

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/04
Date: 13 July 2006

THE APPEALS CHAMBER

Before: Judge Georgios M. Pikis, Presiding
Judge Philippe Kirsch
Judge Navanethem Pillay
Judge Sang-Hyun Song
Judge Erkki Kourula

Registrar: Mr Bruno Cathala

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

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

The Office of the Prosecutor

Mr Luis Moreno-Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Ms Fabricio Guariglia, Senior Appeals Counsel
Mr Eckehard Withopf, Senior Trial Lawyer

Counsel for the Victims

Mr Emmanuel Daoud

**Counsel for the Defence appointed by
the Court**

Mr Joseph Tshimanga

The Appeals Chamber of the International Criminal Court (the "Court"),

In the application of the Prosecutor dated 24 April 2006 entitled "Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" (ICC-01/04-141),

After deliberation,

Unanimously

Delivers the following

JUDGMENT

The application is dismissed.

I. THE NATURE OF THE APPLICATION

1. Pre-Trial Chamber I upheld¹ a victims' application² to participate in the investigation of crimes falling within the jurisdiction of the Court committed within the Democratic Republic of the Congo and proceedings sequential thereto. Their request was approved pursuant to the provisions of article 68 (3) of the Rome Statute ("Statute") trusting "the Court" to permit victims to present their views and concerns "[...] at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." Approval of victims' participation pursuant to article 68 (3) of the Statute entitles

¹ *Situation en République Démocratique du Congo* «Décision sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6 » 17 janvier 2006 (ICC-01/04-100-Conf-Exp; ICC-01/04-101)

² ICC-01/04-25-Conf-Exp; ICC-01/04-26-Conf-Exp; ICC-01/04-27-Conf-Exp; ICC-01/04-28-Conf-Exp; ICC-01/04-29-Conf-Exp; ICC-01/04-30-Conf-Exp preceded by Registry document *Situation Democratic Republic of the Congo* "Report to PTC I in accordance with Rule 89 paragraph 1 of the Rules of Procedure and Evidence, and Regulation 86 paragraph 5 of the Regulations of the Court" 20 May 2005 (ICC-01/04-22-Conf-Exp) and accompanied by Registry document *Situation Democratic Republic of the Congo* "Memorandum in support of the applications for participation in proceedings numbers: VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5, VPRS-6" 26 May 2005 (ICC-01/04-31-Conf-Exp-tEn).



them to voice their views and concerns at such stages of the proceedings and in such a manner as the Court may judge appropriate.³

2. The Prosecutor sought the leave⁴ of Pre-Trial Chamber I to appeal the above decision under the provisions of article 82 (1) (d) of the Statute. The application was refused. In its decision⁵, Pre-Trial Chamber I makes detailed analysis of the provisions of article 82 (1) (d) of the Statute in the process of interpreting them deriving guidance on the subject from an earlier decision⁶ of Pre-Trial Chamber II.

3. The Prosecutor seeks⁷ the review of the above decision, albeit a review of an extraordinary nature, styled "Extraordinary Review", in that no provision is made in the Statute or the Rules of Procedure and Evidence for such an "extraordinary" step. He opposes the interpretation accorded to article 82 (1) (d) of the Statute by the Pre-Trial Chamber liable, in his view, to be set aside for errors rooted in the decision.⁸ In his submission, the Appeals Chamber has jurisdiction to review the dismissal of his application for leave, notwithstanding the absence of express provision to that end in the Statute. The victims and counsel appointed to protect the interests of the defence though notified⁹ of the document of the Prosecutor made no response to it.

4. It has not escaped the Appeals Chamber's attention that the application of the Prosecutor exceeds the page limit set down in regulation 37 (1) of the Regulations of the Court. The Prosecutor asks to be excused for that and prays for the extension of the limit,

³ See also rule 89 (1) of the Rules of Procedure and Evidence.

⁴ *Situation in the Democratic Republic of the Congo* "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" 23 January 2006 (ICC-01/04-103).

