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**International
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Court**

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TRIAL CHAMBER IV

Before: Judge Joyce Aluoch, Presiding Judge
Judge Silvia Fernández de Gurmendi
Judge Chile Eboe-Osuji

SITUATION IN DARFUR, SUDAN

**IN THE CASE OF
*THE PROSECUTOR v. ABDALLAH BANDA ABAKAER NOURAIN
AND SALEH MOHAMMED JERBO JAMUS***

Public

DISSENTING OPINION OF JUDGE EBOE-OSUJI

**Decision on the “Defence Application for Leave to Appeal the ‘Decision on the
defence request for a temporary stay of proceedings’”**

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Counsel for the Defence

Mr Karim A.A. Khan

Mr Nicholas Koumjian

Legal Representatives of Victims

Ms Helene Cisse

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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**The Office of Public Counsel for
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**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

**Others
Appeals Chamber**

THE DISSENTING OPINION OF JUDGE EBOE-OSUJI
(to the Decision of the Majority dated 13 December 2012)

Overview

1. The most compelling legal reasoning is one that unites common sense and logic in the explanation of outcome. There is, of course, the odd occasion when common sense and logic quite simply refuse to serve the same result: in which case, a judicial decision must work harder to situate itself on the side of either palpable common sense or truly gripping logic. I have struggled in vain to locate the Majority's decision of 13 December 2012 in any of the above scenarios. I am thus forced to dissent.

2. The decision that the Chamber was called upon to make concerns the following essential facts in summary. The Defence had earlier requested the Chamber to stay proceedings indefinitely on a temporary basis, on grounds of certain alleged prejudice to fair trial. In its decision rendered on 26 October 2012, the Chamber denied that request and ordered the case to proceed to trial. The Chamber's reasoning, briefly put, was that the defence complaint upon which the request was based was largely speculative, and did not, at any rate, involve any prejudice that is demonstrably beyond the remedial capacity of the trial process itself. Defence Counsel now urge the Chamber to grant them leave to appeal that decision. Counsel's obvious hope in such an interlocutory appeal is to achieve the result—i.e. to stay the proceedings indefinitely on a temporary basis—that they had earlier failed to achieve in virtue of the Chamber's decision of 26 October 2012. But, in order to satisfy the test for the grant of leave for an interlocutory appeal, the moving party must show, among other things, that the decision of the Appeals Chamber, which the party hopes will reverse the earlier decision of the Chamber, will materially advance the proceedings. In the Majority's grant of leave to appeal any issue engaged in the decision of 26 October 2012, the Defence has quite remarkably managed to persuade the Majority to rule in effect that to halt a criminal trial temporarily and indefinitely is an outcome that may materially advance the trial. I am not persuaded. In my view, the proposition is apparently surprising to common sense; and, the logic supporting it—even in the most abstract sense—has, I am afraid, remained unpersuasive to me.

Applicable Provision

3. The grant of leave to embark upon an interlocutory appeal in the present instance is governed by article 82(1)(d) of the Statute. It provides as follows:

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[...]

- (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.

Restriction of Interlocutory Appeals

4. Article 82(1)(d) of the Statute was evidently inspired by rule 73(b) common to the respective sets of Rules of Procedure and Evidence of the ICTR and the ICTY. It provides that decisions on 'motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision 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 Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.'¹ That provision has generated some interesting jurisprudence that may assist this Court in interpreting article 82(1)(d) of the Rome Statute. For instance, in *Prosecutor v Nyiramasuhuko*, ICTR Trial Chamber II considered that the limitation of interlocutory appeals 'is consistent with some important national jurisdictions around the world in which *interlocutory appeals are not allowed in criminal cases, or allowed only in very limited circumstances*.'² Hence, the Trial Chamber stressed that 'the situations which may warrant interlocutory appeals under rule 73(B) must be *exceptional indeed*. This point is made clear

¹ See Rule 73(b) common to the Rules of the ICTR and the ICTY.

