

## INTERNATIONAL DECISIONS

EDITED BY JULIAN ARATO

*The International Criminal Court—Pre-Trial Chamber’s constitutional checks on the prosecutor—discretionary power of the prosecutor—interests of justice*

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN. ICC-02/17-138. Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan. At <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-138>.

International Criminal Court, March 5, 2020.

On March 5, 2020, the Appeals Chamber of the International Criminal Court (ICC) decided to authorize the prosecutor to commence a *proprio motu* investigation into the alleged war crimes and crimes against humanity committed during the Afghanistan War since 2003.<sup>1</sup> This decision is the first case where the requirements for the authorization of an investigation under Article 15(4) of the ICC Rome Statute (Statute) were tested on appeal.<sup>2</sup> The case lays down a marker as to how the ICC sees the division of roles between the Pre-Trial Chamber and the Office of the Prosecutor. The Appeals Chamber proved willing to give the prosecutor broad discretion at the investigation stage. Without limiting principles, this approach may eventually expand the role of the Court beyond what the Statute permits.

Article 15 of the Statute sets out the procedure for the prosecutor’s triggering an investigation *proprio motu*—that is, on her motion when neither a state nor the United Nations Security Council referred the situation. If the prosecutor concludes that there is a reasonable basis to proceed with an investigation, she must submit a request to the Pre-Trial Chamber for authorization.<sup>3</sup> If the chamber considers that there is a reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the ICC, it shall authorize the commencement of the investigation.<sup>4</sup>

Article 53(1) specifies that, in initiating an investigation, the prosecutor shall consider whether the requirements on jurisdiction and admissibility are satisfied and whether there are substantial reasons to believe that an investigation would not serve the interests of justice.<sup>5</sup> The text of paragraph 1 is silent on whether this consideration is for all investigations or only

<sup>1</sup> Situation in the Islamic Republic of Afghanistan, ICC-02/17-138, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (Mar. 5, 2020), at <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/17-138> [hereinafter Afghanistan Judgment].

<sup>2</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90.

<sup>3</sup> *Id.* Art. 15(3).

<sup>4</sup> *Id.* Art. 15(4).

<sup>5</sup> *Id.* Art. 53(1).

when the prosecutor receives a referral. Paragraphs 2 through 4 only apply to the referred cases. Rule 48 of the ICC Rules of Procedure and Evidence provides that the prosecutor shall consider the factors set out in Article 53(1) in a *proprio motu* case.<sup>6</sup>

In the present case, the prosecutor requested authorization to investigate the situation in Afghanistan. The request was based on the information that international crimes within the jurisdiction of the ICC had been committed by groups on all sides of the conflict, including not only the Taliban but also the United States Armed Forces and the Central Intelligence Agency.

On April 12, 2019, Pre-Trial Chamber II rejected the request because, in its view, the investigation would not serve the “interests of justice” as required by Article 53(1)(c).<sup>7</sup> The chamber decided that it had an obligation to review the prosecutor’s decision under the criteria set forth in Article 53 because it had a “filtering role.”<sup>8</sup> It acknowledged that the evidentiary standard applicable for *proprio motu* investigations—a “reasonable basis to proceed”—is the lowest in the Court’s statutory framework.<sup>9</sup> It characterized the Article 15 authorization procedure as empowering the Pre-Trial Chamber to “set boundaries to and restrain the discretion of the Prosecution”<sup>10</sup> and “to avoid manifestly ungrounded investigations due to lack of adequate factual or legal fundamentals.”<sup>11</sup> Through the requirement to determine that the investigation would serve the interests of justice, the chamber reasoned that it could constrain prosecutorial discretion to “avoid engaging in investigations which are likely to ultimately remain inconclusive.”<sup>12</sup> In its view, it was required not only to determine that there is a reasonable basis to believe that crimes under the Court’s jurisdiction have been committed but also to positively determine that “investigations would be in the interests of justice, including in relation to the gravity of the alleged conducts, the potential victims’ interests and the likelihood that investigation be feasible and meaningful under the relevant circumstances.”<sup>13</sup> Because of the lack of the availability of evidence<sup>14</sup> and the difficulty in securing meaningful cooperation from relevant authorities,<sup>15</sup> “the prospects for a successful investigation and prosecution” was “extremely limited.”<sup>16</sup> Based on this assessment, it held that the investigation would not serve the interests of justice.<sup>17</sup> In the end, the Pre-Trial Chamber reviewed and rejected the request on these pragmatic grounds.

