

**Cour
Pénale
Internationale**
**International
Criminal
Court**

No.: ICC-02/04-01/05

Date: 19 August 2005

Original: English

PRE-TRIAL CHAMBER II

Before: Judge Tuiloma Neroni Slade

Judge Mauro Politi

Judge Fatoumata Dembele Diarra

Registrar: Mr Bruno Cathala

SITUATION IN UGANDA

Under Seal

Ex Parte, Prosecutor Only

**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**

The Office of the Prosecutor

Mr Luis Moreno Ocampo, Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor

Ms Christine Chung, Senior Trial Lawyer

Mr Fabricio Guariglia, Senior Appeals Counsel

1. **PRE-TRIAL CHAMBER II** (the “Chamber”) of the International Criminal Court (the “ICC” or the “Court”), sitting as the full Chamber pursuant to its decision on the 18th day of May 2005, to which, on the 5th day of July 2004, the Presidency assigned the situation in Uganda pursuant to regulation 46 of the Regulations of the Court (the “Regulations”);
2. **HAVING RECEIVED** the “Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest Under Article 58” of the Statute of the Court (the “Statute”), dated the 18th day of July 2005 (the “Prosecutor’s application for leave to appeal”);

I. Procedural history

3. On the 8th day of July 2005, the Chamber rendered its “Decision on the Prosecutor’s application for warrants of arrest under article 58” (the “Decision”) and issued sealed warrants of arrest (the “Warrants”) for the persons named in the Prosecutor’s application, as well as requests for arrest and surrender relating thereto (the “Requests”).
4. In the Decision, the Chamber decided that the Warrants and the Requests be issued as separate documents and that the Registrar was the competent and appropriate organ to transmit the Requests.

5. On the 14th day of July 2005, the Prosecutor filed a motion for clarification regarding certain issues dealt with in the Decision and in the Requests; and he also sought an urgent request for variation of the time-limit enshrined in rule 155 of the Rules of Procedure and Evidence (the “Rules”).
6. On the 18th day of July 2005, the Chamber rendered its “Decision on the Prosecutor’s Motion for Clarification and Urgent Request for Variation of the Time-Limit Enshrined in Rule 155”, confirming the Chamber’s determinations contained in the Decisions and rejecting the Prosecutor’s request for variation of the time limit.
7. On the same 18th day of July 2005, the Prosecutor applied to the Chamber for leave to appeal in part the Decision.

II. Submissions of the Prosecutor

Subject matter of the Prosecutor’s application for leave to appeal

8. The Prosecutor requests the Chamber to grant leave to appeal the Decision in respect of the specific issue as to whether the Chamber properly denied the Prosecutor’s request to be the organ to transmit the Requests upon issuance of the Warrants by the Chamber. He points out that reference to “transmission” of such Requests should be understood as encompassing “the entire process of preparation of the requests for arrest and surrender,

as well as subsequent transmission to the relevant States”.¹ Accordingly, the Prosecutor clarifies that the appeal, if granted, should bear on the Chamber’s determination “that the Chamber was the competent organ to prepare the Requests and that the Registry is the proper organ to transmit the Requests and the Warrants”.²

Errors of law and procedural errors complained of

9. The Prosecutor argues that, in denying his request to prepare and transmit the Requests, the Chamber incurred “errors of law and procedural errors” justifying review by the Appeals Chamber of the Court.³ He submits that the determinations that the Chamber itself was the competent organ to prepare the Requests and that the Registry is the proper organ to transmit the Requests and the Warrants involve an issue that would “significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”, for which an immediate resolution by the Appeals Chamber may materially advance the proceedings, within the meaning of article 82, paragraph 1(d), of the Statute.⁴

10. More specifically, the Prosecutor submits that, in making its determinations concerning the issue on which appeal is sought, the Chamber:

(i) erroneously assumed that all requests for arrest and surrender would be made by the Chamber issuing the warrants of arrest and therefore

¹ See para. 1 of the Prosecutor’s application for leave to appeal.

² *Ibid.*, para. 8

³ *Ibid.*, paras. 10-27.

⁴ *Ibid.*, paras. 28-40.

necessarily transmitted by the Registrar pursuant to rule 176, sub-rule 2, of the Rules, absent “specific and compelling circumstances”⁵;

(ii) in so doing, failed adequately to consider the purpose and object of article 89, paragraph 1, of the Statute, which, it is claimed, allows flexibility so as to permit the relevant requests to be “transmitted” by the organ of the Court with the more effective capability to obtain international cooperation and therefore maximise the potential for arrest;⁶

(iii) failed to consider article 58, paragraph 5, of the Statute, which provides that, upon issuance of a warrant of arrest, the Court “may” (not “shall”) request the arrest and surrender of a person on the basis of Part 9 of the Statute, thus allowing discretion as to the determination of the proper moment for the transmission of the request for arrest and surrender even following the issuance of a warrant of arrest⁷;

(iv) erred in determining that the Chamber should “automatically ‘make’ a request for cooperation ... simply because the Pre-Trial Chamber was requested by the Prosecutor to issue a warrant or order or decision”, this being difficult to reconcile with article 57, paragraph 3 (a), of the Statute⁸;

(v) made transmission by the Prosecutor conditional upon the test of “specific and compelling circumstances”, which is not enshrined in the Statute, and which is so restrictive in formulation and effect as to contravene the object and purpose of article 89, paragraph 1, of the Statute⁹;

⁵ *Ibid.*, paras. 14 and 15. The Prosecutor’s application for leave to appeal actually refers to the test of “*special* and compelling circumstances” (emphasis added). However, since the Decision refers to “specific and compelling circumstances”, reference to “specific and compelling circumstances” only will be made throughout this decision.

⁶ *Ibid.*, paras. 11, 18, 23 and 27.

