

THE HYBRID NATURE OF THE CRIMINAL PROCEDURE OF THE INTERNATIONAL CRIMINAL COURT. CURRENT PROCEDURAL CHALLENGES

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I. INTRODUCTION

The purpose of this paper is to discuss a number of important and in some way controversial issues of criminal procedure that are currently the subject of the pending proceedings before the International Criminal Court (ICC).¹ Despite the somewhat confidential nature of pre-trial proceedings, there are already a number of decisions in the public domain which deal with fundamental issues of interest for (international) criminal lawyers and especially for experts in comparative criminal procedure.

To fully appreciate the relevance of the decisions that will be discussed below, it is important to first briefly outline the nature of the legal and procedural framework under which the ICC is operating.

II. THE LEGAL FRAMEWORK OF THE ICC

The ICC is an international organisation, founded by a multilateral treaty, the Rome Statute, which was adopted on the 17th of July 1998, after a long and arduous process of negotiations. As most multilateral trea-

¹ It will be understood that my remarks are my own and that what is written is not intended to reflect the position of the ICC or its judges. My comments are made in a purely private capacity and cannot be attributed to the Court in any way.

ties do, the Rome Statute contains a number of compromises, which were necessary to obtain the support of a majority of states.

The most important issues on which a compromise needed to be reached were of course the question of the jurisdiction *materiae, loci* and *temporis* of the Court and especially the criteria to determine which cases should be dealt with by the ICC and which should be left for domestic jurisdictions, the now well-known principle of complementarity.²

However, what is less known is that the Rome Statute also contains important compromises on the procedural law of the ICC. State delegates came to the negotiations with their own national background in criminal procedure and had strongly-held ideas about how the ICC should conduct its proceedings. Inevitably, this led to difficult and principled negotiations about which approach would be best-suited for the purposes of the ICC. In the end, the Rome Statute contains what is meant to be a synthesis of the world's main systems of criminal law: the inquisitorial and the accusatorial systems. The ICC procedure is thus a hybrid in the true sense of the word.

The crucial question, however, is whether this hybrid procedure has taken what is best about its component origins and created a synergetic procedure, which will make for fairer and more expeditious proceedings, or whether it is simply a compromise mix between the two major systems, because no one system could be adopted in its pure form for political reasons. For many reasons, it is much too early to make a balanced judgment on this question, especially considering that the Court has only received its first person in custody very recently and that the first trial is still several months away.³

What is apparent nevertheless, after initial analysis of the Rome Statute, is that the texts are not always as clear as they might be and that it is not always easy to ascertain the intentions of the drafters. As one ICC judge put it, on some essential features of criminal procedure where no agreement could be reached, the drafters of the Rome Statute opted for

² Article 17 of the Rome Statute, which states that a case is inadmissible when it is (or has already been) investigated or prosecuted by a State which has jurisdiction over it, *unless* it is unwilling or unable to genuinely carry out the investigation or prosecution. Accordingly, when a case has already been investigated, but the local authorities decided not to prosecute, the ICC will not take the case.

³ Mr. Thomas Lubanga was transferred to the custody of the ICC on 17 march 2006. His confirmation hearing is scheduled for september 2006.

“constructive ambiguity”. In other words, vague norms that indicate a general tendency, but which do not provide the necessary detail. As a consequence, it is sometimes difficult to discover a completely coherent system of procedure in the Rome Statute. Any detailed guidance is missing and, as all practitioners know, the devil is always in the detail.

The States Parties had another opportunity to clarify the procedural framework when they drafted the Rules of Procedure and Evidence (“RPE”, adopted by the Assembly of States Parties in september 2002). The RPE provide the procedural meat on the bones of the Rome Statute, to which they are subordinate in all cases.⁴

However, the same theoretical oppositions that prevented States from reaching agreement on the procedure in the Rome Statute also prevented them from clarifying the procedure of the ICC in the RPE. Thus, although the RPE do provide a lot more detail to the procedure of the ICC, they do not solve the most contentious issues.

Another opportunity to create more precise and clear procedures presented itself with the drafting of the Regulations of the Court, in accordance with article 52 of the Rome Statute. In late 2003 the judges, in consultation with the Prosecutor and the Registrar, started drafting the Regulations of the Court, which provide the nuts and bolts for the proceedings. Issues such as time and page limits are prescribed in the Regulations, which were adopted in may 2004. The Regulations also introduced important procedural additions, such as the authority of the Chamber to modify the legal characterisation of facts (Regulation 55), or the power of the Pre-Trial Chamber to request the Prosecutor to provide specific or additional information or documents in order to exercise some important functions and responsibilities of the Pre-Trial Chamber under the Statute (Regulation 48).

