

# PRE-TRIAL DIVISION OF THE INTERNATIONAL CRIMINAL COURT: PURPOSE, POWERS, AND FIRST CASES

By Karen L. Corrie

The Rome Statute of the International Criminal Court (“Rome Statute,” and “ICC” or “the Court,” respectively) divides the judicial chambers of the ICC into three divisions: (1) the Pre-Trial Division; (2) the Trial Division; and (3) the Appeals Division.<sup>1</sup> This paper will address the Pre-Trial Division. It will explain the purpose of the Pre-Trial Division, and its powers and duties. This paper will also examine in brief some of the first matters that the Pre-Trial Division has taken up, and assess whether the Pre-Trial Division is operating as intended.

## Purposes of the Pre-Trial Division

A primary reason for the creation of the Pre-Trial Division was States’ need for a mechanism to check the power of an independent Prosecutor. States debated about whether the Prosecutor should have the power to initiate investigations on his own initiative<sup>2</sup>, and many States felt that the Court could not effectively prosecute the crimes within its jurisdiction unless the Prosecutor was so empowered.<sup>3</sup> However, some States, concerned that a completely independent Prosecutor would bring politically motivated and frivolous allegations<sup>4</sup>, felt that there should be limits to or controls on the Prosecutor’s powers.<sup>5</sup>

The Pre-Trial Division was crafted in attempt to resolve these competing desires. The Prosecutor retains the ability to independently initiate investigations, but the Pre-Trial Division oversees all pre-trial phases of investigation and formal charging, and has the final say as to whether the Prosecutor may proceed with an investigation that he brings on his own motion. As the representative of Fiji to the Security Council stated in 2002: “We are . . . confident that . . . mischievous, malicious allegations or complaints will be screened by a majority of judges in the Court’s Pre-Trial Chamber and in review in the Appellate Chamber. These mechanisms safeguard the integrity and the impartiality of the Court against politically motivated claims.”<sup>6</sup>

The Pre-Trial Division was also established to make trials more efficient. Previous trials at the International Criminal Tribunal for the former Yugoslavia, including the *Tadić*, *Čelebići*, and *Blaskiç* trials, grew long in part because of the number of motions filed by both parties. The drafters of the Rome Statute, aware of these delays, established pretrial procedures to shorten

---

<sup>1</sup> Rome Statute of the International Criminal Court [hereinafter “Rome Statute”], July 17, 1998, art. 39, 37 I.L.M. 999.

<sup>2</sup> Olivier Fourmy, *Powers of the Pre-Trial Chambers*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, VOL. II 1210 (A. Cassese, P. Gaeta and J.R.W.D. Jones eds., 2002).

<sup>3</sup> Morten Bergsmo and Jelena Pejić, *Prosecutor*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 361 (Otto Triffterer, ed. 1999).

<sup>4</sup> *Id.* at 361.

<sup>5</sup> Fourmey, *supra* note 2, at 1210.

<sup>6</sup> U.N. SCOR, 57th Sess., 4568th mtg., at 2, U.N. Doc. S/PV.4568 (2002).

trial proceedings.<sup>7</sup> Though the pre-trial phase may now take more time, the trial phase should be significantly more streamlined, as motions and other pre-trial matters will be resolved.

Additionally, in creating the ICC, the framers of the Rome Statute sought to integrate the best elements of various legal systems, and the Pre-trial Division is a true melding of the inquisitorial approach of civil law systems and the adversarial approach of common law systems.<sup>8</sup> Under the common law approach, used in Great Britain and the United States, the authorities responsible for prosecution prepare a criminal charge inspired by private complaints or their own initiative, and their purpose is to build a case against the accused.<sup>9</sup> In civil law systems, such as those of France, Germany, and Italy, neutral and impartial magistrates prepare a case by collecting evidence of both the guilt and innocence of the accused,<sup>10</sup> and judges can speed up the proceedings and supervise the Prosecution.<sup>11</sup> The combination of the Office of the Prosecutor and the Pre-trial Division unites these two legal systems in one court: the Pre-Trial Division supervises the Prosecutor and ensures that cases proceed properly, while the Prosecutor can focus on building a case against the accused.