² *Prosecutor v Ntahobali and Nyiramasuhuko (Decision on Ntahobali's and Nyiramasuhuko's Motions for Certification to Appeal the "Decision on Defence urgent motion to declare parts of the evidence of Witnesses RV. and QBZ inadmissible")* 18 March 2004, para 14 (emphasis added).

by the conditions which must be satisfied before the Trial Chamber may consider granting certification.’³

5. In *Prosecutor v Strugar*, ICTY Trial Chamber II signalled the need to avoid confusion between issues for the interlocutory appeal and issues for appeal on the merit. [I shall return to this theme later in the discussion.] The ICTY Chamber was faced with an application for request for certification of an interlocutory appeal in relation to a decision of the Chamber concerning fitness to stand trial. In rejecting the request for certification, the Chamber reasoned in part that the certification provision ‘governs interlocutory appeals only, that is, appeals raised in the course of the proceedings and before the final judgment has been entered. Hence, the question currently before the Chamber is not whether the Accused may raise this matter on appeal *at all*. Should he be convicted at the end of the trial, he has a right of appeal which would enable the question of his fitness to stand trial to be ventilated. The question, rather, is whether the Accused should appeal *at this stage of the proceedings*.’⁴ [Underlined emphasis added.] I fully agree with this reasoning. Together with the observations of the ICTR Trial Chamber II in the *Nyiramasuhuko* case, as noted above, what appears evident is that decisions for certification or leave to appeal should not involve undue exertions of the mind or intellectual agony, when common sense would provide an adequate view of whether the Trial Chamber should permit the exceptional process of an interlocutory appeal. In most cases, any error by the Trial Chamber in that connection will not defeat the course of justice, since the affected party could still ultimately raise the concerns as part of his or her appeal on the merits at the end of the case.

6. I note that in their judgment on the merits in the *Strugar* case, the ICTY Appeals Chamber criticised the Trial Chamber for refusing to grant leave to appeal the decision on fitness to stand trial. The entire discussion of the ICTY Appeals Chamber criticising the Trial Chamber appears as follows:

³ *Ibid*, para 15 (emphasis added).

⁴ *Prosecutor v Strugar (Decision on Defence Motion for Certification)* dated 17 June 2004, para 6. See also para 8.

The Appeals Chamber is of the opinion that the issue of an accused's fitness to stand trial is of such importance that it may generally be regarded as "an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" under Rule 73(B) of the Rules. Absent certain exceptions, such as when an accused's submissions in support of his inability to stand trial are frivolous or manifestly without merit, the immediate resolution by the Appeals Chamber of any question of fitness would appear to be essential in that any decision that an accused is not fit to stand trial would necessarily materially advance the proceedings. Correspondingly, the prejudice to the accused resulting from continuing the trial while he or she is unfit to stand would amount to a miscarriage of justice. In the instant case, this matter would have merited deeper consideration by the Appeals Chamber if not for the fact that the parties have not raised the issue in the context of their appeals.⁵

7. With respect, that pronouncement is fraught with assorted flaws. They include the following. First, some critics may be tempted to complain of the presence of what one must necessarily try not to view as appellate hubris in the pronouncement. One sees this in the ICTY Appeals Chamber's virtual neglect to embark upon any depth of analysis that might have elucidated the error of the Trial Chamber. One sees no more than just a peremptory pronouncement dismissively made in four sentences of main text. [There is a footnote that comprised exclusively of quotes from some national case law that largely made different points, not interpreting the equivalent of the ICC and the ICTY provisions on leave or certification of interlocutory appeals. I will say more on the footnote later.] In that short brush stroke, the ICTY Appeals Chamber held out as tackling *all* the elements of the test [specified under the equivalent of article 82(1)(d)] that must be met in order to grant leave for interlocutory appeal. In my humble opinion, if judges who happen to sit in an Appeals Chamber were going to criticise the four-page decision of their equals and peers who happen serve (as someone must do) in the Trial Chamber, on a question involving the interpretation of a complex provision such as the equivalent of article 82(1)(d) of the Rome Statute, it was necessary for the Appeals Chamber to do more by way of analysis, so that there is a clear and objective view of how the Trial Chamber might have been wrong. Merely to hand down an *ipse dixit* on the content and meaning of law is insufficient to persuade the judicial mind that is not bound by it in another forum.

⁵ *Prosecutor v Strugar (Judgment)* dated 17 July 2008 [ICTY Appeals Chamber], para 34.