⁵ *Situation en République Démocratique du Congo* « Décision relative à la requête du Procureur sollicitant l'autorisation d'interjeter appel de la décision de la Chambre du 17 janvier 2006 sur les demandes de participation à la procédure de VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 et VPRS 6 » 31 mars 2006 (ICC-01/04-135).

⁶ *Situation in Uganda* "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" 19 August 2005 (ICC-02/04-01/05-20-US-Exp) made public by decision no ICC-02/04-01/05-52 dated 13 October 2005.

⁷ *Situation in the Democratic Republic of the Congo* "Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" 24 April 2006 (ICC-01/04-141) ("Application of the Prosecutor").

⁸ Application of the Prosecutor, paragraphs 53 to 75.

⁹ Notification email of 25 April 2006 from *Court Management-Court Records* to Mr. Joseph Tshimanga and Mr Emmanuel Daoud.



a necessity, in his view, in light of the complexity of the case and the voluminousness of the subjects to be addressed.¹⁰ An application for the extension of the page limit envisaged by the Regulations of the Court and its approval by a Chamber are prerequisites for the submission of an extended document. Derogation from the ordained procedure should not, in this case, stand in the way of looking into the entirety of the document submitted. The reasons for extending the page limit under regulation 37 (2) of the Regulations of the Court in this case are compelling in view of the issues arising for determination and their complexity; save for this, no justification could be found for bypassing the Regulations of the Court. The exceptional circumstances surrounding the case warrant the extension.

II. REASONS

5. Two questions arise for consideration: (a) the interpretation, ambit and context of the application of article 82 (1) (d) of the Statute leaving, in the submission of the Prosecutor, (b) a lacuna apt to be filled by the provisions of article 21 (1) (c) of the Statute introducing what are termed general principles of law deriving, in his suggestion, from the national legislation of countries adhering to “the principal legal systems of the world”¹¹. Hereafter, the Appeals Chamber shall deal first with the parameters of the application of article 82 (1) (d) of the Statute, an exercise that has the additional advantage of providing guidelines on the interpretation of an important aspect of the Statute, and secondly, the existence, if any, of a lacuna in the law and amenity, in that eventuality, to bridge the gap by recourse to article 21 (1) (c) of the Statute.

A. Article 82 (1) (d) of the Statute

1. *Article 82 (1) (d) of the Statute, its interpretation and ambit*

6. The Appeals Chamber shall now proceed with an analysis of the provisions of article 82 (1) (d) of the Statute noting its interpretational implications guided in the process by the provisions of Part III, Section 3 (notably articles 31 and 32) of the Vienna

¹⁰ Application of the Prosecutor, paragraph 6.

¹¹ Application of the Prosecutor, paragraph 16 and footnote 10.



Convention on the Law of Treaties¹² establishing the principles for the interpretation of treaties.

7. Article 82 (1) (d) of the Statute reads:

Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: (a) [...]; (b) [...]; (c) [...]; (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

8. Evidently, article 82 (1) (d) of the Statute has two components. The first concerns the prerequisites for the definition of an appealable issue and the second the criteria by reference to which the Pre-Trial Chamber may state such an issue for consideration by the Appeals Chamber.

(a) The first component

9. Only an “issue” may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.

10. Not every issue may constitute the subject of an appeal. It must be one apt to “significantly affect”, i.e. in a material way, either a) “the fair and expeditious conduct of the proceedings” or b) “the outcome of the trial”. The issue must be one likely to have repercussions on either of the above two elements of justice.

¹² 1155 United Nations Treaty Series 18232, signed on 23 May 1969 and entered into force on 27 January 1980.



11. The term “fair” in the context of article 82 (1) (d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64 (2) and 67 (1)) and article 21 (3); making its interpretation and application subject to internationally recognized human rights. The expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial.¹³ The principles of a fair trial are not confined to trial proceedings but extend to pre-trial proceedings as well as the investigation of crime; a fact directly borne out by the provisions of articles 55 and 54 (1) (c) of the Statute. Breach of or deviation from the rules of a fair trial at the pre-trial stage of the proceedings may have implications on the proceedings and may affect the outcome of the trial. Purging the pre-trial process of errors consequential in the above sense is designed as a safeguard for the integrity of the proceedings. This is at the core of article 82 (1) (d) of the Statute.