⁷ *Ibid.*, para. 16.

⁸ *Ibid.*, para. 17.

⁹ *Ibid.*, para. 21.

(vi) erred in concluding that this test of “specific and compelling circumstances” was not met in light of the peculiar features of the situation at stake, namely of the set of exclusive contacts developed by the Prosecutor with relevant authorities and of the need to implement proper victim and witness protection measures in the field, such features warranting allocation to the Office of the Prosecutor as the sole organ of the Court possessing the capability to obtain arrests effectively and without undermining further investigative and prosecutorial efforts¹⁰; and (vii) erred in deeming that any damaging consequences of having the transmission of the Requests entrusted to the Registrar could be properly addressed by the mechanism of consultation and cooperation between the Registrar and the Prosecutor set out in the Decision and in the Requests, due, *inter alia*, to the fact that the Prosecutor has exclusive powers to make cooperation agreements under article 54, paragraph 3(d), of the Statute and to receive confidential information under article 54, paragraph 3(e), of the Statute.¹¹

Prosecutor’s arguments in support of the issue affecting the fair and expeditious conduct of the proceedings or the outcome of the trial

11. With a view to supporting his application for leave to appeal, the Prosecutor contends that the errors of law and procedural errors incurred in the Decision would “affect the fair and expeditious outcome of the proceedings” and “require immediate resolution by the Appeals Chamber” within the meaning of article 82, paragraph 1(d), of the Statute.

¹⁰ *Ibid.*, paras. 22 and 26.

¹¹ *Ibid.*, para. 24.

12. In support of this contention, the Prosecutor submits the following arguments:

(i) that the preparation and transmission of any request for arrest and surrender is “a crucial and extremely sensitive step in the process of investigation”¹²;

(ii) that “ensuring effective coordination in support of efforts to arrest is critical to securing the presence of the person named in the warrant” and that the “possibility of success or failure in the arrest effort alone establishes that the issue at bar ‘is bound to affect the proceedings or the outcome’”¹³;

(iii) that the timing and manner of the transmission of the Requests could potentially disrupt or undermine protective measures or the ongoing cooperation with the Court; that “delay during the transmission process, a breach of trust by any member of the Court, the mishandling of information provided confidentially to the Court or of a cooperation relationship could potentially undermine an extremely precarious security situation and/or damage the network of cooperation which thus far has strongly supported the ongoing investigation”¹⁴; and that all this might “substantially affect the Court’s ability to carry on trial or pre-trial proceedings in the future”, thus making “the very outcome of the proceedings to be at stake”¹⁵;

(iv) that, by virtue of the scope of the Decision not being limited to requests for arrest and surrender but potentially extending to all “requests

¹² *Ibid.*, para. 30.

¹³ *Ibid.*, para. 30.

¹⁴ *Ibid.*, para. 30.

¹⁵ *Ibid.*, para. 30.

for cooperation sought in support of the investigation”, it establishes a rule substantially altering the duties and responsibilities of the Prosecutor and the Pre-Trial Chamber by shifting the responsibility of seeking cooperation to the Registrar and Chambers and thus potentially and substantially affecting these proceedings – and all proceedings before the Court¹⁶; and

(v) that the question of whether the parameters of the “specific and compelling circumstances” strike a balance which is consistent with the respective mandates of the Court’s organs “is sufficiently central to the fair and expeditious conduct of the proceedings” so as to warrant appellate review.¹⁷

Prosecutor’s arguments in support of the immediate resolution of the issue by the Appeals Chamber materially advancing the proceedings

13. As to the requirement that the immediate resolution of the issue by the Appeals Chamber would “materially advance the proceedings”, the Prosecutor argues that a decision of the Appeals Chamber, in either direction, would allow the Office of the Prosecutor “to know in advance the procedure to follow” in respect of “new requests for arrest and surrender” which might be required “in the instant investigation, or other investigations”.¹⁸ According to the Prosecutor, the identification of “the competent organ to prepare and transmit requests for arrest and surrender – and by implication other requests relating to other warrants and orders – is a question which will inevitably arise in future cases, and

¹⁶ *Ibid.*, para. 31.

¹⁷ *Ibid.*, para. 33.

¹⁸ *Ibid.*, para. 34.

in other Pre-Trial Chambers”¹⁹; and accordingly, resolution of the matter by the Appeals Chamber will “materially advance not only these proceedings, but all similar ones before this Court”²⁰.

14. Finally, the Prosecutor’s application for leave to appeal highlights that the Decision is the first one to interpret the relevant provisions of the Statute and of the Rules regarding the preparation and the transmission of requests for arrests and surrender and, more broadly, Part 9 of the Statute. Accordingly, it would be “in the interests of the Court as a whole” that the Appeals Chamber provide guidance “at the earliest possible opportunity”²¹, given that it would not be proper to leave the determination of the correct process for the preparation and transmission of requests for final review after a determination of the merits of a case at trial.²² In further support of his position, the Prosecutor stresses that an interlocutory appeal would not cause substantial danger of delay to the overall proceedings, since implementation of other critical portions of the Decision, notably of the scheme for protection of victims and witnesses, may commence pending resolution of the matter by the Appeals Chamber.²³

¹⁹ *Ibid.*, para. 36.

²⁰ *Ibid.*, para. 36.

²¹ *Ibid.*, para. 37.

²² *Ibid.*, para. 38.

²³ *Ibid.*, para. 39.

III. Principles for the Chamber's determination

15. The Chamber believes that any determination of the Prosecutor's application for leave to appeal must be guided by three principles, namely: (i) the restrictive character of the remedy provided for in article 82, paragraph 1 (d), of the Statute; (ii) the need for the applicant to satisfy the Chamber as to the existence of the specific requirements stipulated by this provision; and (iii) the irrelevance of or non-necessity at this stage for the Chamber to address arguments relating to the merit or substance of the appeal.