8. And, beyond the failure of persuasion that results from the absence of evident analysis, the ICTY Appeals Chamber's pronouncement also suffers from an apparent problem of irregularity in terms of proper *vires*. Notably, the ICTY Appeals Chamber had pronounced as follows: 'Absent certain exceptions, such as when an accused's submissions in support of his inability to stand trial are frivolous or manifestly without merit, the *immediate resolution by the Appeals Chamber* of any question of fitness would appear to be essential in that any decision that an accused is not fit to stand trial would necessarily materially advance the proceedings.' But that indicates an opinion that may not have been the Appeals Chamber's to assert *as a matter of certification for interlocutory appeals*. At the ICTY and ICTR, the provision on grant of certification to embark upon an interlocutory appeal is explicitly stated to rest on the 'opinion of the Trial Chamber' that 'an immediate resolution of an issue may materially advance the proceedings.' But in their *Strugar* judgment, the Appeals Chamber appears to have presumed the power to supplant its own view over the 'opinion' of the Trial Chamber as regards the procedural utility of an interlocutory appeal. There is no explanation in that passage for supplanting the 'opinion' of the Trial Chamber; nor is there a clear basis for it in the provision itself.

9. In my view, the reason for founding the need for interlocutory appeals on the 'opinion' of the courts below, and giving to them the exclusive power to grant leave or certification to appeal, when that power is not indicated for the appellate court, is that interlocutory appeals are another form of the procedure known in some national jurisdictions as referring a question or stating a case for the determination of an appellate court. It is a matter of prerogative in the court below; and its grant or denial is not as such justiciable in the appellate court. The idea is that the Trial Chamber has encountered uncertainty and feels that it needs help from the Appeals Chamber in resolving the uncertainty before continuing with a case in process, in order to avoid the risk of reversal eventually on account of the concerned decision. But the Trial Chamber is entitled to feel no need for an interlocutory reference of a question to the Appeals Chamber, knowing that the choice of that course comes with a level of risk that the Appeals Chamber may in an eventual final appeal fault the Trial Chamber for the decision in question; provided the error in question can be properly situated within the proper grounds of appeal on the

merits. Hence, the process of certification or leave for interlocutory appeals does not invite the Appeals Chamber to impose its own opinion that a Trial Chamber needs some interlocutory appellate help for which the Trial Chamber saw no need in the management of the trial proceedings.

10. In short, the terms of the provision on certification or leave for interlocutory appeals explicitly calls for curial deference in favour of the Trial Chamber, 'based on its intimate understanding of the process thus far.'⁶ Ironically, this requirement of curial deference is sufficiently demonstrated by the *Strugar* case itself. The Trial Chamber had responsibly considered the defence request to terminate proceedings on grounds of unfitness to stand trial, and rejected the request in a decision rendered on 26 May 2004.⁷ The Defence sought certification of an interlocutory appeal of the decision of 26 May 2004. That, too, was rejected on 17 June 2004.

11. As part of its reasoning in the latter decision, the Trial Chamber observed as follows: 'Should he be convicted, the question of the correctness of the decision that he is fit to stand trial can then be made the subject of appeal in the ordinary way, and at the normal stage of the proceedings';⁸ and '[s]hould it prove to be the case that on appeal it is held that it should have been decided that he is unfit to stand trial, any conviction would be quashed.'⁹ With that, the case went to trial and the accused was convicted. On appeal, the Appeals Chamber did not quash the conviction. In particular, the Appeals Chamber did not find that the prisoner was unfit to stand trial. Quite the contrary, not only did the Appeals Chamber find that the Trial Chamber had applied the correct legal standards in the decision of 26 May 2004 that the Accused was fit to stand trial,¹⁰ but the Appeals Chamber also found that 'the Trial Chamber acted *well within its discretion* when, on the

⁶ See *Prosecutor v Lubanga Dyilo* (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008"), 21 October 2008, [ICC Appeals Chamber], ICC-01/04-01/06-1486, para 84.

⁷ See *Prosecutor v Strugar* (Decision Re the Defence Motion to Terminate the Proceedings) dated 26 May 2004.

⁸ *Prosecutor v Strugar* (Decision on Defence Motion for Certification), *supra*, para 8.

⁹ *Ibid.*

¹⁰ *Strugar Appeal Judgment*, *supra*, paras 55 and 56.

basis of the totality of evidence before it, it found that Strugar's competence to stand trial was satisfactory.'¹¹