The prosecutor raised two grounds for appeal. The primary reason was that the Pre-Trial Chamber “erred in law in seeking to make a positive determination of the interests of justice” (para. 6). Alternatively, the Pre-Trial Chamber “abused its discretion in assessing the interests of justice” (*id.*).

The Appeals Chamber overturned the Pre-Trial Chamber’s decision. First, the Appeals Chamber held that the Pre-Trial Chamber should not review the “interests of justice” factor

<sup>6</sup> Rules of Procedure and Evidence, ICC-ASP/1/3, Corr.1, Part II.A.

<sup>7</sup> Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (Apr. 12, 2019) [hereinafter Pre-Trial Chamber Decision].

<sup>8</sup> *Id.*, para. 30.

<sup>9</sup> *Id.*, para. 31.

<sup>10</sup> *Id.*, para. 32.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, para. 33.

<sup>13</sup> *Id.*, para. 35.

<sup>14</sup> *Id.*, para. 92.

<sup>15</sup> *Id.*, para. 93.

<sup>16</sup> *Id.*, para. 96.

<sup>17</sup> *Id.*

under Article 53(1) in determining the reasonableness of the *proprio motu* investigation. In its view, it is for the prosecutor alone to make the decision, and the “legal framework does not envisage judicial review of the Prosecutor’s conclusion” (para. 30).

The content and placement of Articles 15 on the initiation of a *proprio motu* investigation and Article 53(1) on the situations referred to the prosecutor “make it clear that these are separate provisions addressing the initiation of an investigation . . . in two distinct contexts” (para. 33). Under Article 15(4), the Pre-Trial Chamber “is *only* required to assess the information contained in the prosecutor’s request to determine whether there is a reasonable factual basis to proceed with an investigation . . . and whether the potential case(s) arising from such investigation would appear to fall within the Court’s jurisdiction” (para. 45, emphasis added). The process under Article 15(3)–(5) is not a review of the prosecutor’s determination. In particular, the Pre-Trial Chamber “is not called to review the Prosecutor’s analysis of the factors under article 53(1)(a) to (c) of the Statute” (*id.*).

The Appeals Chamber also provided several observations on the “interests of justice” concepts of the second and alternative ground of appeal (para. 48). The Appeals Chamber stated that the Pre-Trial Chamber did not correctly assess this element for the following reasons. First, Article 53(1) is formulated in the negative so that the prosecutor need not affirmatively determine that an investigation would be in the interests of justice (para. 49). Second, the Pre-Trial Chamber’s reasoning in support of its conclusion regarding the “interests of justice” was “cursory, speculative and did not refer to information capable of supporting it” (*id.*). Third, there is no indication that the Pre-Trial Chamber considered the gravity of the crimes and the interests of victims in conducting this assessment (*id.*).

Further expanding prosecutorial discretion, the Appeals Chamber held that the Pre-Trial Chamber’s authorization of an investigation should not be restricted to the incidents mentioned in the prosecutor’s request and incidents that are “closely linked” to those incidents (para. 56). If the chamber authorizes an investigation, the full range of investigative powers under the Statute are available to the prosecutor (para. 60). Restricting the authorized investigation to the factual information obtained during the preliminary examination would erroneously inhibit the prosecutor’s truth-seeking function (para. 61). It considered that the alternative proposed by the Pre-Trial Chamber—requiring the prosecutor to submit a new request for authorization for an investigation of incidents not closely related to those authorized—is unworkable in large-scale crimes. In its view, such cumbersome and unwieldy procedures are not required by the Statute (para. 63). However, it held that it was premature and unnecessary to resolve specific and detailed jurisdictional issues on an incident-by-incident basis for the purposes of authorizing the Afghanistan investigation (para. 78).

