Interlocutory Appellate Review of Early Decisions by the International CL

Acknowledgments

INTERLOCUTORY APPELLATE REVIEW OF EARLY DECISIONS BY THE INTERNATIONAL CRIMINAL COURT

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I. EXECUTIVE SUMMARY

Within just over five years

that issued the impugned decision.[3] Specifically, Article 82(1)(d) provides that a party may appeal:

> a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.[4]

To date, however, the Pre-Trial Chambers have only certified in full a single decision for interlocutory appeal under Article 82(1)(d), while granting review of select rulings in four additional decisions; on the other hand, the Chambers have outright rejected sixteen other applications for appellate review. Moreover, each of the issues certified for interlocutory review to date relate to the same central question – namely, the disclosure of certain confidential evidence by the Prosecutor to the Defense prior to a confirmation hearing –

that such review is often seen as disruptive, particularly once trial proceedings have begun. Furthermore, under some circumstances, it may be efficient to require parties in a case to submit all issues for appeal at the conclusion of trial and obtain a single ruling from the appellate chamber on those issues. Finally, limiting the circumstances

citing the *travaux préparatoires* of Article 82(1)(d), as well as the rules and jurisprudence of other international criminal courts, namely the *ad hoc* criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the Special Court for Sierra Leone. However, while the sources cited by the Pre-Trial Chambers support the principle that interlocutory appeals should be limited, a careful review of these sources suggests that the provision need not be read as restrictively as the PTCs have done to date.

Another, equally reasonable, interpretation of the sources cited by the Pre-Trial Chambers is that Article 82(1)(d) is intended to allow for a balancing of the general principle favoring a consolidated appeal of all issues following a final judgment after trial on the one hand, with recognition that, in a variety of circumstances, the Court's proceedings might benefit from early appellate review of a decision on the other. Under this approach, the Pre-Trial Chambers would be able to discourage frivolous and unnecessarily time-consuming applications for interlocutory review, while having the flexibility to obtain an appellate ruling on an issue where considerations of efficiency and fairness, or concerns about the impact of the decision on the outcome of the trial, so require.

Impact of Pre-Trial Chambers' Restrictive Approach to Article 82(1)(d)

As already mentioned, the Pre-Trial Chambers' restrictive approach under Article 82(1)(d) has meant that only a handful of issues have been approved for interlocutory review, with the majority of requests for interim appeal being outright rejected. Although certifying such a small number of issues for interlocutory review is not *per se* problematic, the grounds upon which the Pre-Trial Chambers approved the successful applications were very narrow, and each of

the issues permitted to go up on appeal relate to the same general topic.

At the same time, the Pre-Trial Chamber has rejected a number of applications that raised compelling arguments under Article 82(1)(d). Of these, three are particularly noteworthy, and thus are described in some detail in this report.

The first decision for which interlocutory appeal under Article 82(1)(d) was sought involved a holding by Pre-Trial Chamber II (PTC II) that the Chamber itself, as opposed to the Prosecutor, was the "competent" organ to prepare requests for cooperation in the apprehension and surrender of suspects. Among the arguments put forward by the Office of the Prosecutor (OTP) under Article 82(1)(d) was the claim that the decision threatened the fair conduct of proceedings because it altered the relative responsibilities between the Prosecutor and the Pre-Trial Chamber during the investigation stage of proceedings, a balance that was carefully struck by the drafters of the Rome Statute. However, in the view of the Pre-Trial Chamber, "fairness" is closely linked to maintaining balance between the Prosecutor and Defense during specific proceedings, meaning that the

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Chamber improperly amended the charges against the accused without statutory authority to do so. Furthermore, the parties alleged that their rights had been violated because neither was given notice of, nor a

significantly delay proceedings before the Court, and thus affect the expeditious conduct of proceedings, because the Prosecutor had failed to establish that fairness concerns were implicated by the decision. Of course, this view ignores the fact, recognized by the ICC Appeals Chamber, that the right to a *speedy* trial is a fundamental aspect of a *fair* trial, meaning that an issue affecting the expeditious conduct of proceedings is likely to also affect the fair conduct of proceedings.

Jurisprudence of Other International Criminal Tribunals

In contrast to the restrictive approach adopted by the ICC Pre-Trial Chambers under Article 82(1)(d), the *ad hoc* criminal tribunals and the Special Court for Sierra Leone have seemingly evaluated requests for

Appeals Chamber, including those involving significant challenges to the legality and credibility of the Court.

Today, the ICTY and ICTR review requests for interlocutory appeal under rules using substantially the same language as found in Article 82(1)(d), and the Special Court uses a standard that is closely related to the Rome Statute's relevant provision. It is therefore notable that each of these other international criminal bodies has considered a much wider array of issues as warranting interim appeal than seen to date in the jurisprudence of the ICC's Pre-Trial Chambers. Indeed, contrary to the early practice of the ICC Chambers, the other international criminal courts have found that a variety of topics – including where the impugned decision allegedly infringes on the statutory rights of either party, involves questions of the Chamber's judicial authority over a trial, or is likely to cause serious delay in a manner that raises fairness concerns – to have warranted interlocutory review. Moreover, the *ad hoc* tribunals have not required that a party provide "concrete evidence" that the impugned decision will significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

Recommendations

As suggested by our review of the three cases highlighted above, we believe that certain issues that have already come before the Court – and are likely to arise again in the same or similar form – not only *could* be approved for interlocutory review within the confines of Article 81(2)(d), but also *should* be so approved. Before outlining our specific recommendations, however, we find it important to note that we make these recommendations from a broader viewpoint that finds

recommendations stem from a conviction that, although judicial resources may initially be taxed by a generous interlocutory appeal regime, the ICC stands to benefit over time if certain issues receive authoritative resolution in the early years of the ICC's operation. We believe this approach would not only help ensure the integrity of the Court, particularly in relation to issues regarding the relative statutory authority of different organs of the Court and the safeguarding of key defense rights, but may in some circumstances actually save time by avoiding confusion and resolving unnecessarily time-consuming procedures in the near term.

Of course, the Pre-Trial Chambers must nevertheless stay within the

the issue does not implicate "fairness" concerns under the Chambers' narrow interpretation of that term. Given that issues affecting the expeditious conduct of proceedings are likely to also implicate issues of fairness, a more thorough approach to the "fair and expeditious conduct" requirement would involve analysis of an issue's impact on both the fairness *and* the efficiency of proceedings. The Pre-Trial Chambers could also consider the possibility of whether the immediate appellate resolution of certain issues would itself contribute to the expeditious, and thus fair, conduct of proceedings, due to the fact that the issue is likely to arise repeatedly in proceedings before the Court.

