ICC PRETRIAL PROCEEDINGS: AVOIDING GRIDLOCK

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I. INTRODUCTION

Millions of people have extraordinary hopes for the new International Criminal Court ("ICC"), the world's first permanent tribunal for genocide, war crimes and crimes against humanity. As the most highly visible and ambitious permanent institution in furtherance of international justice ever created, the ICC simply cannot fail. These lofty expectations, however, should be tempered by a number of factors. Some are obvious, such as whether the ICC will be given adequate financial and logistical support and whether the ICC's initial Prosecutor and judges will perform their duties capably and responsibly. Other factors, while less obvious, are no less important in determining how the ICC will operate and how it will be perceived. Chief among these are concerns relating to the ICC's pretrial procedures, which are unusual and largely untested. Indeed, the principles that guide these procedures—"admissibility,"

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"complementarity" and "State consent"—are not concepts that any national or international court has extensive experience in adjudicating.

Designed to give effect to the fundamental principle that the ICC must be a court of last resort, these procedures also involve weighty political issues regarding the genuineness of a government's representation that it will (or will not) prosecute an accused. The stakes in every case before the ICC, moreover, will be enormous: not only will the ICC determine an individual's culpability for the most serious crimes but such determinations are inherently imbued with political conflicts and sensitivities. The consequence is that counsel will likely take full advantage of these pretrial procedures which, in practical terms, may mean that the first cases before the ICC may be consumed by months or even years of pretrial motion practice.

These motions will pose an enormous challenge for the ICC's judges because, although they will certainly need to act expeditiously, they will also have to get it right. The first pretrial motions to be decided will shape initial perceptions of the ICC and largely determine the new institution's credibility. Any decisions that are perceived as politically motivated or legally unprincipled could have lasting repercussions. These extraordinary pressures on the ICC's judges must be handled in the context of resolving the numerous pretrial motions that are permitted by the Rome Statute's cumbersome pretrial framework, which results from a confluence of the following factors.

First, the system of complementarity between the ICC and national courts, designed to permit national courts to take precedence, will require significant pretrial motions if it is to work as anticipated. The ICC is only supposed to prosecute when a national court with jurisdiction is unable or unwilling to legitimately proceed, and this principle is given effect through procedures governing "admissibility." In large part, these procedures are due to the fact that the Rome Statute was written during political negotiations between governments, and some governments were uncomfortable with untethered prosecutorial power. The United States negotiators in the 1998 Rome Diplomatic Conference, in particular, ensured that the ICC's jurisdiction would be narrow, that cases could only proceed in circumstances when a national court could not do the job, and that the Prosecutor's discretion would be circumscribed. These issues will be teed up by pretrial motions arguing a government's genuine willingness or ability to investigate.

Second, the unusual State consent requirements that apply in cases not initiated by the Security Council require the consent of either the terroritorial State or the State of the nationality of the accused. Consent is given by the act of ratification or (for non-State parties) by a special declaration. While this may seem straightforward, ambiguities regarding cross-border conduct and even a person's nationality may lead parties to make motions arguing that a State's

consent is inadequate because the conduct "occurred" outside its territory or because the accused is a "national" of another State.

Third, safeguards designed to prevent politically motivated prosecutions mean that the Prosecutor will have to seek and obtain authorization from the Pre-Trial Chamber to proceed.

Fourth, the fact that victims are permitted to have representation before the ICC, even in the pretrial investigatory stages, may complicate pretrial proceedings. Thousand of victims may mean thousands of lawyers with the right under the Rome Statute to make submissions at certain stages.

Finally, the omnipresent right to appeal may serve to derail investigations as multiple parties exercise rights of appeal that exist even regarding interlocutory admissibility and jurisdictional issues.

The question that should be asked is whether—apart from serving the political purposes of the Rome Statute's creators—these procedures will advance the goals of ending impunity for international crimes and contributing to the prevention of such crimes. Only time will tell, of course, and almost everything about the ICC's pretrial procedure is a venture into uncharted territory. The ICC's system of State consent, admissibility and complementarity differs significantly from previous international criminal tribunals; indeed, it is largely *sui generis*. Because of the nature of the ICC's subject matter jurisdiction, every decision of the ICC will have political overtones, especially ones deciding the question of whether a national government has engaged in an "unjustified delay"[1] .in bringing a person to justice. These pretrial decisions also invite motions and submissions by States and other entities and persons.

