

# INTERLOCUTORY APPELLATE REVIEW OF EARLY DECISIONS BY THE INTERNATIONAL CRIMINAL COURT



WAR CRIMES RESEARCH OFFICE  
International Criminal Court  
Legal Analysis and Education Project  
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## ACKNOWLEDGMENTS

Susana SáCouto, WCRO Director, and Katherine Cleary, WCRO Assistant Director prepared this report, with contributions from former WCRO Assistant Director Anne Heindel, WCL alumna Addy Paola Velasquez, WCL LL.M. student J. Patrick Burns and WCL J.D. student Solomon Shinerock, and additional assistance from WCL J.D. students Peter Chapman and Angela Edman and WCRO Staff Assistant Elizabeth Allan. We are grateful for the generous support of the John D. and Catherine T. MacArthur Foundation, the Open Society Institute and the Washington College of Law (WCL), without which this report would not have been possible. We also wish to thank all those who gave generously of their time to this project, including WCL Professor Robert Goldman and the members of the WCRO's ICC Advisory Committee: Siri Frigaard, Chief Public Prosecutor for the Norwegian National Authority for Prosecution of Organized and Other Serious Crimes; Justice Richard Goldstone, former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR); Daniel Nsereko, University of Botswana Professor of International Law and former Uganda Government Delegate to the Assembly of States Parties to the Statute of the International Criminal Court; Diane Orentlicher, WCL Professor; and Judge Patricia Wald, former Judge of the ICTY.

## ABOUT THE WAR CRIMES RESEARCH OFFICE

The core mandate of the War Crimes Research Office is to promote the development and enforcement of international criminal and humanitarian law, primarily through the provision of specialized legal assistance to international criminal courts and tribunals. The Office was established by the Washington College of Law in 1995 in response to a request for assistance from the Prosecutor of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), established by the United Nations Security Council in 1993 and 1994 respectively. Since then, several new internationalized or “hybrid” war crimes tribunals—comprising both international and national personnel and applying a blend of domestic and international law—have been established under the auspices or with the support of the United Nations, each raising novel legal issues. This, in turn, has generated growing demands for the expert assistance of the WCRO. As a result, in addition to the ICTY and ICTR, the WCRO has provided in-depth research support to the Special Panels for Serious Crimes in East Timor (Special Panels), the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC).

The WCRO has also conducted legal research projects on behalf of the Office of the Prosecutor (OTP) of the International Criminal Court (ICC). However, in view of how significant the impact of the Court's early decisions are likely to be on the ICC's future and in recognition of the urgent need for analytical critique at this stage of the Court's development, in 2007 the WCRO launched a new initiative, the ICC Legal Analysis and Education Project, aimed at producing public, impartial, legal analyses of critical issues raised by the Court's early decisions. With this initiative, the WCRO is taking on a new role in relation to the ICC. While past projects were carried out in support of the OTP, the WCRO is committed to analyzing and commenting on the ICC's early activities in an impartial and independent manner. In order to avoid any conflict of interest, the WCRO did not engage in legal research for any organ of the ICC while producing this report, nor will the WCRO conduct research for any organ of the ICC prior to the conclusion of the ICC Legal Analysis and Education Project. Additionally, in order to ensure the objectivity of its analyses, the WCRO created an Advisory Committee comprised of the experts in international criminal and humanitarian law named in the acknowledgments above.

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### COVER PHOTOGRAPHS (from left)

*A Darfuri rebel fighter sets aside his prosthetic legs. Abeche, Chad, 2007, courtesy Shane Bauer*

*The International Criminal Court building in The Hague, courtesy Aurora Hartwig De Heer*

*A village elder meets with people from the surrounding area. Narkaida, Darfur, Sudan, 2007, courtesy Shane Bauer*

*Archbishop Desmond Tutu and Minister Simone Veil at the second annual meeting of the Trust Fund for Victims, courtesy ICC Press Office*

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THE INTERNATIONAL CRIMINAL  
COURT**

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International Criminal Court  
Legal Analysis and Education Project  
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## I. EXECUTIVE SUMMARY

Within just over 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, Thomas Lubanga Dyilo, 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 will significantly impact the structure and operations of the world's first permanent international criminal court. 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.

Article 82 of the Rome Statute sets forth the conditions pursuant to which interlocutory appeal may be made to the ICC Appeals Chamber.<sup>1</sup> Parties may make appeals as of right with respect to decisions on jurisdiction or admissibility, decisions granting or denying release from custody, and decisions of the Pre-Trial Chamber to take measures for the preservation of evidence that it deems essential for the defense at trial.<sup>2</sup> All other interlocutory appeals may be made only with the permission of the Pre-Trial or Trial Chamber

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<sup>1</sup> See Rome Statute of the International Criminal Court, *adopted* on 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force*, 1 July 2002, Art. 82, U.N. Doc. A/CONF.183/9 (1998) [hereinafter "Rome Statute"].

<sup>2</sup> *Id.* at Art. 82(1)(a) – (c).

that issued the impugned decision.<sup>3</sup> 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.<sup>4</sup>

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 – meaning that essentially only one topic has been permitted to receive interim review under the discretionary standard.

In this report, we describe certain aspects of the Pre-Trial Chambers' approach to Article 82(1)(d) that appear to be unduly restrictive, and recommend a more generous approach to the certification of discretionary interlocutory appeals, particularly in the early years of the ICC's operations.

### **Interlocutory Appeals Generally**

As a general rule in both domestic and international courts, leave to file for interlocutory appeal is an exceptional remedy due to the fact

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<sup>3</sup> *Id.* at Art. 82(1)(d).

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

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 under which interlocutory appeals are permitted helps avoid frivolous appeals brought primarily for the purpose of delay.

On the other hand, there are a number of circumstances under which it would be *more* efficient to have a decision reviewed immediately, particularly if a reversal will either make a costly and lengthy trial unnecessary or significantly alter the substance of that trial. For example, domestic and international courts commonly permit decisions involving questions of jurisdiction to be immediately reviewed on appeal because without jurisdiction, the court has no authority to conduct the trial. An additional benefit of permitting interlocutory appeal is the ability of the parties to receive authoritative rulings on unsettled issues of law, which, particularly in the early years of a court's operation, assists the litigants in preparing their cases and could reduce unnecessary litigation during trial. Finally, interlocutory appellate review may help to ensure consistent application of the law across cases before the same court.

### **Restrictive Approach of the Pre-Trial Chambers under Article 82(1)(d)**

From their earliest rulings on applications seeking leave to appeal decisions under Article 82(1)(d), the Pre-Trial Chambers of the ICC have expressly adopted a restrictive interpretation of that provision. In particular, the Chambers seem to have adopted a particularly narrow reading of the "fairness" prong of the provision, which has had the effect of disqualifying a substantial majority of applications under Article 82(1)(d). The Chambers have supported their approach by

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 “fairness” prong of Article 82(1)(d) is unlikely to be met where the relevant question relates to the apportionment of powers between the OTP and the Pre-Trial Chamber. Importantly, if matters relating to the division of authority between Pre-Trial judges and the OTP do not qualify for interlocutory appeal, they may repeatedly escape review by the Appeals Chamber, as questions of relative authority between organs of the Court are unlikely to be implicated in a final judgment against any given suspect.

More recently, Pre-Trial Chamber I refused to grant applications from both the Prosecution and Defense seeking to appeal the confirmation of charges against Thomas Lubanga Dyilo on the grounds that the

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 chance to comment upon, the amendment to the charges. In dismissing the parties' requests for leave to appeal, the PTC reasoned, in part, that appellate review of its challenged action was unnecessary because the parties could request that the Trial Chamber reverse the amendments before delivering judgment on the charges. Yet, permitting the Trial Chamber to remedy the *result* of the PTC's challenged action does not settle the question of whether the action itself – namely, amending the charges against the accused on its own initiative, without readily apparent statutory authority, and without prior notice to the parties – was permissible. Thus, by denying the parties' request to obtain interlocutory review of its decision, the Pre-Trial Chamber precluded not only an immediate resolution of the dispute existing in the case against Mr. Lubanga, but also prevented the Appeals Chamber from issuing an authoritative decision on a significant question regarding the PTCs' statutory authority that is likely to arise in future proceedings.

The third decision we discuss, which is PTC I's refusal to allow interim review of its January 2006 decision holding that victims have a general right to participate during the investigation phase of the ICC's proceedings, highlights two issues particularly relevant to the PTCs' restrictive approach to requests for leave to obtain interlocutory review. First, PTC I rejected an argument from the Prosecutor claiming that the decision affected the fair conduct of proceedings within the meaning of Article 82(1)(d) – specifically, that the decision would open the door for the improper submission of evidence – on the grounds that the OTP had not provided “concrete evidence” that this would in fact occur. Second, PTC I refused to even consider an argument from the OTP that the January 2006 decision would

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 leave to obtain interlocutory review of decisions on a more generous basis, even under standards identical or very similar to that of the ICC.

In their early years of operations, both the ICTY and the Special Court for Sierra Leone ensured that issues critical to the very legitimacy of the court received interlocutory appellate review. For example, when Dusko Tadic, the first suspect to be tried before the ICTY, sought interlocutory appeal of a decision dismissing challenges to the legality of the tribunal and its claim of primacy over national courts, the ICTY's rules provided that only decisions challenging the jurisdiction of the tribunal could be reviewed on an interim basis. Nevertheless, the ICTY Appeals Chamber held that the interlocutory appeal provision was broad enough to encompass challenges to the tribunal's legitimacy and its relationship with national courts, thereby permitting the appellate chamber to rule on a number of foundational issues authoritatively at the outset of the ICTY's operations. The Special Court for Sierra Leone took a similarly flexible approach early on, applying its unique rule governing appellate review of pre-trial motions broadly enough to allow seventeen of the first twenty-one motions brought before the Special Court to be determined by the

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 value in engaging the ICC Appeals Chamber to settle certain fundamental issues raised by the operations of the Court in its early years. While not every early decision merits interlocutory review, our

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 confines of Article 82(1)(d). The following recommendations therefore address the issue of how the Pre-Trial Chambers might alter their interpretation of the Article 82(1)(d) to allow decisions such as those involving questions of authority, the protection of the parties' statutory rights, and the expeditious conduct of proceedings, to reach appellate review in the early years of the Court's operations.

- Adopt a Broader Interpretation of "Fairness": Rather than limiting the term "fair" under Article 82(1)(d) to implicate primarily "equality of arms" concerns between the Prosecution and Defense, as suggested by some of the Pre-Trial Chambers' decisions, the PTCs could adopt an approach similar to that of the *ad hoc* tribunals, which have found fairness concerns to be affected by issues involving the statutory rights of the accused or the duties of the Prosecutor. In addition, certain actions of the Pre-Trial Chambers themselves may also implicate fairness concerns, particularly where the division of authority in the context of an investigation is implicated, or where the parties challenge an action of the Chamber as *ultra vires*.
- Treat Issues that Affect the Expeditious Conduct of Proceedings as an Aspect of 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 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 ruling prior to final judgment disposing of all issues in a case, these bodies, as a general rule, treat interlocutory appeal as an exceptional remedy. As one practitioner experienced in international criminal proceedings explains, “[i]n many cases, interlocutory appeals may be considered disruptive of the proceedings, particularly if there are many issues on which parties are seeking such appeals, and particularly once trial has actually commenced.”<sup>5</sup> An overly liberal approach to interlocutory review of decisions may also tax the resources of a court’s appellate body, particularly when a substantial number of final judgments are also before the appeals chamber for review. In addition, limiting the circumstances under which interlocutory appeals are permitted helps avoid frivolous appeals brought primarily for the purpose of delay.

