Cour Pénale Internationale

International Criminal Court

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Date: **26 November 2013**

TRIAL CHAMBER V(B)

Before: **Judge Kuniko Ozaki, Presiding Judge**
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. UHURU MUIGAI KENYATTA

Public

Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
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Mr James Stewart
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Counsel for Uhuru Muigai Kenyatta
Mr Steven Kay
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Legal Representatives of Victims
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Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

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Amicus Curiae

REGISTRY

Registrar
Mr Herman von Hebel

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Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber V(B) ('Chamber') of the International Criminal Court ('Court') in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, pursuant to Articles 63, 64 and 67 of the Rome Statute ('Statute'), by majority, issues the following 'Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial'.

I. Procedural Background and Submissions

1. On 6 September 2013, the defence team for Mr Kenyatta ('Defence') submitted an oral application for the excusal of Mr Kenyatta from continuous presence at trial,[1] which was opposed by the Office of the Prosecutor ('Prosecution') and the Legal Representative of Victims ('LRV').[2] On 23 September 2013, following an order of the Chamber,[3] the Defence filed the 'Defence Request for Conditional Excusal from Continuous Presence at Trial' (together with the Defence's oral submissions 'Excusal Request').[4] The Excusal Request sought the conditional excusal of Mr Kenyatta from continuous presence at trial on such terms that his physical presence in the courtroom would only be required at the opening, closing and delivery of the judgment. It further submitted that if at any other time Mr Kenyatta's presence would be required, or he would wish to participate, this should be satisfied by way of video link.[5]

[1] ICC-01/09-02/11-T-26-ENG.
[2] ICC-01/09-02/11-T-26-ENG.
[3] E-mail from the Chamber to the parties on 12 September 2013 at 15.40h.
[4] Defence Request for Conditional Excusal from Continuous Presence at Trial, 23 September 2013, ICC-01/09-02/11-809.
[5] ICC-01/09-02/11-809, paras 1, 28, 38; ICC-01/09-02/11-T-26-ENG, page 18, lines 14-22.

2. On 1 October 2013, the Prosecution responded to the Excusal Request, opposing it.[6] That same day, the LRV also filed a response opposing the Excusal Request.[7]

3. On 18 October 2013, the Chamber, by majority, issued the 'Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial' ('Excusal Decision').[8] The majority granted the relief requested by the Defence in the Excusal Request in part by excusing Mr Kenyatta from continuous presence for part of his trial in order to accommodate the discharge of his duties of state.[9] The Excusal Decision listed those hearings during which Mr Kenyatta would have to be physically present in the courtroom.[10]

4. In the Excusal Decision, the majority recalled that Trial Chamber V(A), by majority, granted Mr Ruto a conditional excusal from continuous presence at trial.[11] The majority in the Excusal Decision found that 'the entirety of the material reasoning employed in that decision is fully applicable to the current request of Mr Kenyatta, with necessary variations' and adopted the said reasoning in full.[12] It identified the fact that Mr Kenyatta is the President of Kenya as an important variation, providing all the more reason to apply to Mr Kenyatta the conditional excusal that was granted to Mr Ruto in consideration of the important functions that his position as Deputy President of Kenya involves.[13]

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[6] Prosecution's Response to the Defence Request for Conditional Excusal from Continuous Presence at Trial, ICC-01/09-02/11-818, paras 4-5.
[7] Victims' Response to "Defence Request for Conditional Excusal from Continuous Presence at Trial", ICC-01/09-02/11-819.
[8] ICC-01/09-02/11-830; Judge Ozaki appended a partially dissenting opinion and Judge Eboe-Osuji a separate opinion. See, respectively, Partially Dissenting Opinion by Judge Ozaki (ICC-01/09-02/11-830-Anx2), and Separate Further Opinion by Judge Eboe-Osuji (ICC-01/09-02/11-830-Anx3-Corr2).
[9] Excusal Decision, ICC-01/09-02/11-830, para. 124.
[10] Excusal Decision, ICC-01/09-02/11-830, para. 124.
[11] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, 18 June 2013, ICC-01/09-01/11-777 ('*Ruto* Decision').
[12] Excusal Decision, ICC-01/09-02/11-830, para. 66.
[13] Excusal Decision, ICC-01/09-02/11-830, para. 66 (quoting the *Ruto* Decision at para. 49).

5. In *Ruto and Sang,* the Prosecution was granted leave to appeal the *Ruto* Decision[14] and on 25 October 2013 the Appeals Chamber delivered its ruling on this appeal ('Appeals Judgment').[15] The Appeals Chamber found that 'the discretion that the Trial Chamber enjoys under Article 63 (1) of the Statute is limited and must be exercised with caution'.[16] It specified six limitations to that discretion.[17] The Appeals Chamber considered that regarding these limitations, Trial Chamber V(A) had not properly exercised its discretion in the *Ruto* Decision.[18] It recalled that the presence of the accused must remain the general rule and concluded that Trial Chamber V(A) had interpreted the scope of its discretion too broadly, exceeding the limits of its discretionary power.[19] The Appeals Chamber therefore reversed the *Ruto* Decision.

6. On 28 October 2013, the Prosecution filed the 'Prosecution's Motion for Reconsideration of the "Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial" and in the alternative, Application for Leave to Appeal' ('Motion for Reconsideration'),[20] seeking the Chamber's reconsideration of the Excusal Decision, in light of the Appeals Judgment. The Prosecution requests

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[14] On 18 July 2013, the Prosecution was granted leave to appeal the Ruto Decision by the majority of Trial Chamber V(A) (*The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', ICC-01/09-01/11-817). On 29 July 2013, the Prosecution filed the 'Prosecution appeal against the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial' (*The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11-831).

[15] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial", ICC-01/09-01/11-1066.

[16] Appeals Judgment, ICC-01/09-01/11-1066, para. 61.

[17] The limitations are "(i) the absence of the accused can only take place in exceptional circumstances and must not become the rule; (ii) the possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial; (iii) any absence must be limited to that which is strictly necessary; (iv) the accused must have explicitly waived his or her right to be present at trial; (v) the rights of the accused must be fully ensured in his or her absence, in particular through representation by counsel; and (vi) the decision as to whether the accused may be excused from attending part of his or her trial must be taken on a case-by-case basis, with due regard to the subject matter of the specific hearings that the accused would not attend during the period for which excusal has been requested'. Appeals Judgment, ICC-01/09-01/11-1066, para. 62.

[18] Appeals Judgment, ICC-01/09-01/11-1066, paras 61 and 63.

[19] Appeals Judgment, ICC-01/09-01/11-1066, para. 63.

[20] ICC-01/09-02/11-837.

the Chamber to vacate the Excusal Decision[21] and revert to the 'general rule' under Article 63(1) of the Statute that Mr Kenyatta must be present during trial,[22] or in the alternative, that it be granted leave to appeal this decision.[23] The Prosecution submits that, as a result of the outcome of the Appeals Judgment, the criteria for reconsideration are met. It contends that the Appeals Judgment provides new and previously unavailable information which has a decisive impact on the Excusal Decision.[24] The Prosecution argues that if the Appeals Judgment had been issued prior to the Excusal Decision, the Chamber would have been required to reach a different conclusion than the one it reached in the Excusal Decision.[25]

7. The Prosecution submits that the Appeals Judgment clarified 'the applicable law both with respect to the legal basis employed by the Trial Chamber', as well as the relief that was granted in the Excusal Decision.[26] It further submits that the conclusions and underlying reasoning of the Appeals Judgment in reversing the *Ruto* Decision, apply equally to the Excusal Decision, because the latter granted 'the same relief for the same reasons'.[27] According to the Prosecution, it would be 'difficult to imagine' that the Appeals Chamber would rule differently on an appeal against the Excusal Decision.[28]

8. The Prosecution combined its request for reconsideration with an application, in the alternative, for leave to appeal the Excusal Decision. The issue it seeks to appeal is 'whether the Trial Chamber correctly exercised its discretion when excusing the Accused from attending substantially all of his trial without first exploring whether

[21] Motion for Reconsideration, ICC-01/09-02/11-837, para. 10.
[22] Motion for Reconsideration, ICC-01/09-02/11-837, para. 16.
[23] Motion for Reconsideration, ICC-01/09-02/11-837, para. 10.
[24] Motion for Reconsideration, ICC-01/09-02/11-837, para. 11.
[25] Motion for Reconsideration, ICC-01/09-02/11-837, para. 11.
[26] Motion for Reconsideration, ICC-01/09-02/11-837, para. 11.
[27] Motion for Reconsideration, ICC-01/09-02/11-837, para. 11.
[28] Motion for Reconsideration, ICC-01/09-02/11-837, para. 12.

there were any alternative options and without exercising its discretion to excuse the Accused on a case-by-case basis at specific instances of the proceedings, and for a duration limited to that which was strictly necessary'.[29]

9. On 29 October 2013, the LRV filed his response, supporting the Motion for Reconsideration and the reasoning set out therein.[30]

10. On 5 November 2013, the Defence notified the Chamber that it would not respond to the Motion for Reconsideration.[31]

II. Analysis by the Chamber

11. The Statute does not provide guidance on reconsideration, but the Chamber agrees with the observation made by Trial Chamber I in *The Prosecutor v. Thomas Lubanga Dyilo* that it would be incorrect to state that decisions can only be varied 'if permitted by an express provision in the Rome Statute framework'.[32] The Chamber considers that the powers of a chamber allow it to reconsider its own decisions, prompted by (one of) the parties or *proprio motu*.[33] In reference to Trial Chamber I's practice, Trial Chamber V acknowledged that 'it may reconsider past decisions when they are "manifestly unsound and their consequences are manifestly

[29] Motion for Reconsideration, ICC-01/09-02/11-837, para. 19.
[30] Victims' Response to "Prosecution's Motion for Reconsideration of the 'Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial' and in the alternative, Application for Leave to Appeal', ICC-01/09-02/11-841.
[31] E-mail sent by the Defence to the Chamber on 5 November 2013 at 15:39.
[32] *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, para. 18.
[33] Article 64(2) and (3) of the Statute. In the Excusal Decision, it was already noted that "[t]his decision and its conditions may, from time to time, be reviewed by the Chamber, of its own motion or at the request of any party or participant" (Excusal Decision, ICC-01/09-02/11-830, para. 124). The Chamber further notes that the Statute, pursuant to Article 84, allows for the reconsideration of a conviction (or sentence) as a result of new evidence, and considers that logically reconsideration of a procedural matter therefore is also allowed.

unsatisfactory"'.[34] Reconsideration should only be done in exceptional circumstances. The Chamber finds support, as was also done by Trial Chamber I,[35] in the relevant jurisprudence of the International Criminal Tribunals for the former Yugoslavia ('ICTY') and Rwanda ('ICTR') whose statutory provisions are equally silent as to the power of reconsideration,[36] that those circumstances can include 'new facts or new arguments'.[37]

12. The Chamber considers that the Appeals Judgement provides important new information. Whereas it was rendered in *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, rather than the instant case, it provides guidance in relation to the question at issue that cannot be set aside by this Chamber. In the current circumstances, where the Appeals Chamber has reversed a decision which was grounded on the same reasoning and resulting in a similar outcome as the Excusal Decision,[38] the Chamber considers that the present circumstances satisfy the reconsideration standard discussed above. Moreover, it would be contrary to the

[34] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the request to present views and concerns of victims on their legal representation at the trial phase, 13 December 2012, ICC-01/09-01/11-511, para 6 (quoting ICC-01/04-01/06-2705, para. 18)

[35] ICC-01/04-01/06-2705, paras 15-17. Trial Chamber I, by majority, noted that the 'approach by the *ad hoc* Tribunals reflects the position in many common law national legal systems'. ICC-01/04-01/06-2705, para. 18.

[36] ICC-01/04-01/06-2705, paras 15-17. Later jurisprudence uses similar wording: see, e.g., ICTY, *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Decision on Motion for Reconsideration of Decisions to Admit Testimony and Statement of Witness KDZ486, 25 October 2013, para. 7; and ICTY, *Prosecutor v. Goran Hadžić*, IT-04-75-T, Decision on Prosecution motion for reconsideration of decision on prosecution motion to substitute expert report of expert witness (Reynaud Theunens), 16 April 2013, para. 5.

[37] See, *inter alia*, ICTY, *Prosecutor v. Goran Hadžić*, IT-04-75-T, Decision on Prosecution motion for reconsideration of decision on prosecution motion to substitute expert report of expert witness (Reynaud Theunens), 16 April 2013, para. 5; *Prosecutor v. Vojislav Šešelj*, IT-03-67-T, Decision on Prosecution's Motion for Reconsideration of the Decision on the Second Bar Table Motion Filed 23 December 2010, 22 January 2013, para. 28; ICTY, *Prosecutor v. Jadranko Prlić et al.*, IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009, paras 6, 18; see ICTY, *Kajelijeli v. Prosecutor*, ICTR-98-44A-A, Judgement, 23 May 2005, paras 203-204; ICTR, *Prosecutor v. Augustin Ngirabatware*, ICTR-99-54-T, Trial Chamber, Decision on Defence Motion for Second Reconsideration of Witness Protective Measures, 15 July 2010, paragraphs 16 - 17; ICTR, *Prosecutor v. Augustin Ngirabatware*, ICTR-99-54-T, Trial Chamber, Decision on Defence Motion for Reconsideration of the Oral Decision Rendered on 6 December 2010, 27 January 2011, paragraphs 24-25.

[38] The majority notes that the Excusal Decision incorporated the reasoning of the *Ruto* Decision, in its entirety, by reference (see ICC-01/09-02/1-830, para. 66). Although the Excusal Decision contained additional reasoning that was not included in the *Ruto* Decision, the effect of the disposition and conditions of excusal was similar.

principle of judicial economy and the expeditiousness of the proceedings to require the Appeals Chamber to rule on the same issue of excusal in the present case. The Chamber therefore, mindful of its duty to ensure that the trial is fair and expeditious, considers it appropriate to reconsider its decision.

13. The Appeals Chamber clarified that 'Article 63(1) of the Statute does not operate as an absolute bar in all circumstances to the continuation of trial proceedings in the absence of the accused'[39] and that trial chambers have discretion in granting case-by-case excusals. In holding that there should be no 'blanket excusal' and that the absence of the accused should not be the 'general rule',[40] the Appeals Chamber set out six limitations to be taken into account when deciding, on a case-by-case basis, on excusal requests.[41]

14. In the Excusal Request, the Defence requested as primary relief that

> (i) President Kenyatta is conditionally excused from continuous presence at trial whereby he attends in person the opening and closing of trial and delivery of judgment before the International Criminal Court; and
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> (ii) In respect of all other hearings wherein the Court requires the presence of Uhuru Kenyatta, or he requests to be present, such presence is fulfilled by way of video-link.[42]

In addition, as alternative relief, the Defence requested that

> [i]n the event that the Chamber does not conditionally excuse President Kenyatta from continuous attendance at trial, President Kenyatta's continuous presence at trial be by means of video link.[43]

[39] Appeals Judgment, ICC-01/09-01/11-1066, para. 1.
[40] Appeals Judgment, ICC-01/09-01/11-1066, para. 63.
[41] Appeals Judgment, ICC-01/09-01/11-1066, paras 62-63.
[42] Excusal Request, ICC-01/09-02/11-809, para. 38.
[43] Excusal Request, ICC-01/09-02/11-809, para. 39.

15. In the Excusal Decision, first, the majority of the Chamber granted the Excusal Request in part by determining that Mr Kenyatta had to be physically present in the courtroom for certain specified hearings, and that his absence from trial during the rest of the hearings 'must always be and be seen to be directed towards the performance of Mr Kenyatta's duties of state'.[44] All other requests were rejected.[45] Second, the Chamber unanimously[46] directed the Defence to refrain from using Mr Kenyatta's official title in its filings.

16. The majority hereby reconsiders the first part of the disposition of the Excusal Decision. In light of the Appeals Judgment, the majority now rejects the primary relief sought in the Excusal Request. Mr Kenyatta will therefore, as a general rule, have to be present for his trial. Any future requests by the accused to be excused from attending parts of the trial will be considered on a case-by-case basis. The Chamber's consideration of any such request(s) shall include the following criteria:

(i) Mr Kenyatta will only be excused in exceptional circumstances and his absence will not become the rule;

(ii) the possibility of alternative measures will first be considered, including, but not limited to, changes to the trial schedule or a short adjournments;

(iii) any absence must be limited to that which is strictly necessary;

(iv) Mr Kenyatta, on each occasion, must explicitly waive his right to be present at trial;

[44] Excusal Decision, ICC-01/09-02/11-830, page 54.
[45] Excusal Decision, ICC-01/09-02/11-830, page 55.
[46] Judge Ozaki joined the majority on this point. See Partially Dissenting Opinion by Judge Ozaki, ICC-01/09-02/11-830-Anx2, para. 1.

(v) the rights of Mr Kenyatta as an accused must be fully ensured in his absence, in particular through representation by counsel; and

(vi) due regard will be given to the subject matter of the specific hearings for which an excusal to attend has been requested.

17. The remainder of the disposition of the Excusal Decision is unaffected by the Appeals Judgment. Hence, all other requests made in the Excusal Request are rejected. The Chamber further reaffirms its direction to the Defence not to use the accused's official title in its filings.

18. As the Motion for Reconsideration is granted, the alternative request for leave to appeal need not be considered.

FOR THE FOREGOING REASONS, THE CHAMBER, BY MAJORITY, HEREBY

GRANTS the Motion for Reconsideration;

REJECTS the primary relief sought in the Excusal Request and **DETERMINES** that the Chamber will apply the standard as set out in paragraph 16 above to any future requests for excusal; and

AFFIRMS the Excusal Decision in all other aspects.

Judge Eboe-Osuji appends a dissenting opinion.

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

Judge Kuniko Ozaki, Presiding

Judge Robert Fremr **Judge Chile Eboe-Osuji**

Dated 26 November 2013

At The Hague, The Netherlands

Dissenting Opinion of Judge Eboe-Osuji

1. I have read with care the joint decision of Judge Ozaki and Judge Fremr 'reconsidering' the Majority decision that Judge Fremr and I had issued in the matter of the Defence request for conditional excusal from continuous presence at trial. The good faith of my colleagues is not in doubt. In particular, I am very certain that my very good and learned friend, Judge Fremr, with whom I authored the Majority decision now being 'reconsidered', is motivated by nothing less than the most impeccable of honourable intentions. Nevertheless, for the reasons explained in this opinion, I regret my inability to agree with their decision, both on the procedure and as to the substance. [I regret, too, my inability to express my opinion with comparable brevity. More presses to be said in solitary dissent.]

OVERVIEW

2. In view of its length, I divide this opinion into five parts. Part I discusses why the decision of the Majority of the Trial Chamber is unsuitable for reconsideration. The better approach, in my view, is to seise the Appeals Chamber of the *Kenyatta* appeal, in order to give them an opportunity to resolve certain questions arising from their decision in the *Ruto* case, particularly the questions that I discuss in parts II, III, IV and V.

3. Part II lays out the thought that, in the construction of legal texts, the incidence of the auxiliary verb 'shall' has not always been accepted as signifying a mandatory outcome that eliminates further judicial inquiry as to the import of the given provision. 'Shall' may, in context, import the directory outcome of 'may'. In Part III, the question is raised whether the decision of the Majority of the Appeals Chamber in *Ruto* has now obscured settled law and practice as regards when and how the Appeals Chamber may interfere with a primary Chamber's exercise of discretion. This is something that the Appeals Chamber should now clarify. In Part IV, an urge is made for a clearer indication of the jural attributes that article 63(1) engages—from the perspectives of discretion, right and duty. In Part V, greater care is urged as regards the future effect of an *obiter dictum* that may be taken as foreclosing the discretion of a Trial Chamber to conduct trial in the absence of an absconding accused, in the right case.

4. Before proceeding further in this opinion that raises questions about the decision of the Appeals Chamber in the *Ruto* case, it is prudent to make clear what is not my aim here. Although aspects of the decision of the Majority of the Appeals Chamber (particularly the aspect that

concerns interference with the discretion that they found to exist in the Trial Chamber) tempt to the mind the notion of *per incuriam*, it is not at all my aim to urge that such a treatment be given to any aspect of the decision of the Majority of the Appeals Chamber in the *Ruto* case.

5. In particular, I do not propose to go so far as Lord Denning MR (sitting in the Court of Appeal of England and Wales) had famously gone in *Broome v Cassell & Co*, when he ventured the view that a decision of the House of Lords 'should not be followed any longer in this country',[1] on grounds that the House of Lords decision was *per incuriam*.[2] Lord Denning's disenchantment with the decision in question included not only that it had been subjected to 'wholesale criticism' in Commonwealth jurisdictions that ordinarily respected judgments of the House of Lords,[3] but also because of Lord Denning's own criticisms of the decision, such as those he deployed in the following direct language:

> [W]hen the House came to deliver their speeches, Lord Devlin threw over all that we ever knew about exemplary damages. He knocked down the common law as it had existed for centuries. He laid down a new doctrine about exemplary damages. He said ... that they could only be awarded in three very limited categories, but in no other category: and all the other lords agreed with him.[4] ...
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> [T]he new doctrine is hopelessly illogical and inconsistent.[5] ...
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> This case may, or may not, go on appeal to the House of Lords. I must say a word, however, for the guidance of judges who will be trying cases in the meantime. I think the difficulties presented by [the newer House of Lords decision] are so great that the judges should direct the juries in accordance with the law as it was understood before [the newer decision]. Any attempt to follow [the newer decision] is bound to lead to confusion.[6]

6. Lord Denning's pronouncements were not received with universal felicity. On further appeal,[7] members of the House of Lords unsurprisingly took exception. The law lords insisted that the 'hierarchical nature' of the English judicial system did not leave it open to the Court of Appeal to urge lower courts to reject a judgment of the House of Lords on grounds that the decision was *per incuriam*.[8] It was, however, acknowledged by Lord Hailsham that the Court of Appeal was

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[1] *Broome v Cassell & Co Ltd* [1971] 2 QB 354 [CA England and Wales] p 380H, *per* Lord Denning MR.
[2] *Ibid*, p 382A.
[3] *Ibid*, p 380D—G.
[4] *Ibid*, p 380D.
[5] *Ibid*, p 381D.
[6] *Ibid*, p 384B.
[7] *Broome v Cassell & Co Ltd* [1972] AC 1027 [House of Lords] at 1053E, *per* Lord Hailsham.
[8] As Lord Hailsham put it (just as directly as Lord Denning had put his own criticism of the House of Lords): '[I]n the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers': *ibid*, p 1054E. A softening of attitudes has since been observed. In *I M Properties v Cape & Dalgleish* [1999] QB 297 [CA England and Wales], the Court of Appeal refused to follow an earlier House of Lords decision on grounds that '[i]f and in so far as the House of Lords were purporting to decide [a point that was not argued before it] that decision was clearly *per incuriam*': *ibid*, at p 305H, *per* Waller LJ. See also 308H, *per* Hobhouse LJ. As was noted in one commentary: 'On this occasion, not only did the House not take

'well entitled' and 'perfectly at liberty' to urge that a decision of the House of Lords 'ought to be looked at again by the House of Lords ...'.[9] In a similar vein, Lord Reid acknowledged that members of the Court of Appeals 'were quite entitled to state their views and reasons for reaching [the] conclusion' that a decision of the House of Lords was 'bad law'.[10] But he rejected, as impermissible, the idea that the Court of Appeal may direct lower courts not to follow the decision of the House of Lords.[11] Viscount Dilhorne more charitably regretted that the Court of Appeal had expressed their criticism of the House of Lords decision in the terminology of *per incuriam*; but he felt great sympathy for the criticism if one looked beyond the use of the phrase. As he put it: 'While I regret the use of this expression, I doubt if it was intended to mean more than that the questions involved deserved more consideration ... . If that is what was meant, it is, I must confess, a view with which I have considerable sympathy.'[12] In a subsequent case, Lord Denning criticized the House of Lords again, while keeping well away from the terminology of *per incuriam*, which he described to have been treated as something of a *lèse majesté* in his previous criticism of the House of Lords in those terms. He observed (sardonically, it seemed): 'The House of Lords never does anything *per incuriam.* So what are we to do with two statements of principle by the House which are not reconcilable the one with the other?'[13]

7. The principle that all judges of the ICC judges 'are of equal status'[14] is necessarily inconvenient to any conception of a judicial hierarchy of the sort that exists among British judges of the various levels. Be that as it may, I do not urge a *per incuriam* view of the decision of Majority of the Appeals Chamber in the *Ruto* case. I merely raise questions that are, in my view, in need of clarification by the Appeals Chamber—in the manner that the members of the House of Lords (in *Broome v Cassell*) had uniformly viewed as wholly proper.

PART I—THE UNSUITABILITY OF RECONSIDERATION

8. I return now to my disagreement with my colleagues in the matter of the decision now at bar. As an initial matter, there is, in my humble view, a procedural flaw in the joint decision of my colleagues supposing the authority to grant the Prosecutor's request for reconsideration. This is because the decision that is the object of the Prosecutor's request was the Majority decision that

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exception—it refused leave to appeal. Some years after this, it explicitly decided not to follow the earlier decision': Glanville Williams, *Learning the Law*, 15th edn (by A T H Smith) [London: Sweet & Maxwell, 2013] p 118.

[9] *Broome v Cassell* [1972], *supra*, [House of Lords] p 1053G.

[10] *Ibid*, p 1084D.

[11] *Ibid.*

[12] *Ibid*, p 1107D.

[13] See *Fellowes & Son v Fisher* [1976] 1 QB 122 [CA England and Wales] p 132E, *per* Lord Denning MR.

[14] See reg 10(1) of the Regulations of the Court.

Judge Fremr and I had rendered. Judge Ozaki was not part of that decision. She was then in dissent. As a dissenting judge, she has no standing, in my view, to 'reconsider' a decision that she did not make. Common sense does not permit her to subrogate herself, as a dissenting judge, into the position of a member of the Majority who is still in the case, in order to revise a decision that a critical member of the deciding Majority had refused to reconsider. No legal authority of any sort has been cited in support of proceeding in that way.