- Adopt a More Generous Approach to Predicting a Decision's Likely Effect on the Fair and Expeditious Conduct or Outcome of the Trial: As already mentioned, Pre-Trial Chamber I denied the Prosecutor's application to appeal the Chamber's decision regarding victim participation at the investigation phase of proceedings, in part, on the ground that the Prosecutor failed to provide "concrete evidence" that the decision affected the fair conduct of proceedings. However, as the ICC Appeals Chamber has observed, the likely effect of a decision requires an exercise in forecasting the possible implications of the ruling. Hence, the Pre-Trial Chamber may grant interlocutory appeal on a decision even absent certainty regarding the decision's effect on proceedings.

II. THE ICC INTERLOCUTORY APPEALS REGIME

A. *INTERLOCUTORY APPEALS GENERALLY*

While national and international tribunals have taken a variety of different approaches to the question of whether a party may appeal a

that is likely to arise again in future proceedings and appellate review would prevent continuing uncertainty about the issue. Furthermore, interlocutory appellate review of a decision may be beneficial because

either party may appeal any of the following:

(a) A decision with respect to jurisdiction or admissibility;

(b) A decision granting or denying release of the person being investigated or prosecuted;

(c) A decision of the Pre-Tria

heard on an interlocutory basis under subpart (d), the relevant decision must fulfill two conditions. First, the decision must involve an issue that would have a significant effect on the fair and expeditious conduct of the proceedings, or it must involve an issue that would have a significant effect on the outcome of the trial. Second, the applicant must also persuade the Pre-Trial or Trial Chamber to conclude that an immediate resolution of the issue may materially advance the proceedings. If a decision satisfies both of these conditions, it may be appealed on an interlocutory basis by either party.

C. *TRAVAUX PRÉPARATOIRES*

The first version of the Draft Statute for an International Criminal Court, prepared by the Interna

as early as 1993,[14] although it ultimately decided to return to the question at a later stage.[15]

The drafters first included a provision on interlocutory appeals in an April 1998 version of the Draft Statute,[16] and the article was included

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[14] International Law Commission, *Report of the International Law Commission on the work of its forty-fifth Session*, 3 May - 23 July 1993, Annex Report of the Working Group on a Draft Statute for an International Criminal Court, at 123, U.N. Doc. A/48/10. Specifically, it was suggested "that the Court's rulings as to the admissibility of evidence should be subject to appeal." *Id*.

[15] The Working Group "decided to return to the question of providing for interlocutory appeals at a later stage," noting that this discussion would "also require consideration of the appropriate body to decide such matters." *Id*. Various reasons were provided in support of permitting some form of interlocutory appellate review following the release of the first Draft Statute. For example, the International Commission of Jurists (ICJ), a non-governmental organization that seeks to ensure that developments in international law adhere to human rights principles, suggested that allowing for interlocutory appeals would "help expedite decision-making by avoiding subsequent appeals and re-trials caused by an improper decision at the interlocutory stage." International Commission of Jurists, *Third ICJ Position Paper*, at 64, August 1995. The same year, the U.N. delegations from Cyprus and Venezuela expr91 Uee rele467 -1" mo

in the Preparatory Committee's Report to the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in June 1998 (Rome Conference).[17] The draft provision included an automatic right of review for: (a) decisions with respect to jurisdiction or admissibility; (b) orders granting or denying release of a defendant on bail; (c) orders confirming or denying the indictment in whole or part; and (d) orders excluding evidence.[18] In addition, the drafters included a standard for the discretionary review of interlocutory appeals when the Trial Chamber was of the view that the decision "involves a controlling issue as to which there is substantial ground for difference of opinion and that immediate appeal from the order may materially advance the ultimate conclusion of the trial and a majority of the judges of the Appeals Chamber, at their discretion, agree to hear this appeal."[19] However, the subparagraphs allowing for an automatic right to appeal a decision on the indictment and a decision excluding evidence, as well as the provision for discretionary appeals, were each bracketed in the Report of the Preparatory Committee.[20]

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that the April 1998 Draft Statute contained a provision on interlocutory appeals which was "substantially similar [in] form to the final text, with one or two exceptions.").

[17] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome, 15 June-17 July 1998), *Official Records* (Vol. III - Reports and other Documents), 65, UN Doc. A/CONF.183/13.

[18] Preparatory Committee on the Establishment of an International Criminal Court, *Text of the Draft Statute for the International Criminal Court*, at 3, U.N. Doc. A/AC.249/1998/CRP.14 (1 April 1998).

[19] *Id.*

[20] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome, 15 June-17 July 1998), *Official Records* (Vol. III - Reports and other Documents), at 65, UN Doc. A/CONF.183/13. A footnote to the draft article explained that "[f]urther consideration should be given to the question of what decisions could be appealed under this article." *Id.* According to one commentary on the drafting negotiations, "[s]ome delegations were concerned

During the Rome Conference, the delegates agreed to delete subparts (c) and (d) of the draft article, which would have allowed for an automatic right to appeal decisions dealing with indictments and the exclusion of evidence.[21] In addition, two delegates submitted written proposals during the Rome Conference recommending changes to the provision in the draft article governing the Court's discretion to allow interlocutory appeals of other decisions. First, Kenya proposed substantially liberalizing the draft provision, recommending that it simply provide: "[o]ther decisions may be appealed with leave of the Chambers concerned, and in the event of refusal, such refusal may be appealed."[22] Second, Canada submitted the language ultimately adopted in Article 82(1)(d) of the Rome Statute, which allows for interlocutory appeal of a "decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial

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that the right to appeal the Court's orders to exclude evidence could be abused by an accused who unnecessarily appeals such rulings." Helen Brady & Mark Jennings, *Appeal and Revision*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, 300 (Roy S. Lee ed., 1999). At the same time, however, "other delegations argued that evidence could be so sensational and prejudicial that to allow it in, or alternatively to exclude crucial evidence, could seriously jeopardize an accused's right to a fair trial." *Id.*

[21] *Id.* Participants to the drafting later reported that, with respect to exclusion of evidence, the drafters determined that a right to interlocutory appeal was unnecessary because an accused may preserve an objection to an evidentiary ruling and "maintain it for later appeal against any final judgment." *Id.* Some delegations "expressed similar reservations about the right to appeal the confirmation of an indictment," arguing that "this could lead to long and deliberate delays, and is a matter quintessentially within the Prosecutor's discretion and should not be the subject of an appeal." *Id.*

