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International Criminal Court

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No.: **ICC-02/05-03/09**
Date: **26 October 2012**

TRIAL CHAMBER IV

Before: **Judge Joyce Aluoch, Presiding Judge**
Judge Silvia Fernández de Gurmendi
Judge Chile Eboe-Osuji

SITUATION IN DARFUR, SUDAN

IN THE CASE OF *THE PROSECUTOR v. ABDALLAH BANDA ABAKAER NOURAIN AND SALEH MOHAMMED JERBO JAMUS*

Public

Decision on the defence request for a temporary stay of proceedings

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
Mr Karim A.A. Khan
Mr Nicholas Koumjian

Legal Representatives of Victims
Ms Hélène Cissé
Mr Jens Dieckmann

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit
Ms Maria Luisa Martinod-Jacome

Detention Section

Victims Participation and Reparations Section

Others

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Trial Chamber IV ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court") in the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* ("*Banda and Jerbo* case"), issues the following Decision on the defence request for a temporary stay of proceedings.

I. BACKGROUND AND SUBMISSIONS

1. The Chamber underlines that the present Decision was preceded by a number of confidential or *ex parte* filings, hearings and status conferences. However, in light of the principle of public proceedings enshrined in Articles 64(7) and 67(1) of the Rome Statute ("Statute"), this Decision is filed publicly, and confidential information, which may only be made available to the defence, is contained in a confidential *ex parte* defence annex. To the extent that the Decision refers to information filed or discussed on a confidential or *ex parte* basis, the Chamber considers that the information concerned does not warrant confidentiality or, as the case may be, *ex parte* treatment at this time.

A. *Defence Requests for a Temporary Stay of Proceedings and for an Oral Hearing*

2. On 6 January 2012, the defence for Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus ("defence") filed a Request for a Temporary Stay of Proceedings ("Request" or "Request for a Temporary Stay").[1]

[1] Defence Request for Temporary Stay of Proceedings, 6 January 2012, ICC-02/05-03/09-274, with Public Annexures A, B, D, E, I, M and O, Confidential Annexures C, J, L and N, and Confidential and *ex parte* Annexures F, G, H and K available only to the defence.

3. In its Request, the defence contends that severe restrictions on investigations have made an effective defence impossible and that these restrictions by the Government of Sudan ("GoS") have been absolute.[2] The defence claims to have made multiple unsuccessful efforts to gain access to the Republic of the Sudan ("the Sudan").[3] However, it states that even if access to the Sudan were to be granted, witnesses' fears of monitoring by the GoS would have adverse implications with regard to any defence investigation.[4] The defence has identified numerous potential defence witnesses who are believed to reside in Darfur, but it is unable to travel there to conduct interviews or to identify and locate other potential witnesses.[5] According to the Defence, the GoS has denied access to the defence – and, indeed, to all ICC-related personnel – and has even criminalized cooperation with the Court.[6] Even contacting identified potential witnesses in the Sudan by telephone may expose them to danger.[7]

4. The defence submits that while it has been able to interview a number of potential witnesses outside the Sudan at considerable risk to these individuals who had to travel out of the Sudan, this is not sufficient to ensure an adequate investigation for a number of reasons. Any interview outside the Sudan requires witnesses to travel through a war zone, cross hostile borders and then return home to live in Darfur. It is stated that the logistics involved in organizing witness interviews outside the Sudan are prohibitive.[8]

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[2] *Ibid.*, paragraph 4.
[3] *Ibid.*, paragraphs 6 to 8.
[4] *Ibid.*, paragraph 8.
[5] *Ibid.*, paragraph 9.
[6] *Ibid.*, paragraph 4.
[7] *Ibid.*, paragraph 12.
[8] *Ibid.*, paragraphs 10 to 15.

5. The defence explains that the evidence available to it is further depleted by the deaths of a number of witnesses, many of whom had a military intelligence background and would have likely possessed first-hand information relevant to the issues. The defence claims that their deaths make its access to other witnesses even more challenging.[9]

6. In addition, the defence claims to have been unable to access documents crucial to its investigation of the African Union ("AU"), the United Nations Security Council ("UNSC"), the Office for the Coordination of Humanitarian Affairs ("OCHA"), the United Nations Mission in Sudan ("UNMIS"), the Government of the Federal Republic of Nigeria ("Nigeria") and the International Committee of the Red Cross ("ICRC"). The defence claims that it would be futile to ask the GoS for these documents.[10]

7. For their case on the merits, the defence intends to show why the accused persons' attack against the peacekeepers was not unlawful given the events on the ground prior to, during and after the attack. Because of the current security situation and the active obstruction of the GoS, gathering evidence on these key aspects of the trial is impossible.[11] The defence submits that although the prosecution is also impeded in its own investigations in the Sudan, these impediments prejudice the defence more than the Office of the Prosecutor ("prosecution") and that the defence will be unable to obtain the attendance and examination of defence witnesses under the same conditions as the prosecution witnesses.[12] Of the 15 witnesses selected by the prosecution at least 12 are based outside the Sudan. It is argued that these witnesses would only provide a

[9] *Ibid.*, paragraph 16.
[10] *Ibid.*, paragraph 17.
[11] *Ibid.*, paragraph 18.
[12] *Ibid.*, paragraph 18.

narrow view of the Haskanita Military Group Site ("MGS Haskanita"), one based on the perspective of the African Union Mission in the Sudan ("AMIS") personnel who were within the base when it was attacked.

8. In addition, the defence argues that the prosecution "chose" to proceed against Mr Banda and Mr Jerbo, "notwithstanding the obvious investigative limitations".[13] Article 67(1) of the Statute provides rights and minimum guarantees to which the accused shall be entitled. The defence argues that these rights and guarantees apply to Mr Banda and Mr Jerbo and not the prosecution. The defence claims that the minimum guarantees of a fair trial under Article 67(1) of the Statute cannot be met given the severe restrictions set out above, and that therefore, a fair trial is impossible.[14] For instance, the defence claims that the minimum guarantee of adequate facilities for the preparation of the defence (Article 67(1)(b)) grants Mr Banda and Mr Jerbo the right and access to all resources that are necessary to prepare the defence for trial. They insist that this implies a right to carry out defence investigations at the scene of the alleged crimes.[15] Moreover, the defence claims that for the Article 67(1)(e) right to be practical and effective, it must necessarily imply a right to place all relevant arguments before the Court and the right to carry out investigations at locations relevant to the alleged crimes.[16] Without first being able to investigate, and thereby identify and interview witnesses, the defence would never be able to obtain the attendance of witnesses.[17] Finally, the Article 67(1)(e) right to present

[13] *Ibid.*, paragraph 19.
[14] *Ibid.*, paragraphs 24 and 25.
[15] *Ibid.*, paragraph 26.
[16] *Ibid.*, paragraphs 27 and 28.
[17] *Ibid.*, paragraph 30.

other evidence cannot be met where, as here, the defence is unable to access evidence such as the intelligence records of the GoS.[18]