9. The precedent that this decision sets is a very dangerous one, indeed. It is especially so in this Court, where there are no rules governing reconsideration. It must mean that any two judges in a Trial Chamber or Pre-Trial Chamber could overturn or change any majority decision, even of their own motion, although one of the new majority was not truly a part of the decision being changed or overturned. No majority decision will be safe from such practice or precedent. The move strikes at the very core of judicial independence. It is not to be encouraged.

10. Beyond the procedural point indicated above, I am also of the view that the decision itself is unsuitable for reconsideration. First, in principle and as a matter of procedural constancy, the request for reconsideration was clearly foreshadowed and overtaken by the prosecution's earlier submission that the Trial Chamber's decision in the *Kenyatta* Excusal Request should await the Appeals Chamber's decision in the *Ruto* Excusal Request.[15] That submission was tabled before the Trial Chamber ahead of its decision in the *Kenyatta* case, complete with the argument of 'judicial economy'. The Trial Chamber considered the submission and unanimously rejected it. At the time, it was clearly within the foresight of the Trial Chamber that the Appeals Chamber might overturn the *Ruto* decision in whole or in part in their decision that was then pending. Having chosen to proceed with rendering the decision (rejecting the Prosecutor's argument of 'judicial economy'), it would seem a little fitful of the Trial Chamber to reconsider its decision immediately upon delivery of the decision of the Appeals Chamber (citing 'judicial economy' as a reason for the reconsideration).

11. Second, at the substantive level, there is an appreciable difference in the circumstances that justified excusal in the two cases. In the *Ruto* case, the ultimate factual consideration that anchored the exceptional circumstance justifying the excusal was his functions as the Deputy President of Kenya.[16] In the *Kenyatta* case, it was the functions of the President of Kenya.[17] The executive

[15] Defence Request pursuant to Article 63(1) of the Rome Statute, ICC-01/09-01/11-685.
[16] *Prosecutor v Ruto and Sang (Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial)* 18 June 2013 [Trial Chamber], Majority Decision of Judge Eboe-Osuji and Judge Fremr, paras 49—53 and 109—110.

president and the vice president of a republic are not in identical positions as far as 'important functions of an extraordinary dimension' go. To say, as the majority did in the *Kenyatta* decision, that Mr Kenyatta's position as President warranted for him a *minimum* of the same excusal as was granted Mr Ruto is a proposition quite different from the supposition (implicit in the reconsideration decision) that the Appeals Chamber must be presumed to have intended Mr Kenyatta (as the President) to be bound by the same constraints indicated by the Appeals Chamber in their *Ruto* decision that concerns Mr Ruto (as the Deputy President). This is not to say, of course, that such a presumption is wholly misplaced. It isn't. There are, indeed, reasons that would amply justify the presumption. But it is more prudent to allow the Appeals Chamber to speak for itself on the matter.

12. Third, it is true that the Majority of the Trial Chamber in the *Kenyatta* decision had incorporated by reference the reasoning of the Majority of the Trial Chamber in the *Ruto* decision.[18] But, it is also true that the *Kenyatta* decision had engaged further legal considerations that were not explored in the *Ruto* decision. It cannot then be presumed that the Appeals Chamber would necessarily dispose of the *Kenyatta* matter in precisely the same way, with the same legal reasoning, as it did in the *Ruto* case.

13. Fourth, developments around the affairs of the Court in recent months must be considered as factorial in the eventual settling of the Court's law, practice and procedure in the matter of proceedings against heads of state and heads of government and their presence during the trials in which they are accused persons. These developments concern events at the African Union, the UN Security Council and the Assembly of States Parties. The African Union insist that no African head of state or head of government should stand trial at the ICC.[19] In that connection, they urged the UN Security Council to defer the Kenyatta case on the basis of article 16 of the Statute: seven members of the Council voted in favour, the rest abstained and the necessary nine vote majority was not reached to achieve the deferral.[20] The general understanding was that the Security Council members who abstained were of the position that the concerns of the African Union and of Kenya were best

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[17] *Prosecutor v Kenyatta (Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial)* 18 October 2013, [Trial Chamber], Majority Decision of Judge Fremr and Judge Eboe-Osuji, paras 66—67.
[18] *Ibid.*
[19] See Extraordinary Summit of Heads of State and Government of the African Union, Decision on Africa's Relationship with the International Criminal Court, Ext/Assembly/AU/Dec.1, 12 October 2013, available at http://www.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E.pdf, pp 1—3.
[20] UN Department of Public Information (News and Media Division, New York), 'Security Council Resolution Seeking Deferral of Kenyan Leaders' Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining', 15 November 2013 available at http://www.un.org/News/Press/docs//2013/sc11176.doc.htm.

addressed at the Assembly of States Parties of the ICC.[21] Presumably towards that end, some proposals for the amendment of the Court's Rules of Procedure and Evidence (at r 134*bis*) were tabled before the Twelfth Session of the ASP, containing among other things, a proposal that would achieve a minimum of the outcome indicated by the Majority of the Trial Chamber in the *Kenyatta* case.[22] At its amplest, the proposal may achieve a minimum of that outcome. But whatever be the case, the proposal will generate debates[23] on the floor of the Twelfth session of the ASP in which States Parties will directly express themselves in a manner that may convey a useful picture of state practice that the Appeals Chamber may see fit to take into account in any decision that they may make in respect of the *Kenyatta* case. Such a picture of state practice that was not present during the Appeals Chamber's deliberation in the *Ruto* case may well yield a different result in a *Kenyatta* appeal.

14. Finally, there are many questions raised by the Appeals Chamber's *Ruto* decision that beg clarification, for the sake of symmetry, internal consistency and enduring confidence in the Court's jurisprudence. It would be better, then, to afford the Appeals Chamber the opportunity to make those clarifications. The best way to afford that opportunity is to seise the Appeals Chamber of the *Kenyatta* appeal, as urged alternatively by the Prosecution. To be clear, such an appeal will only be something in the nature of a case specially stated for the Appeals Chamber to consider, in terms possibly (but not necessarily) analogous to a 'decision granting or denying release of the person being … prosecuted', pursuant to article 82(1)(b) of the Statute. It is an important point to

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[21] See the statement delivered on behalf of the United States of America, by Ambassador-at-Large Stephen J Rapp, at the 12th Session of the ASP, on 21 November 2013, p 4. Available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-USA-ENG.pdf.

[22] An early version of the proposals included the following text among others: '[I]f the accused is a sitting Head of State or Government, or a person entitled to act in such capacity, has prior to the commencement of the trial submitted to the jurisdiction of the Court (discussed alternative: "who is subject to a summons to appear"), appearance by such person throughout the trial may, if he or she so wishes, be by counsel, provided a notice in writing has been filed with the Court stating that the accused has explicitly waived his or her right to be present at the trial and the trial chamber is satisfied that the rights of the accused will be fully ensured in his or her absence.'

[23] To be noted in this connection are statements such as that of Australia, delivered by Dr Greg French on 20 November 2013, saying as follows, among other things: '[P]erhaps the most critical job we have to do at this Assembly is to engage in a constructive and open discussion of the concerns that have been raised by African States. Australia is ready to listen closely to African concerns. African States represent a critical constituency of the ICC and so we hope that the special session scheduled tomorrow will be part of an ongoing dialogue. Australia for its part will be constructive and flexible in working on proposals that African States Parties bring to the Assembly for its consideration. We are particularly ready to support amendments that are aimed at enhancing flexibility while supporting the integrity and effectiveness of the Rome Statute and the Court's Rules of Procedure and Evidence.' Available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP12/GenDeba/ICC-ASP12-GenDeba-Australia-ENG.pdf. See also the statement of Ambassador Rapp delivered on behalf of the United States (an important observer State), saying as follows, among other things: 'I would like to acknowledge the important work being undertaken at this session of the ASP to engage on issues that have been raised by the African Union and Kenya in recent months. The United States takes these matters seriously and believes that they are best addressed within the framework of the Court and here at the ASP. Among other things, we encourage all States to engage in a constructive manner on these issues, and to consider seriously the proposals related to "presence" of defendants under the Rome Statute': at p 3—4, *supra*

underscore, because the Prosecutor's request for leave to appeal the *Kenyatta* decision will not meet the strict test of interlocutory appeals under article 82(1)(d) of the Statute, which contemplates 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 by the Appeals Chamber may materially advance the proceedings.' The request for leave to appeal the *Kenyatta* decision on the basis of article 82(1)(d) is even weaker than the request for leave in the *Ruto* case.[24] It is weaker because a primary argument in the *Ruto* leave request was that the testimony of witnesses heard during the trial may be required to be repeated if the Appeals Chamber found in the end that there was no discretion to grant excusal from presence at trial.[25] With the Appeals Chamber's confirmation of the discretion to grant excusal, that concern is now largely negated.

15. Without a doubt, the decision of the Majority of the Appeals Chamber in the *Ruto* decision has done much to develop the law. This is to the extent that the Majority of the Appeals Chamber rejected the Prosecutor's argument that there is no discretion at all in a Trial Chamber to excuse an accused from presence at trial.[26] Nevertheless, the reasoning of the Majority in recognising that discretion leaves many questions unanswered and raises new ones. So, too, did the manner in which they intervened in the exercise of the discretion they found to exist. It may prove difficult to apply—and continue to apply—the Appeals Chamber's decision directly to the *Kenyatta* case, without receiving answers to those questions. This is why I would prefer to seise the Appeals Chamber of issues that may arise from the *Kenyatta* decision in light of the Appeal Chamber's decision in *Ruto*.

PART II—THE IMPORT OF 'SHALL' IN LEGAL TEXTS

16. But before I address the questions arising from the decision of the Majority of the Appeals Chamber in the *Ruto* case (to the extent that the decision bears on the *Kenyatta* case), it may be helpful to begin with a fundamental question engaged by the decision of the Minority of the Appeals Chamber. For, it marks their divergence with the Majority, along a route that is doubly paradoxical in its effect. This is in the sense that it led the Appeals Chamber's Minority to the

[24] For those weaknesses see my dissenting opinion in the decision on the Prosecutor's leave to appeal the *Ruto* decision, ICC-01/09-01/11-817-Anx.
[25] Prosecution's Application for Leave to Appeal the "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial", 24 June 2013, ICC-01/09-01/11-783, para 15.
[26] *Prosecutor v Ruto and Sang (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial")*, 25 October 2013 [Appeals Chamber], 25 October 2013 para 56.

common point they shared with their colleagues in the Majority in overturning the Trial Chamber's exercise of discretion in granting excusal in the *Ruto* case; while at the same time underscoring the trouble that confronts the Majority of the Appeals Chamber in any suggestion that the Majority of the Trial Chamber had committed an error of law in their own conception of the limits of that discretion.

17. The Minority's difficulty centres upon the incidence of the word 'shall' in the text of article 63(1) of the Statute.[27] Construction of provisions featuring the word is a matter of general concern in the jurisprudence of the Court in relation to the interpretation of the Court's legal texts. As the Minority put the matter: 'In our view, the ordinary meaning of article 63(1) of the Statute is *clear and unambiguous*: "[t]he accused shall be present during trial". *The use of the word "shall" clearly establishes* that the presence of the accused *is a requirement* of the trial.'[28] With respect, it may be that an appeal in the *Kenyatta* case will afford the Minority an opportunity to reconsider or confirm this view of the word.

18. The word 'shall' is an English word. But the word does not dwell among the English-speaking legal world as a miracle word that always carries mandatory worth by the mere virtue of its incidence in a legal text. In many cases a statutory provision has been held to be directory or permissive although the word 'shall' is the operative auxiliary verb in the provision.

19. At the *ad hoc* tribunals, Judge Shahabuddeen adumbrated that point when he observed as follows: '[I]t is said that the "language of a statute, however mandatory in form, may be deemed directory whenever legislative purpose can best be carried out by [adopting a directory] construction."' [29] He was echoing—at the international stage—a notion that had long been understood by many English-speaking lawyers and judges. Indeed, law reports from common law countries are replete with observations to the effect that whether a 'provision is mandatory or directory depends upon the intent of Legislature and not upon the language [in] which that intention is clothed.'[30] In that regard, the Supreme Court of India pronounced as follows in a 1995 case:

> The use of the word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment, on consequences to flow from such construction would not so demand. Normally, the word 'shall' prima facie ought to be considered mandatory but it is the function of the Court

[27] See Joint Separate Opinion of Judge Anita Ušacka and Judge Erkki Kourula, Appeals Chamber's *Ruto* Excusal Decision, para 6.
[28] *Ibid*, para 6 [emphases added].
[29] *Prosecutor v Barayagwiza (Decision [on] Prosecutor's Request for Review or Reconsideration)* 31 March 2000 [ICTR Appeals Chamber], Separate Opinion of Judge Shahabudeen, para 53.
[30] See *State Represented by the Inspector of Police, Chennai v Gnaneswaran*, (2013) 3 SCC 594 [Supreme Court of India], para 22.

> to ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon. The word 'shall', therefore, ought to be construed not according to the language with which it is clothed but in the context in which it is used and the purpose it seeks to serve. The meaning has to be described to the word 'shall' as mandatory or as directory accordingly. Equally, it is settled law that when a statute is passed for the purpose of enabling the doing of something and prescribes the formalities which are to be attended for the purpose, those prescribed formalities which are essential to the validity of such thing, would be mandatory. However, if by holding them to be mandatory, serious general inconvenience is caused to innocent persons or general public, without very much furthering the object of the Act, the same would be construed as directory.[31]

20. Writing recently for the Supreme Court of Nigeria, Justice Muhammad observed that it 'is not always that a court of law would interpret the word "must" or "shall" as mandatory. The court must examine the context within which the word is used. The word "must" is often, interchangeable with the word "shall" and both can mean "may" where the context so admits.'[32]

21. The Supreme Court of the State of Washington (sitting *en banc*) made similar observations in a recent criminal case[33] that involved the application of statutes that variously provided that the 'prosecuting attorney *shall* file special allegation' [emphasis added] where there was evidence: of sexual motivation (in non-sex offence cases); that the offence (of child rape or molestation) was predatory; or that the victim (of a sex crime) was younger than 15 years. Proof of the special allegations would result in increased sentences. And that was the fate of the appellant, a public school teacher who had molested one of her 10-year old pupils. She challenged her conviction and sentencing, arguing that 'special allegation' provisions were an unconstitutional violation of separation of powers, because it displaced prosecutorial discretion. In rejecting the argument, the Supreme Court of Washington State commenced its reasoning by observing that the 'key issue in this case is whether the challenged statutes are directory or mandatory.'[34] Having so observed, the Court explained as follows (as both the supreme courts of India and Nigeria had done):

> The plain language of the challenged charging statutes alone does not resolve whether they are intended to be directory or mandatory. Each statute identifies certain conditions under which "the prosecuting attorney shall file" a special allegation. Although the word "shall" is presumptively mandatory, ... its meaning "is not gleaned from [use of] that word alone because our purpose is to ascertain legislative intent of the statute as a whole," .... This court recognized long ago that "[t]he words 'may' and 'shall' [are] used according to the context and intent found in the statute, and are frequently construed interchangeably." ... In determining whether "shall" is mandatory, directory, or

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[31] *State of Haryana & Another v Raghubir Dayal*, (1995) 1 SCC 133 [Supreme Court of India], para 5.

[32] *Fidelity Bank plc v Monye*, (2012) delivered 28 March 2012, available at http://judgment.supremecourt.gov.ng/pdf.php?case_id=6. See also *Ifezue v Mbadugha* (1984) 1 SCNLR 427 [Supreme Court of Nigeria], especially *per* Bello JSC observing as follows: 'It is germane to the issue to state that the word "shall" has various meanings. It may be used as implying futurity or implying a mandate or direction or giving permission.'

[33] *State v Rice*, 174 Wash 2d 884 (2012) [Supreme Court of Washington].

[34] *Ibid*, para 23.

> simply permissive in any given instance, we consider "'all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or another.'" ... The "prime consideration" remains "the intent of the legislature as reflected in its general, as well as its specific, legislation upon the particular subject."[35]

22. Ultimately, the Court held as follows: 'In this case, we are convinced that the legislature intended the challenged charging statutes to be directory. We rely on the language of the statutes as a whole, related statutory provisions, and constitutional analysis in making this determination. We find that the presumption that "shall" is mandatory has been overcome in this instance. The charging statutes authorize certain special allegations and communicate legislative priority, without interfering with the inherent charging discretion of prosecuting attorneys. The charging statutes are thus directory and constitutional.'[36]

23. Writing for the US Supreme Court in *Gutierrez de Martinez v Lamagno*, Justice Ginsburg noted as follows: 'Though "shall" generally means "must," legal writers sometimes use, or misuse, "shall" to mean "should," "will," or even "may." ... For example, certain of the Federal Rules use the word "shall" to authorize, but not to require, judicial action.'[37] In a notable instance of when 'shall' translates to 'may', the US Supreme Court held in 1877: 'As against the government, the word 'shall', when used in statutes, is to be construed as 'may', unless a contrary intention is manifest.'[38] A number of state supreme courts in the US have ruled in a similar way.[39]

24. A classic judicial statement on the matter had been made at the Privy Council[40] by Sir Arthur Channell in a 1917 appeal originating from Canada. According to him:

> The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but *it has been said that no general rule can be laid down and that in every case the object of the statute must be looked at.* ... When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general

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[35] *Ibid*, para 24.
[36] *Ibid*, para 25.
[37] *Gutierrez de Martinez v Lamagno*, 515 US 417 (1995) [US Supreme Court], footnote 9.
[38] *Railroad Co v Hecht*, 95 US 168 (1877) [US Supreme Court], p 170.
[39] In *Jamborsky v Baskins*, for instance, the Supreme Court of Virginia recalled its own 'repeated holding that the use of "shall," in a statute requiring action by a public official, is directory and not mandatory unless the statute manifests a contrary intent. As this Court explained in *Commonwealth v. Rafferty*, ... "[a] statute directing the mode of proceeding by public officers is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute"': *Jamborsky v Baskins*, 247 Va 506 (1994) [Supreme Court of Virginia], p 511. Also in *State v Rice*, the Supreme Court of the State of Washington observed as follows: 'Rice does not identify any legal consequences resulting from a prosecutor's noncompliance with the charging statutes; she simply assumes that the statutes are mandatory and challenges them on that basis. Rice overlooks that *the legislature sometimes intends to direct the actions of public officers, stating what they "shall" do in certain circumstances, without intending to impose any enforceable legal obligations upon them*': *State v Rice*, *supra*, para 26 [emphasis added].
[40] The Privy Council was the apex court of the British Empire; it continues to be so for rest of the Commonwealth countries that have not established their own supreme courts of appeal.

> inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.[41]

25. Notably, Bryan A Garner has attained eminent standing in the usage of the English language in the field of law.[42] His commentary negates the view that the word 'shall' has a meaning that conveys an absolute sense of obligation on every occasion of the word's usage. He noted the promiscuous propensity of the word; it 'takes on too many senses and cannot be confined to one sense in a given document'[43]; it 'can bear five to eight senses even in a single document.'[44] And, he asks: 'How can *shall* be so slippery … when every lawyer knows that it denotes a mandatory action?'[45] He responds as follows: 'Well, perhaps every lawyer has heard that it's mandatory, but very few consistently use it in that way. And as a result, courts in virtually every English-speaking jurisdiction have held—by necessity—that *shall* means *may* in some contexts, and vice versa.'[46] It is this lack of certainty about the meaning of 'shall' in legal drafting that has driven some commentators to describe it as 'a semantic mess',[47] thus explaining the spirited campaign that has been observed in some quarters against its use.[48]

26. The point of the foregoing review is not that 'shall' may never compel a mandatory result. It is rather that 'shall' is not a magic word that conjures that outcome on every occasion. Judges are not spared the task of construing a provision featuring 'shall', for purposes of ascertaining the true intendment of the provision as either mandatory or directory despite the presence of 'shall'.

27. It is not clear (from the face of their opinion) that the Minority had taken the foregoing into account in their view that the word 'shall' in article 63(1) of the Statute removed from the Trial Chamber any discretion in the interpretation and application of the provision. But, in addition, it demonstrates the challenges facing any conclusion (as regards the decision of the Appeals Chamber's Majority) that the Trial Chamber's Majority had committed an error of law in the appreciation of the limits of the discretion that the Majority of the Appeals Chamber found to exist:

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[41] *Montreal Street Railway Co v Normandin*, [1917] AC 170 [Privy Council], pp 174—75 [emphasis added].
[42] He is the editor-in-chief of the seventh edition of *Black's Law Dictionary*. He is also the author of the following books, among others: *The Elements of Legal Style*, 2nd edn [Oxford University Press, 2002]; *The Redbook: A Manual on Legal Style*, 2nd edn [West, 2006]; and, *Garner's Dictionary of Legal Usage*, 3rd edn [Oxford University Press, 2011].
[43] See *Garner's Dictionary of Legal Usage*, *supra*, p 952.
[44] *Ibid.*
[45] *Ibid.*
[46] *Ibid.*
[47] Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* [St Paul, MN: Thomson/West, 2012] p 113.
[48] See Robert Eagleson and Michèle Asprey, 'Must We Continue with "Shall"?' (1989) 63 *Austl L J* 75; Robert Eagleson and Michèle Asprey, 'We Must Abandon "Shall"' (1989) 63 *Austl L J* 726; Michèle Asprey, '"Shall" Must Go' (1992) 3 *Scribes J Legal Writing* 79; and Scalia & Garner, *supra*, p 114.

in any sense in which it could be said that the law had been—or ought to have been—so clear to the Trial Chamber as to have reasonably revealed to them, prior to the appeals decision, the limits of the discretion that the Appeals Chamber's Majority came to impose. It is partly for this reason that it will assist the development of the jurisprudence of the Court, if the Appeals Chamber were seised of the appeal in this matter, so that these matters are cleared up at the earliest opportunity.

PART III—INTERVENTION IN THE EXERCISE OF DISCRETION

28. As indicated earlier, the Appeals Chamber's Majority have answered in the affirmative the question whether a Trial Chamber enjoys any discretion to excuse accused persons from presence at trial.[49] There remain, however, many questions to be answered in that regard; in a manner that permits predictable application of legal principles in this Court in a consistent manner.

29. One question in need of clarification is the fate of the principle that an appellate court should not intervene with a primary court's exercise of discretion merely because the appellate court might have exercised the same discretion differently. This is a settled principle not only in the international arena, but also in national jurisdictions. A central motivation for this principle is that members of an appellate court may not always be in a better position to second-guess the exercise of discretion by members of a primary court. This is a rule of common sense: because of the peculiarities, intricacies and intrinsic sense of the particular case and the empiric dynamics of the given trial, the factors of which are not always easy to capture and package in a record of appeal that is sent up to the appellate court for assessment. The rule against usurpatory appellate intervention in a primary Chamber's exercise of discretion is also grounded upon the idea of judicial comity, especially in a court like the ICC (where all judges enjoy equal status). The idea does not permit the implied suggestion that members of an appellate court (who find themselves there by mere happenstance) are better qualified by training or experience (than their peers who happen to serve in the primary court because someone must serve in those Chambers) to substitute their own professional judgement so easily in the exercise of discretion.