[22] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, (Rome, 15 June - 17 July 199coEncsf Pl(a)

III. PRE-TRIAL CHAMBERS' APPROACH TO ARTICLE 82(1)(d)

As explained above, it is up to the Chamber responsible for issuing a decision – whether during Pre-Trial or Trial proceedings – to determine whether that same decision will receive interlocutory review by the Appeals Chamber.[26] Indeed, the Appeals Chamber has confirmed that Article 82(1)(d) is the only avenue by which a party may seek interlocutory appellate review of a decision that is not appealable as of right.[27] Thus, the early decisions of the Pre-Trial Chambers[28] interpreting Article 82(1)(d) are particularly worthy of analysis, as it may be a number of years before issues for which a party is unable to obtain interlocutory review reach the appellate level. Moreover, while one Pre-Trial or Trial Chamber's interpretation of a provision under the Rome Statute is not binding on other Chambers, Article 21(2) of the Rome Statute does permit an organ of the Court to "apply principles and rules of law as interpreted in its previous

[26] Rome Statute, *supra* n. 1, Art. 82(1)(d).

[27] *Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, ¶ 20 (Appeals Chamber, 13 July 2006) [hereinafter "*Situation in DRC*, Appeals Chamber, 13 July 2006"] (confirming that it is the opinion of the lower court "that constitutes the definitive element for the genesis of a right to appeal."). Amnesty International advocated during the drafting of the ICC Rules of Procedure and Evidence that the Appeals Chamber should maintain an inherent right "to entertain an interlocutory appeal in other circumstances, for example, in an urgent case where the Trial Chamber is unable to act or has grossly abused its discretion in refusing to certify that its decision requires an immediate resolution by the Appeals Chamber pursuant to Article 82 (1) (d)." Amnesty International, The International Criminal Court: *Drafting Effective Rules of Procedure and Evidence Concerning the Trial, Appeal and Review, Memorandum for Participants at the Siracusa Intersessional Meeting, 22 to 26 June 1999*, IOR 40/009/1999, § 3, 1 June 1999. However, the Appeals Chamber did not find that the Rome Statute or the Rules of Procedure and Evidence provide it with such authority. *See generally Situation in DRC*, Appeals Chamber, 13 July 2006, *supra* n. 27.

[28] As of this writing, no Trial Chamber of the International Criminal Court has yet received a request for leave to obtain interlocutory review under Article 82(1)(d).

decisions."[29] Both Pre-Trial Chamber I and II have shown a willingness to do so,[30] rendering the Court's early decisions all the more important for the overall functioning and credibility of the ICC going forward.

A. *PTCs' READING OF ARTICLE 82(1)(d)*

Pre-Trial Chamber II issued the first decision of the International Criminal Court discussing the requirements of Article 82(1)(d) in August 2005.[31] In that decision, the Chamber determined that all applications for leave to appeal must be evaluated based on what it described as "the restrictive character of the remedy provided for" in Article 82(1)(d).[32] In its view, this restrictive character means that:

> the mere fact that an issue is of general interest or that, given its overall importance, could be raised in, or affect,

[29] Rome Statute, *supra* n. 1, Art. 21(2) ("The Court may apply principles and rules of law as interpreted in its previous decisions.").

[30] *See, e.g.*, *Situation in the Democratic Republic of Congo*, 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, ICC-01/04-135, ¶ 18 (Pre-Trial Chamber I, 31 March 2006) [hereinafter "*Situation in DRC*, PTC I, 31 March 2006"] (applying "the principles set out in the decision of Pre-Trial Chamber II" under Article 82(1)(d) in PTC I's own interpretation of Article 82(1)(d)). *See also* Situation in Uganda in the Case of *The Prosecutor v. Joseph Kony, et al.*, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-101 (Pre-Trial Chamber II, 10 August 2007) (citing the principles applied by PTC I in an earlier decision interpreting Article 68(3) of the Rome Statute).

[31] *Situation in Uganda*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Application for Warrants of Arrest under Articles 58, ICC-02/04-01/05, ¶ 8 (Pre-Trial Chamber II, 19 August 2005) [hereinafter "*Situation in Uganda*, PTC II, 19 August 2005"].

[32] *Id.* ¶ 15. *See also Situation in DRC*, PTC I, 31 March 2006, *supra* n. 30, ¶ 19 (same).

> future pre-trial or trial proceedings before the Court is not sufficient to warrant the granting of leave to appeal.[33]

As discussed directly below, the result of the Court's approach to Article 82(1)(d) has meant that just a handful of issues, all closely tied to the same central question, have been certified for interlocutory review on a discretionary basis.

Pre-Trial Chamber II has supported its interpretation of Article 82(1)(d) by citing, *inter alia*, the Rome Statute *travaux préparatoires*, noting that the drafting history "is instructional" as to the "restrictive character of the remedy" provided for in the provision.[34] Specifically, PTC II has pointed to two pieces of the drafting history. First, in its August 2005 decision, the Chamber refers to the fact that the Kenyan proposal[35] – which would have permitted interlocutory appeals under any circumstances deemed appropriate by the relevant Chamber – was rejected in favor of the more limited language found in the Canadian

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[33] *Situation in Uganda*, PTC II, 19 August 2005, *supra* n. 31, ¶¶ 20-21. Both Pre-Trial Chamber I and Pre-Trial Chamber II have continued to stress the restrictive character of Article 82(1)(d). *See, e.g.*, *Situation in DRC*, PTC I, 31 March 2006, *supra* n. 30, ¶ 21 (citing *Situation in Uganda*, PTC II, 19 August 2005, ¶¶ 20-21); Situation in the Democratic Republic of the Congo in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, ICC-01/04-01/06, ¶ 20 (Pre-Trial Chamber I, 24 May 2007) [hereinafter "*Prosecutor v. Lubanga*, PTC I, 24 May 2007"] ("The case-law of the Court indicates that appeals of interlocutory decisions were intended to be 'admissible only under the limited and very specific circumstances stipulated in article 82, paragraph 1 (d)' of the Statute."); Situation in Uganda in the Case of

proposal ultimately adopted as Article 82(1)(d).[36] Second, in a subsequent decision, PTC II found further support for the Chamber's restrictive interpretation of Article 82(1)(d) in the fact that the drafters ultimately declined to provide for an *automatic right* of interlocutory appeal for rulings on evidence and rulings in relation to the confirmation of an indictment.[37] While these interpretations of the drafting history are certainly reasonable, they are not the only conclusions that could be drawn from the rather sparse history available on the subject.

