Cour Pénale Internationale

International Criminal Court

Original : **English**

No.: **ICC-01/04**
Date: **24 April 2006**

THE APPEALS CHAMBER

Before: **Judge Philippe Kirsch**
Judge Erkki Kourula
Judge Navanethem Pillay
Judge Sang-Hyun Song
Judge Georghios M. Pikis

Registrar: **Mr Bruno Cathala**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal

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Introduction

1. The Prosecution requests the Appeals Chamber to allow this Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 "Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6".[1] The Prosecution respectfully submits that the Chamber wrongly denied appellate review of a matter which qualified for such review under the standard, as properly construed. The Decision also effectively denies the Appeals Chamber the review function which it necessarily must possess in order to determine matters properly within its competence.

2. The Prosecution respectfully requests the Appeals Chamber to overturn the Decision and to itself grant the requested leave to appeal. In the alternative, the Appeals Chamber is requested to order the Pre-Trial Chamber to grant such leave, or to correct any legal error in the Decision and instruct the Pre-Trial Chamber to render a new determination, in light of the Appeals Chamber's legal findings.

Procedural background

3. On 17 January 2006, Pre-Trial Chamber I issued its "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6".[2] The Prosecution filed an application for leave to appeal that decision on 23 January 2006.[3]

4. On 27 January 2006, the Legal Representative of the Applicants filed a document entitled "Observations of the Legal Representative of VPRS 1 to VPRS 6 following the Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in Proceedings of VPRS 1 to VPRS 6".[4] After

[1] ICC-01/04-135-tEN.
[2] ICC-01/04-100-Conf-Exp-tEN (hereinafter, the "First Decision").
[3] "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 6", ICC-01/04-103 (hereinafter, the "Prosecution's Application for Leave to Appeal").
[4] ICC-01/04-105-tEN (hereinafter, "Observations of the Legal Representative for the Victims").

successfully obtaining leave to do so[5], the Prosecution replied to the latter document on 6 February 2006.[6]

5. On 31 March 2006, the Pre-Trial Chamber issued its "Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6"[7], denying the requested leave to appeal.

Request for an extension of the page-limit

6. The complexity and novelty of the issues involved in the Pre-Trial Chamber's First and Second Decisions, as well as the need to demonstrate the legal basis for the Appeals Chamber to entertain this Application, have rendered it impossible for the Prosecution to comply with the page-limit of 20 pages under Regulation 37. The Prosecution accordingly requests an extension of the page-limit by an additional 23 pages under Regulation 37 (2).

The reasons for extraordinary review

7. Throughout these proceedings, the Prosecution has consistently supported the right of victims to participate in the Court's process and to make their independent voice heard. The Prosecution has stressed the importance of implementing the procedural rights of victims in a manner consistent with Court's legal framework and without exposing victims and other persons to risks to their well-being and safety, creating an imbalance between participants or altering the equilibrium that the Statute creates among the different organs of the Court.

8. The Prosecution sought leave to appeal from the Pre-Trial Chamber because it considered that, in the First Decision, the Pre-Trial Chamber had arguably failed to observe the balance among all relevant interests at stake as enshrined in the Statute. This necessarily entailed serious potential consequences for the fairness and efficiency not only of this proceeding but for all others which will come before the Court. The

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[5] Pre-Trial Chamber I, "Decision on the Prosecution's Application for Leave to Reply", ICC-01/04-110-tEN, 1 February 2006.
[6] "Prosecutor's Reply to the Observations of the Legal Representative for the Victims", ICC-01/04-111 (hereinafter, the "Prosecution's Reply").
[7] Hereinafter, the "Second Decision". The official English translation of the Second Decision was not distributed until 20 April 2006.

Decision arguably adopted an approach to victim participation inconsistent with the terms of the Statute, and broader than the most accommodating national practice. In the process, it expanded the Chamber's authority beyond the specific terms of the Court's basic documents, transformed significant aspects of pre-trial procedure, and altered critical compromises reached at Rome.

9. The First Decision substantially affects the fairness and efficiency of the proceedings and creates procedures which cannot effectively be appealed following final judgment. The issues decided include, *inter alia*, the scope of Article 68 (3), the adequate balance between the right of victims to participate under the Statute and the right of the accused to fair pre-trial and trial proceedings, the proper manner of determining whether a person qualifies as a victim, the scope of the statutory requirement of objectivity of the investigation, and the authority of the Pre-Trial Chamber to receive evidence form third parties, to initiate "special procedures" or to allow third party access to confidential information.

10. The Chamber's decision to deny leave to appeal has added other extremely sensitive issues to these proceedings, relating to the authority of the Appeals Chamber. This striking ruling, if left undisturbed, could nullify the procedural vehicle of Article 82 (1) (d), and effectively eliminate the Appeals Chamber's authority to intervene in any matter where an appeal does not lie as a matter of right. The Pre-Trial Chamber, developing on a defective prior decision by Pre-Trial Chamber II, has interpreted the plain language of Article 82 (1) (d) so restrictively as to raise the question of whether any discretionary appeal will ever be permitted. The test adopted by the Second Decision requires any potential appellant to demonstrate an immediate and certain effect on the fairness and efficiency of proceedings, rather than the prospect that the decision "would" or "may" have that consequence. Further, the Chamber has given itself expansive regulatory functions, whereby it is empowered to determine nothing less than the merits of the underlying arguments (i.e., the future grounds of appeal), as a means of precluding appellate review: in short, the Pre-Trial Chamber effectively decides its own appeal.[8]

11. The resulting model of appellate review is a flawed one in which, in contrast to any national jurisdiction, the highest judicial body retains *no* ability to review matters

[8] See an analysis of these aspects of the Second Decision at paras 53-56 and 63-65 below.

which not only substantially affect fairness and efficiency, but are also of a constitutional nature. A system of this type grants Pre-Trial Chambers the power to unilaterally shape the criminal process of this Court, its fairness, and its efficiency, and conversely entails an emasculation of the Appeals Chamber's review functions. Such a system simply cannot have been intended by the drafters of the Statute. The system enshrined in Article 82 (1) (d), as it will be explained below, was designed to filter frivolous or minor appeals or appeals raising issues that could be more effectively dealt with in the context of a final appeal. It was *not* created to vest Pre-Trial or Trial Chambers of this Court with the power to insulate themselves from appellate scrutiny and consolidate their own jurisprudence as the law of the Court.

12. In light of the above, the Prosecution respectfully submits that the extraordinary measure of the Appeals Chamber's intervention is urgently required. Absent such intervention, both the critical issues raised by the defective First Decision and the flawed approach to the system of leave to appeal established by the Second Decision will remain unreviewed, and may lead to a permanent and wrongful restriction on the authority of the Appeals Chamber, entailing its marginalization vis-à-vis the determination of matters of fundamental importance for the entire Court. The Prosecution fully recognizes the extraordinary nature of its request. It submits this application because: (1) a line of decisions that severely limit the scope of the Appeals Chamber's review function, and purport to render it powerless to grant relief in these circumstances, cannot be immune from review; (2) a decision on the scope of the Appeals Chamber's jurisdiction should ultimately be rendered by the Appeals Chamber itself; and (3) the relevant standard for appeal, properly construed, was fully satisfied in this case.

Admissibility of this request

13. The Prosecution recognizes that the Statute does not explicitly provide for a specific remedy against a decision by a Pre-Trial or Trial Chamber denying leave to appeal. The Prosecution nonetheless submits that (a) this is a *lacuna*, and not a corollary of the system of leave to appeal enshrined in Article 82 (1) (d), which, under limited and exceptional circumstances, may be properly filled by the Appeals Chamber; and (b) the Statute provides an avenue for the Appeals Chamber to remedy such *lacunae*

through resort to "general principles of law derived by the Court from national laws of legal systems of the world" within the terms of Article 21 (1) (c).

14. The conclusion that the lack of a specific remedy in the Statute constitutes a *lacuna* and not a case of forbidden judicial intervention is firmly supported by a teleological reading of the Statute, including its provisions related to intervention by the Appeals Chamber. Specifically, any interpretation of the Statute and the Rules that would render the Appeals Chamber entirely powerless to regulate the scope and requirements for its own appellate intervention would defeat the very purposes of the system of appellate review envisioned by the Statute. Such an interpretation would preclude the Appeals Chamber from adequately performing its functions as the ultimate arbiter of the law of this Court. The existence of a general principle of law providing a basis for such a remedy (which will be demonstrated below), further supports the conclusion that the failure of the Statute to speak to review of a denial of leave to appeal does not preclude such review.[9]

The applicable general principles of law

<u>The scope of Article 21 (1) (c) of the Statute</u>

15. The Prosecution submits that it is a general principle of law, importable into the legal framework of the Court though Article 21 (1) (c), that where a lower or first court has the authority to determine whether or not a matter should be brought before an appellate court, then the latter also has the authority to examine whether the first court's decision to either allow or prevent the appellant moving before the higher court was based on a correct interpretation of that lower court's authority, reasonably applied. The Prosecution will first briefly discuss the scope and requirements of Article 21 (1) (c), and will then provide the Appeals Chamber with the legal foundation for the general principle set out above.

16. Article 21 (1) (c) makes it proper and relevant for this Chamber to apply "general principles of law derived ... from national laws of legal systems of the world" when interpreting the Statute. Article 21 (1) (c), however, does not require an exhaustive

[9] In this sense, the Prosecution notes that the very provision of "general principles of law recognised by civilised nations" was inserted into article 38 of the ICJ Statute, on which Article 21(1)(c) based, to close the gap that might be uncovered in international law and avoid a declaration of *non-liquet*. See Shaw, *International Law* (2003), p. 93.

inquiry into every legal system of the world for the purposes of identifying a general principle. As noted by one commentator, the drafters of the Statute quite correctly made reference not to national laws as such, but to "national laws of legal systems of the world". On this point, the French text is clearer; it refers to "*les lois nationales représentant les différents systèmes juridiques du monde*" (the national laws representing the different legal systems of the world), which suggests that it is not necessary to make a systematic comparison of *all* national legal systems, but only to ensure by "polling" that the norms in question are effectively found in the "principal legal systems of the world". According to the same commentator, these can probably be reduced to "civil law, common law, and perhaps Islamic law".[10]

17. Further, and consistent with the manner in which the ICJ has interpreted and applied Article 38 of its Statute, a direct source of Article 21, the role of the judge in deriving general principles from the national laws of the legal systems of the world is to apply not the concrete rules of law found in national legal systems, but the principles underlying these rules. As Judge McNair stated:

> "To what extent is it useful or even necessary to examine what may at first sight appear to be relevant analogies in private law systems and draw help and inspiration from them? International law has recruited and continues to recruit many of its rules and institutions from private systems of law...The way in which international law borrows from this source is not by means of importing private law institutions 'lock stock and barrel', ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of the 'general principles of law'. In my opinion, *the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.*"[11] (emphasis added)

18. The *travaux* of article 38, the decisions of the ICJ and the view of the majority of jurists suggest that "general principles recognised in national law constitute a reservoir

[10] Pellet, "Applicable Law" in Cassese, Gaeta and Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002), p. 1073.
[11] *South West Africa Case (Advisory Opinion),* separate opinion of Judge McNair, (1950) ICJ Reports 28 at 148.

of principles which an international judge is authorised by Article 38 to apply in an international dispute, if their application appears relevant and appropriate in the different context of inter-State relations."[12] As one commentator has pointed out, it is not a case of adopting a "mechanical system of borrowing from domestic law after a census of domestic systems." Rather, international tribunals "have employed elements of legal reasoning and private law analogies in order to make the law of nations a viable system for application in a judicial process...An international tribunal chooses, edits, and adapts elements from better developed systems: the result is a new element of international law the content of which is influenced historically and logically by domestic law."[13]

19. The jurisprudence stemming from the Permanent Court of International Justice, the International Court of Justice, the Iran-U.S. Mixed Claims Tribunal and the ICTY provides relevant examples of the type of general principles of law identified and applied by international judicial bodies:

   - *The Diversion of Water from the Meuse Case:*[14] Lord Hudson held that "It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party." He thus appears to have understood "principles of equity" as being principles common to national legal systems generally and part of international law by virtue of article 38 (I) (3) of the Statute of the PCIJ.[15]

   - In the *Corfu Channel* case, the ICJ, when referring to circumstantial evidence concluded that "this indirect evidence is admitted in all systems of law and its use is recognised by international decisions".[16] Likewise in the *Barcelona*

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[12] Waldock, "General Course on Public International Law" (1962-II) 106 *Recueil des Cours* 54; Harris, *Cases and Materials on International Law* (6th ed) (2004), p. 45.
[13] Brownlie, *Principles of Public International Law* (6th ed) (2003), p. 16.
[14] *Netherlands v Belgium* 1937, P.C.I.J., Series A/B, No. 70, p. 77.
[15] Harris, *Cases and Materials on International Law* (6th ed) (2004), p. 49.
[16] (1949) ICJ Reports 170, as cited in Shaw, *International Law* (2003), p. 95.