30. Indeed, the Majority of the Appeals Chamber noted as 'guiding' their decision[50] the principle that the Appeals Chamber may not interfere with the exercise of discretion because it would have exercised it differently. 'To do so', held the Appeals Chamber, '*would be to usurp*

[49] Appeals Chamber's *Ruto* Excusal Decision, *supra*, para 56.
[50] *Ibid,* para 60.

powers not conferred on it.'[51] In that regard, the Appeals Chamber noted the strict circumstances indicated in the jurisprudence for its own interference with the exercise of discretion by a primary Chamber:

> [T]he Appeals Chamber will not interfere with the ... Chamber's exercise of discretion save where it is shown that that determination was *vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination.* This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions.[52]

31. This line of jurisprudence suggests that the heads of error that may warrant the Appeals Chamber's interference with a primary Chamber's exercise of discretion are (i) material error of law, (ii) material error of fact, and (iii) material procedural error. The reasoning of the Appeals Chamber should make clear under which head of error it stands to interfere. The reasoning should clarify not only the error of law, fact or procedure; but also how it is that such an error had materially affected the determination of the primary Chamber. That exercise was not clearly indicated by the Majority. What they did rather was to proceed to overturn the Trial Chamber's exercise of discretion, upon the argument that the Trial Chamber 'did not properly exercise its discretion in the instant case'.[53] The operative part of the reasoning that articulated why the exercise of discretion was considered improper involved no more than 13 double-spaced lines of reasoning. In those 13 lines, there is no clear indication of the head of error that warranted the interference, nor its materiality in the determination.[54] This deficiency in the Majority decision has been noted by senior scholars in international criminal law. Professor Schabas, for instance, wrote as follows:

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[51] See, *ibid*, para 63 [emphasis added].
[52] *Ibid* [emphasis added].
[53] *Ibid*, para 61.
[54] Brevity in judicial reasoning is not to be condemned, of course. But the nature and circumstances of adjudication that concerns States or their affairs or their sovereignty may place some value in the idea that international judges may occasionally need to say more to explain how they arrived at their decisions. Hersch Lauterpacht, a former ICJ judge, spoke to the idea: '[T]here are compelling considerations of international justice and development of international law which favour a full measure of exhaustiveness of judicial pronouncements of international tribunals': Sir Hersch Lauterpacht, *The Development of International Law by the International Court* [Cambridge: CUP, 1996 (first published in 1958)] p 37. These are some of his explanations for the idea: 'Experience has shown that Governments as a rule reconcile themselves to the fact that their case has not been successful—provided the defeat is accompanied by the conviction that their argument was considered in all its relevant respects. On the other hand, however fully they may comply with an adverse decision, they do not find it easy to accept it as expressive of justice—or of law—if they feel that their argument was treated summarily, that it was misunderstood, or that dialectics have usurped the place of judicial reasoning. Any such impression, if lasting, is bound to affect adversely the cause of international justice. ... A decision which rests not on the manifest foundation of the law—and this is the case of a decision not accompanied by reasons or adequate reasons—but on the personal authority of the judges who compose the majority or of the tribunal as a whole is particularly open to criticism in cases in which the subject-matter of the controversy is connected with political interests of importance. ... If government by men, and not by laws, is resented within the State by individuals, any appearance of it is likely to be viewed with even greater suspicion on the part of sovereign States in relation to judges of foreign nationality': *ibid*, pp 39—40. It would be mistaken, in my own view, to suppose that the wisdom of Lauterpacht's observations is confined to international tribunals that directly adjudicate disputes as such between States. The observations have great value to the ICC: where decisions often entail an encumbrance on States and their leaders

> After acknowledging that the Trial Chamber has discretion to excuse the accused from presence at trial, the Appeals Chamber goes on to find that the discretion of the Trial Chamber was not exercised properly. This is the unconvincing part of the judgment. It seems as if we leave the legal environment, where the Appeals Chamber reaches conclusions based upon interpretation of the text in light of the drafting history and the case law, and move onto the terrain of the individual opinions of its members.
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> The Appeals Chamber doesn't agree with the way the Trial Chamber used its discretion. It sets out a number of criteria for applying article 63. Where these come from is a mystery. Confronted with such a problem, the late Antonio Cassese would have canvassed the sources of applicable law in order to see if rules and guidelines could be derived from, for example, 'general principles of law' found in national court decisions. But here the Appeals Chamber does nothing of the sort. The final portion of the judgment in which it develops the standards for applying article 63 is exceedingly brief and does not seem to be rooted in any recognised sources of law.
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> I suppose the Appeals Chamber devised the criteria to be applied in its wisdom, based upon 'common sense'. But then so, presumably, did the Trial Chamber. That's the whole point of discretion. If legislation leaves a judge with discretion, then the exercise of that discretion should be respected absent evidence that it has been exercised in a grossly abusive manner or for improper motives, which has never been suggested in this case.
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> It is probably not helpful to the proper administration of justice for the Appeals Chamber to intervene with the Trial Chamber merely because in its view the latter 'interpreted the scope of its discretion too broadly and thereby exceeded the limits of its discretionary power', as the Appeals Chamber says. As things stand right now, we simply have a disagreement amongst judges about the use of discretion. Why should that be a matter for appeal?[55]

32. It should not be enough to overturn an exercise of discretion by merely branding it as 'not properly exercise[d]' or that the Trial Chamber had granted a 'blanket excusal'[56]. For, that necessarily obscures the motivation for interference. Did the view that discretion was 'not properly exercised' or that it granted 'blanket excusal' result from 'a disagreement amongst judges' on how the discretion might have been exercised in the proper way? Or, did it proceed from a clear view of material error of law, fact or procedure? It may well be that the Majority of the Appeals Chamber did indeed clearly perceive an error of law or of fact or of procedure that was material. But the consistency of jurisprudence would require that such a perception be articulated clearly. The earliest opportunity to do so would be by way of appeal of the *Kenyatta* decision. If the Appeals Chamber's complaint was that the Majority of the Trial Chamber had committed an error of law—something

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as well as their sovereign jurisdiction over their territories, their citizens and their affairs in general. Indeed, the value of Lauterpacht's observations to the ICC is highlighted in the following remarks of Ambassador Rapp, in a statement delivered on behalf of the United States, at the 12th session of the ASP, on 21 November 2013. As he put it: 'Critical to the future success of the ICC, and the views of the United States and others in the international community regarding the ICC, will be attention to: (1) building institutional legitimacy; (2) promoting a jurisprudence of legality, *with detailed reasoning and steeped in precedent*; (3) fostering a spirit of international cooperation; and (4) developing an institutional reputation for professionalism and fairness': Ambassador Rapp, *supra*, p 1 [emphasis added].

[55] Schabas, 'Appeals Chamber Rules on Presence of Kenyan Leaders During Trial', 26 October 2013 available at http://humanrightsdoctorate.blogspot.nl/2013/10/appeals-chamber-rules-on-presence-of.html.

[56] What was meant by 'blanket excusal'? Was there really 'blanket excusal' when the Trial Chamber had clearly laid down several instances of mandatory presence, and that the accused must be present at trial at any other occasion directed by the Trial Chamber?

that the Appeals Chamber's Majority did not clearly say but ought to have said clearly, if that was the suggestion—the question then arises (as Professor Schabas correctly asks) as to the source and corpus of the law that the Majority of the Trial Chamber had ignored or failed properly to appreciate. What clarity was there for such law? Was it in the same provision that led all the judges (who have pronounced upon this matter) to say different things about article 63(1) and its relationship to the discretion to grant excusal? Notably, at the Trial Chamber, the Majority said that article 63(1) was about a duty on the accused and that the Trial Chamber's discretion to grant excusal is located in article 64(6)(f). At the Appeals Chamber, the Minority said that there was no discretion at all, primarily because 'shall' (whose value I have discussed above) excluded any view of discretion. The Majority of the Appeals Chamber disagreed, saying that there was discretion for the Trial Chamber in article 63(1), but that it was limited. As will be seen presently, however, the Majority of the Appeals Chamber also suggested that article 63(1) is about the *right* of the accused to be present; while saying at the same time that article 63(1) imposed a *requirement* upon the accused to be present. I shall discuss the effect of that particular confusion in the next part of this opinion. It suffices, for present purposes, to wonder how anyone could fairly complain, amidst all of this juristic cacophony about the meaning of the provision (coupled with the absence of earlier jurisprudence that suggested any limitation to the discretion that the majority found in the provision), that the Trial Chamber's Majority had committed an error of law in not properly appreciating the limits of their discretion, in a manner that warranted appellate intervention.

33. And, this raises the following related, troubling question: In matters of exercise of discretion by a primary Chamber, is it correct for the Appeals Chamber to articulate principles of law for the first time in a particular appeal, and then retroactively fault the primary Chamber as having committed an error of law that warranted appellate interference, on grounds of legal reasoning that did not exist at the time of the exercise of discretion by the primary Chamber? Informed and orderly administration of justice in this Court requires a clarification of the ground rules in these matters. It is partly for this reason that an opportunity should be afforded the Appeals Chamber to clarify its decision as to the law that informed the limits of the discretion to grant excusal.

PART IV—THE MATTER OF DISCRETION, DUTY AND RIGHT IN THE INTERPRETATION AND APPLICATION OF ARTICLE 63(1)

34. Another aspect of the decision of the Appeals Chamber that needs clarification is the nature of the jural attributes that article 63(1) implicates at the instances of the Trial Chamber and the accused, in relation to presence at trial. The Appeals Chamber has indicated that discretion of the Trial Chamber is implicated in the provision. But that leaves unanswered the question whether a duty is also engaged for either the Trial Chamber or the accused. What about a right? The manner of characterisation of the jural attribute has certain doctrinal implications that affect the outcome in a manner that respects or upsets internal consistency of the law. As regards the Trial Chamber, for instance, if article 63(1) is a source of discretion for the Trial Chamber (that enables it exceptionally to grant excusal), can it also at the same time be a source of duty upon the Trial Chamber (that imposes on it the obligation to require presence at trial as the general rule)? The Appeals Chamber's Majority dismissed as 'misplaced' the reasoning of the Trial Chamber's Majority that the source of the discretion to grant excusal is in the residual powers under article 64(6)(f) and not article 63(1). But the Appeals Chamber's Majority does not explain its reasoning by which article 63(1) can be a source of both discretion and duty for the Trial Chamber, if that is what was meant.

35. As regards the accused person, is presence at trial—specifically under article 63(1) and not under article 67(1)(d)[57]—a right or a duty? Can it be both a duty and a right for an accused? If presence at trial is a duty on the accused, the Trial Chamber would then have clear authority to require attendance as a general rule and grant excusal in exceptional circumstances. But, the Majority of the Appeals Chamber did not analyse the matter under the theory of duty as the Trial Chamber had done.[58] While not excluding the theory of duty, the Appeals Chamber preferred to analyse presence at trial under article 63(1) under the theory of right.[59] The questions thus arise: if presence at trial under article 63(1) be treated as right for the accused, what then would be the doctrinal warrant for a Trial Chamber to *require* attendance of an accused that has chosen not to be present at his own trial? Indeed, does the view that article 63(1) is about a right for the accused not

[57] Noting the colloquialism famously attributed to Bismark: 'if you love laws and sausages it is better not to see how they are made', Professor Schabas observed that the 'observation is probably applicable to the Rome Statute. It is difficult to discern any profound purpose in the decision of the drafters to specify presence at trial in two places and not one.': Schabas, Appeals Chamber Rules on Presence of Kenyan Leaders During Trial, *supra*. The observation may have some merit. But ICC judges must still interpret the Rome Statute in a manner that makes an integrated sense of its provisions, with the aim of achieving the objects and purposes of the Statute. One principle that guides that interpretation is the rule against redundancy of statutory words and phrases and provision, effectively captured in the maxim *ut res magis valeat quam pereat*. Legislatures must be presumed not to use words in vain.
[58] See *Ruto* Decision, *supra*, paras 38—53.
[59] See Appeals Chamber's *Ruto* Excusal Decision, *supra*, para 54.

negate the very notion of excusal from presence at trial? In those circumstances, will more be required of the accused than merely to notify the Trial Chamber, out of procedural courtesy, that he would not be present on certain occasions in the course of the trial?

36. The decision of the Majority of the Appeals Chamber raises these questions but does not answer them. An appeal of the *Kenyatta* decision will thus afford an opportunity for the Appeals Chamber to answer those questions, for the sake of internal consistency in the Court's jurisprudence.

PART V—DISCRETION TO TRY ABSCONDING ACCUSED

37. In addition to the questions identified above as arising from the Appeals Chamber Majority's characterisation of presence at trial under article 63(1) as a matter of right, the Appeals Chamber Majority also engaged, by way of *obiter dictum*, the important question of discretion of a Trial Chamber to consider the appropriateness of proceeding with the trial of an absconding accused. The Appeals Chamber's observations were expressed as follows:

> The Appeals Chamber finds that part of the rationale for including article 63(1) of the Statute was to reinforce the right of the accused to be present at his or her trial *and, in particular, to preclude any interpretation of article 67(1)(d) of the Statute that would allow for a finding that the accused had implicitly waived his or her right to be present by absconding or failing to appear for trial.*[60]

38. Although this matter is *obiter* in relation to the actual issue before the Appeals Chamber, it is nevertheless a very important question that needs to be considered with care before its possible future conversion into *stare decisis*. For, it is an *orbiter dictum* that has the potential in future to be considered as having foreclosed to a Trial Chamber the discretion to consider the justness of conducting a trial in the absence ('TIA') of an absconding accused. Questions about such an anticipatory foreclosure of discretion are further engaged by the pronouncements of the Appeals Chamber Majority as regards, first, the strictures of the constraint that the Appeals Chamber Majority imposed on Trial Chambers when they exercise the discretion to grant excusal. The pronouncements in question may be taken cumulatively as making it difficult to conduct a trial substantially in the absence of the accused. Second, TIA of absconding accused is also made difficult given the sense in which the Appeals Chamber expressed itself on the matter of presence at the trial being the general rule and excusals the exception.[61] In the circumstances of the work of this Court, a statement about a general rule and its exception in a matter of procedure may have either a

[60] *Ibid* [emphasis added].
[61] See, *ibid*, para 61.

macro or micro orientation. The macro orientation is where the general rule and its exception describe how the broader system operates: such as to say that it must not be the case that most of the trials at the ICC are conducted in the absence of the accused (the general rule); but that in an isolated case (the exception) an entire trial may be conducted in whole or in part in the absence of the accused. The micro orientation is where the general rule and its exception describe what are done in a particular case: such as that a specific trial must be conducted mostly in the presence of the accused (the general rule); but that, exceptionally, the trial may proceed in specific episodes—of very limited duration—in the absence of the accused. The Appeals Chamber's decision appears to favour the latter sense; thus making it difficult to conduct a TIA in respect of an absconding accused. And, third, the Appeals Chamber's criticism of the Majority of the *Ruto* Trial Chamber for granting the excusal before the commencement of the trial.[62] Such a criticism may suggest that a Trial Chamber may not commence a trial where an accused had absconded before the commencement of the trial.

39. Considering that the Appeals Chamber was not called upon to decide that particular question, it will be possible to suppose that the Appeals Chamber may not have intended to foreclose in a firm way the discretion to consider the justness of conducting a trial in the absence of an absconding accused. It is an eminently sensible supposition. But it will be better for the Appeals Chamber to say so itself in a manner that makes clear that the question remains open to be considered in future on the particular merits of an appropriate case. Some of the reasons that the question should remain open are considered below.

40. The central concern involves the question whether there is a firm basis for the following view: notwithstanding the circumstances in which an accused person *chose* to abscond, the Rome Statute does really deprive a Trial Chamber of the discretion to consider whether or not to proceed with the trial of the absconding accused. In this discussion, abscondment is co-terminous with deliberate refusal to be present at one's own trial, in violation of a Trial Chamber's order to be present at trial. Some of the circumstances that may characterise a refusal to be present for trial may include the following, but are not limited to them:

(a) The absconding accused had never accepted the jurisdiction of the Court; and his state of nationality had never been an ICC State Party and had never accepted the jurisdiction of the Court by declaration made under article 12(3) of the Statute;

[62] *Ibid*, para 63.

(b) The absconding accused had never accepted the jurisdiction of the Court; and his state of nationality had never been an ICC State Party and but had, at all material times, accepted the jurisdiction of the Court by declaration made under article 12(3) of the Statute;

(c) The absconding accused had never accepted the jurisdiction of the Court; and his state of nationality has, at all material times, always been an ICC State Party;

(d) The absconding accused had never accepted the jurisdiction of the Court; and his state of nationality was an ICC State Party at the time of commencement of the proceedings, but subsequently withdrew its membership while the case was in progress;

(e) The absconding accused had initially accepted the jurisdiction of the Court and successfully requested to appear on his own recognizance on summons to appear or had had successfully applied for judicial interim release, promising to appear before the court whenever required; and his state of nationality has, at all material times, always been an ICC State Party, or had accepted jurisdiction of the Court pursuant to article 12(3); and

(f) The Court had initially refrained from issuing an arrest warrant against the accused and from placing the absconding accused in pre-trial detention, because the accused had promised to appear when required by the Court.

41. The circumstance of the abscondment may further implicate the following factual considerations:

- At the time that the proceedings were commenced and the accused was allowed to remain free from pre-trial detention (at his own request) the accused was not a high office holder in his state. At that time he struck a conciliatory note towards the Court that made it reasonable to permit him to remain free from pre-trial detention. But upon his elevation into high office, perhaps that of head of state or government in his state, he made a complete *volte face*—refusing to appear before the Court and engaging in a very aggressive campaign of calumny against the court; or
- The absconding accused might be an indicted warlord, who had eventually surrendered himself to the Court and requested pre-trial detention; provoking questions as to whether the prospect of trial in The Hague genuinely 'proved more appealing than war in the bush'[63], or—perhaps, a convenient, temporary manoeuvre in self-preservation, necessitated by a reversal of fortunes that saw former colleagues-at-arms possibly seeking to do him harm.

[63] See statement of Ambassador Rapp, *supra*, p 2.

42. In the nature of things, it may not be prudent to lump all the different circumstances into one basket labelled '*trial in absentia*', to be jettisoned without further thought, as something that the drafters of the Rome Statute had clearly rejected. The lack of prudence stems from the fact that there is no evidence to support the suggestion that the drafters of the Rome Statute had considered and rejected every possible circumstance in which the question might arise in future.

The Focus of this Part of the Opinion

43. Before proceeding further, it is necessary to settle some matters of scope and definition. For purposes of this opinion, an 'absconding accused' is an accused that (a) had made appearance(s) before the Court pursuant to summons to appear and indicated a willingness to comply with the processes of the court, including a promise to be present at his trial, thus avoiding any need for an arrest warrant, or (b) had earlier been arrested pursuant to an arrest warrant, but was subsequently granted judicial interim release pending trial, on a promise to comply with the processes of the court and be present at trial; yet, without leave of the court, voluntarily absented himself from his trial, the date of which had clearly been communicated to him well in advance.

44. The present opinion does not pertain to all ICC fugitives at large. In particular, it is not intended to cover the cases of defendants in the category of circumstances indicated in paragraph 40(a) above—particularly those who had never been arrested pursuant to arrest warrants or who had never appeared before the Court pursuant to summonses to appear, let alone offered promises to appear for their trials.

An Overview of this Part of the Opinion

45. The essential matter of the opinion in this part may be summarised as follows: (1) the discretion to conduct TIA is now well recognised and accepted in international law; (2) that discretion is also well accepted in the principal legal systems of the world that exert the most influence on the development of legal norms and processes that apply at the ICC; (3) while the Rome Statute does not explicitly provide for the TIA discretion, the Statute also does not preclude it explicitly or by implication; (4) as the Statute does not preclude it, the discretion can then be exercised pursuant to article 21(b) and (c) of the Statute, through which the legal norms of the ICC may grow and keep pace with the rest of international law and general principles of law recognised in national jurisdictions, without the need for repeated amendments to the Rome Statute to achieve that purpose. It is, therefore, not necessary to amend the Rome Statute for purposes of recognition of the discretion in question.

46. In considering the subject matter of this part of the opinion, it is helpful always to keep in mind the very obvious point that the legal system of the Rome Statute is also a system of international law. In that regard, Lord McNair wrote as follows: 'Treaties must be applied and interpreted against the background of the general principles of international law. ... Moreover, those principles are always available for the purpose of supplementing treaties, and for interpreting them, when interpretation is necessary ...'.[64] That being the case, the traditionally accepted sources of international law, as articulated in article 38(1) of the Statute of the International Court of Justice, remain applicable to the work of the ICC, in addition to the provisions of article 21 of the Rome Statute. That is to say, for purposes of filling gaps and stimulating growth, the norms of the Rome Statute remain open to the complementary influences of other sources of international law, such as customary international law; general principles of law widely recognised by States; judicial opinions and the most eminent scholarship as secondary sources. In other words, any of these sources, will, in accordance to its designated station, validly feed principles of international law into the legal system of the Rome Statute. Hence, if the TIA discretion is, for instance, recognised by principles of law widely applicable in national jurisdictions, it would then have been received into the stream of international law that the ICC must recognise and apply, inasmuch as the Rome Statute has not unequivocally forbidden it by clear language or necessary implications that are just as clear.

Whether TIA of Absconding Accused deserves Serious Consideration at the ICC

47. When both the charges against an accused and the date set for his trial have been clearly communicated to him, his failure to be present for trial on the appointed date may raise legitimate questions that he may have been prevented from coming to the court by forces beyond his control. In those circumstances, the discretion to proceed with the trial in his absence ought not to be exercised.

48. But in the cases where it had been clear that the defendants' absence resulted from plain volition to abscond from their trials, it had often been argued on their behalf that it was legally wrong to proceed with the trial in the absence of the defendants. Appellate judges have rejected such arguments with ample reasoning in level language. There is nothing, of course, wrong with that. It is also possible, however, to dismiss the argument summarily as excessive teasing of reason. It implicates a truly filamentary conception of justice in the form rejected by Justice Cardozo who, writing on behalf of the US Supreme Court, observed that '... justice, though due to the accused, is

[64] Lord McNair, *The Law of Treaties* [Oxford: Clarendon Press, 1961(reprinted 2003)] p 466, footnotes omitted.

due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.'[65]

49. It is certainly possible to debate whether the reason to reject the argument lies in considerations of waiver of the right involved or its forfeiture,[66] but what is beyond debate is the operation of the maxim *ex turpi causa non oritur actio*. That is, the law condones no one to benefit from his own wrong. The law frowns upon the prospect of such unfair advantage when it results from unintended wrong—let alone when it results from a clearly volitional one. This principle is a recurring theme—however expressed—in the judgments that have recognised the discretion of the courts to proceed with criminal trials in the absence of absconding defendants. An early invocation of the principle is seen in *Falk v United States*. In 1899, the US Federal Court of Appeals for the District of Columbia rejected an attack against a trial judge's exercise of the TIA discretion in a case in which the defendant absconded in the course of his trial. In doing so, the Court stated as follows, among other things: 'Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong.'[67] In 1912, the United States Supreme Court quoted that dictum with approval in *Diaz v United States* which, as we will see, is the American *locus classicus* for the exercise of the TIA discretion where a defendant voluntarily absented himself.[68]

50. That 'a person cannot take advantage of his own wrongdoing' is also a well-established principle of international law,[69] where the Latin maxim is alternatively expressed as *ex iniuria ius non oritur*.[70]

51. Arguments against TIA are often couched in terms of '(un)fairness' and violation of rights.[71] But such arguments appear to forget that fairness is equity. And equity requires those who come to

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[65] *Snyder v Commonwealth of Massachusetts*, 291 US 97 (1934) [US Supreme Court], p 122.
[66] See generally the division among the law lords in *R v Jones (Anthony)*, [2002] UKHL 5 [House of Lords] concerning waiver. Lord Bingham of Cornhill, Lord Nolan and Lord Hutton agreed with the Court of Appeals characterisation that the appellants' absconding had raised questions of waiver. But Lord Hoffman and Lord Rodger of Earlsferry did not agree that the facts of the case revealed waiver. In *R v Abrahams*, (1895) 21 VLR 343 [Supreme Court of Victoria] as quoted by Lord Justice Roskill in *R v Jones (No 2)*, (1972) 56 Cr App R 413 [CA England and Wales], p 420, Williams J. spoke of forfeiture and waiver at the same time. See also See National Conference of Commissioners on Uniform State Laws, *Uniform Rules of Criminal Procedure* (1974): *Approved Draft - With Preparatory Note and Comments*, p 293 available at https://www.ncjrs.gov/App/publications/abstract.aspx?ID=15260. See also Wayne LaFave and Jerold Israel, *Criminal Procedure*, 2nd edn [St Paul, Minn: West, 1992] p 1013.
[67] *Falk v United States*, 15 App DC 446 (1899) [US Court of Appeal, DC], p 460. See also *Reynolds v Unites States*, 98 US 145 (1879) [US Supreme Court], p 159. The First Division of the Court of Appeal for Washington State has similarly observed that '[o]ne cannot indiscriminately obstruct the course of justice and then rely on constitutional safeguards to shield him from the legitimate consequences of his own wrongful act': *State of Washington v LaBelle*, 18 Wash App 380 (1977) [Court of Appeals of Washington, 1st Div], p 398.
[68] *Diaz v United States*, 223 US 442 (1912) [US Supreme Court], p 458.
[69] See Anthony Aust, *Modern Treaty Law and Practice*, 2nd edn [Cambridge: CUP, 2007] p 299.
[70] Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, 9th edn [London: Longman, 1996] pp 183—184; see also Malcolm Shaw, *International Law*, 6th edn [Cambridge: CUP, 2008] pp 104—105.

it, to come with clean hands. A defendant who deliberately absconds from his trial, without just cause, does not come with clean hands to complain that he was tried in his absence. Hence, any rationale against TIA must then lie elsewhere. It does not lie in the argument of unfairness or of violation of the right of the accused to be present at his trial.

52. It may, then, be helpful to revisit here the original purpose of the right of an accused to be present at own trial. That purpose was to avoid a situation in which a defendant is unfairly prevented (due to force, chicanery or other reasons beyond his control) from appearing at his own trial and being in a position to mount a full answer and defence to the charges against him. That purpose is adequately captured by Hodges J's remarks in *R v Abrahams*. He noted, by way of illustration, a case in which the defendant 'was a prisoner, he was in custody, he was by order of the Judge ... incarcerated out of Court' while his trial proceeded. The trial in Hodges J's illustration was declared invalid on grounds of violation of the right to be present at the trial. In agreeing with that result, Hodges J remarked that 'it would be monstrous to chain a man in his cell and while he is so chained proceed to try him in Court.'[72] And, continuing with that reasoning, he further opined: '[I]t is correct to say that the trial cannot proceed in the absence of the prisoner without his consent; but it is the absence of the prisoner (who is detained out of Court, not the accused, who are at liberty to be present or not as they please) that invalidates the trial. ... When the accused, as in this case, have appeared and pleaded and are under no constraint, their right to be present at the trial is not in any way interfered with. Their absence from the Court during any part of the trial does not affect the validity of the trial.'[73]

53. Notably, in modern international law, a similar interpretation has been given to the right of a defendant to be present at his trial. According to the ICTR Appeals Chamber: 'Such right is clearly aimed at protecting the accused from any outside interference which would prevent him from effectively participating in his own trial; it cannot be violated when the accused has voluntarily chosen to waive it.'[74] That indeed is the original intendment of the right to presence at one's own trial. It becomes, as a US federal appellate court described it, 'a travesty of justice' for accused persons to 'distort that right to thwart the effective administration of justice.'[75] The result, in my view, is really nothing short of a cynical abuse of the right, for the unintended purpose of frustrating

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[71] In *R v Jones (Anthony)*, for instance, 'Counsel for the appellant laid great stress on what he submitted was the inevitable unfairness to the defendant if a trial were to begin in his absence after he had absconded': *R v Jones (Anthony)*, *supra*, para 11.
[72] *R v Abrahams*, *supra*.
[73] *Ibid*.
[74] *Nahimana* et al. *v Prosecutor (Judgment)* dated 28 November 2007 [ICTR Appeals Chamber], para 107.
[75] *Virgin Islands v Brown*, 507 F 2d 186 (1975) [US Court of Appeals, Third Circuit], pp 189—190.

justice. It is not a legitimate assertion of a right. It is for that reason that I say that it amounts to excessive teasing of reason to venture the argument.