16. Reference to the drafting history of article 82 is instructional as to the first principle. That history indicates that within the Court's system interlocutory appeals (ie, appeals against decisions other than final decisions) were meant to be admissible only under the limited and very specific circumstances stipulated in article 82, paragraph 1 (d), of the Statute. In particular, the Chamber notes from such drafting history that, during the preparatory process, a proposal according to which all "other" decisions (ie, other than final decisions) might be appealed²⁴, albeit with leave of the Chamber concerned, was defeated in favour of the current wording of article 82 of the Statute, which sets instead specific requirements for leave. Secondly, an almost identical provision governing interlocutory appeals appears in Rule 73 (B) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia

²⁴ See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, Working Group on Procedural Matters, Proposal submitted by Kenya (Article 81, Appeal against interlocutory decisions), 3 July 1998, Doc. A/CONF.183/C.1/WGPM/L.46.

("ICTY")²⁵ and the International Criminal Tribunal for Rwanda ("ICTR")²⁶. Each of the ICTY and ICTR rules provides that the Trial Chamber "may" grant certification to appeal a motion "if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".²⁷ While, in contrast to the ICC Statute, both the ICTY and the ICTR Rules of Procedure and Evidence vest discretion in the Trial Chamber (allowing the Trial Chamber to deny certification even when it is satisfied that the twofold requirement is met), article 82, paragraph 1(d), of the Statute reflects a general trend to narrow the grounds for interlocutory appeals, and in particular to deviate from the concept that an issue is subject to interim appeal because of its "general importance to proceedings" or "in international law generally", as a previous formulation of the relevant rule in the ICTY Rules of Procedure and Evidence had allowed.²⁸

²⁵ See Rule 73 (B) of the Rules of Procedure and Evidence of the ICTY, adopted on 11 February 1994, as amended on 11 February 2005, IT/32/Rev.34.

²⁶ See Rule 73 (B) of the Rules of Procedure and Evidence of the ICTR, adopted on 29 June 1995, as amended on 21 May 2005.

²⁷ Rule 73 (B) of the Rules of Procedure and Evidence of the ICTY reads: "Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification, if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings."

²⁸ Former Rule 73 (D) of the Rules of Procedure and Evidence of the ICTY read as follows: "Decisions on all other motions are without interlocutory appeal save with the leave of a bench of three Judges of the Appeals Chamber which may grant such leave (i) if the impugned decision would cause such prejudice to the case of the party seeking leave as could not be cured by the final disposition of the trial including post-judgment appeal; (ii) if the issue in the proposed appeal is of general importance to proceedings before the Tribunal or in international law generally" (emphasis added). See ICTY, Rules of Procedure and Evidence, IT/32/Rev.22.

17. The Chamber notes that a rather broad provision, similar to the earlier version of the ICTY rule, appears in the “Transitional Rules of Criminal Procedure” adopted by the United Nations Transitional Administration in East Timor in 2000.²⁹ However, the most recent international standard for interlocutory appeals, being that enacted for the Special Court for Sierra Leone (“SCSL”), reflects again the more restrictive approach. Rule 73 (B) of the Rules of Procedure and Evidence of the SCSL states that the Trial Chamber may give leave to interlocutory appeals only “in exceptional circumstances and to avoid irreparable prejudice to a party”.³⁰
18. Moreover, the case-law of the ICTR and the SCSL, which is especially relevant given the similarity of provisions set forth in the Tribunal and SCSL rules and in article 82, paragraph 1 (d), of the Statute, reinforces the view that leave for interlocutory appeals should be granted under limited circumstances. In the jurisprudence of the ICTR, interlocutory appeals under Rule 73 (B) have been described as “exceptional”.³¹ It was pointed

²⁹ See Sections 23 and 27 of UNTAET Regulation No. 2000/30 (*On Transitional Rules of Criminal Procedure*), 25 September 2000, UNTAET/REG/2000/30.

³⁰ Rule 73 (B) of the Rules of Procedure and Evidence of the SCSL reads in full: “Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such leave should be sought within 3 days of the decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders”. See Rules of Procedure and Evidence of the Special Court for Sierra Leone, As Amended at Sixth Plenary, 14 May 2005.

³¹ See ICTR, *Prosecutor v Théoneste Bagosora et al.*, ICTR-98-41-T, Certification of Appeal Concerning Prosecution Investigation of Protected Defence Witnesses, 21 July 2005, para. 6; ICTR, *Prosecutor v Casimir Bizimungu et al.*, ICTR-99-50-T, Decision on Prosper Mugiranza’s Motion for Leave to Appeal from the Trial Chamber’s Decision of 3 November 2004, 24 February 2005, para. 8 (referring to the “exceptional nature” of such appeals); ICTR, *Prosecutor v Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, ICTR-97-21-T, Decision on Ntahobali’s and Nyiramasuhuko’s Motions For Certification To Appeal the “Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible”, 18 March 2004, para. 14 (“exceptional circumstances”). See also ICTR, *Prosecutor v Édouard Karemera*, ICTR-98-44-T, Decision on the Defence Request For Certification Appeal the Decision on Accused Nzirorera’s Motion For Inspection of Materials, 26 February 2004, para. 26 (“exceptional cases”); ICTR, *Prosecutor v Ndayambaje et al.*, ICTR-98-42-T, Decision on Prosecutor’s Motion for Certification to Appeal the Decision of the Trial Chamber Dated 30 November 2004 on the

out that these appeals should be “granted only sparingly”³² or under circumstances which are “exceptional indeed”.³³ In one decision, the ICTR Chamber recalled that the exceptional character of interlocutory appeals is “consistent with some important national jurisdictions around the world in which interlocutory appeals are not allowed in criminal cases, or allowed only in very limited circumstances”.³⁴ The ICTR has also highlighted that the use of the term “significantly” in the wording of the provision is meant to confirm that certification is only to be granted on an exceptional basis, upon assessment of the circumstances which are peculiar to each case.³⁵ The SCSL adopted a similar approach in its jurisprudence. The Trial Chamber, noting the terms of Rule 73 (B) of the SCSL Rules, found that “it must apply an entirely new and considerably more restrictive test than the one applied by the ICTR and the ICTY”³⁶, noting that “this restriction is in line with the trend ... to tighten the test for granting leave in respect of interlocutory appeals in the interests of expeditiousness”.³⁷

Prosecution Motion For Disclosure of Evidence of the Defence, 4 February 2005, para. 11 (“very limited circumstances”).