Yet, although the Regulations of the Court were drafted by the judges themselves, they are also rather indeterminate on some of the most fundamental issues (e.g. the relationship between the Office of the Prosecutor and the Pre-Trial Chambers; victims’ participation; the inquisitorial or accusatorial nature of the investigations, etc.) of the proceedings. The reason for this seems to be that the 18 judges really do represent the dif-

⁴ See Explanatory note to the RPE, which further specify that “In all cases, the Rules of Procedure and Evidence Should be Read in Conjunction with and Subject to the Provisions of the Statute”.

ferent principal legal systems of the world as is required by article 36, paragraph 8 (i) of the Statute. As a result, the same theoretical oppositions as were faced by the State delegates who drafted the Rome Statute and the RPE reappeared in the discussions among the judges. The debate was sharpened by the participation of a representative of the Prosecutor who was present during most of the discussions and who evidently had an interest in their outcome. On almost all really contentious issue that would have necessitated a choice between fundamentally different approaches, the judges decided to defer the decision to the jurisprudence of the Court. As a result, there are thus still quite a number of important procedural questions that require clarification by the Chambers.

In what follows, I will briefly discuss two procedural issues on which the Pre-Trial Chambers have already made first pronouncements of law, namely the definition of the concepts of ‘situation’ and ‘case’ and their relation to the principle of complementarity (I) and victims’ participation (II). It should be clear, however, that these are only the first decisions and that they therefore cannot be considered settled law.

III. DEFINITION OF MAIN PROCEDURAL PHASES. SITUACIONS, CASES AND THE PRINCIPLE OF COMPLEMENTARITY

1. *The challenge of selecting where to investigate and prosecute*

The ICC is unique in many ways, but what distinguishes it most from the other existing international and semi-international tribunals is its permanent character.⁵ The ICC was created without any specific conflict or incident in mind and is thus inherently forward-looking.⁶ Its mandate is to bring an end to impunity, wherever and whenever international crimes are committed within its sphere of competence.

What is important to bear in mind in this respect is that the jurisdiction of the ICC is not fixed *ratione loci*. New ratifications continue to

⁵ Article 1rst. “It shall be a permanent institution...”.

⁶ This is most apparent from article 11 of the Rome Statute, which limits the Court’s jurisdiction to crimes committed after the entry into force of the Statute. The Statute entered into force on 1 July 2002.

expand the geographical zone of jurisdiction. Also non-state parties may at any time lodge a declaration accepting the Court's jurisdiction for a specific set of crimes.⁷ In addition, the Security Council of the United Nations may refer a situation to the Prosecutor under Chapter VII of the UN Charter.⁸ The jurisdiction of the ICC is thus potentially universal.

Against this potentially global jurisdiction, the limited resources of the ICC stand in stark contrast. Even if the Prosecutor wanted to prosecute all crimes that fall within the jurisdiction of the Court, he would be prevented from doing so by lack of sufficient operational capacity.⁹ There is thus an inevitable necessity for the Court to be highly selective in deciding where and for which events it wants to allocate its limited resources.

As the ICC is a judicial institution, such choices cannot be made purely on the basis of practical convenience or political pragmatism. Although considerations about the political and military reality on the ground inevitably come into play when determining whether or not the Court can get involved in a certain area, the Court must in the first place be guided by legal principles. Unfortunately, the legal framework of the Rome Statute does not provide much guidance on this issue. There is thus a level of discretion on the part of the Court and especially the Prosecutor to determine where he wants to focus the attention of his office.¹⁰

But even within the context of a situation it will very often be impossible for the Court to investigate and prosecute all crimes that fall within

⁷ The Republic of Ivory Cost already lodged such a declaration, see press release 'Registrar confirms that the Republic of Côte d'Ivoire has accepted the jurisdiction of the Court', 15 February 2005, ICC-20050215-91-En, available at:

<http://www.icc-cpi.int/press/pressreleases/93.html>.

⁸ Article 13(b). The Security Council has so far referred one situation to the ICC, namely the situation in Darfur, West-Sudan.

⁹ It is hard to exaggerate the immensity of logistical and human resources implications that are involved in conducting an investigation, even when the state in question is willing to cooperate with the Court. Problems of language, safety and security, health, infrastructure, transport and logistics etc. put severe limitations on the operations of the ICC.