Some Reasons for Proceeding with Trial of Absconded Accused

54. The reasons are legion that support giving a serious consideration to the TIA of an absconding defendant at the ICC. Among them are the following. First, a very eminent judge observed not long ago that 'considerations of practical justice' support the idea of TIA. 'To appreciate this,' he reasoned, 'it is only necessary to consider the hypothesis of a multi-defendant prosecution in which the return of a just verdict in relation to any and all defendants is dependent on their being jointly indicted and jointly tried. On the eve of the commencement of the trial, one defendant absconds. If the court has no discretion to begin the trial against that defendant in his absence, it faces an acute dilemma: either the whole trial must be delayed until the absent defendant is apprehended, an event which may cause real anguish to witnesses and victims; or the trial must be commenced against the defendants who appear and not the defendant who has absconded. This may confer a wholly unjustified advantage on that defendant'.[76] The observation is apposite for purposes of ICC trials.

55. Second, article 14(1) of the International Covenant on Civil and Political Rights provides: 'All persons shall be equal before the courts and tribunals.' This provision has direct implications in the discussion at hand. One such implication concerns multi-accused cases where one or more accused absconds from the trial, while the rest respect their obligations to be present at their trial. The absconding accused would necessarily have set the Court up to decide whether or not all persons shall be treated equally before the court. Such inequality surely results where the Court permits the absconding accused to go without their trial. Is it equal treatment to proceed with the trial of the accused who have respected their obligation to be present for their own trials? The same reasoning of unequal treatment applies with even greater force in respect of other persons who—having been indicted, arrested and kept in pre-trial detention—are in fact being proceeded against, while those who had not been kept in pre-trial detention are allowed to go without trial upon their own decision to abscond from their trials. In that situation, the absconded accused would have been given the double advantage of not only enjoying legitimate freedom from pre-trial detention (in contrast to the accused to whom such freedom was denied); but also an opportunity to exploit an illegitimate advantage of avoiding trial by absconding and frustrating their own trials. This would

[76] *R v Jones (Anthony), per* Lord Bingham of Cornhill, *supra*, para 12.

explain why Lord Justice Roskill described the situation as putting 'a premium on jumping bail.'[77] That engages the question, as Roskill LJ also contemplated, if one accused should be allowed the opportunity to frustrate their own trials in this way, why should every accused person not be given an equal opportunity to do likewise? That amply demonstrates the fallacy of the arguments against the TIA discretion in cases of absconding defendants. If every defendant should be allowed to do the same—as the logic of equal treatment would require—what then is the point of having an international criminal court?

56. Third, the preamble to the Rome Statute remains a constant reminder that the central *raison d'être* of the ICC is the determination of the States Parties 'to put an end to impunity for the perpetrators of [the crimes within the ICC jurisdiction]'. We must always keep that in mind in the task of interpreting the Rome Statute; particularly noting that '[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.*'[78] [Emphasis added.] We must recall here the following observation of Hugo Grotius as regards interpretation of treaties: 'Another source of interpretation is derived from the consequences, especially where a clause taken in its literal meaning would lead to consequences foreign or even repugnant to the intention of a treaty. For in an ambiguous meaning such an acceptation must be taken as will avoid leading to an absurdity or contradiction.'[79] But how does the Court begin to fulfil the States Parties' determination to put an end to impunity if the consequence of a certain interpretation of article 63(1) of the Statute is that persons indicted before it are allowed to escape accountability, by the simple strategy of absconding from their trials after they had made initial appearances and solemn promises to appear for their trials?

57. In its recent judgment in the *El Masri v Macedonia*, the European Court of Human Rights reiterated 'that the Convention is an instrument for the protection of human rights and that it is of crucial importance that it is interpreted and applied in a manner that renders these rights practical and effective, not theoretical and illusory. This concerns not only the interpretation of substantive provisions of the Convention, but also procedural provisions; ...'.[80] I must pause to observe that the same principle also directly animates the Rome Statute. The *El Masri* case concerned an allegation that Khalid El Masri had been illegally abducted and disappeared and tortured with the complicity of agents of the respondent government; and, that the respondent government had refused to

[77] See *R v Jones (No 2)*, *supra*, p 421.
[78] See article 31(1) of the Vienna Convention on the Law of Treaties.
[79] Hugo Grotius, *The Rights of War and Peace: Including the Law of Nature and of Nations* [translated by A C Campbell from the original Latin] [Washington and London: M Walter Dunne, 1901, reissued in 2005 by Elibron Classics] p 179.
[80] *El Masri v Macedonia*, Application No 39630/09, Judgment of 13 December 2012, para 134 [ECtHR].

investigate the applicant's allegation of violation of his rights in that manner. In its judgment, the European Court particularly reiterated that the incidence of human rights and the correlative duty on the State to ensure their enjoyment do operate to *require* that whenever an individual raises an arguable claim of the violation of human rights, 'there should be *an effective official investigation*. Such investigation should be capable of leading to *the identification and punishment of those responsible. Otherwise, the general legal prohibition* of [gross human rights violation] *would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity* ...'.[81] This observation, too, has a direct relevance to the processes of the ICC. If a defendant is able wilfully and effectively to frustrate a judicial inquiry into allegations of gross violations of the human rights of the victims that international crimes typically entail, there would not have been effective investigation—certainly none that would have led to the identification and punishment of those criminally responsible for gross human rights violations.

58. Fourth, there are other ways in which the rights of victims of the crimes alleged also play a part in the question of TIA of absconding accused, beyond the question of the violation of victims' human rights that the commission of crimes within the jurisdiction of the ICC almost invariably implicate. It would be strange to suggest that these rights are less important than the illicit privilege of the defendants to choose to frustrate their own trials at the ICC, by absconding. Even if accused have a 'fundamental human right' to abscond from their criminal trials—a preposterous proposition really—a strong line of jurisprudence from eminent courts such as the European Court of Human Rights, the UK House of Lords, the Privy Council and the US Supreme Court tells us that in appropriate cases, the interests of the accused are to be balanced against those of victims and witnesses[82] or the public[83] as the case may be. That line of jurisprudence is for presented purposes adequately encapsulated by the following pronouncement by Lord Hope of Craighead at the Privy Council, in *Brown v Stott*:

> The rule of law requires that every person be protected from invasion by the authorities of his rights and liberties. But the preservation of law and order, on which the rule of law also depends, requires that those protections should not be framed in such a way as to make it impractical to bring those who are accused of crime to justice. The benefits of the rule of law must be extended to the public at large and to victims of crime also.[84]

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[81] *Ibid*, para 182 [emphasis added].
[82] See *Doorson v The Netherlands*, Application No 20524/92, Judgment of 26 March 1996, para 70; and, *R v Jones (Anthony)*, *supra*, para 58.
[83] *Brown v Stott*, [2002] 1 AC 681 [Privy Council]; *R v Jones (Anthony)*, *supra*, para 58; and *Mattox v United States*, 156 US 237 (1895) [United States Supreme Court], p 243.
[84] *Brown v Stott*, *supra*, p 718.

59. If such a balance must be struck against the *legitimate* rights of defendants, it must follow, as a matter of evident logic, that *illicit* advantages that defendants may claim as rights cannot possibly override the legitimate rights of victims and interests of the community.

60. Now, beyond that general matter of violation of the victims' human rights, as an incident of the alleged crime, is a more specific one at the ICC. It arises from the unique feature of victims' right to reparation under the Rome Statute. It is common knowledge that not only does the Statute recognise the right to reparation for victims as such;[85] it also permits the Court to make reparation orders against convicted persons.[86] Hence, the question arises whether it is open to the defendants to frustrate this right to reparation by absconding, thereby occasioning the abortion of their trial?

61. Fifth, it is to be considered that in recognising the right to reparation for victims of atrocities, the States Parties were ensuring that the Rome Statute in its principles is in step with developments in the relevant spheres of international law that now lay a great store in ensuring that restorative justice (to the victims) is given just as much scope as punitive justice (is given against accused convicts). In this connection, it is noted that the manner of reparation indicated in article 75 of the Rome Statute is indicated in the inclusive language—as '*including* restitution, compensation and rehabilitation.'[Emphasis added.] Notably, it does not *exclude* 'satisfaction'. Satisfaction has now been recognised as belonging to the stock list of what reparation has been accepted to mean in international law.[87] The definition of satisfaction directly implicates the right of victims to the fact-finding process and the judicial determination that the courtroom trial entails. In this connection, paragraph 22 of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law explains as follows:

> *Satisfaction* should include, where applicable, any or all of the following:
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> (a) [...];

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[85] See article 75(1) of the ICC Statute.
[86] See article 75(2).
[87] See para 18 of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005)- adopted in identical terms by the UN General Assembly (GA resolution 60/147, Doc. A/RES/60/147, 16 December 2005), the UN Economic and Social Council (see UN ECOSOC resolution 2005/30, E/RES/2005/30, 25 July 2005), and the UN Commission on Human Rights (see UN Commission on Human Rights resolution 2005/35, E/CN.4/RES/2005/35, 19 April 2005); article 34 of International Law Commission's draft Articles on the Responsibility of States for Internationally Wrongful Acts: annexed to UN General Assembly resolution 56/83, Doc. No A/RES/56/83, 12 December 2001 and corrected by Doc. A/56/49(Vol. I)Corr.4; and second paragraph of article I of International Law Association's Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues) (2010) (see ILA Resolution 2/2010 adopted at the 74th Conference of the International Law Association, held at The Hague, The Netherlands, 15-20 August 2010).

(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;

(c) [...];

(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;

(e) [...];

(f) Judicial and administrative sanctions against persons liable for the violations;

(g) [...];

(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

62. In short, satisfaction, as a measure of reparation, includes among other things the right of the victims to have their day in court—to settle the truth to the extent possible. It fleshes out the very sensible observation that 'justice is truth in action.'[88] The accused should not be able to also frustrate the victims' right to the truth by absconding from the trial and occasioning an abortion of the process; thus compounding the injustice done to the victims whose rights were violated in the first place by the events that caused them the initial injury that are the material facts of the charges against the accused.

63. But even aside from the value of satisfaction as a measure of reparation, the other measures of reparation specifically mentioned in article 75 of the Rome Statute would also require an ascertainment of the facts of the events. In particular, 'restitution'[89] and 'compensation'[90] are not readily achieved without a proper factual inquiry into the events.

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[88] Benjamin Disraeli, Speech, House of Commons, 11 February 1851: HC Deb 11 February 1851 vol 114 cc374 at 412 available at: http://hansard.millbanksystems.com/commons/1851/feb/11/agricultural-distress.

[89] Notably, 'restitution' is explained in paragraph 19 of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation contemplates as follows: '*Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.'

[90] Paragraph 20 of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation explains 'compensation' in the following way: '*Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation *and the circumstances of each case*, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

(*a*) Physical or mental harm;
(*b*) Lost opportunities, including employment, education and social benefits;
(*c*) Material damages and loss of earnings, including loss of earning potential;
(*d*) Moral damage;

64. Sixth, yielding to the ability of the absconding accused to frustrate their own trials will also have negative effect on the regime of both summons to appear and judicial interim release pending trial. It would discourage granting them in future, thereby jeopardising liberty as another cherished right.[91] Is it correct, then, to protect some defendants' privilege to abscond—an unquestionably illicit interest—at the expense of the legitimate interest of other defendants in the enjoyment of legitimate liberty through summonses to appear and reasonable bails?

65. Seventh, the peculiar problem of witness protection issues, a central feature of ICC proceedings, is also not to be ignored. The identities of many of the witnesses are protected, with their disclosure ordered to be made to the defence within a time-limit usually ahead of the date of commencement of trial. Ordinarily, those disclosures are made as ordered before the commencement of the trial. The ramifications of the prejudice to not only the prosecution but also the witnesses themselves is hard to imagine if the identifying information have already been disclosed, but the trial is aborted subsequently simply because the accused refused to show up for their trial.

66. Eighth, evidence does deteriorate over time. Memories fade. Witnesses do die or become intellectually or bodily impaired due to failing health or advanced age. The quality of tangible evidence may degenerate. All these confer potential advantages to an accused who occasions, by absconding, the abortion of a trial that was ready to commence or proceed. Writing about the limitations of the power of contempt of court as a judicial technique to control disruptive defendants in the courtroom, the US Supreme Court, in *Illinois v Allen*, observed as follows: 'It must be recognized ... that a defendant might conceivably, as a matter of calculated strategy, elect to spend a prolonged period in confinement for contempt in *the hope that adverse witnesses might be unavailable after a lapse of time. A court must guard against allowing a defendant to profit from his own wrong in this way.*'[92] [Emphasis added.] The same principle operates in relation to absconding defendants, who might strategically remain at large, hoping for deterioration of the evidence against him. Should this Court allow that to happen?

67. Ninth, a defendant that absconded may subsequently suffer serious impairment of health during his flight from justice. Upon subsequent arrest or surrender, the fact of his earlier absconding

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(*e*) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.' [Emphasis added.]

[91] See *Diaz v United States*, *supra*, p 458, citing with approval *Falk v United States*, *supra*, p 460.

[92] *Illinois v Allen*, 397 US 337 (1970) [US Supreme Court], p 345.

may be immaterial to questions of fitness to stand trial on the subsequent occasion. He would then have escaped accountability and possibly enjoyed impunity for his alleged crimes.

68. And, finally, at the ICC, witnesses are typically flown in from distant countries to come and testify. After the investment of efforts, logistics and costs to bring them for the commencement of trial, it will be grossly unfair and inefficient to abort the trial indefinitely, and to hope to start all over again when the accused finally decides to permit the trial to proceed by agreeing to be present. That is bad enough. But the absurdity is demonstrated by the fact that an accused that eventually decides to show up, may again occasion the abortion of the trial on the subsequent occasion by refusing again to be present for his trial. And the charade can go on forever. Here, it is to be noted that arrest and detention may be insufficient to cure the absurdity; for, as ICTR precedents indicate, international judges are reluctant to order detained accused persons to be brought to the courtroom against their will. But to proceed with the trial when detained accused persons have refused to come to the courtroom of their own free will is still to try them in their absence. This then explains why the ICTR resolved to proceed with the trial of accused persons who refuse to come to the courtroom, and eventually codified the practice into the ICTR Rules of Procedure and Evidence.[93]

Whether TIA of Absconding Accused is forbidden under the Rome Statute

69. Having reviewed some of the merits of the TIA discretion in the case of absconding accused at the ICC, I shall next consider whether the exercise of that discretion, regardless of its merits, is forbidden under the Rome Statute.

70. Many years ago, the US Supreme Court pronounced itself on the need to recognise necessary and reasonable limits to rights of defendants in a criminal case. For, as the Court observed, '[a] technical adherence to the letter of a constitutional provision may occasionally be carried further than is necessary to the just protection of the accused, and further than the safety of the public will warrant.'[94] This is a reasonable view of the law that is wholly consistent with the views of eminent modern human rights courts that similarly recognised the need to give necessary regard to the rights of others and public interest while giving due regard to the fair trial rights of defendants.[95] It is, of course, always helpful to keep that sensible approach in mind in the interpretation of provisions of the Rome Statute for purposes of the question whether that instrument forbids TIA when the defendant has absconded.

[93] The relevant developments at the ICTR are discussed below.
[94] *Mattox v United States*, *supra*, p 243 [emphasis added.]
[95] See *Demebukov v Bulgaria*, Application No 68020/01, Judgment of 28 February 2008 [ECtHR], para 51.

71. But we need not really go that far. This is because even a 'technical adherence to the letter' of article 63(1) of the Rome Statute—which is often thought to proscribe TIAs—does not inevitably forbid TIA of absconding accused. The Rome Statute *in its actual texts* is silent on the matter. In particular, contrary to popular (mis)impressions, article 63(1) of the Statute does not prohibit TIAs. It bears here to recall the cardinal rule of interpretation of international treaties—that provisions shall be interpreted '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.'[96] It has been observed that the determination of the ordinary meaning cannot be done in the abstract, only in the *context* of the treaty and in the light of its *object and purpose*. With particular regard to the determination of object and purpose, it has been observed that '[i]n practice, having regard to the object and purpose is more for the purpose confirming an interpretation. If an interpretation is incompatible with the object and purpose, it may well be wrong.'[97]

72. The context, object and purpose of the Rome Statute have been considered above as strongly militating in favour of the TIA discretion when defendants abscond. But what does the 'ordinary meaning' of the terms of article 63(1) say? The provision actually says: '*The accused shall* be present during the trial.' The ordinary meaning of those terms—on their face—does not entail a command on the Court. The command rather is on *the accused* to 'be present during the trial.' It is thus not a prohibition against the Court from conducting the trial in the absence of an absconding accused. Surely, as the Appeals Chamber Majority correctly noted, the drafters of article 63(1) of the Statute were quite capable of an express statement to the effect that 'an accused may not be tried in his absence' or that 'no part of a trial shall take place outside the presence of the accused,'[98] if the aim was to impose that sort of command on the Court. Notably, the drafters of r 60(a) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone had clearly employed the formulation 'an accused may not be tried in his absence', before quickly adding an exception permitting TIA of the accused who (i) 'has made his initial appearance, has been afforded the right to appear at his own trial, but refuses to do so' or (ii) 'having made his initial appearance, is at large and refuses to appear in court.'

73. As article 63(1) of the Rome Statute does not provide that 'an accused may not be tried in his absence,' to give article 63(1) that effect is simply to read into the provision words that are not

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[96] See article 31(1) of the Vienna Convention on the Law of Treaties [emphasis added].
[97] See Aust, *supra*, p 235.
[98] See s 92(1) of the Criminal Procedure (Scotland) Act, 1995, providing in the relevant part that '... no part of a trial shall take place outwith the presence of the accused.' As the Appeals Chamber correctly noted, such a formulation had been considered during the drafting of article 63(1) but was not adopted: see the *Ruto* appeal decision, para 52.

there. And, to the extent that the 'ordinary meaning' of the actual words—'[t]he accused shall be present during the trial'—conveys only an obligation upon the accused to be present during his or her own trial, the provision has a different apparent effect that makes sense in the context of a criminal trial.

74. It is, perhaps, worthy of note at this juncture that the US National Conference of Commissioners on Uniform State Law has also rightly explained as 'imposing an obligation upon the defendant to be present at the trial'[99] an equivalent provision in their draft Uniform Rules of Criminal Procedure, which provides that 'the defendant must be present at every stage of the trial'.[100] In their draft rule, the consequences of breach of that duty may include a TIA.[101]

75. As noted a little earlier, beyond the textual reading of article 63(1), that apparently imposes a duty on the defendant, is also the consideration that such an interpretation makes eminent sense in the context of a criminal trial. It effectively eliminates *any right* that a defendant may *claim* to be *absent* from his own trial, notwithstanding other objective juristic reasons that press for his presence even against his will. For instance, such an obligation is wholly sensible with a regime that allows the Court to permit appearances through summonses to appear, permits judicial interim releases and allows suspects to be absent from confirmation proceedings. In contrast, article 63(1) is saying: for his own trials, an accused is required to be present, notwithstanding that he may have been permitted to be absent during confirmation proceedings or been allowed to put in appearance by way of summons to appear or granted judicial interim release.

76. Indeed, the provision eliminates the scope for a certain debate that took place at the beginning of the *Bagosora* et al. trial at the ICTR. In an apparent protest, all four accused persons had absented themselves from the courtroom on the day their trial commenced. The Prosecution Counsel insisted that they must be brought to the courtroom, as they had an obligation to be present in the courtroom for purposes of their trial. In response, one of the Defence Counsel correctly argued as follows:

> [...] I do not see where in the Statute or in the Rules there is a Rule or an Article that says the say accused person *must be in court*. What I see in the Statute under Article 20 are the rights of the Accused, *not obligations of the Accused*; the rights of the Accused. So I want to challenge the

[99] See National Conference of Commissioners on Uniform State Laws, *Uniform Rules of Criminal Procedure* (1974), *supra*, p 290. See also National Conference of Commissioners on Uniform State Laws, *Uniform Rules of Criminal Procedure* (1987)...With Preparatory Note and Comments, p 242.
[100] See *ibid*, r 713(b) of the Uniform Rules of Criminal Procedure (1974) and (1987).
[101] See *ibid*, r 713(b)(2) of the Uniform Rules of Criminal Procedure (1974) and (1987).

> Prosecution -- I want to challenge the Court to show me where there is an order saying that the accused persons *must come to court as a matter of law.*[102]

77. The point put by Defence Counsel on that occasion was never an idle one. First, in common law criminal procedures, an accused not only enjoys a right to be present at his trial, but is understood to have an obligation to be present at his trial.[103] But in the absence of express language in the basic documents of the Tribunal, the ICTR Trial Chamber in the *Bagosora* case was not prepared to order the defendants to be brought to the courtroom against their will, on the view urged upon the Chamber that there was obligation on the defendants to be present during their trial.[104] The only way then to put such an obligation beyond debate is by way of an express statement in a governing legal text. That is what article 63(1) of the Rome Statute precisely accomplishes by providing that 'the *accused shall* be present during the trial.' Furthermore, the view that article 63(1) of the Statute which imposes an obligation on the accused to be present during the trial, alongside the right given to him in article 67(1)(d) to be present, resolves the dilemma concerning whether it is waiver or forfeiture that voluntary absence of the accused engages in a criminal trial. A waiver is something concerned with the exercise of a right. If there is no obligation on the accused to be present, the only question then to consider for purposes of validity of a TIA would be whether he has waived the right to be present. The right whose non-exercise engages questions of waiver is a matter for the right bearer alone. As the ICTR Trial Chamber stated in the *Bagosora* case: 'The choice is theirs, and they may make whatever choice they chose.'[105] The Chamber only treated the absence of the accused as a question of waiver. As noted earlier, the ICTR Trial Chamber was constrained to that view—rather than order the accused to be brought into the courtroom from their cells—given the absence of a statutory language in the ICTR Statute comparable to article 63(1) of the ICC Statute that may be confidently relied upon as imposing an obligation on the accused, rather than only a right for him, to be present.

78. An obligation, on the other hand, engages questions of forfeiture—a matter of sanctions for breach of a legal obligation. Notably, in *Black's Law Dictionary* forfeiture is defined as: 'The loss of a right, a privilege, or property *because of a crime, breach of obligation, or neglect of duty.*'[106] An obligor has no prerogative to do as he pleases with the subject matter of his obligations.

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[102] *Prosecutor v Bagosora* et al., transcripts of proceedings of 2 April 2002, pp 41 to 42 [emphasis added].
[103] See *R v Jones (Anthony)*, *supra*, para 6, *per* Lord Bingham; see also *R v Abrahams*, *supra*, p 353, *per* Hood J, quoted with approval by Lord Justice Roskill in *R v Jones (No 2)*, *supra*, p 421.
[104] *Prosecutor v Bagosora* et al., transcripts, *supra*, pp 56 to 59.
[105] *Ibid*, p 59.
[106] *Black's Law Dictionary*, 7th edn [St Paul, Minn: West Group] 661 [emphasis added].

Notably, the US Supreme Court has accepted that the rule of forfeiture by wrongdoing has the effect of extinguishing a defendant's right to confrontation 'on essentially equitable grounds.'[107]

79. Hence, the implication of a defendant's obligation to be present in the courtroom during his trial means that violation of that duty is a wrongdoing that leaves the court the choice to treat TIA as a matter of forfeiture, unconstrained by the elements that must be present in order to find waiver.

80. And there is no inconsistency at all between the existence of both an obligation and right in the same subject matter, such as we see in the Rome Statute, respectively in articles 63(1) and 67(1)(d), as regards the presence of the accused at his trial. It means that each may operate in its own sphere. The ability of the two notions—of a right and an obligation to be present—becomes clearer if the point of right to presence is properly appreciated. As noted earlier, that point is to ensure that an accused is not unfairly kept out of his trial, though he wants earnestly to be there. But the obligation on him accomplishes something different. It ensures not only that he may not fairly be allowed to undermine the legitimacy of the trial by his absence, such as where the Court deems it necessary for the witnesses to identify the accused; but also that his presence is assured for purposes of serving any punishment that the Court may see fit to impose on him at the end of the trial.

81. Before proceeding further, it should be necessary also to consider the import of two further provisions in the Rome Statute—article 63(2) and article 61(1) and (2)—in terms of their implication to the construction of the Rome Statute articulated in this opinion, in relation to TIA. Article 63(2) empowers the court to remove a disruptive defendant from the courtroom during his trial. There may be some temptation to view this provision as an indication that article 63(1) requires that the accused may not be tried *in absentia*; in the sense that article 63(2) indicates the only exception in which the court may try an accused in his absence. In my view, article 63(2) really supports the opposite conclusion—i.e. that the Statute, as a general proposition, does not forbid the trial of an absconding accused. But, first, we must consider what it is that article 63(2) is saying on its face. It says: '*If the accused, being present before the Court*, continues to disrupt the trial, the Trial Chamber may remove the accused …'. [Emphasis added.] Read together with article 63(1) which is a statutory standing *order* on the accused to be present at his trial (and, indeed, article 67(1)(d) which creates a right in the accused to be present during his trial), article 63(2) operates to prevent an accused who obeys the article 63(1) command against his will to use the incidence of his presence to disrupt the proceedings. The situation may be illustrated in the following imaginary courtroom dialogue:

[107] See *Crawford v Washington*, 541 US 36 (2004) [US Supreme Court], p 62.

> ACCUSED: I do not want to be here. I'm here only because article 63(1) commands me to be here. But, now that I am here, I shall do my best to frustrate the trial; by being disruptive throughout. And, there is nothing anyone can do about it; especially since article 67(1)(d) also gives me a right to be present at my own trial.
>
> PRESIDING JUDGE: No. You will do no such thing. You will sit still, observe the proceedings and make your contributions in an orderly manner. If you do not, I shall, on the authority of article 63(2), remove you from the courtroom. And the trial will proceed in your absence. By the way, article 67(1)(d) also makes your right to be present subject to my authority to remove you from the courtroom, if you are disruptive.