Traction Case the ICJ relied upon the "lifting the veil" principle which it found "admitted by municipal law" generally.[17]

- In the *Sea-Land Service Inc v Iran*, the Iran-US Mixed Claims Tribunal held that the concept of "unjust enrichment" is "codified or judicially recognised in the great majority of the municipal legal systems of the world, and is widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals."[18] The Tribunal has treated numerous doctrines as general principles, most being simple and familiar to international commerce and to many legal systems.[19]

- In *Prosecutor v Delalic et al,* the ICTY Appeals Chamber, upon review of common and civil law jurisdictions, rejected the mechanical insertion of the partial defence of diminished mental responsibility provided for by the English *Homicide Act* 1957, and concluded that: "the relevant general principle of law upon which, in effect, both the common law and the civil law systems have acted is that the defendant's diminished mental responsibility is relevant to the sentence to be imposed and is not a defence leading to an acquittal in the true sense. This is the appropriate general legal principle representing the international law to be applied in the Tribunal."[20]

20. Thus the principle of interpretation is the following: when a survey of jurisdictions representing the main legal systems results in the identification of a common rule or set of rules, i.e. the survey shows a degree of comparative equivalence sufficient to ensure a broad consensus,[21] then the judge or chamber engaging in the interpretation may extract the principle underpinning those rules and subsequently apply the

[17] The Court was deciding that, in exceptional circumstances, the national state of the shareholders of a company could act to protect them in place of the national state of the company – (1970) ICJ Reports 6, at p. 39.
[18] (1984) 6 Iran-USCTR 149, at p. 168-9; referred to in Crook, "Applicable law in International Arbitration: The Iran-US Claims Tribunal Experience" (1989) 83 *AJIL* 278, at p. 292.
[19] Crook, *ibid*, p. 293. For example, the Tribunal's application of *force majeure* has rested entirely (implicitly or explicitly) on general principles. For example, in *Anaconda - Iran Inc v Iran*, it was held that "under a variety of names, most, if not all, legal systems recognize *force majeure* as an excuse for contractual non-performance. *Force majeure* therefore can be considered a general principle of law." ((1986-IV) 13 Iran-USCTR 199, at p. 211 cited in Crook, *ibid*, at p. 293)
[20] *Prosecutor v Delalic et al,* IT-96-21-A, Judgement, 20 February 2001 at para. 590.
[21] See Bassiouni, "A Functional Approach to 'General Principles of International Law'" (1990) 11 *Mich J Int'l Law* 768, at p. 813.

principle to the case at bar.[22] Resort to relevant policy considerations is also appropriate. As stated by one commentator:

> "Reference to the 'correct legal view' or 'rules' can never avoid the element of choice (though it can seek to disguise it), nor can it provide guidance to the preferable decision. In making this choice one must inevitably have consideration for the humanitarian, moral, and social purposes of the law...Where there is ambiguity or uncertainty, the policy-directed choice can properly be made."[23]

<u>Direct access to appellate courts in comparative law</u>

21. Therefore the next inquiry is whether there is any identifiable general principle of law, relevant to the issue of the availability of review of the denial of leave to appeal by a lower court, in the legal systems of the world. Research into the law of 24 national jurisdictions representing both the Civil and the Common Law traditions, and the law of a further three jurisdictions with a strong Islamic law component, shows the existence of two major groups: (a) those where an appeal is always lodged before the appellate court or, if filed with the lower or first court, it is immediately forwarded to the former (certain civil law jurisdictions and the Islamic law systems reviewed); (b) systems where, at least in certain instances, an appeal is filed with the lower or first court and that court is empowered to make certain determinations as to the legal requirements pertaining to the appeal (both civil and common law; the scope of these determinations vary from jurisdiction to jurisdiction). In the first group there is no need for a remedy vis-à-vis the first court's determination, as the appellate court is involved in the potential appeal from the outset. In the second group, as explained below, there is always a remedy against flawed determinations pertaining to the filing of the appeal entered by the lower or first court.

[22] Conversely, that should not happen in the case of rules or institutes that are known only to a confined number of legal systems. See the ICJ *South West Africa Case* (second phase) (1966) ICJ Reports 6 (finding that the *actio popularis* was known only to certain legal systems and hence was not a general principle).
[23] Higgins, *Problems and Process: International Law and How We Use It* (1994) at p. 5 (further stressing the desirability that policy factors are dealt with systematically and openly). Former ICTY Judges McDonald and Vohrah also relied on this authority in their Joint Separate Opinion in *Prosecutor v Erdemovic,* (IT-96-22-A, 7 October 1997, at para. 78).

A. Civil Law jurisdictions

22. The Prosecution has reviewed and analysed the laws of Argentina, Chile, Ecuador, El Salvador, Finland, Germany, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, Portugal, Spain and Uruguay.[24] In each of these systems a remedy exists where a lower court unfairly fails to submit itself to appellate review. The Prosecution has also reviewed other jurisdictions falling within the civil law tradition, namely Cambodia, the Democratic Republic of the Congo, France, and China, which do not contemplate any similar remedy. That absence is, as already stated, explained by the fact that in these jurisdictions decisions on the admissibility of an appeal are exclusively reserved to the higher court hearing the appeal, even when the appeal is initially to be filed with the judge or tribunal that issued the impugned decision.[25]

23. In those Civil Law jurisdictions where the first or lower court enjoys the authority to regulate the intervention of the appeals court, there is always an available remedy, generally in the form of a "Complaint motion" for refusal to admit an appeal. The relevant civil, commercial or criminal laws of the national systems reviewed provide

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[24] Argentina, Code of Criminal Procedure (*Código Procesal Penal de la Nación*, Law No. 11179), art. 476; Chile, Code of Criminal Procedure (*Código Procesal Penal*, Law No. 19.696, published on 12 October 2000), art. 369; Ecuador, Code of Criminal Procedure (*Código de Procedimiento Penal*, Law No. 000.RO/Sup 360, 13 January 2000), art. 321; El Salvador, Civil Procedure Code (*Código de Procedimientos Civiles*, 31 December 1881), art. 1028; Finland, Code of Judicial Procedure (Law No. 4/1734), section 9; Germany, Code of Civil Procedure (*Zivilprozeßordnung*, ZPO), section 544; Guatemala, Code of Criminal Procedure (*Código Procesal Penal*, Decree No. 51-92), art. 412; Honduras, Code of Criminal Procedure (*Código Procesal Penal*, Decree No. 9-99-E, 30 December 1999), art. 351; Mexico, Federal Code of Criminal Procedure (*Código Federal de Procedimientos Penales*, Diario Oficial de la Federación, 30 August 1934), art. 392; Nicaragua, Code of Criminal Procedure (*Código Procesal Penal*, Law No. 406, 13 November 2001, published in *La Gaceta* No. 243 and 244 on 21 and 24 December 2001), art. 3654; Panama, Judicial Code (*Código Judicial de Panamá*), art. 1152; Peru, Code of Criminal Procedure (*Código de Procedimientos Penales*, Law No. 9024), art. 297; Portugal, Code of Criminal Procedure (*Código de Processo Penal*, Decree-Law No. 78/87, 17 February 1987), art. 405; Spain, Spanish Law on Criminal Procedure (*Ley de Enjuiciamiento Criminal*, 14 September 1882), arts. 218 and 862; Uruguay, General Code of Procedure (*Código General del Proceso*, Law No. 15.982), art. 262, applicable to criminal proceedings by virtue of art. 265 of the Code of Criminal Procedure (*Código del Proceso Penal*, Law No. 16.893, published on 30 December 1997).

[25] In Cambodia, an appellant must file the appeal before the registrar of the court that issued the decision which is being appealed (art. 176 of the 1993 law of criminal procedure). That court, however, may not review the admissibility of the appeal or reject it; quite on the contrary, it must forward the appeal together with the record of the proceedings as soon as possible (art. 180). The same system is followed in France (*Code of Criminal Procedure*, art. 380-12 and 380-14). In China the same procedure is followed for complaints brought by parties other than the Prosecutor (*Criminal Procedure Law of the People's Republic of China*, 17 March 1996, art. 184). Complaints by the Prosecutor are filed directly with the higher level court which is to hear the appeal (art. 185). For the DRC, in criminal proceedings, an appeal against a judgement can be filed before the tribunal which rendered it or before the tribunal hearing the appeal (art. 100, *Code of Criminal Procedure*, 6 August 1959). In case the appeal is filed before the tribunal *a quo*, the registrar of such tribunal is mandated to forward the file of the case and the judgement to the tribunal hearing the appeal as fast as possible (art. 101). There seems to be no general provision for interlocutory appeals, but decisions on provisional detention can be appealed. In this case, the appeal is filed before the tribunal which issued the decision (art. 39), the registrar of such tribunal being obliged to transmit it without delay to the tribunal hearing the appeal (art. 39).

for a remedy against a tribunal's refusal (tribunal *a quo*) to admit an appeal against one of its decisions before a higher tribunal (tribunal *ad quem*). The name of this remedy varies: in Ibero-American jurisdictions (Portugal, Spain and Latin-American countries) it is usually called "*recurso de queja*" or "*recurso de hecho*", which roughly translates as "complaint motion" or "*de facto* appeal". In Germany, it is referred to as "complaint against a declaration of inadmissibility" (*Nichtzulassungsbeschwerde*). The origin of the remedy lies with the fact that the tribunal *a quo* is legally empowered to filter the appeals brought by the parties against its decisions but might abuse such power to protect its rulings and deprive the parties of a second review by simply declaring any appeal inadmissible. The purpose of the remedy is therefore twofold:

(a) To control the way in which the tribunal *a quo* exercises its power to declare an appeal inadmissible, ensuring that the tribunal *a quo* is in fact abiding by the law[26] and avoiding the consequences of a potential conflict of interest.[27]

(b) To protect the right to appellate review of the parties prejudiced by a decision of the lower court, enshrining the fundamental principle that not to allow for any meaningful form of appellate intervention would render illusory the right to an appeal.[28]

24. The legal basis of a "complaint motion", "de facto appeal" or other similar remedies in Argentina, Chile, Ecuador, El Salvador, Finland, Germany, Guatemala, Honduras,

[26] Córdoba, "Recurso de queja en el Código Procesal Penal de la Nación", in Maier, Bovino and Diaz Cantón (eds.) *Los recursos en el procedimiento penal* (2nd ed.) (2004), p. 57 (hereinafter "Córdoba, *Recurso de queja*")
[27] Supreme Court of Ecuador, Civil and Commercial Chamber, *Judgements Nos. 131-98, 160-98, 161-98 and 189-98*, para. 2 (Unofficial translation: "The decision to admit an appeal is a power which in principle belongs to the Judge *a quo*; it is him, therefore, who, once an appeal is filed, must apply the legal provisions regulating the admission of the appeal in order to admit it or declare it inadmissible. But, in addition, in the latter case and by virtue of the complaint, the Judge *ad quem* reviews the use of such power by the *a quo*. To leave to the mercy of the Judge *a quo* the declaration of admissibility or inadmissibility of appeals against his own judgements, would tantamount to making him an arbiter to free all such judgements from appeal. In such case he would only have to declare the appeals inadmissible. This is the reason why the law of procedure created a remedy to avoid such contingency, which is called complaint motion, whereby the Court [*ad quem*] can examine the reasons relied on by the lower instance to deny the appeal."; Córdoba, *Recurso de queja*, p. 56, and other academic authorities cited therein.
[28] Family Second Instance Tribunal in the Central Department of San Salvador, *Case 68-A-99*, 16 August 1999 ("In application of the Principle of Procedural Economy, in cases such as the present one, this is, where the appeal filed does not fulfil all the formal requirements, such as when it is filed out of time, judges are empowered to declare the appeal inadmissible and if the interested party does not agree with the reasons supporting such decision, he still has the option of the *De facto* appeal as a guarantee of the right to a second instance, art. 163 of the Family Procedural Law"); Arrieta Gallegos, *Impugnación de las Resoluciones Judiciales*, (1996), p. 274 (cited in Amaya et al., *La Interpretación y Aplicación del Recurso de Apelación Adhesiva en la Ley Procesal de Familia*, El Salvador, 2000); Córdoba, *Recurso de queja*, pp. 55-56 and academic authorities cited therein.