For example, it is possible that the drafters rejected the Kenyan proposal in favor of the Canadian version out of fear that the Kenyan proposal was overly permissive. This would seem logical given the concern of the drafters that interlocutory appeals not be allowed to "paralyze the process."[38] Nevertheless, negotiators also made clear that interlocutory appeals "must be allowed where to do otherwise would be unfair,"[39] suggesting that while laying out limited circumstances for interlocutory appeals, the provision was not intended to be approached in an unduly restrictive manner.[40]

decided not to provide an automatic right of appeal for evidentiary issues and rulings on the confirmation of charges does not necessarily mean that the drafters intended to exclude *any* appellate review of such decisions, as the relevant rulings could still fall under the discretionary standard of Article 82(1)(d). To the contrary, the drafters' consideration of affording parties an automatic right of appeal for these issues suggests that these are the very kind of issues which are likely to merit interlocutory review, even if not in every circumstance.

B. *IMPACT OF PTCS' RESTRICTIVE APPROACH UNDER ARTICLE 82(1)(d)*

1. Only a Handful of Issues, All Relating to the Same Topic, Have Been Approved for Interlocutory Review under Article 82(1)(d)

As a result of the Pre-Trial Chambers' strict approach to discretionary interlocutory appeals under Article 82(1)(d), only one application filed under the provision has been granted in full in the Court's first five years of operations,[41] while select rulings in four additional

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appeal. Given the importance of such issues for the future functioning of the Court, adequate staffing is needed from the very beginning of its operation."). Indeed, these discussions indicate that the Working Group expected a large number of the Pre-Trial Chambers' early rulings to be certified for interlocutory appeal. *See id*. at n. 13. ("In the light of the experience of ICTY and ICTR, all decisions would most likely be subject to appeal. Accordingly, if a Pre-trial Chamber is functioning, the Appeals Chamber would also need to be ready to function in order to deal with any appeals that would arise."). Thus, while not necessarily evidence of the drafters' intent, these discussions certainly suggest that interlocutory appeals were conceived of as a substantial part of the ICC's practice that might well contribute to the Court's credibility in the important early stages of its operations. *See id.* ¶ 37 ("[T]he proper functioning of Pre-Trial, Trial and Appeals Chambers are crucial, as the manner in which the first applications under the relevant provisions of the Statute are handled will both *establish procedures for the future and affect the credibility of the Court*."). e(h)-wou04.9(ffe)

applications were allowed up on appeal.[42] Moreover, each of the issues that has been approved for interlocutory review under Article 82(1)(d) dealt with closely-related issues regarding the Prosecutor's disclosure duties prior to confirmation of charges proceedings.[43] In its first

[42] *See*

Similarly, PTC I has found that the term "fairness" means "equilibrium, or balance," which in turn "entails equilibrium between the two parties, which assumes both respect for the principle of equality and the principle of adversarial proceedings."[47] As explained in further detail throughout the remainder of this section, the Pre-Trial Chambers' narrow interpretation of the term "fairness" has had important consequences for its overall approach to Article 82(1)(d), as the majority of requests for leave to appeal have been denied on the grounds that the applicant failed to establish that the fair conduct of the proceedings would be affected.[48]

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[47] *Situation in DRC*

2. Significant Decisions Not Found to Warrant Interlocutory Appeal under Article 82(1)(d)

a) Division of Authority between the Pre-Trial Chamber and the Office of the Prosecutor during an Investigation

As noted above, the first decision interpreting Article 82(1)(d) was issued by Pre-Trial Chamber II in August 2005. In the underlying decision, which concerned the issuance of arrest warrants for five alleged members of the Lord's Resistance Army in Northern Uganda, PTC II had declared itself – rather than the Office of the Prosecutor

the judiciary that is given as substantial a role in the conduct of investigations as the PTC is given in the context of the ICC's investigations. Thus, the ICC is unable to look to the practice of other international criminal bodies for guidance in determining the relative division of authority between the Pre-Trial Chambers and the Office of the Prosecutor during an investigation. Furthermore, due to the Rome Statute's blend of common law and civil law systems[54] – the former of which favors a highly independent prosecutor and the latter of which typically affords significant authority to "investigating" judges – a number of ambiguities exist regarding the relative authority of the ICC's organs during the investigation phase of a situation.[55] Hence, the scope and limits of the language governing the relationship between the PTCs and OTP during an investigation are novel terrain, suggesting it is an area particularly worthy of interim appellate review.[56] Moreover, there is a risk that if issues arising in the context

[54] *See, e.g.*, Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Cew*.

of a situation are not dealt with on interlocutory appeal, they may repeatedly escape review by the Appeals Chamber, as questions of

2006, a two week confirmation of charges hearing was held during which Mr. Lubanga was given the opportunity to argue that the

submitted appears to establish a different crime within the jurisdiction of the Court.[64] Following the decision, both the Prosecutor and Defense submitted applications under Article 82(1)(d).

In seeking leave to appeal, the Defense argued that, by "changing the charges and subsequently confirming the new charges without adjourning the proceedings and giving the Defence the right to be heard,"[65] the PTC acted beyond the scope of its statutory authority[66] and violated the accused's right to a fair trial.[67] According to the Defense's request for leave to appeal:

> the clear text of the [Rome] Statute contains an additional element for crimes committed in international armed conflicts, namely the conscription or enlistment into a national armed force. At no point in time did the charging document or the Prosecution evidence refer to the [Union of Congolese Patriots] as a national armed force. The question as to whether a national armed force could be

contradicted the "clear language of the Statute."[69] For its part, the OTP stressed that the Rome Statute "only allows the Chamber to adjourn the proceedings and request the Prosecution to consider amending a charge, if the Chamber is of the view that the evidence submitted appears to establish a different crime."[70] As a result of the PTC's "substitution of the crime charged by the Prosecution," the OTP argued that it would be "forced to proceed with a crime that it had already determined, after careful examination of the evidence in its possession, should not be charged, and to devote time and resources to supplement that evidence, if possible, in order to adequately substantiate that crime at trial."[71]

