THE RAISONS D'ÊTRE OF THE PRE-TRIAL CHAMBER
OF THE INTERNATIONAL CRIMINAL COURT

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1. Introductive remarks

In 1999, Judge Claude Jorda had just been elected President of the International Criminal Tribunal for the former Yugoslavia (“the ICTY”) when he visited his friend Judge Laïty Kama, the first President of the International Criminal Tribunal for Rwanda, in Arusha. During the visit, President Kama shared with Judge Jorda both the hopes he had for “his” tribunal and his fears that such a court would not meet the expectations of the international community. Both judges had been trained in the same legal system and had witnessed what could be seen as procedural “drift” at the ICTY. They shared their concerns, based on their own international experience, relating to the length of trials and the lack of judges’ intervention during the proceedings of both ad hoc tribunals.

In performing our duties at the International Criminal Court (“the ICC”), it occurred to us that we could pay a fitting tribute to Judge Kama by attempting to shed some light on the raisons d’être of the Pre-Trial Chamber, since its very purpose is rooted, for the most part, in the experience of the ad hoc tribunals as well as in a desire to rationalise proceedings and thereby make them fairer and more expeditious.

It could be said that the Pre-Trial Chamber is an “unidentified judicial institution”. It is neither a juge d’instruction (investigating magistrate) nor a chambre d’instruction (investigating chamber). It is the Prosecutor of the

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ICC who has primary responsibility for investigations and the Pre-Trial Chamber cannot in any way conduct the investigation of a situation or of a case brought before the Court. However neither does the ICC’s Pre-Trial Chamber act as the pre-trial judge would in most common law legal systems. One of the innovations in the Rome Statute is the introduction of specific powers that may be exercised *proprio motu* by the Pre-Trial Chamber with a view to protecting specific interests related, in particular, to the protection of the rights of the defence. There are also fundamental differences between the pre-trial phase as it was created in the context of the *ad hoc* tribunals and the way it works under the Rome Statute, where the procedure of confirmation of charges is the final step of the pre-trial phase and not, like in the *ad hoc* tribunals, the starting point.

It is difficult today to define the pre-trial procedure of the ICC within the context of an existing procedural national or international system. Only judicial practice will make it possible to determine the concrete procedural implications of the Pre-Trial Chamber’s hybrid nature. Those concrete implications will be determined by the judges in view of the circumstances of each case and the issues and arguments presented to them. In addition, a straightforward reading of the founding texts of the ICC is no easy matter. It could be said that it is made more difficult still by the fact that a good understanding of the Statute and the Rules of Procedure and Evidence, tinged with so many “constructive ambiguities”, often involves a complex interpretative process.

In this contribution we will refrain from any attempt to interpret the provisions of the Statute and the Rule of Procedure and Evidence of the ICC. We will primarily quote from the provisions of the founding texts without comment. Nevertheless, without venturing into an interpretation that would be inappropriate, we wish to shed some light on the purpose of the Pre-Trial Chamber so as to indicate the various interests that the States Parties, when drafting the Rome Statute, felt it important to protect during what is a sensitive phase of criminal proceedings: investigation and prosecution prior to the commencement of the trial.

This first effort to put the texts into perspective could perhaps begin with a reading of article 57 of the Statute, a key provision relating to the functions

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1 This contribution was written in June 2005.