Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/09-02/11**
Date: **19 March 2013**

TRIAL CHAMBER V

Before: **Judge Kuniko Ozaki, Presiding Judge**
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA

Public
PARTIAL DISSENTING OPINION OF JUDGE OZAKI
AND
CONCURRING SEPARATE OPINION OF JUDGE EBOE-OSUJI

Decision on the withdrawal of charges against Mr Muthaura

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

The Office of the Prosecutor
Ms Fatou Bensouda

Counsel for the Defence
Counsel for Francis Kirimi Muthaura
Karim A. A. Khan QC, Mr Essa M. Faal, Mr Kennedy Ogetto, Ms Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta
Steven Kay QC, Gillian Higgins

Legal Representatives of the Victims
Mr Fergal Gaynor

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia, Registrar

Defence Support Section

Victims and Witnesses Unit
Ms Maria Luisa Martinod-Jacome

Detention Section

Victims Participation and Reparations Section

Other

PARTLY DISSENTING OPINION OF JUDGE OZAKI

(to the Decision of the Majority dated 18 March 2013)

1. Although I fully concur with the termination of the proceedings against Mr Muthaura, I regret that I cannot share the Majority's decision in so far as it grants leave to the Prosecution to withdraw the charges. I would have terminated the proceedings without granting leave as I do not consider that the Prosecution is required to seek leave of a chamber in order to withdraw charges against an accused after the confirmation hearing and prior to the commencement of trial.

2. In my view Article 61(9) is *lex specialis* in relation to amending or withdrawing the charges in the post-confirmation phase of proceedings before the Court. As noted by the Majority, this provision clearly provides that after the confirmation hearing but before the trial has begun, the Prosecutor may amend the charges with the permission of the Pre-Trial Chamber. It equally clearly provides that after "the commencement of the trial", charges may be withdrawn with the permission of the Trial Chamber. Like the Majority, I consider that the trial has not yet commenced for the purposes of Article 61(9). The trial commences, in the relevant sense, once the charges are read to the accused and opening statements are made followed by the presentation of evidence. [1] Accordingly, on a plain text reading of Article 61(9), there is no

[1] This interpretation is also consistent with prior jurisprudence of this Court. See *Prosecutor v Thomas Lubanga Dyilo* ("Lubanga"), Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 39; *Lubanga*, Reasons for Oral Decision lifting the stay of the proceedings, ICC-01/04-01/06-1644, 23 January 2009, para. 36; *Prosecutor v Germain Katanga and Mathieu Njudjolo Chui*, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19of the Statute), 16 June 2009, ICC-01/04-01/07-1213-tENG, para. 36 (finding that it was not possible on a purely literal reading of Article 61(9) to determine whether "commencement of trial" refers to the point at which the Trial Chamber is constituted or the point at which opening statements are made) and paras.37-38 (notably omitting article 61(9) from a list of provisions "appearing to favour the argument that the trial commences as soon as the Trial Chamber is constituted").

requirement for the Prosecutor to seek the permission of any chamber in order to withdraw the charges in the period following confirmation and prior to the commencement of the trial proper.

3. I cannot accept the implicit premise of the Majority's position that such a requirement can be read into the Statute by reference to the Trial Chamber's authority, set out in Article 64(2) of the Statute, to regulate the conduct of the proceedings. Apart from being inconsistent with the clear wording of Article 61(9) of the Statute, this kind of interpretation is not in keeping with the statutory framework as a whole which clearly confers responsibility on the Prosecution to initiate investigations[2] and frame the charges upon which the accused is brought to trial.[3] Any limitation on the Prosecution's authority to modify or withdraw the charges must, in my view, be expressly provided for in the Statute. I would therefore interpret the powers conferred on the Chamber, in Articles 64(2) and 61(11) of the Statute and Rule 134(1) of the Rules, to extend to ordering the formal discontinuance of the case and issuing any related orders but not to authorising a withdrawal of charges, which remains in the sole discretion of the Prosecutor.

4. Furthermore there is, in my view, no reason of principle to require the Prosecution to seek permission of the Chamber to withdraw the charges prior to commencement of trial. The primary reason to impose a requirement on the Prosecutor to seek permission for a withdrawal of charges would be to safeguard the rights of an accused who may object to a proposed withdrawal on the grounds that he or she is entitled to an acquittal in order to ensure the *ne bis in idem* principle attaches. However,

[2] Articles 15 and 53 of the Statute.
[3] Articles 61. See also Order regarding the content of the charges, Order regarding the content of the charges, 20 November 2012, **ICC-01/09-02/11-536, para. 7**; Decision on the content of the updated document containing the charges, 21 December 2012, **ICC-01/09-02/11-584, para.19.**

there is nothing in the Statute to suggest that this principle applies prior to the commencement of trial. In this regard, I note that Article 61(8) in fact expressly provides for the Prosecution to resubmit charges that have previously been declined for confirmation if there is additional evidence. Nor, in my view, can the recognition of *ne bis in idem* at this point of proceedings be said to be a general principle of law, and as such applicable pursuant to Article 21(3) of the Statute, given the vast divergence in national practice as to the temporal scope of the principle.[4]

5. For the foregoing reasons, I would not have granted permission to withdraw the charges and would simply have terminated the case without further enquiry upon the Prosecution's submission of its notification of withdrawal.