¹⁰ Article 53 of the Rome Statute provides three criteria which the Prosecutor must consider when deciding to proceed with an investigation or prosecution: 1) whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; 2) whether the case is or would be inadmissible under article 17, and 3) taking into account the gravity of the crime and the interests of victims, whether there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. The Statute provides judicial oversight over the use of this last criterion by the Pre-Trial Chamber.

its jurisdiction. If one considers the estimated number of casualties mentioned in relation to the situations in the Democratic Republic of Congo or Uganda, for example, it is immediately apparent that even the most powerful judicial system in the world would be unable to investigate all crimes committed. So also in the context of a situation there is a need for extreme selectivity. However, also on this point there is very little guidance for the Court to be found in the Rome Statute on this delicate exercise.

In the coming years it will thus be one of the main tasks of the ICC itself to formulate on what basis it will select situations and cases. The Prosecutor has already issued a set of policy papers, which touch upon the issue,¹¹ but they can of course not in and of themselves provide a legal basis. The responsibility for formulating legal criteria for the selection of situations and cases, and especially the borders of the margin of discretion of the Office of the Prosecutor, must ultimately lie with the Chambers of the Court. Inevitably, the Chambers have to take a gradual approach and can only develop a comprehensive legal system in a piecemeal fashion, one decision at a time. It will thus still be some time before a clear legal framework for the selection of situations and cases will emerge, but the process has started.

One first step in the development of any system is of course defining the relevant vocabulary. The Rome Statute uses the terms ‘situation’ and ‘case’ throughout the Statute, without providing a legal definition. Yet, they are crucial concepts for a proper understanding of the procedural framework of the ICC. In one of its first substantive decisions, Pre-Trial Chamber I stated that situations are generally defined “in terms of temporal, territorial and in some cases personal parameters”, whereas cases “comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear”.¹² The latter concept is familiar to any criminal lawyer from domestic practice. Indeed, it could be argued that criminal law and procedure is developed entirely around the

¹¹ See *e.g.* “Paper on some policy issues before the Office of the Prosecutor, September 2003, available” at http://www.iccepi.int/library/organs/otp/030905_Policy_Paper.pdf and the Annex thereto, available at http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf.

¹² PTC I – Decision on the applications for participation in the proceedings of VPRS 1 – 6, 17 January 2006 – ICC-01/04-101, paragraph 65.

concept of a 'case'. Criminal law is centered on the principle of individual criminal accountability and is completely geared towards showing personal guilt for specific acts or omissions. In this sense, the ICC is in theory not different from any other criminal court. The concept of 'case' is thus not really problematic, although some uncertainty remains about the precise procedural moment when a case commences.

More difficulties arise with the concept of 'situation', which is somewhat unique. Of course, one could argue that all the ad-hoc tribunals and semi-international courts are all simply 'one-situation' courts. For example, both the ICTY and ICTY are dealing with one 'situation' which is defined *ratione temporis* and *ratione loci*. But in this context, the temporal and geographical delimitation of the situation is directly related to the jurisdiction of the respective tribunals. By contrast, the concept of 'situation' has almost no bearing on the jurisdiction of the ICC as such. Instead, in the context of the Rome Statute the concept of 'situation' seems to have more of an organizational function. Even if a referral only relates to a part of a territory, as for example in the Uganda situation, the Court still has jurisdiction over the rest of the country and the Prosecutor could in theory decide to request permission from the Pre-Trial Chamber to investigate there as well.

In other words, the concept of 'situation' is a tool to define the scope of specific ICC investigations. In theory, there should be no impediment against having a situation which is limited to a single case,¹³ but in general the practice will most likely be that the Court will investigate a broader and much more complex set of facts, which are usually related to a specific political context, rather than to a particular individual. For example, a particular armed conflict or a set of violent incidents which are linked by a certain factor, such as the military campaign of the Lord's Resistance Army. It goes without saying that the definition of the scope of a situation is of crucial importance. It may determine whether or not a certain crime will be investigated or whether the perpetrators will escape the jurisdiction of the ICC.