### **Duties and Powers of the Pre-Trial Division**

The Pre-Trial Division is composed of at least six judges<sup>12</sup>, who will be divided into different Pre-Trial Chambers, each of which consists of either one or three judges; the number of judges in each Pre-Trial Chamber depends on the function that the Chamber exercises.<sup>13</sup>

The Chambers of the Pre-Trial Division supervise all pre-trial phases of cases that the Prosecutor takes up. The Prosecutor may initiate investigations in three ways: (a) a situation may be referred to the Prosecutor by a State Party to the Rome Statute; (b) a situation may be referred to the Prosecutor by the United Nations Security Council, acting in accordance with its powers under Chapter VII of the Charter of the United Nations; or (c) the Prosecutor may initiate an investigation by his own motion (“*proprio motu*”).<sup>14</sup> When cases are referred to the Prosecutor pursuant to methods (a) and (b), the Prosecutor *may*, but is not required to, initiate an investigation.<sup>15</sup> Additionally, the Prosecutor can only take up cases pursuant to methods (a) or (c) if either (1) the State on the territory of which the crime occurred is a party to the Rome Statute, or (2) the person accused of the crime is a national of a State party.<sup>16</sup>

---

<sup>7</sup> Fourmey, *supra* note 2, at 1211.

<sup>8</sup> Silvia A. Fernández de Gurmendi, *International Law Procedures: The Process of Negotiations*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS, 223 (Roy S. Lee, ed., 1999).

<sup>9</sup> WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 95 (Cambridge University Press 2001).

<sup>10</sup> *Id.*

<sup>11</sup> Formey, *supra* note 2, at 1211-1214.

<sup>12</sup> Rome Statute, *supra* note 1, art. 39(1).

<sup>13</sup> *Id.* art. 39(2)(b)(iii).

<sup>14</sup> *Id.* art. 13.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* art. 12(2).

The supervisory role of the Pre-Trial Chamber begins from the moment the Prosecutor decides to initiate an investigation. Once the Prosecutor decides that there is a “reasonable basis” to proceed with an investigation, the Prosecutor must submit to the Pre-Trial Chamber a request for authorization of the investigation, along with any supporting material collected.<sup>17</sup> At this stage, victims may also make representations to the Pre-Trial Chamber.<sup>18</sup> If the Pre-Trial Chamber then determines that there is indeed a “reasonable basis” to begin an investigation, and that the case appears to fall within the jurisdiction of the Court, the Pre-Trial Chamber authorizes the commencement of a full investigation by the Prosecutor.<sup>19</sup> The Pre-Trial Chamber can refuse to authorize investigations, but this does not preclude the Prosecutor from presenting a subsequent request to investigate the same situation based on new facts or evidence.<sup>20</sup> In cases where the Prosecutor has evaluated initial information but finds himself that there is not a sufficient basis for a prosecution, the Prosecutor must so inform the Pre-Trial Chamber, and the Chamber can request that the Prosecutor reconsider the decision.<sup>21</sup>

The Pre-Trial Chambers also govern the process of investigations. The Pre-Trial Chambers can authorize the Prosecutor to perform investigations on the territory of a State-Party to the Rome Statute,<sup>22</sup> and issue orders and warrants.<sup>23</sup> The Pre-Trial Chambers may also provide for the protection and privacy of victims and witnesses, the preservation of evidence, and for the protection of national security information.<sup>24</sup>

In addition to investigative oversight, the Pre-Trial Division also deals with preliminary trial-related matters, thus relieving the Trial Chambers from needing to address them. For example, the Pre-Trial Chambers entertain preliminary motions and makes rulings on such matters as the admissibility of evidence or the jurisdiction of the Court.<sup>25</sup>