82. In my view, the arrangement inures to the benefit of discretion in a Trial Chamber to proceed with the trial of an absconding accused. The discernible strand for that conclusion is drawn from the interest of the Rome Statute in ensuring that disruptions do not result in the frustration of the search for the truth. Could the Rome Statute then be seen to condone the frustration of the search for the truth by other methods—such as by absconding? Lord Lane, Chief Justice of England and Wales, has answered to the improbability of such a legal position. As he said in a 1991 case, 'There is no distinction in principle between a defendant who misbehaves in such a way as to make his/her removal from court necessary and on the other hand the person who deliberately refuses to attend the trial when he is at liberty to do so.'[108] Lord Lane's point had effectively been made almost a century earlier in Australia by Williams J at the Supreme Court of Victoria. According to Williams J, the right to be present in court is subject to the limiting principle that the accused may not abuse the right: 'If he abuses that right *for the purpose of obstructing the proceedings of the Court, by unseemly, indecent, or outrageous behaviour*, the Judge may have him removed and proceed with the trial in his absence, or he may discharge the jury, but subject to that qualification the right of being present remains with the accused as long as he claims it. When he waives it, then the discretion of the Judge comes into play.'[109] So, too, would the discretion come into play when the accused '*elects to be absent, and absents himself through caprice or malice, or for the purpose of embarrassing the trial.*'[110]

83. The other provisions to consider are to be found in article 61(1) and (2), dealing with indictment confirmation hearings. In the relevant part, they provide as follows:

> (1) [...] The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

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[108] *R v Jones, Planter and Pengelly*, (1991) Crim L R 856 [CA England and Wales], quoted in *R v Hayward & Ors*, [2001] EWCA Crim 168 [CA England and Wales], para 6.
[109] *R v Abrahams, supra*, p 347 [emphasis added].
[110] *Ibid* [emphasis added].

> (2) The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:
>
> (a) Waived his or her right to be present; or
>
> (b) Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.
>
> In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

84. It is quite understandable that this provision would tempt an invitation of the negative implication canon of interpretation—i.e. *expressio unius est exclusio alterius*—as ruling out TIA under the Rome Statute, since this is the only provision that contemplates 'a hearing in the absence' of the would-be defendant. But, there are many obstacles to that view. First, there is a material particularity to the text of article 61(1) when it provides that 'the hearing *shall be held* in the presence of the Prosecutor and the person charged …'. The point of the provision concerns how the hearing is 'held.' The provision, when compared to article 63(1), which provides that '[t]he accused *shall be* present at the trial,' does not implicate a duty on the suspect, as does article 63(1) on the accused. For its part, article 63(1) does not provide that the 'trial shall be *held*' in the presence of the accused. Hence, it is more obvious that, in saying so, article 61(1) is speaking to the Court—the only entity capable of determining or controlling how the hearing is 'held'. The suspect cannot control or determine that. But, by way of contrast with article 63(1), the accused can determine or control his own presence at the trial, hence the different reading of article 63(1) in view of its own different formulation.

85. Second, in a recent text on the interpretation of legal documents, US Supreme Court Justice Antonin Scalia and the renowned legal lexicographer Bryan Garner, correctly (as we shall presently see) observed that '[v]irtually all the authorities who discuss the negative implication canon emphasize that it must be applied with great caution …'. The reason they suggest for such great caution is that the maxim's 'application depends so much on context.'[111] We shall see presently other reasons that recommend great caution in the application of the maxim. But, for now, we may explore context sensitivity a little further. According to Scalia and Garner, '[t]he doctrine properly applies only when the *unius* (or technically, *unum,* the thing specified) can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved.'[112] That observation is fully consistent with the observations of Lord Reid who once wrote at the House of Lords that 'the

[111] See Scalia and Garner, *supra*, p 107.
[112] *Ibid* [emphasis received].

brocard *expressio unius exclusio alterius* must be applied with some caution.' This is particularly so, where it is clear that 'all the details [of the statute under consideration] have not been fully thought out …'.[113]

86. Against that background, it is to be considered that the provisions of article 61(1) and (2) have a unique context—never mind that it is also true that 'all the details' of the Rome Statute had not 'been fully thought out'. Article 61 deals with a hearing to *confirm an indictment* of a person who has not yet become an accused person. That context is therefore different as compared to the *trial* of a person who is an accused person, particularly one that promised to appear at his or her trial, as an incident of either summons to appear or judicial interim release. These considerations therefore render article 61(1) and (2) inapposite as a reference point for the construction of the meaning of article 63(1).

87. Third, apart from context sensitivity, other reasons that 'great caution' has been sounded against an over-enthusiastic resort to that maxim include the following. Lord Justice Lopes wrote in *Colquhoun v Brooks* that the maxim 'is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The *exclusio* is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject matter to which it is to be applied, leads to *inconsistency or injustice*. I think a rigid observance of the maxim in this case would make other provisions of the statute *inconsistent and absurd*, and result in injustice. I cannot, therefore, permit it to govern my decision.'[114] And in *Re Newspaper Proprietor's Agreement*, Russell J declined to apply the maxim because it 'would produce a wholly irrational situation' in the particular circumstances.[115] On appeal to the House of Lords, Lord Reid agreed, as indicated above.[116] Lord Justice Jenkins once declined to apply the maxim where it would have led to a 'capricious … operation' of the statute under consideration.[117]

88. Fourth, as noted earlier, the *expressio unius est exclusio alterius* maxim is merely an interpretation by negative implication.[118] Such an implication is necessarily weakened if there is an alternative purpose to the provision urged as indicating an exclusion of something not mentioned. As Lord Justice Jenkins correctly observed, the *exclusio* maxim 'has little, if any, weight where it is possible … to account for the *inclusio unius* on grounds other than an intention to effect the

[113] *Re Newspaper Proprietor's Agreement,* [1964] 1 WLR 31 [House of Lords], p 38.
[114] *Colquhoun v Brooks*, (1888) 21 QBD 52 [CA England and Wales], p 65 [emphasis added].
[115] *Re Newspaper Proprietor's Agreement*, [1962] 1 WLR 328, [UK, England Restrictive Practices Court], 335.
[116] *Re Newspaper Proprietor's Agreement* [House of Lords], *supra,* p 38.
[117] See *Dean v Wiesengrund*, [1955] 2 QB 120, [CA England and Wales], p 131.
[118] Scalia and Garner, *supra*, p 107.

exclusio alterius.'[119] Indeed, there is an evident primary purpose to article 61(1) and (2) than to make provisions for hearings *in the absence* of the person charged. Such a primary purpose is to give the person charged an adversarial standing in indictment confirmation proceedings, in a marked departure from the processes of the *ad hoc* tribunals. At the *ad hoc* tribunals, suspects were routinely—if not invariably—excluded from indictment confirmation proceedings, perhaps, as a result of the failure of the basic documents to provide that the proceedings shall be conducted in their presence.[120]

89. In a related message, Scalia and Garner teach that one reason to express an *unum* is because of a particular mischief that is prevalent in the particular context in question. For instance, a sign posted at the front door of a restaurant saying 'No dogs allowed' may not reasonably be construed as bearing any implication for adolescent pet leopards being allowed into the restaurant, simply because dogs were particularly intended for exclusion. This is because experience teaches that dogs are the animals that most pet-owning customers tend to bring into a restaurant; thus, deserving specific mention for exclusion when their presence is not welcome in a particular restaurant.[121] Applying that reasoning to the *unum* expressed in article 61(1) and (2), it is simple to see that the reason for the specific provision requiring that indictment confirmation hearings be held in the presence of the suspect, and recognising exceptions to that injunction, is because, as indicated above, the experience at the *ad hoc* tribunals teaches that the indictment confirmation process is one from which suspects invariably tended to be excluded from participation. Thus, to provide against that exclusion in article 61(1) and (2) in the Rome Statute warrants no necessary implication of excluding TIAs at the ICC.

90. Fifth, it is possible to consider that the very terms of article 61(1) and (2) in the relevant respect may well suggest that proceedings in the absence of the accused are not contrary to the spirit of the Rome Statute; for, if it is possible to hold hearings to confirm serious criminal charges against a person who at that point is a stranger to the processes of the Court, the principle of the matter ought also to accommodate the idea of trying that person in his absence following the confirmation of the indictment. But, a parity of reasoning should recommend the rejection of that argument: that is, there is no union of context between indictment confirmation hearings and trials, such as makes what is applicable to the one also necessarily applicable to the other.

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[119] *Dean v Wiesengrund*, *supra*, p 131.
[120] See for instance, article 19 of the ICTY Statute and article 18 of the ICTR Statute; and r 47 common to the ICTY and the ICTR Rules of Procedure and Evidence. See also r 47 of the SCSL Rules of Procedure and Evidence.
[121] Scalia and Garner, *supra*, pp 107—108.

91. And, finally, the immediately preceding argument does, however, reasonably invite the consideration that it was enough reason to expect that the drafters would have been clear in excluding TIA, in order surely to eliminate the temptation to consider the principle of 'hearing in the absence' of the person charged as applicable also to authorise his TIA once the indictment has been confirmed. But, as such a clearly excluding provision was not made, in the obvious face of that possible interpretation, it may not confidently be said that the drafters had intended to exclude the TIA discretion from the Trial Chambers of the Court.

92. In view, therefore, of the neutral value that articles 61(1) and (2) and article 63(2) have on the question of TIA, we are then neatly left, *at worst*, with a statutory silence on the question whether there can be a TIA in respect to an accused who absconds. Indeed, silence is the best that there is, considering that during the negotiation of the ICC Statute, competing proposals were tabled including the following options: '(i) no trials *in absentia* under any circumstances; (ii) powers to continue a trial without the accused, if he or she was present at the commencement of the trial, (iii) powers also to hold a trial in absentia when the accused is not present at the commencement of the trial, but has been duly informed of the opening of the trial or, under certain circumstances, without notification of the charges.'[122] But there was no agreement on any of these proposals within the time left to complete the negotiations on the question.[123] It is important to stress that the failure to make express provision either for or against TIA was largely due to a failure of agreement than a clear consensus to not provide for it.

93. But the silence of the Rome Statute on the specific question of TIA does not foreclose the question of its possibility at the ICC.[124] That possibility is more appropriately examined under article 21(1)(c) of the Statute. That provision *obligates* the Court, in the event of silence of the basic documents of the Court and applicable treaties and principles and rules of international law, to apply general principles of law derived by the Court from national laws of the legal systems of the world; provided that those principles are not inconsistent with either the Rome Statute or international law (and internationally recognised norms and standards).

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[122] See Håkan Friman, 'Rights of Persons Suspected or Accused of a Crime', in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute* [The Hague: Kluwer, 1999] p 259.
[123] *Ibid*, pp 259—261.
[124] It is perhaps helpful to recall that ICC Trial Chamber V has observed that the Rome Statute 'is neither an exhaustive nor a rigid instrument' and that silence does not signal proscription of a procedural measure: *Prosecutor v Ruto and Sang (Decision on Witness Preparation)* dated 2 January 2013, para 27.

Is TIA Inconsistent with International Norms?

94. Against the backdrop of the debates of the delegates in the drafting committees of the Rome Statute, a proposition has been expressed as follows: 'Since different views exist, international law has not been able to provide a definite answer to the question of whether trials *in absentia* should be allowed.'[125] Perhaps that proposition was defensible prior to the adoption of the Rome Statute in 1998. But there is no question in the current state of international law that it *does* allow TIAs.

95. Before proceeding to examine whether TIA is permissible as a matter of general principles of law derived from national laws of the legal systems of the world, thus making it stuff of international law according to article 38(1)(c) of the Statute of ICJ, it may be helpful to examine whether TIA is forbidden by other manner of international law besides general principles of law recognised by nations.

96. As already indicated, the Rome Statute does not forbid it. The next question is whether international law and international recognised norms and standards forbid it. The answer to the question primarily lies in a review of international human rights law and international criminal law outside of the Rome Statute system.

International Human Rights Law

97. It is not unusual to encounter the view that TIAs are forbidden by international human rights law. An example of such a view was the opinion of a former UN Secretary General, writing as follows in his report in 1993 on the establishment of the ICTY: 'A trial should not commence until the accused is physically present before the International Tribunal. There is a widespread perception that trials in absentia should not be provided for in the statute as this would not be consistent with article 14 of the International Covenant on Civil and Political Rights, which provides that the accused shall be entitled to be tried in his presence.'[126]

98. The first part of that statement should attract little or no controversy if what was meant is that a trial should not commence in the absence of a defendant who has not made an initial appearance. But the second part would be a mistaken view if it means to suggest that article 14 of the ICCPR forbids the TIA of an accused who voluntarily absented himself from trial after he has made an initial appearance. And, notably, a subsequent UN Secretary General rectified the earlier mistake in his report in 2006 on the establishment of the Special Tribunal for Lebanon which

[125] Friman, *supra*, p 255.
[126] Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), presented on 3 May 1993, Doc No S/25704, para 101.

explicitly permitted TIAs. In that report, the Secretary-General observed as follows: 'In introducing the institution of trials in absentia on the conditions that the accused has waived his or her right to be present, that he or she has not been handed over or absconded, or otherwise cannot be found, the statute of the special tribunal takes account of the relevant case law of the European Court of Human Rights, which determined the regularity of trials in absentia in full respect for the rights of the accused.'[127]

99. Indeed, there is a solid body of jurisprudence in which the European Court of Human Rights that has found that TIAs conducted with certain guarantees of fair trial are not incompatible with human rights norms.[128] Perhaps, their more recent case of *Demebukov v Bulgaria* merits close attention. The ECtHR held that in light of the particular facts of that case, 'the applicant's conviction in *absentia* and the refusal to grant him a retrial at which he would be present did not amount to a denial of justice.'[129] Nor did it amount to a denial of the right to fair trial guaranteed by the European Convention on Human Rights.[130] The path along which the Court had travelled to arrive at those conclusions took it through, first, its usual observation that 'proceedings that take place in the accused's absence are not of themselves incompatible with Article 6 of the Convention.' But that violation would be found if a person convicted *in absentia* is unable subsequently to obtain a fresh determination of the merits of the charge, 'where it has not been established that he has *waived* his right to appear and to defend himself ... *or that he intended to escape trial.*'[131] That is to say, the requirement for a fresh trial (following an earlier TIA) does not apply—as was the case in *Demebukov*—if the defendant is shown either to have waived the right to presence at trial or if he had absconded.

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[127] Report of the Secretary-General on the establishment of a special tribunal for Lebanon,' 15 November 2006, Doc No S/2006/893, para 33.
[128] Some notable ECtHR cases of note in this regard are *Demebukov v Bulgaria*, *supra*, para 45; *Sejdovic v Italy*, Application No 56581/00, Judgment of 1 March 2006, paras 82 and 83; *Somogyi v Italy*, Application No 67972/01, Judgment of 18 May 2004, para 66; *Medenica v Switzerland*, Application No 20491/92, Judgment of 14 June 2001, paras 55-59; *Krombach v France*, Application No 29731/96, Judgment of 13 February 2001, para 85; *Poitrimol v France*, Application No 14032/88, Judgment of 23 November 1993 , paras 30 and 31; *Colozza v Italy,* Application No 9024/80, Judgment of 12 February 1985, paras 28 and 29; *Ensslin v* Germany, Application No 7572/76, 7586/76 and 7587/76, Decision of 8 July 1978 on the admissibility of the applications, para 22. See also Council of Europe, Committee of Ministers, Resolution (75) 11 adopted on 21 May 1975.
[129] *Demebukov v Bulgaria*, *supra*, para 58.
[130] *Ibid*, para 59.
[131] *Ibid*, para 45 [emphasis added].

100. Next, the Court explained what it contemplated by way of waiver, as follows:

> Neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial. However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance; furthermore, it must not run counter to any important public interest ...[132].

101. The Court reiterated its earlier pronouncements that waiver begins with a clear notice of the proceedings having demonstrably been brought to the attention of the accused, and ends with conducts on his part which could be seen as either expressly agreeing that the proceedings could go on in his absence or tacitly by conduct being imputed with that interpretation of the facts as a fair and reasonable proposition. In this regard, the Court recalled that it had rejected that either of these conclusions might arise by way of mere inference as a fugitive from justice, 'founded on a presumption with an insufficient factual basis.'[133] The Court also recalled that a prerequisite to a finding of implied waiver of a right so important as the right to fair trial is a showing that the accused 'could reasonably have foreseen what the consequences of his conduct would be.'[134] The European Court, as always, also signalled the cardinal importance of effective representation by defence counsel—assigned at public expense—if need be; although that right, too, is not absolute.[135]

102. On the converse side of the right in consideration, the Court stressed that 'it is of capital importance' that a defendant should appear. Among the reasons for this are the interests of victims that must also be protected. In consequence, there is legitimate need, beyond the rights of the accused, to discourage 'unjustified absences'; provided that the attendant sanctions are not disproportionate in the circumstances of the case and the defendant is not deprived of his right to be defended by counsel.[136] It may be observed that this recognition on the part of the European Court is consistent with the observations of the US Supreme Court made well over a century earlier about the necessary adjustment that needs to be made between trial rights of defendants and the interest of the public. As the Supreme Court put it: '[G]eneral rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to consideration of public

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[132] *Ibid*, para 47.
[133] *Ibid*, para 48.
[134] *Ibid*.
[135] *Ibid*, para 50.
[136] *Ibid*, para 51.

policy and the necessities of the case … The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an *incidental benefit* may be preserved to the accused.'[137]

103. Applying the principles that it had outlined above, the ECtHR took into account the fact that Demebukov had been present with his counsel at all material times during the pre-trial stage. The Court found that he 'was in possession of sufficient knowledge of the criminal proceedings against him and his accomplices, that they were progressing rather rapidly as the case file had been forwarded to the public prosecutor's office and, accordingly, that it was probable that he would be indicted and brought to trial.'[138] As a separate consideration, the Court also noted that following his eventual indictment, the authorities had placed restrictions on his movements, forbidding him from leaving his residence in a named village without authorisation from the public prosecutor's office. But, in violation of this condition, the defendant changed his residence without informing the prosecutor of his new address, without evident just cause.[139] In the result, the ECtHR held that the accused had, through his own conduct, 'brought about a situation that made him unavailable to be informed of and to participate in' his own trial.[140] In those circumstances, the Court found no violation of his fair trial rights on account of both his TIA and the refusal of the court to grant him a fresh trial when he reappeared.

104. Quite significantly, it is not only the European Court of Human Rights that has found that TIAs conducted with certain guarantees of fair trial are not incompatible with human rights norms. The United Nations Human Rights Committee has also found that TIAs conduced with the prescribed guarantees of fair trial are not incompatible with article 14 of the International Covenant on Civil and Political Rights. Quite the contrary, in certain situations TIA is 'permissible in the interest of proper administration of justice', as long as certain guarantees have been observed in the conduct of the TIA. In *Mbenge v Zaire*, the UN Human Rights Committee made that point as follows:

> […] According to article 14 (3) of the Covenant, everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance. *This provision and other requirements of due process enshrined in article 14 cannot be construed as invariably rendering proceedings in absentia inadmissible irrespective of the reasons for the accused person's absence. Indeed, proceedings in absentia are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice.* Nevertheless, the effective exercise of the rights under article 14 presupposes that the necessary steps should be taken to inform the accused beforehand about

[137] See *Mattox v United States*, *supra*, p 243 [emphasis added].
[138] *Demebukov v Bulgaria*, *supra*, para 53.
[139] *Ibid*, para 54.
[140] *Ibid*, para 57.

> the proceedings against him (art 14 (3) (a)). Judgement in absentia requires that, notwithstanding the absence of the accused, all due notification has been made to inform him of the date and place of his trial and to request his attendance. Otherwise, the accused, in particular, is not given adequate time and facilities for the preparation of his defence (art 14(3)(b)), cannot defend himself through legal assistance of his own choosing (art 14 (3) (d)) nor does he have the opportunity to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf (art 14 (3) (e)).[141]

105. This observation was followed in a General Comment saying as follows, among other things: '[...] When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary.'[142]

106. The central conditions that consistently come through in the pronouncements of both the UN Human Rights Committee and the ECtHR that justify a TIA appear to be the following: (a) clear notice of the trial must be seen to have been given to the accused, in order to anchor an express waiver of the right to be present for the trial or such that a wrongful failure to be present may justify an inference of waiver or forfeiture; (b) where there has been no waiver and the trial proceeded in his absence, the accused shall have a right to a trial *de novo*, if (s)he shows up at a later date, unless it is shown that the defendant's absence was a calculated move to avoid trial; and (c) where the trial proceeded in his absence, due diligence would require the Court to appoint counsel (at the public expense if need be) who would do her best to represent the interests of the absent accused, although such participation of defence counsel will not override the right of trial *de novo* where there had been no proper case of waiver of the right to be present during the trial or where absence was not shown to have been designed to avoid trial.

International Criminal Law

107. Having established unequivocally that TIA is permissible under international human rights law, under certain conditions, the inquiry of the permissibility of TIA will also take us to examine how TIA has fared in international criminal law.

108. One notable feature of the Special Tribunal for Lebanon is the power that the judges expressly enjoy to proceed with TIAs.[143] This is often considered as something of an aberration in international criminal law. But this would be an erroneous view. TIAs have been a feature of modern international criminal law since its inception in the Nuremberg era. As with the Statute of

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[141] UN Human Rights Committee, Communication No 16/1977, 25 March 1983, para 14.1 [emphasis added].
[142] UN Human Rights Committee, General Comment 13/21, 12 April 1984, para 11.
[143] See article 22 of the STL Statute. See also *Prosecutor v Ayyash* et al. *(Decision on Defence Appeals against Trial Chamber's Decision on Reconsideration of the Trial* in Absentia *Decision)* dated 1 November 2012 [STL Appeals Chamber].

the STL, article 12 of the Charter of the Nuremberg Tribunal had given that Tribunal a broad discretion to conduct TIA. That discretion was exercised in the case of Martin Bormann, Hitler's secretary.[144]

109. It is often thought that the procedures of the UN *ad hoc* tribunals did not allow TIAs.[145] But that, also, would be an incorrect impression. The trial of Jean-Bosco Barayagwiza, one of the accused jointly tried in the *Nahimana et al* case—a flagship case at the ICTR—was conducted entirely in his absence. At the commencement of his trial in October 2000, Mr Barayagwiza voluntarily stayed away. Although he was in pre-trial custody at the seat of the Tribunal in Arusha, the Trial Chamber (presided over by Judge Navi Pillay, the current UN High Commissioner for Human Rights), chose to commence, continue and conclude the trial in his absence. In deciding to proceed with the trial in Mr Barayagwiza's absence, the Trial Chamber reasoned as follows: '[I]n the present case, Mr Barayagwiza is fully aware of his trial, but has chosen not to be present, despite being informed by the Chamber that he may join the proceedings at any time. In such circumstances, where the accused has been duly informed of his ongoing trial, neither the Statute nor human rights law prevent the case against him from proceeding in his absence.'[146] It is significant to note that the Trial Chamber considered that the ICTR Statute did not 'prevent the case against him to proceed in his absence' notwithstanding that article 20(4)(d) of the Statute had guaranteed the accused's right to be tried in his presence. Although the Trial Chamber had initially declined to permit his original counsel to withdraw, the Chamber did eventually permit their withdrawal, appointing new counsel to represent the interests of the accused for the duration of the trial. On appeal, the ICTR Appeals Chamber held that the Trial Chamber had the discretion to proceed as they did and that they had exercised the discretion properly in the circumstances of the case.[147] In particular, the Appeals Chamber did not fault the Trial Chamber's reasoning that the ICTR Statute's guarantee of the *right* to be tried in his presence posed an impediment to TIA in the circumstances. As noted earlier, the Appeals Chamber had ruled that the right is not violated when the accused voluntarily chose to waive it.[148]

110. In considering whether Mr Barayagwiza had waived his right to presence at his trial, the Appeals Chamber noted that he had been informed of the charges against him at his initial

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[144] See William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* [Oxford: OUP, 2010] p.750.
[145] See Friman, *supra*, p 257.
[146] *Prosecutor v Barayagwiza (Decision on Defence Counsel Motion to Withdraw)* dated 2 November 2000 [ICTR Trial Chamber I], para 6.
[147] *Nahimana* et al. *v Prosecutor (Judgment)*, *supra*, paras 96—109.
[148] *Ibid*, para 107.

appearance made about two years before the commencement of the trial; and, that he had participated at the pre-trial stage of the case, specifically attending at some of the proceedings himself.[149] The Appeals Chamber also noted that: about a week to the date set for commencement of the trial, Mr Barayagwiza communicated in writing to the Chamber his decision to absent himself from the trial; three days to the date set for trial the Registry communicated to him the presiding judge's message that the trial would proceed as scheduled and that every opportunity would be afforded him to attend the trial, while reminding him of the date set for trial;[150] on the first day of trial he was absent as he had said he would be, so too was another of the three co-defendants,[151] and in response to questions from the bench about the absences Mr Barayagwiza's counsel tendered a statement from him formally informing the Chamber about his intention to remain absent from the trial;[152] in that statement, he said, among other things: 'Even though I am unwilling to participate in this travesty of justice, I am not at all waiving my inalienable right to a defence and to appear before an independent and fair Tribunal. I am instructing my lawyers that they are not to represent me in this trial that commences today. Nor do I wish to be present at this "trial"'; the security officers had informed him six times that he was to prepare to attend trial and he refused; the Trial Chamber then rendered an oral ruling reaffirming Mr Barayagwiza's right to presence at his trial, that he had chosen not to exercise it, but that the trial would proceed in his absence, adding that the opportunity will remain open for him to join the proceedings if he changed his mind; a similar message was delivered for the second absent co-defendant;[153] the next few days the Trial Chamber issued two further rulings (one oral, the other written) in the context of his continuing legal representation, during which the Trial Chamber recalled Mr Barayagwiza's determination to remain absent and the Trial Chamber's efforts to ensure that he understood that the consequences of his chosen course of conduct entailed waiver of his right to be present at his trial.[154]

111. In light of the foregoing, the Appeals Chamber found that Mr Barayagwiza 'freely, explicitly and unequivocally expressed his waiver of the right to be present during his trial hearings, after he had been duly informed by the Trial Chamber of the place and date of the trial, of the charges laid against him, of his right to be present at those hearings, and that his presence was

[149] *Ibid*, para 110.
[150] *Ibid*, para 111.
[151] Mr Hassan Ngeze, the second defendant subsequently changed his mind and resumed presence in the courtroom for the remainder of the trial.
[152] *Nahimana* et al *v Prosecutor (Judgment)*, *supra*, para 112.
[153] *Ibid*, para 113.
[154] *Ibid*, paras 114 and 115.

required.'[155] The Appeals Chamber found no error on the part of the Trial Chamber in proceeding with the trial in the absence of Mr Barayagwiza.[156]

112. Similarly, on the morning of 2 April 2002, when the case of *Bagosora* et al—another ICTR flagship case—was scheduled to commence, all four accused stayed away. Trial Chamber III declined a specific urging by the Prosecution to order the accused to be brought to the courtroom, even against their will, as an incidence of their pre-trial custody. As Trial Chamber I had done in the case of *Nahimana* (as regards Mr Barayagwiza), Trial Chamber III elected instead to proceed with the trial of Col Bagosora and his co-defendants in their absence, allowing them the choice to rejoin the proceedings whenever they pleased. In the ruling of Trial Chamber III, the presiding Judge Williams pronounced as follows:

> This is not the first time this issue has been raised before us, and we have dealt with it. With regard to the absence of the Accused, the ruling of the Chamber is as follows. We direct the Registrar to write to each of the Accused indicating to them that it is their right to be present at their trial; that it is in their interests to be present; it is in the interests of justice that they be present, but if they choose not to be present, we do not feel it is appropriate to bring them here by force and drag people before the Court. But whenever they choose to join the proceedings, they may do so. The choice is theirs, and they make whatever choice they choose. *That will not prevent the trial from proceeding.*[157] [Emphasis added.]