On the other hand, in jurisdictions where interlocutory appeals are “unknown or rare,” parties “may be required to defer any appellate proceedings until final judgment at first instance, by which time, depending on the course that the proceedings have taken, many issues may have become moot or irrelevant.”<sup>6</sup> As a result, interim appellate review may in some cases be warranted on the ground that, if an issue is not raised on interlocutory appeal and subsequently becomes moot, the court’s appellate body may never review the issue, even if it is one

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<sup>5</sup> Christopher Staker, *Appeal and Revision*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 869, 1031 (Otto Triffterer ed., 1999).

<sup>6</sup> *Id.* at 1031-32.

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 “early resolution of a point of law may render unnecessary a lengthy and costly trial on certain allegations of fact.”<sup>7</sup>

Finally, permitting interlocutory appeal under some circumstances will help to ensure the consistent application of the law across cases in the same court. For example, in the context of a discussion on interlocutory appeals in the *ad hoc* criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), one commentator has noted that the Appeals Chambers have played “an all-important role in ensuring consistent case law,” including in the “interpretation of the Rules of Procedure and Evidence among ICTY and ICTR Trial Chambers, as well as between ICTY and ICTR Trial Chambers, where the applicable statutory provision or Rule is the same.”<sup>8</sup>

#### B. *ARTICLE 82(1)(d) OF THE ROME STATUTE*

As adopted, Article 82 of the Rome Statute sets forth the circumstances under which a party may appeal against a decision that is not an acquittal, a conviction, or a sentence. Specifically, under the heading “[a]ppel against other decisions,”<sup>9</sup> Article 82(1) provides that

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<sup>7</sup> *Id.* at 1032. See also *Prosecutor v. Delalic, et al.*, Judgment, IT-96-21-A, ¶ 122 (Trial Chamber, 20 February 2001) (“The purpose of an appeal, whether on an interlocutory or on a final basis, is to determine the issues raised with finality.”).

<sup>8</sup> Xavier Tracol, *The Appeals Chambers of the International Criminal Tribunals*, 12 *Crim. L.F.* 137, 163, 2001 (noting that the ICTY Appeals Chamber has held “there is no reason why interlocutory decisions of the Appeals Chamber should be considered, as a matter of principle, as having any lesser status than a final decision on appeal.”) (citing *Prosecutor v. Delalic, et al.*, Judgment, IT-96-21-A, ¶ 122 (Trial Chamber, 20 February 2001)).

<sup>9</sup> Rome Statute, *supra* n. 1, Art. 82. By contrast, Article 81 of the Rome Statute is entitled “[a]ppel against decision of acquittal or conviction or against sentence.” *Id.* Art. 81.

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-Trial Chamber to act on its own initiative under Article 56, paragraph 3;<sup>10</sup>
- (d) 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.<sup>11</sup>

Thus, a party before the ICC has an automatic right to obtain interlocutory appeal of non-final judgments dealing with any of the issues specified in subparts (a), (b), and (c) of Article 82(1). Subpart (d) allows a party to make an interlocutory appeal under other circumstances, but the party's ability to do so is subject to the discretion of the Pre-Trial or Trial Chamber.<sup>12</sup> For an appeal to be

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<sup>10</sup> Article 56(3) provides as follows: "(a) Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the Defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative. (b) A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis." Rome Statute, *supra* n. 1, Art. 56(3).

<sup>11</sup> Rome Statute, *supra* n. 1, Art. 82(1).

<sup>12</sup> In the negotiation of the Rules of Procedure and Evidence, which did not take place until after the Rome Statute was finalized, at least "one delegation thought it would be useful to include criteria clarifying the types of decision that may be appealed under [Article 82(1)(d)]" in the Rules. See Helen Brady, *Appeal Proceedings*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE*, 590 (Roy S. Lee ed., 2001). However, a

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 International Law Commission (ILC) in 1994, did not include any provision for appeals made on an interlocutory basis. However, in the words of one commentator, “as the procedural regime of what would ultimately be the Rome Statute became increasingly complex, it became apparent that an article on interlocutory appeals was desirable.”<sup>13</sup> Indeed, the ILC Working Group on a Draft Statute for an International Criminal Court broached the possibility of allowing for interlocutory appeals in the Draft Statute

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“strong view prevailed that the Court should resolve this, and that criteria should not be set out in the Rules.” *Id.*

<sup>13</sup> Leila Nadya Sadat, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW*, 243 (M. Cherif Bassiouni, *et al.* eds., Transnational Publishers, Inc. 2002).

as early as 1993,<sup>14</sup> although it ultimately decided to return to the question at a later stage.<sup>15</sup>

The drafters first included a provision on interlocutory appeals in an April 1998 version of the Draft Statute,<sup>16</sup> and the article was included

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<sup>14</sup> 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.*

<sup>15</sup> 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 expressed the view that allowing for some form of appellate review prior to the final judgment might be necessary to protect the due process rights of the accused. *See Ad hoc* Committee on the Establishment of an International Criminal Court, Session 3-13 April 1995, *Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court*, U.N. Doc A/AC.244/1, at 24, 20 March 1995; *id.*, Addendum at 25, U.N. Doc. A/AC.244/1/Add.2. Finally, the United States submitted a “non-paper” in August 1995 recommending that, as in the rules of the *ad hoc* criminal tribunal for the former Yugoslavia, “there should be a provision permitting interlocutory appeal of [preliminary] rulings that substantially or wholly impair the ability of the prosecutor to bring an accused to trial.” U.S. Non-Paper on Rules of Investigation, *Procedure & Evidence for the International Criminal Court*, 21 August 1995, at 33-34. In that same submission, in a section entitled “Motions for Extraordinary Relief and Interlocutory Appeal,” the U.S. wrote: “Rules are needed permitting the Prosecutor to appeal decisions of the Trial Chamber dismissing all or part of an accusation (this will be particularly necessary in cases of challenge to the Court’s jurisdiction), or excluding important evidence. In addition, to cover those situations where neither appeal nor revision is available and a lower Chamber’s ruling would cause an immediate irreparable injury, a catch-all provision permitting review in the discretion of the Appeals Chamber would be useful.” *Id.* at 58.

<sup>16</sup> 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). *See also* Sadat, *supra* n. 13 at 244 (noting

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).<sup>17</sup> 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.<sup>18</sup> 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."<sup>19</sup> 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.<sup>20</sup>

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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.").

<sup>17</sup> 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.

<sup>18</sup> 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).

<sup>19</sup> *Id.*

<sup>20</sup> 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.<sup>21</sup> 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."<sup>22</sup> 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.*

<sup>21</sup> *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.*

<sup>22</sup> 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 319, *Proposal submitted by Kenya*, U.N. Doc. A/CONF.183/C.1/WGPM/L.46 (submitted 3 July 1998).

Chamber, an immediate resolution of the Appeals Chamber may materially advance the trial.”<sup>23</sup>

On 10 July 1998, the Drafting Committee produced a revised draft statute that, without explanation or other commentary, adopted the Canadian proposal as the language governing discretionary interlocutory appeals.<sup>24</sup> According to participants in the negotiations, the final version of Article 82(1)(d) represents “an acknowledgement that interlocutory appeals must be allowed in cases where to do otherwise would be unfair; however, such appeals must not be allowed to paralyze the process.”<sup>25</sup>

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<sup>23</sup> *Id.*, *Proposal submitted by Canada*, U.N. Doc. A/CONF.183/C.1/WGPM/L.47 (submitted 3 July 1998).

<sup>24</sup> *Id.*, *Working Paper on Article 81*, U.N. Doc. A/CONF.183/C.1/WGPM/L.72 (submitted 10 July 1998).

<sup>25</sup> Brady & Jennings in Lee, *supra* n. 20 at 300. *See also* Sadat, *supra* n. 13 at 244 (stating that Article 82(1)(d) is a “compromise between the need for appellate guidance on crucial issues and the need for the trial and pre-trial proceedings to proceed expeditiously.”).

### 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.<sup>26</sup> 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.<sup>27</sup> Thus, the early decisions of the Pre-Trial Chambers<sup>28</sup> 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

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<sup>26</sup> Rome Statute, *supra* n. 1, Art. 82(1)(d).

<sup>27</sup> *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.

<sup>28</sup> 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.”<sup>29</sup> Both Pre-Trial Chamber I and II have shown a willingness to do so,<sup>30</sup> 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.<sup>31</sup> 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).<sup>32</sup> 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,

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<sup>29</sup> Rome Statute, *supra* n. 1, Art. 21(2) (“The Court may apply principles and rules of law as interpreted in its previous decisions.”).

<sup>30</sup> *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).

<sup>31</sup> *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”].

<sup>32</sup> *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.<sup>33</sup>

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.<sup>34</sup> 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<sup>35</sup> – 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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<sup>33</sup> *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 The Prosecutor v. Joseph Kony, et al.*, Decision on Prosecutor's applications for leave to appeal dated the 15<sup>th</sup> day of March 2006 and to suspend or stay consideration of leave to appeal dated the 11<sup>th</sup> day of May 2006, ICC-02/04-01/05-90 (Pre-Trial Chamber II, 10 July 2006) ¶¶ 16-18 [hereinafter "*Prosecutor v. Kony*, PTC II, 10 July 2006"] (generally discussing the Chamber's understanding that "interlocutory appeals are meant to be admissible only under limited and very specific circumstances.").

<sup>34</sup> *Situation in Uganda*, PTC II, 19 August 2005, *supra* n. 31, ¶ 16.

<sup>35</sup> *See supra* n. 22 and accompanying text.

proposal ultimately adopted as Article 82(1)(d).<sup>36</sup> 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.<sup>37</sup> 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."<sup>38</sup> Nevertheless, negotiators also made clear that interlocutory appeals "must be allowed where to do otherwise would be unfair,"<sup>39</sup> suggesting that while laying out limited circumstances for interlocutory appeals, the provision was not intended to be approached in an unduly restrictive manner.<sup>40</sup> Similarly, the fact that the drafters

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<sup>36</sup> *Situation in Uganda*, PTC II, 19 August 2005, *supra* n. 31, ¶ 16.

<sup>37</sup> *Prosecutor v. Kony*, PTC II, 10 July 2006, *supra* n. 33, ¶ 21. After reviewing this history, PTC II concluded that "one could infer that the ultimate purpose was to limit interlocutory appeals to decisions involving issues with a bearing on the conduct of proceedings related to criminal responsibility for offences under the jurisdiction of the Court." *Id.*

<sup>38</sup> Brady & Jennings in Lee, *supra* n. 20 at 300.