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

Judge Kuniko Ozaki, Presiding Judge

Dated 19 March 2013

At The Hague, the Netherlands

[4] See generally Triffterer, Commentary on the Rome Status of the International Criminal Court (2nd ed), p673.

CONCURRING SEPARATE OPINION OF JUDGE EBOE-OSUJI
(to the Decision of the Majority dated 18 March 2013)

1. I agree with the outcome of the Chamber's decision that discontinued the case against Mr Muthaura. And, as a matter of the correct procedure, I share the view that the matter is to be dealt with by way of Chamber's grant of permission, rather than by way of discretion of the Prosecutor. I elaborate below my own reasoning for that approach.

2. It should not be right for a criminal court to compel a prosecutor to proceed to trial with a case which the prosecutor has admitted is insufficiently supported in the evidence currently or prospectively available to her: and, it would be clearly wrong for a prosecutor to decide on her own to proceed to trial with a case similarly deficient. The former situation is not insulated against the disagreeable legal characterisation of the error that the latter situation would bear, merely because the decision of a court is involved. It is therefore correct for the Chamber to accept the reality presented by the Prosecutor's announcement (at the status conference of 11 March 2013) of her decision to withdraw the case against Mr Muthaura. That reality is that the case against him must be discontinued.

3. But, I must add one caveat. Quite apart from the substantive reason (the lack of evidence) that the Prosecutor had indicated for withdrawing the charges, the adjectival considerations surrounding that reason are very troubling. In the words of the Prosecutor:

> Witnesses who may have been able to provide evidence concerning Mr Muthaura's role in the events of 2007 and 2008 have either *been killed*, or have died since those events, *and other witnesses refuse to speak with the Prosecution.* In addition, ... despite assurances of co-operation with the Court, *the Government of Kenya has provided only limited assistance to the Prosecution and they have failed to provide the Prosecution with access to witnesses, or documents, that may shed light on Mr Muthaura's case.* Further, ... it came to light after the confirmation hearing that *a critical witness for the Prosecution against Mr Muthaura had recanted part of his incriminating evidence after receiving bribes.* In the circumstances, we felt we could no longer present this witness as a reliable witness and dropped him from our witness list.[1]

4. In my view, where there is credible evidence connecting a defendant to the sort of conducts emphasised above, the consequence should not be withdrawal of the

[1] Transcript of status conference of 11 March 2013, pp 4—5.

charges against him. Lest, other defendants begin to view those conducts as passports to impunity. This caveat, however, does not disturb the good sense in the Chamber's decision. For, the Prosecutor had not seised the Court with proceedings under article 70 against Mr Muthaura in relation to these conducts, with the supporting evidence. Furthermore, in their recent filings, the Prosecution had clearly indicated that their case against Mr Muthaura was not strong to begin with—at least at the confirmation stage; as, according to them, it was founded almost exclusively on the potential testimony of the one witness whom they eventually felt obligated to drop in the circumstances indicated in the quotation appearing above. In those circumstances, it is right to discontinue the case.

The Question of Discretion or Leave to Withdraw Confirmed Charges prior to Trial

5. We are now left to work out the matter of legal procedure of how best to give effect to that discontinuance. That task centrally involves the question whether the Prosecutor has an unfettered discretion to withdraw confirmed charges before the commencement of trial; or whether she requires leave of the Chamber.

6. To answer that question, it is important to keep in mind the following judicial events among others. A Pre-Trial Chamber of this Court rendered a judicial decision, by a majority, on 23 January 2012 confirming the charges.[2] By a decision rendered on 29 March 2012, the Presidency of the Court transferred the case to this Trial Chamber.[3] On 9 March 2012, the Pre-Trial Chamber rendered a decision denying the Defence request for leave to appeal the decision on confirmation of charges.[4] On 24 May 2012, the Appeals Chamber rendered a decision rejecting the Defence appeal challenging jurisdiction of the Court as regards certain issues pronounced upon in the decision of the Majority of the Pre-Trial Chamber confirming the charges.[5] On 9 July 2012, this Trial Chamber rendered a decision setting the date for commencement of trial as 11 April 2013; that decision also set 9 January 2013 as the date for disclosure of the Prosecution list of witnesses and list of evidence to be relied on at trial.[6] On 3 October 2012, this Trial Chamber issued its decision on victims' participation and