9. In addition, the defence claims to be prejudiced by inequality of arms between it and the legal representatives of victims since the former legal representatives of victims a/6046/10 and a/6047/10 are able to travel to Darfur.[19] The Legal Representatives may still assist victims a/6046/10 and a/6047/10 outside the courtroom or pass information to the Common Legal Representatives. As a result, individuals from Haskanita may be called to provide testimony at trial without the defence having been able to conduct investigations on their evidence.[20]

10. The defence claims to have considered alternative means to secure the evidence necessary for the presentation of its case, but contends that they are inadequate.[21] First, the defence has discussed protective measures with the Court's Victims and Witnesses Unit ("VWU"), and such measures cannot be provided within the Sudan. Therefore, any witness who cooperates with the defence or who chooses to testify and return to the Sudan would be unprotected.[22] Second, the defence asked the prosecution to facilitate interviews with ten of the prosecution's witnesses. However, four witnesses did not wish to be interviewed by the defence and one said that he was unable to agree to an interview at that time. The prosecution was unable to contact the remaining five.[23]

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[18] *Ibid.*, paragraph 35.
[19] *Ibid.*, paragraph 20.
[20] *Ibid.*
[21] *Ibid.*, paragraph 21.
[22] *Ibid.*, paragraph 22.
[23] *Ibid.*, paragraph 23.

11. The defence further submits that within the ICC regime, any investigative difficulties experienced by the defence should, in part, be offset by the prosecution's duty under Article 54(1) of the Statute to investigate incriminating and exonerating circumstances equally and to ensure that such investigations are effective.[24] However, because of the GoS' stance against the Court and the prosecution's inability to investigate in the Sudan, the prosecution has been able to discharge only part of its duty in this case; it has not undertaken any investigation into the exonerating circumstances.[25] The defence submits that the prosecution has, for instance, failed to interview the GoS representative(s) or their superiors or any of the local civilian personnel who were working in the base with a view to properly investigating the activities of the GoS representatives present in MGS Haskanita, or the GoS' use of MGS Haskanita as an intelligence tool in its campaign of violence against the civilian population in Darfur.[26] Further, the prosecution has been unable to obtain contemporaneous documents produced by the AMIS force at MGS Haskanita, documents extensively referred to in the prosecution's disclosed evidence.[27]

12. In these circumstances, the defence contends that the Trial Chamber has the power to grant a temporary stay and that the power to do so flows directly from Article 67(1).[28] Relying on jurisprudence from Trial Chamber I, the defence submits that the test for granting a stay of proceedings in the present circumstances is: whether the accused person's rights have been breached to the extent that a fair trial is rendered impossible. To establish that a fair trial is impossible, the defence suggests that it does not need to produce "clear and

[24] *Ibid.*, paragraph 36.
[25] *Ibid.*, paragraph 37.
[26] *Ibid.*, paragraph 38.
[27] *Ibid.*, paragraph 39.
[28] *Ibid.*, paragraphs 40 and 41.

convincing evidence". Rather, it only needs to "properly substantiate" the factual basis of the application.[29] The defence further contends that where no other remedy exists, it has a duty to make an application now, rather than proceeding through a flawed trial and reserving the issue for appeal.[30] It is submitted that Mr Banda and Mr Jerbo's willingness to submit to the Court's jurisdiction is predicated on the understanding that they will be given a fair trial. Such a trial should allow the defence adequate facilities to investigate and to obtain the attendance of witnesses in order to present the reality of what is happening in Darfur and an explanation of why MGS Haskanita was attacked. Neither is possible due to the present situation in Darfur.[31] The defence explains that this "unique and exceptional situation" necessitates this "drastic and exceptional remedy" and that no lesser remedy can ensure that Mr Banda and Mr Jerbo receive a fair trial.[32]

13. On this basis, the defence invites the Chamber to stay the proceedings until such time as the minimum guarantees of a fair trial can be met, the prosecution is able to fully discharge its Article 54 duties and this Trial Chamber is able to determine the truth.[33]

14. On 18 January 2012, the defence filed a Request for an Oral Hearing,[34] to allow for the interaction of oral argument[35] and to allow the parties to provide the Trial Chamber with the most up-to-date information on the situation in Darfur.[36] The defence argued that, in addition, an oral hearing would "assist the Trial

[29] *Ibid.*, paragraph 42.
[30] *Ibid.*, paragraph 43.
[31] *Ibid.*, paragraph 44.
[32] *Ibid.*, paragraphs 45 and 46.
[33] *Ibid.*, paragraph 47.
[34] Defence Request for an Oral Hearing, 18 January 2012, ICC-02/05-03/09-280.
[35] *Ibid.*, paragraph 7.
[36] *Ibid.*, paragraph 8.

Chamber in resolving mixed questions of fact and law" that arise out of the Request for a Temporary Stay.[37] The defence submitted that a temporary stay would significantly affect the course of proceedings against Mr Banda and Mr Jerbo and that the matters raised in the temporary stay request "go to the heart of their right to a fair trial and ultimately their ability to defend themselves against the serious charges" brought by the prosecution.[38] The defence further submitted that the Request for a Temporary Stay raises important and novel issues because it relates to the first case pending trial in which the UNSC has referred a non-State Party to the Court and where the non-State Party decides not to cooperate with the Court. It is also the first case pending trial in which neither the defence nor the prosecution is able to enter the country in which the alleged crimes occurred. Finally, the Request for a Temporary Stay is novel because it is the first such request before the Court based on the submission that a fair trial is not possible due to the lack of cooperation of a State and the resulting inability of the defence to investigate, rather than on the basis of alleged abuse of process by the prosecution.[39]

15. On 19 January 2012, the Chamber ordered the parties to respond to the Request for a Temporary Stay and to the Request for an Oral Hearing by 30 January 2012.[40]

B. *Prosecution Response*

[37] *Ibid.*, paragraphs 2 and 9.
[38] *Ibid.*, paragraph 11.
[39] *Ibid.*, paragraphs 12 and 13.
[40] Email communication from a Legal Officer of the Chamber to the defence and the prosecution sent on 19 January 2012 at 18.36.