<sup>39</sup> *Id.*

<sup>40</sup> This interpretation seems to be supported by Preparatory Commission discussions held a few years after the adoption of the Rome Statute, when the Commission's Working Group on a Draft Budget for the First Financial Year of the Court was debating the projected budgetary needs of the ICC's early operations. See PCNICC/2002/L.1/Rev.1/Add.1, *Proceedings of the Preparatory Commission at its ninth session (8-19 April 2002)*, Annex II Revised draft budget for the first financial period of the Court, ¶ 75, 26 April 2002 ("In the first financial period, judicial proceedings may primarily take place in the pre-trial phase and on (interlocutory)

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,<sup>41</sup> 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.*”).

<sup>41</sup> *See* Situation in the Democratic Republic of Congo in the Case of *The Prosecutor v. Germain Katanga*, Decision on the Prosecution Request for Leave to Appeal the First Decision on Redactions, ICC-01/04-01/07-108 (Pre-Trial Chamber I, 14 December 2007) [hereinafter “*Prosecutor v. Katanga*, PTC I, 14 December 2007”].

applications were allowed up on appeal.<sup>42</sup> 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.<sup>43</sup> In its first

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<sup>42</sup> See Situation in the Democratic Republic of Congo in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution Motion for Reconsideration and, In the Alternative, Leave to Appeal, ICC-01/04-01/06 (Pre-Trial Chamber I, 23 June 2006) [hereinafter "*Prosecutor v. Lubanga*, PTC I, 23 June 2006"]; Situation in the Democratic Republic of Congo in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Second Defence Motion for Leave to Appeal, ICC-01/04-01/06-489 (Pre-Trial Chamber I, 28 September 2006); Situation in the Democratic Republic of Congo in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Third Defence Motion for Leave to Appeal, ICC-01/04-01/06 (Pre-Trial Chamber I, 4 October 2006); Situation in the Democratic Republic of Congo in the Case of *The Prosecutor v. Germain Katanga*, Decision on the Defence Motion for leave to Appeal the First Decision on Redactions, ICC-01/04-01/07-116 (Pre-Trial Chamber I, 19 December 2007) [hereinafter "*Prosecutor v. Katanga*, PTC I, 19 December 2007"].

<sup>43</sup> *Prosecutor v. Lubanga*, PTC I, 23 June 2006, *supra* n. 41, ¶ 31. Indeed, in granting leave to appeal the second of the two decisions, the Pre-Trial Chamber justified its decision in part on the fact that the issues raised therein were "closely related" to issues already before the Appeals Chamber as a result of the first decision. *Prosecutor v. Lubanga*, PTC I, 4 October 2006, *supra* n. 41, at 10-11. Furthermore, the third and fourth successful applications for leave to obtain interlocutory appeal raised questions as to whether Pre-Trial Chamber I was properly implementing the very decisions issued by the Appeals Chamber on matters raised in the first and second successful applications for interlocutory appeal. See, e.g., *Prosecutor v. Katanga*, PTC I, 14 December 2007, at 7 (granting leave to appeal under Article 82(1)(d) in relation to, *inter alia*, the issue of "whether the Single Judge erred in the application of the test prescribed by the Appeals Chamber in its 14 December 2006 Decisions...") (referring to Situation in the Democratic Republic of Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81," ICC-01/04-01/06-773 (Appeals Chamber, 14 December 2006), and Situation in the Democratic Republic of Congo in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81," ICC-01/04-01/06-774 (Appeals Chamber, 14 December 2006)); *Prosecutor v. Katanga*, PTC I, 19 December 2007 (referencing Situation in the Democratic Republic of Congo in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence," ICC-01/04-01/06-568 (Appeals

decision approving such issues for interlocutory review, the Chamber reasoned that such issues significantly affected the “fairness” of the proceedings because “non-disclosure could affect the ability of the Defence to fully challenge the evidence of relevant Prosecution witnesses.”<sup>44</sup> Likewise, where the Prosecutor sought to restrict the disclosure of evidence and materials to which the Defense has a general right of access under the ICC Rules, the Chamber found that the issue affected the Defense’s “procedural right to be aware [and...] to have a say”<sup>45</sup> and thus directly related to the fairness of proceedings.

Even before PTC I approved any requests for interlocutory review, both Pre-Trial Chambers had indicated that issues implicating the “equality of arms” between the Prosecutor and Defense – such as those relating to disclosure – would be the very type of questions capable of fulfilling the “fairness” prong under Article 82(1)(d). For example, in its August 2005 decision announcing the Chamber’s restrictive approach to interlocutory appeals in general, PTC II wrote:

Fairness is closely linked to the concept of “equality of arms”, or of balance, between the parties during the proceedings. As commonly understood, it concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour.<sup>46</sup>

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Chamber, 13 October 2006)).

<sup>44</sup> *Prosecutor v. Lubanga*, PTC I, 23 June 2006, *supra* n. 42, ¶ 32. *See also* *Prosecutor v. Lubanga*, PTC I, 4 October 2006, *supra* n. 42, p. 12 (finding “that the redaction of the names of Prosecution sources could affect the ability of the Defence to fully challenge the Prosecution evidence at the confirmation hearing”).

<sup>45</sup> *Prosecutor v. Lubanga*, PTC I, 23 June 2006, *supra* n. 42, ¶ 55. Similarly, the Pre-Trial Chamber found that the question of whether the Prosecutor’s investigation generally must be completed prior to the confirmation hearing directly related to the fairness of the proceedings against the accused. *Id.* ¶ 43.

<sup>46</sup> *Situation in Uganda*, PTC II, 19 August 2005, *supra* n. 31, ¶ 30.

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.”<sup>47</sup> 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.<sup>48</sup>

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<sup>47</sup> *Situation in DRC*, PTC I, 31 March 2006, *supra* n. 30, ¶ 38.

<sup>48</sup> Although Article 82(1)(d) permits interlocutory appellate review where an issue is likely to affect *either* the fair and expeditious conduct of the proceedings *or* the outcome of the trial, the majority of applications for discretionary interlocutory review have not included an argument under the second alternative of the first prong, and thus few decisions discuss the “outcome of the trial” standard. One explanation for the relative predominance of arguments under the “fair and expeditious conduct” standard to date is that many of the requests for interlocutory appeal have been filed in the context of a “situation,” as opposed to a “case,” meaning there is no single “trial” and thus no single “outcome” that might be affected. For further discussion on the distinction between a “situation” and a “case,” *see infra* n. 55. It should also be noted that, because most of the applications under Article 82(1)(d) are dismissed for failure to establish an effect on the fair and expeditious conduct of proceedings, or in a few instances on the outcome of the trial, under the first prong of the provision, the ICC’s jurisprudence to date includes very little discussion on the second prong, namely, the requirement that an immediate resolution by the Appeals Chamber would “materially advance” proceedings. *See, e.g., Situation in Uganda*, PTC II, 19 August 2005, *supra* n. 31, ¶ 52 (“Having found that neither the first nor the second limb of the first requirement for leave to appeal is satisfied, it would not be necessary for the Chamber to address the second requirement.”); *Situation in DRC*, PTC I, 31 March 2006, *supra* n. 30, ¶ 61 (“[T]he Chamber holds that since the first condition of the first requirement of [A]rticle 82(1)(d) has not been met, the Chamber need examine neither the second condition, relating the expeditiousness of the proceedings, nor the second requirement, consisting of reaching a determination as to whether the immediate resolution of the matter by the Appeals Chamber would materially advance the proceedings.”). While the two decisions granting leave to appeal under Article 82(1)(d) have made a finding that an immediate resolution of the relevant issues by the Appeals Chamber will “materially advance the proceedings,” there is no substantive discussion of the standard. *See Prosecutor v. Lubanga*, PTC I, 23 June 2006, *supra* n. 42, ¶¶ 34, 45, 57; *Prosecutor v. Lubanga*,

## 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 (OTP) – to be the “competent organ” to prepare requests for State cooperation in the arrest and surrender of suspects,<sup>49</sup> even though the relevant language of the Rome Statute and the ICC Rules of Procedure

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PTC I, 4 October 2006, *supra* n. 42, at 13-14. Furthermore, the PTCs have, at the time of this writing, never determined that an issue does affect the “fair and expeditious conduct of proceedings” or the “outcome of the trial,” and yet refused to certify the appeal on the ground that resolution by the Appeals Chamber would not materially advance the proceedings. The remainder of this report therefore includes little analysis under the “materially advance” prong of Article 82(1)(d), as it has yet to play a meaningful role in the PTCs’ approach to discretionary interlocutory appeals. It is nevertheless worth mentioning that the ICC Appeals Chamber has offered a reasonable interpretation of the requirement in *dicta* that will ideally be followed by the Pre-Trial and Trial Chambers in future decisions under Article 82(1)(d). See *Situation in DRC*, PTC I, 31 March 2006, *supra* n. 30. Specifically, the Appeals Chamber has found that, to satisfy the “materially advance” requirement, “the issue must be such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness or the proceedings or mar the outcome of the trial.” *Id.* ¶ 14. According to the Appeals Chamber, the word “advance” is a “crucial word,” the meaning of which is to “move forward, by ensuring that the proceedings follow the right course.” *Id.* ¶ 15. The decision continues: “[r]emoving doubts about the correctness of a decision of mapping a course of action along the right lines provides a safety net for the integrity of the proceedings.” *Id.* The Appeals Chamber therefore concludes: “[a] wrong decision on an issue in the context of Article 82(1)(d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process.” *Id.* ¶ 16. It should also be noted that,

<sup>49</sup> *Situation in Uganda*, PTC II, 19 August 2005, *supra* n. 31, ¶ 8.

and Evidence suggests that the PTC and OTP share overlapping authority in this area.<sup>50</sup>

In its application to the Pre-Trial Chamber seeking immediate appellate review under Article 82(1)(d), the Prosecutor argued, *inter alia*, that the decision implicated the fair conduct of proceedings by “substantially altering the duties and responsibilities of the Prosecutor and the Pre-Trial Chamber” during the investigation phase of the ICC’s operations.<sup>51</sup> The Chamber dismissed this argument, however, relying primarily on its strict interpretation of “fairness” described above and finding that in “general terms,” it was “hard to see how a merely procedural issue, such as the preparation and the transmission of a request for arrest and surrender, might impair or otherwise adversely affect the fairness of the proceedings.”<sup>52</sup> Furthermore, the Pre-Trial Chamber found it “debatable whether a question exclusively relating to the apportioning of powers between organs of the Court may qualify as an issue that pertains to or would ‘significantly affect the fair... conduct of proceedings.’”<sup>53</sup>

Notably, neither the *ad hoc* criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) nor the Special Court of Sierra Leone has a separate “pre-trial” chamber or analogous organ of

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<sup>50</sup> See, e.g., Rome Statute, *supra* n. 1, Art. 87(1) (providing that “the Court shall have the authority to make requests to States Parties for cooperation,” without assigning a particular organ of the Court to make the requests at the exclusion of the others); International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3 (2002), R. 176(2) (“The Registrar shall transmit the requests for cooperation made by the Chambers and shall receive the responses, information and documents from requested States. The Office of the Prosecutor shall transmit the requests for cooperation made by the Prosecutor and shall receive the responses, information and documents from requested States.”).