12. The term “proceedings” as encountered in the first part of article 82 (1) (d) is not confined to the proceedings in hand but extends to proceedings prior and subsequent thereto.

13. The outcome of the trial is postulated as a separate and distinct consideration warranting the statement of an issue for consideration by the Appeals Chamber, where the possibility of error in an interlocutory or intermediate decision may have a bearing

¹³ Article 14 of the *International Covenant on Civil and Political Rights*, General Assembly Resolution 2200A (XXI), U.N. Document A/6316 (1966) entered into force 23 March 1976, 999 United Nations Treaty Series 171, reads: “1. [...] In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...] 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [...] (c) To be tried without undue delay;” Article 6 (1) of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (4 November 1950), European Treaty Series No. 5, reads: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” Article 7 (1) (d) of the *African Charter on Human and Peoples' Rights*, signed on 27 June 1981, entered into force on 21 October 1986 reads: “1. Every individual shall have the right to have his cause heard. This comprises: “d. The right to be tried within a reasonable time by an impartial court or tribunal.” The *American Convention on Human Rights*, “Pact of San José, Costa Rica”, signed on 22 November 1969, entered into force on 18 July 1978, 1144 United Nations Treaty Series 17955, provides under the heading “Article 8. Right to a Fair Trial” in paragraph 1: “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal [...]”



thereupon. The Pre-Trial or Trial Chamber must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence.

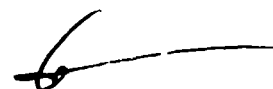
(b) The second component

14. Identification of an issue having the attributes adumbrated above does not automatically qualify it as the subject of an appeal. The issue must be one “for which in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.” Hence, the issue must be such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial.

15. A crucial word in the second leg of article 82 (1) (d) is “advance”; a term having a number of nuances depending on the context in which it is used. Here, the context is judicial proceedings. The word cannot be associated with the expeditiousness of the proceedings, one of the prerequisites for defining an appealable issue. The meaning conveyed by “advance” in the latter part of sub-paragraph (d) is “move forward”¹⁴; by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of the proceedings.

16. A wrong decision on an issue in the context of article 82 (1) (d) of the Statute unless soon remedied on appeal will be a setback to the proceedings in that it will leave a decision fraught with error to cloud or unravel the judicial process. In those circumstances the proceedings will not be advanced but on the contrary they will be set back.

¹⁴ *Brown L* (Editor in chief), *The Shorter Oxford English Dictionary*, Oxford University Press, 2002, Fifth Edition, Volume 1, A-M, at page 31. The French term “progresser” applied in article 82 (1) (d) of the Statute means according to *Larousse de poche 2006*, Larousse 2005 Paris, at page 649: “Faire des progrès, aller de l’avant”.



17. The term “proceedings” in the second part of article 82 (1) (d) of the Statute can have no different meaning from the one ascribed to it in the first part of the paragraph, encompassing the proceedings in their entirety.

18. Lastly, the term “immediate” underlines the importance of avoiding errors through the mechanism provided by sub-paragraph (d) by the prompt reference of the issue to the court of appeal. A corresponding duty is cast upon the Appeals Chamber to render its decision, the earliest possible (see also rule 156 (4) of the Rules of Procedure and Evidence).

19. Put in a nutshell, the object of paragraph (d) of article 82 (1) of the Statute is to pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial.