[2] Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red.
[3] Decision referring the case of *The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* to Trial Chamber V, ICC-01/09-02/11-414.
[4] Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges ICC-01/09-02/11-406.
[5] Decision on the appeal of Mr Francis Kirimi Muthaura and Mr Uhuru Muigai Kenyatta against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute," ICC-01/09-02/11-425.
[6] Decision on the schedule leading up to trial, ICC-01/09-02/11-451.

representation.[7] On 7 March 2013, this Trial Chamber rendered a decision vacating the trial commencement date of 11 April 2013 and provisionally set 9 July 2013 as the new date for start of trial.[8] In the meantime, mostly between December 2012 and February 2013, this Trial Chamber issued a number of decisions setting and varying the dates set for the disclosure of identity of prosecution witnesses.[9]

7. On 5 and 7 February 2013, the two defendants in the case respectively filed motions, pursuant to article 64(4) of the Rome Statute, requesting the Chamber to refer back to the Pre-Trial Chamber (for reconsideration) the question of the validity of the Confirmation Decision. They characterised their requests as involving a preliminary issue ahead of trial.[10] Further written submissions on those requests were filed by the parties thereafter.[11] On 5 March 2013, the Chamber issued an order

[7] Decision on victims' representation and participation, ICC-01/09-02/11-498.
[8] Order concerning the start date of trial, ICC-01/09-02/11-677.
[9] Decision on prosecution application for delayed disclosure of witness identities, 21 December 2012, ICC-01/09-02/11-580-Conf-Red, Decision on second Prosecution application for delayed disclosure of witness identities, 8 January 2013, ICC-01/09-02/11-593-Conf-Red, Second decision on the first and second Prosecution applications for delayed disclosure of witness identities, 5 February 2013, ICC-01/09-02/11-619-Conf-Red.
[10] Defence Application to the Trial Chamber Pursuant to Article 64(4) of the Rome Statute to Refer the Preliminary Issue of the Confirmation Decision to the Pre-Trial Chamber for Reconsideration, ICC-01/09-02/11-622; and Defence Application pursuant to Article 64(4) for an order to refer back to Pre-Trial Chamber II or a Judge of the Pre-Trial Division the Preliminary issue of the Validity of the Decision on the Confirmation of Charges or for an order striking out new facts alleged in the Prosecution's Pre-Trial Brief and Request for an extension of the page limit pursuant to Regulation 37(2), ICC-01/09-02/11-628-Conf.
[11] Addendum to ICC-01/09-02/11-628-Conf and ICC-01/09-02/11-628-Conf-AnxA, 20 February 2013 (ICC-01/09-02/11); Corrigendum to Observations on the Conduct, Extent and Impact of the Prosecution's Investigation and Disclosure on the Defence's Ability to Prepare for Trial with Confidential Annex A, Public Annex B, and Public Annex A1, 20 February 2013 (ICC-01/09-02/11-655); Consolidated Prosecution response to the Defence applications under Article 64 of the Statue to refer the confirmation decision back to the Pre-Trial Chamber (ICC-01/09-02/11-664-Conf-Exp); Muthaura Defence Application for Leave to Reply to the "Public redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Article 64 of the Statue to refer the confirmation decision back to the Pre-Trial Chamber" (ICC-01/09-02/11-668); and Defence Request for Leave to Reply to the "Confidential redacted version of the 25 February 2013 Consolidated Prosecution Response to the Defence applications under Article 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber" (ICC-01/09-02/11-669); Prosecution response to the "Muthaura Defence Application for Leave to Reply to the 'Public redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Article 64 of the Statue to refer the confirmation decision back to the Pre-Trial Chamber'" (ICC-01/09-02/11-670); Defence Reply to Confidential redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Article 64 of the Statue to refer the confirmation decision back to the Pre-Trial Chamber, 7 March 2013, ICC-01/09-02/11-678-Conf; Defence Reply to the "Confidential redacted version of the 25 February 2013 Consolidated Prosecution Response to the Defence applications under Article 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber", 8 March 2013, ICC-01/09-02/11-681-Conf; Defence Observations on Article 64(4) and 61(11) of the Rome Statute Pursuant to the "Order Scheduling a Status Conference", 8 March 2013, ICC-01/09-02/11-682; Additional Prosecution observations on the Defence's Article 64 applications, filed in accordance with order number ICC-01/09-02-11-67, 8 March 2013, ICC-01/09-02/11-683-Conf; Corrigendum of "Defence Submissions on Article 61(11) and Article 64(4) of the

convening a hearing on 11 March 2013 for purposes of oral arguments on the article 64(4) requests.[12]

8. But, suddenly on the morning of 11 March 2013, just ahead of the scheduled hearing (with an alert having been given to the Chamber a little before convening in court), the Prosecutor announced that she was withdrawing the charges against Mr Muthaura. As she had indicated her reasons as lack of evidence with which to proceed to trial and lack of confidence as to the availability of such evidence in the near future, the Chamber ruled that the case could not proceed.