12. Nevertheless, the Appeals Chamber, in what is clearly an *obiter dictum* at best, saw fit to criticise the Trial Chamber as regards the certification decision, in the quote already set out in paragraphs 6 and 8 above. But, for present purposes, the quote bears repeating here: '*Absent certain exceptions, such as when an accused's submissions in support of his inability to stand trial are frivolous or manifestly without merit, the immediate resolution by the Appeals Chamber of any question of fitness would appear to be essential in that any decision that an accused is not fit to stand trial would necessarily materially advance the proceedings.*' [Emphasis added.] The following questions thus arise: what are those exceptions, since the Appeals Chamber's pronouncement evidently contemplated, as exceptions, more than frivolity or manifest want of merit? Was it really the case that the Trial Chamber had not considered the Strugar request as frivolous or manifestly without merit? If there are more exceptions than frivolity or manifest lack of merit, was it the case that the Trial Chamber's decision did not fall into any of those other exceptions? Was the Appeals Chamber truly in a position to list the exceptions exhaustively? Beyond questions of unfitness to stand trial, in what other category of cases would there be a general rule and exceptions that will guide the Trial Chamber in deciding when and when not to grant certification for interlocutory appeals? Is the Appeals Chamber really in a position to list all of them exhaustively?

13. The difficulties with these questions then clearly underscore the need for curial deference to the Trial Chambers on matters of certification or leave for interlocutory appeals, 'based on its intimate understanding of the process thus far.' The Appeals Chamber will have its ultimate prerogative to find an error of law on the part of the Trial Chamber as part of an appeal on the merits.

14. But, beyond the foregoing, there appears also to be internal problems in the pronouncement of the ICTY Appeals Chamber in its criticism of the Trial Chamber's

¹¹ *Ibid*, para 63 [emphasis added.]

certification decision in *Strugar*. This is in the sense of mixing up considerations that concern standards of review in merits appeals with the test for certification of interlocutory appeals. For instance, the ICTY Appeals Chamber said that ‘the prejudice to the accused resulting from continuing the trial while he or she is unfit to stand would amount to a miscarriage of justice.’ One obvious problem with that pronouncement is that concerns of ‘miscarriage of justice’ are specifically indicated as grounds for final appeals.¹² It is not part of the grounds indicated for grant of certification of interlocutory appeals under rule 73(b) common to the respective Rules of the ICTY and the ICTR. If the drafters wanted considerations of ‘miscarriage of justice’ to animate the test for grant of certification of interlocutory appeal they would have said so. There must be a reason that the drafters indicated different considerations for the two types of appeal. It makes sense to not mix them up.

15. In addition, the cases that the ICTY Appeals Chamber cited in the footnote did not concern tests for grant of certification for interlocutory appeals. The *Podola* case that they cited concerns the question whether the England Court of Appeal had jurisdiction to hear a *final appeal* on grounds of ‘error of law’. Again, this is clearly a separate consideration from whether there should have been certification of an interlocutory appeal on the question concerned. The Appeals Chamber’s reference to the *Ngatayi* case of the High Court of Australia is even stranger. It was a *final appeal* in a case concerning the application of a special provision that pertains to aborigine accused in the Australian criminal justice system. It required the trial judge to enter a plea of not guilty if it appeared to the trial judge that the accused did not understand the nature of the proceedings. In Australia, appeals go to the High Court of Australia only by the Court’s grant of special leave. The quote relied on by the ICTY Appeals Chamber concerns whether ‘special leave’ should be granted so that Ngatayi’s *final appeal* may be heard by the High Court of Australia. Hence, in context, what the ICTY Appeals Chamber had relied on was a passage that concerns the functional equivalence of the standards of *final appellate* review at the ICTY. It was not a case concerning the test for certification of an interlocutory appeal. Similarly, the

¹² See article 25 of the ICTY Statute; and article 24 of the ICTR Statute.

Kesavarajah case concerns a *final appeal* of an error of law. It does not deal with the question whether leave should have been granted to litigate an interlocutory appeal of that error of law during the course of the trial. The Malaysian High Court case of *Misbah Bin Saat* also has nothing to do with the propriety of grant of certification of interlocutory appeal. It has to do with questions of the appropriate time for a trial judge to determine the question of fitness to stand trial.

16. In light of these flaws, the ICTY Appeals Chamber's criticism of the Trial Chamber's certification decision does not provide a firm basis, here at the ICC, to reject the wisdom of the reasoning of the *Strugar* Trial Chamber in the certification decision.