There is another risk resulting from protracted pretrial proceedings: persons may be identified as targets of the ICC long before trial. An accused, of course, can object to the charges and challenge evidence at a confirmation hearing under Article 61, which requires the Pre-Trial Chamber to determine whether "substantial grounds" exist to believe the person committed the crimes. However, to the extent that pretrial proceedings unduly lengthen the time when a target of an investigation has been named and the resolution of that person's trial, the rights of persons accused of crimes by the ICC may be adversely affected. The eighteen judges of the ICC will have to resolve these challenges and administer the Rome Statute in a fair, impartial and decisive manner.

1. United Nations, Rome Statute of the International Criminal Court, July 17, 1998, art. 2(b), 37 I.L.M. 999 [hereinafter "Rome Statute"].

II. GETTING OFF THE GROUND: REFERRALS BY THE SECURITY COUNCIL AND STATE PARTIES

Three entities may initiate investigations: the Security Council, State Parties or the Prosecutor. Cases referred by the Security Council will likely proceed quicker through the pretrial stages than cases referred by State Parties or initiated by the Prosecutor. Security Council referrals, which are made pursuant to the Security Council's universally binding powers under Chapter VII of the UN Charter,[2] .are not subject to the State consent requirements. In addition, preliminary rulings regarding admissibility are not permitted. And, of course, there would be no threat of a Security Council deferral.

The best hope for avoiding ICC pretrial gridlock, then, is for cases to originate with Security Council referrals. This avenue, however, at least for the foreseeable future, is unrealistic. The United States, with its veto over any Security Council action, remains steadfastly opposed to the ICC. It is highly unlikely, therefore, that the United States will permit any Security Council referrals to the ICC. It remains to be seen whether this will change when the Security Council attempts to refer a matter that does not infringe on United States interests. For example, in October 2002, President Bush signed the Sudan Peace Act, which accused the Sudanese government of genocide. Would the United States use its veto to prevent the Security Council from referring a genocide prosecution of Sudan to the ICC?

Referrals by State Parties offer a slightly more streamlined alternative to investigations by the Prosecutor because the investigation can commence without the necessity of a determination by the Pre-Trial Chamber. Under Article 14, any State Party is entitled to refer to the Prosecutor a "situation in which one or more crimes within the jurisdiction of the Court appear to have been committed."[3] State referrals must be "in writing."[4] Following such a referral, the Prosecutor investigates the situation and determines whether any "specific persons should be charged."[5]

The Statute provides little guidance on the content of referrals except that the submission "shall specify the relevant circumstances" and must "be accompanied by such supporting documentation as is available to the State referring the situation."[6] There is no requirement that a referral be made public.

The Prosecutor does have discretion to decline to investigate a State Party's referral if "there is no reasonable basis to proceed," taking into consideration:

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2. *Id.* at art. 12(3)(b).
3. *Id.* at art. 14(1).
4. Rule of Procedure and Evidence 45.
5. Rome Statute, *supra* note 1, at art. 14(1).
6. *Id.* at art. 14(2).

(1) whether there is no legal or factual basis to seek a warrant or a summons; (2) whether the case is inadmissible because a national court has exercised jurisdiction; or (3) whether prosecution is "not in the interests of justice."[7] The Pre-Trial Chamber may, at the request of the referring State or the Security Council, review the Prosecutor's decision not to proceed.[8] The Pre-Trial Chamber also may act "on its own initiative" to review decisions of the Prosecutor not to proceed based on the "interests of justice" criteria.[9] This presents yet another avenue for pretrial proceedings: disputes between the Pre-Trial Chamber (acting on its own or at the behest of a State or the Security Council) and the Prosecutor regarding the propriety of the Prosecutor's decision not to proceed.

III. FIRST HURDLE: REQUEST FOR AUTHORIZATION

Due to Security Council paralysis, the Prosecutor probably will originate most investigations. In investigations initiated by the Prosecutor, however, the potential for gridlock arises early because although the Prosecutor can "initiate" an investigation he or she cannot "commence" an investigation without authorization. This authorization comes from the Pre-Trial Chamber, which at several critical stages is given oversight when the Prosecutor acts independently. In contrast, the Prosecutor needs no such authorization to commence an investigation when the referral comes from the Security Council or a State Party.