<sup>51</sup> *Situation in Uganda*, PTC II, 19 August 2005, *supra* n. 31, ¶ 32.

<sup>52</sup> *Id.* ¶ 29.

<sup>53</sup> *Id.* ¶ 33.

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<sup>54</sup> – 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.<sup>55</sup> 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.<sup>56</sup> Moreover, there is a risk that if issues arising in the context

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<sup>54</sup> See, e.g., Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 Am. J. Int'l Law 22, 25 (January 1999) (explaining that the Rome Statute's “provisions dealing with general principles and procedural issues are a hybrid of the common and the civil law”); Sadat, *supra* n. 13, at 243 (“The delegations that came together to craft the Rome Statute came from many different legal traditions and represented a myriad of national legal regimes, including, *inter alia*, countries in the civil law tradition [and] countries adhering to the common law tradition.”).

<sup>55</sup> In the context of the ICC, the Court's operations are divided into two broad categories: “situations” and “cases.” According to Pre-Trial Chamber I, “situations” are “generally defined in terms of temporal, territorial and in some cases personal parameters” and “entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such.” *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-tEN-Corr, ¶ 65 (Pre-Trial Chamber I, 17 January 2006). In other words, the “situation” refers to the operations of the ICC designed to determine whether crimes have been committed within a given country that should be investigated by the Prosecutor. By contrast, “cases” are defined as “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects” and entail “proceedings that take place after the issuance of a warrant of arrest or a summons to appear.” *Id.*

<sup>56</sup> Interestingly, the only other international criminal court currently in operation that

of a situation are not dealt with on interlocutory appeal, they may repeatedly escape review by the Appeals Chamber, as questions of relative authority between the organs of the Court are unlikely to be implicated in a final judgment against any given suspect whose trial eventually arises from a situation.

*b) Allegedly Ultra Vires Actions by a Pre-Trial Chamber*

Another decision that was not permitted up on interlocutory appeal was Pre-Trial Chamber I's decision confirming charges against the first accused brought before the ICC, Thomas Lubanga Dyilo.<sup>57</sup> Mr. Lubanga was originally charged by the Prosecutor with violating Article 8(2)(e)(vii) of the Rome Statute,<sup>58</sup> which prohibits "[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities" *during a non-international armed conflict*.<sup>59</sup> In November

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includes a role for judges in the context of an investigation – the Extraordinary Chambers in the Court of Cambodia (ECCC) – permits the Co-Prosecutors to automatically appeal any decision by the court's Co-Investigating Judges to a Pre-Trial Chamber, which retains the authority to reverse decisions of the Co-Investigating Judges. *See* Extraordinary Chambers in the Court of Cambodia, Internal Rules, *adopted on* 12 June 2007, R. 74(2) ("The Co-Prosecutors may appeal against all orders by the Co-Investigating Judges."). While the structure of the ECCC varies significantly from that of the ICC, it is nevertheless notable that at least some level of review is available where the Co-Investigating Judges make decisions in the context of an investigation that the Co-Prosecutors believe to be in error.

<sup>57</sup> Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06, ¶ 9 (Pre-Trial Chamber I, 29 January 2007) [hereinafter "*Prosecutor v. Lubanga*, PTC I, 29 January 2007"].

<sup>58</sup> Document Containing the Charges, *Prosecutor v. Lubanga*, ICC-01/04-01/06 (28 August 2006).

<sup>59</sup> Rome Statute, *supra* n. 1, at Art. 8(2)(e)(vii). Article 8 reads, in part: "(2) For the purpose of this Statute, 'war crimes' means: ... (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: ... (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities."

2006, a two week confirmation of charges hearing was held during which Mr. Lubanga was given the opportunity to argue that the evidence presented against him was insufficient to establish substantial grounds to believe that he had in fact violated Article 8(2)(e)(vii) of the Rome Statute.<sup>60</sup>

Two months later, in January 2007, PTC I issued its decision confirming charges against Mr. Lubanga. However, the charges confirmed by the Chamber were not the same as those found in the Document Containing the Charges against the accused, which had formed the substance of the confirmation hearing.<sup>61</sup> Instead, PTC I determined that, for a portion of the time period during which Mr. Lubanga allegedly violated the Rome Statute, the conflict was *international* rather than non-international in nature, and thus the Chamber confirmed the charges for that period of time under Article 8(2)(b)(xxvi),<sup>62</sup> which refers to the same conduct as Article 8(2)(e)(vii) but when committed in the context of an international armed conflict.<sup>63</sup> Notably, PTC I amended the charges on its own initiative and announced its decision in an oral ruling delivered several weeks after the conclusion of the confirmation hearing, even though Article 61(7) of the Rome Statute expressly requires that a Pre-Trial Chamber, if unable to confirm or deny a charge, adjourn the hearing and request the Prosecutor to consider amending a charge because the evidence

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<sup>60</sup> See generally *Prosecutor v. Lubanga*, PTC I, 29 January 2007, *supra* n. 57; Rome Statute, *supra* n. 1, Art. 67.

<sup>61</sup> *Prosecutor v. Lubanga*, PTC I, 29 January 2007, *supra* n. 57, at 156-57.

<sup>62</sup> *Id.*

<sup>63</sup> Rome Statute, *supra* n. 1, Art. 8(2)(b)(xxvi). Article 8 reads, in part: “(2) For the purpose of this Statute, ‘war crimes’ means: ... (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: ... (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.”

submitted appears to establish a different crime within the jurisdiction of the Court.<sup>64</sup> 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,”<sup>65</sup> the PTC acted beyond the scope of its statutory authority<sup>66</sup> and violated the accused’s right to a fair trial.<sup>67</sup> 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 constituted by non-State actors was a legal issue which had not been put to the parties before or during the confirmation hearing. The Defence submits that the conclusion of the Chamber was therefore predicated on a legally debateable [*sic*] issue, which would have transformed the nature of the submissions of the parties.<sup>68</sup>

The Prosecutor also argued that the Pre-Trial Chamber’s action

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<sup>64</sup> *Id.* Art. 61(7).

<sup>65</sup> Situation in the Democratic Republic of the Congo in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, Version publique expurgée de la requête de la Défense en autorisation d’interjeter appel de la Décision de la Chambre Préliminaire I du 29 janvier 2007 sur la confirmation des charges en conformité avec les décisions de la Chambre Préliminaire du 7 et 16 février 2007, ICC-01/04-01/06-836, ¶ 16 (Defence, 22 February 2007) [hereinafter “*Prosecutor v. Lubanga*, Defence Request for Leave to Appeal, 22 February 2007”].

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* ¶¶ 61-62, 71.

<sup>68</sup> *Id.* ¶ 14.

contradicted the “clear language of the Statute.”<sup>69</sup> 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.”<sup>70</sup> 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.”<sup>71</sup>

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.<sup>72</sup> However, while some comments were made by both the Prosecutor and Defense regarding the roles played by Uganda and Rwanda in the DRC conflict, the parties never received notice that the Pre-Trial Chamber was considering amending the charges against Mr. Lubanga, and thus at no point did the parties have an opportunity to submit formal arguments either on the nature of the amendment or on

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<sup>69</sup> Situation in the Democratic Republic of the Congo in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, Prosecutor’s Application for Leave to Appeal Pre-Trial Chamber I’s 29 January 2007 «*Décision sur la confirmation des charges*», ICC-01/04-01/06, ¶ 2 (OTP, 5 February 2007) [hereinafter “*Prosecutor v. Lubanga*, OTP Request for Leave to Appeal, 5 February 2007”].

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* ¶¶ 1-2.

<sup>72</sup> *Prosecutor v. Lubanga*, PTC I, 24 May 2007, *supra* n. 33, ¶ 43 (citing the confirmation of charges hearing transcript as follows: ICC-01-04-01-06-T-33-EN, p. 96, lines 12-23; ICC-01-04-01-06-T-44-EN, p. 73, lines 1-4; ICC-01-04-01-06-T-47-EN, p. 16, lines 12-20; and ICC-01-04-01-06-T-47-EN, p.49-51).

the PTC's authority to make the amendment.<sup>73</sup>

In addition to finding that fairness concerns were not implicated by its decision to alter the charges against Mr. Lubanga, the Pre-Trial Chamber also seems to have dismissed arguments that the decision would affect the outcome of the trial<sup>74</sup> by reasoning that “there is nothing to prevent the Prosecution or the Defence from requesting the Trial Chamber reconsider the legal characterisation of the facts.”<sup>75</sup> In other words, PTC I seemed satisfied that, even if its decision to amend the charges on its own initiative is found to be in error, the Trial Chamber might choose to correct the error before issuing a final judgment against the Accused, and therefore interlocutory review of the decision was unnecessary. However, there are two significant problems with this position.

First, the procedure by which the Trial Chamber would be able to re-amend the charges against Mr. Lubanga, as recognized by PTC I in its decision denying interlocutory appeal, falls under Regulation 55 of the Court's Regulations, which permits a Trial Chamber to change the “legal characterisation of facts” based on findings made during trial prior to rendering its final judgment.<sup>76</sup> Thus, the procedure would be

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<sup>73</sup> *See id.*

<sup>74</sup> For example, the Prosecution stressed in its application for leave to appeal the decision that, “under the terms of the Decision the Prosecution is forced to prosecute at trial a crime containing specific elements which the Prosecution considers not to be supported by the evidence currently in its possession,” leading to “different problematic scenarios at trial ranging from an acquittal for the crime envisaged in Article 8 (2) (b) (xxvi) if the Prosecution fails to adequately substantiate the existence of an international armed conflict, to a conviction for a different crime through a recharacterization of the facts by the Trial Chamber, if the Chamber considers that a distinct crime has been established by the evidence led.” *Prosecutor v. Lubanga*, OTP Request for Leave to Appeal, 5 February 2007, *supra* n. 69, ¶ 19.

<sup>75</sup> *Prosecutor v. Lubanga*, PTC I, 24 May 2007, *supra* n. 33, ¶ 44.

<sup>76</sup> Regulations of the Court, Adopted by the Judges of the Court on 26 May 2004, Fifth Plenary Session, ICC-BD/01-01-04, Chapter 5, The Hague, 17- 28 May 2004,

equivalent to an evaluation on the merits of the question whether Mr. Lubanga may be charged, based on the evidence, of “[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities” in an international armed conflict. The procedure would *not*, however, involve any evaluation of the claims forwarded by both the Prosecutor and the Defense that the Pre-Trial Chamber exceeded its statutory authority by the very act of altering the charges *proprio motu* following the conclusion of the confirmation of charges hearing. By not certifying the parties’ requests for interlocutory review of this decision, therefore, the issue of the Pre-Trial Chamber’s authority to substitute charges on its own initiative, and without providing the parties an opportunity to be heard on the proposed amendment, remains unsettled. Given that the ICC has a number of arrest warrants outstanding, and the Prosecutor is actively pursuing investigations in four countries, it is reasonable to assume that this issue may arise in the context of subsequent confirmation hearings before a final judgment is issued in the case against Mr. Lubanga. Moreover, if the Trial Chamber does in fact amend the charges against Mr. Lubanga to reflect those contained in the charging document, appellate review of PTC I’s decision will be moot.