It is important to note, in this respect, that in some cases the definition of the scope of the situation will depend on external factors, such as a Security Council referral or the acceptance of the Court's jurisdiction un-

¹³ This is recognized by the Pre-Trial Chamber in the definition of 'situation', where the Chamber states that a situation can in some cases be defined by "personal parameters", see note.

der article 12 (3). In most other circumstances, however, the definition of a situation is not cut in stone, since the Prosecutor can always come to the Pre-Trial Chamber to expand his authorization to investigate. If, for example, the Prosecutor would find that the Lord's Resistance Army has also allegedly committed crimes in the territory of another state party, he could ask permission to investigate these facts as well, even though the scope of the initial situation was defined by the referral by Uganda.

The concept of situation is thus somewhat malleable, but this is exactly why a clear legal definition is so important to avoid unrealistic expectations from the ICC. Also the precise implications of the relation between a situation and the cases evolving from it will need further clarification by the Chambers. Both questions are directly related to the complementarity principle and the question as to when the admissibility of a situation or case must be assessed and by which standards.

2. Admissibility of situations and cases.

The complementarity principle in practice

A. Absence of domestic proceedings

As is well-known, the principle of complementarity plays a pivotal role in the selection of situations where the ICC can be active. By giving priority to states to prosecute those alleged to be responsible for the crimes under the Rome Statute, it was thought that national sovereignty would be best protected, whilst not allowing it to become an excuse for impunity. The principle of complementarity also has an additional function, namely to make clear that there is a division of labour between the ICC and domestic jurisdictions. The ICC is a court of last resort, which comes into action only when everything else fails on the domestic level.

In the decision on the issuance of the first warrant or arrest, the Pre-Trial Chamber did not fail to point out this primary responsibility of the States Parties, when it reminded that the "drafters of the Statute emphasized the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes and affirmed the need to ensure their effective prosecution by taking measures at the national level and

by enhancing international cooperation".¹⁴ Nevertheless, the Chamber also recognized that the so-called 'self-referrals', *i.e.* referrals by the State Party on whose territory the crimes are alleged to have been committed, were consistent with the ultimate purpose of the complementarity regime.¹⁵

It seems, therefore, that States Parties are entitled to make a first assessment about their own ability to conduct an investigation into certain crimes and prefer to pass it on to the ICC. In other words, in the selection of which situations come before the Court, states can play an active role by taking the initiative and defining themselves what they want the ICC to investigate. However, this does not mean that states could thereby limit the Court to investigating only these crimes or groups/individuals they want and shield others from its jurisdiction. This was made apparent when the government of Uganda had initially only referred the Lord's Resistance Army to the ICC.¹⁶ It soon became clear that the Court would only accept to exercise its jurisdiction if it could also investigate alleged crimes committed by all sides in the conflict in northern Uganda.¹⁷

There is thus some room for manoeuvring when it comes to defining the precise scope of a situation. That the Court must abide by standards or fairness and equal justice in this exercise seems almost self-evident. Nevertheless, this may not always be very easy in practice, considering the fact that the ICC is to a very large extent dependent on the cooperation of states to conduct its investigations. To avoid any impression of arbitrariness, the Court will have to find the right balance between the principle of complementarity, political realities and the fairness and even-handedness that must be expected from any system of criminal justice.

This problem of indeterminacy is almost absent when it comes to applying the complementarity regime to concrete cases. In deciding on the admissibility question in relation to the request for a warrant of arrest,

¹⁴ PTC I – Decision on the Prosecutor's Application for Warrants of Arrest, 10 February 2006 ICC-01/04-01/06-8-US-Corr (unsealed), hereinafter Warrant of arrest decision, paragraph 47.

¹⁵ *Ibidem*, paragraph 35.

¹⁶ See press release 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC', 29 January 2004, ICC-20040129-44-En, available at http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html.

¹⁷ See press release 'Prosecutor of the International Criminal Court opens an investigation into Northern Uganda', 29 July 2004, ICC-OTP-20040729-65-En, available at http://www.icc-cpi.int/pressrelease_details&id=33&l=en.html.

the Chamber simply investigated whether any domestic investigation or prosecutions with regard to Mr. Lubanga Dyilo had taken place. In this regard, the Chamber noted that “[i]t is a *conditio sine qua non* for a case to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court”.¹⁸

In other words, the Chamber will accept a State referral of the situation as a whole almost at face value, but it will evaluate, case by case, whether there have been any domestic proceedings with regard to a particular person and set of facts. In the case at issue, the Chamber concluded that “the warrants of arrest issued by the competent DRC authorities contain no reference to his alleged criminal responsibility for enlisting, conscripting and using to participate actively in hostilities children under the age of fifteen. ... as a result, the DRC cannot be considered to be acting in relation to the specific case before the Court (which is limited to (enlisting, conscripting and using to participate actively in hostilities children under the age of fifteen)”.¹⁹