The Trump administration vehemently criticized the decision<sup>18</sup> and imposed sanctions on the ICC officials, employees, agents, and immediate family members on June 11, 2020.<sup>19</sup> The Biden administration revoked this order on April 2, 2021.<sup>20</sup>

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<sup>18</sup> U.S. Dep’t of State Press Statement, ICC Decision on Afghanistan (Mar. 5, 2020), at <https://2017-2021.state.gov/icc-decision-on-afghanistan/index.html>.

<sup>19</sup> Exec. Order No. 13928, 85 Fed. Reg. 36139 (June 11, 2020). See Kristen Eichensehr, Contemporary Practice of the United States, 115 AJIL 138 (2021).

<sup>20</sup> Exec. Order No. 14022, 86 Fed. Reg. 17895 (Apr. 1, 2021).

The hallmark of the Appeals Chamber's decision is its determination that the Pre-Trial Chamber's review is limited to the scope of Article 15(4) and does not encompass a review of the prosecutor's analysis of the factors in Article 53(1)(a)–(c). This is a novel step. Pre-Trial Chambers on four prior *proprio motu* cases had all reviewed the interests of justice of the case—in the *Kenya*,<sup>21</sup> *Côte d'Ivoire*,<sup>22</sup> *Georgia*,<sup>23</sup> and *Burundi* situations.<sup>24</sup> Unlike *Afghanistan*, none of them rejected the prosecutor's request.

The Appeals Chamber's opening the way for the Afghanistan investigation is a welcome development because Pre-Trial Chamber II seemed to have erred in its interpretation and application of Article 53(1)(c).<sup>25</sup> The meaning of the criterion “interests of justice” remains controversial.<sup>26</sup> Yet, regardless of the differences among views, the bottom line is that Article 53(1)(c) operates as an exception to the general rule of initiating criminal proceedings. The text of this provision and its *travaux préparatoires* indicate that the prosecutor has to make a negative determination.<sup>27</sup> In other words, the prosecutor *may* decide *not to* initiate an investigation—notwithstanding referral by a state or the Security Council—when it does not serve the interests of justice. The prosecutor does not have to show affirmatively that the investigation *serves* the interests of justice. The Pre-Trial Chamber nonetheless held that judicial supervision “must include a positive determination to the effect that investigations would be in the interests of justice.”<sup>28</sup>

However, the Appeals Chamber has now given overly broad discretion to the prosecutor to undermine the ICC Statute's careful balance of power between the Pre-Trial Chamber and the Office of Prosecutor.<sup>29</sup> According to this decision, the chamber is no longer allowed to

<sup>21</sup> Situation in the Republic of Kenya, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, para. 63 (Mar. 31, 2010) [hereinafter Kenya Decision]. It was explicitly confirmed in this decision that requirements set out in Article 53(1)(a)–(c) fall under judicial scrutiny. *Id.*, para. 25.

<sup>22</sup> Situation in the Republic of Côte d'Ivoire, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire,” ICC-02/11-14, para. 17 (Oct. 3, 2011) [hereinafter Côte d'Ivoire Decision].

<sup>23</sup> Situation in Georgia, Decision on the Prosecutor's Request for Authorization of an Investigation, ICC-01/15-12, para. 3 (Jan. 27, 2016) [hereinafter Georgia Decision].

<sup>24</sup> Situation in the Republic of Burundi, Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi,” ICC-01/17-X-9-US-Exp, 25 October 2017, ICC-01/17-9-Red, para. 190 (Nov. 9, 2017) [hereinafter Burundi Decision].

<sup>25</sup> For the critical comments on the Pre-Trial Chamber's decision, see Luca Poltronieri Rossetti, *The Pre-Trial Chamber's Afghanistan Decision*, 17 J. INT'L CRIM. JUST. 585, 591 (2019).