9. The remaining question now is whether she is free to withdraw the confirmed charges in those circumstances without permission of a Chamber of this Court, merely because the trial had not commenced. The Prosecutor advances two views. The first is that it is entirely within her discretion to withdraw the case without leave of the Trial Chamber. This, she argues, is because the language of article 61(9) of the Rome Statute—the only provision that clearly says anything about withdrawal of charges *after commencement of hearing for the confirmation of the charges*—mentions permission from the Trial Chamber only when the trial has commenced. Indeed, article 61(9) says nothing about withdrawing confirmed charges with or without permission of a Chamber before the start of trial. In his submissions at the 11 March 2013 status conference, following the Prosecutor's announcement, Mr Khan, counsel for Mr Muthaura, embraced the Prosecutor's first approach with even greater vigour than the Prosecutor had employed in asserting it. But Mr Gaynor, counsel for victims, disagreed. In his own view, permission from the Trial Chamber is necessary to withdraw confirmed charges notwithstanding that the trial had not yet commenced. In support, he referred to the Rules of Procedure and Evidence of the ICTR and the ICTY. The procedural norm that Mr Gaynor alluded to is, perhaps, best expressed in rule 51 of the Rules of the ICTR. It provides as follows:

> (A) The Prosecutor may withdraw an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance an indictment may only be withdrawn by leave granted by a Trial Chamber pursuant to Rule 73.
>
> (B) The withdrawal of the indictment shall be promptly notified to the suspect or the accused and to the counsel of the suspect or accused.

Rome Statute in Accordance with the Trial Chamber's Order scheduling a status conference and agenda, dated 5 March 2013", 8 March 2013, ICC-01/09-02/11-684-Corr.
[12] Order scheduling a status conference and agenda, ICC-01/09-02/11-673.

10. Rule 51 of the ICTY Rules makes an equivalent provision, though not in precisely the same terms.

11. In my view, Mr Gaynor's position is, all told, the more sensible one in the circumstances. This is not merely because it rightly finds support in the procedures of the *ad hoc* tribunals; but, because unfettered discretion in the Prosecutor to withdraw confirmed charges at any stage is inconsistent with the general flow of the Rome Statute. In particular, it is inconsistent with the rights of the defence, the interests of victims (which have been given explicit recognition in the process of the ICC), and, the interest of general order in the administration of justice in this Court.

12. The fate of all these interests ought not to be subjected to the mere happenstance of silence of article 61(9) on a question so important. In my view, the circumstances of that statutory silence only signal what appears to be an error of omission in legislative drafting. The sense of that error begins to emerge if one considers that article 61(9) of the Statute clearly requires such permission for withdrawal of charges after commencement of the trial, which, according to some of the Court's jurisprudence [with which I agree], occurs at the time the Prosecutor's opening statement is made. But there is no sensible rationale yet advanced to explain the legal difference that an opening statement makes, such that properly removes a discretion that the Prosecutor supposedly enjoyed minutes before its delivery. Without that explanation, we are left with the impression that the administration of justice in this Court must be left a slave to the sort of practice that has been deprecated as the 'austerity of tabulated legalism.'[13]

13. Another clear proof of the drafting error—now claimed as giving the Prosecutor an unfettered discretion to withdraw a confirmed charge before the trial starts—is in the failure of the provision even to provide that the Prosecutor need give notice or reasons when withdrawing a confirmed charge at that stage of the case. That requirement appears in article 61(4), in cases of withdrawal of a charge before commencement of hearing for confirmation of charges. If the logic of silence is to be accepted as the basis for the Prosecutor's discretion to withdraw confirmed charges at this stage, it must also follow, as a function of precisely the same logic, that the Prosecutor need not give notice of withdrawal or reasons for it; since article 61(9) is also silent on the matter of notice and reasons as to withdrawal of confirmed charges before the commencement of trial. In that case, it should be enough for the Chamber and the accused to read about the withdrawal in a press statement announcing it to the public, where the Prosecutor decides to issue one. Also, according to that logic, it

[13] See *Minister of Home Affairs v Fisher* [1980] AC 319 at p 328 [Privy Council].

should be enough for the Prosecutor to give a notice of withdrawal but with no reasons whatsoever. So much for the reign of mechanic logic in the administration of justice!

14. To be sure, the Prosecutor in this case did the responsible thing of giving to the Chamber that notice and the reasons, even though article 61(9) says nothing about them. But such an elementary omission in the provision, which the Prosecutor saw fit to correct in practice by giving notice and reasons, points, in my view, to the larger omission as regards the permission of a Chamber to withdraw confirmed charges before commencement of trial in cases that have been transferred to the Trial Chamber.