Second, the Pre-Trial Chamber’s denial of interlocutory appeal on the grounds that any potential error might be fixed during trial disregards the fact that the PTC’s proposed remedy would likely cause significant delays to the proceedings, whereas an interlocutory decision by the Appeals Chamber would be in the interests of efficiency.<sup>77</sup> As PTC I

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at Reg. 55(1) [hereinafter “ICC Regulations”].

<sup>77</sup> As noted above, the International Commission of Jurists had advocated during the drafting of the Rome Statute for the availability of interlocutory appeals for the precise reason that interim review would “help expedite decision-making by avoiding subsequent appeals and re-trials caused by an improper decision at 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."<sup>78</sup> 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 to review and possibly re-amend the charges, on the other hand. In the former instance, the issue under review would require little factual analysis by the Appeals Chamber, as the issue is one of the Pre-Trial Chamber's statutory authority. Furthermore, a final decision on appeal would settle the nature of the charges against the Accused before trial proceedings begin, significantly affecting the parties' preparation and strategy.<sup>79</sup> Indeed, in its request for leave to appeal the confirmation of charges under Article 82(1)(d), the Defense expressly argued that,

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interlocutory stage." *See supra*, n. 15 (citing International Commission of Jurists, *Third ICJ Position Paper*, August 1995 at 64).

<sup>78</sup> *Prosecutor v. Lubanga*, PTC I, 24 May 2007, *supra* n. 33, ¶ 30. Indeed, as evident from the first prong of Article 82(1)(d) – allowing for interim review of decisions likely to affect the “fair and expeditious conduct of proceedings” – the efficiency implications of an interlocutory appeal are a factor to be considered in determining whether such appeal should be permitted. Rome Statute, *supra* n. 1, Art. 82(1)(d). The Pre-Trial Chambers' treatment of the “expeditious conduct” language in Article 82(1)(d) is explored in detail immediately below. *See infra*, n. 85 *et seq.* and accompanying text.

<sup>79</sup> For example, in its request for leave to obtain interlocutory appeal of PTC I's confirmation of the charges against Mr. Lubanga, the Prosecutor explained that it “has recognized from the outset of these proceedings the substantial involvement of third States in the DRC situation, namely Uganda and Rwanda,” but that “after an in-depth factual and legal analysis of all the available evidence, the Prosecution concluded that it could not establish before a Trial Chamber of this Court, in the context of proceedings aimed at establishing the individual criminal responsibility of a person, and not State responsibility, a sufficient nexus capable of supporting a finding beyond a reasonable doubt of the existence of an armed conflict of an international character.” *Prosecutor v. Lubanga*, OTP Request for Leave to Appeal, 5 February 2007, *supra* n. 69, ¶ 9. As a result of the PTC's decision, therefore, the Prosecutor will most likely need to continue to collect evidence in an effort to substantiate a charge it did not previously feel it could adequately prove.

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.”<sup>80</sup> 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.”<sup>81</sup> 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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<sup>80</sup> *Prosecutor v. Lubanga*, Defence Request for Leave to Appeal, 22 February 2007, *supra* n. 65, ¶ 64.

<sup>81</sup> 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 defence in accordance with article 67, paragraph 1 (b); and (b) If necessary, be given the opportunity to examine again, or have examined again, a previous witness, to call a new witness or to present other evidence admissible under the Statute in accordance with article 67, paragraph 1 (e).” ICC Regulations, *supra* n. 76, at Reg. 55(2) & Reg. 55(3).

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 Expeditionness 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).”<sup>82</sup> PTC I rejected this argument, not because the

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<sup>82</sup> *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.<sup>83</sup> 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.<sup>84</sup>

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.<sup>85</sup> 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 victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and (c) Fully respect the rights of persons arising under this Statute.” Rome Statute, *supra* n. 1, Art. 54(1).

<sup>83</sup> *Situation in DRC*, PTC I, 31 March 2006, *supra* n. 30, ¶ 44.

<sup>84</sup> ICC Rules, *supra* n. 50, R. 155.

<sup>85</sup> *Situation in DRC*, OTP Request for Leave to Appeal, 23 January 2006, *supra* n. 82, ¶ 32.

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.<sup>86</sup>

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.<sup>87</sup> 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."<sup>88</sup> As a result, PTC I never analyzed whether the potential impact of the challenged decision on the expeditiousness of

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<sup>86</sup> *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.*

<sup>87</sup> *Situation in DRC*, PTC I, 31 March 2006, *supra* n. 30, ¶ 44 (emphasis added).

<sup>88</sup> *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.<sup>89</sup> 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,"<sup>90</sup> with "observations" submitted on each application by the Prosecutor and Defense.<sup>91</sup> To date, more than 150 victims have applied to participate in proceedings arising from the investigation in the Democratic Republic of Congo alone, and there is no reason to expect these numbers will not continue to grow. Moreover, many of these victims have had to wait more than fifteen months to receive an initial decision

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<sup>89</sup> See, e.g., Situation in the Democratic Republic of Congo in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, Order Setting Out Schedule for Submissions and Hearings Regarding the Subjects that Require Early Determination, ICC-01/04-01/06 (Trial Chamber I, 5 September 2007). Notably, the Prosecutor also filed for leave to obtain interlocutory appeal of Pre-Trial Chamber II's decision granting victims general participation rights during the investigation phase of a situation, but that request was rejected on the grounds that the Prosecutor had not raised an "appealable subject." See *Situation in Uganda*, Decision on the Prosecution's Application for Leave to Appeal the 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-02/04-112 (Pre-Trial Chamber II, 12 December 2007).

<sup>90</sup> *Situation in DRC*, PTC I, 31 March 2006, *supra* n. 30, ¶ 47.

<sup>91</sup> See ICC Rules, *supra* n. 50, R. 89(1) ("In order to present their views and concerns, victims shall make written application to the Registrar, who shall transmit the application to the relevant Chamber. Subject to the provisions of the Statute... the Registrar shall provide a copy of the application to the Prosecutor and the Defence, who shall be entitled to reply within a time limit to be set by the Chamber.").

on their applications,<sup>92</sup> 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 Chambers have continued to apply the approach adopted by PTC I's decision rejecting interlocutory review of the January 2006 victim participation decision, refusing to certify other decisions likely to substantially impact the expeditious nature of proceedings based on the fact that an effect on "fairness" had not been established.<sup>93</sup> Indeed, this approach has been applied even after the ICC Appeals Chamber wrote in a July 2006 decision that "[t]he term 'fair' in the context of [A]rticle 82(1)(d) of

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<sup>92</sup> Situation in the Democratic Republic of Congo in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/105/06 in the case of *The Prosecutor v. Thomas Lubanga Dyilo* and of the investigation in the Democratic Republic of the Congo, No. ICC-01/04-01/06, pp. 2-3 (Pre-Trial Chamber I, 20 October 2006) (noting that approximately 65 victims had applied to participate in the DRC investigation and the *Lubanga* case between 31 July 2006 and 25 September 2006); *Situation in Democratic Republic of Congo*, Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 à a/0241/06 à a/0250/06, ICC-01/04-423 (Pre-Trial Chamber I, 24 December 2007) (issuing the first decision on victims' applications to participate during the investigation phase of the Democratic Republic of Congo situation since January 2006).

<sup>93</sup> See, e.g., *Prosecutor v. Kony, et al.*, PTC II, 10 July 2006, *supra* n. 33, ¶ 38; Situation in the Democratic Republic of Congo in the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Defence Request for Leave to Appeal Regarding the Transmission of Applications for Victim Participation, ICC-01/04-01/06-672-tEN, p. 7 (Pre-Trial Chamber I, 6 November 2006).

the Statute is associated with the norms of a fair trial,” one of which is “[t]he expeditious conduct of the proceedings.”<sup>94</sup>

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<sup>94</sup> *Situation in DRC*, Appeals Chamber, 13 July 2006, *supra* n. 27, ¶ 11 (emphasis added).

#### IV. RULES AND JURISPRUDENCE OF OTHER INTERNATIONAL CRIMINAL BODIES

##### A. *THE EVOLUTION OF RULES GOVERNING INTERLOCUTORY APPEALS IN OTHER INTERNATIONAL CRIMINAL BODIES*

As noted earlier, Pre-Trial Chamber II supported its initial adoption of a restrictive approach to Article 82(1)(d), in part, by citing its interpretation of the provision's drafting history.<sup>95</sup> In addition, the Chamber found support for its approach in the rules governing interlocutory appeals in the *ad hoc* criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) and the Special Court of Sierra Leone, saying that these bodies' rules demonstrate a general trend toward restricting the grounds for interlocutory appeals.<sup>96</sup> However, a more extensive examination of the history behind the rules of two of these courts – the ICTY and the Special Court for Sierra Leone – demonstrates that, particularly in their early years of operation, these bodies saw value in adopting a more generous approach to interlocutory certification.<sup>97</sup>

##### 1. International Criminal Tribunal for the former Yugoslavia

As initially adopted, the ICTY Rules of Procedure and Evidence did not make *any* provision for interlocutory appeal of non-final

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<sup>95</sup> See *supra* n. 34 *et seq.* and accompanying text.

<sup>96</sup> *Situation in Uganda*, PTC II, 19 August 2005, *supra* n. 31, ¶ 16. See also ICTY Rules of Procedure and Evidence, IT/32/Rev. 40, *as amended* 12 July 2007, R. 72(B) & R. 73(B); ICTR Rules of Procedure and Evidence, *as amended* 10 November 2006, R. 72(B) & R. 73(B).

<sup>97</sup> Throughout the early years of the *ad hoc* tribunals' operations, the ICTY and the ICTR shared a "joint" Appeals Chamber, meaning that although the rules of the ICTR did not permit discretionary interlocutory appeal of non-jurisdictional issues until 2003, interim appellate review of ICTY decisions likely provided guidance to the ICTR Trial Chambers prior to that time.

judgments, whether as of right or as a matter of discretion.<sup>98</sup> According to one commentator, the drafters believed that a consolidated appeal of all issues at the conclusion of a trial would be more efficient, and excluding interim review was “not considered to entail a significant delay in the appeal of preliminary decisions since the trials were expected to be concluded in a matter of months.”<sup>99</sup> However, it soon became clear that the validity of the ICTY’s establishment by the United Nations Security Council would be “challenged by at least the first defendant who came before it,” and some judges were of the view that “this type of challenge needed to be considered as a preliminary matter before proceeding with the consideration of a case.”<sup>100</sup>

The ICTY Rules were therefore amended to allow for interlocutory appeal as of right of decisions dismissing challenges to jurisdiction.<sup>101</sup> Notably, at least one State involved in the creation of the ICTY – the United States – believed the Rules should be expanded further, saying:

With no mechanism for resolving disputes prior to final judgment, critical legal rulings made by the trial chamber which are thereafter reversed may occasion the need to take substantial additional testimony... We believe that a

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<sup>98</sup> ICTY Rules of Procedure and Evidence IT/32, *adopted on* 11 February 1994.