One could wonder whether the principle of complementarity was conceived for such scenarios. Indeed, it seems that if a state is able to prosecute an individual for one type of crime (e.g. crimes against humanity), it is hard to argue that it would not be able to also investigate and prosecute other very similar crimes in the same category (e.g. war crimes). The Chamber recognised this, when it pointed out that “in the Chamber’s view, the Prosecution’s general statement that the DRC national judicial system continues to be unable in the sense of article 17 (1) (a) to (c) and (3), of the Statute does not wholly correspond to reality any longer”.²⁰

The Chamber then went on to conclude, as quoted above, that the proceedings in the DRC did not encompass the specific crimes for which the Prosecutor was seeking the arrest warrant. For this reason, the Chamber held that “on the basis of the evidence and information provided by the Prosecutor [...] no State with jurisdiction over the case against Mr. Thomas Lubanga Dyilo is acting, or has acted, in relation to such case. Accordingly, in the absence of any acting State, the Chamber need not make any analysis of unwillingness or inability”.²¹ In other words, when

¹⁸ Warrant of arrest decision, see footnote, paragraph 31.

¹⁹ *Ibidem*, paragraphs 38 y 39.

²⁰ *Ibidem*, paragraph 36.

²¹ *Ibidem*, paragraph 40.

it comes to applying the complementarity principle to cases, the Chamber took a fairly straightforward and empirical approach.

This shows again that, even in the context of a case, states can have a direct influence on the application of the complementarity principle, simply by not investigating a specific crime and declaring themselves unwilling to prosecute. It needs to be stressed, however, that this does not exclude the Court from putting its own judgment in place of the wishes of the state. It will be for the jurisprudence to develop the relevant criteria for such cases, based on the object and purpose of the Rome Statute and the fundamental principles of justice and equality.

B. Gravity threshold

A second important element of the admissibility test is whether the case is of “sufficient gravity to justify further action by the Court” (article 17 (1) (d)). This is clearly a criterion that needs a lot of judicial interpretation and it was thus interesting to see the first judicial pronouncements on this issue.

The first important consideration to be made here is that the gravity threshold applies both to the situation and to the case. For example, in deciding about whether or not to seek authorisation to open an investigation into allegations of crimes committed by British troops in Iraq, the Prosecutor decided that the alleged facts “did not appear to meet the required threshold [of gravity] of the Statute”.²² In other words, the Prosecutor made an assessment of the gravity of the ‘situation’ as a whole and decided that the allegations did not measure up to the minimum threshold that could warrant ICC involvement. It should be noted here, however, that the Prosecutor limited the definition of the scope of the ‘situation’ to the conduct of the British troops and did not make an evaluation about the gravity of the entire Iraq conflict, simply because the Court would not have jurisdiction over it.

Thus, the set of facts under consideration was rather limited, as becomes clear from the following language: “The number of potential victims of crimes within the jurisdiction of the Court in this situation 4 to 12

²² Letter to persons who referred information to the Office of the Prosecutor in relation to the alleged crimes in Iraq by United Kingdom soldiers, available at http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

victims of wilful killing and a limited number of victims of inhuman treatment was of a different order than the number of victims found in other situations under investigation or analysis by the Office.”²³ It appears from this language that the Prosecutor was looking at a limited number of cases that together made up the entire ‘situation’ of alleged crimes by United Kingdom forces in Iraq. It was on the basis of the analysis of these cases that the Prosecutor came to the conclusion that the situation would not meet the gravity threshold.

However, it is not because the situation is of a sufficient level of gravity that every particular incident that occurs within that situation will meet the gravity threshold. As the Chamber pointed out, “any case not presenting sufficient gravity to justify further action by the Court shall be declared inadmissible”.²⁴ In other words, the Pre-Trial Chamber will make a case-by-case gravity assessment, even in the context of a situation that clearly meets the gravity threshold.

On the substance of the gravity criterion, the Chamber stated that “the relevant conduct must present particular features which render it especially grave”.²⁵ To ascertain whether that is the case, the Chamber looked at two additional elements. The first element is the element of scale. To meet the gravity threshold under the Rome Statute, “conduct must be either systematic (pattern of incidents) or large-scale”.²⁶ The reasoning of Chamber in introducing this condition was that “[i]f isolated instances of criminal activity were sufficient, there would be no need to establish an additional gravity threshold beyond the gravity-drive selection of the crimes (which are defined by both contextual and specific elements) included within the material jurisdiction of the Court”.²⁷

The second element is the attitude of the international community toward the conduct in question: “due consideration must be given to the social alarm such conduct may have caused in the international community”.²⁸ This latter criterion relates to the type of conduct as such and not to the particular incident under consideration. What matters is that the

23 *Idem.*

24 See note, paragraph 41.

25 *Ibidem*, paragraph 45.