15. Indeed, the silence used to anchor the theory of discretion in the Prosecutor is even appreciably inconvenient to the Prosecutor; for, it holds a real potential to jack-knife against her ability to withdraw confirmed charges before commencement of trial. That is to say, the same silence provokes the question as to whether the Prosecutor is even at liberty to withdraw confirmed charges before commencement of trial, since article 61(9) is entirely silent on that prospect.[14] Much of my reasoning in the following paragraphs militates in favour of that interpretation as powerfully underscoring the need for permission from a Chamber; as it does against an insistence that the Prosecutor should not be permitted to withdraw confirmed charges before commencement of trial simply because article 61(9) is silent as to that possibility. I need not belabour the point for now. It is enough to see this argument as implicating a drafting error of omission.

16. What judges may do when they are confronted with errors of omission in statutes has been the subject of debate among jurists since the idea of separation of powers took hold as a dominant political and constitutional theory in the modern age. The debate persists. On the one side is the view that judges are to take the particular statute they interpret as they find it. It is not the business of courts, so goes the argument, to fill in gaps and rectify what appear to them as errors in legislative drafting. I may be permitted to refer, by way of illustration, to the book on statutory interpretation that Antonin Scalia (of the US Supreme Court) and his co-author, Bryan Garner, recently published. They throw their full weight behind that view. According to them: 'The absent provision cannot be supplied by the courts. What the legislature

[14] This is not a question that is so easily answered by a ready resort to the rule that whatever the law does not forbid it allows; for some have argued that the rule applies only in relation to the freedom of action of individuals or States (in international law) in the absence of legal norms that constrain such freedom; but does not apply to permit constituted authorities to exercise powers that no legal norm has prescribed in a positive way. But, it is not necessary to enter that dispute for purposes of the present decision.

"would have wanted" it did not provide, and that is an end of the matter.'[15] They cite Justice Louis Brandeis who had written, respectively in 1925 and 1926, that '[a] *casus omissus* does not justify judicial legislation' and that '[t]o supply omissions transcends the judicial function.'[16] The central point of the objection of Scalia and Garner against judicial filling of legislative gaps is that 'gap-filling ultimately comes down to the assertion of an inherent judicial power to write the law.'[17] But, their 'rejection of such a power does not rest on a belief that "when a legislature undertakes to prescribe at all for a problem it prescribes in full."'[18] It is unsurprising that they side-step that ground of objection; as it is not a proposition to be taken seriously as regards a piece of legislation of any length or complexity, such as the Rome Statute. The ground of their objection rather is this: 'Judicial amendment flatly contradicts democratic self-government.'[19]

17. It would appear, however, that upon closer examination, even that ground of objection is no more solid for the weight of the objection placed on it than the ground of the objection that Scalia and Garner avoided embracing. For one thing, they effectively accepted that 'inherent judicial power to write the law' should continue to be so as regards the development of the common law. They do not express themselves precisely in those words, but that is the effect of their point when they approvingly wrote as follows: '[I]nterstitial lawmaking by courts is to be distinguished from the courts' continuing exercise of their common-law powers in jurisdictions where those are retained.'[20] It may be accepted that what the authors wrote as regards the 'common-law powers' exception has equal application for judicial development of the law beyond statutory provisions—or treaty provisions—at the international stage.

18. In my view, this exception effectively cancels the philosophical objection to legislative gap-filling, if not limits it to the point of negation, inasmuch as the objection is based on intuitions of democracy. It is difficult to see how it is more acceptable that judges should continue to develop non-statutory law and fill its gaps, but should not fill gaps found in legislation.

19. Is it even possible to avoid gap-filling by the Courts? It should be noted here that the fallacy of selectivity weakens the objection against the judicial role in filling gaps identified in legislation and goes beyond the exception made for judicial role in

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[15] Antonin Scalia and Bryan Garner, *Reading Law: Interpretation of Legal Texts* [St Paul, Minn: Thomson/West, 2012] 94.
[16] *Ibid.*
[17] *Ibid*, p 95.
[18] *Ibid*, p 95—96.
[19] *Ibid*, p 96.
[20] *Ibid.*

the continued development of non-statutory law. Here, we must also consider the selective predisposition of the objection by virtue of which the spot-light of attention is trained only on the so-called 'interstitial' gaps—meaning, gaps that occur between words, phrases, sentences, clauses, etc, that appear in statutes. The criticism tends to accept it as proper judicial function to fill gaps that occur inside the words and phrases that appear in the text of the statute. These are the hollow gaps within words and phrases employed without a definition. Even where definitions have been provided, the words and phrases employed in the definitions themselves are, in their own turn, left undefined. Hollow gaps are, thus, so inevitable and routine that they appear as a non-issue. It is never questioned that judges may reasonably fill in this type of gaps. But they are gaps, still. Again, it is difficult to see how it would be wrong for judges to fill one type of gaps, out of concern for strict adherence to the principles of separation of powers, while it is considered right to fill the other. This dilemma demonstrates the futility of the objection against judges sensibly filling gaps in statutes, in a manner that is consistent with the discernible legislative intent, with the same sense of professional responsibility with which it is accepted that they may continue to develop non-statutory law.