Mexico, Nicaragua, Panama, Peru, Portugal, Spain and Uruguay is provided below. The analysis is focused on criminal laws, but the remedy is usually found in civil/commercial laws as well. In the vast majority of the cases, the remedy applies both to final as well as interlocutory appeals.[29]

(a) *Argentina.* Article 476 of the *Código Procesal Penal de la Nación* provides: "When an appeal to be decided by another tribunal is not granted, the appellant can complain directly before the latter tribunal, so that it can be ruled that it was not proper not to grant the appeal".[30]

(b) *Chile.* Article 369 of the *Código Procesal Penal* similarly provides that once the admissibility of an appeal is rejected by the lower court, those participating in the case may make representations within three days before the higher court with the aim of obtaining a determination as to whether the appeals should have been declared admissible or not.

(c) *Ecuador.* Article 321 of the *Código de Procedimiento Penal* provides for a specific remedy before the higher court (*recurso de hecho*), which shall be granted when the judge or court has rejected requests filed by the parties for remedies contemplated in the same Code.

(d) *El Salvador.* Article 1028 of the *Código de Procedimientos Civiles* affords a party whose appeal has been rejected by the lower court to appear before the higher court within three days from the notification of the decision and request that the appeal be entertained by the latter.

(e) *Finland.* Section 9 (3) of the *Code of Judicial Procedure* provides:

> The decision to reject a declaration of an intention to appeal shall be subject to complaint to the Court of Appeal. The letter of complaint shall be delivered to the registry of the District Court within thirty days of the day when the decision of the District Court was handed down or made available to the parties. If the Court of Appeal deems that the declaration of an intention to appeal has been legal, it shall, where necessary, set a new deadline for appeal.

[29] See, e.g., Córdoba, *Recurso de queja*, p. 59.
[30] Unofficial translation.
For an analogous institution in civil law, see Article 282 of the Commercial and Civil Procedure Code (Código Procesal Civil y Comercial de la Nación) (Unofficial translation: "282. Refusal to admit the appeal motion. If the judge declares the appeal motion inadmissible, the party who believes to have been prejudiced may appear directly on complaint before the tribunal, and request that the appeal motion be admitted and the case file be referred to the tribunal.").

(f) *Germany*. Under § 346 (1) of the *Code of Criminal Procedure (StPO)*, the lower court is only authorized to verify whether the appeal has been filed in time and whether the formal requirements prescribed in the law have been complied with. If the lower court mistakenly rejects the appeal, then the appellant has under § 346 (2) recourse to the appellate court for the purposes of obtaining a decision on the matter, in which case the record of the proceedings must be sent to the appellate court.

In the context of civil cases, where the lower court may refuse to admit an appeal on the basis that (1) the case does not raise an issue of fundamental significance, or (2) the development of the law or the preservation of a unified legal practice does not require a review decision,[31] a specific remedy has been created, namely the "*Nichtzulassungsbeschwerde*", which roughly translates as "appeal against declarations of inadmissibility" (§ 544 *ZPO*). Thus as identified by scholars,[32] the origin of this remedy is twofold: (a) to compensate the more restricted availability of appellate review after the introduction of the leave to appeal process in 2001; (b) to ensure that the Federal Supreme Court can actually carry out its duty to guarantee both a unified legal practice and individual justice.

(g) *Mexico*. Article 392 et seq of the *Código Federal de Procedimientos Penales* provides for a remedy against denied appeals (*recurso de denegada apelación*), whereby the appeals court is the final arbiter as to whether the appeal should have been allowed or not and with which effects (with or without suspensive effect).

(h) *Portugal*. Article 405 of the *Código de Processo Penal* provides:

> Article 405 - Complaint against decision not to admit or to hold back an appeal
>
> 1 - The appealing party may complain against the decision not to admit or to hold back an appeal motion to the president of the tribunal to which the appeal is addressed. ...
>
> 3 - In the petition the claimant includes the reasons that justify the admission or the immediate referral of the appeal to the upper instance and indicates the elements on which it intends to argue the complaint.

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[31] German *Code of Civil Procedure (ZPO)*, section 543 (2).

[32] Rühl, "Preparing Germany for the 21st Century: The Reform of the Code of Civil Procedure", (2005) 6 *German Law Journal*, at p. 934, footnote 156.

> 4 - The decision of the president of the higher tribunal is final when it confirms the decision for rejection or delay of the appeal. In the contrary case, it is not binding on the tribunal to which the appeal is addressed.[33]

(i) *Spain.* Articles 218 and 862 of the *Ley de Enjuiciamiento Criminal* respectively provide that:

> 218. A "complaint motion" may be brought against any decision of the investigative Judge which cannot be appealed, and against the decisions whereby an appeal motion [to be decided by a higher court] is not admitted.[34]
>
> 862. If the appellant believes to have been prejudiced by the negative decision referred to in article 858 [decision refusing to forward the appeal to the Supreme Court], he can complain before the Second Chamber of the Supreme Court, giving notice to the intervening Tribunal [which refused to forward the appeal], within two days following the notification of such decision, for the purposes of article 863.[35]

25. Similar provisions can be found in the legislations of Guatemala,[36] Honduras,[37] Nicaragua,[38] Panama[39] and Uruguay.[40]

B. Common Law Jurisdictions

26. A comparable trend can be identified in the common law jurisdictions reviewed: the vesting of discretionary powers to the first or lower court for the purposes of determining whether an appeal should be heard by the higher court is accompanied by a subsidiary remedy protecting the appellant against an abusive exercise of that discretion. The remedies available include writs of certiorari (used to quash the

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[33] Unofficial translation.
[34] Unofficial translation.
[35] Unofficial translation; Therefore, under the Spanish criminal procedure it is possible for a party to appear directly before a higher court both where an *investigating* judge or tribunal (art. 218) or a *trial* judge or tribunal (art. 862) refuses to allow an appeal.
[36] According to Article 412 of the *Código Procesal Penal*, when the intervening judge has denied the appeal, the grieving party may file a complaint before the appeals court within three days of the decision being notified, requesting that the appeal be admitted.
[37] Article 351 of the *Código Procesal Penal* states that if a lower court rejects an appeal which should have been granted, the grieving party may move before the respective higher court in order to obtain a declaration of admissibility of the appeal.
[38] Article 3654 of the *Código Procesal Penal* provides for an identical remedy, which must be filed before the Court which would have heard the appeal within the time-limit of three days from the day of notification of the lower court's decision.
[39] According to Article 1152 et seq of the *Código Judicial de Panamá*, the party who has unsuccessfully filed an appeal before the first instance court may bring the matter before the higher court, and must furnish the latter with copies of the appeal and the lower court's decision as well as with a brief of argument. Article 2432 expressly extends the applicability of this remedy to criminal cases.
[40] Article 262 et seq of the *Código General del Proceso*, aplicable to criminal proceedings by virtue of article 265 of the *Código del Proceso Penal*, provide for a complaint procedure (*recurso de queja*) before the appellate court for cases where the first instance court has wrongfully rejected the appeal.

decisions of the lower court) and writs of mandamus (to order the lower court to carry out its function by granting leave to appeal).

(a) *The United States.* In *Hohn v United States of America* the US Supreme Court held that "this Court has jurisdiction under §1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals" and proceeded to hold that "the judgment of the Court of Appeals is vacated, and the case is remanded for further consideration consistent with this opinion".[41] This acceptance of the Supreme Court's ability to review decisions refusing applications for certificates of appealability has been recognized in a long line of Supreme Court precedent. For example in *House v Mayo*,[42] House's petition for a writ of habeas corpus was denied by the district court. The district judge denied a certificate of probable cause for an appeal to the Circuit Court of Appeals, and the petitioner's application to the Circuit Court of Appeals for an appeal in *forma pauperis* was denied. On application by the petitioner, the Supreme Court ordered that the order of the Circuit Court of Appeals and the judgment of the district court be reversed and the cause be remanded to the district court for further proceedings that conform to the opinion of the Supreme Court. Although *Hohn* overruled *Mayo* by holding that there is *statutory* certiorari jurisdiction, *Mayo* remains authority for the proposition that *common-law* certiorari is available to review the denial of the certificate[43]

The instrument used for review of the lower court's decision is a writ of certiorari.[44] The same approach was taken in *Lozada v Deeds*,[45] and the court also discussed the test for issuing a certificate for probable cause.[46]

(b) *United Kingdom and related commonwealth jurisdictions.* The *Judicial Committee (General Appellate Jurisdiction) Rules Order 1982* of the Privy Council in the

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[41] 524 U.S. 236, 253 (1998).
[42] *House v. Mayo*, 324 U.S. 42 (1945).
[43] See further the concurring opinion of Justice Souter in *Hohn* above. A similar approach has been taken by the US Supreme Court in *United States ex rel. Jennings v. Ragen*, 358 U.S. 276, 277 (1959); *In re Shuttlesworth*, 369 U.S. 35 (1962); *Smith v. Digmon*, 434 U.S. 332, 333-334 (1978); *Walker v. Wainwright*, 390 U.S. 335, 336-337 (1968).
[44] Writs of certiorari are used to quash ultra vires decisions of, inter alia, lower courts.
[45] *Lozada v. Deeds*, 498 U.S. 430, 431 (1991).
[46] See further *Allen v. Hardy*, 478 U.S. 255, 257-258 (1986); *Maxwell v. Bishop* 385 U.S. 650 (1967); *Conway v. California Adult Auth* 393 U.S. 1062 (1969); *Humphrey v. Cady* 401 U.S. 973 (1971); *Graham v. Lynaugh* 492 U.S. 915 (1989); *Selvage v. Lynaugh*, 493 U.S. 888, 889 (1989); *Lynce v. Mathis*, 116 S. Ct. 1671 (1996).

United Kingdom provides as follows:

> 2. Leave to appeal generally
>
> No appeal shall be admitted unless either—
>
> (a) leave to appeal has been granted by the Court appealed from; or
>
> (b) *in the absence of such leave, special leave to appeal has been granted by Her Majesty in Council.* (emphasis added)

The above rules are of considerable importance, since the final court of appeal for several common law countries grouped around the commonwealth is the Judicial Committee of the Privy Council of the United Kingdom.[47] The above rules have been used to override decisions denying leave to appeal to the Privy Council by municipal courts.[48]

(c) *Canada.* The *Supreme Court Act of Canada* provides for the Supreme Court to hear appeals from lower courts "whether or not leave to appeal to the Supreme Court has been refused by any other court" in certain circumstances, where the issue involved in the decision is of such importance as to warrant a decision by the Supreme Court. In such cases, the Supreme Court itself may provide leave to appeal.[49]

The existence of jurisdiction to review a lower court's decision not to grant leave to appeal has been recognized by the Canadian Supreme Court. In *MacDonald v. Montreal (City)* the Supreme Court held that it has jurisdiction to review the Quebec Court of Appeal's decision not to grant leave to appeal from a judgment at trial. It was stated that "this is a jurisdiction which, for obvious reasons of policy

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[47] *Inter alia*, Antigua and Barbuda, Grenada, Bahamas, Jamaica, Barbados, St. Christopher and Nevis, Belize, Saint Lucia, Dominica, Mauritius, Trinidad and Tobago and, until recently, New Zealand.

[48] See *Robert Mohammed and Johnny Richardson v the State* [2001] UK PC 21; *Matthew v State of Trinidad and Tobago* [2004] UKPC 33; [2004] 3 W.L.R.; *Bimal Roy Paria v The State*, [2003] UKPC 36, para. 1.

[49] "40. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

....