16. On 30 January 2012, upon the Chamber's direction,[41] the prosecution filed a response to oppose the defence Requests for a Temporary Stay of Proceedings and for an Oral Hearing ("Response").[42]

17. The prosecution submits that in this Court, a stay of proceedings is to be applied only when the rights of an accused have been irreparably violated and a fair trial has been irremediably compromised. It is submitted that the defence has not demonstrated any infringement of the rights of the accused.[43] It has not exhausted all other means to obtain the information sought. Accordingly, the prosecution argues that the remedy requested by the defence is premature, excessive and unjustified.[44]

18. The prosecution further submits that none of the rights of Mr Banda and Mr Jerbo under Articles 67(1)(b) and (e) of the Statute has been irreparably violated.[45] Even assuming that the evidence the defence claims to be unable to secure is relevant to the narrow issues at trial, it is premature to conclude that a fair trial will be impossible. Instead, that finding can only be made at the end of the trial, or at a minimum at the end of the prosecution's case.[46] According to the prosecution, "[i]f there was unavailable essential evidence that the defence could not have procured if it had acted with greater diligence, the Chamber then will be in a position to determine whether, and what, remedies might compensate".[47] Even assuming that the fair trial rights of Mr Banda and Mr Jerbo have already

[41] Email from a Legal Officer of the Chamber to the prosecution on 19 January 2012 at 18.36.
[42] Prosecution's Response to the "Defence Request for a Temporary Stay of Proceedings" and to the "Defence Request for an Oral Hearing", 30 January 2012, ICC-02/05-03/09-286-Conf. A public redacted version was filed on 1 February 2012, ICC-02/05-03/09-286-Red.
[43] *Ibid.*, paragraph 9.
[44] *Ibid.*, paragraph 10.
[45] *Ibid.*, paragraphs 9 and 11.
[46] *Ibid.*, paragraph 11.
[47] *Ibid.*

been violated by their inability thus far to secure evidence, only unfairness that cannot be resolved, rectified or corrected will trigger a stay of proceedings.[48] Such a finding cannot be confidently made, in the submission of the prosecution, without a trial record.[49]

19. In response to the claim of lack of time and facilities based on Article 67(1)(b), the prosecution argues that the defence has been able to prepare for this case for many months and that it therefore did not lack time. If it had, however, the remedy would not be to grant a stay of proceedings but to delay the start of the trial.[50] The prosecution further argues that the defence has not established that access to the "scene of the alleged crimes" and other unspecified "locations crucial to the crimes charged" is necessary to this case.[51] The attack itself is not part of the disputed issues. There are numerous photographs of the site, as well as numerous witnesses and potential witnesses located outside Darfur who can provide information about the site, and the defence has not interviewed any of them. Other investigative options, based for instance on cooperation, are also available.[52]

20. In addition, the prosecution argues that there is no legal support for the defence position that to visit the site is a fundamental right or that the inability to go there justifies a presumption that the trial is unfair. Hence, according to the prosecution, the defence has not met its burden of showing how the site visits are relevant, much less essential, to the preparation of the defence. It has also failed to demonstrate why the evidence cannot be obtained through alternative

[48] *Ibid.*, paragraph 12.
[49] *Ibid.*
[50] *Ibid.*, paragraph 13.
[51] *Ibid.*, paragraphs 15 and 17.
[52] *Ibid.*, paragraph 16.

sources and why a fair trial cannot be conducted in this case in the absence of site visits.[53]

21. Moreover, in the view of the prosecution, the defence has interpreted the lack of response to requests for information from the AU and other sources, such as the UNSC, OCHA, UNMIS and the Government of Nigeria, as an outright refusal and consequently an exhaustion of all investigative avenues available to the defence.[54] However, it is not unusual for international agencies, regional bodies and States to take time in responding to sensitive requests.

22. In response to the defence argument concerning its inability to obtain the attendance and examination of witnesses pursuant to Article 67(1)(e), the prosecution argues that it cannot be said that the defence right to call witnesses has been violated because no trial has been scheduled yet. Moreover, nothing in the defence Request points to critical defence witnesses being prevented from testifying or being unable to testify, and nothing indicates that the defence has exhausted all available measures to secure its evidence. Thus, it is premature to conclude that Mr Banda and Mr Jerbo have been irreparably prejudiced by an inability to call witnesses in their defence and to invoke, at the stage of the preparation of the trial, Article 67(1)(e) as a basis for requesting a stay.[55] The prosecution submits that in any event, the right under Article 67(1)(e) is not absolute.[56]

23. According to the prosecution, the information and material that the accused persons claim to be unable to secure must be relevant and must relate to the

[53] *Ibid.*, paragraphs 17 and 18.
[54] *Ibid.*, paragraph 19.
[55] *Ibid.*, paragraph 21.
[56] *Ibid.*, paragraph 22.

heart of the case, such that its absence will have "a decisive impact" on the outcome of the case. In substantiating alleged prejudice, the accused also must particularise the unavailable evidence. In this instant case, the defence has done no more than speculate as to whether witnesses might provide information likely to assist with the preparation of its case. The prosecution further argues that it is unreasonable to conclude that the defence has been thwarted in its "right to investigate" so as to require the Chamber to order a stay of proceedings.[57]

24. The prosecution suggests that the relationship between the accused and the GoS is also apparently in a flux. It submits that Mr Abu Garda, who also publicly cooperated with the Court and is part of the same rebel movement as Mr Banda, was appointed Minister of Health by President Al Bashir.[58] Moreover, as part of its oral submissions, the prosecution stresses that one of the accused persons, namely Mr Banda, belongs to a movement that now appears to be in a "pro-government alliance".[59]

25. Moreover, the prosecution argues in its submission that, despite the challenges faced, the defence has been able to identify, locate, meet and interview potential witnesses.[60] The two accused persons can move within the Sudan and they can travel to and within Chad.[61] It is submitted that the defence has the capacity to investigate in Darfur or elsewhere in the Sudan.[62]

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[57] *Ibid.*, paragraph 23.
[58] *Ibid.*, paragraph 25.
[59] Transcript of hearing on 11 July 2012, ICC-02/05-03/09-T-17-ENG ET, page 31, lines 12 to 16.
[60] ICC-02/05-03/09-286-Red, paragraphs 24 and 28.
[61] *Ibid.*, paragraphs 24 and 26.
[62] *Ibid.*, paragraph 28.

26. In addition, the defence is not prevented from investigating in Darfur or elsewhere in the Sudan and a judicial request to the GoS for cooperation remains a possibility.[63] In any event, there is no indication that further efforts to interview potential defence witnesses from the Sudan in a third country would be futile.[64] In short, the prosecution argues that there are options available to the defence. Thus, it is premature and excessive for it to claim that fairness to the accused is impossible at this stage.[65]

27. In response to the defence claim under Article 67(1)(e) that it is unable to present other evidence (such as the relevant contemporaneous documents from the AU, UNSC, OCHA, UNMIS, the Government of Nigeria, the ICRC as well as the GoS), the prosecution argues that the judicial request to the AU for cooperation has been pending for a short time only and that similar requests could be made to other entities. For these reasons, the prosecution argues that it is premature to conclude that the defence investigation will be fruitless.[66]

28. As for the defence claim of inequality of arms, the prosecution argues that it is also restricted in its ability to investigate in the Sudan and that, consequently, equality of arms is preserved. The prejudice to the prosecution is at least as significant as the one claimed by the defence because the prosecution bears the sole burden of proof.[67] The prosecution submits that the defence can collect evidence from witnesses within the Sudan and it presumably has contacts within rebel movements and civilian communities in Darfur's liberated areas, including

[63] *Ibid.*, paragraph 28.
[64] *Ibid.*, paragraph 29.
[65] *Ibid.*, paragraph 31.
[66] *Ibid.*, paragraph 34.
[67] *Ibid.*, paragraph 36.

in and around Haskanita. The prosecution has no such access.[68] Moreover, it is said that the defence claim of inequality of arms vis-à-vis the victims is unfounded because the doctrine only applies to parties to a trial, not victims.[69]