The Pre-Trial Division is also charged with ensuring the rights of the accused throughout all pre-trial phases, and can provide for the protection of persons who have been arrested or appeared in response to a summons.<sup>26</sup> For example, the Pre-Trial Chambers can authorize or appoint counsel for defendants<sup>27</sup>, either before defendants have specifically been named, or before a named defendant has chosen her own counsel. The Pre-Trial Chambers can also determine whether an arrested person has been informed of the charges against her and of her rights under the Rome Statute,<sup>28</sup> and decide whether a person should be released or detained.<sup>29</sup>

---

<sup>17</sup> *Id.* art 15(3).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* art. 15(4).

<sup>20</sup> *Id.* art. 15(5).

<sup>21</sup> *Id.* arts. 53(2), 53(3).

<sup>22</sup> *Id.* arts. 54(2)(a), 57(2).

<sup>23</sup> *Id.* arts. 57(3)(a), 58, 60(5).

<sup>24</sup> *Id.* arts. 18(6), 57(3)(b).

<sup>25</sup> *Id.* arts. 18, 19.

<sup>26</sup> *Id.* art. 57(3)(b).

<sup>27</sup> *Id.* art. 56(2)(d).

<sup>28</sup> *Id.* art. 60(1).

<sup>29</sup> *Id.* art. 60(1) and (2).

Additionally, the Pre-Trial Chambers confirm the charges against the accused on which the Prosecutor intends to seek a trial<sup>30</sup>: a hearing is held for the confirmation, the aim of which is to determine whether there is “sufficient evidence” to establish “substantial grounds” to believe that the person committed each of the crimes charged.<sup>31</sup> This confirmation process is similar to the American indictment process: a hearing is held before a panel of laypersons (rather than judges) called the Grand Jury, at which a prosecutor presents evidence and seeks to have the Grand Jury charge the accused with crimes. If the Grand Jury finds that there is “probable cause” to believe that the accused committed a crime, the Grand Jury returns a bill of indictment, a formal written instrument charging the accused with specific crimes, which is presented to a trial court for prosecution.

Appeals from the decisions of the Pre-Trial Division are to be made to the Appeals Division; the Pre-Trial Division cannot hear appeals of the decisions of its Chambers.<sup>32</sup>

### **Current Work of the Pre-Trial Division**

The Pre-Trial Division is currently constituted of three Pre-Trial Chambers. Pre-Trial Chamber I is assigned to the situation in the Democratic Republic of Congo and to the situation in Darfur, Sudan; Pre-Trial Chamber II is assigned to the situation in Uganda; and Pre-Trial Chamber III is assigned to the situation in the Central African Republic. Pre-Trial Chambers I and II have been more active than Pre-Trial Chamber III, and have issued many decisions from which it is clear that the active Pre-Trial Chambers are exercising their powers and duties as set forth in the Rome Statute.

#### Pre-Trial Chamber I

Pre-Trial Chamber I has been the most active Pre-Trial Chamber to date. First, Pre-Trial Chamber I has set precedent for the method by which the Pre-Trial Chambers can exercise their duties and powers. In February 2005, Pre-Trial Chamber I issued a decision to convene a status conference to address questions concerning the confidentiality of documents being used in the case, and discuss the protection of evidence and security of witnesses and victims (all of which are within the province of the Pre-Trial Chamber as set forth in the Rome Statute).<sup>33</sup> The Prosecutor argued against the use of a status conference on the grounds that neither the Rome Statute nor the Rules of Procedure and Evidence provided the Pre-Trial Chamber with the authority to order a status conference for Pre-Trial Chamber I’s given purposes.<sup>34</sup> Pre-Trial

---

<sup>30</sup> *Id.* art. 61.