(3) No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence."

and comity, we should exercise most sparingly, in those very rare cases where, as in this case, there is a risk that a question of major constitutional importance might otherwise be put beyond the possibility of review by this Court."[50] It further recognised that "[w]hile the Court should maintain an attitude of deference to the exercise of judicial discretion by intermediate appellate courts, it undoubtedly has the jurisdiction and should not hesitate to interfere with discretionary decisions on those rare occasions when it perceives legal principles of national, and more particularly constitutional, significance to be at stake."[51]

The court held that "while there are many instances in which this Court is justifiably reluctant to intervene in decisions of the courts below, it is incorrect to confuse this attitude of reluctance with lack of jurisdiction",[52] relying on Dickson J's statement in *R v Gardiner* that "The function of this Court is ... to settle questions of law of national importance in the interests of promoting uniformity in the application of the law across the country, especially with respect to matters of federal competence. To decline jurisdiction is to renounce the paramount responsibility of an ultimate appellate court with national authority."[53]

(d) *Sierra Leone*. The constitution of Sierra Leone provides:

> 123. (1) An appeal shall lie from a judgement, decree or order of the Court of Appeal to the Supreme Court - ...
>
> (c) with leave of the Court of Appeal in any criminal cause or matter, where the Court of Appeal is satisfied that the case involves a substantial question of law or is of public importance.
>
> (2) Notwithstanding the provisions of subsection (1), the Supreme Court shall have power to entertain any application for special leave to appeal in any cause or matter, civil or criminal, to the Supreme Court, and to grant such leave accordingly.

(e) *Australia*. The case of *Sammartino* provides another example of a higher court reviewing the refusal by a lower body to give leave to appeal. Here, the Federal Court issued writ of certiorari removing the decision to deny leave and issued a writ of mandamus directing the body which refused leave to "...hear and

[50] [1986] 1 S.C.R. 460, 25 C.C.C. (3d) 481 at pp. 503-504.
[51] *Ibid*, at p. 510, also noting that "s. 41(1) of the *Supreme Court Act* (and its cognate in s. 31(3) of the *Federal Court Act*), in its conferring of jurisdiction on the Court to review "any final or other judgment" of a court below, must be given a large and liberal interpretation."
[52] *Ibid*, at p. 509.
[53] [1982] 2 S.C.R. 368 at p. 397.

determine, in accordance with law...the application...for leave to appeal". The Federal Court noted that the body refusing leave to appeal "...erred in its approach to the application before it..." The Court went on to opine that if the lower body "...bears in mind what the prosecutor must establish in order to succeed on an appeal and perhaps also takes account of the general importance of the case, we are far from satisfied that leave will inevitably be refused".[54]

C. Islamic Law Jurisdictions

27. In Malaysia, Singapore and Philippines, the higher court is, as a general principle, the one in charge of determining whether leave to appeal should be granted. According to Section 48 of the *Malaysian Administration of Islamic Law (Federal Territories) Act* (1993), the Syariah High Court exercises appellate jurisdiction, *inter alia*, in criminal cases (appeals against acquittals, convictions or sentence), in civil cases, and "in any other case, if the Syariah High Court gives leave to appeal". Further, under Section 51 (1), the Syariah High Court "shall have supervisory and revisionary jurisdiction over all Syariah Subordinate Courts and may, if it appears desirable in the interest of justice, either of its own motion or at the instance of any party or person interested, at any stage in any matter or proceedings, whether civil or criminal, in any Syariah Subordinate Court, call for and examine any records thereof and may give such directions as justice may require".[55]

28. Similar provisions can be found in the *Administration of Muslim Law Act (Chapter 3)* (1999) of Singapore. Section 55 (1) provides that an appeal from the "Syariah Court" to an Appeals Board lies, *inter alia*, in all cases involving any decision as to personal status, the custody of minor children, disposition or division of property on divorce or nullification of marriage, or "in any other case, with leave of the Appeals Board".

[54] *Sammartino v Commissioner Foggo* [1999] FCA 1231, at paras 15-16.
[55] Identical powers are given to the Syariah Appeal Court which, under Section 52, may "on the application of any party grant leave for the determination by itself of any question of law of public interest which has arisen in the course of the appeal and the determination of which by the Syariah High Court has affected the result of the appeal". Additional powers are given to the Syariah Appeal Court by Section 53.

29. Finally, in the Philippines, according to *Presidential Decree No. 1083*:[56]

> Art. 144 (1): Shari'a District Courts shall have appellate jurisdiction over all cases tried in the Shari'a Circuit Courts within their territorial jurisdiction.

The decree states further in Art. 143 that the Shari'a District Court shall have exclusive original jurisdiction over

> ... (e) All petitions for mandamus, prohibition, injunction, certiorari, habeas corpus, and all other auxiliary writs and processes in aid of its appellate jurisdiction.

D. Comparative Analysis and Conclusion

30. It is submitted that the comparative research summarised above establishes the following proposition: when the parties enjoy a statutory right to appeal a decision, with or without conditions, and the court which issued the challenged decision intervenes in the exercise of such right, both common and civil law systems provide for last-resort remedies before the court which would have ordinarily heard the appeal in order to ensure the former court's adherence to the law and to avoid the consequences of any wrongful exercise of jurisdiction. The reasons for such remedy are the possible conflict of interests of the lower or first court,[57] and/or the possible abuse of discretion of that court, disregarding existing law or creating new law on the subject (on important matters) without the authorisation or participation of the higher court.[58]

31. Further, the fact that certain jurisdictions (notably, some civil law jurisdictions cited at footnote 25 above and all of the Islamic Law jurisdictions reviewed) provide for little or no participation at all of the lower court in the appellate process, concentrating instead all functions pertaining to the admissibility and subsequent treatment of the appeal in the appeals court, supports the existence of a more general principle, namely

[56] A Decree To Ordain And Promulgate A Code Recognizing The System Of Filipino Muslim Laws, Codifying Muslim Personal Laws, And Providing For Its Administration And For Other Purposes..

[57] Supreme Court of Ecuador, Civil and Commercial Chamber, *Judgements Nos. 131-98, 160-98, 161-98 and 189-98*, para. 2 (Unofficial translation: "To leave to the mercy of the Judge *a quo* the declaration of admissibility or inadmissibility of appeals motions against his own judgements, would tantamount to making him an arbiter to free all such judgements from appeal. In such case he would only have to declare the motions inadmissible. This is the reason why the law of procedure created a remedy to avoid such contingency, which is called complaint motion, whereby the Court *ad quem* can examine the reasons relied on by the lower instance to deny the motion."; Córdoba, *Recurso de queja*, p. 56, and other academic authorities cited therein.

[58] *MacDonald v. Montreal (City)* [1986] 1 S.C.R. 460, 25 C.C.C. (3d) 481, at p. 510.

that the last word on whether a particular matter ought to be heard by an appeals court always lies with that court, and not with the lower or first court. The specific remedy before the higher court provided for in those systems that assign the initial determination of the admissibility of the appeal to the lower or first court is simply a mechanism to ensure the validity of this broader general principle.

32. The Prosecution submits that the persuasive policy considerations underpinning the development of this remedy in comparative law, as described above, are transposable to the particular context of the Court. The authority of the Appeals Chamber to review, according to its discretion, decisions by Pre-Trial or Trial Chambers denying leave to appeal is a much needed safeguard against possible abuses of discretion, whereby flawed decisions are effectively protected from appellate review or issues of constitutional importance cannot be brought at all before the Appeals Chamber. Resort to the this general principle, it is submitted, is the only effective tool at the Appeals Chamber's disposal for the purposes of ensuring (1) that parties are not unduly deprived of an appellate remedy in those instances where an appeal does not lie as a matter of right; and (2) that its own role as the final arbiter of the law is not undermined. However, the Prosecution does not submit that this general principle should be applied by the Appeals Chamber in an unfettered fashion. Rather, the Prosecution submits that the principle should be incorporated into the jurisprudence of the Court in a prudent and meaningful manner. The Appeals Chamber is called to intervene in this case because the Second Decision constitutes a direct threat to its own jurisdiction, on the basis of an overly restrictive reading of Article 82 (1) (d). The test adopted by Pre-Trial Chamber I, if not corrected, will effectively sideline the Appeals Chamber for the purposes of judicial determination of issues that affect the fair and expeditious conduct of the proceedings, and even for those that entail fundamental consequences for the entire Court. The Appeals Chamber must have the opportunity to examine a legal interpretation that regulates its jurisdiction, and to decide on the correctness of that interpretation. This is an exceptional case, dealing with exceptional matters, and it is on that basis that the Prosecution is requesting extraordinary review.

33. The Prosecution notes the Second Decision was the third time that an application for leave to appeal filed by the Prosecution was rejected by a Pre-Trial Chamber.[59] The

[59] Then prior instances were Pre-Trial Chamber I's "Decision on the Prosecutor's Application for Leave to

Prosecution considered, and still does, that on both prior occasions the Prosecution had been wrongfully deprived of its right to an appellate remedy, and that the emerging interpretation of the terms and scope of Article 82 (1) (d) was flawed.[60] The Prosecution did not consider on those prior occasions that requesting extraordinary review was justified. However the consolidation and further narrowing of the improperly restrictive approach to interlocutory appeals in the Second Decision, combined with the particular seriousness of the issues raised by the First Decision, which was not disputed by the Pre-Trial Chamber,[61] led the Prosecution to conclude that the impact of the Second Decision on the system of leave to appeal and the ability of the Appeals Chamber to properly exercise its functions required that this particular remedy be pursued.

The Approach Taken by the Pre-Trial Chamber in Denying Leave to Appeal

34. Regulating when issues may be appealed is important for the efficient administration of justice, and a careful balance must be struck between the risk of delaying proceedings, and the risk of allowing errors which might have been easily identified and remedied at an early stage to taint a range of proceedings. With the exception of certain decisions on matters such as provisional release or jurisdiction and admissibility,[62] interlocutory decisions may be appealed under the Statute only where they raise an issue which significantly impacts on the fair and expeditious conduct of the ongoing proceedings, and where the resolution of that issue by the Appeals Chamber in the context of the decision at hand will materially advance the proceeding.[63] Two underlying principles are clear from the language of Article 82 (1) (d): a grant of leave is primarily concerned with the impact of the issues dealt with in a decision, not the correctness of that decision; and a grant of leave is based on the likely consequences of the issue on the ongoing and future conduct of the proceedings, rather than solely on the situation and parties at the time the decision is rendered.

Appeal", ICC-01/04-14, 14 March 2005, and Pre-Trial Chamber II's "Decision on 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, 19 August 2005 (hereinafter the "19 August 2005 Decision"). These were the only decisions delivered to date on applications for leave to appeal filed by the Prosecution.

[60] The Prosecution will develop its arguments in relation on this particular point in the next sections of this brief.

[61] In contrast, Pre-Trial Chamber II considered that the issues dealt with in the 19 August 2005 Decision were "merely procedural" – see e.g. para. 29. While the Prosecution does not agree with this characterisation of the issues involved in that case, there can be no suggestion that the issues dealt with by the First Decision are of a minor or merely procedural nature.

[62] See Article 82(1)(a)-(c), (2) and (4).

[63] Article 82(1)(d).

35. The purpose of this Article is to promote the efficient and expeditious conduct of proceedings before the Court in two ways: by ensuring that interlocutory appeals are not allowed to unduly delay the proceedings,[64] through eliminating frivolous or minor appeals and deferring those issues that can best be dealt with as part of a final appeal; and by ensuring that important issues that will have a significant effect on the ongoing proceedings are dealt with promptly, in order to prevent any errors from compromising those proceedings.

36. The Pre-Trial Chamber made three fundamental, interlinked, errors in the interpretation and application of Article 82 (1) (d) in the Second Decision:

- it endorsed the incorrect and inappropriately restrictive interpretation of 82 (1) (d) set out by Pre-Trial Chamber II in its 19 August 2005 Decision, without addressing the specific submissions of the Prosecution on why this precedent should not be followed;
- it then applied this standard in a singularly restrictive manner, in particular through its insistence of the provision of "concrete evidence", ignoring the fact that Article 82 (1) (d) deals with the ongoing or future effects of a decision and therefore necessarily involves a predictive element; and
- it addressed many of the arguments of the Prosecution relating to the impact of the issues on the fairness of the proceedings by asserting the correctness, or appropriateness, of the Decision.