29. In opposing the defence Request for an Oral Hearing, the prosecution argues that the issues in this case are straightforward. Moreover, an oral hearing would not assist in addressing the "mixed questions of fact and law" because most facts are not in dispute.[70]

30. Finally, the prosecution submits that a stay of proceedings is not warranted in this case and that the defence Request should be denied.[71]

C. *The Legal Representatives of Victims submissions*

31. On 30 January 2012, the Legal Representatives of Victims filed submissions to oppose the defence Requests.[72] The Legal Representatives acknowledge that rights and guarantees are provided for the accused persons under Article 67(1), but submit that under Article 64(2) and Rule 69 of the Rules of Procedure and Evidence ("Rules") the Chamber must also protect victims' rights.[73] The Legal Representatives further submit that these latter obligations are reflected in other rules, principles and customary international and domestic law.[74] In short, the

[68] *Ibid.*, paragraph 37.
[69] *Ibid.*, paragraph 39.
[70] *Ibid.*, paragraph 42.
[71] *Ibid.*, paragraph 44.
[72] Observations des représentants légaux des victimes en réponse aux requêtes d'arrêt temporaire des procédures et une audition orale, 30 Janvier 2012, ICC-02/05-03/09-285.
[73] *Ibid.*, paragraphs 29 to 31.
[74] *Ibid.*, paragraph 32.

Legal Representatives submit that a temporary stay would violate the applicable law as well as the victims' rights to fair, equitable and timely proceedings.[75]

32. In addition, the Legal Representatives submit that the defence has not exhausted all legal and other means available to it, including those suggested by the Trial Chamber such as requesting the cooperation of the GoS.[76] Until the defence has done so, a Request for a Temporary Stay is not justified.[77]

33. The Legal Representatives submit that the defence cannot rely on the prosecution's alleged failure to undertake its Article 54 duty to request a stay.[78] Rather, the defence must request that the Trial Chamber order sanctions against the prosecution under Article 71 and Rule 171 of the Rules of Procedure and Evidence.[79]

34. The Legal Representatives further submit that the judicial request to the AU for cooperation has been pending for a short time only and that it is premature for the defence to request a stay for lack of cooperation.[80] Moreover, the defence Request for a Temporary Stay would halt all efforts by the Trial Chamber to assist the defence and render ineffective the AU's cooperation.[81] This would violate the victims' fundamental rights guaranteed by the Rome Statute.[82] The victims, whose rights to fair, equitable and timely proceedings are equal to those of the accused, could not express their concerns, know the truth, or benefit from

[75] *Ibid.*, paragraph 34.
[76] *Ibid.*, paragraphs 35 to 43.
[77] *Ibid.*, paragraph 45.
[78] *Ibid.*, paragraph 46.
[79] *Ibid.*, paragraph 48.
[80] *Ibid.*, paragraph 56.
[81] *Ibid.*, paragraph 61.
[82] *Ibid.*, paragraph 62.

reparations for the trauma that they have endured on the physical, moral, psychological and economic levels.[83]

35. They also suggest that if a temporary stay is granted until the conditions claimed by the defence as necessary for proper exercise of its rights are met, the stay would be of indeterminate duration. Moreover, those conditions extend beyond the crime scene to include Darfur in its entirety. The Legal Representatives claimed it was a paradox that the conditions are countered in part due to the rebel activity of the accused in that region.[84]

36. The Legal Representatives highlight that, in the *Lubanga* case, the Appeals Chamber overturned the stay of proceedings that had been ordered by Trial Chamber I because a stay, even if only temporary, is an extreme measure, and a high threshold must be met for it to be ordered to avoid serious consequences for the proper administration of justice.[85] The jurisprudence of this Court and of the International Criminal Tribunal for the former Yugoslavia ("ICTY") requires that all other solutions be exhausted before a stay is ordered.[86] Moreover, the doctrine of equality of arms must be interpreted flexibly because, when faced with States' non-cooperation, international tribunals do not have at their disposal such coercive means of enforcement as do domestic courts. In any event, it is submitted, the doctrine is not violated in this case because the prosecution is confronted with the same difficulties as the defence.[87]

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[83] *Ibid.*, paragraph 63.
[84] *Ibid.*, paragraphs 69 to 72.
[85] *Ibid.*, paragraphs 74 and 75 referring to *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010, ICC-01/04-01/06-2582, paragraph 55.
[86] *Ibid.*, paragraph 76.
[87] *Ibid.*, paragraphs 77 to 79.

37. Finally, the Legal Representatives submit that the defence has not specified the investigations it would conduct in the Sudan and their relevance to the issues before the Court. It is said to be in the interest of justice and in the interest of the victims that such investigations are specified.[88]

D. *The Application for leave to Reply and Application for leave to file supplementary material*

38. On 3 February 2012, the defence filed an application for leave to reply ("Application")[89] to the prosecution's Response. On 8 February 2012, the prosecution filed its Response to the Application[90] to oppose the defence request for leave to reply. On 14 February 2012, the Trial Chamber granted the defence Application for leave to reply to the prosecution's Response on the following issues only: (i) the appropriate timing of the defence Request; (ii) whether an agreement pursuant to Rule 69 limits Mr Banda and Mr Jerbo's fair trial rights on the remaining contested issues; (iii) whether the defence is required to demonstrate that the unavailable evidence is "relevant", "must relate to the heart of the case" and must have "a decisive impact" on the outcome of the case; (iv) whether certain facts have been misrepresented; and (v) whether the accused could be used as investigators.[91]

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[88] *Ibid.*, paragraphs 81 and 82.
[89] Defence Application for Leave to Reply to "Prosecution's Response to the 'Defence Request for a Temporary Stay of Proceedings' and to the 'Defence Request for an Oral Hearing'", 3 February 2012, ICC-02/05-03/09-288-Conf. A Public Redacted version was filed on 15 February 2012, ICC-02/05-03/09-288-Red.
[90] Prosecution's Response to the Defence Application for Leave to Reply to the "Prosecution's Response to the Defence Request for a Temporary Stay of Proceedings" and to the "Defence Request for an Oral Hearing", 8 February 2012, ICC-02/05-03/09-291-Conf.
[91] Order on the defence Application for Leave to Reply to the "Prosecution's Response to the 'Defence Request for a Temporary Stay of Proceedings' and to the 'Defence Request for an Oral Hearing'", 14 February, 2012 ICC-02/05-03/09-294-Conf, paragraph 6. A Public Redacted version of the Order was filed on 16 February 2012, ICC-02/05-03/09-294-Red.

39. On 9 February 2012, the defence submitted an application to file supplementary material. The defence requested leave to file the letters and statement in public Annex A and confidential Annex B to its Request as supplementary material pursuant to Regulation 28 of the Regulations of the Court. The letters and statement about the defence Request are from leading scholars and practitioners of international criminal law. The defence notes that the letters and statement do not raise any new facts or arguments and therefore are not prejudicial to the prosecution.[92]

40. On 17 February 2012,[93] the prosecution and the victims Legal Representatives filed responses to the defence application to file supplementary material.[94] The prosecution argued that submission of outside opinions through a supplementary filing is not sanctioned by the Statute, Rules, Regulations or any other authority. In any event, it argued, judicial decisions should not be influenced by "polling the outside legal community, even less so by a limited and selective poll". The prosecution opposed the submission of the letters and statement and requested that those contained in Annex A be expunged from the record of the case.[95] The prosecution did not object in substance to the document contained in Annex B.