2. *The right to appeal under article 82 (1) (d) of the Statute*

20. Article 82 (1) (d) of the Statute does not confer a right to appeal interlocutory or intermediate decisions of either the Pre-Trial or the Trial Chamber. A right to appeal arises only if the Pre-Trial or Trial Chamber is of the opinion that any such decision must receive the immediate attention of the Appeals Chamber. This opinion constitutes the definitive element for the genesis of a right to appeal. In essence, the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue. By the plain terms of article 82 (1) (d) of the Statute, a Pre-Trial or Trial Chamber may certify such a decision on its own accord. If it fails to address the appealability of an issue it may do so on the application of any party to the proceedings. It may be regarded as axiomatic that, if any power is conferred upon a court to make an order or issue a decision, the parties have an implicit right to move the Chamber to exercise it.



B. The absence of provision in article 82 (1) (d) of the Statute for the review of a decision ruling out an appeal

1. The Prosecutor's arguments

21. The Prosecutor submitted that the absence of provision in subparagraph (d) of paragraph (1) of article 82 of the Statute or any other section of the law for the review of a negative decision for the statement of an appealable issue is not conclusive. Reconciling with the absence of review mechanism as suggested would deprive the Appeals Chamber of its statutory role and position as the final arbiter of the applicable law in a wide spectrum of judicial action.¹⁵ Disowning such a power would, in the Prosecutor's submission, entail abdication of duty on the part of the Appeals Chamber.¹⁶

22. In his contention, the absence of mechanism for review of negative decisions under consideration cannot be regarded as anything other than a lacuna in the law.¹⁷ As such, it must be remedied by the general principles of law finding application in such a situation provided for in the instant case by article 21 (1) (c) of the Statute.¹⁸

23. Article 21 (1) of the Statute provides that the Court must apply firstly the Statute, Rules of Procedure and Evidence and Elements of Crimes, secondly applicable treaties and the principles and rules of international law and thirdly "[f]ailing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards."

24. Sub-paragraph (c) of paragraph 1 of article 21 of the Statute is a multipolar provision of the law involving in the same spell an amplitude of factors definitive of its subject-matter. Be that as it may, there is little doubt about its basic intent that lies in the incorporation of general principles of law derived from national laws of legal systems of the world as a source of law.

¹⁵ Application of the Prosecutor, paragraph 12.

¹⁶ Application of the Prosecutor, paragraph 14.

¹⁷ Application of the Prosecutor, paragraph 13.

¹⁸ Application of the Prosecutor, paragraph 13.



25. The Prosecutor asserts that a review of the principles of law finding application in many countries belonging to the Romano-Germanic system of law, and many countries adhering to the common law system of law and in some countries practising the "Islamic Law Jurisdictions", as the Prosecutor termed it,¹⁹ establish a uniform pattern of reviewability of decisions of an hierarchically lower court disallowing an appeal to a higher court.²⁰ The Prosecutor broadened his submission to include a general right to appeal any decision of a first instance court.²¹ In these proceedings the Appeals Chamber is only concerned with decisions of the character falling within article 82 (1) (d) of the Statute.

26. To begin the Prosecutor referred the Appeals Chamber to the relevant law finding application in fourteen countries belonging to the Romano-Germanic system of justice (Argentina, Chile, Ecuador, El Salvador, Finland, Germany, Mexico, Portugal, Spain, Guatemala, Honduras, Nicaragua, Panama and Uruguay) exemplifying in his view a practice recognizing competence to the appeals court to review decisions disallowing an appeal.²² A right to do so is conferred by statutory law, often referred to as a "complaint motion".²³ It may be noted parenthetically that none of the countries referred to acknowledge, as may be discerned from the Prosecutor's submission, an inherent power to the court of appeal to review decisions of a subordinate court disallowing an appeal. In all countries the right to review decisions of such a nature is vested in the hierarchically higher courts as the court of appeal by statutory adjectival law.

27. That the legislation of the countries enumerated above reflects a uniform rule finding application in all States having the Romano-Germanic system of justice, the Appeals Chamber cannot confirm.²⁴ An instance to the contrary is France, where the process of review of decisions denying a right to appeal is unknown, as acknowledged by

¹⁹ Application of the Prosecutor, page 19 (before paragraph 27).