<sup>99</sup> Virginia Morris & Michael P. Scharf, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA*, 553-54 (Transnational Publishers, Inc. December 1997).

<sup>100</sup> *Id.* at 554.

<sup>101</sup> See ICTY Rules of Procedure and Evidence, IT/32/Rev. 3, *as issued* 30 January 1995, R. 72(B) (“The Trial Chamber shall dispose of preliminary motions *in limine litis* and without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction.”). Under the Statutes of both the ICTY and the ICTR, the judges are vested with authority to amend the Rules of Procedure and Evidence. See Statute of the International Tribunal [ICTY], Art. 15, *adopted by* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1203 (1993); Statute of the International Tribunal for Rwanda, Art. 14, *annexed to* S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994).

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.<sup>102</sup>

Even with the limited opening created for interlocutory appeals based on jurisdictional issues, however, the ICTY Appeals Chamber accepted an application for interlocutory appellate review filed by the first suspect tried in the ICTY by adopting an expansive interpretation of the term “lack of jurisdiction.” Specifically, the Appeals Chamber determined that it had authority to review an interim appeal filed by Dusko Tadic, who sought review of a Trial Chamber decision dismissing, *inter alia*, the Defense’s challenges to the legality of the ICTY and the tribunal’s claim of primacy over national courts.<sup>103</sup> The Prosecutor challenged the authority of the Appeals Chamber to review the decision on an interlocutory basis, questioning:

whether the three grounds relied upon by Appellant really go to the jurisdiction of the International Tribunal, in which case only, could they form the basis of an interlocutory appeal. More specifically, can the legality of the foundation of the International Tribunal and its primacy be used as the building bricks of such an appeal?<sup>104</sup>

The Appeals Chamber answered this question in the affirmative, adopting what one commentator has described as “a broad

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<sup>102</sup> Morris & Scharf, *supra* n. 99, at 555-56, n. 1845 (citing U.S. comments on Rules Adopted by the Tribunal, May 2, 1994).

<sup>103</sup> *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, ¶ 2 (Appeals Chamber, 2 October 1995) (“Before the Trial Chamber, Appellant had launched a three-pronged attack: a) illegal foundation of the International Tribunal; b) wrongful primacy of the International Tribunal over national courts; c) lack of jurisdiction *ratione materiae*.”).

<sup>104</sup> *Id.* ¶ 5.

interpretation of the concept of jurisdiction.”<sup>105</sup> 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.”<sup>106</sup> Notably, however, the ICTY would subsequently take a much stricter approach under its rule permitting automatic interim appeal of jurisdictional decisions,<sup>107</sup> suggesting the judges were willing to adopt a broad interpretation of the rule, particularly when necessary to settle foundational issues directly relating to the legality and authority of the ICTY itself.

In 1996, the ICTY again increased the availability of interlocutory appellate review by granting the Appeals Chamber the discretion to review lower court decisions on non-jurisdictional issues upon a showing of “serious cause” by the party seeking review.<sup>108</sup> The Appeals Chamber later explained that the “serious cause” standard was intended as a “filter” that would prevent “the Appeals Chamber from being flooded with unimportant or unnecessary appeals which unduly prolong pretrial proceedings.”<sup>109</sup> At the same time, however, the fact

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<sup>105</sup> John Hocking, *Interlocutory Appeals before the ICTY*, in *ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD*, International Humanitarian Law Series, 465 (Richard May, *et al.*, eds., 2001).

<sup>106</sup> *Prosecutor v. Tadić*, Appeals Chamber, 2 October 1995, *supra*, n. 103, ¶ 6.

<sup>107</sup> See Hocking, *Interlocutory Appeals before the ICTY*, *supra* n. 105, at 464 (noting that “[s]ince the Tadic decision, a number of other cases have... unsuccessfully attempted to classify issues as jurisdictional before the Appeals Chamber.”).

<sup>108</sup> ICTY Rules of Procedure and Evidence, IT/32/Rev. 9, *as amended* June 25 and July 5, 1996, R. 72(B)(ii) (emphasis added).

<sup>109</sup> *Prosecutor v. Delalic*, Decision on Application for Leave to Appeal (Separate Trials), IT-96-21, ¶ 16 (Appeals Chamber, 14 October 1996). The appellate judges developed a three-part test to determine whether to accept an interim appeal. Specifically, the appellate judges considered whether: (i) the impugned decision was encompassed within the limited categories of preliminary motions enumerated in the Rules; (ii) the application was frivolous or otherwise pursued for an improper reason; and (iii) the applicant had demonstrated serious cause for certification. *Id.* ¶¶ 18-20.

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.”<sup>110</sup> 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.”<sup>111</sup>

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.<sup>112</sup> 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.<sup>113</sup> One year later, the ICTR, which previously allowed only jurisdiction-based interlocutory appeals, amended its

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<sup>110</sup> ICTY Rules of Procedure and Evidence, IT/32/Rev. 12, *as amended* 12 November 1997, R. 72(B) and R. 73(B).

<sup>111</sup> Hocking, *Interlocutory Appeals before the ICTY*, *supra* n. 105, at 462. Specifically, non-preliminary decisions could be appealed at the discretion of the Appeals Chamber: “(i) if the decision impugned would cause such prejudice to the case of the party seeking leave as could not be cured by the final disposal of the trial including post-judgment appeal; [or] (ii) if the issue in the proposed appeal is of general importance to proceedings before the Tribunal or in international law generally.” ICTY Rules of Procedure and Evidence, IT/32/Rev. 12, *as amended* 12 November 1997, R. 73(B).

<sup>112</sup> ICTY Rules of Procedure and Evidence, IT/32/Rev. 24, *as amended* 10-11 July 2002, R. 72(B)(ii) & R. 73(B).

<sup>113</sup> *Id.*

rules on interim appellate review to mirror those of the ICTY.<sup>114</sup> 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.”<sup>115</sup> 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.<sup>116</sup> 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

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

<sup>115</sup> Mark A. Drumbl & Kenneth S. Gallant, *Appeals in the ad hoc International Criminal Tribunals: Structure, Procedure, and Recent Cases*, 3 J. App. Prac. & Process 589, 595-96, September 2001.

<sup>116</sup> ICTR Rules of Procedure and Evidence, *as amended* 31 May 2001, R. 72(D), operative at the time of establishment of the Special Court (“Decisions on preliminary motions are without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction, where an appeal will lie as of right.”).

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.”<sup>117</sup> 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.<sup>118</sup>

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.”<sup>119</sup> 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.<sup>120</sup> 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

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

<sup>118</sup> 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.” Rules of Procedure and Evidence of the Special Court for Sierra Leone, *as amended* 7 March 2003, R. 73(B).

<sup>119</sup> *See, e.g., Prosecutor v. Norman, et al.*, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, SCSL-2003-08-PT, ¶ 12 (Appeals Chamber, 4 November 2003) [hereinafter, “*Prosecutor v. Norman*, Appeals Chamber, 4 November 2003”].

<sup>120</sup> *Id.*

certain pre-trial decisions while recognizing the need for the SCSL to operate efficiently, given its limited mandate and resources.<sup>121</sup>

A few months later – in August 2003 – the SCSL rule governing the practice of “fast track” appellate decision-making was amended again.<sup>122</sup> Under the current version of the rule, preliminary motions that “raise an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of a trial *shall be referred* to a bench of at least three Appeals Chamber Judges, where they will proceed to a determination as soon as practicable.”<sup>123</sup> Thus, the Trial Chamber is now *required* immediately to refer for appellate review issues that, in the determination of that Chamber, will affect the fair and expeditious conduct of the proceeding or the outcome of a trial. Moreover, the rule no longer requires a

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<sup>121</sup> *Id.* The Prosecutor, Registrar, and all judges were provided with three year terms by the Special Court’s Statute. See Statute of the Special Court for Sierra Leone, Art. 13(3), Art. 15(3) & Art. 16(3), *annexed to* Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002. Furthermore, the Appeals Chamber has interpreted this to imply that three years “is an appropriate time frame in which to deal at least with the initial indictees.” *Prosecutor v. Norman*, Appeals Chamber, 4 November 2003, *supra* n. 119, ¶ 12. Finally, the Security Council Resolution establishing the Special Court confirms the agreement of the international community that expedited justice is appropriate for the Special Court, citing the need “to expedite the process of bringing justice and reconciliation to Sierra Leone and the region.” UN Security Council Resolution 1315, U.N. Doc S/Res/1315, Preamble, ¶¶ 1, 8(b) (14 August 2000); Secretary General, *Report of the Secretary General on the Establishment of a Special Court for Sierra Leone*, ¶¶ 7, 42, 74, U.N. Doc. S/2000/915 (4 October 2000).

<sup>122</sup> Rules of Procedure and Evidence of the Special Court for Sierra Leone, *as amended* 1 August 2003, R. 72(F).

<sup>123</sup> *Id.* R. 72(F) (emphasis added). Note that the new rule is not one of automatic referral, as it is still up to the Trial Chamber to determine whether the relevant motion fits the criteria for referral. See *Prosecutor v. Norman*, Appeals Chamber, 4 November 2003, *supra* n. 119, ¶ 13 (“The referral requires a judicial determination: the Rule does not turn the Trial Chamber into a post box.”).

determination by the Trial Chamber that an immediate resolution by the Appeals Chamber will materially advanced the proceedings.<sup>124</sup>

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.<sup>125</sup>

Among the early issues receiving review from the Appeals Chamber was a challenge to the very use of the “fast track” procedure itself.<sup>126</sup> Other motions receiving immediate review from the appellate judges of the Special Court were challenges to the court’s constitutionality;<sup>127</sup> 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;<sup>128</sup> claims of judicial bias;<sup>129</sup> and

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<sup>124</sup> 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.

<sup>125</sup> Nina H. B. Jorgensen, *The Early Jurisprudence of the Special Court for Sierra Leone from the Perspective of the Rights of the Accused*, 5 ERA-Forum 545, 547 (December 2004).

<sup>126</sup> *See, e.g., Prosecutor v. Norman*, Appeals Chamber, 4 November 2003, *supra* n. 119.

<sup>127</sup> *See, e.g., Prosecutor v. Norman, et al.*, Decision on Constitutionality and Lack of Jurisdiction, SCSL-2004-14-AR72(E) (Appeals Chamber, 13 March 2004).

<sup>128</sup> *See, e.g., Prosecutor v. Kondewa*, Decision on Lack of Jurisdiction / Abuse of Process: Amnesty Provided by the Lomé Accord, SCSL-2004-14-AR72(E) (Appeals

questions as to whether the recruitment of child soldiers is a crime under international law.<sup>130</sup> While it took nearly one year to dispose of most of the motions, obtaining a ruling on such fundamental issues from the Appeals Chamber prior to the commencement of trial proceedings was viewed by the Special Court of Sierra Leone as *favoring* the expeditious conduct of proceedings by providing an authoritative interpretation of important questions raised before the Court.<sup>131</sup> Again, a similar argument could be made to support the adoption of a more generous reading of the ICC's Article 82(1)(d) such that significant issues might receive authoritative interpretations from the ICC Appeals Chamber in the early years of the Court.