113. Following the foregoing ruling, the Chamber adjourned the proceedings briefly to enable the Registry to attend the detention facility and deliver the message. Upon receiving the Chamber's ruling signalling an unequivocal determination to proceed with the trial in their absence, the defendants promptly reappeared in the courtroom and assumed their customary places to hear the prosecution opening statements. [I was the lead prosecution counsel in the case at the time.]

114. It is expected that absconding defendants may be tempted to argue that the TIA questions in the *Nahimana* et al and *Bagosora* et al cases presented a different situation because the accused were already in ICTR pre-trial custody. The obstacles to that argument will include the following: First, the principle of fair dealing makes that argument extremely unreasonable in their mouths. This is for the reason that they would have been seen to be aiming to legitimate a complaint from their own wrongs. This is in the sense that they did not want to be in pre-trial detention and be put in the same position as all the other accused persons who are so detained. They wanted to be free to go about their lives under the regime of summonses to appear. And the summonses to appear were precisely premised on their very promise to appear for their own trials. Now, having breached that

[155] *Ibid*, para 116.
[156] *Ibid.*
[157] *Prosecutor v Bagosora et al.*, transcripts, *supra*, pp 58—59.

promise and their summonses to appear, they cannot now be heard to compound their illegitimate advantage by arguing that those in pre-trial detention may be tried in their absence, but that those who breached their summonses and promise to appear should escape with impunity. Second, it was clear that the fact of pre-trial detention made no material difference at the ICTR, beyond the assurance that the Court always knew where the detained accused persons were at all material times and that notice of their trial hearings would be conveyed to them without a doubt. The immateriality of the pre-trial detention in other respects was particularly engaged in the *Bagosora* case where prosecution counsel had clearly urged the Trial Chamber to order the ICTR security staff to bring the accused to the courtroom even against their will, as an incident of their arrest and detention for trial. But the Chamber declined to make such an order. The Chamber's refusal to make that order had the practical implication, for purposes of the trial, that the accused may as well have been at a private home in Arusha or Moshi, rather than at the UN Detention Facility, while the trial proceeded, as long as the notice of their trial could have been effectively communicated to them. If that was the case, it makes no difference in principle whether they were in New York or New Delhi, as long as notice of their trial could be reasonably communicated to them.

115. These TIA incidents in the *Nahimana* and the *Bagosora* trials resulted in the amendment of the ICTR Rules of Procedure and Evidence on 27 May 2003, by the addition of r 82*bis* providing as follows:

> If an accused refuses to appear before the Trial Chamber for trial, the Chamber may order that the trial proceed in the absence of the accused for so long as his refusal persists, provided that the Trial Chamber is satisfied that:
>
> (i) the accused has made his initial appearance under Rule 62;
>
> (ii) the Registrar has duly notified the accused that he is required to be present for trial;
>
> (iii) the interests of the accused are represented by counsel.

116. On 1 August 2007, a similar amendment was made to r 60 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, providing as follows:

> (A) An accused may not be tried in his absence, unless:
>
> i. the accused has made his initial appearance, has been afforded the right to appear at his own trial, but refuses so to do; or
>
> ii. the accused, having made his initial appearance, is at large and refuses to appear in court.

(B) In either case the accused may be represented by counsel of his choice, or as directed by a Judge or Trial Chamber. The matter may be permitted to proceed if the Judge or Trial Chamber is satisfied that the accused has, expressly or impliedly, waived his right to be present.

117. Notably, in the *Nahimana* case, the ICTR Appeals Chamber cited the SCSL r 60 with approval, observing that it 'sheds light on the ... international practice' in relation to TIAs.[158] The formulation of r 60 of the SCSL Rules properly outlines the desired distinction between TIA in general and TIA of absconding accused. In particular, it captures the essential element of distinction that the defendant whose TIA is contemplated is the defendant who has (a) made an initial appearance before the Court; (b) been afforded the right to appear at his own trial; and (c) but refuses to avail himself of that right. It also underscores the right to representation of the absconding accused, either by counsel of his own choice or by a court appointed counsel.

118. For completeness of inquiry, r 61 of the ICTY Rules may also be noted. It lays down a procedure involving evidential hearings before a Trial Chamber, including examination of witnesses for the prosecution, in the event that a warrant of arrest remains unexecuted after a reasonable time. At the end of the hearing, the Trial Chamber 'shall determine' that 'there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment,' if the Trial Chamber is satisfied that the evidence warrants that determination. The possible consequences of such a hearing include an order upon a State or States to 'adopt provisional measures to freeze the assets of the accused.' Upon casual glance, it is easy to think that this hearing is the equivalent of the indictment confirmation proceedings at the ICC, in which the Pre-Trial Chamber conducts a hearing for purposes of determining whether 'there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.'[159] But this is not the case, for the r 61 proceedings at the ICTY contemplate a hearing on an indictment that has already been confirmed. Little wonder then that some eminent commentators have insisted that '[d]espite persistent denials, it had many similarities with the *in absentia* procedure.'[160]

119. From the foregoing review, therefore, it is clear that modern international criminal law—beyond the processes of the STL—does not prohibit TIA. To the contrary, it has generally permitted it.

Whether TIA of Absconding Accused is Permissible under the Rome Statute as a Matter of General Principles of Law

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[158] See *Nahimana* et al *v Prosecutor (Judgment)*, *supra*, para 106.
[159] See article 61(7) of the Rome Statute.
[160] See Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, *supra*, p 752.

120. It has been reported that during the drafting of the Court's Statute, delegates were divided on the question whether TIA should be explicitly provided for under the ICC Statute. It is not clear whether the distinction had been considered between TIA in general (including of persons who were never served the indictment or arrest warrant) and the TIA of absconding accused who had put in initial appearance before the court (and had been duly served their indictment or arrest warrants), but were spared pre-trial detention by virtue of summons to appear or judicial interim release. It should not be unreasonable to imagine that discussions about TIA in the early days of drafting and negotiation of the ICC Statute may have troubled the delegates from the States who had no immediate intentions to subscribe to the jurisdiction of the proposed court; and that the need to create the court successfully would have impelled the delegates from the more favourable States to tread carefully on the matter. But such concerns are not at all engaged where the question of TIA concerns the cases of accused persons who are either citizens of States Parties or whose cases proceed from Security Council referrals, and who had appeared before the Court and been allowed their liberty as an incident of either summonses to appear or judicial interim releases.

121. Be that as it may, the division among the delegates, it seems, appeared generally along the line separating the Romano-Germanic system and the common law system. Delegates from the Romano-Germanic jurisdictions were generally supportive of TIA though not always exclusively so, while delegates from the common law system generally objected, on grounds that TIA was foreign to the common law legal tradition.[161]

122. Beyond the more chauvinistic reasons indicated by the common law delegates for their objection—which, as will be seen presently, are largely not supported in fact by the actual laws of their legal system—the more neutral arguments also do not travel far on the road of sustainability. An often cited argument of that kind was expressed as a fear that TIAs would result in the discrediting of the ICC as TIAs would degenerate into show trials.[162] All that is needed to expose the weakness of that argument is the fact that TIAs are generally permitted in many civil law jurisdictions; and, as will be seen later, they are also permitted in one form or another in the flagship common law countries like England and Wales, United States, Canada, Australia and New Zealand. If the criminal justice systems in these civil and common law jurisdictions have not been discredited for permitting TIAs as they do, it is difficult to see how it is that the ICC will be discredited for permitting the same measure when accused persons abscond.

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[161] *Ibid*, p 754; see also Friman, *supra*, p 256.
[162] See Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, *supra*, p 754.

123. Another argument that some delegates made is that TIAs are 'of little practical value given the right … of an accused convicted in his or her absence to demand subsequently a *de novo* trial upon appearance before the Court, as is the case in most Romano-Germanic codes.'[163] Put that way, the argument is necessarily incomplete, and, hence, does not meet its purpose. This is in the sense that any right—to the extent that it exists—to 'demand' a *de novo* trial subsequently does not inevitably compel that result. As is clearly illustrated in the *Demebukov* case reviewed above, the jurisprudence of the ECtHR does not recognise any right as such to a *de novo* trial upon the reappearance of an absconded defendant, as an inevitable consequence of the conduct of a TIA. Specifically, a trial *de novo* is not required where there is convincing proof that the defendant deliberately absconded after he had received a clear and unequivocal notice of the case against him and of the date for his trial. A *de novo* trial is required only when a TIA proceeded without such a convincing proof of notice.

124. It is also not to be supposed that a TIA that results in a conviction is a wasted process, if the resulting sentence (typically prison term) is not actually enforced against the fugitive from justice. For, such will be a very short-sighted view of the legal disabilities and social incommodities that attend a criminal conviction from a legitimate legal process, beyond imprisonment. The consequences are many beyond the following: loss of civic rights and privileges in one's own country (including the right to vote and be voted for), denial of travel and immigration privileges in foreign countries, adverse consequences on economic rights and privileges, loss of membership in honourable professions. And, for many, the mere stigma of criminal conviction is sufficient to deny the convict admittance to respectable society.

125. But the fact that the delegates had failed to reach agreement on an express provision authorising it in the Statute, while not expressly forbidding it, does not foreclose the matter definitively. The Statute was adopted in its terms, including in the words of its raison *d'être* and aspirations as expressed in the preamble and the right to reparation for victims (through the processes of the Court) provided for in article 75. Perhaps, more significantly for present purposes, the terms of the Statute also include the provisions of article 21 that require the Court to apply principles of international law, in the manner of treaties and custom or general principles of international law recognised by the major systems of the world—provided those are not inconsistent with the express language of the Statute or that general principles derived from national law are not inconsistent with international law in other respects.

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[163] *Ibid.*

126. Indeed, there may be a temptation to assert the proposition that a given international legal norm may not be given effect in the province of a particular treaty, as a later process of its construction, if the delegates who negotiated the terms of that treaty had failed to reach agreement on the express inclusion or exclusion of that norm. Even such a proposition is highly questionable, as it excludes the application of general principles of international law from the realms of a treaty that is, on its face, apparently silent on the matter. The proposition would amount to a blatant neglect of the implications of article 31(3)(c) of the Vienna Convention on the Law of Treaties, which requires that in addition to the context of a treaty, 'any relevant rules of international law applicable in the relations between the parties' shall also be taken into account in the interpretation of a treaty. The dubiety of the proposition that would exclude a relevant rule of international law where a particular treaty is apparently silent as to such a rule is even further compounded in the light of the *Oil Platforms* merits judgment. On the authority of article 31(3)(c) of the Vienna Convention, the ICJ insisted on the application of relevant principles of general international law that apparently limited the effect of the ordinary meaning of the terms of a treaty that expressly allowed a specific right to the parties,[164] thus requiring parties to conform their actions to the general principles of international law.

127. In relation to the Rome Statute, the application of relevant rules of general international law, in the face of failure of the negotiating delegates to agree to an express provision as to that rule, is even less debatable in the light of article 21(1)(b) and (c) that apparently *require* the Court to apply relevant principles of general international law (even in the directory sense!), including general principles of law derived from national laws to the extent that those are not inconsistent with the Rome Statute or international legal norms. It would thus require express language of the Rome Statute—not merely a failure to agree to the inclusion of a particular norm—to remove general international law from consideration and application: so, too, general principles of law derived from national laws that are not inconsistent with the Rome Statute or international legal norms.

Civil Law Systems

128. As indicated, TIAs are generally accepted in the criminal procedures of continental European jurisdictions.[165] A sampling of the case law of the European Court of Human Rights

[164] *Case concerning Oil Platforms (Iran v United States) (Judgment)* (2003) ICJ Reports 161, paras 41—45.
[165] See Report of the Secretary-General on the establishment of a special tribunal for Lebanon,' *supra*, para 32. See also Professor William Schabas's commentary in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, 2nd edn [Munich: C H Beck, 2008] p 1191.

readily shows this. France is generally recognised as the representative jurisdiction in this regard.[166] In Italy[167] and Switzerland,[168] criminal trials may also be conducted in the absence of the accused.

Common Law Systems

Default Proceedings in Civil Litigation

129. As noted above, France is a leading example of civil law jurisdictions that permit TIAs. There is some significance in the fact that, in France, the judgment of the court handed down following a TIA is called a '*jugement par défaut*'—translated into English as 'judgment in default'.[169] It may be significant then to examine the feature of TIAs in common law jurisdictions by considering that the notion of 'judgment in default' is also a standard feature of civil litigation in common law countries. It follows a procedure equivalent to TIAs in criminal cases in France. That is to say, where a defendant in a civil case absents himself from a trial, a judge may hand down a judgement in default, if satisfied that the defendant had defaulted in entering a defence following the service of the plaintiff's claim. The question that remains is whether there is an equivalent discretion for common law judges to try criminal cases in the absence of the accused. The answer is yes. But, before passing on to the modern dispensation, it may be instructive to trace a bit of history. The historical review appropriately situates the discussion in the context of legal developments—ancient and modern—in England and Wales, which is, by other circumstances of history, the flagship jurisdiction of the common law system.

TIAs in Criminal Cases

130. Not only would any claim that TIA is an alien notion to the common law be incorrect as a matter of modern practice in many common law jurisdictions; but also, a close look at the history of common law contradicts the claim. We will examine modern practice, of course, but it is logical to begin with history.

TIA and the History of Common Law

131. It is certainly possible to trace this history back to the days of trial by ordeal.[170] The merits of a case were determined by procedures such as requiring the hands of the accused to hold onto hot iron or burning coal or be submerged in hot water for a minimum period of time, or subjecting him to a sword fight. If criminal trials were necessarily by ordeal at the end of which judgment was

[166] See *Poitrimol v France*, *supra*; *Krombach v France*, *supra*.
[167] See *Sejdovic v Italy*, *supra*; *Somogyi v Italy*, *supra*; *Colozza v Italy*, *supra*.
[168] *Medenica v Switzerland*, *supra*.
[169] See *R v Governor of Brixton Prison & Ors*, ex p *Caborn-Waterfield*, [1960] 2 QB 498 pp 510—511.
[170] See James Starkey, *Trial* In Absentia, (1979) 53 *St John's Law Review* 721.

pronounced, one could readily imagine the immense difficulty that confronted the prospect of immersing an absent hand into hot water (or a similar procedure) or to do battle with an accused that was nowhere to be found. This affords a serviceable explanation[171] for the observations in commentaries on early common law that from *time immemorial* trials were never conducted against absent defendants.[172]

132. With the demise of trials by ordeal and its replacement by trials by judicial fact-finding through the adversarial process, also came questions of what courts of law should do when accused persons absconded. Regarding that period in the history of the common law, Pollock and Maitland notably reviewed, 'the various processes which the law employ[ed] in order to compel men to come before its courts. They var[ied] in stringency from the polite summons to the decree of outlawry.'[173]

133. I will briefly consider outlawry. H Erle Richards described it as 'one of the oldest weapons of the Common Law.'[174] Pollock and Maitland described it as 'the law's ultimate weapon.'[175] It was employed against persons 'accused of felony either by appeal or by indictment.'[176] 'An appeal was a proceeding which was normally commenced in the county court without any writ. If the appellee did not appear, the ceremony of "exacting" or "interrogating" him was performed in four successive county courts: that is to say, a proclamation was made bidding him "come in to the king's peace," and if he came not, then the dread sentence was pronounced. Then again, if any one was indicted before the king's justices and was not forthcoming, *they would make inquisition as to his guilt* and, being assured of this, would direct that he should be exacted and outlawed in the county court. In either case he might, it will be seen, remain contumacious for some five months without being put outside the peace. Outlawry was still a grave matter. It involved, not merely escheat and forfeiture, but a sentence of death. If the outlaw was captured and brought before the justices, they would send him to the gallows so soon as the mere fact of outlawry was proved.'[177] Plunkett wrote that '[a]nyone could capture him and kill him if he resisted.'[178] H Erle Richards put the proposition

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[171] *Ibid*, p 722.
[172] See W S Holdsworth, *A History of English Law*, 3rd edn [London: Metheun & Co, 1923] p 105.
[173] Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, 2nd edn, [Cambridge: Cambridge University Press, 1898], vol II, p 578. See also *Encyclopædia Britannica* available at http://www.britannica.com/EBchecked/topic/435613/outlawry.
[174] H Erle Richards, 'Is Outlawry Obsolete?' (1902)18 *Law Quarterly Review* 297 at p 298.
[175] Pollock and Maitland, *supra*, p 580.
[176] *Ibid*, pp 580—581.
[177] *Ibid*, p 581 [emphasis added].
[178] Theodore Plunkett, *A Concise History of the Common Law*, 2nd edn [Rochester, NY: Lawyers Cooperative Publishing, 1936] p 382.

more forcefully in terms of 'the duty of every man to exterminate' the declared outlaw as if he were a rabid wolf.[179]

134. The process thus described suggests two fallacies to the claim that TIA is genetically foreign to the common law. For one thing, the very process of outlawry did truly involve the most extreme strain of trial *in absentia*. For, the absconding accused was subjected to a summary judicial process in his absence—including 'inquisition as to his guilt.' In the words of H Erle Richards: 'It was in substance a process by which punishment could be inflicted on criminals who fled from justice: their flight was regarded as an admission of guilt, and they were outlawed in their absence without trial.'[180] Richards must have meant 'without [regular] trial.' Blackstone wrote in terms of 'prosecut[ion] ... to outlawry,'[181] Pollock and Maitland wrote of a 'process',[182] and Stephen wrote that '[t]here were elaborate rules' involved;[183] at the end of which the 'judgment',[184] 'decree'[185] or 'sentence'[186] of outlawry was judicially pronounced. Blackstone consistently equated it to the death sentence as the two most extreme punishments known to common law.[187] According to Plunkett, 'The result of outlawry on criminal process is, in effect a conviction ...'.[188] H Erle Richards summed it up as follows:

> The effect of a judgment of outlawry was at first to put the outlawed person entirely beyond the protection of the law in every sense: he was said to have *caput lupinum,* in other words to be like a wolf, a hateful beast which it was the duty of every man to exterminate. It was no offence to kill an outlaw: indeed, in the strictest sense of the law, it appears rather to have been the duty of every man to do so.[189]

135. But, perhaps, more significantly for the point at hand, the institution of outlawry would have made it wholly unnecessary to waste precious time trying the fugitive from justice in his absence on the original charge. Indeed, Pollock and Maitland observed as much. According to them: 'The law seems to believe much more in outlawry than in arrest. When there is an appeal of felony in the county court ... we see no serious effort made to catch the absent appellee. The process of 'exacting'

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[179] Richards, *supra*, p 298.
[180] *Ibid.*
[181] William Blackstone, *Commentaries on the Laws of England* (in Four Books, in Two Volumes) (from the 19th London edition) [New York: W E Dean, 1848] vol II—bk III & IV, p 301.
[182] Pollock and Maitland, *supra*, pp 578 and 584. See also Richards, *supra*, p 298.
[183] James Fitzjames Stephen, *A History of the Criminal Law of England* [London: MacMillan & Co, 1883] vol 1, ch VIII, p 246.
[184] See Richards, *supra*, p 298. See also Blackstone, *supra*, p 305.
[185] Pollock and Maitland, *supra*, p 578.
[186] *Ibid*, p 581.
[187] Blackstone, *supra*, pp 305 and 308.
[188] Plunkett, *supra*, p 382.
[189] Richards, *supra*, p 298.

him begins. If the fear of outlawry will not bring him in, we despair.'[190] This history, thus described, effectively negates any claim that TIA was something unknown to the common law.

TIA and Modern Common Law

136. It has been observed that '[i]n civil proceedings outlawry was formally abolished in England in 1879. Under English law outlawry remained thereafter to be invoked only in criminal cases.'[191] In practice, however, outlawry together with its harsh consequences fell into desuetude as a method of ensuring the attendance of accused in court. But, the question remained whether an absconding accused left the criminal justice system with no other recourse than the adjournment of the trial and the issuance of a bench warrant to arrest the fugitive.

137. As will be presently seen, with the obsolescence of outlawry, modern common law jurisdictions have resorted to TIAs on the actual charges. One of the earliest recorded judicial opinions in the common law world on that question came in *R v Abrahams*, a decision rendered in 1895 by the Supreme Court of Victoria, Australia, sitting as a full court of appellate jurisdiction.[192] The case involved a jury trial in a misdemeanour case, during which the trial judge had permitted the accused to be absent from the courtroom during certain periods of the case, including during the jury verdict. Upon review, the judges of the review court held that the trial judge had a discretion to proceed with the trial in the absence of the defendant. But as part of his opinion, Williams J, went further than the specific question presented, expressing himself as follows on the question of absconding accused:

> To take an extreme case by way of illustration: suppose an accused person to be out on bail, to appear and take his trial for either a felony or misdemeanour, and that when his trial comes on he is found to have absconded. By so doing, I take it, the accused has clearly waived his right to be present, and the Crown might elect to go on with the trial in the prisoner's absence, but then the presiding judge has to exercise his discretionary power; if in such a case the accused was not represented by counsel in court, or even if he were so represented, his presence was necessary for the proper conduct of his defence by his counsel, the judge would, I apprehend, certainly exercise his discretion by postponing the trial. In short, it seems to me that the judge's discretion is very much at the root of the whole matter, subject to the accused's right, when he has not forfeited the right, does nothing to forfeit it, or does not waive it, to be present.[193]

138. It is important to emphasise that Williams J was clear—as were his two colleagues—that the discretion existed in the trial judge to decide whether or not to proceed with a TIA of an accused who had been absent. The difficult question for him was rather whether that discretion had been

[190] Pollock and Maitland, *supra*, pp 583—584.
[191] Richards, *supra*, p 297.
[192] *R v Abrahams*, *supra*, discussed in *R v Jones (No 2)*, *supra*, and *R v Howson*, (1982) 74 Cr App R 172, [CA England and Wales].
[193] *R v Abrahams, supra*, p 347.

properly exercised by the trial judge, taking into account the particular circumstances of the case. During the argument on the case, counsel had canvassed ancient textbooks on criminal law in the common law world, as there was no judicial precedent or statute on the point. And the ancient textbooks had been uniform in informing that the discretion existed in misdemeanour cases, while remaining silent on whether the discretion also existed in felony cases. This resulted in the only difference of opinion among Williams J and his colleagues. While his colleagues were not confident enough to extrapolate that principle to cover felony trials, Williams J had no such trouble. To him, there was no basis in principle to make a distinction between misdemeanour and felony trials: the discretion existed in both cases. According to Williams J, the only reason that the textbook authors had focused on misdemeanour cases was that during the period material to the textbook commentaries the question arose only in misdemeanour cases. That was for the simple reason that during that period, only misdemeanours were bailable offences: felonies were not so and a very large proportion of them were capital offences.[194] Hence, accused persons charged with felonies were never in a position to be absent from their trial.

139. Williams J's opinion has been relied upon by present day appellate courts in England in a line of authorities that consistently found that there is a discretion in trial judges to try accused persons who are absent from the courtroom, where the interests of justice require the case to proceed, as long as the discretion is exercised with extreme care.[195] We will examine those cases next.