³² See the submission of the Prosecution in ICTR, *Prosecutor v Casimir Bizimungu et al.*, ICTR-99-50-T, Decision 24 February 2005, para. 4.

³³ See ICTR, *Prosecutor v Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, ICTR-97-21-T, Decision 18 March 2004, para. 15.

³⁴ See ICTR, *Prosecutor v Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, ICTR-97-21-T, Decision 18 March 2004, para. 14.

³⁵ See ICTR, *Prosecutor v Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, ICTR-97-21-T, Decision 18 March 2004, para. 16.

³⁶ See SCSL, *Prosecutor v Alex Tamba Brima et al*, Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motions for Joinder, SCSL-2004-16-PT, 13 February 2004, para.15; SCSL, *Prosecutor v Issa Hassan Sesay et al*, Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motions for Joinder, SCSL-2004-15-PT, 13 February 2004, para. 12.

³⁷ SCSL, *Prosecutor v Issa Hassan Sesay et al*, Decision on Prosecution’s Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution Motions for Joinder, SCSL-2004-15-PT, 13 February 2004, para. 12.

19. This case-law shows that in striking the balance between the convenience of deciding certain issues at an early stage of the proceedings, and the need to avoid possible delays and disruptions caused by recourse to interlocutory appeals, the provisions enshrined in the relevant rules of the *ad hoc* Tribunals, and in the ICC Statute, favour as a principle the deferral of appellate proceedings until final judgment, and limit interlocutory appeals to a few, strictly defined, exceptions.

20. Read against this background, it is also clear (see principle (ii) in paragraph 15 above) that article 82, paragraph 1 (d), of the Statute requires of the applicant for leave to appeal to establish and demonstrate that:

- a. the decision complained of involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and
- b. an immediate resolution of such issue by the Appeals Chamber may “materially advance the proceedings”.

21. As elaborated in the case-law of the *ad hoc* Tribunals and the SCSL, this means that the party applying for leave to appeal needs to demonstrate the existence of both the above requirements³⁸; and that failure by the applicant to establish the first of such requirements will exempt the Chamber from considering whether the second has been met.³⁹ It is also to

³⁸ See ICTY, *Prosecutor v Slobodan 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, para. 2 (“cumulative criteria”); ICTY, *Prosecutor v Slobodan Milosevic*, IT-02-54-T, Decision on Prosecutor’s Application for Certification Under Rule 73 (B) Concerning Rule 70, 29 August 2002 (“two cumulative criteria”). See also SCSL, *Prosecutor v Alex Tamba Brima et al.*, SCSL-2004-16-PT, Decision 13 February 2004, para. 13; SCSL, *Prosecutor v Issa Hassan Sesay et al*, SCSL-2004-15-PT, Decision 13 February 2004, para. 10.

³⁹ See ICTR, *Prosecutor v Bizimungu et al.*, ICTR-00-56-T, Decision on Sagahutu’s Request for Certification to Appeal the Decision Dated 13 May 2005 Dismissing Applicant’s Request for Exclusion of

be noted that the first requirement consists of two conditions: the issue on which the appeal is sought must significantly affect either the proceedings both in terms of fairness and in terms of expeditiousness (the “first limb”) or the outcome of the trial (the “second limb”). As a result, the mere fact that an issue is of general interest or that, given its overall importance, could be raised in, or affect, future pre-trial or trial proceedings before the Court is not sufficient to warrant the granting of leave to appeal.⁴⁰ What the party seeking leave needs to demonstrate is that the issue at stake affects, first and foremost, the fairness and expeditiousness of the proceedings currently before the Chamber or the outcome of the related trial, as well as the impact (in terms of material advancement) of an immediate resolution of the issue on such proceedings. Failing such demonstration, leave to appeal cannot be granted, unless article 82, paragraph 1 (d), of the Statute is interpreted as allowing interlocutory appeals against any decision of a Chamber that touches upon a question of general importance for the Court. But, in the opinion of this Chamber, such an interpretation would be contrary to the letter and spirit of article 82, paragraph 1 (d) (see paragraph 16 above).

22. With respect to principle (iii) (see paragraph 15 above), the Chamber considers that the existence of the requirements set forth in article 82, paragraph 1 (d), of the Statute is the sole factor of relevance in determining whether leave should be granted or not. Accordingly, it is the

Witnesses LMC, DX, BB, GS, CJ, and GFO, 9 June 2005, para. 18; ICTR, *Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, ICTR-97-21-T, Decision 18 March 2004, paras. 23 and 24.