B. *JURISPRUDENCE OF OTHER INTERNATIONAL CRIMINAL BODIES UNDER RULES SIMILAR TO THE ICC'S ARTICLE 82(1)(d)*

As already mentioned, the ICTY and ICTR adopted standards essentially mirroring Article 82(1)(d) for the purposes of the *ad hoc* tribunal's own interlocutory appeals regime in 2002 and 2003, respectively.<sup>132</sup> Similarly, while the Special Court for Sierra Leone employed the unique "fast-track" procedure for important issues raised in pre-trial proceedings, the August 2003 amendments to the SCSL

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Chamber, 25 May 2004).

<sup>129</sup> *Prosecutor v. Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence), SCSL-2004-14-AR72(E) (Appeals Chamber, 16 March 2004).

<sup>130</sup> *Prosecutor v. Norman, et al.*, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), SCSL-2003-14 AR72(E) (Appeals Chamber, 31 May 2004).

<sup>131</sup> *See Prosecutor v. Norman*, Appeals Chamber, 4 November 2003, *supra* n. 119, ¶ 30 ("[I]n order to get on with the trial, at the very least to have it begin within a reasonable time of a defendant's arrest, we are firmly of the view that the fast-track mechanism of Rule 72 is necessary and will serve to enhance rather than undermine the basic right to expeditious justice.").

<sup>132</sup> *See supra* n. 112 *et seq.* and accompanying text.

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.”<sup>133</sup> 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,<sup>134</sup> 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

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<sup>133</sup> Rules of Procedure and Evidence of the Special Court for Sierra Leone, *as amended* 1 August 2003, R. 73(B). Note that despite Rule 73(B)’s two-pronged standard for reviewing applications for leave to appeal interlocutory decisions – *i.e.*, “in exceptional circumstances” and to “avoid irreparable prejudice” – in practice, the “exceptional circumstances” prong has proved to be the critical standard. The Special Court will not look to the “irreparable prejudice” prong if “exceptional circumstances” are not present, and no decision of the SCSL has found “exceptional circumstances” to be present without also finding “irreparable prejudice.” *See, e.g.*, *Prosecutor v. Brima*, Trial Chamber, 13 February 2004, *supra* n. 146, ¶ 18 (“[H]aving found that no exceptional circumstances have been articulated by the Prosecution to warrant additional comments, it would not be necessary to address the question of irreparable prejudice given that the test is conjunctive.”).

<sup>134</sup> Indeed, the judges of the Special Court of Sierra Leone have said that the standard embodied in SCSL Rule 73(B) is intended to be *more restrictive* than the most recent standard adopted by the ICTY and ICTR, which is virtually the same as that used in Article 82(1)(d). *See Prosecutor v. Brima, et al.*, Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motions for Joinder, SCSL-2004-16-PT, ¶ 15 (Trial Chamber, 13 February 2004) [hereinafter “*Prosecutor v. Brima*, Trial Chamber, 13 February 2004”]. It is therefore particularly noteworthy that the Special Court has, in practice, appeared to have taken a much broader approach to the availability of interlocutory appeals than have the ICC Pre-Trial Chambers.

determines particularly crucial matters of procedure or evidence.<sup>135</sup>

While the ICC has not yet issued decisions dealing with the admission of broad categories of evidence, the principle behind this excerpt may be interpreted more generally as a recognition that certain decisions are particularly well-suited for interlocutory appellate review.

These decisions, in the jurisprudence of the *ad hoc* tribunals and the SCSL, have raised the following issues:

- Decisions implicating the rights of the accused: Unlike the ICC Pre-Trial Chambers to date,<sup>136</sup> the *ad hoc* tribunals have on a number of occasions granted leave to appeal decisions that involve the “general category of statutory rights guaranteed to the Accused.”<sup>137</sup> For instance, the tribunals have held that decisions involving the accused’s right to counsel,<sup>138</sup> adequate trial preparation time,<sup>139</sup> and the rights

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<sup>135</sup> *Prosecutor v. Bagosora, et al.*, Certification of Appeal Concerning Access to Protected Defence Witness Information, ICTR-98-41-T, ¶ 2 (ICTR Trial Chamber I, 29 July 2005). See also *Prosecutor v. Bizimungu, et al.*, Decision on the Prosecutor’s motion for certification to appeal the Trial Chamber’s decisions on protection of Defence witnesses Rule 73(b) of the Rules of Procedure and Evidence, ICTR-99-50-T (ICTR Trial Chamber II, 28 September 2005) (same).

<sup>136</sup> See, e.g., *supra*, n. 52 *et seq.* and accompanying text.

<sup>137</sup> *Prosecutor v. Halilovic*, Decision on Motion for Certification, IT-01-48-T (Trial Chamber, 30 June 2005).

<sup>138</sup> See *Prosecutor v. Milutinovic*, Decision on Defence Request for Certification of Appeal Against the Decision of the Trial Chamber on Motion for Additional Funds, IT-99-37-PT, at 2 (Trial Chamber, 16 July 2003) (explaining that “questions relating to the legal representation of an accused may affect the conduct of a trial, and have implications for the statutory rights of the accused”); *Prosecutor v. Gotovina, et al.*, Decision on Request for Certification to File Interlocutory Appeal against Trial Chamber’s Decision on Conflict of Interest of Attorney Miroslav Separovic and on Request for Certification to File Interlocutory appeal against Trial Chamber’s Decision on Finding of Misconduct of Attorney Miroslav Separovic, IT-06-90-PT, at 3 (Trial Chamber, 13 March 2007) (granting certification where “the Impugned Decisions involve the issue of the assistance of counsel of choice which would significantly affect the fair and expeditious conduct of the proceedings.”).

<sup>139</sup> *Prosecutor v. Bagosora*, Decision on Certification of Interlocutory Appeal From

that must be afforded to an accused subject to a joint trial<sup>140</sup> were likely to significantly affect the fair and expeditious conduct of the proceedings. Likewise, in granting leave to appeal a decision taking judicial notice of certain facts, the Special Court recognized that “it may not have given proper consideration” to the Defense’s objections to the decision.<sup>141</sup>

- Decisions implicating the Prosecutor’s ability to comply with his or her duties: In at least two cases, the ICTR has granted the Prosecutor’s request for interim review of a decision that, in the opinion of the Prosecutor, infringed on the Office of the Prosecutor’s ability to comply with its duties.<sup>142</sup> For example, the Office of the Prosecutor (OTP) was permitted to

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Decisions on Severance and Scheduling of Witnesses, ICTR-98-41-T (Trial Chamber I, 11 September 2003) (granting leave to file interlocutory appeal of a decision affecting the accused’s right to adequate trial preparation time).

<sup>140</sup> *Prosecutor v. Tolimir, et al.*, IT-04-80-PT (ICTY Trial Chamber III, 6 October 2005) (“The first requirement of Rule 73(B) is met because the Decision involves an issue -- the right of an accused to be accorded the same rights in a joint trial as he would have if tried separately -- which significantly affects the fair and expeditious conduct of the proceedings.”).

<sup>141</sup> *Prosecutor v. Norman, et al.*, Decision on Joint Request for Leave to Appeal Against Decision on Prosecution’s Motion for Judicial Notice, SCSL-04-14-T, ¶ 20 (Trial Chamber, 19 October 2004). This lack of consideration, the SCSL reasoned, impaired the right of the Accused to present submissions in response to an application, which in turn impaired the Accused’s fundamental right to a fair trial, meaning the ruling was appealable on an interlocutory basis. *Id.* The SCSL has also found that an application for leave to appeal a decision involving the re-appointment of Defense Counsel by its very nature satisfied the “exceptional circumstances” test because it concerned a “fundamental right enshrined” in the SCSL Statute concerning the rights of accused to counsel. *Prosecutor v. Brima, et al.*, Decision on Brima – Kamara Application for Leave to Appeal From Decision on the Re-Appointment of Kevin Metzger and Wilbert Harris as Lead Counsel, SCSL-04-16-PT, p. 3 (Trial Chamber II, 5 August, 2005).

<sup>142</sup> See, e.g., *Prosecutor v. Bizimungu*, Trial Chamber II, 28 September 2005, *supra* n. 135; *Prosecutor v. Norman, et al.*, Decision on Motions by the First and Second Accused for Leave to Appeal the Chamber’s Decision on Their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone, SCSL-04-14-T, ¶ 11 (Trial Chamber, 28 June 2006); *Prosecutor v. Bizimungu, et al.*, Decision on the Prosecution Motion for Certification to Appeal the Chamber’s Decision of 26 January 2004, ICTR-99-50-T (Trial Chamber II, 20 February 2004) [hereinafter “*Prosecutor v. Bizimungu*, Trial Chamber II, 20 February 2004”].

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.<sup>143</sup> 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.<sup>144</sup>

- 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 refused to take judicial notice of certain facts, explaining that "the very objective of judicially noticing adjudicated facts, involving as it does the concepts of judicial economy and expeditiousness, is relevant to the fair and expeditious conduct of the proceedings."<sup>145</sup> Furthermore, the ICTR Trial Chamber has found that the "fair and expeditious" conduct of proceedings is affected where the relevant decision is likely to arise repeatedly in the same proceedings,<sup>146</sup> as the recurrent nature of the issue could

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<sup>143</sup> *Prosecutor v. Bizimungu*, Trial Chamber II, 28 September 2005, *supra* n. 135.

<sup>144</sup> *Prosecutor v. Bizimungu*, Trial Chamber II, 20 February 2004, *supra* n. 142.

<sup>145</sup> *Prosecutor v. Dragomir Milošević*, Decision of 3 May 2007, IT-98-29/1-T, at 2 (ICTY Trial Chamber III, 3 May 2007).

<sup>146</sup> *Prosecutor v. Nyiramasuhuko & Ntahobali*, Decision on Ntahobali's Motion for Certification to Appeal the Chamber's Decision Granting Kanyabashi's Request to Cross-Examine Ntahobali using 1997 Custodial Interviews, I-97-21-T, ¶ 27 (ICTR Trial Chamber II, 1 June 2006) ("With respect to the expeditious conduct of the proceedings, the Chamber notes that the Impugned Decision is the first decision on the admissibility of prior statements of an Accused in this case. Moreover, the Chamber has noted the Parties' submissions that there may be similar statements

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.<sup>147</sup>

- 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.<sup>148</sup> The Chamber explained that the decision was ultimately concerned with the “very core of any judicial exercise, namely, the issue of judicial independence,” and therefore was “certainly a matter that is able significantly to affect the fair and expeditious conduct of the proceedings or the outcome of the trial.”<sup>149</sup> Similarly, the

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made by other Accused. The Chamber therefore considers that a resolution of this issue by the Appeals Chamber at this stage could significantly expedite the conduct of the proceedings. Accordingly, the first condition set out in Rule 73 (B) [*i.e.*, the issue would affect the *fair and expeditious* conduct of proceedings] of the Rules is met.”).