The First Component of the Test for Leave to Appeal

17. In the process of granting leave to appeal, the Chamber must be satisfied that the tests indicated in article 82(1)(d) of the Statute have been met. According to the ICC Appeals Chamber, the applicable tests are grouped into two components.¹³ The first component concerns the identification of an issue that falls for the Appeals Chamber to examine. In this regard the Chamber must be satisfied that the decision for which interlocutory appeal is sought 'involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial'. In the *Nyiramasuhuko* decision, ICTR Trial Chamber II insisted that all the operative words of the test must be given their due effect. 'In particular,' they held, 'the adjective "significantly" has a value that must be considered in each case. In each of these tests, the applicant must show how significantly the decision in question affects (a) a fair and expeditious conduct of the proceedings, or (b) how significantly the decision would affect the outcome of the trial.'¹⁴ My colleagues in the Majority appear to agree.¹⁵ So, too, do I. That is to say, it is not enough to identify an issue. But the issue must be shown to be one that would 'significantly affect' 'the fair and expeditious conduct of the proceedings or the outcome of the trial.' This is consistent with

¹³ In the matter of the *Situation in the Democratic Republic of the 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 of 13 July 2006, para 8.

¹⁴ *Nyiramasuhuko*, *supra*, para 16.

¹⁵ See footnote 47 of their decision.

the jurisprudence of the ICC Appeals Chamber, which has also pointed to the need to give meaning to the phrase ‘significantly affect’ in the sense of ‘in a material way’.¹⁶

18. As regards the main frame of the first component, there are two alternative sub-components on which the applicants needed to satisfy the Chamber. The issue must be demonstrably seen as affecting in the significant way (i) ‘the fair and expeditious conduct of the proceedings’, or (ii) ‘the outcome of the trial’.

19. It is notable that Trial Chamber I had correctly observed that the first component involves two sub-components is indicated in the conjunctive. That is to say, not only must the issue significantly affect fair conduct of the proceedings, it must also be seen as significantly affecting expeditious conduct of the proceedings.¹⁷ The ICTR Trial Chamber II had also indicated a similar interpretation in the *Nyiramasuhuko* case.¹⁸

20. Against that background, it is to be borne in mind that the decision of the Chamber which the Defence is seeking to appeal concerns, as already mentioned, a request for temporary stay of the proceedings for an indefinite period. In my view, this is a major factor that distinguishes the present case from other cases in which the existing jurisprudential formula on leave to appeal may be applied. [And that unique feature reveals, in my view, the weakness of certain views of the interlocutory appeals process pursuant to article 82(1)(d) of the Statute.] The Chamber denied the request for stay and invited the parties to propose dates for trial. The Defence’s objective in appealing that decision will effectively prolong the eventuality of commencing the trial, if they succeed in getting the Appeals Chamber to reverse the Chamber’s decision and stay the proceedings indefinitely on a temporary basis. This would, no doubt, significantly affect expeditious conduct of the proceedings—by significantly delaying it. But to suppose that this is what the drafters of article 82(1)(d) had intended as the import of the phrase ‘significantly affect’ would be to give the provision quite an unfortunate reading. Happily, the provision is

¹⁶ See *Situation in the Democratic Republic of the Congo*, *supra*, para 10.

¹⁷ See *Prosecutor v Lubanga (Decision on the Prosecution Request for Leave to Appeal the “Decision on Intermediaries”)* ICC-01/04-01/06-2463 of 2 June 2010, para 27.

¹⁸ *Nyiramasuhuko*, *supra*, para 22.

spared such a fall into absurdity, as we shall see, in the second limb of the test that contemplates an 'immediate' resolution of the issue in a way that may 'materially advance the proceedings.' Notably, part of the reasoning of ICTY Trial Chamber II in *Prosecutor v Strugar*, was this: '[W]ere the Chamber to certify at this stage for an interlocutory appeal from its decision that the Accused is fit to stand trial, there would be likely to be significant delay. In particular, the issue would inevitably arise whether the trial proceedings should be suspended pending the determination of the appeal. In these circumstances, it is difficult to see that an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings.'¹⁹ I agree.

21. I am, therefore, unable to agree with the Majority that the case is made out as regards the existence of an issue that will significantly affect the expeditious conduct of the proceedings. In view of the failure of that limb of the test, there is no need to consider whether there is an issue that significantly affects the fair conduct of the proceedings, as 'the fair and expeditious conduct of the proceedings' must be given their natural conjunctive reading.

22. But this is not the end of the inquiry on the first component, since the Chamber must also consider the alternative question of whether there is an issue that would significantly affect 'the outcome of the trial'. The Appeals Chamber has indicated in this regard that the Chamber 'must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence'.²⁰ In my view, what is naturally contemplated by the words 'outcome of the trial' must be a verdict of guilty or not guilty or sentencing upon conviction, at the end of the trial.