⁴⁰ See with respect to Rule 73 (B) of the Rules of Procedure and Evidence also ICTY, *Prosecutor v. Slobodan, Contempt Proceedings Against Kosta Bulatovic*, IT-02-54-T-R77.4, Order on Defence Motion Seeking Reconsideration of Order on Contempt Concerning Witness Kosta Bulatovic and Alternatively Motion Requesting Certification, 3 May 2005 (“[E]ven when an important point of law is raised, such as in this case, the effect of Rule 73 (B) is to preclude certification unless the party seeking clarification establishes that both conditions are satisfied”).

view of the Chamber that the arguments on the merits or the substance of the appeal are more appropriately for consideration and examination before the Appeals Chamber if and when leave to appeal has been granted. As the ICTR Trial Chambers have noted, submission of arguments on the merits or the substance at an early stage must be considered “irrelevant and premature”⁴¹; and revising generally the thrust of previous arguments without demonstrating relevant conditions for leave is not sufficient for the party to satisfy the requirements set forth in the rule⁴². Along the same lines of reasoning, the ICTR also stated that “it is not the substance of the appeal which guides the Chamber in determining whether or not certification should be allowed”, but only the two criteria set out in ICTR Rule 73 (B) (ie, the issue at stake must significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and an immediate resolution of the issue by the Appeals Chamber would materially advance the proceedings).⁴³

23. These conclusions are particularly important with respect to the Prosecutor’s application seeking leave to appeal from this Chamber. In requesting the Chamber to grant leave to appeal the Decision, the Prosecutor essentially submits arguments relating to the substance of the appeal, ie to the question of whether the Chamber has correctly interpreted the relevant provisions of the Statute and of the Rules concerning the making and transmission of the Requests. In this respect, as will follow from the Chamber’s view indicated in the foregoing

⁴¹ See ICTR, *Prosecutor v Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, ICTR-97-21-T, Decision 18 March 2004, para. 20.

⁴² See ICTR, *Prosecutor v Ndayambaje et al.*, ICTR-98-42-T, Decision 4 February 2005, para. 12.

⁴³ See ICTR, *Prosecutor v Casimir Bizimungu et al.*, ICTR-99-50-T, Decision on Prosper Mugiranzee’s Motion for Leave to Appeal, 24 February 2005, para. 9.

paragraphs, the Chamber considers that it would be inappropriate for the Chamber to examine arguments on the merit of the appeal in the context of the Prosecutor's application, unless those arguments are legally relevant and have a bearing on the criteria set out in article 82, paragraph 1 (d), of the Statute.

IV. Specific requirements of article 82, paragraph 1 (d), of the Statute

Absence of significant impact on the fair conduct of the proceedings

24. There can be little controversy about the two-fold nature of the first limb of the first requirement of article 82, paragraph 1(d), of the Statute: it is necessary that the issue on which appeal is sought would significantly affect the proceedings both in terms of fairness and in terms of expeditiousness.⁴⁴ It is therefore necessary for the Chamber to assess whether the Prosecutor has satisfied the burden that he bears to demonstrate that the issue at stake affects the proceedings now before the Chamber in this two-fold manner.

25. As regards the significant impact on fairness, the Prosecutor advances two main arguments: first, that entrusting an organ other than the Office of the Prosecutor with the transmission of the Requests, in particular with the task of determining the timing and manner of such transmission, could potentially disrupt or undermine protective measures or the ongoing measures of cooperation with the Court; second, that the

⁴⁴ See ICTY, *Prosecutor v Slobodan Milosevic*, IT-02-54-T, Decision 29 August 2002; See ICTR, *Prosecutor v Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, ICTR-97-21-T, Decision 18 March 2004, para. 22.

mechanism of cooperation set out in the Decision and in the Requests would shift the balance of powers among the organs of the Court by impinging upon the prerogatives of the Prosecutor in investigative matters. The two arguments deserve to be considered separately.

26. As to the first argument, the Prosecutor submits that “delay during the transmission process, a breach of trust by any member of the Court, the mishandling of information provided confidentially to the Court or of a cooperation relationship could potentially undermine an extremely precarious security situation and/or damage the network of cooperation which thus far has strongly supported the ongoing investigation”.⁴⁵ The Prosecutor does not provide any fact or specific information in support of his argument, nor offers any ground that allows the Chamber to make an assessment of the matters he asserts, other than on the basis of surmise.

27. Based on the evidence and information submitted before the Chamber, there is nothing to indicate that the Registrar is or might be operating in such a way or under such constraints so as to entail one or more of the prejudicial consequences described or envisaged by the Prosecutor. On the contrary, information made available to the Chamber by the Prosecutor suggests that cooperation between the two organs has so far proceeded smoothly and effectively, and entirely in accordance with the scheme laid out in the Statute and the Rules. During the hearing on the 16th day of June 2005, the Prosecutor highlighted that the Office of the Prosecutor’s cooperation with the Registrar and the Victims and Witnesses Unit had played “an enormous role” and that the cooperation

⁴⁵ See para. 30 of the Prosecutor’s application for leave to appeal.

with these organs had been “excellent”.⁴⁶ The Prosecutor reiterated this statement during the hearing on the 21st day of June 2005.⁴⁷

28. The Chamber notes furthermore that the Decision and the Requests mandate the Registrar “to promptly refer to the Chamber for further direction any difficulty that may arise in the execution of” the Requests. Therefore, the Chamber will be able to address any operational difficulty which might prevent the proper implementation of the Decision, especially with regard to victims’ and witnesses’ protection, and to give the Prosecutor an opportunity to present his point of view as to how such difficulties should be resolved.

29. Moreover, the Prosecutor fails to demonstrate how the negative consequences described in his application would be entailed by the mere fact that the Requests have been prepared by the Chamber and that the Registry, as the organ of the Court responsible for the implementation of judicial decisions and requests for cooperation emanating from Chambers, is mandated to ensure the transmission of such Requests to the relevant state authorities. In general terms, it is hard to see how a merely procedural issue, such as the preparation and the transmission of a request for arrest and surrender, might impair or otherwise adversely affect the fairness of the proceedings. To the contrary, it seems to this Chamber that to have requests for arrest and surrender prepared by a judicial organ such as the Chamber and their transmission by the Registry (having no participant-role in the proceedings) might actually result in

⁴⁶ See Transcript of the Hearing held on the 16th day of June 2005, English language version, p. 78.