<sup>26</sup> William Schabas, *Article 15. Prosecutor/Le Procureur*, in THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 393, 405 (William A Schabas, 2d ed. 2016); Morten Bergsmo & Jelena Pejic, *Article 15: Prosecutor*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE (Otto Triffterer ed., 2d ed. 2008). For the analysis of the significance of the “interests of justice” clause, see Talita de Souza Dias, “*Interests of Justice*”: *Defining the Scope of Prosecutorial Discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court*, 30 LEIDEN J. INT'L L. 731 (2017).

<sup>27</sup> ICC, *Policy Paper on Preliminary Examinations*, para. 71 (Nov. 2013); ICC Office of the Prosecutor, *Policy Paper on the Interests of Justice 1* (Sept. 2007). All of the previous decisions on the *proprio motu* investigation affirmed this interpretation. Kenya Decision, *supra* note 21, para. 63; Côte d'Ivoire Decision, *supra* note 22, paras. 207–08; Georgia Decision, *supra* note 23, para. 58; Burundi Decision, *supra* note 24, para. 190.

<sup>28</sup> Pre-Trial Chamber Decision, *supra* note 7, para. 35.

<sup>29</sup> For such critiques, see Kevin Jon Heller, *The Appeals Chamber Got One Aspect of the Afghanistan Decision Very Wrong*, OPINIO JURIS (Mar. 9, 2020), at <http://opiniojuris.org/2020/03/09/the-appeals-chamber-got-one-aspect-of-the-afghanistan-decision-very-wrong>; Parv Kaushik, *Judicial Review Under Article 15 of the Rome Statute and the*

check the prosecutor's analysis of Article 53(1) factors under Rule 48 of the Rules of Procedure and Evidence. This may lead to the authorization procedure under Article 15(4) becoming "a mere rubber-stamping instance."<sup>30</sup> The modalities of its reasoning are problematic on several grounds.

First, there seems to be confusion between the applicability of Article 53(1) to the *proprio motu* investigation and the standard for reviewing the prosecutor's analysis. The Appeals Chamber arrived at its conclusion through the textual interpretation of the ICC Statute and the distinction between the contexts of the two provisions (para. 33). It explained that Article 53 does not apply in the case of *proprio motu* investigation because otherwise, the prosecutor has to make the same decision twice, which is unreasonable.<sup>31</sup> A logical and textual reading of the Statute would support the Appeals Chamber's conclusion, although it may not have been the intention of the drafters.<sup>32</sup> It is contradictory that the prosecutor "shall" initiate an investigation under Article 53(1) when there is no obligation to start a *proprio motu* investigation. In addition, it would be redundant to adopt Rule 48 if Article 53(1) applies to *proprio motu* investigation.

Yet, the fact that the prosecutor has the sole authority to decide on the factors listed under Rule 48 does not mean that the Pre-Trial Chamber *cannot* review the decision or that the Pre-Trial Chamber has to defer to the prosecutor completely. Nothing in the Statute goes so far. On the contrary, the Pre-Trial Chamber's review should cover every ground that supports the request for an investigation to secure due process. It is not possible to examine whether there is "a reasonable basis to proceed with an investigation" (Article 15(4)) unless the Pre-Trial Chamber applies the exact standard that the prosecutor's conclusion was based on.<sup>33</sup> The Appeals Chamber read this provision to indicate that the Pre-Trial Chamber need only consider whether there is "a reasonable factual basis to proceed with an investigation" (para. 34). It also characterized the adoption of Rule 48 as "show[ing] that the factors under Article 53(1)(a) to (c) are not relevant" for the Pre-Trial Chamber's decision (para. 35). The text of the Statute does not support this interpretation.