23. In this connection, it is recalled that the Chamber's decision on the stay request was to the following effect: (i) the Defence did not persuade the Chamber to exercise its discretion in favour of staying the proceedings prior to the commencement of trial, because the

¹⁹ *Strugar*, *supra*, para 8.

²⁰ See *Situation in the Democratic Republic of the Congo*, *supra*, para 13.

Defence complaint was largely speculative, and that the case should therefore proceed to trial; (ii) the Chamber was not persuaded that the prejudice to fair trial that the Defence alleged were not capable of remedy in the course of the trial process, as contemplated overwhelmingly by the case law on stay; and (iii) nevertheless the Chamber will bear the Defence complaint in mind in the course of the trial, in order to see it in concrete terms as the trial unfolds. Such a decision thus preserves for the Defence the opportunity to revisit their complaint in concrete terms in the course of the trial, should they wish to do so, in any eventuality of their continued view that the alleged prejudice that they complained of remains without the cure contemplated by the Chamber in its decision. The direct implication then is that the Defence has not been shut out from its complaint. A more successful litigation of the complaint in the course of the trial would mean that the Chamber would reflect its findings in the outcome of the trial, either by rendering a verdict accordingly or by staying proceedings before verdict in a manner that possibly engages the plea of double jeopardy. Hence, having ‘ponder[ed] the possible implications’ of the stay decision issue being wrongly decided, and having tried to ‘forecast ... the consequences of such an occurrence’, I am unable to see then how it is that the Chamber’s decision would significantly affect the outcome of the trial at this stage.

The Second Component of the Test

24. The second component of the certification test indicated in article 82(1)(d) requires the applicant for leave to demonstrate that ‘an immediate resolution’ of the issue by the Appeals Chamber ‘may materially advance the proceedings.’ According to the Appeals Chamber, what is intended is a forward movement of the proceedings, by ensuring that they follow the right course.²¹ In that regard, Trial Chamber I correctly held that ‘the Chamber must be satisfied that the resolution of the issue by the Appeals Chamber will benefit the substantive progress of the case.’²²

²¹ *Situation in the Democratic Republic of the Congo (Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal)*, *supra*, para 15.

²² *Prosecutor v Lubanga (Decision on the Prosecution Request for Leave to Appeal the “Decision on Intermediaries”)*, *supra*, para 29.

25. In their reasoning pertaining to the second limb of the test for the grant of leave to appeal, the Majority hinged their analysis almost exclusively on the idea of proceedings following ‘the right course’ — a phrase that appears, as seen above, as part of the Appeals Chamber’s reasoning in a previous case.²³ It is certainly interesting to note that ‘right course’ and its cognate or correlative phrases ‘correct course’, ‘right lines’, ‘wrong course’ appear multiple times in the Majority’s reasoning; while a passing reference is literally made once only to the phrase ‘forward movement’ in the Majority’s reasoning.²⁴ That misses the point that the phrase ‘move forward’ is the primary idea indicated by the Appeals Chamber to explain the meaning of ‘materially advance’, notwithstanding that they did also modulate that idea by indicating the need to follow ‘the right course’. This is evident from the full passage in the Appeals Chamber’s judgment which appears as follows:

The meaning conveyed by “advance” in the latter part of sub-paragraph (d) is “move forward”; by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings.²⁵

26. With respect, the Majority’s inordinate focus on the ordinal idea (of following ‘the right course’ etc) indicated in the Appeals Chamber’s reasoning takes it out of its serviceable context; while not adequately resolving the apparent contradiction in the suggestion that to halt a criminal trial indefinitely may ‘materially advance’ it. As indicated earlier, the unique feature of the case at bar as involving a request for indefinite stay of proceedings on a temporary basis reveals the weakness of relying on the ‘right course’ idea as the controlling consideration in decisions on leave for interlocutory appeals. The appellate issue in that Appeals Chamber’s earlier decision concerned whether

²³ *Situation in the Democratic Republic of the Congo (Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal)*, *supra*, para 15.

²⁴ This appears in the following pronouncement: ‘Finally, as regards the requirement that the immediate resolution of an issue will materially advance the proceedings, according to the Appeals Chamber, what is intended is a forward movement of the proceedings, by ensuring that they “follow the right course”’: see paragraph 18 of the Majority decision.