26 *Ibidem*, paragraph 46.

27 *Idem.*

28 *Idem.*

international community has condemned a specific type of conduct, in this case enlisting child soldiers, as being a grave problem. It does not appear to be important whether the international community has already pronounced itself on the actual allegations underlying the specific case or situation.

The Chamber did not end its interpretation of the gravity threshold here, but went on to give a teleological interpretation. According to the Chamber, the gravity threshold of article 17 “is a key tool provided to maximise the Court’s deterrent effect. As a result, the Chamber must conclude that any retributory effect of the activities of the Court must be subordinate to the higher purpose of prevention”.²⁹ In other words, it is not the task of the ICC to prosecute a person only because he or she has committed very grave crimes. If this were the case, good arguments could be made that the Court should investigate and prosecute the so-called ‘small fish’, on the basis of the fact that they are often the ones who carry out the atrocities.

The Chamber clearly wanted to foreclose such arguments and held that the gravity threshold “is intended to ensure that the Court initiates cases only against the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court”.³⁰ According to the Chamber, it is “only by concentrating on this type of individual can the deterrent effects of the activities of the Court be maximised because other senior leaders in similar circumstances will know that solely by doing what they can to prevent the systematic or large-scale commission of crimes [...] can they be sure that they will not be prosecuted by the Court”.³¹

In order to ascertain who the ‘most responsible’ persons are, the Chamber decided to look into the position the person held within the (state) entity, organisation or armed group, which role the person played, through acts or omissions, when the entity to which the person belongs committed systematic or large-scale crimes and what the role of the entity was in the overall context of the crimes that were committed.³²

²⁹ *Ibidem*, paragraph 48.

³⁰ *Ibidem*, paragraph 50.

³¹ *Ibidem*, paragraph 54.

³² *Ibidem*, paragraphs 51-53.

IV. VICTIM'S PARTICIPATION

Perhaps the most notable innovation of the Rome Statute is the provision that victims can present their views and concerns, whenever their personal interests are affected.³³ As with many other contentious issues in the Rome Statute, the precise modalities of this right to participate have not been clearly spelled out in either the Statute or the Rules. The first decisions of the Pre-Trial Chambers will thus have to resolve a lot of unanswered questions. One of the most interesting questions in this regard is the question at what stage of the proceedings victims can be allowed to participate. Here the fundamental distinction between situations and cases arises again. Indeed, the criteria for participating during the investigation phase must be different from the ones applicable to participation in a specific case.

1. Participation during the situation phase

One of the most fundamental questions to be resolved by the jurisprudence is whether victims have a right to participate at the early stages of the proceedings, when the investigation is still ongoing and when there is no identifiable defence yet, *i.e.* when there is still only a situation. The mere possibility that the Court could allow victims to participate at all during the investigation stage is of course a hotly contested issue. Allowing victims to participate during the investigation could potentially have a far-reaching impact on the autonomy and discretion of the Office of the Prosecutor. It could also potentially overstretch the resources of the Court by allowing several thousands of alleged victims to participate in the proceedings.

In its first decision on the matter, the Pre-Trial Chamber stressed the principle that victims have an independent voice and role in the proceedings, including during the investigation stage. It relied on jurisprudence of the European Court of Human Rights and the Inter-American Court of

³³ Article 68, paragraph 3.

Human Rights to support this decision,³⁴ indicating that victims have an interest insofar as the outcome of these proceedings is of decisive importance for obtaining reparations for the harm they suffered. This is, according to the Chamber, a personal interest “because it is at [the investigation] stage that the persons allegedly responsible for the crimes from which they suffered must be identified as a first step towards their indictment”.³⁵

In response to the Prosecutor’s objections to such participation, the Chamber noted that “the core consideration, when it comes to determining the adverse impact on the investigation alleged by the OTP, is the extent of the victim’s participation and not his or her participation as such”.³⁶ Accordingly, the Chamber decided that victims would be authorised to be heard by the Chamber in order to present their views and concerns and also to file documents pertaining to the investigation.³⁷ However, victims do not have an absolute right to participate in all proceedings taking place before the Pre-Trial Chamber. When the proceedings are initiated by the Office of the Prosecutor or the defence, victims are in principle allowed to participate in public proceedings, but when the proceedings are confidential or *ex parte*, victims will not be allowed to participate, unless the Chamber decides otherwise in the light of the impact of such proceedings on the personal interests.³⁸

Interestingly, the Chamber also held that victims are also entitled to request the Pre-Trial Chamber to order specific proceedings.³⁹ It seems that the Chamber left it open for future interpretation how far this right extends and which proceedings victims are entitled to request.