⁴⁷ See Transcript of the Hearing held on the 21st day of June 2005, English language version, p. 144.

enhancing the fairness of the proceedings, precisely at such a crucial and sensitive step such as the moment of the arrest.

30. Fairness is closely linked to the concept of “equality of arms”, or of balance⁴⁸, between the parties during the proceedings⁴⁹. As commonly understood, it concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of the proceedings in its favour.⁵⁰ From the experience of the ad hoc tribunals, it appears in fact that the question of the possible impact of the issue on which interlocutory appeals is sought on the fairness of the proceedings is usually raised at a stage of the trial when both the Prosecutor and the defense have made their respective cases before the Chamber. In the instant situation, the Chamber is dealing with “*ex parte*” proceedings involving only the Prosecutor.

31. The Chamber recognises that the requirement of fairness exists for all participants in the proceedings and therefore also operates to the benefit of the Prosecutor.⁵¹ In this connection, the Chamber notes that fairness vis-

⁴⁸ See generally Salvatore Zappalà, *The Rights of the Accused*, in Cassese-Gaeta-Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 2 (Oxford, 2000), 1319, at 1328.

⁴⁹ See Anne-Marie La Rosa, *Juridictions pénales internationales – La procédure et la preuve* (Paris, Presses Universitaires de France, 2003), at 221, noting that issues liable to affect fairness of the proceedings are those which are “relatives à l’égalité des armes, aux composantes du droit à une procédure équitable ou à des questions probatoires”.

⁵⁰ See ICTY, Appeals Chamber, *Prosecutor v Dusko Tadic*, IT-94-1-A, Judgment of 15 July 1999, para. 48 (“[E]quality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case”); ICTR, Appeals Chamber, *The Prosecutor v Clément Kayishema and Obed Ruzindana*, ICTR-95-1-A, Judgment of 1 June 2001, para. 70. See also European Court of Human Rights, *Dombo Beheer B V v The Netherlands*, Judgment of 27 October 1993, Series A, No. 274, para. 33 (“[T]he requirement of ‘equality of arms’, in the sense of a ‘fair balance’ between the parties, applies in principle ... to criminal cases ... ‘Equality of arms’ implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent”).

⁵¹ See with respect to the principle of “equality of arms” also Zappalà, *The Rights of the Accused*, in Cassese-Gaeta-Jones (eds.), *The Rome Statute of the International Criminal Court*, cit., at 1330.

à-vis the Prosecutor has been preserved in the course of these proceedings. Specifically, the Prosecutor was heard on the point of the preparation and transmission of the Requests prior to the decision of the Chamber; and the Registrar, whilst entrusted with the task of transmitting the Requests, was specifically instructed in the Decision and in the Requests and is therefore mandated not to act unless upon prior consultation with the Prosecutor, with any disagreement or difficulty arising in the process having to be submitted to the Chamber. The purpose underlying this mechanism is precisely to ensure that cooperation is fruitful by allowing the point of view of the Prosecutor to be taken into account.

32. As to the second argument, the Prosecutor's submission is that the Decision substantially affects the fair and expeditious conduct of the proceedings because "the reasoning of the Decision ... is not limited to requests for arrest and surrender" and therefore results in "substantially alter[ing] the duties and responsibilities of the Prosecutor and the Pre-Trial Chamber".⁵²

33. In the light of the Chamber's reading of the requirement for fairness, as referred to above, it appears debatable whether a question exclusively relating to the apportioning of powers between organs of the Court may qualify as an issue that pertains to or would "significantly affect the fair ... conduct of proceedings". In any event, even if this were the case, the concern of the Prosecutor seems to stem from a mischaracterisation or incorrect reading of the actual terms of the Decision. As stated in the

⁵² See para. 31 of the Prosecutor's application for leave to appeal.

Chamber's "Decision on the Prosecutor's motion for clarification and urgent request for variation of the time-limit enshrined in rule 155" dated the 18th day of July 2005, the Decision was never meant to prejudice or otherwise impinge upon the specific responsibilities, functions or powers of the Prosecutor. Contrary to what is stated in the Prosecutor's application for leave to appeal, the Decision did not require that "even requests for cooperation sought in support of the investigation must be prepared by the Chamber and transmitted by the Registrar, absent specific and compelling circumstances, in any case where the Prosecutor sought a warrant or order for the purpose of the investigation". The Decision only stated that the Chamber, as one of the judicial organs of the Court, may make a request for cooperation and for arrest and surrender pursuant to article 87 of the Statute and that, on the basis of the circumstances described in the Prosecutor's application, the Registry was the competent and appropriate organ of the Court to transmit the Warrants and the Requests. Accordingly, the present or future ability of the Prosecutor to efficiently carry out its investigative tasks and to secure the necessary cooperation is not prejudiced nor otherwise affected by the fact that requests for arrest and surrender will be prepared by the Chamber and that this specific set of Requests will be transmitted by the Registrar.

34. In the light of the above, it is the conclusion of the Chamber that its decision of the 8th day of July 2005 does not, as claimed by the Prosecutor, significantly affect or otherwise have an adverse impact on the fairness of the proceedings.

Absence of significant impact on the expeditiousness of the proceedings

35. Failure by the Prosecutor to demonstrate that the “fairness” tenet of the first limb of the first requirement of article 82 has been met would *per se* exonerate the Chamber from the need to assess the “expeditiousness” tenet of the same limb. Be that as it may, the Chamber considers it appropriate to state its views on the matter. In doing so, the Chamber wishes to emphasise that the Prosecutor also does not demonstrate how the issue on which appeal is sought would have a significant impact on the expeditiousness of the proceedings.