²⁵ *Situation in the Democratic Republic of the Congo (Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal)*, *supra*, para 15.

the Appeals Chamber should conduct an 'extraordinary review' of the Pre-Trial Chamber's decision permitting victims to participate in the investigations of crimes within the Court's jurisdiction; as the Pre-Trial Chamber had refused leave to appeal its victims participation decision. Hence, the appellate issue in that instance did not pose a challenge of contradiction to forward movement of the case. Forward movement was assured in the plain sense of the phrase 'materially advance', regardless of the outcome of that appeal. The participation—or not—of the victims in the investigation phase would not, as such, have impeded forward movement of the case. It was thus largely faultless in those circumstances to engage concerns about the correctness of the course along which that assured forward movement should occur, although one may question the necessity of the reasoning. That, then, made the question of 'right course' an ordinal consideration, rather than the cardinal one, in relation to the meaning of 'materially advance' the proceedings. In contrast, the issue in the case at bar engages a starkly different reality relative to forward movement. There will be no forward movement in the proceedings if the Defence prevails in their appeal. The case will, as a matter of fact, be halted in its tracks for an indefinite duration. It is thus difficult to see how the case would have 'moved forward' in the 'right course' in those circumstances. One could possibly excuse such an argument, although with difficulty, where the Defence objective is to bring finality to the proceedings by having it dismissed definitively *in limine*. But that is not their objective. They want a temporary halt *sine die*.

27. It bears reiterating that in the reasoning of the Appeals Chamber the main sense of the word 'advance' is to 'move forward'. That remains the better view of the essence of interlocutory appeals. It is to clear procedural impediments from the path of criminal proceedings, so that the proceedings may 'move forward'.

28. Indeed, the virtual subjection of all analysis on the second component to the control of the phrase 'right course', to the effective ignorance of 'move forward' as almost inconsequential, will also produce the following hapless results: first, it will, for all practical purposes, render pointless the second component of the test for grant of leave for

interlocutory appeals. All that will then be required to overcome the test will be a mere claim that the impugned decision had put the proceedings on ‘the wrong course’ or off ‘the right course’. No decision can fairly escape such an attack in the hands of a displeased party or participant. Every issue that survives the analytical sieve of the first component will, to all intents and purposes, automatically pass muster under the second component. It will, in that sense, reduce the quality of interlocutory appeal as the exceptional process that it should be. It must be recalled that the first component concerns the question whether an issue involves an appealable error. An issue does not truly become appealable unless it implicates a departure from ‘the right course’. In fact, such duplicative rational value of ‘the right course’ appears all too evident in the Majority reasoning. Consider the following pronouncements of the Majority in relation to the meaning of ‘materially advance’: ‘The Chamber notes the defence submission that, if ultimately convicted the “first ground of their appeal against conviction will likely be that the trial was unfair (...), which relates to the First Issue”.’²⁶ In a similar vein, the Majority also wrote as follows: ‘The applied specificity threshold which, among other factors, led the Chamber to decide not to stay the proceedings at this stage is interlinked with the issue of fairness and with the right of the accused to have adequate facilities for the preparation of the defence.’²⁷ All these are issues that bear on the first component. If that is so, what value does the second component truly add to rational analysis in the context of grant of leave for interlocutory appeals?

29. Quite notably, that manner of analysis is necessarily eschewed by the Appeals Chamber in light of its inclination against the duplication of considerations between the first and second components. This is evident in the Appeal’s Chamber’s refusal to associate ‘advance’ with expeditiousness of the proceedings, since the latter has already been accounted for in the first component.²⁸ A related mischief concerns a notorious feature of adversarial litigation. That feature is simply that there is literally no contested

²⁶ See paragraph 18 of the Majority decision.

²⁷ *Ibid.*

²⁸ See *Situation in the Democratic Republic of the Congo (Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal)*, *supra*, para 15.

case in which multiple questions do not arise regarding whether a case is proceeding along the 'right course'. Every motion or request—and every objection—contested in a case engages that very question at the instance of the party at the losing end of the decision of the trial judge(s). Should the drafters of article 82(1)(d) of the Statute then be taken to have intended all those questions to be subject of interlocutory appeals once the issue has passed the test of the first component indicated in the provision? But that is the resulting inference if the controlling test of the second component is dependent on questions as to the 'right course' of the proceedings or indeed on '[r]emoving doubts about the correctness of a decision or mapping a course of action along the right lines.'