There are no limits on the sources from which the Prosecutor can receive information.[10] Following receipt of such information, the Prosecutor "may initiate investigations." At this early stage, before the necessity of requesting authorization, the Prosecutor is given leeway to look into a situation and to conduct a preliminary investigation unfettered by outside limitations. Thus, the Prosecutor may "analyze the seriousness of the information received," and may even "seek additional information" from states, nongovernmental organizations, international organizations or any "other reliable sources."[11] Even at this preliminary stage, State Parties are obliged to "cooperate fully" with any requests for information.[12]

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7. *Id.* at art. 53(2).
8. *Id.* at art. 53(3)(a).
9. *Id.* at art. 53(3)(b).
10. *Id.* at art. 15(2).
11. Rome Statute, *supra* note 1, at art 15(2).
12. *Id.* at art. 86.

The Prosecutor is also permitted to "receive written or oral testimony at the seat of the Court."[13] This testimony may be recorded or videotaped,[14] .and presumably may later be admissible at trial. This geographical limitation, permitting testimony only "at the seat of the Court" in The Hague, seems designed to limit the Prosecutor's fact-finding capabilities by curtailing on-site investigatory capacity before the Pre-Trial Chamber has given authorization.

Once this preliminary investigation is concluded, the Prosecutor will either determine that further proceedings are not required or that there is "a reasonable basis to proceed with an investigation."[15] If the latter,[16] .then the Prosecutor "shall submit to the Pre-Trial Chamber a request for authorization of an investigation."[17] Requests for authorization under Article 15(4) seem to be essentially *ex parte*, with no allowance made for submissions in opposition, although victims are permitted to "make representations" to the Pre-Trial Chamber.

The criterion to be applied by the three-judge Pre-Trial Chamber is somewhat vague: it need only determine whether "there is a reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the Court."[18] If so, then the Pre-Trial Chamber "shall authorize the commencement of an investigation."[19] It remains to be seen whether Article 15(4) authorizations will be a significant roadblock for investigations initiated by the Prosecutor or merely a rubber stamp. This is one-sided request, with potential targets not permitted to make submissions. As a result, this stage may be more mechanical than substantive. The Pre-Trial Chamber, however, has a strong interest in ensuring that the jurisdictional basis of an Article 15(4) authorization is proper and therefore will have compelling reasons making sound Article 15(4) determinations.

The request-for-authorization stage will also serve to publicize an investigation because the Prosecutor is required to notify victims. The means of notification may be through the Victims and Witnesses Unit or "by general means" consistently with the integrity of the investigation and the safety of

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13. *Id.* at art. 15(2).

14. Rule of Procedure and Evidence 112.

15. Rome Statute, supra note 1, at art. 18(1).

16. Somewhat conversely, art. 53(1) of the Rome Statute states that "the Prosecutor shall initiate an investigation unless he or she determines there is no reasonable basis to proceed." In referrals by the Security Council or a State, this seems to create a presumption that an investigation will be initiated unless the Prosecutor determines otherwise.

17. Rome Statute, *supra* note 1, at art. 15(3).

18. *Id.* at art. 15(4).

19. *Id.*

victims and witnesses.[20] Although the notice is of a general "investigation," it is possible that the notification process may have unintended consequences by identifying targets at a preliminary stage and by impacting the presumption of innocence or by triggering actions by persons subject to the investigation. However, this should be viewed as an acceptable trade-off because the notice provision advances the legitimate goals of minimizing frivolous prosecutions and maintaining transparency.

IV. SECOND HURDLE: NOTIFICATION AND POSSIBLE STATE DEFERRAL

The next threshold involves notification of certain States not only of a generalized investigation but of an intention to investigate and prosecute persons alleged to have committed crimes within the ICC's jurisdiction. This notification process begins once the Pre-Trial Chamber authorizes the "commencement" of an investigation under Article 15 or once a State Party makes a referral and the Prosecutor determines that there is "a reasonable basis to proceed."[21]

At this stage, the Prosecutor must issue a written notice to all States, including States not party to the Rome Statute, that "would normally exercise jurisdiction over the crimes concerned." The notice may be "on a confidential basis" if necessary "to protect persons, prevent destruction of evidence or prevent the absconding of persons."[22]

