articles 56 to 61 of the Statute, pertinent to the role and powers of the PTC, do not contain an explicit notion as to victim participation. Other articles of the Statute, however, do implicitly confer a participatory role to victims before the PTC. In the investigation phase (Part II of the Statute), victims may already take active part in the proceedings by making “representations” to the Pre-Trial Chamber pursuant to Article 15(3) of the Statute, if the Prosecutor has decided that there is a reasonable basis to commence an investigation. It may be noted that Article 18 of the Statute, dealing with preliminary rulings regarding admissibility, does not contain a reference to a possible participation of victims. However, pertaining to the jurisdiction of the Court and admissibility of a case, according to Article 19(3) victims may submit their “observations”. This participatory right is located in the pre-trial phase since Article 19 applies only once a case is brought before the Court. Rule 59(1)(b) and (3) RPE indicate that in such a case, victims who have already communicated with the Court are notified by the Registrar of any challenge of jurisdiction or admissibility and can make “representations in writing”. This Rule is equally applicable in case of a request for review under Article 53(a) of the Statute, if an issue of jurisdiction or admissibility is raised.

These two examples illustrate that victims may participate already at the early stages of the proceedings. It is not clear whether the involvement of victims at the stage of proceedings in Part II of the Statute is specifically regulated or formalized, since formal requirements as stipulated in the RPE only apply “in the proceedings” (see subtitle of Rules 89 f. RPE). This may suggest that for the applicability of said Rules the pre-trial case must have commenced (which may well be the case in the situation of Article 19(3), since Article 19(1) and (2) refer to a “case” brought before the Chamber). The only formal requirement appears to be that the participation takes effect by written communications (see also Rule 50(3)). However, even this factor has to be seen in accordance with Rule 102 of the RPE, which allows persons to communicate other than in writing, if they are unable to do so. An active participation of victims is, in any case, already ensured at this stage of the proceedings.

The RPE further regulate an involvement of the victims which is more formalized, and enshrined in Rules 89 et seq. These provisions are applicable in situations in which the victims seek to present their “views and concerns”. To be considered a participant, the victim has to apply in writing to the Registrar, who in turn transmits the application to the relevant Chamber, Rule 89(1) of the RPE. Article 68 as well as Rules 85, 89 et seq. contain no statutory limitation to any phase of the proceedings; Article 68 merely relates to “all stages of [Court] proceedings” and aforementioned Rules are located in Chapter 4 (provisions related to various stages of the proceedings). If the victim seeks

to participate in pre-trial proceedings, the application is therefore dealt with by the PTC. If the victim is accepted as a participant in the proceedings, it is for the PTC to decide in which manner the participation is deemed appropriate. The requirements for acceptance can be extracted from Rule 89(2) of the RPE and are twofold. First, the person must be a "victim", as defined in Rule 85(a) of the RPE; second, the person must meet the criteria of Article 68(3) of the Statute, which requires that the "personal interests of the victims are affected".

The advantages of the victim's formal participation include the right to choose a legal representative pursuant to Rule 90 of the RPE, and a victim may even, if indigent, apply for financial assistance of the Registrar to choose a legal representative. The legal representative is subsequently entitled to, *inter alia*, participate in the court hearings pursuant to Rule 91(2) of the RPE. Victims also have the right to ask the Court to take all possible measures to protect their safety, physical and psychological well-being, dignity and privacy. Victims may also be entitled to make opening and closing statements. Additionally, once accepted as participant, the victim and his legal representative are given advanced notice of upcoming hearings and the date of the issuance of a decision. All these rights furnish victims with a significant participatory role in the pre-trial proceedings.

In general, it appears that the participation of victims, in the sense that they are permitted to present their views and concerns, is possible in any stage of the proceedings before the PTC. Two specific situations are implicitly recognized by Rule 92 of the RPE. On a first account, victims, in order to apply for participation, are notified of the Prosecutor's decision not to initiate an investigation or not to prosecute pursuant to Article 53 of the Statute. Victims are also notified of the Court's decision to hold the hearing to confirm charges pursuant to Article 61 of the Statute. In these two situations of Article 53 and 61 of the Statute, the formal participation of victims in the pre-trial phase is explicitly foreseen by the Rules. These provisions may give the victims even a right to be heard and present their views and concerns with the leave of the Chamber pursuant to the general provision of Article 68(3). It may be inconsequential to oblige the Court to notify the victims of a certain proceeding ("the Court shall notify" (emphasis added), Article 68(3)) and then not to allow the victims to participate in it. On the other hand, the Pre-Trial Chamber has the power to limit the participation of victims in the proceedings if it considers it appropriate (Rule 89(1) of the RPE).

Apart from these situations, the PTC is always allowed to seek the views of victims pursuant to Rule 93 of the RPE. Rules 107, 109, and 125 of the RPE are explicitly mentioned, all relevant to the investigation stage and the pre-trial proceedings. Further, the wording of Rule 93 of the RPE illustrates that this list is not exhaustive ("*inter alia*"). It may be noted that the power of the PTC, or any Chamber, to seek the views of victims is not limited and may therefore extend to other victims, who do not formally participate in the proceedings under the regime of Rules 89 to 91 of the RPE.

The Statute and the RPE give the victim an important role at the pre-trial stage. In particular, once recognised by the PTC as a participant in the proceedings, the victim receives certain rights and may be allowed by the PTC to actively engage in all kinds of circumstances, subject to the necessary balance between the defence's right to a fair and expeditious trial and a meaningful participation of victims already in the pre-trial phase. It seems that the Court has been empowered to address the rights and needs of the victims, not only in the stage of reparations for suffered harm (Article 75 in connection with Rule 94 of the RPE) but also at the pre-trial stage, when many important and presumably decisive issues are discussed and decisions made.

The role of victims in the pre-trial stage is one of provision of direct knowledge of the commission, extent of cruelty of the relevant crimes and of an acknowledgement of the international community of the suffering endured by the victims through the crimes. The victims' active participation from the pre-trial stage on will also generate a notion of local ownership of the proceedings before the ICC and thus contribute to a general reconciliation of conflicting parties.

Verantwortung

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