41. The Legal Representatives opposed the defence application to file supplementary material for two reasons. First, the Legal Representatives argued

[92] Defence Application to File Supplementary Material, 9 February 2012, ICC-02/05-03/09-292.
[93] As instructed by email from a Legal Officer of the Trial Chamber to the prosecution on 10 February 2012 at 14.58.
[94] Prosecution's Response to the Defence Application to File Supplementary Material, 17 February 2012, ICC-02/05-03/09-297, and Réponse des Représentants Légaux Communs, 17 February 2012, ICC-02/05-03/09-296.
[95] Prosecution's Response to the Defence Application to File Supplementary Material, 17 February 2012, ICC-02/05-03/09-297, paragraphs 2 and 3.

that the material was submitted by the defence on its own initiative, and not at the request of the Court as required by Regulation 28 of the Court. Second, the Legal Representatives argued that the material was submitted directly to the Chamber and not filed through the Registry as required by Rule 103.

42. On 6 March 2012, the Legal Representatives filed a request for leave to respond to the defence reply.[96] On 9 Mach 2012, the defence opposed this request.[97]

43. On 9 March 2012, the Chamber issued a decision on the defence application to file the supplementary material referenced above. The Chamber rejected the submission of Annex A and accepted the submission of the Letter in confidential Annex B.[98]

E. *Defence reply*

44. On 21 February 2012, the defence filed its defence reply to the Prosecution's Response ("the Reply").[99] On the appropriate timing of its requests, the defence argues that the prosecution is wrong to focus its response on considerations relevant to permanent rather than temporary stays. The defence request in this

[96] Requête des Représentants Légaux Communs aux fins d'être autorisés à Répondre à la Réplique de la Défense aux Observations du Procureur sur la Demande de la Défense en Arrêt Temporaire des Procédures avec Autorisation d'Extension des Délais pour Déposer ladite Réponse, 5 March 2012, ICC-02/05-03/09-303. On 9 March the Legal Representatives filed a corrigendum thereto. Corrigendum de la Requête des Représentants Légaux Communs aux fins d'être Autorisés à Répondre à la Réplique de la Défense aux Observations du Procureur sur la Demande de la Défense en Arrêt temporaire des Procédures avec Autorisation d'Extension des Délais pour Déposer ladite Réponse, 9 March 2012, ICC-02/05-03/09-303-Corr.

[97] Defence Response to the "Requête des Représentants Légaux Communs aux fins d'être autorisé à Répondre à la Réplique de la Défense au Observations du Procureur sur la Demande de la Défense en Arrêt Temporaire des Procédures avec Autorisation d'Extension des Délais pour Déposer ladite Réponse", 19 March 2012, ICC-02/05-03/09-309.

[98] Decision on the "Defence Application to File Supplementary Material", 9 March 2012, ICC-02/05-03/09-307, paragraph 9.

[99] Defence reply to the Prosecution's Response to the "Defence Request for a Temporary Stay of Proceedings" and to the "Defence Request for an Oral Hearing", 21 February 2012, ICC-02/05-03/09-300-Conf. A public redacted version was filed on 22 February 2012, ICC-02/05-03/09-300-Red.

case is for a temporary stay. It is inherent in the grant of a temporary stay that the unfairness might be resolved or rectified at a later date and if it is, then the proceedings may resume.[100] Moreover, the defence argues that contrary to the prosecution's submissions, the reality is that Mr Banda and Mr Jerbo's fundamental rights have already been violated and this violation is continuing. Article 67(1)(b) of the Statute guarantees the right to "adequate time and facilities for the preparation of the defence". The phrase "for the preparation of the defence" indicates that this minimum guarantee applies from the very outset of proceedings, which includes preparing the defence for trial and not simply once trial has commenced.[101] As for Article 67(1)(e), it guarantees the right to "obtain the attendance and examination of witnesses". The prosecution suggests that the process of "obtaining" the attendance and examination of witnesses begins when the first witness is called. The defence, however, suggests that it must first be able to investigate in Darfur and meet with and interview the witnesses.[102]

45. In addition, the defence suggests that an application for a temporary stay should be made as soon as the rights of an accused are violated and indicates that this is consistent with the approach adopted by Trial Chamber I and the United Nations tribunals for the former Yugoslavia and Rwanda ("ICTY" and "ICTR" respectively). By contrast, it is argued that the approach adopted by the prosecution is "absurd" because while the violation of Mr Banda and Mr Jerbo's rights occurred during the investigation phase, the Trial Chamber could not rule on that violation until, at the earliest, the close of the prosecution's case.[103] The defence submits that this would result in the Trial Chamber proceeding with the

[100] *Ibid.*, paragraphs 3 and 4.
[101] *Ibid.*, paragraph 5.
[102] *Ibid.*, paragraph 6.
[103] *Ibid.*, paragraphs 7 to 9.

"charade and wasted expense of a flawed trial only to later conclude that the proceedings were not fair".[104] Moreover, it is submitted that once witnesses have been called, the accused persons' rights against being twice tried for the same offence come into play and, as a result, the Chamber will be required to dismiss the charges at that stage if it finds that their rights have been compromised.[105]

46. On the issue of whether an agreement pursuant to Rule 69 limits Mr Banda and Mr Jerbo's fair trial rights, the defence maintains that the Rule was never intended to compromise the accused persons' rights. It is "disquieting" to the defence that the prosecution continues to advance Mr Banda and Mr Jerbo's willingness to agree to facts that they do not dispute, as a reason to deny them a fair hearing on those facts that are disputed.[106] According to the defence, the relationship between AMIS, the GoS and the Movements, the GoS offensive in the Haskanita area in 2007, how this offensive fits into the GoS's on-going criminal campaign against civilian populations in Darfur, the role of the MGS Haskanita in facilitating this offensive, and other facts at issue in this trial all concern what was happening in Darfur and require investigation in Darfur and witnesses from Darfur.[107]

47. As to whether the defence is required to demonstrate that the unavailable evidence is "relevant", "must relate to the heart of the case" and must have "a decisive impact" on the outcome of the case, the defence argues that the test suggested by the prosecution creates a paradox. It requires the defence to particularize the evidence that is unavailable to it. But the fact that the evidence

[104] *Ibid.*, paragraph 9.
[105] *Ibid.*
[106] *Ibid.*, paragraphs 10 to 13.
[107] *Ibid.*, paragraph 13.

is unavailable prevents the defence from knowing and hence from particularising such evidence.[108]

48. In reply to the prosecution's claim that the defence has been "able to locate, meet with and interview potential witnesses [...] including in the Sudan", the defence states that no member of its team has entered the Sudan, and that all meetings with and in-person interviews of potential witnesses conducted by the defence, including all those referred to in its Request and annexes, occurred outside the Sudan.[109]