³⁴ See, PTC I Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, of 17 January 2006, ICC-01/04-101-tEn-Corr paragraphs 50-54.

³⁵ PTC I Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, of 17 January 2006, ICC-01/04-101-tEn-Corr, paragraph 72.

³⁶ *Ibidem*, paragraph 58.

³⁷ *Ibidem*, paragraph 72.

³⁸ *Ibidem*, paragraph 74.

³⁹ *Ibidem*, paragraph 75.

The Office of the Prosecutor was very unsatisfied with this decision by the Pre-Trial Chamber and asked for leave to appeal,⁴⁰ arguing that the Chamber's decision could result in tens of thousands, or hundreds of thousands of individuals having the right to participate in the investigation stage. The Prosecutor stressed that the decision deals with matters that "go to the core of the Court's functions, such as the scope of the authority and functions of the Pre-Trial Chamber, the Court's ability to protect confidential information, to provide for the protection of victims and witnesses, including those victims that may face risks due to their participation in the Court's process, the degree to which the integrity and impartiality of the investigation must be protected from influences not permitted by the Statute, and the scope of the right of victims to meaningfully participate in the Court's process. That a decision aimed at establishing the delicate balance between these fundamental interests will impact on the fairness and expeditiousness of the proceedings is a natural consequence of the importance of the issues at hand. Such a crucial, constitutional decision cannot but influence the fairness and expeditiousness of ongoing proceedings".⁴¹

Despite these strong admonishments, the request for leave to appeal was denied by the Pre-Trial Chamber.⁴² The Prosecutor then took the unusual step of filing a so-called 'application for extraordinary review' of the Pre-Trial Chamber's decision directly with the Appeals Chamber.⁴³ However, the Appeals Chamber dismissed the application as being without procedural basis.⁴⁴

⁴⁰ Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 23 January 2006, ICC-01/04-103.

⁴¹ Prosecution's Application for Leave to Appeal, note paragraph 10.

⁴² Décision relative à la requête du Procureur sollicitant l'autorisation d'interjeter appel de la décision de la Chambre du 17 Janvier 2006 sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6, 31 march 2006, ICC-01/04-135.

⁴³ Prosecutor's Application for Extraordinary Review of PTC I's 31 March Decision Denying Leave to Appeal, ICC-01/04-141, 24 april 2006.

⁴⁴ Appeal Chamber Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168.

2. *Participation during the case*

Meanwhile, the proceedings have moved forward and the Court has now scheduled its first ever confirmation hearing in the presence of the accused, Mr. Thomas Lubanga Dyilo. The question with regard to victims' participation was thus to know whether those victims who were allowed to participate in the situation stage would now also be allowed to participate in the proceedings related to the case against Mr. Lubanga.

In its decision of 29 June 2006, Pre-Trial Chamber I held that "at the stage of the case, the Applicant must demonstrate that a sufficient causal link exists between the harm they have suffered and the crimes [...] for which the Chamber has issued a warrant of arrest".⁴⁵ Such a link can be shown when the victim, or close family or guardians of the direct victim, can show that they have suffered a harm directly linked to the crimes included in the warrant of arrest, or have suffered harm by intervening to help the direct victims or to avoid that they become victims of the commission of these crimes.⁴⁶

In the specific circumstances of the applicants, the Chamber found that none of the six⁴⁷ had demonstrated any such causal link between the damage suffered and the crimes in the warrant of arrest or that they had suffered harm as a result of their intervention on behalf of the victims. Their application to have the right to participate in the case against Mr. Lubanga was accordingly rejected.

Viewed in light of the fact that the Prosecutor has now announced that he has "decided to temporarily suspend the further investigation in relation to other potential charges against Thomas Lubanga Dyilo up until the close of the present proceedings pertaining to the present charges [and that a]ccordingly the Prosecutor will not amend the charges during the present proceedings",⁴⁸ it seems questionable that the victims of the situation will be allowed to participate in the case pertaining only to child soldiers. It seems that by deciding on their participation at this sta-

⁴⁵ PTC I Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, 29 June 2006, ICC-01/04-01/05-172-tEn, 4th consideration.