20. The reality that must be accepted is that there is no such thing in practice as absolute purity of the theory of separation of powers in democratic self-government. It is not necessary to prolong the discussion by listing all the contrary indications. It is enough to point to the very fact that it has been generally accepted in large parts of the democratic world, that it is proper for judges to continue to develop the law through jurisprudence, in a manner that is consistent with the will of the legislature in the given sphere. In international law, it has been equivalently accepted that judicial decisions are a subsidiary source of international law.[21] In the circumstances, the objection to judges filling gaps in legislation, in a manner that is consistent with the legislative intent, becomes eventually unsustainable.

21. Francis Bennion is a foremost modern authority on statutory interpretation. He was formerly one of the parliamentary counsel in the UK Parliament, responsible for drafting legislation there and elsewhere around the world. He knows of what he speaks when he observes as follows: 'It has to be accepted that drafting errors *frequently occur*. This has always been so: there is nothing new in it. Blackstone remarked that "in one statute only, 5 Anne, c 14, there is false grammar in no fewer

[21] See art 38(1)(d) of the Statute of the International Court of Justice. It is also of interest that article 21(2) of the Rome Statute supports that tendency.

than six places, besides other mistakes.'"[22] Insisting on the frequency of errors in pieces of legislation, Bennion had also observed that '[t]he truth is that it is *extremely common* for drafters to produce a text which raises doubt unnecessarily.'[23] In the further observation of Bennion, 'Drafting errors continue to occur, and often escape everyone's eyes until spotted by some alert observer.'[24]

22. In those circumstances, to accept the view that '[w]hat the legislature "would have wanted" it did not provide, and that is an end of the matter', is to accept that the course of justice must be distorted according to the mistakes and errors found in legislation, and that courts are powerless to intervene in a corrective way. Even in the world of computer science, the Gigo ('garbage in, garbage out') phenomenon has not been idealised as a preferred state of things. Human intervention is occasionally called upon to override the machine, in order to achieve the correct result. It is strange then that jurists should effectively urge giving in to Gigo as the ideal norm in the administration of justice.

23. I therefore regret my inability to accept the view that it is not the judicial role to interpret statutory provisions in a manner that corrects drafting errors and fills obvious gaps. In that regard, I find comfort in Bennion's observation that in the modern era, 'it is regarded as not in accordance with legal policy to allow [drafting errors and faulty omissions] to prevent justice being done and the legislator's intention implemented.'[25]

24. The better view is that embodied in the idea of 'rectifying construction', articulated by Bennion as follows: 'It is presumed that the legislature intends the court to apply a construction which rectifies any error in the drafting of the enactment, where it is required in order to give effect to the legislator's intention. This may be referred to as a rectifying construction.'[26] The preferred approach in the common law world, Bennion observes, is that '[t]he so-called literal rule of interpretation nowadays

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[22] Francis Bennion, *Bennion on Statutory Interpretation: a Code*, 5th edn [London: LexisNexis, 2008] p 875 (emphasis added).
[23] Francis Bennion, *Bennion on Statute Law*, 3rd edn [London: Longman, 1990] p 279 (emphasis added).
[24] *Bennion on Statutory Interpretation: a Code, supra*, p 876.
[25] Mr Bennion's actual words are these: 'Nowadays it is regarded as not in accordance with legal policy to allow a drafter's ineptitude to prevent justice being done and the legislator's intention implemented': Francis Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* [Oxford: Oxford University Press, 2001] p 50. It is not always 'ineptitude' that causes errors in drafting. In many instances, it is simply a question of the human factor of the enterprise. Lord Reid's gentler language is preferable: 'Fortunately draftsmen do not often make mistakes but I cannot suppose that every draftsman is entirely free from that ordinary failing': *Connaught Fur Trimmings Ltd v Cramas Properties Ltd* [1965] 1 WLR 892 at p 899.
[26] *Bennion on Statutory Interpretation: a Code, supra*, p 875.

dissolves into a rule that the text is the primary indication of legislative intention, but that the enactment is to be given a literal meaning only where this is not outweighed by more powerful interpretative factors.'[27] Justice G P Singh similarly observes:

> [I]t is nowadays misleading to draw a rigid distinction between literal and purposive approaches. The real distinction lies in the balance to be struck in the particular case between literal meaning of the words on the one hand and the context and purpose of the measure in which they appear on the other. When there is a potential clash, the conventional English approach has been to give decisive weight to the literal meaning but this tradition is now weakening in favour of the purposive approach.[28]

25. These observations are not unique to common law jurisdictions. It is really the accepted approach in international law, by virtue of the Vienna Convention on the Law of Treaties: '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 light of its object and purpose.*'[29]

26. It is notable in this regard that the International Court of Justice has recognised that the literal rule of interpretation 'is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.'[30]

27. The point then is clear that courts of law are not to adopt a disembodied approach to literal interpretation: literal approach for its own sake. It is the context, the object and the purpose of the statute in an organic blend that give body to the literal approach to statutory construction.