49. The defence claims that Chad has not granted permission to Mr Banda and seven potential witnesses to enter its territory. It is submitted that the explanations provided by the prosecution as to why Mr Banda was unable to enter that country are disingenuous.[110]

50. The defence objects to the prosecution's argument related to the *Abu Garda* case and to the suggestion that the defence does have a means of investigation.[111]

51. Finally, as to whether the accused persons can be used as investigators, the defence maintains that the accused cannot conduct the investigation themselves (as pseudo-investigators) and they should not be required to contact, screen or interview witnesses themselves. Moreover, the accused cannot travel freely around the Sudan and even if they could, they are not investigators or lawyers, and in fact they do not have the benefit of any formal education. The assistance that they provide to their lawyers is far more limited than the prosecution

[108] *Ibid.*, paragraphs 14 to 16.
[109] *Ibid.*, paragraph 17.
[110] *Ibid.*, paragraphs 18 to 20.
[111] *Ibid.*, paragraphs 21 to 25.

alleges. The investigative capabilities of the accused persons are further compromised because they speak Zaghawa, which is not a written language. Finally, Mr Banda and Mr Jerbo are unable to arrange for potential witnesses to travel out of the Sudan and have themselves encountered problems arranging their own travel. In short, the presence of Mr Banda and Mr Jerbo in the Sudan offers no solution to the fair trial rights issues with which defence is faced. [112]

F. *Status Conferences of 19 June 2012*

52. On 25 May 2012, the Chamber requested a hearing and a status conference on 11 and 12 July 2012 with both accused in attendance.

53. On a related point, on 4 June 2012 and upon a Chamber's order, [113] the prosecution filed its "Prosecution's Submission of Additional Details and Information on the Evidence Disclosed to the Defence Pursuant to Article 67(2) of the Statute or Provided Pursuant to Rule 77 of the Rules of Procedure and Evidence", [114] together with two annexes containing charts of potentially exculpatory material. In this respect, the prosecution specified that disclosure of Article 67(2) evidence and inspection of Rule 77 material is ongoing and that additional potentially exculpatory information is also contained in the numerous incriminatory evidence already disclosed to the defence.[115]

54. On 8 June 2012, the defence requested the Chamber to postpone the hearing and status conferences ("Request for Postponement") and to convene an urgent *ex parte* status conference "to properly inform the Trial Chamber about the

[112] *Ibid.*, paragraphs 26 to 31.
[113] Order to the prosecution for information on potentially exculpatory evidence or Rule 77 material, 24 May 2012, ICC-02/05-03/09-336.
[114] Prosecution's Submission of Additional Details and Information on the Evidence Disclosed to the Defence Pursuant to Article 67(2) of the Statute or Provided Pursuant to Rule 77 of the Rules of Procedure and Evidence, 4 June 2012, ICC-02/05-03/09-343 and Confidential *ex parte* Annexes A and B.
[115] ICC-02/05-03/09-343, paragraphs 6 to 12.

complicated logistical and security issues which may jeopardize the timely appearance of Mr Banda and Mr Jerbo, as well as to obtain the Trial Chamber's further assistance and guidance".[116]

55. The request was granted, and on 19 June 2012, the Chamber held a confidential status conference with both parties ("19 June Confidential Status Conference")[117] and an urgent *ex parte* status conference with the Registry together with the defence to address, *inter alia,* logistical and security issues with regard to the appearance of both accused persons at the July hearing and status conferences ("19 June *ex parte* Status Conference").[118]

56. On 28 June 2012, the Legal Representatives requested authorization to file additional elements in support of their response to the request for a stay of the proceedings and the request for an oral hearing.[119]

G. *Hearing and status conferences of 11 and 12 July 2012*

57. On 6 July 2012, the Chamber issued an order scheduling a hearing and status conferences on 11 July 2012. In consideration of the defence counsel's submissions during the 19 June Confidential Status Conference, the Chamber

[116] Defence Request for Postponement of Scheduled Hearing and Status Conference and Urgent *Ex Parte* Hearing, 8 June 2012, ICC-02/05-03/09-345-Conf, paragraph 4. The legal basis for the confidential *ex parte* classification of this information no longer exists as the same information has been made available to the public in the public Defence Submission on Additional Agenda Items for 11 and 12 July 2012 Hearing and Status Conference, 28 June 2012, ICC-02/05-03/09-359, paragraph 3, and in the public Order on the scheduling of a hearing and status conferences on 11 July 2012, 6 July 2012, ICC-02/05-03/09-366, paragraph 3.
[117] Transcript of hearing on 19 June 2012, ICC-02/05-03/09-T-15-CONF-ENG ET.
[118] Transcript of hearing on 19 June 2012, ICC-02/05-03/09-T-16-CONF-EXP-ENG ET.
[119] Requête des Représentants Légaux Communs aux fins d'être autorisés à soumettre des éléments supplémentaires déterminants en support à leurs observations en réponse aux requêtes d'arrêt temporaire des procédures et une audition orale (ICC-02/05-03/09-30 Janvier 2012), 28 June 2012, ICC-02/05-03/09-362.

excused the accused persons from appearing at the July hearing. The Chamber granted the legal representatives' request to attend the July hearing and to make oral observations on the request for stay of proceedings as well as on the cooperation issues.[120] The defence was directed to file its update on logistical and security issues concerning both accused persons in writing, no later than 6 August 2012.

58. For purposes of the hearing, the Chamber authorised submissions by way of an update of relevant factual developments or additional legal arguments related to the defence request for a temporary stay of proceedings.[121] The defence alleged that it had been unable to investigate or speak to non-AMIS witnesses[122] and it explained the reasons why it believed that this was important.[123] However, it submitted that the VWU was unable to protect defence witnesses and that, as a result, they were not willing to speak to the defence.[124] This constituted, in the view of the defence, a fundamental breach of the defence rights to investigate.[125] The defence added that, as regards their need to investigate intelligence from the AMIS base concerning assistance given to the GoS, the defence so far had been unable to speak to non-AMIS witnesses who would have information about what was going on inside the base. Even if the names of these individuals were provided to the defence, the defence believed that they would be afraid to talk to the defence in Darfur, or about leaving Darfur.[126] The defence recalled the travel difficulties that the accused would have to face in order to attend the hearing and stated that defence witnesses would be confronted with similar risks or

[120] ICC-02/05-03/09-366, paragraphs 8 to 10.
[121] *Ibid.*, paragraph 15.
[122] ICC-02/05-03/09-T-17-ENG ET, page 7, lines 22 and 23.
[123] Ibid., page 7, line 24 to page 9, line 25; see below paragraph 104 *et seq.*
[124] *Ibid.*, page 9, line 25 to page 10, line 7.
[125] *Ibid.*, page 10, lines 6 and 7.
[126] *Ibid.*, page 19, lines 8 to 25.

problems in crossing the Sudanese borders.[127] It concluded that if it were unable to investigate and gather the information not only to properly question prosecution witnesses, but also to propose an informed, alternative narrative to prosecution witnesses who desired to speak the truth, the whole exercise would become futile.[128] The prosecution stated that, specifically in relation to the defence access to non-AMIS witnesses, there had been some progress and that the office would provide an update.[129] The Legal Representatives submitted that the Chamber should take into account the drastic effects of a stay of proceedings, even if temporary, since it would cause unavoidable harm to the victims.[130]

59. With regard to the status conference that followed the hearing, the Chamber authorised submissions on disclosure and cooperation issues.[131] The Chamber also scheduled and held an *ex parte* status conference with the prosecution and Registry together and another *ex parte* status conference with the defence and Registry together and set out the agenda thereto.[132] The hearing and the status conferences took place on 11 and 12 July 2012.

