Chapter 17  The status of ICTY and ICTR precedent in proceedings before the ICC

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1. Introduction

In his foreword to Archbold International Criminal Courts, Justice Richard Goldstone, the first prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY), remarked that the judges and the first prosecutor of the International Criminal Court (ICC, or Court) are in a fortunate position because they can build on the precedent of the ICTY and of the International Criminal Tribunal for Rwanda (ICTR).¹ And indeed, in the proceedings before the ICC thus far, both the filings of the participants² and the decisions of the Chambers³ often contain references to the

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² See, for example, Prosecution’s Response to Request Submitted pursuant to Rule 103(1) of the Rules of Procedure and Evidence for Leave to Participate as Amicus Curiae in the Situation in the Democratic Republic of Congo, ICC-01/04-316, 5 December 2006, at paras 13 et seq.; Prosecutor v. Lubanga Dyilo, Defence submissions on the scope of the right to appeal within the meaning of Article 82 (1) (b) of the Statute, ICC-01/04-01/06-812, 7 February 2007, paras. 28 et seq.; Prosecution’s submissions regarding the subjects that require early determination: procedures to be adopted for instructing expert witnesses, witness familiarization and witness proofing, ICC-01/04-01/06-952, 12 September 2007, paras. 18 et seq.; Defence Submission on the Subjects that Require Early Determination: Trial Date, Languages to be Used in the Proceedings, Disclosure and E-court Protocol, ICC-01/04-01/06-960-tENG, 24 September 2007, para. 25.

³ See, for example, Prosecutor v. Kony et al., Decision on the Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, PTC II, 19 August 2005, paras. 16 et seq.; Prosecutor v. Lubanga Dyilo, Decision on the Final System of Disclosure and the Establishment of a Time Table, ICC-01/04-01/06-102, PTC I, 15 May 2006, para. 14; Decision Establishing General Principles Governing Applications to Re-
jurisprudence of the two *ad hoc* tribunals of the United Nations. Given the impact that decisions of international courts have had on the development of international criminal law,\(^4\) this reliance on precedent from the *ad hoc* tribunals does not come as a surprise, in particular because the tribunals are the immediate predecessors of the Court. Their mere existence has had a tremendous impact on the drafting of the Rome Statute\(^5\) and of the subsidiary legal instruments of the ICC,\(^6\) notably the Court’s

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*strict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence, ICC-01/04-01/06-108-Corr, PTC I, 19 May 2006, fn. 9 and 10; Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, ICC-01/04-01/06-915, PTC I, para. 19, fn. 18; 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-01/04-01/06-776, AC, 14 December 2006, para. 20; Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo,’ ICC-01/04-01/06-824, AC, 13 February 2007, paras. 122 et seq.*