Finding that the fairness prong of Article 82(1)(d) was not satisfied, PTC I summarily dismissed the parties' grounds in support of leave to appeal, saying that the issue of the proper legal characterization of the charges had been "raised" elsewhere in the case against Mr. Lubanga.[72] However, while some comments were made by both the ProsecutTJa87 -s wa1.4mb9elsewh48 h thwrl0.i8-17.215e

equivalent to an evaluation on the

recognized at the outset of its decision on the parties' requests for leave to file an interlocutory appeal, "[t]o authorize the parties to appeal the decision confirming charges when the suspect is under detention would cause avoidable delay in the procedure."[78] However, the Pre-Trial Chamber failed to consider the *relative* delay likely to result from permitting interim appellate review of the confirmation of charges decision, on the one hand, and leaving it to the Trial Chamber

while "it is clear that some decisions may relate to the immediate expeditiousness of proceedings, other issues may need to be resolved in order to provide for an expeditious trial."[80] Lastly, because trial proceedings have yet to commence in the *Lubanga* case, interim appellate review would not have required the suspension of a trial in progress. Conversely, for the Trial Chamber to change the characterization of facts pursuant to Regulation 55, as suggested by PTC I, a number of time-consuming steps would need to be taken, including the re-evaluation of facts presented at the confirmation hearing and possibly the suspension of proceedings to "ensure that the participants have adequate time and facilities for effective preparation or, if necessary, [the holding of] a hearing to consider all matters relevant to the proposed change."[81] Thus, on balance, granting the parties leave to file an interlocutory appeal would be, in this case, far more likely to promote the efficiency of proceedings than the alternative means of leaving it to a Trial Chamber to correct a potential error by the Pre-Trial Chamber.

In sum, given the current position of the ICC's operations – namely, with six arrest warrants outstanding, and the Office of the Prosecutor

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[80] *Prosecutor v. Lubanga*, Defence Request for Leave to Appeal, 22 February 2007, *supra* n. 65, ¶ 64.

[81] Regulations 55(2) and 55(3) provide: "If, at any time during the trial, it appears to the Chamber that the legal characterisation of facts may be subject to change, Chamber shall give notice to the participants of such a possibility and having heard the evidence, shall, at an appropriate stage of the proceedings, give the participants the opportunity to make oral or written submissions. The Chamber may suspend the hearing to ensure that the participants have adequate time and facilities for effective preparation or, if necessary, it may order a hearing to consider all matters relevant to the proposed change. [T]he Chamber shall, in particular, ensure that the accused shall: (a) Have adequate time and facilities for the effective preparation of his or her

actively conducting investigations in four countries for the purpose of identifying additional suspects – it is reasonable to expect that Pre-Trial proceedings will constitute a large proportion of the Court's work for several years to come. Without any interlocutory review of challenged actions taken by Pre-Trial judges in these early proceedings, the ability of the ICC to function efficiently and effectively could be compromised.

c) Decision Likely to Have a Significant Impact on Expeditiousness of Proceedings, Thereby Threatening Fairness of Proceedings

A final example of an application for interlocutory appeal denied under Article 82(1)(d) worthy of note involves the Prosecutor's request to obtain interim review of PTC I's January 2006 decision holding that victims had a general right to participate during the investigation phase of the ICC's operations.

Among the arguments put forth by the Office of the Prosecutor in favor of its request was that the decision threatened the fair conduct of proceedings because it "opens the door for direct – and unregulated – presentation of evidentiary or documentary material ('pièces') by victims to the Chamber during the investigative stage, thereby allowing for consideration by the Chamber of material collected *outside* the framework of the investigation conducted by the Prosecution in compliance with the requirements and safeguards of Article 54(1)."[82] PTC I rejected this argument, not because the

[82] *Situation in the Democratic Republic of Congo*, Prosecution'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, ICC-01/04-103, ¶ 16 (OTP, 23 January 2006) [hereinafter "*Situation in DRC*, OTP Request for Leave to Appeal, 23 January 2006"] (emphasis in original). Article 54(1) provides that the "Prosecutor shall: (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate

Prosecutor failed to demonstrate fairness concerns, but rather because the OTP had not presented "concrete evidence" that the fair conduct of proceedings would in fact be affected.[83] Notably, neither the Rome Statute nor the ICC Rules of Procedure and Evidence require a showing of "concrete evidence" in support of certification under Article 82(1)(d). In fact, any potential effect of an impugned decision will necessarily be speculative, as requests for leave to obtain interlocutory appeal must be filed within five days of the challenged decision.[84]

The more troubling aspect of the Pre-Trial Chamber's decision rejecting interim review of its January 2006 decision on victim participation came in response to another argument submitted by the Prosecutor under Article 82(1)(d). Specifically, the OTP argued that the decision would affect the "fair and expeditious conduct" of proceedings because it would cause substantial delay and constitute a substantial drain on the resources of the Court.[85] For example, the OTP wrote:

> the Chamber will be required to deal with petitions coming from potentially thousands of victims, to decide litigation on matters such as the scope of their intervention, to decide on each particular case whether an individual applicant

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incriminating and exonerating circumstances equally; (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of

> qualifies as a victim, within the terms of Rule 85, including engaging in the fact-finding functions that the Decision requires, and to determine in those cases in which the Chamber is acting under Article 56(3) or 57(3)(c) whether the victims' personal interests require them to intervene in the proceedings (a determination that necessarily will have to be made on a case-by-case basis). The Prosecution notes that the Chamber may also be faced with challenges brought by arrested persons related to the involvement of victims during the investigative stage. This burden adds to the already heavy set of duties and functions with which the Chamber is tasked under the Statute and the Rules.[86]

Nevertheless, because PTC I had already determined that the Prosecutor failed to present "concrete evidence" demonstrating that the impugned decision "undermines the *fairness* of the proceedings," the Chamber never considered any of the Prosecutor's arguments relating to the effect of the decision on the *expeditious conduct* of proceedings.[87] In fact, the Chamber wrote that the failure of a party "to demonstrate that the 'fairness' tenet of the first limb of the first requirement of [A]rticle 82 has been met would *per se* exonerate the Chamber from the need to assess the 'expeditiousness' tenet of the same limb."[88] As a result, PTC I never analyzed whether the potential impact of the challenged decision on the expeditiousness of

[86] *Id.* ¶ 33. The Prosecutor's application also explained: "The Prosecution will be required, as a matter of process and fairness, to consider and respond to the views put forward by all victim participants, which will already have a severe impact on the expeditious conduct of the investigation and proceedings. In addition, the Prosecution will necessarily have to address issues related to the victims' access to specific hearings and materials filed with the Chamber, to the presentation of material by victims to the Chamber, and to any specific measures requested by them. As new groups of victims are granted the right to participate, the Prosecution will be forced to respond to constantly changing array of issues. This will further divert resources from a methodical and objective investigation to address subjective submissions and requests of individual victims." *Id.*

[87] *Situation in DRC*, PTC I, 31 March 2006, *supra* n. 30, ¶ 44 (emphasis added).