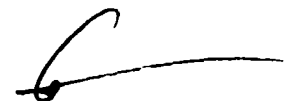
²⁰ Application of the Prosecutor, paragraphs 30 to 32.

²¹ See e.g. the Prosecutor's submission relating to Germany (Application of the Prosecutor, paragraph 24 (f)).

²² Application of the Prosecutor, paragraphs 22 to 25.

²³ Application of the Prosecutor, paragraphs 23 and 24.

²⁴ The national provisions cited by the Prosecutor do not clarify whether they refer to appeals from decisions that bear comparison to article 82 (1) (d) of the Statute nor does he refer to the legal requisites for the definition of an appealable issue.



the Prosecutor himself.²⁵ No such power exists in Germany either with regard to decisions akin to decisions envisioned by article 82 (1) (d) of the Statute.²⁶ In the countries cited above, where power to review decisions ruling out an appeal is provided for, the modalities for the exercise of this right differ and in large measure vary from country to country.

28. The citations of the Prosecutor with regard to countries adhering to the common law system of justice (The United States, The United Kingdom, Canada, Sierra Leone, Australia) are on the one hand confined as in the case of the Romano-Germanic systems of law to statutory provisions allowing for a decision by the hierarchically higher court to grant "special leave" to hear an appeal²⁷ and on the other hand to the jurisdiction of an hierarchically higher court to grant writs of certiorari and mandamus.²⁸ These writs derive from England evolved in the context of the common law, acknowledging power to the High Court a branch of the Supreme Court to oversee the exercise of judicial functions by inferior courts²⁹, i.e. courts of limited jurisdiction, with a view to ensuring that they operate within the bounds of their jurisdiction and observe fundamental norms of justice.³⁰ The parameters of the jurisdiction in the countries cited by the Prosecutor do

²⁵ See page 11, footnote 25 of the document in support of the appeal.

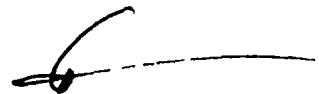
²⁶ The interlocutory appeals in criminal proceedings provided for in the German Criminal Procedure Code (available in an English translation at <http://www.iuscomp.org/gla/statutes/StPO.htm> (last accessed on 10 July 2006)) do not foresee certification or leave to appeal by a hierarchically lower court (see sections 304 to 311a of the German Criminal Procedure Code). The legal provisions cited by the Prosecutor in the document in support of the appeal concern appeals against final and not interlocutory decisions.

²⁷ *United Kingdom and related commonwealth jurisdictions*: The Prosecutor referred to a legal provision empowering the Privy Council to grant "special leave"; *Sierra Leone* The Prosecutor did likewise respecting the powers of the Supreme Court; *Canada*: The Prosecutor referred to a legal provision empowering the Supreme Court to hear appeals with respect to final or other judgments of the Federal Court of Appeal or of the highest courts of final resort "whether or not leave to appeal [...] has been refused [...]".

²⁸ *United States*: The Prosecutor referred to 28 United States Code § 1254 that allows the Supreme Court of the United States to review cases in the courts of appeals "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree" available at http://www4.law.cornell.edu/uscode/html/uscode28/usc_sec_28_00001254----000-.html (last accessed on 9 July 2006); *Australia*: The Prosecutor referred to the writ of certiorari; a power conferred upon the Federal Court.

²⁹ See *Murphy P* (Editor in chief), *Blackstone's Criminal Practice* 2006, Oxford University Press 2005, D27.19; see also Supreme Court Act 1981, section 29-(3) in: *Richardson P J* (Editor), *Archbold, Criminal Pleading, Evidence and Practice*, London, Sweet & Maxwell 2005, Chapter 7-4.

³⁰ See *Lord Mackay of Clashfern* (Editor in chief), *Halsbury's Laws of England*, Fourth Edition, 2001 Reissue, I (1) Administrative Law, Admiralty, para 59.



not always coincide with the English prototype. What they share in common is the corrective character of the jurisdiction.