H. *Further submissions requested during, or resulting from, the hearing and status conferences of 11 and 12 July 2012*

[127] *Ibid.*, page 18, lines 11 to 19.
[128] *Ibid.*, page 29, lines 4 to 11.
[129] *Ibid.*, page 13, line 24 to page 14, line 2.
[130] *Ibid.*, page 15, lines 15 to 17.
[131] ICC-02/05-03/09-366, paragraph 15.
[132] ICC-02/05-03/09-366, paragraph 16.

60. On 20 July 2012, the prosecution filed its First Report on Translation and Interpretation Issues,[133] as was requested by the Chamber during the July hearing.[134]

61. On 20 July 2012, the Registry filed in the case record the materials distributed by the defence to the Chamber, the parties and the participants during the public hearing.[135]

62. On 2 August 2012, the prosecution filed a notification of disclosure to the defence of incriminating, potentially exonerating and Rule 77 material.[136] It also filed a notification of disclosure to the defence of incriminating evidence.[137]

63. On 6 August 2012, the defence filed an update on logistical issues and security concerns.[138]

64. On 6 August 2012, the prosecution filed an update on the protection of DAR-OTP-P-307 ("Witness 307").[139] On the same date, the prosecution filed an update

[133] First Prosecution Report on Translation and Interpretation Issues, 20 July 2012, ICC-02/05-03/09-369.
[134] ICC-02/05-03/09-T-17-ENG ET, page 51, lines 19 to 21.
[135] Registration in the Record of Materials Distributed during the Public Hearing held on 11 July 2012 (ICC-02/05-03/09-HNE-3 to ICC-02/05-03/09-HNE-42), 20 July 2012, ICC-02/05-03/09-370 and annexes.
[136] Prosecution's Notification of Disclosure to the Defence of Incriminating, Potentially Exonerating and Rule 77 Material on 18 July 2012, 2 August 2012, ICC-02/05-03/09-373.
[137] Prosecution's Notification of Disclosure to the Defence of Incriminating Evidence on 27 and 30 July 2012, 2 August 2012, ICC-02/05-03/09-374.
[138] Defence Submission on Updates Regarding Logistical Issues and Security Concerns, 6 August 2012, ICC-02/05-03/09-375-Conf-Exp and annexes A to J. A confidential redacted version and public redacted version were filed on the same date, ICC-02/05-03/09-375-Conf-Red and ICC-02/05-03/09-375-Red2.
[139] Update on the Protection of Witness P-0307, 6 August 2012, ICC-02/05-03/09-376-Conf-Exp. A public redacted version was filed on 30 August 2012, ICC-02/05-03/09-376-Red. Witnesses are referred to hereinafter by their number.

on the outcome of the prosecution's efforts to contact Witnesses 304, 305 and 306.[140]

65. On 27 August 2012, the prosecution filed a further update on the protection of Witness 307 whereby it requested a variation of the protective measures related to this witness.[141]

66. On 27 August 2012, the prosecution filed an update on its consultations concerning the Article 54(3)(e) documents and application for protective measures.[142] The report addresses the following issues: (i) the inclusion of additional information in two narrative summaries,[143](ii) the position of the Second Provider regarding disclosure[144] and a concession of fact in relation to the documents from this provider,[145] and (iii) the Rule 77 nature of document DAR-OTP-0128-0691.[146]

[140] Update on the outcome of the Prosecution's efforts to contact Witnesses P-0304, P-0305 and P-0306, 6 August 2012, ICC-02/05-03/09-377-Conf-Exp. A Public Redacted version was filed on 31 August 2012, ICC-02/05-03/09-377-Red.
[141] Prosecution's Further Update on the Protection of Witness P-0307 and Request for Variation of Protective Measures Related to Witness P-0307 Pursuant to Regulation 42 of the Regulations of the Court, 27 August 2012, ICC-02/05-03/09-386-Conf-Exp. A public redacted version was filed on 30 August 2012, ICC-02/05-03/09-386-Red.
[142] Prosecution's Update on its Consultations Concerning the Article 54(3)(e) Documents and Application for Protective Measures, 27 August 2012, ICC-02/05-03/09-387-Conf-Exp. A Public Redacted version was filed on 31 August 2012, ICC-02/05-03/09-387-Red.
[143] ICC-02/05-03/09-387-Conf-Exp, paragraph 1.
[144] *Ibid.*, paragraph 2.
[145] *Ibid.*, paragraphs 12 and 15.
[146] *Ibid.*, paragraph 3.

67. On 27 August 2012, the prosecution filed an update on cooperation issues.[147] It updated the Chamber on the status of cooperation in relation to various relevant documents.

68. On 27 August 2012, the prosecution filed its Submission of a Draft Protocol on the Handling of Non-Public Information and Contact of a Party with Witnesses of the Opposing Party, and Prosecution's Update on Expert Witness.[148] The Chamber had directed the parties and the VWU to engage in discussions on the development of a "non-disclosure protocol" to be finalised, if possible, by way of a joint filing.[149] There were several significant issues on which the prosecution and defence diverged. Thus, the prosecution filed separate submissions on the proposed scope and content of the non-disclosure protocol whereby it also reflected the VWU's input.[150]

69. On 25 October 2012, the defence filed the "Second Defence Application to File Supplementary Material", together with a confidential Annex, [151] which, according to the defence, constitutes a response to one of the defence request for cooperation to the United Nations.[152] The defence invites the Chamber to accept

[147] Prosecution's Update on Cooperation Issues, 27 August 2012, ICC-02/05-03/09-388-Conf-Exp. A Public Redacted version was filed on 31 August 2012, ICC-02/05-03/09-388-Red.
[148] Prosecution's Submission of a Draft Protocol on the Handling of Non-Public Information and Contact of a Party With Witnesses of the Opposing Party, and Prosecution's Update on Expert Witness, 27 August 2012, ICC-02/05-03/09-389-Conf.
[149] Transcript of hearing on 12 July 2012, ICC-02/05-03/09-T-19-CONF-EXP-ENG ET, page 19, lines 15-25; page 24, lines 18-22; page 26, lines 13-25; page 28, lines 1-8; page 29, line 17 to page 30, line 15; page 32, lines 13-25; page 33, lines 19-23; page 34, lines 8-15.
[150] ICC-02/05-03/09-389-Conf, paragraph 3.
[151] Second Defence Application to File Supplementary Material, 25 October 2012, ICC-02/05-03/09-409 and confidential Annex to the Second Defence Application to File Supplementary Material, 25 October 2012, ICC-02/05-03/09-409-Conf-Anx.
[152] ICC-02/05-03/09-409, paragraph 11.

the submission of a memorandum as part of the record of the case and to consider it for the purposes of its final determination on the Request.[153]

II. RELEVANT PROVISIONS

70. In accordance with Article 21(1) of the Statute, the Chamber has considered the following provisions:

> **Article 54 of the Statute**
> **Duties and powers of the Prosecutor with respect to investigations**
>
> 1. The Prosecutor shall:
> (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;
>
> **Article 64 of the Statute**
> **Functions and powers of the Trial Chamber**
>
> [...]
> 2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
> 3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:
> (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;
> [...]
> (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.
>
> **Article 67 of the Statute**
> **Rights of the accused**
>
> [...]