[88] *Situation in Uganda*, PTC II, 19 August 2005, *supra* n. 31, ¶ 35.

proceedings would also affect the accused's right to a fair trial, thereby satisfying both requirements of the "fair and expeditious conduct" prong.

Importantly, PTC I's decision rejecting the Prosecutor's request for leave to appeal has effectively barred any appellate review of its ruling on victims' participation at the investigation stage until a judgment is reached in the case against Thomas Lubanga Dyilo, which has just entered the first stages of trial.[89] In the meantime, under the system for evaluating victims' applications to participate at the investigation stage established by Pre-Trial Chamber I, the Court intends to perform a "case-by-case assessment of victim participation,"[90] with

on their applications,[92] suggesting PTC I is already having difficulty efficiently managing the scheme it created in its January 2006 decision. Thus, in the event the Appeals Chamber disagrees with PTC I's interpretation of victims' right to participate at the investigation stage of proceedings, an enormous amount of time and resources would have been saved by an immediate decision to that effect.

Perhaps most concerning is the fact that the Pre-Trial Chamber [illegible]

the Statute is associated with the norms of a fair trial," one of which is "*[t]he expeditious conduct of the proceedings*."[94]

[94] *Situation in DRC*, Appeals Chamber, 13 July 2006, *supra* n. 27, ¶ 11 (emphasis added).

judgments, whether as of right or as a matter of discretion.[98]

> provision should be inserted to permit interlocutory appeal at the discretion of the appeals chamber. By making the right of appeal within the discretion of the appeals chamber, the danger of excessive interlocutory appeals is eliminated.[102]

Even with the limited opening created for interlocutory appeals based

interpretation of the concept of jurisdiction."[105] Explaining its decision, the Appeals Chamber wrote: "in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and the proper rule is selected."[106]

that the ICTY amended its rules to allow for interim appeal of non-jurisdictional issues suggests that the judges believed the pre-1996 regime was too restrictive. In 1997, the ICTY interlocutory appeal rule was amended again, changing the relevant standard for evaluating whether a preliminary decision should receive interlocutory review from "serious cause" to "good cause," and creating an opportunity for parties to apply for leave to appeal non-preliminary motions, termed "other motions."[110] As one commentator explains, this change was made because the judges "recognized that in certain circumstances it may be more beneficial to finally resolve an issue rather than waiting for the completion of both the trial and final appeal processes."[111]

The most recent amendment to the ICTY provisions on interlocutory appeals occurred in 2002, when a standard very similar to the one employed in Article 82(1)(d) of the Rome Statute was adopted for decisions on both preliminary and non-preliminary motions.[112] In addition, the 2002 amendments follow the Rome Statute in that the revised provisions vest the Trial Chamber, rather than the Appeals Chamber, with authority to determine whether a decision qualifies for interlocutory appeal.[113] One year later, the ICTR, which previously allowed only jurisdiction-based interlocutory appeals, amended its

[110] ICTY Rules of Procedure and Evidence, IT/32/Rev. 12, *as amended* 12 November 1997, R. 72yen

rules on interim appellate review to mirror those of the ICTY.[114] While the new standards, discussed in further detail below, signal a tightening of the ICTY interlocutory appellate regime, it is important to recognize the liberal approach taken by that tribunal to applications for interlocutory appeal, particularly during the early years of its existence. Indeed, as the authors of a 2001 commentary on the ICTY and ICTR observed, the "interlocutory appeals have been very important insofar as the Tribunals are new and as many procedural formalities have to be established by precedent."[115] It seems reasonable to assume that the ICC would similarly benefit from a more liberal approach to discretionary interlocutory appeals in its early years of operation, a benefit that could be more thoroughly achieved through a less restrictive reading of Article 82(1)(d).

2. Special Court for Sierra Leone

Similar to the early rules of the ICTY, the Special Court's Rules of Procedure and Evidence initially limited the availability of interlocutory appeal strictly to decisions dismissing a challenge to the Court's jurisdiction.[116] However, in March 2003, the rules were amended to provide the Trial Chamber with discretion to refer preliminary motions *directly* to the Appeals Chamber, without an initial Trial Chamber decision on the merits, where the motion raised "an issue that would significantly affect the fair and expeditious

[114] ICTR Rules of Procedure and Evidence, *as amended* 26-27 May 2003, R. 72(B) & R. 73(B).

[115] Mark A. Drumbl & Kenneth S. Gallant, *Appeals in the ad hoc International Criminal Tribu2n8(d)]TJ3(2i]TJ3(2dple)2.(r0,s m)lh S)2 0947 0947Tm2003, thet2e(8A-f60947gnifuhn2s*

conduct of the proceedings or the outcome of a trial, and for which an immediate resolution by the Appeals chamber may materially advance the proceedings."[117] Thus, while the parties still had no right to seek interlocutory appeal of non-jurisdictional decisions during the pre-trial phase of proceedings, the rule adopted in March 2003 permitted the Trial Chamber itself to obtain a ruling directly from the Appeals Chamber.[118]

Notably, the Special Court judges – the organ of the Court vested with authority to amend the Rules of Procedure and Evidence – amended the initial rule of the SCSL due to the legitimate need for appellate review of preliminary decisions which threatened "the fair and expeditious conduct of the proceedings."[119] At the same time, however, the judges were concerned by the risk of undue delay in allowing decisions involving complicated questions of international law to be argued first at the trial level only to be re-litigated at the appeal level.[120] Hence, the March 2003 version of the SCSL rule on interlocutory appeals – which closely tracks the language of Article 82(1)(d) – was intended as a means of securing interlocutory appeal of

[117] Rules of Procedure and Evidence of the Special Court for Sierra Leone, *as amended* 7 March 2003, R. 72(D).