29. Any parallelism between “complaint motions” and the writs of certiorari and mandamus is deceptive. In the case of certiorari there is jurisdiction to quash a decision of an inferior court *inter alia* for an error of law manifest on the record of the proceedings.³¹ Mandamus is an ancillary remedy conferring power upon a higher court to order an inferior court to do what it is law-bound to do.³² Nowadays the above writs find application in England and Wales under the umbrella of judicial review.³³ Attention must be drawn to the fact that in England and Wales the writs are only available to oversee and correct the judicial process of inferior courts; a species of supervisory jurisdiction exercised by the High Court.³⁴ No jurisdiction to issue the aforesaid writs exists or is acknowledged as a means of overseeing the course of the judicial process in the case of first instance higher courts, such as the High Court of Justice of England and Wales, a tier of justice of the Supreme Court³⁵ of England and Wales.

30. The Pre-Trial and Trial Chambers of the International Criminal Court are in no way inferior courts in the sense that inferior courts are perceived and classified in England and Wales. Hence, any comparison between them and inferior courts under English law is misleading.

³¹ See *Murphy P* (Editor in chief), Blackstone’s Criminal Practice 2006, Oxford University Press 2005, D27.20 - D27.23; the relevant case in the context under consideration is *Regina v. Blackfriars Crown Court, ex parte Sunworld Ltd* [2000] The All England Law Reports, 837, available in Westlaw.

³² See *Murphy P* (Editor in chief), Blackstone’s Criminal Practice 2006, Oxford University Press 2005, D27.24; *Lord Mackay of Clashfern* (Editor in chief), Halsbury’s Laws of England, Fourth Edition, 2001 Reissue, 1 (1) Administrative Law, Admiralty, para 58; *Richardson P J* (Editor), Archbold, Criminal Pleading, Evidence and Practice, London, Sweet & Maxwell 2005, Chapter 7-4 and 7-5

³³ See *Murphy P*. (Editor in chief), Blackstone’s Criminal Practice 2006, Oxford University Press 2005, D27 19.

³⁴ See *Richardson P J* (Editor), Archbold, Criminal Pleading, Evidence and Practice, London, Sweet & Maxwell 2005, Chapter 7-4.

³⁵ See the Supreme Court Act 1981, section 1 (1) (cited in *Murphy P* (Editor in chief), Blackstone’s Criminal Practice 2006, Oxford University Press 2005, D2.1): “The Supreme Court of England and Wales shall consist of the Court of Appeal, the High Court of Justice and the Crown Court, each having such jurisdiction as is conferred on it by or under this or any other Act”.



31. The three countries cited³⁶ by the Prosecutor adhering to Islamic law (Malaysia, Singapore and the Philippines) have no uniform rules with regard to review of lower courts' decisions not permitting an appeal by a higher court.³⁷

32. It emerges from the above that nothing in the nature of a general principle of law exists or is universally adopted entailing the review of decisions of hierarchically subordinate courts disallowing or not permitting an appeal. The Appeals Chamber concludes that the Prosecutor's submission in this respect is ill-founded. A greater obstacle still in the way of the Prosecutor invoking article 21 (1) (c) of the Statute is that it finds no application in the case under review.

2. *The existence of a lacuna in article 82 (1) (d) or article 82 of the Statute generally*

33. The interpretation of treaties, and the Rome Statute is no exception, is governed by the Vienna Convention on the Law of Treaties (23 May 1969)³⁸, specifically the provisions of articles 31 and 32. The principal rule of interpretation is set out in article 31 (1) that reads:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The Appeals Chamber shall not advert to the definition of "good faith",³⁹ save to mention that it is linked to what follows and that is the wording of the Statute. The rule governing the interpretation of a section of the law is its wording read in context and in light of its

³⁶ Application of the Prosecutor, paragraphs 27 to 29.

³⁷ In the case of the *Philippines* it can be inferred that the provisions of the law cited by the Prosecutor incorporate in terms and in substance common law jurisdiction to grant writs of certiorari and mandamus.