28. In light of the foregoing, it is clear to me that in the task of statutory construction it is a legitimate part of the judicial function to channel all the disparate—and occasionally, apparently discordant—elements that rear their heads, into a coherent stream of discernible legislative intent that links the scheme of the statute together. This is consistent with what Justice Singh has identified as the rule of 'harmonious construction', according to which 'a statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute. Such a construction has the merit of avoiding any inconsistency or repugnancy either within a

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[27] See Bennion, *Understanding Common Law Legislation*, *supra*, para 41.
[28] G P Singh, *Principles of Statutory Interpretation*, 8th edn [New Delhi: Wadhwa, 2001] p 26.
[29] Vienna Convention on the Law of Treaties, article 31(1) (emphasis added).
[30] *South West Africa Cases*, (1962) ICJ Reports 336.

section or between a section and other parts of the statute.'[31] Once more, this is not an approach that is unique to the common law system. It is also an approach recognised in international law. As Sir Gerald Fitzmaurice observed: 'Treaties are to be interpreted as a whole, and particular parts, chapters or sections as a whole.'[32]

29. In my view then, the silence of the Rome Statute may not control the question whether permission of a Chamber is necessary for the Prosecutor to withdraw confirmed charges before the commencement of the trial in a case that has been transferred to the Trial Chamber pursuant to article 61(11) of the Statute. What must control the question are the context, object and purpose of the Rome Statute, discernible from a composite appreciation of relevant parts of the Rome Statute—when the Statute is read as a whole. As mentioned earlier, account must then be taken of all the interests implicated in the Statute, such as the interests of defendant, victims and orderly administration of justice. How is this so?

30. We begin with how the interest of the defendant is affected. The principle of equality of the parties, a sacred principle of international criminal law, is engaged in the matter in a very serious way. It generates the question whether the ICC Prosecutor should, purely as a result of an error in statutory drafting, enjoy greater power over a defendant, in the sense of being able to put a prolonged lien on the defendant's freedom from fear and the right to good name, beyond what is strictly permissible. Without urged discretion, the Prosecutor's legitimate power is ample enough in that regard; when prosecution has either not yet been initiated or when it is initiated and pursued to verdict. The power should not also encompass the ability to stake a claim in perpetuity over the defendant's freedom from fear and the right to good name, by being able to withdraw confirmed charges at will (before the Court has had a chance to examine them definitively on their merits) and then hold them over the head of the accused forever; noting that there is no statute of limitation against international crimes. In the nature of things, this is a matter over which article 20 of the Rome Statute has the controlling say; as it disallows a subsequent trial of a defendant for a crime of which he or she had been convicted or acquitted before. In the circumstances, a defendant against whom charges had once been confirmed in this Court at the instance of the Prosecutor who had insisted that he or she had sufficient evidence to establish reasonable grounds to believe that the defendant committed the crimes, should have the right to insist that there be a comprehensive answer on the merits of the question of guilt or innocence once and for all. This the defendant can do

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[31] Singh, *supra*, p 123.
[32] See Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points', (1957) 33 *British Yrbk Int'l L* 203, at 211.

by opposing the ability of the Prosecutor to withdraw the charges at will before the Court has had an opportunity to pronounce upon guilt or innocence in the case in a manner that puts the positive application of article 20 of the Statute beyond debate. In that sense, the saying that one ought not to start something the one is unable to finish acquires a substantive juristic value, beyond the mere avoidance of the appearance of sloppiness in doing one's work. The indicated strategy is not without its risks and inconveniences to any defendant who chooses to pursue it: but it should be a defendant's right to elect that course. But, that right is defeated if it is accepted that the Prosecutor has unfettered discretion to withdraw confirmed charges before commencement of trial; as a Chamber would then be without powers to rule in favour of a defendant who opposes withdrawal of the charges at that stage.