[118] The March 2003 amendments to the SCSL Rules also authorized the Trial Chamber to grant a party leave to appeal a decision taken during the course of trial if the Chamber was satisfied that a decision by the Appeals Chamber "would be in the interest of a fair and expeditious trial.

determination by the Trial Chamber that an immediate resolution by the Appeals Chamber will materially advanced the proceedings.[124]

From its inception in March 2003, the "fast track" procedure adopted for preliminary motions in the SCSL made a significant impact on the Court's operations. Indeed, within seven months of the Prosecution's filing of its initial indictments in March 2003, 17 of the 21 preliminary motions filed by the Defense were referred directly to the Appeals Chamber.[125]

Among the early issues receiving review from the Appeals Chamber was a challenge to the very use of the "fast track" procedure itself.[126] Other motions receiving immediate review from the appellate judges of the Special Court were challenges to the court's constitutionality;[127] questions about the validity of the blanket amnesties granted by the July 1999 Lomé Peace Agreement, which allegedly ensured that no official or judicial action would be taken against any member of the warring parties in Sierra Leone;[128] claims of judicial bias;[129] and

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[124] Rules of Procedure and Evidence of the Special Court for Sierra Leone, *as amended* 1 August 2003, R. 72(F). As summarized in the Special Court's 2002/03 Annual Report, the amended rule was expected to "substantially expedite proceedings and the judicial workload," particularly as compared to other international tribunals where preliminary motions "are determined in the first instance by the Trial Chamber subject to interlocutory appeal before the Appeals Chamber." Justice Geoffrey Robertson QC, *First Annual Report of the President of the Special Court For Sierra Leone: For the Period 2 December 2002 – 1 December 2003*, at 12-13.

[125]

questions as to whether the recruitment of child soldiers is a crime under international law.[130]

Rules also authorized the Trial Chamber to allow interlocutory review by the Appeals Chamber of non-preliminary motions "in exceptional circumstances and to avoid irreparable prejudice to a party."[133] Yet despite the adoption by the *ad hoc* tribunals of an interlocutory appeals standard virtually identical to that of the ICC, and the arguably even narrower standard adopted by the SCSL,[134] these bodies have continued to allow a range of decisions to receive appellate review on an interim basis. Thus, for instance, the ICTR has summarized its approach to Rule 73(B), which uses the same language as Article 82(1)(d), as follows:

> Interlocutory appeals under Rule 73 (B) have been described as exceptional; on the other hand, certification has been granted where a decision may concern the admissibility of broad categories of evidence, or where it

that must be afforded to an accused subject to a joint trial[140] were likely to significantly affect the fair and expeditious

obtain interlocutory review of a decision restricting disclosure of protected witness's identities to the attorneys working on the particular case at hand, as opposed to the entire staff of the OTP, where the Prosecutor argued that the decision unduly restricted its ability to fulfill its obligation to disclose exculpatory evidence.[143] The same tribunal also granted a request from the Prosecutor to appeal an interlocutory decision relating "to the degree of specificity that is required for an Indictment to escape the test of vagueness," where the Prosecutor argued that the ruling "unfairly ties the hands of the Prosecution" in presenting its case against the accused.[144]

- Decisions implicating the expeditious conduct of proceedings in a way that also raises fairness concerns: Unlike the ICC Pre-Trial Chambers, the *ad hoc* tribunals have found the "fair and expeditious" prong of the interlocutory appeals standard is met where the decision implicates concerns of efficiency such that the fairness of proceedings are also at stake. For example, the ICTY Trial Chamber certified a decision in which it [illegible]

cause unwarranted delay if not authoritatively resolved in the first instance. The Special Court, while operating under a different standard, has also held that the likely recurrence of a question weighs in favor of granting leave to obtain interlocutory appeal.[147]

- Decisions implicating the Trial Chamber's exercise of its authority: Both the ICTY and the ICTR have found that the fairness of proceedings is implicated for purposes of allowing interlocutory appeal where a decision involves the ability of the Trial Chamber to exercise control over its proceedings. For example, the ICTY permitted interlocutory appeal of a decision excluding a particular witness from testifying on the ground that the witness's government had placed limits on the scope of his testimony.[148] The Chamber explained that the decision was ultimately concerned with the "very core of

ICTR permitted interlocutory review of a decision that was challenged not for its substance, but due to the fact that it was issued by two, as opposed to three, Trial Chamber judges.

which ought to be determined by the Appeals Chamber."[154] Similarly, the question of whether a human rights officer could be compelled to reveal the sources of his information was considered appropriate for interim appeal by the SCSL because, in addition to being novel, the Trial Chamber found that an interpretation by the Appeals Chamber of the rules in question was "of fundamental importance."[155] In another case, involving the proper scope of witness testimony, the ICTR granted leave to obtain interlocutory review after finding that "[l]eaving the issue for possible appeal after judgment risks unnecessary complication, a risk which will be avoided by resolution of the matter at this stage."[156] Finally, in granting a request from the Prosecutor to take interlocutory appeal of a decision involving the implications of improper service of process, the SCSL noted that "it does not conduce to the overall interests of justice and the preservation of the integrity of the proceedings to leave the law on such important issues in international criminal adjudication unsettled and in a state of uncertainty."[157]

A final point in relation to the approach of the *ad hoc* tribunals and the SCSL to requests for interlocutory review, as compared to the approach taken thus far by the ICC Pre-Trial Chambers, is that the

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[154] *Prosecutor v. Seselj*, Decision on Certification to Appeal and to Extend the Deadline for Filing Certain Preliminary Motions, IT-03-67-PT (Trial Chamber II, 18 November 2003).

[155] *Prosecutor v. Brima*, Trial Chamber, 12 October 2005, *supra* n. 147, at 3.

[156] *Prosecutor v. Bizimungu*, Trial Chamber II, 22 May 2007, *supra* n. 148, ¶ 13. Likewise, the ICTY has stated the interlocutory review will be appropriate where "leaving the matter to be resolved in any later appeal creates a risk of unnecessarily

former have not required that a party seeking review provide "concrete evidence" that a decision will effect the fair and expeditious conduct of proceedings. Indeed, in at least one case, the ICTR granted a request for interlocutory appeal even after describing the potential impact of the decision on the fair and expeditious conduct of proceedings as "remote."[158] At the same time, the ICTY has permitted interlocutory review of a decision where the issue sought to be appealed was "a matter that *[was] able* significantly to affect the fair and expeditious conduct of the proceedings…,"[159] as opposed to requiring evidence that the matter *would* so affect the proceedings.