37. On the substance of the test in Article 82 (1) (d), the Chamber additionally took an approach to fairness that lends itself to an erroneously narrow interpretation,[65] and mistakenly held that if an applicant fails to demonstrate either that the issue affects the fairness of the proceedings, or the expeditiousness of the proceedings, then he or she has failed to meet the test in Article 82 (1) (d).[66]

38. As a result, the Pre-Trial Chamber has effectively insulated itself from review. The approach to leave to appeal manifest in the Second Decision vests the Pre-Trial

[64] See paras 42-45 below. Not unduly encumbering or delaying proceedings has also regularly been cited as a purpose of restricting interlocutory appeals under the SCSL Rules: e.g. *Prosecutor v Brima et al*, SCSL 04-16-PT, Decision on Prosecution Applications for Leave to Appeal Decision on Oral Application to Witness TF1-150 to Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality, 12 October 2005.
[65] Second Decision, paras 38-40.
[66] See Second Decision, para. 27 (relying on the 19 August 2005 Decision, at para 21) and para. 31.

Chambers with the ability to shape the architecture of the Court without any supervision or scrutiny from the Appeals Chamber, even where the decisions plainly have the potential to affect the fair and expeditious conduct of the proceedings, as was the case here. This is especially controversial because systemic and constitutional decisions, in particular those taken during the investigation, can never be fully remedied as part of a final appeal. Any final appeal could only properly deal with the application of such a system in the case at hand, and any remedy rendered would come far too late. In this case, for example, if it was determined only on a final appeal after judgement that the system of victim participation during the investigation was inappropriate, the impact on this case, and other cases which had utilised this system of victim participation and which may be near trial, at trial, or even awaiting appeal, could be devastating.

The Pre-Trial Chambers' improperly restrictive approach to interpreting Article 82(1)(d)

39. The Pre-Trial Chamber relied extensively on the previous decision of Pre-Trial Chamber II in its interpretation of the basic principles of Article 82 (1) (d).[67] The Prosecution submits that the 19 August 2005 Decision, which focussed on "the restrictive character of the remedy" in Article 82 (1) (d)[68] and considered that grants of leave require "an exceptional basis",[69] took an erroneously narrow view of Article 82 (1) (d), and that the Pre-Trial Chamber erred in following this approach. While Article 82 (1) (d) prescribes the circumstances under which interlocutory decisions may be appealed, the Prosecution submits that nothing in the Statute mandates an inherently or overly restrictive reading of these requirements,[70] and in particular that Article 82 (1) (d) does not reflect "a general trend to narrow the grounds for interlocutory appeals".[71] The Prosecution respectfully submits that Pre-Trial Chamber II misinterpreted the jurisprudence of the ad-hoc Tribunals on their analogous provisions, and that in any event the different structure and circumstances of the Court must be considered in the application of any principles stemming from such jurisprudence.

[67] Second Decision, paras 17-29. See also para 46, and footnote 84, below.
[68] 19 August 2005 Decision, para. 15.
[69] 19 August 2005 Decision, para. 18 (see generally paras 15-20).
[70] 19 August 2005 Decision, para. 18.
[71] 19 August 2005 Decision, para. 16; Second Decision at para. 23.

40. At the time of its drafting, Article 82 (1) (d) represented a principled middle ground – narrower than the ICTY RPE, but considerably broader than the ICTR.[72] The Prosecution therefore submits that Article 82 (1) (d) does not represent a trend to continually narrow the scope of interlocutory appeals.[73] In contrast, Article 82 (1) (d) is the first time that a right of interlocutory appeal has been recognised in the Statute of an international criminal forum, as opposed to merely the Rules of Procedure and Evidence, suggesting the importance to which the drafters ascribed such a right.

41. Rule 73 (B) of the ICTY and ICTR Rules establishes a general rule that "[d]ecisions on all motions are without interlocutory appeal", and then goes on to create an exception to that general rule: "save with certification of the Trial Chamber...". In this sense, grants of leave to appeal are "exceptional".[74] In contrast, there is no such express general prohibition in Article 82 (1) (d), which is permissive in nature.[75] Article 82 (1) (d) sets out specific criteria for granting leave to appeal, however nothing in Article 82 (1) (d) requires that it be interpreted or applied in a particularly restrictive manner. Rather, the test itself is the restriction; it does not require a further

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[72] In July 1998, the ICTR rules allowed no interlocutory appeals against motion except for preliminary motions dismissing objections for lack of jurisdiction. In contrast, the ICTY rules allowed for interlocutory appeals on a grant of leave from a bench of three appeals judges (for good cause, in the case of preliminary motions; or where the issue in the proposed appeal is of general importance to proceedings before the Tribunal or in international law generally or 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-judgement appeal, in the case of other motions). The standard from Article 82(1)(d) has since been adopted in both the ICTY and the ICTR - ICTY Rule 73(B) amended on 23 April 2002; ICTR Rule 73(B) amended on 27 May 2003.

[73] PTC II use a truncated quote from *Prosecutor v Sesay et al* to support its conclusion on the trend to narrow interlocutory appeals – 19 August 2005 Decision at para. 18. The full quotation, however, is:

> "...the trend <u>and our determination</u> to tighten the test for granting leave in respect of interlocutory appeals in the interests of expeditiousness. <u>The further restriction is appropriate and acceptable in the peculiar circumstances of the Special court whose mandate, we must observe, is limited in its duration.</u>"
> (SCSL-2004-15-PT, Decision on Prosecution's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution Motions for Joinder, 13 February 2004 at para. 12 – the sections omitted by PTC-II have been underlined)

That passage was discussing a change of the SCSL Rules from the language of Art 82(1)(d) to "an entirely new and considerably more restrictive test". The Prosecution submits that this demonstrates the need to consider the context of the Court (e.g. the ICC does not share the SCSL's strictly limited time-frame), and that given the differences between Article 82(1)(d) and Rule 73(B) of the SCSL RPE, the statement by PTC-II that SCSL jurisprudence "is especially relevant given the similarity of the provisions" (para 18) should be discounted.

[74] 19 August 2005 Decision at para. 18.

[75] The express prohibition on interlocutory appeals in Rule 73(B) of the ICTY, ICTR and SCSL RPE is a critical difference between this application and the circumstances in *Prosecutor v Norman et al*, SCSL-04-14-T, Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, 17 January 2005. The ICC Statute also is distinguishable from that of the SCSL in that it expressly provides for reference to general legal principles in Article 21(1)(c), allowing the Appeals Chamber to fill this lacunae. The distinct circumstances of the two Courts also provide a basis for a different approach, for while the SCSL has a strict time limit, the ICC must look to create a durable framework for ongoing operations. Further, both the initial decision (which in the SCSL had no systemic implications or effects beyond the case at hand) and the context of the decision denying leave to appeal are different in this application.

restrictive interpretation or application.[76] As has been said even of the stricter standard for leave to appeal in the SCSL, despite the restrictive nature of tests for granting leave to appeal, they should not be given such a limited interpretation as to deny any realistic possibility of granting leave, as that would render such provisions without purpose.[77] Article 82 (1) (d) must therefore be interpreted and applied in light of the purpose of restricting interlocutory appeals, and considering the unique characteristics of the ICC.[78]

42. The Prosecution submits firstly that the purpose of restricting the right of interlocutory appeals is not to deny a party the ability to appeal an issue and have an error corrected; rather it is to regulate whether an issue is best dealt with by way of an appeal at this stage in proceedings, or whether is should be left to be considered as part of an appeal against final judgement.[79] The objective is to avoid delays by ensuring that errors that can properly and more efficiently be dealt with as part of the final appeal are reserved

[76] *The Prosecutor v Karamera et al*, ICTR-98-44-T, Decision on the Defence Request for Certification to Appeal the Decision on Accused Nzirorera's Motion for Inspection, 26 February 2004, at para. 6: "Only in exceptional cases, i.e. if the prerequisites detailed in Rule 73(B) are met". The tension inherent in the application of provisions for grants of leave to appeal was recognised in *The Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, 21 July 2005 at para. 6, where it noted that grants of leave are the exception, but that "on the other hand, certification has been granted where a decision ... [*inter alia*] determines particularly crucial matters of procedure or evidence." The Prosecution submits that the system for the participation of victims if just one such crucial matter of procedure.

[77] "Although, as stated, Rule 73 (B) is a restrictive provision, it should not in my view be given such a limited interpretation that it would inevitably lead to never granting any leave provision, as this Rule would effectively be without purpose. A purposive interpretation of Rule 73 (B), taking into account the restrictive nature of the Rule, must not and cannot be interpreted in such a way as to completely deny any real possibility of any leave to appeal regardless of the circumstances." - *Prosecutor v Norman et al*, SCSL-04-14-T, Dissenting Opinion of Judge Pierre Boutet on Decision on the Prosecution's Application for Leave to File an Interlocutory Appeals Against the Decision on the Prosecution's Request for Leave to Amend the Indictment, 5 August 2004 at para. 7.

[78] The need for each international criminal jurisdiction to develop and interpret its rules in accordance with its specific circumstances, has been seen in the way that the ICTY and ICTR have diverged in their RPEs, reflecting the individual circumstances and experiences of the tribunals, and by the SCSL regarding interlocutory appeals given the limited time for completion of its mandate.

[79] *Prosecutor v Strugar*, IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004 at paras 6-8 (approved in *Prosecutor v Milosevic; Contempt Proceedings Against Kosta Bulatovic (Order of 17 September 2003)*, IT-02-54-R77.4, Order on Defence Motion Seeking Reconsideration of Order on Contempt Concerning Witness Kosta Bulatovic and Alternatively Motion Requesting Certification, 3 May 2005). See also *Prosecutor v Halilovic*, IT-01-48-PT, Separate Opinion of Judge O-Gon Kwon Appended To Trial Chamber Decision Dated 12 January 2005, 14 January 2005 at para. 5; *Prosecutor v Milosevic*, IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding, 20 June 2005 at para. 4; *Prosecutor v Milosevic*, IT-02-54-T, Order on Request for Certification to Appeal the Decision of the Trial Chamber on Court Assigned Counsel, 10 September 2004.
Prosecutor v Norman et al, SCSL-04-14-T, Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, 17 January 2005 considered that "The underlying rationale for permitting such [interlocutory] appeals is that certain matters cannot be cured or resolved by final appeal against judgement. However, most interlocutory decisions of a Trial Chamber will be capable of effective remedy in a final appeal" (at para. 29) – the Prosecution submits that systemic decisions taken at an early stage, such as the first Decision, are not capable of being fully remedied as part of a final appeal against judgement in any one case – see further paras 45, 74-75 below.

until that point. The requirement that the issue "significantly" affect the fair and expeditious conduct of the proceedings further serves to ensure that minor, trivial or frivolous appeals do not delay proceedings or over-burden the Appeals Chamber.[80]

43. Secondly, the ICC Statute establishes a different judicial structure to the other international criminal tribunals and courts. The creation of a Pre-Trial Chamber means that judicial decisions are taken at a much earlier stage,[81] and some will have far-reaching consequences. The Prosecution submits that this will affect the propriety of allowing interlocutory appeals against these decisions.

44. In the existing tribunals, interlocutory decisions are almost always taken once a person is in custody, and once there is a trial approaching or underway. The existing jurisprudence thus focuses on whether to grant leave to appeal against decisions taken once formal proceedings preparatory to the trial, or the trial itself, has commenced, i.e. decisions that go to the conduct of the trial. As a result:

- the proximity of the decisions to the trial greatly increases the chances of delay by allowing interlocutory appeals on a regular basis; and
- the fact that the decisions are generally taken during, or closely related to, a trial makes it far more likely that any error can be meaningfully appealed and remedied in an appeal against final judgement.

45. In contrast, interlocutory appeals from a decision during the investigative phase in the ICC run a far lower risk of causing any delay. Conversely, allowing such appeals during the investigative phase are more likely to promote efficiency and promptly resolve controversies that could themselves later cause delays. Such decisions are also far removed from the fabric of a trial, and will therefore often be much less susceptible to being cured as part of a final appeal against the decision in that trial. Moreover, a single decision during the investigation of a situation may affect the conduct of proceedings in many cases. If such a decision does contain an error, and the issue involved in the decision affects the fair conduct of the proceedings (as systemic decisions often will), then it is far more efficient to remedy the error once, at an early

[80] *Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on Bicamumpaka's Request pursuant to Rule 73 for Certification to Appeal, 4 February 2005 at para. 26.
[81] One need only look at the number of decisions rendered prior to the formation of a case or the transfer of an accused person in the ICTY, as compared with the number of decisions already rendered prior to such steps in the Court, to see the impact of the Pre-Trial Chambers on the balance of judicial activity.

stage, rather than to appeal the effect of that error on each case in turn after a final judgement[82].