140. In England, the principle more fully expressed *obiter* by Williams J in 1895 ('in order to give the profession whatever assistance [he could] upon this obscure and much-vexed question'[196]) were also apparently captured in the 1906 case of *R v Browne* and s 15 of the Magistrates' Courts Act (1952).[197] Referring to those authorities, the Divisional Court of England, in 1960, observed as follows in *R v Governor of Brixton Prison & Ors,* ex parte *Caborn-Waterfield*: 'It is … to be observed that in this country there are cases, admittedly most exceptional, in which a man accused of misdemeanour may be tried and sentenced in his absence …'. [198] The case was an application for habeas corpus concerning the extradition of Michael Caborn-Waterfied to France. He had been tried

[194] See, *ibid,* p 348.
[195] See, for instance, *R v Jones (No 2), supra*; *R v Howson, supra*; *R v Jones, Planter and Pengelly, supra*; and *R v Jones (Anthony), supra.*
[196] *R v Abrahams, supra*, p 348.
[197] *R v Browne* (1906) 70 JP 472 noted in *R v Governor of Brixton Prison & Ors*, ex p *Caborn-Waterfield, supra*, p 509.
[198] *R v Governor of Brixton Prison & Ors*, ex p *Caborn-Waterfield, supra*, p 509. Indeed, s 11(1) of the 1980 iteration of the Magistrates' Court Act provided as follows: 'Subject to the provisions of this Act, where at the time and place appointed for the trial or adjourned trial of an information the prosecutor appears but the accused does not, the court may proceed in his absence.'

and convicted in France in his absence, on a charge of theft of approximately 23 million francs and US $7,000.00. He had been duly notified of the case against him in France and the dates of his trial there, but he repeatedly failed to appear for his trial. Quite significantly, one of his defences to his extradition from England was that as the proceedings against him in France were conducted in his absence, they were 'contrary to English notions of substantial or natural justice.'[199] The Divisional Court rejected that argument, saying as follows:

> We are *completely satisfied* that the proceedings in France *in no way* offended against English views of substantial justice. The applicant was treated with complete fairness and, indeed, was shown every consideration by the French court; he was fully apprised of the very strong case he had to meet, and repeatedly given the fullest opportunity of meeting it. He elected not to do so and on three separate occasions, without any excuse, he failed to appear in person before the French court. Accordingly, it certainly does not lie in his mouth to complain that the case was dealt with in his absence.[200] [Emphasis added.]

141. In the 1972 case of *R v Jones (No 2)*,[201] the England Court of Appeal in a case that would have been characterised as a 'felony' in the old days, found that a trial judge had correctly exercised his discretion to continue the trial of a defendant who had absconded. In 1982, in *R v Howson*, a case involving involuntary absence of an accused from his trial due to genuine health conditions, the Court of Appeal ruled that the trial judge had wrongly exercised his discretion to proceed with the trial in the absence of the accused. It must be observed that the Court of Appeal did not question the existence of the discretion; it was rather that the discretion had been wrongly exercised. Notably, as part of the Court's reasoning, Lord Justice Griffiths observed that 'all the distinctions between felony and misdemeanour' were abolished in England by s 1 of the Criminal Law Act of 1967; and that on all matters on which a distinction had previously been made would thenceforth be governed by the law and practice applicable to misdemeanour. Hence, held the Court, 'In so far as our law recognises a discretion in a judge to continue a trial in the absence of an accused charged with a misdemeanour now since 1967, the same principle applies to all trials whether or not the crime would have been a felony under the old law.'[202] As indicated earlier, Williams J had made the point as far back as in 1895 in Australia in *R v Abrahams*.[203]

142. In 1991, the Court of Appeal of England and Wales, in *R v Jones, Planter and Pengelly*,[204] upheld the decision of a judge who conducted TIA of two absconded accused. The case involved TIA of two accused who had remained absent from their trial *de novo* from the date of its

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[199] *R v Governor of Brixton Prison & Ors*, ex p *Caborn-Waterfield*, *supra*, p 502.
[200] *Ibid*, pp 508—509.
[201] *R v Jones (No 2)*, *supra*.
[202] *R v Howson*, *supra*, p 178.
[203] *R v Abrahams*, *supra*, p 346.
[204] *R v Jones, Planter and Pengelly*, *supra*.

commencement to the end. There were three accused in a joint trial on charges of robbery, assault with intent, assault occasioning actual bodily harm, kidnapping and blackmail. Partway into their first trial—after the case of the Prosecution and the first defendant had concluded—two of the accused 'deemed it prudent, for reasons best known to them, to absent themselves without trace, rather than to continue with their defence at the trial.'[205] The judge thereupon discontinued the trial and discharged the jury. Two weeks later, the case was relisted for trial before another judge. Still, the two absconded accused remained at large. The judge decided that the fresh trial should proceed in respect of the one accused present and the two who had absconded. All three were convicted at the end of the trial. Lord Lane CJ, writing for the Court of Appeal, noted in passing that it was 'perhaps unfortunate' that the first judge did not 'continue with [the first] trial in the absence of those two men.'[206] But the judge in the fresh trial had exercised his discretion correctly in proceeding and completing the fresh trial in their absence throughout. In the course of the Court's reasoning, Lord Lane noted a statement of law expressed as follows: 'Obviously the power to continue a trial in the absence of the accused would be used sparingly and only when this would not prejudice the defence.' To that, Lord Lane responded as follows: 'That, as one would expect, ... is an impeccable statement of the law, but it is difficult to think that those who formulated that paragraph had in mind a case such as the present where the question arose because the prisoner concerned had deliberately jumped his bail.'[207] In the end, the Court held that it was 'quite plain in principle' that there is 'a discretion in the judge to order a trial to continue or indeed to start in these circumstances' not only where a person 'voluntary absents himself' (such as by absconding from his trial) but also 'where he has involuntarily been absent' (such as being removed from the courtroom as a result of disruptive behaviour).[208]

143. In a short commentary on the case, Professor Smith observed, among other things, as follows: 'There is a difference between the case of a defendant who deliberately absents himself and one who is involuntarily absent. In the former case there is in effect a waiver of his right to be present. In the latter case the right to be present is qualified by the discretion of the judge to allow the case to proceed in the defendant's absence.'[209]

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[205] *Ibid*, p 1 of the Lexis-Nexis print-off version of the report.
[206] *Ibid.*
[207] *Ibid*, pp 3—4.
[208] *Ibid*, pp 4—5.
[209] (1991) Crim LR 1991, Nov, 856—857.

144. In 1997, in *R v Donnelly and Donnelly*,[210] the Court of Appeal once more ruled that a trial judge had the discretion to proceed with the trial in the absence of absconded accused.

145. And finally, in 2001, *R v Jones (Anthony)* afforded the occasion to definitively confirm, consolidate and crystallise this line of jurisprudence—along with any remaining gap that was filled in. There, the Court of Appeal succinctly stated the operative point of law in the following way: 'We see no necessity for a defendant who is bailed to be expressly warned that, if he absconds, he may be tried in his absence, *for that has been the English common law for over a century.*'[211] [Emphasis added.] The Court of Appeal made clear that a trial judge had discretion to try an absconding accused. The existence of that discretion was not open to dispute. And, to their credit, defence counsel no longer disputed the existence of the discretion. The only question for dispute rather would be whether the discretion had been correctly exercised in the particular case. It is to be recalled that this was precisely Williams J's point in *R v Abrahams* over a century earlier. At the Court of Appeal, the appeal of Anthony Jones had been considered together with the appeals in the cases of *John Hayward* and *Paul Purvis*. In all three cases, the appellants had jumped their bail and remained at large from the beginning to the end of their respective trials which were all separate. In their disposition of the appeals, the Court of Appeal dismissed the challenge to the trial judges' exercise of the TIA discretion in the *Jones* and the *Purvis* cases. The Court found that the discretion had been correctly exercised in both cases and that their convictions were good. But, the Court quashed the conviction in the *Hayward* case, reasoning that at no time did the trial judge consider the question whether it was appropriate to exercise the TIA discretion in the specific circumstances of that case.

146. Upon Anthony Jone's further appeal to the House of Lords, the Court of Appeal certified the question for determination as: 'Can the Crown Court conduct a trial in the absence, from its commencement, of the defendant?' In their 2002 judgment in *R v Jones (Anthony)*,[212] the House of Lords, with all five law lords concurring separately, unequivocally answered 'yes' to that question.

147. In a comparative reference to s 92(1) of Scotland's Criminal Procedure Act of 1995 which had completely foreclosed TIAs in Scotland, Lord Bingham of Cornhill pointedly declared the position in the common law of England and Wales as follows: 'The law of England and Wales, while conferring a right and imposing an obligation on the defendant to be present at a trial on

[210] *R v Donnelly and Donnelly* [CA England and Wales], unreported, 12 June 1997, cited in *R v Jones (Anthony)*, *supra*, para 7.
[211] *R v Hayward & Ors*, *supra*, para 23.
[212] *R v Jones (Anthony)*, *supra*.

indictment, has never been held to include any comparable rule. If a criminal defendant of full age and sound mind, with full knowledge of a forthcoming trial, voluntarily absents himself, there is no reason in principle why his decision to violate his obligation to appear and not to exercise his right to appear should have the automatic effect of suspending the criminal proceedings against him until such time, if ever, as he chooses to surrender himself or is apprehended.'[213]

148. That framing of the appellate question in *R v Jones (Anthony)* and its answer by the House of Lords, as addressing the existence of the TIA discretion even when the accused was absent from the commencement of the trial, are very significant—for reasons of the jurisprudence of the US Supreme Court. Rule 43 of the US Federal Rules of Criminal Procedure provides that an accused that absconds after the commencement of trial shall be deemed to have 'waived' the right to presence. That rule, it is to be noted, was an eventual regulatory codification[214] of the principle to that effect enunciated by the US Supreme Court in a 1912 decision, involving a defendant who had voluntarily absented himself from his trial, after it had commenced.[215]

149. It is important to make clear here, that there was never an issue as to whether US law permitted trial judges the discretion to proceed with the trial in the absence of an absconding accused. The discretion was always acknowledged. The only controversy among senior American judges concerned, rather, the limits of that discretion, relative to the wording of r 43 of the Federal Rules of Criminal Procedure that had been perceived as permitting the discretion only after the trial had commenced in the presence of the accused. The contrasting stream of judicial precedents started in the 1972, with the judgment of the US Federal Appeals Court for the Second Circuit in *United States v Tortora*, in which the Court held that the TIA discretion operated equally in respect of an absconding accused who was absent at the commencement of his trial as it did in the case of the defendant who absconded only part way through the trial.[216] The US Supreme Court denied leave to appeal.[217] The US Supreme Court also denied leave to appeal the decision of the Arizona Supreme Court in *Tacon v Arizona*.[218] The case concerned the TIA of a former US soldier who had been indicted in Arizona state courts on charges of sale of marijuana while duty stationed in Arizona. While on bail, he was discharged from the Army and he returned to New York. His trial date was set and his lawyers informed him of the date. But he claimed to have no money to travel back to Arizona for the commencement of his trial. The trial was conducted in his absence, at the

[213] *Ibid*, para 10.
[214] See *Crosby v United States*, 506 US 255 (1993) [US Supreme Court], pp 259—260.
[215] *Diaz v United States*, *supra*.
[216] *United States v Tortora*, 464 F 2d 1202 (1972) [US Court of Appeals, 2nd Cir].
[217] See *Santoro v United States*, 409 US 1063 (1972) [US Supreme Court].
[218] *Tacon v Arizona*, 410 US 351 (1973) [US Supreme Court].

end of which he was convicted. He reappeared at his sentencing, apparently having found the funds to travel. The Supreme Court of Arizona refused to quash his conviction. Although the US Supreme Court had initially granted leave to appeal; they later, by majority, dismissed the leave to appeal. The majority reasoned that leave had been 'improvidently granted' to litigate broader arguments of policy (concerning questions as to constitutional limits on the States' authority to try *in absentia* a person who has voluntarily left the State and is unable, for financial reasons, to return to that State) that had not been raised in the courts below. According to them, the 'only related issue actually raised below was whether petitioner's conduct amounted to a knowing and intelligent waiver of his right to be present at trial.' In the view of the majority, that was 'primarily a factual issue' which did not, by itself, justify the grant of leave to appeal.

150. In 1975, in *Government of Virgin Islands v Brown*, the US Federal Court of Appeal for the Third Circuit also held that the TIA discretion may be exercised to commence a trial of absconding accused who had voluntarily absented himself at its commencement. The Court famously declared that, for purposes of the TIA discretion, they did 'not perceive any talismanic properties which differentiate the commencement of a trial from later stages'.[219] Also in 1975, the US Federal Court of Appeal for the Fourth Circuit held in *United States v Peterson et al.* that the TIA discretion covered trial of absconding accused who remained voluntarily absent at the commencement of his trial and remained so throughout. According to the Court:

> The very purpose of the exception embodied in [r 43(b) of the US Federal Rules of Criminal Procedure] is to prevent an accused from defying with impunity "the processes of that law, ... [paralyzing] the proceedings of courts and juries and ... [turning] them into a solemn farce." To permit a defendant, free on bail, to obstruct the course of justice by absconding without a compelling reason, after having received actual notice of the time and place of trial, is as inconsistent with the purposes of the rule as to permit a defendant to abscond after the trial has commenced. We therefore hold that a defendant may waive his right to be present at the commencement of his trial just as effectively as he can waive his right to be present at later stages of the proceedings.[220]

151. Once more, the US Supreme Court denied leave to appeal.[221] In 1976, the First Division of the Court of Appeal for the State of Washington also held, in *State of Washington v Labelle*, that the TIA discretion existed from commencement of trial, where an accused voluntarily absented himself, although he was fully aware of the date set for trial, but chose to be absent.[222] The exercise of the discretion in those circumstances, the Court held, 'will not be a material departure from the spirit of the right, for the protection afforded the accused in the right to confrontation need not be adhered to

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[219] *Government of Virgin Islands v Brown, supra.*
[220] *United States v Peterson* et al, 524 F 2d 167 (1975) [US Court of Appeals, 4th Cir], p 184.
[221] See *Peterson v United States*, 423 US 1088 (1976) [US Supreme Court].
[222] *State v LaBelle*, 568 P 2d 808 (1977) [Washington State, Court of Appeals, 1st Div].

blindly regardless of the cost to society. … One cannot indiscriminately obstruct the course of justice and then rely on constitutional safeguards to shield him from the legitimate consequences of his own wrongful act.'[223]

152. Other notable appellate judgments to the same effect include *State v Goldsmith*,[224] *United States v Powell*,[225] and *People v Sanchez*.[226] In *Sanchez*, the Court of Appeal for New York determined that '[t]here is no significant difference between the misconduct of a defendant who deliberately leaves the courtroom shortly after the trial begins and that of a defendant who does so after he has been told that the trial is about to begin. In either case, his conduct unambiguously indicates a defiance of the processes of law and it disrupts the trial after all parties are assembled and ready to proceed.'[227]

153. In the result, for over 20 years, the Supreme Court permitted jurisprudential strength to the *Tortora* and *Brown* precedents that, on grounds that there was 'no talismanic properties that differentiated' absence from the commencement of the trial from absence afterwards, TIA could proceed against an absconding accused who failed to be present at the commencement of his trial, if it was established to the court's satisfaction that he was aware of the trial date and if it was reasonably considered that the interest of justice required the trial to proceed.

154. In 1993, however, the Supreme Court had occasion to reconsider the matter in *Crosby v United States*.[228] The US Court of Appeals for the Eight Circuit had followed the *Tortora* and *Brown* line of cases in finding that a federal district court judge had correctly exercised a discretion to proceed with a trial in which an absconding accused had been absent at the commencement. Justice Blackmun, writing for the US Supreme Court reversed the Court of Appeal; insisting that literal effect must be given to the actual text of r 43(b) of the Federal Rules of Criminal Procedure in the sense that the provision must be taken to 'mean what it says'. This impulse from the Court is not at all surprising, given that it had reiterated less than just a year earlier that when interpreting a legal text, 'courts must presume that a legislature says in a statute what it means and means in a statute what it says there.'[229]

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[223] *Ibid*, p 398.
[224] *State v Goldsmith*, 542 P 2d 1098 (1975) [Arizona Supreme Court].
[225] *United States v Powell*, 611 F 2d 41 (1979) [US Court of Appeal, 4th Cir].
[226] *People v Sanchez*, 65 NY 2d 436 (1985) [New York, Court of Appeals].
[227] *Ibid*, p 444.
[228] *Crosby v United States*, *supra*.
[229] *Connecticut Nat'l Bank v Germain*, 503 US 249 (1992) [US Supreme Court], pp 254—254.

155. For purposes of this discussion, it may be important then to recall the exact text of r 43 (as it existed then[230]) that was being considered in that judgment. In the relevant part, it provided as follows:

> (a) *Presence Required.* The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
>
> (b) *Continued Presence Not Required.* The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,
>
> (1) is voluntarily absent after the trial has commenced ... .[231]

156. In the end, the Court held that the 'language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial in absentia of a defendant who is not present at the beginning of trial.'[232] *En route* to that pronouncement, the Court attempted to negotiate around the obstacle of the waxing dictum that 'there are no "talismanic properties which differentiate the commencement of a trial from later stages"...'.[233] Although the Justices considered that the dictum 'may be true', they did 'not find the distinction between pre-and midtrial flight so farfetched as to convince [them] that Rule 43 cannot mean what it says.'[234] It is important to set out below in full the Court's effort in articulating its understanding of that distinction and its implications:

> As a general matter, the costs of suspending a proceeding already under way will be greater than the cost of postponing a trial not yet begun. If a clear line is to be drawn marking the point at which the costs of delay are likely to outweigh the interests of the defendant and society in having the defendant present, the commencement of trial is at least a plausible place at which to draw that line. ...
>
> There are additional practical reasons for distinguishing between flight before and flight during a trial. As did *Diaz*, the Rule treats midtrial flight as a knowing and voluntary waiver of the right to be present. Whether or not the right constitutionally may be waived in other circumstances—and we express no opinion here on that subject—the defendant's initial presence serves to assure that any waiver is indeed knowing. "Since the notion that trial may be commenced in absentia still seems to shock most lawyers, it would hardly seem appropriate to impute knowledge that this will occur to their clients." ... It is unlikely, on the other hand, "'that a defendant who flees from a courtroom in the midst of a trial—where judge, jury, witnesses and lawyers are present and ready to continue—would not know that as a consequence the trial could continue in his absence.'" ... Moreover, a rule that allows an ongoing trial to continue when a defendant disappears deprives the defendant of the option of gambling on an acquittal knowing that he can terminate the trial if it seems that the verdict will go against him—an option that might otherwise appear preferable to the costly, perhaps unnecessary, path of becoming a fugitive from the outset.[235]

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[230] The text of the provision has undergone several stylistic revisions since the *Crosby* decision.
[231] The text is quoted in *Crosby v United States*, *supra*, p 258.
[232] *Ibid*, p 262.
[233] *Ibid*, p 261.
[234] *Ibid*.
[235] *Ibid*, pp 261—262.

157. It may be pointed out with respect, that the foregoing reasoning reveals an apparent absence of any principle of common law that warranted the distinction suggested as encumbering the *discretion* of a trial judge to proceed with a TIA of an absconding accused who knowingly absented himself without proper cause at the commencement of his trial. A starting point for such a principle might have been the Supreme Court's reconciliation of their *Crosby* judgment with the basic mischief that the same Supreme Court ruled earlier in *Allen* that trial courts 'must guard against.' In *Allen* the Supreme Court had been confronted with the prospect of a defendant disrupting proceedings in a manner that leaves a contempt of court order powerless to resolve, thus leaving the trial judge no other choice but to remove the defendant and proceed with a TIA. In its reasoning, as we saw earlier, the Supreme Court noted that such disruptive behaviour might conceivably be a 'calculated strategy' to arrest the proceedings while the defendant remained in jail for 'a prolonged period of time' pursuant to a contempt of court order, 'in the hope that adverse witnesses might be unavailable after a lapse of time.' As a counter strategy, the Supreme Court enjoined that trial courts 'must guard against allowing a defendant to profit from his own wrong in this way.'[236] If the mischief that must be guarded against is a 'calculated strategy' to arrest the proceedings in the hope of attrition of adverse witnesses and evidence after a lapse of time, a calculated strategy which may also take the form of absconding at the commencement of the case and staying away for 'a prolonged period of time,' it becomes difficult to see how the court is to guard against that mischief under the regime of *Crosby.*

158. Indeed, there has been criticism that the view of r 43 that was given judicial *imprimatur* in *Crosby* had not resulted from principles of common law: it resulted because the *ratio decidendi* in *Diaz* and *Falk*—the two cases that 'largely if not exclusively' furnished the language of r 43—had been inadvertently calcified into a general principle of law.[237] In *Falk*, the accused who had jumped bail after their trials had commenced. The US Court of Appeals for DC rejected the argument that the TIA conducted after absconding vitiated the proceedings. In *Diaz* the accused had in fact voluntarily absented himself from parts of the proceedings but had written to the court to continue in his absence. After his conviction, he attacked the process by arguing that although his conduct may have amounted to waiver, there was in law no waiver since the right to presence was a right that could not be waived. The Supreme Court rejected the argument.

159. It is therefore questionable that those facts should forever control the general principles of common law regarding a trial judge's TIA discretion. I find merit in this criticism, particularly

[236] *Illinois v Allen*, *supra*, p 345.
[237] See Starkey, *supra*, p 726.

given the circumstances through which the r 43 regime resulted. It is to be noted that r 43 was largely a regime ordained by the US Supreme Court itself, directly traced to the judgment of the Court in *Diaz*. The creation of that regime remains judge-made law, considering that the promulgation of the rules of procedure for the US federal courts is also largely a mandate of the US Supreme Court under the Rules Enabling Act,[238] although the Court is required to transmit new rules (or their revisions) to Congress before the Rules go into effect.[239] The question then arises as to the desirability of etching in stone for all purposes a view of the law once articulated by the Court as appropriate to dispose of a particular case before it in view of its own facts, without a clear articulation of any legal principle that compels non-deviation in subsequent cases with different facts. It should also be within the powers of the Supreme Court to signal a need to reconsider the text of r 43 if need be for purposes of accommodating clearly considered principled reasons to guard against the mischief that the Supreme Court had noted in *Allen*. A compelling reasoning in this connection is the dictum of the US Federal Court of Appeal for the Fourth Circuit in its judgment in *Peterson*, urging that r 43 be construed in a manner that is consistent with the 'evolving meanings and purposes of the common law.'[240] It may be useful to note how the purposes of the common law were articulated in *Falk*. It was stated as follows:

> It does not seem to us to be consonant with the dictates of common sense that an accused person, being at large upon bail, should be at liberty, whenever he pleased, to withdraw himself from the courts of his country and to break up a trial already commenced. The practical result of such a proposition, if allowed to be law, would be to prevent any trial whatever until the accused person himself should be pleased to permit it. For by the statute ... he is entitled as a matter of right to be enlarged upon bail "in all criminal cases where the offense is not punishable by death;" and, therefore, in all such cases he may be absconding prevent a trial. This would be a travesty of justice which could not be tolerated; and it is not required or justified by any regard for the right of personal liberty. On the contrary, the inevitable result would be to abridge the right of personal liberty by abridging or restricting the right now granted by the statute to be abroad on bail until the verdict is rendered. And this the counsel for the appellant appear candidly to admit. But we do not think that any rule of law or constitutional principle leads us to any conclusion that would be so disastrous as well to the administration of justice as to the true interests of civil liberty.[241]

160. Undoubtedly, those purposes are just as valid in cases of absconding after commencement of trial, as are they in cases of absconding before. That possibly explains the reason that the American Law Institute did not make the TIA discretion in respect of absconding accused dependent on the distinction that the Supreme Court eventually ordained in *Crosby*. In §287 of the ALI Model Code of Criminal Procedure (1930), the TIA discretion is provided in the following way:

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[238] 28 USC § 2072

[239] The order of the Supreme Court adopting the rules are promulgated before 1 May, to take effect no earlier than 1 December of the same year unless Congress enacts legislation to reject, modify, or defer the pending rules. See www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works.aspx.

[240] *United States v Peterson*, *supra*, p 184.

[241] *Falk v United States*, *supra*, pp 454—455.

Presence of defendant under prosecution for felony. In a prosecution for a felony the defendant shall be present:—

(a) At arraignment

(b) When a plea of guilty is made

(c) At the calling, examination, challenging, impanelling and swearing of the jury

(d) At all proceedings before the court when the jury is present

(e) When evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury

(f) At a view by the jury

(g) At the rendition of the verdict.

If the defendant is voluntarily absent, the proceedings mentioned above except those in clauses (a) and (b) may be had in his absence if the court so orders.[242]

161. There are no words of limitation in that draft rule suggesting that the discretion was applicable only in instances where the accused absconded after the commencement of the trial. It must be significant that the American Law Institute did not make that distinction, considering that they were well aware that as of 1930 such a distinction had been made in the legislation of a number of states in the USA.[243] Similarly, the National Conference of Commissioners on Uniform State Laws [the NCCUSL] made no such distinction in r 713 of the Uniform Rules of Criminal Procedure (1987). Rule 713 of the URCrP provides as follows:

(a) *Right of Presence.* The defendant has a right to be present at every stage of the trial ... and at the sentencing hearing ...

(b) *Required Presence*. The defendant must be present at every stage of the trial and at the sentencing hearing, but if the defendant will be represented by a lawyer at the trial of hearing, the court may:

(1) excuse the defendant from being present at the trial or part thereof, or the sentencing hearing, if the defendant in open court understandingly and voluntarily waives the right to be present;

(2) direct that the trial or part thereof or sentencing hearing be conducted in the defendant's absence if the court determines that the defendant understandingly and voluntarily failed to be present after personally having been informed by the court of:

(i) the right to be present at the trial or hearing;

(ii) when the trial or hearing would commence; and

(iii) the authority of the court to direct that the trial or hearing be conducted in the defendant's

[242] See The American Law Institute, *Code of Criminal Procedure (Official Draft: June 15, 1930) with Commentaries* [Philadelphia: Executive Office, The American Law Institute, 1931] p 114. See also Starkey, *supra*, pp 726-727.
[243] See The American Law Institute, *supra*, p 880.

absence; or

> (3) direct that the trial or part thereof be conducted in the defendant's absence if the court justifiably excluded the defendant from the courtroom because of the defendant's disruptive conduct.