[158] *Prosecutor v. Bagosora, et al.*, Certification of appeal concerning Prosecution investigation of protected Defence witnesses, ICTR-98-41-T (ICTR Trial Chamber I, 21 July 2005) ("The consequences predicted by the Defence would undoubtedly have a significant effect on the fairness and expeditiousness of proceedings. The point of contention is whether those consequences will actually ensue. In its decision, the Chamber considered the dangers

V. RECOMMENDATIONS AIMED AT INCREASING AVAILABILITY OF INTERLOCUTORY REVIEW FOR ISSUES CRITICAL TO THE OVERALL EFFICIENCY, FAIRNESS, AND CREDIBILITY OF ICC

A. *GENERAL RECOMMENDATION: ADOPT A MORE GENEROUS APPROACH TO ARTICLE 82(1)(d) IN EARLY YEARS OF ICC'S OPERATION*

While the Pre-Trial Chambers are warranted in treating interlocutory appeal as a remedy that in principle should be exercised judiciously, the ICC may benefit in the long run from a more liberal approach towards interlocutory appeals in the Court's early years. Although judicial resources may initially be taxed by a generous interlocutory appeal regime, the ICC stands to benefit over time if authoritative resolution of, or at least guidance on, particular issues is available for future proceedings. Significantly, this approach could in many cases expedite the overall proceedings of the Court, as seen with the practice of the Special Court for Sierra Leone using "fast track" appellate review for key issues arising in the early years of the Court.

A more generous approach to interlocutory appeals is particularly warranted in the case of certain Pre-Trial Chamber decisions, given the fact that the trial itself has yet to commence, and therefore interim review may be obtained without requiring a disruptive suspension of ongoing trial hearings. Indeed, the *ad hoc* criminal tribunals have expressed a greater willingness to certify a decision for interlocutory appeal where it is possible to conduct the interim review without suspending trial proceedings.[160]

[160] *See*, *e.g.*,*Prosecutor v. Bizimungu*, Trial Chamber II, 22 May 2007, *supra* n. 148, ¶ 13 ("In addition, there would be no need to adjourn or otherwise delay the proceedings to await the outcome of the appeal."); *Prosecutor v. Milutinovic*, Trial

Statute in favor of permitting interlocutory appellate review of some decisions was that allowing for some form of appellate review prior to

2. Treat Issues that Affect the Expeditious Conduct of Proceedings as Potentially Affecting Fairness

Related to the Pre-Trial Chambers' narrow approach to fairness is the PTCs' practice of automatically dismissing claims upon finding that the issue does not implicate "fairness" concerns under the Chambers' narrow interpretation of that term. Given that issues affecting the expeditious conduct of proceedings are likely to also implicate issues of fairness, a more thorough approach to the "fair and expeditious conduct" requirement would involve analysis of an issue's effect on both the fairness *and* the efficiency of proceedings.

In evaluating a decision's potential impact on the expeditious nature of proceedings, the Pre-Trial Chambers could also consider whether the immediate appellate resolution of an issue would itself contribute to the expeditious, and thus fair, conduct of proceedings, due to the fact that the issue is likely to arise repeatedly in the same proceedings before the Court. While the *ad hoc* criminal tribunals have not done this in every instance, some decisions have considered the likely recurrence of a particular issue in determining that the "fair and expeditious" prong was satisfied.[167] Moreover, such an approach may be more warranted in the context of the ICC, particularly in regard to decisions arising in the context of an ongoing investigation of a situation, as it is not entirely clear how an issue arising at the "situation" phase of proceedings – *i.e.*, outside the context of any individual case – will ever reach the Appeals Chamber at the end of

rendered by a bench of three Judges "is intimately connected to the fairness and expeditiousness of the proceedings."); *Prosecutor v. Milutinovic*, Trial Chamber, 14 March 2007, *supra* n. 148, ¶ 13 (finding that a decision involving "ability to control its own proceedings by controlling cross-examination of the witnesses appearing before it" was "certainly a matter that is able significantly to affect the fair and expeditious conduct of the proceedings or the outcome of the trial.").

[167] *See supra* n. 145 *et seq.* and accompanying text.

any given case. By contrast, the *ad hoc* tribunals investigate only particular individuals or crimes, me

proceedings, as seen in the practice of the *ad hoc* criminal tribunals, rather than demanding concrete evidence of consequences of such an occurrence.

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Interlocutory Appellate Review of Early Decisions by the International Criminal Court

Within five years of commencing operations, the International Criminal Court (ICC) has initiated investigations in four different countries, issued a handful of arrest warrants, concluded the pre-trial proceedings against its first suspect in custody, and commenced pre-trial proceedings against a second suspect. In the context of these investigations and cases, the Pre-Trial Division of the ICC has issued decisions on a variety of seminal issues that may significantly impact the ability of the world's first permanent international criminal court to carry out its mandate efficiently and effectively. While many of these decisions may ultimately be subject to review by the Appeals Chamber, this will normally not occur until a final judgment is issued, which is likely to take a number of years. Thus, the only circumstances under which the Appeals Chamber will have the opportunity to review decisions of the Pre-Trial Chambers (PTCs) in the near future will be if those decisions reach the chamber on interlocutory appeal.

This report examines the early jurisprudence of the Pre-Trial Chambers under Article 82(1)(d), which is the provision of the Rome Statute governing discretionary interlocutory appeals. To date, the Pre-Trial Chambers have only certified in full a single decision for interlocutory appeal under Article 82(1)(d), while granting review of select rulings in four additional decisions; on the other hand, the Chambers have outright rejected sixteen other applications for appellate review. Moreover, each of the issues certified for interlocutory review to date relate to the same central question – namely, the disclosure of certain confidential evidence by the Prosecutor to the Defense prior to a confirmation hearing – meaning that essentially only one topic has been permitted to receive interim review under the discretionary standard. At the same time, a number of the applications rejected under Article 82(1)(d) have raised compelling issues seemingly worthy of early appellate review, including those regarding the relative statutory authority of different organs of the Court and the safeguarding of key defense rights.

Based on a review of the drafting history of Article 82(1)(d), the rules and jurisprudence of other international criminal bodies, and a critical analysis of significant ICC Pre-Trial Chamber decisions that have not been allowed to go up on appeal, this report recommends that the PTCs adopt a more generous approach to requests for discretionary interlocutory review, particularly in the early years of the Court's operations. This approach may not only save time by avoiding confusion and resolving unnecessarily time-consuming procedures in the near term, but also help ensure the long-term credibility and integrity of the Court.

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