46. The Prosecution outlined this analysis to the Pre-Trial Chamber in seeking leave to appeal.[83] However the Chamber chose to endorse the particularly restrictive approach adopted in the 19 August 2005 Decision. It did so based on a permissive provision of the Statute[84] and without addressing or giving reasons for rejecting the submissions of the Prosecution.

47. It is in the interests of the entire Court that substantial concerns or disagreements about fundamental elements of the Court's architecture which will shape the fairness and efficiency of the Court's operations be resolved at an early stage, to allow proceedings to develop on a certain footing.[85] It would create an absurd system if the Statute was interpreted so as to give exclusive say on constitutional issues to the Pre-Trial Chambers, which may create and entrench a system before a case even gets to trial, let alone the appellate stage. This would result in the polar opposite of most national jurisdictions, which commonly provide for special rights of review or avenues of appellate intervention for constitutional issues to ensure that they are resolved by the highest judicial body.[86]

Interpreting the substantive elements of Article 82 (1) (d)

48. The Prosecution agrees with the statement that fairness applies prior to the formation of a case[87] (especially given the impact that decisions taken during the investigation

[82] These differences also mean that the description in the 19 August 2005 Decision of the balance struck between deciding issues early and avoiding delay in the ICTY, ICTR and SCSL (19 August 2005 Decision, para. 19) cannot simply be transposed to the ICC in all circumstances.
[83] Both alerting the Pre-Trial Chamber to the structural differences and making submissions on the proper purpose and interpretation of Article 82(1)(d) - see paras 37-38 and footnotes 4 and 5 of the Prosecution's Application for Leave to Appeal and para. 17 of the Prosecution's Reply. The Prosecution made further submissions on the interpretation of fairness and expeditiousness in paras 12 and 29 of the Prosecution's Application for Leave to Appeal.
[84] Article 21(2), which allows, but does not require, the Court to rely on interpretation from previous decisions. The Chamber does not explain why "the principles set out in the Decision of Pre-Trial Chamber II should be applied here" (para. 18), and although it purports to "analyse the decision of Pre-Trial Chamber II" (para. 20), it largely quotes sections of the decision with discussing the underlying reasoning or the relevant legal authorities.
[85] See e.g. *Prosecutor v Blagojevic*, IT-02-60-PT, Decision on Joint Defence Motions for Certification, 10 February 2003, considering in granting leave that "to not run any risk in this complex case by starting with an unsettled question, only a decision by the Appeals Chamber on this issue will provide a sound basis" (p. 7).
[86] This is all the more important in an institution such as the ICC, where the compromises during drafting necessarily resulted in a degree of ambiguity on various important issues, which the Court will be required to resolve through judicial interpretation and which will potentially have significant effects on its operations.
[87] Second Decision, para. 36.

and early in the proceedings can have on the fairness of later proceedings). The Prosecution also agrees that fairness involves more than merely equality of arms,[88] and extends to respect for the rights of all participants.[89] However, other elements of the Chamber's interpretation of fairness suggest too narrow and formalistic an approach. The Prosecution emphasises from the outset that under Article 82 (1) (d) the question is not solely whether the proceedings at this stage are fair, but the impact that the instant decision will have on the fairness of the future and connected proceedings.[90] The Prosecution submits that fairness requires respect for all rights of the relevant participants – procedural and substantive; enumerated in the Statute or implied.[91] With regard to the rights of the Prosecutor, these are not limited to the ability to exercise his powers under Article 54. Likewise, the preservation of the fairness of proceedings during the investigation is not limited to, or protected simply by, ensuring fairness to the Prosecutor.[92] In particular, and as an example, the Prosecution submits that an inherent imbalance created among participants by giving one privileged access to the decision maker, and unfettered right to submit material without qualification, cannot be rendered "fair" by allowing a party subsequent access to that same material, as the Second Decision determined.[93]

49. The Prosecution submits that the Pre-Trial Chamber also erred when it held that an applicant must prove that the issue affects both the fair conduct of the proceedings and the expeditious conduct of the proceedings, following the 19 August 2005 Decision, and that therefore if "one of the two conditions [fairness or expeditiousness] has not been met, it will not proceed to examine the second condition or the second criteria mentioned in article 82 (1) (d)".[94] The Prosecution drew the Chamber's attention to

[88] As suggested by Pre-Trial Chamber II in the 19 August 2005 Decision, para. 30.
[89] Second Decision, para. 38.
[90] See further paras 12 and 38 of the Prosecution's Application for Leave to Appeal and authorities cited therein.
[91] The Prosecution set out its position regarding the interpretation of "fair … conduct of the proceedings" in para 12 of the Prosecution's Application for Leave to Appeal.
[92] Contra Second Decision, paras 38-40.
[93] Second Decision, paras 45 and 54 (in particular footnote 68). See also para. 38, footnote 52.
[94] Second Decision, para. 31. This is based on the Chamber's approval of the 19 August Decision, holding that "the issue on which the appeal is sought must significantly affect either the proceedings both in terms of fairness <u>and</u> in terms of expeditiousness" – 19 August 2005 Decision at para. 21 (quoted in Second Decision at para. 27) (emphasis in original). The Chamber went on to reinforce this in para. 28, stating that "as the conditions of the first criteria are concurrent, if the Chamber determines that one of the two conditions has not been met, the second condition need not be examined."
As a result, the Chamber did not consider the interpretation of "expeditious conduct of the proceedings", or when "immediate resolution by the Appeals Chamber may materially advance the proceedings". The Prosecution set out submissions on the interpretation of these elements at paras 29 and 37-38 of the Prosecution's Application for Leave to Appeal.

concerns with this aspect of interpretation of Article 82 (1) (d) in the 19 August 2005 Decision.[95] However the Chamber chose to ignore substantive submissions of the Prosecution regarding the effect of the First Decision on the expeditious conduct of the proceedings,[96] without even considering the arguments and authorities put forward by the Prosecution. These arguments and authorities supported the legal proposition that the Chamber was obliged to consider expeditiousness even if it found that the issues in the Decision did not affect the fair conduct of the proceedings.

50. On the question of whether the issue must affect both the fair conduct of the proceedings and the expeditious conduct of the proceedings in order for leave to appeal to be granted under Article 82 (1) (d), the plain language of the article permits two readings: "affects the fair and expeditious conduct of the proceedings" could be a single condition which is fulfilled once either element is met (as the proceedings are no longer "fair and expeditious"), or could be a compound condition which requires that both elements be met.

51. The context of the Statute suggests that "fair and expeditious" is a *single* condition. The obligation borne by the Chambers is to ensure fair and expeditious proceedings.[97] Once proceedings are no longer fair, *or* no longer expeditious, the Chamber is not ensuring the "fair and expeditious" proceedings. Likewise if an objective of the Court is to ensure fair and expeditious proceedings, then allowing an issue that significantly affects the fair *or* the expeditious conduct of the proceedings to be resolved promptly, instead of potentially being deferred for many months or even years, best serves the object and purpose of the Statute.[98]

52. The ICTY and ICTR have both extensively considered a test for leave to appeal interlocutory decisions in the same substantive terms as Article 82 (1) (d). While a small number of decisions have required that both fairness and expeditiousness be affected,[99] the vast majority of decisions that have addressed whether one or both of

[95] Prosecution's Application for Leave to Appeal, footnote 5.
[96] Prosecution's Application for Leave to Appeal, paras 29-36.
[97] See in particular Articles 64(2) and (3)(a). Indeed, maintaining fair and expeditious proceedings has been referred to in the ad-hoc tribunals as the "very object and purpose of the Statute and the Rules." – see Robinson, "Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia" (2000) 11 *EJIL* 569 at p. 583, quoting cases in footnote 71.
[98] Provided, of course, that immediate resolution by the Appeals Chamber would materially advance the proceedings.
[99] Of the cases cited by PTC-II in the 19 August 2005 Decision, para. 24, footnote 44, *Prosecutor v Ntahobali*,

fairness or expeditiousness are required have held that once the fair conduct of proceedings or the expeditious conduct of proceedings are affected, the decision affects the "fair and expeditious conduct of the proceedings" and this limb of the test is satisfied.[100]

The Pre-Trial Chamber's erroneous approach to the application of Article 82 (1) (d)

53. Many of the fundamental misunderstandings of the manner in which Article 82 (1) (d) is applied are encapsulated in paragraph 44, where the Chamber states that "the Prosecutor does not present concrete evidence in his Application that would enable the Chamber to determine that its Decision undermines the fairness of the proceedings".[101] Firstly, by framing the question as whether "the Decision undermines" the fairness of the proceedings, rather than whether "an issue" involved in the Decision "affects" the fairness of the proceedings as Article 82 (1) (d) requires, the Chamber led itself to err into considering the correctness of its own decision. Secondly, the Chamber compounded this error by requiring "concrete evidence" to prove the effects of the Decision. Each of these fundamental misconceptions grossly distort the balance in Article 82 (1) (d), setting the bar impossibly high for applicants, especially at the early stages of a situation and on decisions of a systemic, rather than specific, nature.

ICTR-97-21-T, Decision of 18 March 2004 does support the dual requirement. The Prosecution acknowledges that *Prosecutor v Kallon*, SCSL-2003-07-PT, Decision on the Defence Application for Leave to Appeal, 10 December 2003, also supports this position at para. 28. However the Prosecution submits that PTC-II misinterpreted *Prosecutor v Milosevic*, IT-02-54-T, Decision on Prosecution's Application for Certification under Rule 73(B) concerning Rule 70, 29 August 2002, on which it also purports to rely.

[100] See e.g. *The Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005 at para. 8; *Prosecutor v Halilovic*, IT-01-48-T, Decision on Motion for Certification, 30 June 2005; *Prosecutor v Halilovic*, IT-01-48-T, Decision on Prosecution Request for Certification for Interlocutory Appeal of Decision on Motion for Exclusion of Statement of Accused, 25 July 2005; *Prosecutor v Blagojevic*, IT-02-60-T, Order for additional submissions from parties in relation to request for certification, 24 August 2004; *Prosecutor v Strugar*, IT-01-42-T, Decision on Defence Motion for Certification, 17 June 2004 at para. 5; *Prosecutor v Milosevic*, IT-02-54-T, Decision on Two Prosecution Requests for Certification of Appeal Against Decision of the Trial Chamber, 6 May 2003; *Prosecutor v Blagojevic et al*, IT-02-60-PT Decision on Joint Defence Motions for Certification of Decision on Joint Defence Motions, 10 February 2003.

[101] The question is not, as the Chamber goes on to say, whether "the Chamber ... determine[s] that its Decision ... [means that] the investigation cannot be carried out independently and impartially", it is whether <u>if the decision is in error</u>, that error will impact of the fairness of the proceedings and the independence and impartiality of the investigation. In a sense, the error must be assumed for the purposes of determining whether to grant leave.

(a) The need to consider the impact of the issue, not the Chamber's own interpretation of the Decision

54. The Chamber recognised, in principle, as submitted by the Prosecutor, that the merits or substance of the appeal need not be discussed or decided at the stage of the application for leave.[102] To do so would be inappropriate, as it would require a Chamber to pass judgment on the correctness of its own decision, effectively frustrating any independent review of its decisions. It is integral to the effective operation of Article 82 (1) (d) that a Chamber be able to grant leave to appeal on an important and appropriate case without prejudice to the correctness of their decision. A grant of leave should not be seen to carry any implication that the Chamber itself has doubts about the correctness of their decision. The grant of leave merely means that, if the applicant is correct and there is an error in that decision, the issue is one which impacts on the fairness of the proceedings.[103]

55. To require an applicant to convince the Chamber that the decision, rather than an issue involved in the decision, impacts on the fairness of the proceedings is tantamount to requiring a showing that the decision is in error. Naturally, a Chamber which considers its decision correct will be loath to rule that such a decision "undermines the fairness of the proceedings" or is otherwise incorrect. Yet the Second Decision wrongly focuses on the correctness of the impugned decision itself rather than on the issues determined by that decision.[104] Grants of leave must be completely divorced from the Chamber's interpretation or evaluation of its own decision: provided that the applicant has identified an arguable error, the grant of leave must focus on whether the issues raised have an effect (or will likely have an effect) on the fairness of the proceedings.