³⁸ 1155 United Nations Treaty Series 18232, signed on 23 May 1969 and entered into force on 27 January 1980.

³⁹ A subject discussed in many decisions of the International Court of Justice (see *inter alia* the *Nuclear Tests Case* (Australia v France) 20 December 1974 (available at http://www.icj-cij.org/icjwww/w/icasess/iaf/iaf_ijudgment/iaf_ijudgment_19741220.pdf (last accessed on 9 July 2006)), paragraph 46; the *Fisheries Jurisdiction Case* (Spain v. Canada) 4 December 1998 (available at Westlaw) paragraph 37; *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*, 9 July 2004 (available at Westlaw), paragraph 161.



object and purpose.⁴⁰ The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety.⁴¹ Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.

34. Interpreting article 82 (1) (d) of the Statute in this sense and spirit, it emerges as an undisputed fact that it does not in terms confer power or competence on the Appeals Chamber to review a decision not stating a subject for appeal.

35. Article 82 is included in Part 8 of the Statute dealing with appeals and matters incidental thereto. The decisions that are subject to appeal are enumerated in articles 81 and 82 of the Statute. There is nothing in Part 8 to suggest that a right to appeal arises except as provided thereunder. Another corollary is that the legislator specified distinctly decisions liable to or subject to appeal. The Rules of Procedure and Evidence regulating the exercise of the right to appeal reflect that.⁴²

36. Article 82 (1) (d) of the Statute confers a right of appeal against interlocutory or intermediate decisions of either the Pre-Trial or the Trial Chamber.

37. The self-evident purpose of the Statute is to make internationally punishable the heinous crimes specified therein in accordance with the principles and the procedure institutionalized thereby. As far as it may be gathered, nothing is left out with respect to the question under consideration otherwise expected from the tenor of the Statute.

38. Like every other article of the Statute, article 82 must be interpreted and applied in accordance with internationally recognized human rights, as declared in article 21 (3) of the Statute. Is a right to appeal against every decision of a hierarchically subordinate court to a court of appeal, or specifically an interlocutory decision of a criminal court to

⁴⁰ See also International Court of Justice, Case concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad), 3 February 1994 (*available at Westlaw*), paragraph 41; International Court of Justice, Case concerning maritime delimitation and territorial questions between Qatar and Bahrain (Qatar v. Bahrain) (*available at Westlaw*), paragraph 33.

⁴¹ See paragraph 2 of article 31 of the Vienna Convention on the Law of Treaties.

⁴² See rules 150, 154 and 155 of the Rules of Procedure and Evidence.



the court of appeal, acknowledged by universally recognized human rights norms? The answer is in the negative. Only final decisions of a criminal court determinative of its verdict or decisions pertaining to the punishment meted out to the convict are assured as an indispensable right of man. This is reflected in article 14 (5) of the International Covenant on Civil and Political Rights and many regional conventions and treaties giving effect to universally recognized human rights norms.⁴³ This right is assured to the accused under article 81 of the Statute.

39. The inexorable inference is that the Statute defines exhaustively the right to appeal against decisions of first instance courts, namely decisions of the Pre-Trial or Trial Chambers. No gap is noticeable in the Statute with regard to the power claimed in the sense of an objective not being given effect to by its provisions. The lacuna postulated by the Prosecutor is inexistent.

40. The interpretation accorded hereinabove to subparagraph (d) of paragraph 1 of article 82 of the Statute and article 82 generally is confirmed by the travaux préparatoires that establish as laid down in article 32 of the Vienna Convention on the Law of Treaties supplementary means of interpretation designed to provide a) confirmation of the meaning of a statutory provision resulting from the application of article 31 of the Vienna Convention of the Law of Treaties and b) the clarification of ambiguous or obscure provisions and c) the avoidance of manifestly absurd or unreasonable results. The travaux préparatoires reveal that a specific suggestion made by the Kenyan delegation to the Committee of the Whole at the 1998 United Nations Diplomatic Conference of Plenipotentiaries designed in essence to give effect to the right claimed by the Prosecutor