<sup>147</sup> *Prosecutor v. Brima, et al.*, Decision on Prosecution’s Application for Leave to Appeal Decision on Oral Application for Witness TFI-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality, SCSL-04-16-PT, p. 3 (Trial Chamber, 12 October 2005) (granting leave to seek interlocutory appeal on the question of whether a human rights officer, acting as a witness, can be compelled to reveal the sources of his or her information, in part because the issue was “likely to arise again with regard to other witnesses in the present case.”); *Prosecutor v. Norman*, Trial Chamber, 28 June 2006, *supra* n. 142, ¶ 12.

<sup>148</sup> *Prosecutor v. Milutinovic, et al.*, Decision on Prosecution Request for Certification of Interlocutory appeal of Second Decision on Addition of Wesley Clark to Rule 65 Ter List, IT-05-87-T (Trial Chamber, 14 March 2007). *See also* *Prosecutor v. Bizimungu*, Decision on Casimir Bizimungu’s Request for Certification to Appeal the Decision on Casimir Bizimungu’s Motion in Reconsideration of the Trial Chamber’s Decision Dated February 8, 2007, In Relation to Condition (B) requested by the United States Government, I-99-50-T (ICTR Trial Chamber II, 22 May 2007) (same).

<sup>149</sup> *Prosecutor v. Milutinovic*, Trial Chamber, 14 March 2007, *supra* n. 148, ¶ 13. *See*

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.<sup>150</sup> The Trial Chamber reasoned that “the scope of an authorization to conduct routine matters [absent one or more judges]<sup>151</sup> is an issue which would significantly affect the fair and expeditious conduct of the proceedings” because the provision allowing for such authorization is itself an exceptional provision that departs from the “general rule” requiring that decisions be issued by a bench of three judges.<sup>152</sup>

In other instances, less readily categorized, the tribunals have seemed to be influenced by the very nature of the question raised by the impugned decision. For example, although the *ad hoc* tribunals have generally stated that decisions may not be appealed simply because they involve an “important point of law,”<sup>153</sup> at least one decision by the ICTY – involving a denial of the accused’s request to meet with an Orthodox priest of his choosing, rather than one attached to the detention facility – was found to be appealable on an interlocutory basis precisely because the decision concerned “an important issue

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*also Prosecutor v. Bizimungu*, Trial Chamber II, 22 May 2007, *supra* n. 148, ¶¶ 9-11 (citing ¶ 13 of the 14 March 2007 *Milutinovic* decision).

<sup>150</sup> *Prosecutor v. Karemera, et al.*, Decision on the Defence Application For Certification to Appeal Denial of Motion to Obtain Statements of Witnesses ALG and GK, ICTR-98-44-T (Trial Chamber III, 4 April 2007).

<sup>151</sup> Rule 15 *bis* (F) of the ICTR Rules of Procedure and Evidence permits a Chamber to “conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members” under certain circumstances. ICTR Rules, *supra* n. 96, R. 15 *bis* (F).

<sup>152</sup> *Prosecutor v. Karemera*, Trial Chamber III, 4 April 2007, *supra* n. 150, ¶ 7.

<sup>153</sup> *See, e.g., Prosecutor v. Milutinovic, et al.*, Decision on Prosecution’s Request for Certification for Appeal of Decision on Vladimir Lazarevic’s and Sreten Lukic’s Preliminary Motions on Form of the Indictment, IT-05-87-T, p. 4 (Trial Chamber, 19 August 2005) (“Considering that even when an important point of law is raised... the effect of Rule 72(B) is to preclude certification unless the party seeking certification establishes that both conditions are satisfied.”).

which ought to be determined by the Appeals Chamber.”<sup>154</sup> 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.”<sup>155</sup> 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.”<sup>156</sup> 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.”<sup>157</sup>

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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<sup>154</sup> *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).

<sup>155</sup> *Prosecutor v. Brima*, Trial Chamber, 12 October 2005, *supra* n. 147, at 3.

<sup>156</sup> *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 complicating and delaying the proceedings, all of which could be avoided by having the matter resolved at this stage.” *Prosecutor v. Milutinovic*, Trial Chamber, 14 March 2007, *supra* n. 148, ¶ 15.

<sup>157</sup> *Prosecutor v. Norman, et al.*, Decision on Prosecution Application for Leave to Appeal “Decision on the First Accused’s Motion for Service and Arraignment on the Consolidated Indictment,” SCSL-04-14-T, at 3 (Trial Chamber, 15 December 2004).

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.”<sup>158</sup> 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...,”<sup>159</sup> as opposed to requiring evidence that the matter *would* so affect the proceedings.

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<sup>158</sup> *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 raised by the Defence to be remote in light of the secrecy of the role of the asylum-seeker in proceedings, and the confidentiality of any testimony which might reveal their identity. Nevertheless, the Chamber recognizes that this is a question which may affect a considerable number of Defence witnesses. If the Chamber’s interpretation of the witness protection orders is incorrect, then the effect on the Defence would be profound.”).

<sup>159</sup> *Prosecutor v. Milutinovic*, Trial Chamber, 14 March 2007, *supra* n. 148, ¶ 13 (emphasis added).

**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.<sup>160</sup>

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<sup>160</sup> 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

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B. *SPECIFIC RECOMMENDATIONS REGARDING PRE-TRIAL CHAMBERS' INTERPRETATION OF ARTICLE 82(1)(d)*

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 these recommendations arise from a broader viewpoint that finds value in engaging the ICC Appeals Chamber to settle certain fundamental issues raised by the operations of the Court in its early years. While not every early decision merits interlocutory review, our 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 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.

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Chamber, 14 March 2007, *supra* n. 148, ¶ 16 (granting leave for interlocutory review of a decision in part because the appeal could be resolved in the “significant period of the adjournment of the trial between the close of the Prosecution case and the start of the Defence case”); *Prosecutor v. Mrksic*, Decision Granting Certification to Appeal, IT-95-13/1-PT (Trial Chamber, 29 May 2003) (granting Defense's request for leave to file an interlocutory appeal because, *inter alia*, “no date has yet been set for trial, and therefore that any marginal delay that the Prosecution may experience in preparing its case pending the determination of this issue is outweighed by the Defence concerns regarding their ability to mount their case.”).

Of course, the Pre-Trial Chambers must nevertheless stay within the confines of Article 82(1)(d). The following recommendations therefore address the issue of how the Pre-Trial Chambers might alter their interpretation of the Article 82(1)(d) to allow decisions such as those involving questions of authority, the protection of the parties' statutory rights, and the expeditious conduct of proceedings, to reach appellate review in the early years of the Court's operations.

### 1. Adopt a Broader Interpretation of "Fairness"

As explained above, the Pre-Trial Chambers have effectively limited the term "fair" under Article 82(1)(d) to issues implicating the notion of "equality of arms" between the Prosecution and Defense. However, as the ICC Appeals Chamber has found, "the term 'fair' in the context of Article 82(1)(d) of the Statute is associated with the norms of a fair trial,"<sup>161</sup> which extends beyond issues of equality between the parties.<sup>162</sup> Indeed, among the reasons cited by the drafters of the Rome

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<sup>161</sup> *Situation in DRC*, Appeals Chamber, 13 July 2006, *supra* n. 27, ¶ 11.

<sup>162</sup> *See, e.g.*, International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, *entry into force* 23 March 1976, at Art. 14(1) ("In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."); *Id.* at Art. 14(2) ("Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."); *Id.* at Art. 14(3) ("In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the

Statute in favor of permitting interlocutory appellate review of some decisions was that allowing for some form of appellate review prior to the final judgment might be necessary to protect the due process rights of the accused.<sup>163</sup> In addition, the availability of interlocutory review was thought to be important for decisions “that substantially or wholly impair the ability of the prosecutor to bring an accused to trial” or otherwise “cause an immediate irreparable injury,”<sup>164</sup> meaning that fairness concerns are not limited to the rights of the accused. Thus, as discussed above, the ICTR has held on at least two occasions that the fairness of proceedings were affected for the purposes of obtaining leave to file an interlocutory appeal where the impugned decision was alleged to interfere with the Prosecutor’s ability to carry out its statutory or procedural duties.<sup>165</sup> Similarly, as mentioned above, the *ad hoc* criminal tribunals have determined that decisions challenging the scope of authority granted to Trial Chamber judges are appealable on an interlocutory basis because the issues involved are likely to affect the fair and expeditious conduct of proceedings.<sup>166</sup>

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language used in court; (g) Not to be compelled to testify against himself or to confess guilt.”).

<sup>163</sup> See *supra*, n. 15 (citing *Ad hoc* Committee on the Establishment of an International Criminal Court, Session 3-13 April 1995, Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court, at 24, U.N. Doc A/AC.244/1 (20 March 1995); *id.* Addendum at 25, U.N. Doc. A/AC.244/1/Add.2.).

<sup>164</sup> See *supra*, n. 15 (citing U.S. Non-Paper on Rules of Investigation, *Procedure & Evidence for the International Criminal Court*, 21 August 1995, at 33-34, 58).

<sup>165</sup> See, e.g., *Prosecutor v. Bizimungu*, Trial Chamber II, 28 September 2005, *supra* n. 135 (certifying interlocutory appeal on grounds that Trial Chamber’s decision allegedly interfered with Prosecutor’s disclosure obligations under the ICTR Rules of Procedure and Evidence); *Prosecutor v. Bizimungu*, Trial Chamber II, 20 February 2004, *supra* n. 142 (certifying interlocutory appeal of decision where Prosecutor argued the ruling “unfairly ties the hands of the Prosecution” in presenting its case against the Accused).

<sup>166</sup> See, e.g., *Prosecutor v. Karemera*, Trial Chamber III, 4 April 2007, *supra* n. 150, ¶ 10 (noting that the scope of the exception to the rule that decisions must be

## 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.<sup>167</sup> 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

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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.").

<sup>167</sup> See *supra* n. 145 *et seq.* and accompanying text.

any given case. By contrast, the *ad hoc* tribunals investigate only particular individuals or crimes, meaning that those tribunals may be less likely to face recurrent issues that may take years to reach the Appeals Chamber or, in fact, evade review altogether. Significantly, this recommendation would not require the PTCs to give equal weight to an issue's likely recurrence in every instance, but rather would allow interim appellate review of particular issues that are likely to arise often, yet are unlikely to receive any appellate review if not under Article 82(1)(d).

3. Adopt a More Lenient 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 with respect to claims that an issue is likely to affect the "outcome of the trial" under Article 82(1)(d), the Pre-Trial Chamber "must ponder the *possible* implications of a given issue being wrongly decided on the outcome of a case."<sup>168</sup> This exercise, according to the Appeals Chamber, "involves a forecast of the consequences of such an occurrence."<sup>169</sup> Similarly, if the applicant seeking leave to file an interlocutory appeal claims that the decision implicates the "fair and expeditious conduct of proceedings," it seems reasonable to expect that the PTC would "ponder the *possible* implications" of the issues on the conduct of

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<sup>168</sup> *Situation in DRC*, Appeals Chamber, 13 July 2006, *supra* n. 27, ¶ 13 (emphasis added).

<sup>169</sup> *Id.*

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.



**AMERICAN UNIVERSITY**

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**WAR CRIMES RESEARCH OFFICE**

Washington College of Law  
4801 Massachusetts Avenue, NW  
Washington, DC 20016

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