<sup>31</sup> *Id.* art. 61(5); Michelle Marchesiello, *Proceedings before the Pre-Trial Chambers*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, VOL. II 1243, 1245 (A. Cassese, P. Gaeta and J.R.W.D. Jones eds., 2002).

<sup>32</sup> Rome Statute, *supra* note 1, art. 18(4).

<sup>33</sup> *Decision to Convene a Status Conference*, Pre-Trial Chamber I, International Criminal Court, 17 February 2005, ICC-01/04-9.

<sup>34</sup> *Prosecutor’s Position on Pre-Trial Chamber I’s 17 February 2005 Decision to Convene a Status Conference*, Pre-Trial Chamber I, International Criminal Court, 8 March 2005, ICC-01/04-12.

Chamber I did not respond to this argument, and ordered that the status conference would proceed, which it did in March 2005.<sup>35</sup>

In ordering this first status conference, Pre-Trial Chamber I established a precedent whereby a Pre-Trial Chamber may use a pre-trial status conference as a vehicle for the exercise of clusters of its powers and duties. A status conference was later requested by Pre-Trial Chamber II in December 2005, without protest from the Prosecutor.<sup>36</sup> This procedure may enable cases to move more swiftly, as numerous issues may be addressed together at a status conference, rather than in separate proceedings.

In a related decision in March 2005, Pre-Trial Chamber I also used its power to enforce the Rules of Evidence and Procedure. When the Prosecutor sought leave to appeal the Pre-Trial Chamber I's February decision to hold the status conference<sup>37</sup>, it sought leave to appeal to the Pre-Trial Division itself. Pre-Trial Chamber I rejected the appeal partly on the grounds that appeals from decisions of the Pre-Trial Chambers are to be made to the Appeals Division, not to the Pre-Trial Division.<sup>38</sup>

In April 2005, Pre-Trial Chamber I also exercised its power to permit the Prosecutor to take advantage of a unique investigative opportunity. Pursuant to Article 56(1) of the Rome Statute, a unique investigative opportunity may be present where the opportunity to take testimony or a statement from a witness or to examine, collect or test evidence "may not be subsequently available for the purposes of trial . . . ."

In mid-April, the Prosecutor informed Pre-Trial Chamber I of a unique investigative opportunity for him to view a forensic report that would be prepared by the Netherlands Forensic Institute; the report would be an unbiased scientific assessment, in whose preparation the Prosecutor would not be involved.<sup>39</sup> Pre-Trial Chamber I allowed the Prosecutor to review this report, finding that the opportunity was considered "unique" because "the items submitted for the forensic examinations . . . will not be available at subsequent stages of the proceedings . . . ."<sup>40</sup> Pre-Trial Chamber I also ordered the Registrar to appoint an ad hoc counsel to represent the interests of future defendants, so that a representative of the defendants would also have the opportunity to garner information from the report.<sup>41</sup> In doing so, Pre-Trial Chamber I fulfilled its duty to ensure the fairness of the accused.

---

<sup>35</sup> *Decision on the Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference*, Pre-Trial Chamber I, International Criminal Court, 9 March 2005, ICC-01/04-11.

<sup>36</sup> *Decision to Convene a Status Conference on the investigation in the Situation in Uganda in Relation to the Application of Article 53*, Pre-Trial Chamber II, International Criminal Court, December 2, 2005, ICC-02/04-01/05-68.

<sup>37</sup> *Prosecutor's Application for Leave for Appeal*, Pre-Trial Chamber I, International Criminal Court, 11 March 2005, ICC-01/04-13.

<sup>38</sup> *Decision on the Prosecutor's Application for Leave to Appeal*, Pre-Trial Chamber I, International Criminal Court, 14 March 2005, ICC-01/04-14.