56. The jurisprudence of the ICTY and ICTR is replete with examples where a Trial Chamber has been convinced that its decision was correct, indeed that it was necessary to promote the fair and expeditious conduct of the proceedings, or where that Chamber has disagreed with the applicant's interpretation of the decision or their prediction of its consequences, and yet where that Chamber has, correctly, recognized that the issue

[102] Second Decision, paras 25, 29-30.
[103] Or the expeditiousness of the proceedings, or the outcome of the trial.
[104] E.g. Second Decision, paras 44-45, 54, 58-60. See further paras 61-65, below.

at stake impacts on the fair and expeditious conduct of the proceedings[105] and the issue is sufficiently important to merit a grant of leave.[106]

(b) The inappropriate nature of a requirement that the applicant provide "concrete evidence"

57. Article 82 (1) (d) requires the Chamber to consider the effect of the issue involved in the decision on the ongoing fairness and expeditiousness of the proceedings.[107] A core purpose of granting leave to appeal an issue on an interlocutory basis is to prevent *future* proceedings being compromised by an error in an earlier decision. Making an evaluation based on the consequences of a decision, as Article 82 (1) (d) requires, necessarily involves an element of prediction, and therefore cannot be proven by direct evidence or to a certainty.[108] Rather the applicant should be expected to provide cogent arguments outlining how the issues on which the applicant asserts that the Chamber made an error will likely impact on the fairness (or expeditiousness) of the proceedings.

58. Bearing this in mind, the requirement that the applicant present "concrete evidence"[109] is inappropriate and, as a review of the Second Decision reveals, based on no existing law. A party will only rarely be in a position to provide "concrete" evidence of the impact that the issues have on the future fairness of the proceedings, and such a

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[105] i.e. where if the applicants are correct in their interpretation then the fair or expeditious conduct of the proceedings may be compromised.

[106] *The Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005 at para. 8; *The Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, 21 July 2005 at para. 9; *Prosecutor v Blagojevic et al*, IT-02-60-PT Decision on Joint Defence Motions for Certification of Decision on Joint Defence Motions, 10 February 2003; *Prosecutor v Milosevic*, IT-02-54-T, Decision on Prosecutor's Application for Certification under Rule 73(B) Concerning the Evidence of an Investigator, 20 June 2002 (where despite the fact that the Trial Chamber had denied the admissibility of the evidence of an investigator, *inter alia* "in the opinion of the Trial Chamber it would compromise the fairness of the proceedings by allowing the admission of material of little or no probative value", thus the decision of the Chamber maintained the fairness of the proceedings, but the issue on which the decision was made is one that nonetheless affected the fair and expeditious conduct of the proceedings). See also *The Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecution Motion for Certification to Appeal the Chamber's Decision of 3 February 2004, 20 February 2004 at para. 12 (discussion the principle at stake, and the impact if the Appeals Chamber overrules the Chamber's decision).

[107] See further paras 8-9 of the Prosecution's Reply.

[108] This is particularly clear in the case of expeditiousness – the impact of an issue on the expeditious conduct of proceedings, as understood as the timely and efficient conduct of those proceedings (see Prosecution's Application for Leave to Appeal, para. 29), can only be determined on a forward looking basis – it can never be proved by evidence at hand when leave to appeal is sought.

[109] Second Decision, paras 44 and 51. The Second Decision also refers to requiring "actual evidence" in para. 54. The Chamber does not explain what is meant by "concrete" or "actual" evidence.

standard is not required by the language of Article 82 (1) (d). Likewise the standard of "concrete" evidence implies that the Chamber requires certainty as to the impact on the proceedings. The applicant need not prove with certainty that the fairness of the proceedings is in jeopardy; rather "some error must be alleged by the moving party and this error [i.e. the issue raised by the decision] must have the capacity to significantly affect the fair and expeditious conduct of the proceedings".[110] The Chamber also need not agree that the consequences argued by the applicant will come to pass – even a "remote" danger may justify a grant of leave to appeal where the impact on the fairness of the proceedings if the Chamber's interpretation is incorrect would be serious.[111]

59. A requirement that the applicant provide concrete evidence that a decision will have certain future effects is particularly illogical when the decision, by its terms, establishes a system or shapes the very structures and basic principles which will underpin all future proceedings before this Court. Further, the fact that the effects will be felt in the future does not make them hypothetical: most of the effects on the fairness of the proceedings flow from the immediate consequences of the First Decision.[112]

60. Conspicuously, the Pre-Trial Chamber gives no indication of what would satisfy the requirement of "concrete evidence", but rather uses the term to dismiss various of the

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[110] *Prosecutor v Strugar*, IT-01-42-PT, Decision on the Defence's Request for Certification to Appeal the Trial Chamber's Decision dated 26 November 2003, 12 December 2003 at para. 6 (emphasis added). See also *The Prosecutor v Bagosora*, ICTR-98-41-T, Decision on Certification of Interlocutory Appeal from Decision on Severance and Scheduling of Witnesses, 11 September 2003 at para. 9 – "The Defendant's motions have questioned the fairness of the proceedings against he Accused, and have suggested that the outcome of the trial may be at stake" (emphasis added). Similarly, leave was granted in *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003 on the basis that the defence ability to communicate with its witnesses "may be impaired". The same principle is recognised in national jurisdictions, where it has been stated that determining grants of leave for interlocutory appeals "inevitably calls for some predictions about the likely future course of the litigation" and that "the party seeking certification need not demonstrate that the litigation will certainly be expedited by an interlocutory appeal" although obviously "mere conjecture" is not sufficient – *In re: Magic Marker Securities Litigation*, 472 F.Supp 436 (U.S. District Court, 25 June 1979) at pp. 438-439; see also *Zygmuntowicz v Hospitality Investments Inc*, 828 F.Supp 346 (U.S. District Court, Memorandum Denying Certification for Appeal, 26 July 1993) at p. 353.

[111] *The Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, 21 July 2005 at para 9 – Despite the fact that "the Chamber considered the dangers raised by the Defence to be remote", it recognized that if it was wrong (a question only the Appeals Chamber could answer) then the range of persons who would be affected and the impact on the fairness of the proceedings if the applicant was correct in his interpretation merited granting leave to appeal.

[112] The Prosecution addressed suggestions by the victims' representative that the consequences were merely hypothetical in its Reply, paras 8-10. The Prosecution demonstrated why the effects detailed by the Prosecution were the direct consequence of the Decision (para 9), and outlined specific impacts on the fairness of the proceedings which had already occurred (para 10), including the "detrimental effects to the rights of the defence, for instance, instantly flow from the imbalance created by the Decision and from the arguable prejudgement."

Prosecution's arguments without discussion. This requirement would therefore appear to be a means of allowing the Chamber to summarily dispatch arguments, rather than a principled standard based on clear judicial reasoning or established authority.

The errors in action:

(a) Deciding the merits of the appeal – prejudgement and "grounds to believe"

61. One aspect of the First Decision which the Prosecution argued impacted on the fairness of the proceedings was the manner in which the Pre-Trial Chamber made its determination that the individuals were victims within the meaning of Rule 85. After briefly summarising its concerns with the process,[113] the Prosecution stated that it would "provide detailed submissions on the appropriateness of this test to the Appeals Chamber, if leave to appeal is granted",[114] and went on to set out in detail the ways in which the issues impacted on the fairness of the proceedings.[115]

62. In addressing this issue, the Chamber analysed whether the manner in which it addressed the question of whether the applicants qualified as victims within the meaning of Rule 85 did amount to prejudgement. This is precisely the question which was to be argued before the Appeals Chamber. Not once did the Chamber discuss whether the issue of prejudgement (if the Prosecution's interpretation of the scheme was correct) would affect the fair conduct of the proceeding. The Chamber concluded, on the basis of its own interpretation of a number of provisions, that it "therefore finds no merit in the Prosecutor's argument that 'the Chamber [is engaging] in inquiry and fact-finding activities not provided for in the Statute and capable of giving rise to allegations of prejudgement.'"[116] A clearer example of a Chamber passing judgement on the merits of the appeal is difficult to imagine.[117]

[113] Prosecution's Application for Leave to Appeal, paras 23-24.
[114] Prosecution's Application for Leave to Appeal, para 25.
[115] Prosecution's Application for Leave to Appeal, paras 25-28.
[116] Second Decision, para 60 (emphasis added).
[117] Had the Chamber granted leave to appeal, the Prosecution would have submitted, *inter alia*, that the issuance of an arrest warrant (or summons to appear) was intended to be the first factual determination by a Chamber on the existence of crimes, and that such a determination is to be made exclusively based on the information presented by the Prosecutor (Schlunck, "Article 58" in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) p. 756); this principle, linked to the principle of objectivity in the investigation, is aimed at safeguarding the rights of a suspect, and the quality of the Pre-Trial Chamber's determination, by precluding external considerations from influencing the decision. These arguments are outlined here not to persuade the Appeals Chamber of their correctness, but to underscore that this is an arguable issue which should have been fully debated before the Appeals Chamber, and that the Pre-Trial Chamber should

(b) Inappropriate requirements for "actual evidence" and failure to consider the consequences if the applicant is correct – the imbalance between victims and future accused persons

63. The Prosecution also provided detailed argument that the system of victim participation created an imbalance between victims and the defence which would compromise the fairness of future proceedings.[118] The Pre-Trial Chamber failed to consider whether the issue of imbalance, or alteration to the balance, between the rights of the defence and victims was one which would affect the fairness of the proceedings, if the Prosecution was correct in its interpretation of the decision and its consequences. Rather, the Chamber summarily dismissed the arguments of the Prosecution on the basis that it "adduces no actual evidence".[119]

64. The Prosecution specifically argued that the appointment of ad-hoc counsel did not adequately address the issues of fairness arising from the First Decision, and that it would develop arguments on the adequacy of ad-hoc counsel in its appeal brief if leave was granted (as this issue went to the merits of any future appeal). The Chamber did not consider whether, if the Prosecution's interpretation was correct and ad-hoc counsel were inadequate in this scenario, the issue impacted on the fairness of the proceedings. In contrast, the Chamber cited the presence of the ad-hoc counsel to justify denying leave to appeal.[120] In doing so, the Pre-Trial Chamber effectively decided the appropriateness of its own decision, dismissing the merits of the Prosecution's concerns that ad-hoc counsel are inadequate to protect the interests of fairness in generalised proceedings as defined by the Chamber. This was a question that only the Appeals Chamber could decide, on the basis of full arguments presented by the appellant.

(c) Other examples of errors committed by the Chamber in reasoning the Decision

65. The arguments examined above are but a sample of those inappropriately analysed by the Pre-Trial Chamber. In addition to these clear examples of deciding the correctness of its own decision, the Chamber also repeatedly addressed the merits of the First

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not have ruled on the correctness of its own decision.

[118] Prosecution's Application for Leave to Appeal, paras 20-22.

[119] Second Decision, at para 54. How the Prosecution could be expected to provide evidence of a future imbalance is not explained.

[120] Second Decision, para 54.

Decision and of any future appeal, stating its view that the outcome of its decision promoted the fairness of the proceedings. This is inappropriate as it (1) has the Chamber pronouncing on the correctness or appropriateness of its own decision, or is predicated on the decision being correct, and (2) confuses the question of whether the issue affects the fair conduct of the proceedings with whether the decision undermines (or promotes) the fairness of the proceedings.[121] Examples include statements that:

- "the system of participation can only enhance the impartiality of the Prosecutor's investigation";[122]
- "the Chamber recalls that giving persons with the status of Victims the right to present in general terms their views and concerns regarding the investigation of a situation and to submit material to the Pre-Trial Chamber cannot have an adverse impact on the investigation";[123]
- "the Chamber considers that the system of victim participation as provided for in the Decision is very limited".[124]

66. Further substantive arguments raised by the Prosecution were dismissed in a cursory fashion,[125] or on the basis of generic assertions or predictions that the Chamber would ensure the fairness of the proceedings.[126] Other arguments of the Prosecution were completely ignored,[127] including:

- concerns over the ability of victims to initiate/request specific procedures (as opposed to merely presenting views and concerns in existing proceedings);[128]

[121] See paras 53-56, above for more detailed discussion of this point.
[122] Second Decision, para 45.
[123] Second Decision, para 46.
[124] Second Decision, para 47.
[125] In addition to the arguments dismissed for the purported lack of "concrete evidence" or "actual evidence", arguments of the Prosecution relating to the dangers of the Chamber having unregulated information and evidence put before it by the victims, including information collected without the safeguards of Art 54, potentially unreliable, prejudicial, or even forged material (Prosecution's Application for Leave to Appeal, para 16) was dismissed based on the Prosecutor receiving notification of any such document and having the right to respond (para 45 of the Second Decision).
[126] Concerns of the Prosecution relating to exposure of victims (Prosecution's Application for Leave to Appeal, para 13) was dismissed based on a promise that "the Chamber will take all measures necessary to protect the safety and well-being of the victims, in particular by protecting their identity" (Second Decision, para 51); similarly the Chamber dismisses concerns over the impartiality of the investigation partly with a generic promise that "the Chamber will ensure the impartiality and integrity of the investigation at all stages of the proceedings to come." (Second Decision, para 47).
[127] In addition to the arguments raised by the Prosecution regarding the proper interpretation of Article 82(1)(d), see para. 46, above.
[128] Prosecution's Application for Leave to Appeal, paras 17 and 20.