In this context, the Appeals Chamber's assessment concerning the relations between Articles 15 and 53 was disappointingly shallow because it skirted the constitutional checks and balances between the Pre-Trial Chamber and the prosecutor set out by the Statute. The history of the establishment of *proprio motu* investigation under Article 15 and the *raison d'être* of the Pre-Trial Chamber's authorization of the investigation show that such a consideration is necessary. The Rome Conference approved this mechanism notwithstanding the

"Interests of Justice": Towards a Renewed Understanding 18 J. INT'L CRIM. JUST. 1157 (2021). See also Megumi Ochi, *Case Comment*, 9 TOKYO REV. INT'L L. 190 (2021) (Japanese).

<sup>30</sup> Kenya Decision, *supra* note 21, para. 19 (diss. op., Hans-Peter Kaul, J.).

<sup>31</sup> Judge Luz del Carmen Ibáñez Carranza argued that there is nothing in Article 53 that restricts its application to referrals, and the plain reading of the text indicates that the provision regulates *proprio motu* investigations. Afghanistan Judgment, *supra* note 1, para. 7(i) (sep. op., Luz del Carmen Ibáñez Carranza, J.).

<sup>32</sup> *Travaux préparatoires* offers no significant elucidation. Different groups drafted Articles 15 and 53, and at the time of the Rome Conference, there was no time to harmonize the two provisions. See Silvia A. Fernandez De Gurmendi, *The Role of the International Prosecutor*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS (Roy S. Lee ed., 1999); Gilbert Bitti, *The Interests of Justice – Where Does That Come From? Part I*, EJIL:TALK! (Aug. 13, 2019), at <https://www.ejiltalk.org/the-interests-of-justice-where-does-that-come-from-part-i>.

<sup>33</sup> Kenya Decision, *supra* note 21, para. 24.

will of dominant states, including the United States, which wanted to limit prosecutorial investigations to referred cases.<sup>34</sup> Robust judicial oversight was indispensable to this compromise. Furthermore, the non-reviewability of Article 53(1)(b), i.e., the determination of admissibility, means that the Pre-Trial Chamber would not be able to prevent an investigation that does not satisfy the requirements of complementarity and gravity (Article 17).

By limiting the Pre-Trial Chamber's authority to review *proprio motu* investigations under even a deferential review of the prosecutor's application of the Article 53 factors, the Appeals Chamber postpones judicial control of the prosecutor's decision until after the investigation has been opened. The Appeal's Chamber's interpretation thus seems to represent a radical expansion of the prosecutor's discretion and a corresponding limitation of the Pre-Trial Chamber's checking function.

There are, of course, subsequent safeguards. Article 15(4) provides that the authorization is without prejudice to determinations by the Court with regard to the jurisdiction and admissibility. Article 19 allows states to raise challenges to jurisdiction, and Articles 97 and 98 include safeguards with respect to preexisting treaty obligations and other international obligations that may affect the execution of requests for arresting suspects and collecting evidence (para. 44).

Furthermore, the prosecutor is formally accountable before the Assembly of State Parties for its activities, and the Assembly has the power to remove the prosecutor by majority vote if she is found to have committed serious misconduct.<sup>35</sup> The temporal, financial, and personnel capacity also restricts the prosecutor's activities.<sup>36</sup> It is, therefore, difficult to imagine that the Office of the Prosecutor will initiate a *proprio motu* investigation that it knows will not succeed.<sup>37</sup> However, once the investigation starts, Part IX of the Statute obligates member states to cooperate. Therefore, the chamber should assess the justifiability of the investigation before its authorization.

Even if the Pre-Trial Chamber is to exercise some oversight, the standard of review remains a question. In light of the analysis above, neither the Pre-Trial Chamber II's *de novo* review nor the Appeals Chamber's complete deference reflects the institutional power balance between the Pre-Trial Chamber and the prosecutor set out by the state parties in the Statute. Pre-Trial Chambers in cases prior to the *Afghanistan* situation have applied the "reasonable basis to proceed with an investigation" standard provided under Article 15(4) to engage in some review of the Article 53 factors. However, they seemed to have reached a consensus that this standard is deferential. This approach better serves the underlying purpose of the procedure, which is "to prevent the Court from proceeding with unwarranted, frivolous or politically motivated investigations that could have a negative effect on its credibility."<sup>38</sup>

<sup>34</sup> See Schabas, *supra* note 26, 396.