A State receiving notice has one month from receipt to inform the Court "that it is investigating or has investigated" persons within its jurisdiction.[23] If requested, the Prosecutor "shall defer to the State's investigation." State deferrals have no time limit and may permanently stop an investigation. The purpose is to give teeth to the premise of the Rome Statute that national courts have primacy. All a national government has to do is make a request and the ICC must defer—although, as discussed in Part V *infra*, such deferral may be reviewed in six months "based on the State's unwillingness or inability genuinely to carry out the investigation."[24]

The mandatory nature of Article 18(2) deferrals—the Prosecutor "shall defer to the State's investigation" upon receipt of a request to do so—may prove difficult to overcome. If multiple states assert jurisdiction, there may be multiple States making Article 18(2) requests. The result could be years of delay.

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20. Rule of Procedure and Evidence 50(1).

21. Rome Statute, *supra* note 1, at art. 18(1).

22. *Id.* at art. 18(1).

23. *Id.* at art. 18(2).

24. *Id.* at art. 18(3).

V. THIRD HURDLE: PRELIMINARY RULING ON ADMISSIBILITY AND APPEAL

Although the Prosecutor must stop the investigation upon receipt of a request,[25] .the mandatory cessation can be circumvented if the Prosecutor makes an application to the Pre-Trial Chamber to "authorize the investigation" notwithstanding a State's request for a deferral.[26] Upon such application, the Pre-Trial Chamber can nonetheless "decide[] to authorize the investigation."[27] It appears that only the Prosecutor can make such an application, and that State Parties do not have standing to do so. The standards to be applied by the Pre-Trial Chamber, as well as the timing, are somewhat elastic. The Prosecutor can seek review in six months, presumably on any basis, or "at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation."

The "preliminary" ruling is also the first opportunity for a trip to the Appellate Chamber. In one of the more open-ended articles of the Rome Statute, either the Prosecutor or the State concerned may appeal any decision "with respect to jurisdiction or admissibility" within five days of an adverse decision.[28] The likely effect of an appeal will be to suspend proceedings for many months because, even though the Article 82(3) of the Rome Statute states that an appeal "shall not of itself have suspensive effect," the Rules permit the appellant to request, in effect, a stay pending appeal.[29] Certainly a State that has previously served a deferral request under Article 18(2) would demand a stay pending an appeal of a decision of the Pre-Trial Chamber vacating a deferral.

Even an adverse decision of a preliminary ruling at this stage, however, does not prevent a State from challenging admissibility at later stages of the proceedings. Indeed, in an apparent recipe for gridlock, Article 18(7) guarantees the right of a State which has failed in a preliminary motion on admissibility to make a separate motion on admissibility at a later stage. While Article 18(7) requires a change in facts and circumstances, this should not be a burdensome hurdle to overcome. As a result, in cases where the crimes in question occurred in several States or involve persons of different nationalities, there may be multiple motions and appeals on the same admissibility issue under both Article 17 and Article 19.

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25. In "exceptional" cases, the Prosecutor can continue to collect evidence in spite of a State request if necessary to preserve evidence. Rome Statute, *supra* note 1, at art. 18(6).

26. Authorizations under article 18(2) must be made by a majority of the three judges of the Pre-Trial Chamber. Rome Statute, *supra* note 1, at art. 57(2)(a).

27. Rome Statute, *supra* note 1, at art. 18(2).

28. Rome Statute, *supra* note 1, at art. 82(1)(a); Rule of Procedure and Evidence 154(1).

29. Rule of Procedure and Evidence 156(5).

VI. FOURTH HURDLE: JURISDICTION AND ADMISSIBILITY CHALLENGES AND APPEALS

As noted, the most active areas for pretrial motion practice relate to issues of jurisdiction and admissibility. These issues relate to the Court's basic competence to hear a case, and can be raised at any time before or at the commencement of trial (or after, if the basis is that the person has already been tried). Indeed, it is likely that a new area of legal expertise will evolve pertaining to admissibility challenges under Articles 17 and 19 focusing on whether a national court is able or willing to prosecute. The area demands the creation of uniform standards so that the adjudication of these issues will appear objective. National court judges and other international legal scholars may offer the equivalent of expert testimony regarding the legitimacy of a government's investigation.