30. A second problem with the heavy focus on 'right course' as to the meaning of 'materially advance' the proceedings is its tendency towards unitary empathy with the concerns of one interest (in this instance, the Defence's) in a process that should also typically cater to the concerns of three other interests (those of the Prosecution, the victims and the public). In the judicial process, there may be a desire from one interest (hopefully for good cause) to halt the proceedings indefinitely, while the other interests indicate a preference for materially advancing the case in the literal sense of forward movement towards a verdict, allowing the chips of final judgment to fall where they may. Is a Trial Chamber to ignore these other interests who desire the case to move forward in the ordinary acceptation of the idea, out of regard for a one-dimensional view of 'materially advance' as somehow meaning to 'move forward' in the 'right course' by temporarily halting the case indefinitely?

31. Third, the inordinate reliance on the notion of 'right course' also effectively erodes the province of appeals on the merit. This is in the sense that all the errors that are statutorily designated as matters for appeals on the merit may now be sought to be litigated in interlocutory appeals, if they implicate the 'wrong course'. In order to avoid this difficulty, questions concerning whether or not the proceedings are moving forward on the 'right course' ought not control the grant of leave to embark upon an interlocutory appeal; for, the correctness of the path along which the proceedings had moved will be captured in any appeal on the merits that may arise at the end of the day, where any such errors has

the potential to occasion injustice. The appeal on the merit thus remains the safety net against miscarriage of justice. Interlocutory appeals should not be that safety net. This view clearly strikes a balance—correctly alluded to by the ICTY Trial Chamber II in *Strugar*—between giving interlocutory appeals their due role of moving proceedings forward, while ensuring that any lingering questions of injustice alleged to have been unduly caused along the way—by responsible trial judges who must enjoy a presumption of good faith, competence and professionalism—will be taken up on appeals on the merits.

32. And, finally, the consequences of the difficulties reviewed above will be to clog the Court's appellate system with interlocutory appeals, which will undermine confident movement in proceedings in progress at the trial stage.

33. Ultimately, the foregoing difficulties clearly demonstrate the wisdom of giving plain meaning to statutory language. In the case at hand, the statutory language is the phrase 'materially advance'. It means to 'advance', as Trial Chamber I has correctly suggested, in a manner that 'will benefit the *substantive progress* of the case'.²⁹ It does not mean to advance in a manner that is seen by all as *qualitatively pure*. In view of the foregoing, I strongly recommend the return of focus to the actual language of the statute, and not to get swept away by a strong, alternative normative terminology employed in an effort to interpret the original language of the statute, but the effect of which is to lead away from the actual statutory language.

34. I am wholly sympathetic, of course, with the concern about cases proceeding along the 'right course'. It is no doubt better that they do. But I am firmly of the view that the concern is wholly misplaced as the dominant consideration in the meaning of 'materially advance' proceedings in the litigation of leave for interlocutory appeals pursuant to article 82(1)(d) of the Statute. I am confident that concerns about cases proceeding along the 'right course' are readily resolved not only by recognising the limitations of that concern as discussed above, but also by giving due credit to trial judges whose presumptions of good

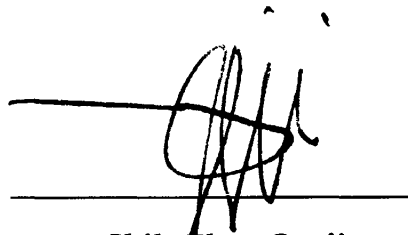
²⁹ *Prosecutor v Lubanga (Decision on the Prosecution Request for Leave to Appeal the "Decision on Intermediaries")*, *supra*, para 29 (emphasis added).

faith, competence and professionalism are not easily reconciled with routine questions regarding whether they have allowed the proceedings to move off the 'right course', thus requiring the interlocutory correction of the Appeals Chamber. These presumptions favour the need to allow Trial Chamber's the full impetus they need to run their trials and move them along, without questions of 'right course' of the proceedings constantly shadowing their decisions. Parties will be free to pursue such questions on any appeals on the merits.

Conclusion

35. In the final analysis, the Majority decision in granting leave to appeal involves a lowering of the threshold of interlocutory appeals in a manner that will confuse the process, if not result in a more troubling trend capable of clogging the process itself with interlocutory appeals on issues that should wait for appeals on the merit. It makes interlocutory appeals less than an *exceptional* process. I disagree with it. I would deny leave to appeal.

Done in both English and French, the English version being authoritative.



Chile Eboe-Osuji
Judge

Dated this 17 December 2012

At The Hague, the Netherlands