⁴⁶ See note ,12th consideration.

⁴⁷ The Pre-Trial Chamber did leave the possibility open for three of the applicants, but because the decision is redacted, it is not possible to ascertain on which grounds.

⁴⁸ Prosecutor's Information on Further Investigation, 28 June 2006, ICC-01/04-01/06-170.

ge before the confirmation hearing, the Chamber has pre-empted these victims from still influencing the choice of charges against Mr. Lubanga Dyilo by the Prosecutor.

Parallel to the applications of VPRS 1 to 6, other alleged victims have come forward who applied for participation directly in the case against Mr. Lubanga Dyilo. The Prosecutor did not contest that at least in part the applicants could claim status as victims in the case⁴⁹ and the Chamber had thus little difficulty in granting them that status.⁵⁰ The Chamber went one step further, however, and also granted them the status of victims of the situation, which was clearly not what the Prosecutor would have preferred. The Prosecutor argued that “the question whether “*the personal interests of the victim are affected*” within the meaning of article 68(3) must be causally connected to the specific crimes being prosecuted. Otherwise, the participation of a victim serves no useful purpose and could, in fact, result in significant prejudice to the accused”.⁵¹ Despite this, the Pre-Trial Chamber decided to grant the applicants the right to participate in the situation as well.⁵² The Chamber found that the applicants had also claimed to be victims of other crimes falling within the Court’s jurisdiction, without any link to the case against Thomas Lubanga Dyilo, and that they should thus be allowed to participate at the situation phase if they could establish grounds to believe that they had suffered harm from them.

⁴⁹ Prosecution’s Observations on the Applications for Participation of Applicants a/0001/06 to a/0003/06, 6 June 2006, ICC-01/04-01/06-140.

⁵⁰ PTC I Décision sur les demandes de participation à la procédure a/0001/06, a/0002/06 et a/0003/06 dans le cadre de l’affaire *le Procureur c. Thomas Lubanga Dyilo* et de l’enquête en République démocratique du Congo, 24 July 2006, ICC-01/04-01/06-228.

⁵¹ *Idem*, paragraph 8. In its final submission, the Prosecutor asked the Chamber to grant the Applications to participate as victims in the case of *The Prosecutor vs. Thomas*.

⁵² PTC I Décision sur les demandes de participation à la procédure a/0001/06, a/0002/06 et a/0003/06 dans le cadre de l’affaire *le Procureur c. Thomas Lubanga Dyilo* et de l’enquête en République démocratique du Congo, 24 July 2006, ICC-01/04-177.

V. CONCLUSION

The ICC has only just started functioning judicially. The first decisions on important principles have been rendered, but the jurisprudence is still far from being settled. The Appeals Chamber has not yet had a chance to get involved and it will undoubtedly be on this level that principles and rules will be finally formulated. It is much too early to draw any conclusions from this limited activity either about the performance of the Court or the quality of the procedural system contained in the Rome Statute.

What the short period of activity has undoubtedly shown, however, is that the Court is faced with some very difficult procedural questions which touch upon the fundamental nature and fairness of the Court's proceedings. The process of finding answers to most of these questions will not always be an easy one and may require the rethinking of some of the assumptions that the drafters of the Rome Statute took for granted. Paradoxically, there is both too much and too little guidance for the Court to go by. Too little, because the Rome Statute and RPE do not provide sufficiently clear guidelines or principles and too much, because the "general principles of law derived by the Court from national laws of legal systems of the world", mentioned in article 21 paragraph 1 (c), do not offer unequivocal answers to the questions of the ICC. Indeed, the very fact that the ICC criminal procedure is conceived as a hybrid between the world's major legal systems means by definition that the Court cannot inspire itself on one kind of system only.

The challenge for the Court is thus to find a careful balance between the main systems, whilst making sure that its proceedings live up to the highest standards of fairness as laid down in international human rights.⁵³ Ultimately, the Chambers will have to decide, inspired by the submissions of the parties, *amici curiae* and the available scholarship. The ICC can only exist in correlation with the rest of the world and the legal profession as a whole and it is from this interaction that solutions will eventually have to come.

⁵³ See article 21, paragraph 3, which stipulates clearly that the ICC must respect internationally recognized human rights in everything it does.