162. Indeed, r 713(b)(2)(ii) specifically contemplates that the TIA discretion exists to commence a trial when the accused is voluntarily absent. The URCrP in which that provision was contained was approved by the American Bar Association at its Meeting in Philadelphia on 9 February 1988. Again, it is important to note that the NCCUSL were well aware that many state laws dealt with the TIA dispensation only when the defendant absconded after the commencement of trial; yet, the NCCUSL did not make such a distinction in their draft model code.[244]

163. The confusion about the limits of the discretion implicated in r 43, the criticism continues, 'was subsequently compounded by various legal draftsmen who injected the same erroneous implication into rules and statutes meant to codify the case law.'[245]

164. Perhaps, the improbability of the distinction (between absconding before or after commencement of trial) is illustrated by the cases of *Taylor v United States*,[246] and *People v Sanchez*.[247] In *Taylor*, the Supreme Court held that the right to presence was waived when accused absconded during the lunch break after the morning session of the first day of trial, after only one witness for the prosecution (a police witness) had testified.[248] It sharply casts into relief the general criticism of the distinction as being 'anomalous' to hold that a defendant cannot waive his right to be present during the period of often routine proceedings that often occur at the commencement of a criminal case, 'but can waive that right during the time when witnesses against him are presenting crucial evidence.'[249] In *Sanchez*, the accused persons had actually come to the court house on the dates scheduled for their respective trials; but they absconded shortly before the trials were to commence. These starkly underscore the technicality of the view that discretion exists only after the commencement of trial.

165. It is possible, however, that the criticism of *Crosby* is even more fundamental. A proper appreciation of this criticism begins with the construction of r 43(a) when it said '[t]he defendant shall be present …'. Notably, the provision has since been revised to say '[t]he defendant must be

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[244] National Conference of Commissioners on Uniform State Laws, *Uniform Laws Annotated* [St Paul, Minn: West Publishing, 1974] p 315.
[245] See Starkey, *supra*, p 726.
[246] *Taylor v United States*, 414 US 17 (1973) [US Supreme Court].
[247] *People v Sanchez, supra.*
[248] See *US v Taylor*, 478 F 2d 689 (1973) [US Court of Appeals, 1st Cir].
[249] See *Virgin Islands v Brown*, *supra*, p 189. See also *R v Jones (Anthony)*, *supra*, para 30, *per* Lord Hutton.

present …'. The variation in language is largely immaterial as regards the fundamental question: Who bears the jural burden of those words given their plain meaning? Is it the accused or the court? That is to say, do the words require 'the defendant' to 'be present' for his trial or face some consequences of failing to be present? Or, do they require 'the court' to not proceed if defendant was not present? As indicated before (during the discussion on the meaning of article 63(1) of the Rome Statute), the principle that the language of instruments ought first to be given the plain meaning recommended by their actual text[250] indicates that it is the accused that bears burden of the words. For one thing, as a matter of apparent meaning, the plain text of the provision does not mention the court in the requirement that the defendant shall be present. And, as a matter of common sense, it would be awkward, at least, to suggest that the train is prevented from leaving the station at the appointed hour in the absence of the passenger, if the passenger's ticket stipulates that the 'the passenger shall [or must] be present' at the appointed hour. It must be considered that the train of trial in criminal cases carries not only the accused who is no doubt a very important passenger; it also carries the prosecution, the judges, the witnesses (who may come from far and wide, particularly in international criminal cases, and may have been inconveniently relocated), the community (who, in the context of the ICC, have resolved to protect humanity from gross atrocities and to prevent threats to international peace and security), and most importantly victims (whose rights have not only been violated as a direct incidence of the conduct under prosecution, but who, at the ICC, also deserve reparation for the wrongs they suffered). It is indeed an unfortunate conception of justice that should glibly cancel their train of justice with no prospect of a certain journey, simply because the accused had chosen to abscond at his own pleasure without legitimate reason.

166. But there are other reasons to worry that Justice Blackmun (and the colleagues who joined him) may have inadvertently overlooked the obvious language of the provision; while focusing on an implication that may not be accurate. This is because, upon a closer look, the *actual* language of r 43(b)—'what it [actually] says'—may not really, after all, stand in the way of the discretion of a trial judge to proceed with the trial of an absconding accused who absented himself at the beginning of his trial. Rather, the obstacle that the rule poses for the discretion of the trial court may be against stopping the proceedings when the accused absconds *after the trial has been commenced.* First, the rule 43(b) that the Court was construing in *Crosby* specifically provided that the 'further progress of the trial to and including the return of the verdict *shall not be prevented* and the defendant *shall be considered to have waived the right to be present* whenever a defendant, initially present, … is

[250] See Scalia and Garner, *supra*, p 56.

voluntarily absent after the trial has commenced. …' . [Emphases added.] This is a direct imposition on the court, as a matter of *obligation*, to (a) proceed with the trial, and (b) deem the accused to have waived the right to be present, if the accused voluntarily absents himself after the commencement of the trial. Indeed, the history of r 43(b) supports this interpretation in light of the relevant dictum in *Diaz* that inspired that rule, as well as in light of the facts of the case. As indicated earlier, the accused, who was initially present at the commencement of the trial, had voluntarily absented himself from parts of the trial during which two prosecution witnesses were examined and cross-examined. But he had accompanied his absence with a letter to the court, signalling his agreement that the proceedings could continue in his absence. But, after his conviction, he sought to impugn the proceedings. His argument was not that he had not in fact waived the right to presence; but that the right to presence could not be waived as a matter of law. As part of the reasoning rejecting the argument and finding waiver, the Supreme Court said as follows:

> But where the offense is not capital and the accused is not in custody, the prevailing rule has been that if, after the trial has begun in his presence, he voluntarily absents himself, this *does not* nullify what has been done or prevent the completion of the trial, but, on the contrary, *operates as a waiver* of his right to be present, and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.[251] [Emphasis added.]

167. Clearly, the dictum indicates certainty of outcomes, foreclosing any debates, in view of the emphasised phrases. That is to say, voluntary absence after commencement of trial when the accused had once been present 'does not nullify what has been done' and 'operates as a waiver'. The indicated regime neither invites nor entertains any further inquiry as regards the effectuation of waiver, as might have been the case if the pronouncement had been stated in terms of 'does not necessarily nullify what was done before' and 'may operate as a waiver.'

168. If what r 43(b) and *Diaz* indicate is a positive obligation—as it obviously is—that operates after the trial has commenced in the presence of the absconded accused, it does not necessarily operate as a negative obligation on the court displacing any discretion to consider whether, in specific cases, it will be in the interest of justice to proceed with the trial if the accused absconded before the commencement of the trial.

169. This construction would similarly serve s 475(1) of the Criminal Code of Canada which also expressly contemplates TIAs in the following words: 'Notwithstanding any other provision of this Act, where an accused, whether or not he is charged jointly with another, absconds during the

[251] *Diaz v United States*, *supra*, p 455.

course of his trial, (*a*) *he shall be deemed to have waived his right to be present* at his trial, and (*b*) the court may (i) continue the trial and proceed to a judgment or verdict and, if it finds the accused guilty, *impose a sentence* on him in his absence …'. That provision may not so readily be construed as preventing the discretion of a trial court to commence the TIA of an absconding accused. It is rather, first, an imposition on a court to deem a waiver against an accused who absconded in the course of the trial. Second, it is a power legislatively authorised to impose a sentence on him, if found guilty; considering that doubts have often been expressed regarding whether the TIA discretion also encompassed the power to impose a sentence upon an absconding accused tried in his absence. And, third, it expresses a uniquely Canadian feature of the TIA discretion—i.e. the consequences of absconding in the course of the trial also leaves the Court free to draw an adverse inference of consciousness of guilt. As s 475(2) provides: 'Where a court continues a trial pursuant to subsection (1), it may draw an inference adverse to the accused from the fact that he has absconded.' Hence, in addition to the obligatory waiver deeming provision, this provision of adverse inference is another particular feature that operates when the accused absconds 'during the course' of the trial. They are features of a TIA statutory regime that may not so easily apply for purposes of the common law discretion that the House of Lords found to exist in *R v Jones (Anthony)* that empowers common law judges to commence the TIA of an absconding accused. Obviously, the propriety of drawing an inference of consciousness of guilt as a consequence of absconding may take into account the point at which the accused absconded in the course of the trial. That the accused absconded after hearing particularly damning evidence or a strong case for the prosecution may make it more compelling to draw such an inference. But such an inference will be too harsh—and perhaps unreasonable—to draw in cases of TIA discretion exercised in cases where the accused absconded before the commencement of the trial, hence justifying the view that such inferences are limited to instances of absconding in the course of the trial.

170. Indeed, the construction of r 43 of the US FRCrP as imposing a deeming obligation on the trial judge when the accused absconded after the commencement of the trial is more powerfully supported by the arguments that the US Supreme Court employed in *Crosby* to justify the limitation that they perceived. In particular, the argument that 'the costs of suspending a proceeding already under way will be greater than the cost of postponing a trial not yet begun' explains why the trial court is being prevented—by the literal language of r 43—from stopping the proceedings. So, too, does the Supreme Court's argument that 'the Rule treats midtrial flight as a knowing and voluntary waiver of the right to be present'—hence removing any doubts whether the accused knew that his

trial would be or was taking place. Equally, a rule that requires an ongoing trial to continue when a defendant disappears 'deprives the defendant of the option of gambling on an acquittal' in hopes that a trial court may exercise a discretion 'to terminate the trial if it seems that the verdict will go against him'.

171. But a further reason to question the principled correctness of the *Crosby* interpretation arises from what the US appellate courts have viewed as the consequences of absconding in a manner that triggers the TIA discretion of the court. In *Taylor*, for instance, the US Supreme Court considered that an accused 'had a duty to be present at the trial.'[252] This raises the question as to the source of that duty. This takes us back to r 43(a). It is on its face clearly an obvious legal source of that duty upon the accused to be present, notwithstanding that such a duty may also (perfectly or imperfectly) have been expressed elsewhere in the corpus of law. In *Stack v Bole,* the Supreme Court held that bail conditions obligate accused to be present at the trial.[253] The trouble with concentrating on bail conditions as the only source of duty to be present is that it leaves an accused in pre-trial custody without an equivalent *legal* duty to be present, since there is no bail condition that operates to require him or her to be present at the trial. The 'duty' upon the accused in those circumstances will then reside only on the police officer(s) who must drag the unwilling accused to the courtroom. It is an unsatisfactory result that raises further questions as to the legal source of the judicial power to put the police officer(s) in such a position; in addition to the already awkward question whether it is legally correct to situate in police officer(s) alone a 'duty' that the law supposes on an accused. And, even as regards accused on bail the terms of which include the duty to be present at the trial, questions might arise as to the legal basis of the duty so imposed in the bail conditions. These reasons thus recommend a view of r 43(a) as a source of the duty on the accused to be present on a plain reading of its terms that the 'defendant shall be present …'. For purposes of symmetry, *Stack v Bole* would then be considered as the judicial source of the duty codified in r 43(a), in the same way that *Diaz* is considered to be the judicial source of r 43(b) which codifies the consequences of the breach of that duty.

[252] *Taylor v United States*, *supra*, p 20.
[253] *Stack v Bole,* 342 U S 1 (1952) [US Supreme Court] pp 4—5. See also *Taylor v United States*, *supra*, p 20.

172. As noted earlier, the view that r 43(a) 'imposes an obligation upon the defendant to be present at the trial', the sanction for breach of which is the exercise of the TIA discretion is supported by the National Conference of Commissioners on Uniform State Laws.[254]

173. Furthermore, it is noted that r 43(b) provided that 'the defendant shall be considered to have waived the right to be present whenever a defendant, initially present ... is voluntarily absent after the trial has commenced ...'. This feature of r 43 has triggered controversy as to whether what was meant to be imputed to the absconding accused is really 'waiver' or should it more accurately be regarded as a forfeiture. Some eminent commentators in US criminal procedure, including the National Conference of Commissioners on Uniform State Laws, have criticised views such as that as difficult to sustain against traditional waiver-of-rights theory.[255] Thus, 'it would seem preferable to view the matter in terms of *forfeiture* of a right *by misconduct.*'[256] Clearly, then, the misconduct that r 43(b) would have contemplated in order to attract forfeiture could only be the misconduct contemplated in r 43(a) that provided that the 'defendant shall be present ...'. Therein lays the obligation that *Black's Law Dictionary* considers as the essential element of forfeiture, when it defines the term to mean, as seen earlier: 'The loss of a right, a privilege, or property *because of a crime, breach of obligation, or neglect of duty.*' Upon careful consideration, this indeed is the effect of the scheme contemplated in the r 43 that the Court was interpreting in *Crosby.*

174. My purpose in this extended commentary is surely not to purport any superior authority on American law than Justice Blackmun and his colleagues at the Supreme Court who decided *Crosby.* The point rather is to add to the shroud of doubt about the correctness of the distinction that they ordained, with the view to demonstrating that judgment as unsuitable to influence legal thought at the ICC in that respect. The shroud of doubt had been most eminently cast by senior American judges of no less a stature as federal appeals court judges of different circuits, together with their colleagues in the courts of appeal for the states of New York, Washington and Arizona, who had decided against the position eventually accepted in *Crosby* without principled reasoning; as well as by the American Law Institute and the National Conference of Commissioners on Uniform State Laws who drafted model rules that did not make the distinction that the Court insisted upon in *Crosby.*

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[254] See National Conference of Commissioners on Uniform State Laws, *supra*, p 312. See also National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure (1987) ... *With Preparatory Note and Comments*, p 242.
[255] See National Conference of Commissioners on Uniform State Laws, *Uniform Rules of Criminal Procedure* (1974), *supra*, p 293. See also Wayne LaFave and Jerold Israel, *supra*, p 1013.
[256] LaFave and Israel, *supra*, p 1013. See also National Conference of Commissioners on Uniform State Laws, *Uniform Rules of Criminal Procedure* (1974), *supra*, p 293.

175. Perhaps, the last serious blow against the correctness of that distinction was delivered by the House of Lords in *R v Jones (Anthony)*, in clearly rejecting the view that the discretion of the trial judge to continue with the TIA of an absconding accused is limited by any distinction between absconding before commencement of trial and absconding later. The law lords appeared instead to favour the positions of US Federal Appellate Courts in *Tortora*, *Virgin Islands v Brown* and their progeny.[257] It was considered in *R v Jones (Anthony)* that reasons such as those employed by the Supreme Court in *Crosby* are not matters of principle, but practical considerations that the trial judge may properly weigh as factors in the exercise of discretion as to whether or not to commence or continue a trial. As Lord Bingham of Cornhill put the point:

> In turning to general principle, I find it hard to discern any principled distinction between continuing a trial in the absence, for whatever reason, of a defendant and beginning a trial which has not in law commenced. If, as is accepted, the court may properly exercise its discretion to permit the one, why should it not permit the other? It is of course true that if a trial has begun and run for some time, the inconvenience to witnesses of attending to testify again on a later occasion, and the waste of time and money, are likely to be greater if the trial is stopped than in the case of a trial that has never begun. But these are matters which, however relevant to the exercise of discretion, provide no ground for holding that a discretion exists in the one case and not in the other.[258]

176. The judgment of the House of Lords has now become the modern *locus classicus* on TIA discretion around the contemporary common law world. Recently, in *R v Gee*, the Supreme Court of South Australia sitting in full court as the Court of Criminal Appeal followed it, by a majority, in rendering an affirmative answer to the question: 'whether the common law of Australia allows for the trial of a defendant to commence and continue to verdict in their absence'.[259] In this regard, the majority reasoned as follows:

> For our part, we find the reasoning in the approach of the members of the House of Lords in *Jones (Anthony)* compelling. There appears to be no reason in principle for distinguishing between the circumstances of a defendant who is voluntarily absent before the trial, and a defendant who absconds during the course of a trial. Principle strongly supports the conclusion that a trial judge retains a general discretion to proceed with the trial in the absence of the defendant. However, that discretion should be exercised with caution.[260]

177. The majority further found that 'Australian authority appears to adopt and confirm the correctness of the observations of the House of Lords in *Jones (Anthony)*.'[261] In holding, accordingly, that the District Court judge had a discretion to commence the trial in the absence of the accused,[262] the majority of the Court ruled that, in the particular circumstances of the case, the

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[257] *R v Jones (Anthony)*, *supra*, paras 29 and 30, *per* Lord Hutton.
[258] *R v Jones (Anthony)*, *supra*, para 10.
[259] *R v Gee*, [2012] SASCFC 86 [Supreme Court of South Australia].
[260] *Ibid*, para 79.
[261] *Ibid*, para 82.
[262] *Ibid*, para 83.

District Court judge had wrongly exercised that discretion by declining to commence and continue the trial, in light of the reasons he gave for so declining.[263]

178. In New Zealand, *R v Jones (Anthony)* has been followed since its emergence in a string of cases in which trial was commenced in the absence of the accused.[264] Notably, however, the Law Commission of New Zealand has observed that *R v Jones (Anthony)* 'did not lead to a significant change' in New Zealand. It only gave New Zealand judges 'additional and useful guidance' in doing what they had been doing since the 1980s at least.[265]

179. Even in Scotland where s 92(1) of the Criminal Procedure (Scotland) Act 1995 had forbidden any part of the trial to be conducted *in absentia*—a position that the House of Lords noted and sharply contrasted in *R v Jones (Anthony)* as not reflecting the law in England and Wales[266]—there has been a clear, albeit incremental, movement in the direction of the principle articulated in *R v Jones (Anthony)*. Notably, in his '2002 Review of the Practices and Procedure of the High Court of Justiciary', appearing under the main title 'Improving Practice', Lord Bonomy recommended a total embrace of the *R v Jones (Anthony)* regime. According to him:

> When an accused absconds shortly before the trial, the disruption and uncertainty caused can be a source of great anxiety to victim witnesses. It should be open to the court to order the trial to proceed in the absence of the accused in appropriate cases. In many cases that would not be possible, because his presence in court may be necessary for purposes of identification. Where there are no problems of that kind, it may be appropriate to proceed to trial to avoid the risk that evidence will be lost or become degraded with the passage of time. For example, in child sex abuse cases the alleged abuser is often known to the victim, and his presence in court would be immaterial for identification purposes.[267]

180. In a White Paper following a broad consultation process carried out on Lord Bonomy's recommendation, the Scottish Government noted that there had been a strong reservation against the

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[263] *Ibid*, para 107.

[264] See *R v Paraku*, [2002] DCR 699; *R v Sthmer*, (17 June 2003) T064/01[New Zealand, High Court of Wellington]; *R v Williams*, (10 September 2004) CRI 2003-404-025445 [New Zealand, High Court of Auckland]; *R v McFall*, (7 April 2005) CRI 2004-019-20514 [New Zealand, High Court of Hamilton]; *R v Guo and Hui*, (22 February 2006) CRI 2004-004-18566 [New Zealand, High Court of Auckland]; and *R v Dunn*, (4 June 2008) CRI 2008-404-000076 [New Zealand, High Court of Auckland].

[265] According to the Law Commission: 'Since at least the mid-1980s, New Zealand courts have been willing to exercise their discretion to commence or continue a trial in an accused's absence. In that sense, while the House of Lords' decision in Jones provided the courts with additional and useful guidance, it did not lead to a significant change in the approach the courts were already beginning to take': Law Commission of New Zealand, 'Discussion Document: Proceeding in the Absence of the Defendant' (May 2009), para 28. Available at http://www.justice.govt.nz/courts/modernising-courts/documents/cpai-documents/cpai-consultation/Consultation-Proceeding-in-the-absence-of-the.pdf.

[266] See *R v Jones (Anthony)*, *supra*, para 10.

[267] Government of Scotland, *Improving Practice: 2002 Review of the Practices and Procedure of the High Court of Justiciary by the Hon Lord Bonomy* (2002) available at http://www.scotland.gov.uk/Publications/2002/12/15847/14150, para 11.20.

recommendation. Nevertheless, noting that the House of Lords' judgment in *R v Jones (Anthony)* has now resolved that question of law in England and Wales,[268] the Government signaled a willingness to move at least half-way in the direction of *R v Jones (Anthony)*:

> A possible option would be to legislate to enable the Court to allow a trial to proceed exceptionally in the absence of the accused where there was clear evidence that the accused was aware of the hearing date and had absconded and the Court was satisfied that the case could proceed without unfairness. The classic cases for such consideration would be those where there were several accused and one or other was apparently attempting to thwart the trial process, where the accused absconds after repeated adjournments at defence request or—perhaps the clearest of all—where an accused on bail absconds after evidence has been concluded. Such a power would probably be exercised very rarely by the Court, but it would act as a deterrent to accused who may be inclined to play—or take a chance with—the system.[269]

181. Indeed, in 2004, s 92(1) of the Criminal Procedure (Scotland) Act 1995 was amended,[270] to permit some TIA discretion in limited circumstances. A trial judge is now permitted to remove unduly disruptive accused from the courtroom. As well, a trial judge 'may ... proceed with the trial and dispose of the case in the absence of the accused', when the accused absconded after evidence has been led which substantially implicates the accused, and the court is satisfied that it is in the interests of justice to proceed with the case. In Scottish terms, even this is quantum improvement from the past position on the matter.

182. From the foregoing review, it is clear that the modern practice in common law jurisdictions does clearly recognize TIA discretion in respect of absconding accused. In a majority of the more dynamic common law jurisdictions, judges enjoy a clear discretion to commence and conclude the trial in the absence of the accused.

183. Given then that the TIA discretion is generally recognized under contemporary common law jurisdictions, as it is generally recognized in civil law jurisdictions, it is reasonable to conclude that the discretion has now formed part of international law, in terms of article 38(1)(c) of the Statute of the International Court of Justice, which is generally accepted as identifying the sources of international law.

Considerations of Complementarity

184. With the recognition of TIA by both international law and the principal domestic legal systems so clearly demonstrated, it should also be helpful to consider the matter from the angle of

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[268] Government of Scotland, *Modernising Justice in Scotland: Reform of the High Court of Justiciary* (2003) available at http://www.scotland.gov.uk/Publications/2003/06/17498/22823, para 133.
[269] *Ibid*, para 134.
[270] See Criminal Procedure (Amendment) (Scotland) Act, 2004.

complementarity. This consideration is necessarily inspired by the general acceptation that the system of the Rome Statute is no legal integer. It is part of a larger entity. The larger entity is the international legal system or domestic legal systems or both.

185. The doctrine of complementarity of the Court's jurisdiction, in particular, should make it inconvenient for the ICC functionaries to construe the Court into an ivory tower of novel ideas, which are divorced from generally accepted norms that guide the administration of justice in the systems that enjoy the primary jurisdiction—unless, of course, the language of the Rome Statute strictly compels such a construction in a specific regard. Such attitudes will ring as particular instances of hollow pretensions, in the absence of solid support in general international law, broader international criminal law or human rights law in the aspects that bear on the work of the Court.

186. That is to say, it will be very odd indeed if the impression is to be created at the ICC that a TIA conducted in a national court, as part of a State's exercise of sovereign or primary jurisdiction over a crime, would not have met the right standard of justice, merely because the trial was conducted in the absence of an absconding accused. There will be no basis at all for such a view.

187. That is another reason that ICC norms ought to be synchronised with those of the principal legal systems—who necessarily form the bedrock of the doctrine of complementarity—and, indeed, the rest of international law on the issue of TIA.

Conclusion of the Discussion on TIA

188. In considering whether an ICC Trial Chamber enjoys the discretion to consider whether to commence and continue with the trial in the absence of an absconded defendant, it helps to keep the following in mind. First, there is no express language in the Rome Statute the plain meaning of which would inevitably result in the exclusion of that discretion. Second, the discretion is warranted by the purposes and context of the Rome Statute, rooted in the need to ensure accountability for gross human rights violations, promote reparation for victims, and discourage threats to international peace and security. Third, the contemporary standards of international human rights law do directly permit the discretion, when exercised with care with measures put in place to ensure that the interests of the defendant are represented as best as can be done during the trial. Fourth, contemporary standards of international human rights law command that the interests of victims be protected, not only in terms of retroactive condemnation of the violations they suffered as a direct incidence of the crime committed, but also in the prospective terms of reparation required to be made for the violations suffered. Fifth, modern international criminal law does not proscribe the

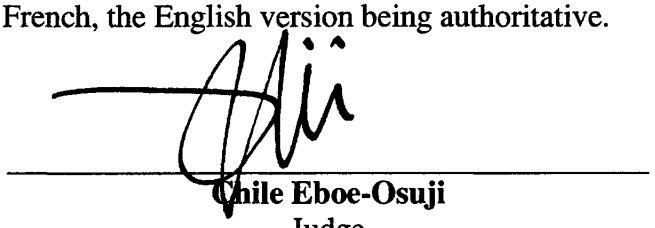
TIA discretion for absconding defendants. It has always permitted such trials. Sixth, the principal legal systems of the world—most notably the civil law and the common law systems—specifically recognise the TIA discretion for absconding accused. As a result, the discretion is now a principle of international law, by operation of article 38(1)(c) of the Statute of the ICJ that has been accepted as identifying sources of international law. And, finally, given that article 21(1)(c) of the ICC Statute requires the Court to apply general principles of law, as long as they are not inconsistent with the letter and spirit of the Rome Statute or with international law in general, it is correct then to recognise the TIA discretion for absconding accused.

189. The question then should not be whether an ICC Trial Chamber may exercise the TIA discretion in the case of absconding defendants, but how such a trial should be conducted in a manner that ensures its conformance to the standards indicated in international human rights law for purposes of the exercise of that discretion.

CONCLUSION

It is for the foregoing reasons that I would not reconsider the decision of the Majority of the Trial Chamber in the matter of the *Kenyatta* excusal application. I would instead seise the Appeals Chamber of an appeal on the matter, based on issues arising from the *Kenyatta* decision, formulated in a way affording the Appeals Chamber an opportunity to clarify the many questions that their decision in the *Ruto* case has raised.

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



Chile Eboe-Osuji
Judge

Dated 26 November 2013
At The Hague, the Netherlands