- the danger posed by fabricated requests and persons purporting to be victims undermining proceedings;[129]
- the argument that victims have rights that not even defendants are given;[130]
- the argument that the expansion of the participation will lead to overburdening VWU and the inability of the Court to properly protect those victims and witnesses who are cooperating with the investigation.[131]

How should the First Decision have been assessed for leave under Article 82 (1) (d)?

67. As the Prosecution has previously outlined, the First Decision involved a number of issues that go to the very heart of the fairness and the expeditiousness of the proceedings that will flow from this situation – in particular, the proper scope, nature and timing of victim participation; and the expansion of the Pre-Trial Chamber's authority to receive material directly, proactively seek out information, and make factual determinations outside of a request or presentation of evidence by a party. The question to be asked in determining an application for leave was whether these issues may substantially affect the fairness and the expeditiousness of the proceedings: whether allowing victims to participate in the investigation, if incorrect, would impact on fairness; whether allowing victims to improperly initiate specific proceedings would affect fairness; whether the scope of victim participation,[132] arguably opening the door to a near-limitless class of victims during the investigation, could impact on the fair and expeditious conduct of the proceedings; whether assessing the status of a victim in such a way that risked pre-judging issues that could be part of later judicial determinations, if as the Prosecution argued that is the effect of the system adopted in the First Decision, would impact on the fairness of the proceedings.

68. The Appeals Chamber might ultimately agree that the Pre-Trial Chamber correctly interpreted the relevant provisions and struck an appropriate balance of the different interests involved. However this is not the question to be asked by the applicant or answered by any Chamber at the stage of granting leave to appeal. The potential that

[129] Prosecution's Application for Leave to Appeal, para 18.
[130] Such as to submit material at an early stage unrelated to any charge – Prosecution's Application for Leave to Appeal, para 21.
[131] Prosecution's Reply, para 20. This was identified by the Pre-Trial Chamber in para 11 of the Second Decision but was not addressed in the remainder of that decision.
[132] Including the requirements that their "personal interests ... are affected" and that they only participate "at stages of the proceedings determined to be appropriate".

the First Decision might be entirely correct does not detract from the fact that the issues involved significantly affect the fair and expeditious conduct of the proceedings, and that if the Pre-Trial Chamber was wrong then the potential impact of that decision on the ongoing proceedings is severe.

69. There can be little doubt that immediate resolution of the issues involved in the First Decision would materially advance the proceedings.[133] Given the early stage of the proceedings, the risk of delay caused by allowing the appeal is negligible. In contrast, the ICTY has previously held that the interest of "not run[ing] any risk in this complex case by starting with an unsettled question" provided a sound basis for granting leave to appeal on a systemic issue, in order to safeguard the integrity of the future proceedings from any uncertainty.[134]

70. Resolution of this issue at this, early stage will benefit not only the present and directly related proceedings, but also a wide range of ongoing and future proceedings in all current situations. While not dispositive of the issue, this is a factor which can be weighed in deciding whether to grant leave.[135] Further, while the Prosecution agrees that the mere general importance of an issue does not in itself justify a grant of leave,[136] this does not consign the importance of an issue to complete irrelevance in deciding whether to grant leave. Issues of fundamental importance are more likely to impact on the fairness and expeditiousness of proceedings than less-important issues,[137] and the prompt resolution of important issues that affect a range of

[133] See further Prosecution's Application for Leave to Appeal, paras 37-42.
[134] *Prosecutor v Blagojevic*, IT-02-60-PT, Decision on Joint Defence Motions for Certification of Decision on Joint Defence Motion for Reconsideration, 10 February 2003, page 7. A similar approach has been taken in the ICTR, in *The Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005 at para 11 ("An interlocutory appeal will ensure that proper procedures are followed in respect of this important and sensitive category of information. Procedures which are subsequently found to be improper could give grounds for appeal at the conclusion of this trial. The legal questions involved affect the proper conduct of every trial before the Tribunal".)
[135] *The Prosecutor v Bizimungu et al*, ICTR-99-50-T, Decision on the Prosecutor's Motion for Certification to Appeal the Trial Chamber's Decisions on Protection of Defence Witnesses, 28 September 2005, para 5 ("The Chamber takes the view that the effect of its decision on other trials is relevant in determining whether the criteria in Rule 73(B) are met.") See also *The Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005 at para 4; *Prosecutor v Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003 ("immediate resolution by the Appeals Chamber may materially advance the proceedings, and not only in this case").
[136] Second Decision, para. 21.
[137] *The Prosecutor v Bagosora et al*, ICTR-98-41-T, Certification of Appeal Concerning Access to Protected Defence Witness Information, 29 July 2005, para 11. The importance of a legal issue has been considered by the SCSL in granting leave for interlocutory appeal even under their more restrictive standard, not as a ground for leave *per se*, but as a factor to be taken into account – see e.g. *Prosecutor v Brima et al*, SCSL 04-16-PT, Decision on Prosecution Applications for Leave to Appeal Decision on Oral Application to Witness TF1-150 to

proceedings best promotes the efficient use of judicial resources, which is in keeping with the overall goal, in part implemented through Article 82 (1) (d), of minimising delays and promoting efficient and expeditious proceedings.

The Consequences of the Second Decision

71. If the approach taken by the Pre-Trial Chamber in the Second Decision, building on and providing a singularly restrictive application of the erroneous and narrow interpretation of Article 82 (1) (d) in Pre-Trial Chamber II's 19 August 2005 Decision, becomes entrenched in the practice of the Court, the consequences both for participants and for the Court as a whole are profound.

72. Under the system that has been developed by the Pre-Trial Chambers, all participants will be systematically denied leave to appeal on issues that potentially have grave consequences on the fairness or the expeditiousness of the proceedings, because of the approach that Article 82 (1) (d) must be interpreted in the most restrictive possible manner, and leave will further only be granted in cases in which concrete and immediately available proof of consequences is available. Participants will thus be left without any means to seek prompt correction of potentially serious errors, which in fact meet the requirements intended by the drafters of the Statute.[138]

73. The impact of this erroneous approach on participants – to deny them on an arbitrary basis prompt and independent judicial review of important questions that affect the ongoing fairness or expeditiousness of their proceedings – cannot but affect the Court and the perception of the Court. In the present case expectations on the part of countless putative victims – as to the potential for meaningful protection and reparations – will have been wrongly and unnecessarily raised and then dashed. Errors, if they have indeed been made, that should have been identified and corrected at an early stage will be allowed to continue and to contaminate the ongoing

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Testify Without Being Compelled to Answer Questions on Grounds of Confidentiality, 12 October 2005; *Prosecutor v Norman et al*, SCSL-04-14-T, Decision on Application by First Accused for Leave to Make Interlocutory Appeal Against the Decision on the First Accused's Motion for Service, 16 December 2004.

[138] The impact of the restrictive approach to interlocutory appeals is exacerbated by the manner in which the Pre-Trial Chambers have systematically denied any other possibility of review of a decision and referred to the possibility to seek leave to appeal – see Pre-Trial Chamber II, "Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration and Motion for Clarification", ICC-02/04-01/05-60, 28 October 2005 at paras 20-23; Pre-Trial Chamber I, "Decision on the Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference", ICC-01/04-11, 9 March 2005 at page 2.

proceedings (which may extend to multiple individual cases in the scenario of an error at the investigation stage). Yet the impact on the Court of the regime for leave to appeal set out in the Second Decision goes beyond even these serious consequences.

74. While a cautious approach to interlocutory appeals is appropriate where a trial is imminent or ongoing, and where the decision is specific in nature, a more balanced approach may be required when considering decisions taken early in the proceedings, which will by their very nature affect a range of subsequent proceedings across the situation (and potentially in other situations). Decisions, such as the First Decision, develop a system which, if not promptly reviewed, can become the practice and architecture of the Court. Pre-Trial Chambers should not be allowed unilaterally to make constitutional decisions of fundamental importance which will do nothing less than shape the future functioning and reach of the Court. Likewise, the Appeals Chamber, as the highest judicial body, should not be excluded from the debate on how fundamental interests are balanced, and how essential systems of the Court develop.

75. If leave is not granted to appeal a decision that introduces systemic change, it is only the impact on that system on any given case that may be brought before the Appeals Chamber as part of a final appeal. This is a wholly inadequate remedy for the parties and the Court as a whole. The principles and systems set out in such a decision might impact on a large number of cases and investigations at different stages over an extended period. A decision on a final appeal that belatedly casts doubt on the correctness or propriety of such a decision years after the initial decision therefore might have devastating and widespread consequences. Judicial review should aim to promote certainty, to unify jurisprudence, rather than to divide and to multiply uncertainty. If ever there was a situation in which an interlocutory appeal is appropriate, it is to ensure that systemic decisions of an important nature are reviewed before their impact spreads through the caseload of the Court. Certainty, judicial economy, and logic itself demands no less.

Remedy Sought

76. There are three types of remedial action that the Appeals Chamber can consider for the purposes of this Application, assuming that the Chamber determines that it has the authority to act. The remedies are all requested in the alternative:

(a) The Appeals Chamber may decide to overturn the Pre-Trial Chamber's Second Decision and, substituting its own discretion for that of the latter Chamber, grant leave to appeal the First Decision;[139]

(b) Alternatively, the Appeals Chamber may decide to overturn the Decision and instruct the Pre-Trial Chamber to grant leave, in a manner akin to a common law *mandamus*;

(c) Finally, the Appeals Chamber may decide to overturn the Second Decision, enter findings as to the correct interpretation of the relevant legal provisions and subsequently remand the matter to the Pre-Trial Chamber for a new determination, in light of the legal findings made by the Appeals Chamber.[140]

77. The Prosecution respectfully submits that even if the Appeals Chamber were of the view that it lacks jurisdiction to entertain this Application, it should nonetheless consider providing guidance *obiter dicta* on the correct interpretation of the terms of Article 82 (1) (d), the boundaries of a Pre-Trial or Trial Chamber's proper exercise of discretion under that provision, and the prerogatives of the Appeals Chamber as the highest judicial body of this institution,[141] with a view to establishing in a clear and conclusive fashion the legal criteria and procedure regulating the Appeals Chamber's intervention within the terms of Article 82 (1) (d). In this manner, the Appeals Chamber may successfully avert any consequences which might otherwise result from a lack of clarity about the role of Pre-Trial Chambers and the Appeals Chamber in the judicial decision-making process of this Court.

[139] This is the remedy that civil law jurisdictions that provide for "complaint procedures" would ordinarily afford. For an example, see Córdoba, *Recurso de Queja*, pp. 69 et seq.
[140] If the Appeals Chamber considers that it may have the authority to act, then to assist its decision making process, the Chamber may wish to request that the Registrar forward to it the relevant record for the appeal, without prejudice to any subsequent determination.
[141] For a similar example in the ICTR, see *Nyiramasuhuko v. The Prosecutor*, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, ICTR-98-42-AR73.2, 4 October 2004 at para 5.

Conclusion

78. For the foregoing reasons, the Prosecution respectfully requests the Appeals Chamber

(a) To admit this Application for Extraordinary Review;

(b) To overturn Pre-Trial Chamber I's Second Decision; and

(c) To grant the requested remedy.

Luis Moreno-Ocampo
Prosecutor

Dated this 24th day of April 2006

At The Hague, The Netherlands