36. Such impact is commonly understood in the case-law of the *ad hoc* Tribunals as existing whenever failure to provide for an immediate resolution of the issue at stake by the Appeals Chamber would entail the risk that lengthy and costly trial activities are nullified at a later stage, following the decision of first instance by the Trial Chamber⁵³.

37. However, the Chamber notes that the Prosecutor does not demonstrate in specific terms the existence of such a risk. In particular, once the arrest of the persons sought by the Prosecutor is secured, the investigative and cooperation efforts of the Prosecutor will have reached their goal and the issue of the proper organ for the transmission of the Requests would become moot or irrelevant, so as to make it unlikely that the Prosecutor will wish to raise the issue at a later stage.

⁵³ See ICTR, *The Prosecutor v Théoneste Bagosora et al.*, ICTR-98-41-T, Decision 11 September 2003, para. 9.

38. At any rate, following the execution of the warrant of arrest, there will be an early opportunity at the confirmation stage for the Prosecutor or the person against whom the confirmation of the charges is sought, pursuant to rule 122, sub-rule 3, of the Rules, to "raise objections or to make observations concerning an issue related to the proper conduct of the proceedings", before the matter is heard on the merits.

39. It would, in any event, better serve the interests of fairness and of expeditiousness that, at the very least, the matter at issue be debated at a stage when both parties will be represented or have the opportunity to be represented and will therefore be able to state their respective cases. At the same time, it should be noted that rule 122 takes specifically into account the need to preserve the expeditiousness of the proceedings by ensuring that objections and observations made under sub-rule 3 cannot be raised or made again at a subsequent point in the confirmation or trial proceedings (sub-rule 4).

40. For these considerations, the Chamber has come to the conclusion that no impact, let alone a significant impact, on the expeditious course of the proceedings will necessarily follow or can be feared by virtue of the fact that the issue of the organ competent to prepare and transmit a request for arrest and surrender is not examined by the Appeals Chamber on an interlocutory basis.

41. In this connection, the Chamber notes that the Prosecutor does not seem to claim that failure to have the issue addressed by the Appeals Chamber at this stage would have the impact usually associated with expeditiousness

of the proceedings within the meaning of article 82, paragraph 1 (d), of the Statute, or of the corresponding rules of the *ad hoc* Tribunals. Rather, the thrust of the Prosecutor's claim seems to be that "the Decision necessarily introduces unnecessary delay... in requiring the Registry to initiate and develop cooperation relationships which the OTP has maintained since January 2004".⁵⁴ In so doing, he seems to read the "expeditious conduct of the proceedings" referred to in article 82, paragraph 1 (d), of the Statute as encompassing also the phase from the issuance of the arrest warrant until the arrest of the person.

42. Even if reference to the expeditiousness of the proceedings were actually to be read in the terms suggested by the Prosecutor, it remains that the Prosecutor also does not show how the fact of having the Chamber drafting the Requests and the Registrar transmitting them to the relevant authorities would have a negative impact on the proceedings. The Prosecutor warns that "delay during the transmission process ... could potentially undermine an extremely precarious security situation and/or damage the network of cooperation".⁵⁵ However, it is worth recalling that, while entrusting the Registrar with the task of transmitting the Warrants and the Requests, the Chamber specifically instructed the Registrar not to act unless upon prior consultation with the Prosecutor, with any disagreement or difficulty arising in the process of consultation and of sharing any relevant information having to be submitted to the Chamber for directions.

⁵⁴ See para. 25 of the Prosecutor's application for leave to appeal.

⁵⁵ See para. 30 of the Prosecutor's application for leave to appeal.

43. As said above, based on the information available to the Chamber at this stage, there is no demonstrated deficiency or lack of capacity affecting the Registry which might suggest the actual occurrence or even the risk of the negative or inconvenient consequences evoked by the Prosecutor. The determination that an issue may have a significant impact on the expeditiousness of the proceedings cannot be based on surmise or allegations which are not substantiated by specific information. Besides, the mechanism for close and full cooperation set out in the Decision and the Requests is aimed at and capable of achieving a twofold objective: firstly, to allow the Prosecutor to share with the Registrar the contacts secured so far with relevant authorities; and secondly, to allow both the Prosecutor and the Registrar to refer to the Chamber any difficulty in the implementation of its Decision, and specifically in the transmission of the Requests, which might arise at a later stage.

44. Accordingly, the Chamber concludes that the Prosecutor also does not show that failure to grant leave to appeal on the issue at stake at this preliminary stage would have a significant impact on the expeditiousness of the proceedings.

Absence of significant impact on the outcome of the trial

45. Having concluded that the first limb of the first requirement set forth in article 82, paragraph 1 (d), of the Statute is not satisfied, the Chamber needs to consider the alternative limb, ie whether the issue at stake would significantly affect the “outcome of the trial.”

46. The Prosecutor submits that the Chamber should grant leave to appeal because the “[n]egative consequences” of the Decision “to ... security or cooperation” would “substantially affect the Court’s ability to carry on trial or pre-trial proceedings in the future” and therefore compromise “the very outcome of these proceedings”.⁵⁶
47. The Prosecutor fails, however, to demonstrate specifically the manner and the extent to which the transmission of the Warrants and the Requests by the Registrar would so affect or compromise the outcome of the trial.
48. The Prosecutor’s reading of the requirement of the potential impact of the issue on the outcome of the trial appears to be excessively broad in the context of article 82, paragraph 1 (d), of the Statute. Not every issue that may influence the course of the proceedings in general terms is or can be regarded as an issue likely to affect the outcome of the trial within the meaning of this article and as understood in the case-law of the *ad hoc* Tribunals applying the corresponding common Rule 73 (B). It is only those issues that are bound to specifically affect the decision of the trial in favour of or against the accused⁵⁷, ie issues having a bearing on the determination of his or her guilt or innocence and therefore on the Trial Chamber’s decision to convict or to acquit, which are of relevance in this context.