⁴³ Article 14 (5) of the *International Covenant on Civil and Political Rights*, General Assembly Resolution 2200A (XXI), U.N. Document A/6316 (1966) entered into force 23 March 1976, 999 United Nations Treaty Series 171, reads: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." Article 8 (2) (h) of the *American Convention on Human Rights*, "Pact of San José, Costa Rica", signed on 22 November 1969, entered into force on 18 July 1978, 1144 United Nations Treaty Series 17955, reads: "2. Every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: [.] h. the right to appeal the judgment to a higher court." Article 2 (1) of *Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (22 November 1984), European Treaty Series No. 5, reads: "1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised shall be governed by law".



was turned down. The suggestion was: "Other decisions may be appealed with the leave of the Chamber concerned and in the event of refusal such refusal may be appealed."⁴⁴ The dismissal of the suggestion rules out any possibility that the content of article 82 (1) (d) of the Statute was anything other than deliberate.⁴⁵

41. The travaux préparatoires confirm that article 82 (1) (d) of the Statute reflects what was intended by its makers.

42. The application of the Prosecutor is ill-founded and the subject set for consideration non-justiciable. Inevitably, it must be dismissed and so the Appeals Chamber adjudges.

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

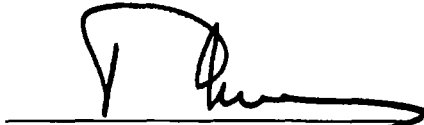
⁴⁴ See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, *Working Group on Procedural Matters*, Proposal submitted by Kenya (Article 81, Appeals against interlocutory decisions), 3 July 1998, Document A/Conf.183/C.1/WGPM/L.46 in United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, *Official Records Volume III Reports and other Documents* (Document A/CONF.183/13 (Vol. III), page 321.

⁴⁵ See the only other proposal to the Committee of the Whole made on this specific issue by the Canadian delegation of 3 June 1998 (Document A/CONF.183/C.1/WGPM/L.47) (in: United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June – 17 July 1998, *Official Records Volume III Reports and other Documents* (Document A/CONF.183/13 (Vol. III), page 321)) under the heading "Appeal against interlocutory decisions": "(e) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution of the Appeals Chamber may materially advance the trial." The Report of the Preparatory Committee on the Establishment of an International Criminal Court (Document A/CONF.183/2) dated 14 April 1998 that was the basis for discussion at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court contained the following text (apparently based upon a proposal by the United States delegation of 18 March 1998): "Either party may appeal any of the following interlocutory decisions in accordance with the Rules of Procedure and Evidence [...] (e) When the majority of the members of a Trial Chamber shall be of the opinion that the order involves a controlling issue as to which there is a substantial ground for difference of opinion and that immediate appeal from the order may materially advance the ultimate conclusion of the trial and a majority of the judges of the appellate chamber, at their discretion, agree to hear the appeal."

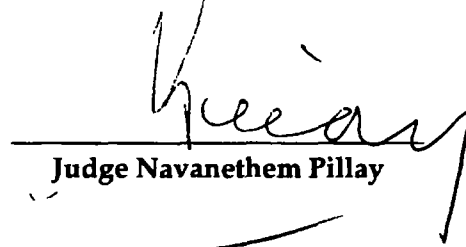




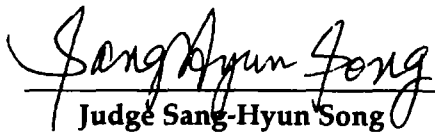
Judge Georghios M. Pikis (Presiding)



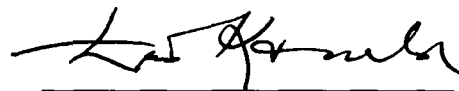
Judge Philippe Kirsch



Judge Navanethem Pillay



Judge Sang-Hyun Song



Judge Erkki Kourula

Dated this 13 July 2006

At The Hague, The Netherlands