Procedurally, the Rome Statute treats jurisdictional and admissibility similarly. The Court's "jurisdiction" encompasses both the substantive crimes to be prosecuted by the ICC, and the system of State consent. Thus, a jurisdictional challenge could argue that the actions of the accused do not constitute crimes within the jurisdiction of the ICC. In addition, jurisdictional challenges could argue that (assuming no Security Council referral), either the territorial State or the State of nationality of the accused has not consented because, for example, there are questions about the citizenship of the defendant or, in crimes that occur in several countries, the State in which the conduct occurred.

The potential for lengthy delays resulting from Article 19 challenges to admissibility and jurisdiction arises from the fact that the Rome Statute places no clear limits on the number of these motions that can be made and on the parties that can make them. Consider, for example, the list of entities eligible to bring motions challenging admissibility and jurisdiction:

1) An accused;
2) A person for whom a warrant or summons has been issued based on a finding of the Pre-Trial Chamber that reasonable grounds exist to believe the person committed a crime within the jurisdiction of the ICC;
3) A State which has jurisdiction over a case and has investigated or prosecuted;
4) The State of nationality of the accused;
5) The territorial State; and
6) The Prosecutor or the Court.[30]

30. Rome Statute, *supra* note 1, at art. 19(2), (3).

Each of these entities appears to have the ability to bring motions regarding jurisdiction and admissibility; and each motion may suspend the investigation and then be appealed. It is not too far-fetched to imagine multiple motions brought seriatim on essentially the same area.

There is a textual argument for strictly limiting motion practice. Article 19(4) states that jurisdiction and admissibility challenges can be brought "only once by any person or State." This would have to be interpreted literally – "only once" means "only once." However, because each moving party would have different circumstances and arguments, it seems improbable this literal approach would be adopted because it could lead to unfairness in many cases. The more likely interpretation is that each person or State is limited to one bite at the apple, and not that all States and persons collectively are limited to a single challenge. Moreover, Article 19(6) refers to "challenges" to admissibility and to jurisdiction, suggesting multiple opportunities.

Article 19 challenges are unlikely to be expeditious. The issue of the adequacy of a State's investigation may require significant testimony and evidence to the extent the inquiry goes to the merits. When brought by a State, moreover, Article 19(7) requires the Prosecutor to suspend the investigation. "Observations" from other interested States, the Security Council and from victims must be solicited, and the Pre-Trial Chamber may hold a hearing. These hearings will probably be mini-trials, especially if a State is attempting to prove the genuineness of its investigation. Article 19 challenges conceivably could tie up the ICC for years if there are serial motions with suspensive effect that are subject to appeal.

VII. Fifth Hurdle: Security Council Deferral

Functioning as a kind of sword of Damocles over the ICC, the Security Council has the power to intervene under Article 16 to stop any investigation or prosecution for renewable twelve-month periods. The mechanism in Article 16 is a resolution adopted under the Security Council's enforcement powers in Chapter VII of the UN Charter. The ICC has no authority to circumvent such a Security Council resolution.

The purpose of Article 16 was to permit the Security Council to prevent the ICC from proceeding when an ICC prosecution might interfere with ongoing diplomatic negotiations necessary to maintain international security. An open question is whether the Security Council would permit Article 16 to be used not because of ongoing diplomatic negotiations but rather because of a Security Council member's ideological bias against any ICC investigation or prosecution.

VIII. CONCLUSION

Pretrial proceedings before the International Criminal Court present unusual and unprecedented challenges. The Rome Statute requires that national courts be given every opportunity to prosecute the crimes within the ICC's jurisdiction, and that the Prosecutor's independence be limited. The only way to make these requirements real is to permit challenges to be made to the ICC's ability to exercise its jurisdiction. The Rome Statute, however, creates a recipe for lengthy delays by permitting multiple challenges and appeals in the same areas.

The judges of the ICC face a daunting task in effectuating these principles of the Rome Statute while at the same time protecting the rights of defendants to a swift and fair trial and ensuring that the victims of the world's worst crimes receive redress. They will have to decide many thorny questions, such as how to limit admissibility motions and whether a government is unable or unwilling to prosecute. These are largely issues that no judges in any national or international court have had to deal with in such a systematic fashion. The discretion and wisdom with which the ICC's initial judges and Prosecutor deal with these issues will largely determine the ultimate success of the International Criminal Court in achieving its critically important purpose.