⁵⁶ See para. 30 of the Prosecutor’s application for leave to appeal.

⁵⁷ See ICTR, *Prosecutor v Casimir Bizimungu et al.*, ICTR-99-50-T, Decision on Bicamumpaka’s Request Pursuant to Rule 73 For Certification to Appeal the 1 December 2004 “Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material”, Decision 4 February 2005, para. 26 (“Examples of ‘significant’ issues within the meaning of Rule 73 (B) include those that affect the rights of the Accused to a fair trial or, upon which a decision whether or not to certify an appeal may lead to a different result at the end of the trial”)

49. The Chamber does not exclude that this requirement may be invoked at this early stage of the proceedings. In such cases, however, the Chamber is still required to assess the potential impact of the issue at stake for a future trial. More specifically, the Chamber must assess whether an issue merits immediate resolution by the Appeals Chamber at this stage of the proceedings because its impact would later compromise the outcome, ie the very result of the trial as clarified above.

50. From this perspective, the Chamber is not convinced that the issue that forms the subject of the Prosecutor's application for leave to appeal falls within this category. The prospect of "success or failure in the arrest effort alone" does not affect the "outcome of the trial" in the proper sense. The issue raised in the Prosecutor's application might, at most, have an impact on the phase between the issuance of the warrant and the arrest and surrender of a person to the Court, which does not in itself affect the position of that person in respect of the substantive charges made against him or her. The transmission of the Warrants and the Requests is a technical procedure for international cooperation for the arrest of a person. It does not, however, by itself affect the very "outcome of the trial".

51. The Chamber notes in this respect that not every issue that may have an impact on proceedings, no matter how limited or circumscribed in time or scope, can be construed as an issue significantly affecting the outcome of the trial for the purposes of an interlocutory appeal. Such an interpretation would run counter to the very objective underlying the first requirement

of article 82, paragraph 1(d), of the Statute and to the restrictive regime of interlocutory appeals as a whole.

Lack of material advance to the proceedings following immediate resolution of the issue by the Appeals Chamber

52. Having found that neither the first nor the second limb of the first requirement for leave to appeal is satisfied, it would not be necessary for the Chamber to address the second requirement of article 82, paragraph 1 (d), of the Statute, ie whether, in the opinion the Chamber, “an immediate resolution” of the issue at stake by the Appeals Chamber “may materially advance the proceedings”.

53. However, the Chamber wishes to note that most of the arguments put forward by the Prosecutor in support of this requirement relate to the impact of an immediate resolution of the issue at stake on other, future proceedings, instead of addressing specifically the proceedings at stake.

54. The Chamber is aware that the Trial Chambers of the *ad hoc* Tribunals have in some instances interpreted the reference to the impact of the issue on which appeal is sought as encompassing not only the specific proceedings or trial during which the issue arose, but also other proceedings or trials being held or to be held in the future.⁵⁸ However, it should be noted that such reference is usually made in addition to and not

⁵⁸ See ICTY, *Prosecutor v Mile Mrksic*, IT-95-13/1-PT, Decision Granting Certification to Appeal, 29 May 2003; ICTY, *Prosecutor v Slobodan Milosevic*, IT-02-54-T, Decision on Prosecution’s Application for Certification Under Rule 73 (B) Concerning the Evidence of an Investigator, 20 June 2002; ICTR, *Prosecutor v Casimir Bizimungu et al.*, ICTR-99-50-T, Decision on Bicomumpaka’s Request Pursuant to Rule 73 For Certification to Appeal, 4 February 2005, para. 29.

in replacement of the necessary reference to an existing impact on the current proceedings. The Chamber already highlighted that the rule previously in force in the *ad hoc* Tribunals allowed leave to be granted on the mere basis that the issue was of general relevance to “international law”.⁵⁹ The difference between that previous rule and the provision now appearing in both the ICC Statute and in the current version of the rules of the *ad hoc* Tribunals consists of the need to show a specific link between the immediate resolution of the issue at stake and the impact on the current proceedings. In the opinion of the Chamber, the potential impact on future proceedings may at most be invoked as an additional argument in support of the alleged significant impact on the current proceedings, which remains an essential condition to be met for the purpose of the leave to appeal.

55. The Chamber is also not convinced that the fact that an issue is new and has never been the subject of the scrutiny by the Appeals Chamber necessarily constitutes a ground for admitting interlocutory appeals. The Court will face novel issues on an ongoing basis throughout its first proceedings. To claim that the novelty of an issue as such warrants the grant of the leave to appeal pursuant to article 82, paragraph 1 (d), of the Statute would essentially deprive its provisions of any meaningful content. The argument must therefore be dismissed.

⁵⁹ See above (fn 28) former Rule 73 (D) of the Rules of Procedure and Evidence of the ICTY.

31/31

FOR THESE REASONS, THE CHAMBER HEREBY:

REJECTS the Prosecutor's application for leave to appeal;

DECIDES to authorise the disclosure of the Prosecutor's application and of this decision to the Registrar;

DECIDES that this decision be kept under seal until further order by the Chamber.

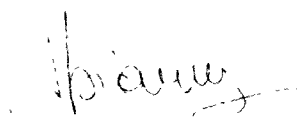
Done both in English and French, the English version being authoritative.



Judge Tuiloma Neroni Slade
Presiding Judge



Judge Mauro Politi



Judge Fatoumata Dembele Diarra

Dated this 19th day of August 2005

At The Hague, The Netherlands