31. This rationale for insisting on the necessity of permission of a Chamber to withdraw confirmed charges before the start of trial strikes the right balance between accountability of accused persons for international crimes and reasonable limitation on the power of one human being (the ICC Prosecutor) over another (the accused). This idea should be one of the limitations—and not the only one—to any understanding of whatever it is that the Prosecutor had in mind when she asserted that the decision to initiate and discontinue prosecutions under the Rome Statute is hers alone and depends on her own 'judgement call'.[33]

32. As regards the interests of victims, it must be noted that article 68(3) of the Statute specifically provides in the relevant respect that where 'the personal interests of the victims are affected, the Court *shall* permit their views and concerns to be presented and considered'. Is it the case that the victims' views and concerns are not effectively to be considered by the Chamber if the Prosecutor chooses to withdraw confirmed charges before commencement of trial? But that will be the result if it is accepted that the Prosecutor has discretion to withdraw at that stage. Similarly, it is to be noted that article 75 of the Statute recognises the right of victims to reparation. Should that provision not effectively constrain the discretion of the Prosecutor to withdraw confirmed charges? Were that not the case, the Prosecutor would be free to withdraw charges with no ability on the part of the Chamber to review the reasons for the withdrawal and deny permission if withdrawal would unfairly defeat the victim's right to reparation.

33. Finally, interests of orderly administration of justice are also affected. One only needs to consider the myriad of judicial decisions rendered in this case, a handful

[33] Transcript of status conference of 11 March 2013, pp 3—4.

of which I have recounted earlier in this opinion.[34] It is a cardinal principle of administration of justice that a court of law may not act in vain. But this Court would have acted in vain, if after all those decisions, the Prosecutor is to be free to withdraw confirmed charges before the commencement of trial, without the Court having a say.

34. In this regard, I am mindful that part of the impetus for the theory of prosecutorial discretion to withdraw confirmed charges before the commencement of the trial is derived from an analogous view of article 61(4) which recognises the discretion of the Prosecutor to withdraw charges before commencement of the hearing for confirmation of charges. But that analogy is necessarily false, in light of the significantly different circumstances respectively attending the two stages—the period before commencement of the confirmation hearings, on the one part; and the period between the confirmation of charges and the commencement of trial, on the other. In the former stage, it is understandable that the Prosecutor should have the discretion to withdraw, because the charges have not received judicial approval. Upon confirmation of charges, however, the case becomes impressed with judicial imprimatur. In my view, the consequences of that judicial act includes the sealing away of unrestrained discretion on the part of the Prosecutor to do with the case as she pleases—including withdrawing the charges without the ability of the Chamber to ask any questions about the withdrawal.

35. In the final analysis, the better approach lies in the Prosecutor's alternative submission, which would presume the existence of the need for permission of a Chamber, but contend that such permission should be granted. I would therefore treat the Prosecutor's 'notification' as a request for permission. And, I would grant the permission, for the reasons indicated in paragraphs 2—4 of this opinion.

The Proper Chamber to Grant the Leave

36. There remains the question as to the proper Chamber to grant the permission, as between the Pre-Trial and Trial Chamber. That question was not presented by the parties. They appear to have assumed that if leave was required for the withdrawal announced at the status conference of 11 March 2013, this Trial Chamber would be the proper Chamber to grant it. As a matter of common sense, let alone the operation of article 61(11) of the Statute, that was a reasonable assumption.

37. In my view, the Pre-Trial Chamber would be the Chamber to grant the leave, if a confirmed charge is sought to be withdrawn before the Presidency has, pursuant

[34] See paragraphs 4 and 5 above.

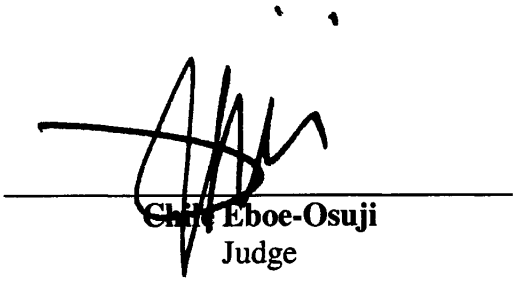
to article 61(11), constituted a Trial Chamber 'which, subject to paragraph 9 and article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.' But once article 61(11) has overtaken the case, then that provision controls the question as to the proper Chamber to grant the leave now under consideration.

38. Notably, article 61(11) makes an exception as regards article 61(9). This is important. But, what article 61(9) does is distribute responsibilities between the Pre-Trial Chamber and the Trial Chamber on the matters expressly indicated. The provision indicates expressly which tasks belong to the Pre-Trial Chamber and which belong to the Trial Chamber. According to that provision, amendments belong to the Pre-Trial Chamber; and, withdrawal of confirmed charges *after* commencement of trial belongs to Trial Chamber. But the provision is silent as regards withdrawal of confirmed charges *before* commencement of trial. In light of that silence, the question will then be controlled residually by article 61(11). And residual matters that are engaged by operation of article 61(11) generally belong to the Trial Chamber to handle. In my view, the authority to grant leave to withdraw confirmed charges before commencement of trial is such a residual matter. It was therefore, correct of the parties to assume that the power to grant leave in the circumstances of the present case belongs to this Trial Chamber.

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

Dated this 19 March 2013

At The Hague, the Netherlands



Chile Eboe-Osuji
Judge