<sup>39</sup> *Decision on the Prosecutor's Request for Measures under Article 56*, Pre-Trial Chamber I, International Criminal Court, 26 April 2005, ICC-01/04-21.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

Pre-Trial Chamber I has also issued decisions involving its powers to protect victims and include victims in pre-trial proceedings. Under the Rome Statute, victims can apply to participate in all phases of judicial proceedings. Several victims in the Democratic Republic of Congo acquired a counsel and filed such an application to the Court, and in July 2005, Pre-Trial Chamber I gave an edited version of the victims' applications for the case to the ad hoc counsel for future defendants, thus protecting these victims by withholding information that could lead to the identification of the victims or other location and time of the crimes against them.<sup>42</sup>

In further support for the rights of victims, Pre-Trial Chamber I also issued a decision that the six victims who have thus far been identified could take part in proceedings during the investigations of the case.<sup>43</sup> The Prosecutor filed leave to appeal from this decision, arguing that allowing participation from all identified victims at this stage could slow investigation by obliging the recognition and participation of all potentially identifiable victims, and that it could bias the Pre-Trial Chamber's view of the case before the Prosecutor had an opportunity to present the entire case.<sup>44</sup> In particular, he argued that this participation could prejudice the rights of a future defendant who is now unnamed and perhaps even unknown. This matter, which will set precedent for the participation of victims in pre-trial proceedings, has not yet been resolved.

### Pre-Trial Chamber II

Pre-Trial Chamber II has also occupied itself with the protection of victims and witnesses. In October 2005, Pre-Trial Chamber II permitted the Prosecutor to unseal arrest warrants for the case in Uganda after measures were taken to protect witnesses and victims and the judges were satisfied that the unsealing would not jeopardize their safety.<sup>45</sup> To achieve this goal, Pre-Trial Chamber II required that the documents be publicized in edited form that withheld the dates, locations, and characteristics of crimes. After the redacted warrants were published, the Prosecutor submitted his concerns that such redactions would hurt the Court's ability to proceed with transparent and public hearings, and that redacting information about the brutality of the crimes would hinder the Prosecutor's ability to obtain international support.<sup>46</sup> However, Pre-Trial Chamber II found that the needs of the victims and witnesses outweighed the Prosecutor's concerns. This decision shows the usefulness of having a neutral and detached body making decisions for the welfare of victims and witnesses.

\* \* \*

---

<sup>42</sup> *Decision on Protective Measures Requested by Applicants 01/04-1/dp and 01/04-6/dp*, Pre-Trial Chamber I, International Criminal Court, 21 July 2005, ICC-01/04-73.

<sup>43</sup> *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, Pre-Trial Chamber I, International Criminal Court, 18 January 2006, ICC-01/04-101.

<sup>44</sup> *Prosecutor's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, Pre-Trial Chamber I, International Criminal Court, 23 January 2006, ICC-01/04-103.

<sup>45</sup> *Decision on the Prosecutor's Application for the Unsealing of the Warrants of Arrest*, Pre-Trial Chamber II, International Criminal Court, 13 October 2005, ICC-02/04-01/05-52.

<sup>46</sup> *Prosecutor's Position on the Decision of Pre-Trial Chamber II To Redact actual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification*, Pre-Trial Chamber II, International Criminal Court, 18 October 2005, ICC-02/04-01/05-58.

In sum, these initial decisions of the Pre-Trial Chambers show that the ICC is up and running – the Prosecutor is investigating cases, and the Pre-Trial Chamber is ensuring that these investigations proceed properly and fairly. Though the Office of the Prosecutor has objected to some decisions issued by the Pre-Trial Chambers, such objections are to be expected, because Prosecutor’s desire to build the best case against a defendant will conflict with the Pre-Trial Chambers’ duty to enforce the Court’s rules and protect the rights of victims and the accused. Moreover, because the Court is young, not all pre-trial procedure has been delineated, and thus the Pre-Trial Chambers and the Office of the Prosecutor are bound to disagree as to the proper format of pre-trial stages. In these initial opinions, the Pre-Trial Chambers will set precedent for procedures to be followed in future cases.