<sup>35</sup> Rome Statute, *supra* note 2, Art. 46(2)(b).

<sup>36</sup> See Philippa Webb, *The ICC Prosecutor's Discretion Not to Proceed in the "Interests of Justice,"* 50 CRIM. L. Q. 305 (2005).

<sup>37</sup> ICC Office of The Prosecutor, *Policy Paper on Case Selection and Prioritisation*, para. 13 (Sept. 15, 2016).

<sup>38</sup> Kenya Decision, *supra* note 21, para. 32. The standard for opening an investigation is lower than the prerequisites for the issuance of warrant of arrest ("reasonable grounds to believe," Article 58(1)(a)) and the confirmation of charges ("substantial grounds to believe," Article 61(5)). In these two cases, the evidence and information are required that is directed to the individual rather than to the situation. See Karel de Meester, *Article 53: Initiation of an Investigation*, in COMMENTARY ON THE LAW OF THE INTERNATIONAL CRIMINAL COURT 388 (Mark Klamberg ed., 2017).

Furthermore, in the *Kenya* situation, the Pre-Trial Chamber held that the standards under Article 15(3) and 53(1) should not be dissociated. The same threshold is found irrespective of the trigger mechanisms because both provisions specify the procedure to open an investigation.<sup>39</sup> This seems to reflect the best textual interpretation and the right policy balance.

In sum, the Appeals Chamber went too far in providing the widest possible discretionary powers to the prosecutor. Its decision is at odds with the limits set out by the ICC Statute and comes at the expense of legitimacy and practicality.

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doi:10.1017/ajil.2021.48

*United States Supreme Court—jurisdiction—forced labor—international human rights law—International Labor Organization—multinational corporations*

NESTLÉ UNITED STATES, INC. v. DOE. 141 S. CT. 1931. At [https://www.supremecourt.gov/opinions/20pdf/19-416\\_i4dj.pdf](https://www.supremecourt.gov/opinions/20pdf/19-416_i4dj.pdf).

United States Supreme Court, June 17, 2021.

On June 17, 2021, the United States Supreme Court reversed and remanded a suit filed against Nestlé USA and Cargill under the Alien Tort Statute (ATS)<sup>1</sup> for lack of jurisdiction. This case has already garnered attention over the nature of the dispute (child slaves in Africa), the Supreme Court's treatment of jurisdiction under the ATS, and the finding shared by five of the nine Supreme Court justices that domestic corporations can potentially be sued under the ATS. This analysis focuses on the child slavery and global supply chain aspects of the decision.

The case was brought by six Malian nationals, all former child slaves who had been forced to harvest cocoa in the Ivory Coast, otherwise known as Côte d'Ivoire (Respondents). Their working conditions were perilous. They were forced to work for up to fourteen hours per day, six days per week, in hazardous conditions. They were starved and beaten, slept in locked rooms, and spent their days frightened that their overseers would maim them to keep them from leaving.

Respondents filed suit under the ATS, alleging that Nestlé and Cargill bore some responsibility for their injuries by aiding and abetting violations of international law prohibitions of slavery, forced labor, child labor, torture, and cruel, inhuman, or degrading treatment. They argued that the companies, which are major global chocolate producers, provided their enslavers with financial support, supplies, and training. Although Nestlé and Cargill “knew or should have known” that the cocoa farms were exploiting child slaves, those companies allegedly “continued to provide those farms with resources” (p. 1935). The Respondents were motivated to file suit in the United States because: (1) Mali contains no law allowing for civil damages for their injuries; (2) the Ivory Coast judicial system is notoriously corrupt;

<sup>39</sup> Kenya Decision, *supra* note 21, para. 21.

<sup>1</sup> 28 U.S.C. § 1350.