[153] ICC-02/05-03/09-409, paragraph 13.

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
[...]
(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
[...]
2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Rule 76 of the Rules
Pre-trial disclosure relating to prosecution witnesses

1. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.
2. The Prosecutor shall subsequently advise the defence of the names of any additional prosecution witnesses and provide copies of their statements when the decision is made to call those witnesses.
3. The statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks.
4. This rule is subject to the protection and privacy of victims and witnesses and the protection of confidential information as provided for in the Statute and rules 81 and 82.

Rule 77 of the Rules
Inspection of material in possession or control of the Prosecutor

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

III. ANALYSIS AND CONCLUSIONS

A. *Preliminary issue*

71. On 6 March 2012, the Legal Representatives filed a request for leave to respond to the defence reply.[154] The defence opposed the request.[155]

72. Moreover, on 28 June 2012 the Legal Representatives requested authorisation to file additional submissions in support of their response to the Request.[156]

73. The Chamber notes that, when it granted the Legal Representatives' request to attend the July hearing it allowed the victims to make oral observations on the request for a stay of proceedings as well as on the cooperation issues.[157] The Legal Representatives made their submission accordingly during the July hearing. Given the circumstances, the Chamber decides that these requests are now moot.

B. *The Relevant Principles*

1. *Exceptional remedy*

74. International criminal courts and tribunals have determined that they have the power to stay criminal proceedings, which stems from the concept of "inherent

[154] ICC-02/05-03/09-303.
[155] ICC-02/05-03/09-309.
[156] ICC-02/05-03/09-362.
[157] ICC-02/05-03/09-366, paragraphs 8 to 10.

jurisdiction" of the international institutions in question.[158] It is notable in this regard that the Regulations of the Court refer to the concept of "inherent powers" of the Court.[159] It is also notable that the Appeals Chamber has confirmed that while a stay of proceedings is not explicitly provided for in the legal framework of the Court, it may result from the Court's "inherent power to stop judicial proceedings where it is just to do so" in order to "remedy breaches of the process in the interest of justice".[160]

75. The Chamber considers it important to clarify that "inherent" powers or jurisdiction in the context of ICC proceedings should be understood as meaning "incidental jurisdiction". In this regard, the Chamber finds some assistance in the following definition offered by the Appeals Chamber of the Special Tribunal for Lebanon:

> With regard to the Tribunal, by 'inherent jurisdiction' we mean the power of a Chamber of the Tribunal *to determine incidental legal issues* which arise as a direct consequence of the procedures of which the Tribunal is *seized by reason of the matter falling under its primary jurisdiction.*[161]

76. The Chamber also notes the more composite but similarly useful definition indicated by the International Court of Justice as follows:

> [I]t should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one

[158] The Appeals Chamber of the Special Tribunal for Lebanon ("STL") has made a helpful summary of some of the relevant jurisprudence. See, for instance, STL, *In the Matter of El Sayed, CH/AC/2010/02*, Appeals Chamber, Decision on Appeal of Pre-Trial Judge's Order regarding Jurisdiction and Standing, 10 November 2010, paragraph 46. See also ICTR, *Prosecutor v. Barayagwiza, ICTR-99-52A-R*, Appeals Chamber, Decision, 3 November 1999, paragraph 75, quoting the Privy Council in *Bell v. DPP of Jamaica*. See also *The Prosecutor v. Thomas Lubanga Dylo*, Appeals Chamber, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, paragraphs 29 and 35.

[159] See, for instance, Regulation 28(3) of the Regulations of the Court.

[160] ICC-01/04-01/06-772, paragraph 24.

[161] STL, *In the Matter of El Sayed, CH/AC/2010/02*, Appeals Chamber, Decision on Appeal of Pre-Trial Judge's Order regarding Jurisdiction and Standing, 10 November 2010, paragraph 45 (emphasis added).

> hand, *to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court,* and *to 'maintain its judicial character'* .... Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of the States, and is conferred upon it in order that its basic judicial functions may be safeguarded.[162]

77. This interpretation of "inherent jurisdiction" is well-grounded in international law, which generally recognises that an international body or organisation "must be deemed to have those powers which, though not expressly provided in the [constitutive instrument], are conferred upon it by necessary implication as being essential to the performance of its duties."[163]

78. However, the Chamber wishes to stress that such inherent powers or incidental jurisdiction may only be invoked in a restrictive manner in the context of the ICC. This caveat is important for the reason, among others, that its proceedings are governed by an extensive legal framework of instruments in which the States Parties have spelt out the powers of the Court to a great degree of detail. This restrictive approach should particularly be adopted when considering a procedural step such as stay of proceedings. Not only is this procedural step not contemplated in the Rome Statute or its procedural instruments, as recognised by the Appeals Chamber, but it might appear contradictory to the object and purpose of the Court, as it may frustrate the possibility of administering justice

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[162] International Court of Justice, *Nuclear Tests Case (New Zealand v. France)*, (1974) ICJ Reports, paragraph 23 (emphasis added).

[163] See International Court of Justice, Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations (1949), ICJ Reports 174, page 182. See also G G Fitzmaurice, "The Law and Procedure of the International Court of Justice: International Organizations and Tribunals" (1952) 29 *British Yearbook of International Law* 1, pages 5 to 6; C F Amerasinghe, *Jurisdiction of International Tribunals*, page 171 [The Hague: Kluwer, 2003].

in a case. Such a step should indeed be exceptional, when the specific circumstances of the case render a fair trial impossible.

79. In the view of the Chamber, to conceive of a stay of proceedings as a remedy in every case in which a claim of frustration of access to information or facilities needed for trial preparation has been made, would run contrary to the responsibility of trial judges to relieve unfairness as part of the trial process. As the Appeals Chamber has noted, the stay of the proceedings is the necessary remedy only if (i) the "essential preconditions of a fair trial are missing", and (ii) there is "no sufficient indication that this will be resolved during the trial process".[164]

80. Therefore, a stay of proceedings is a drastic remedy. It brings proceedings to a halt, potentially frustrating the trial's objective of delivering justice in a particular case as well as affecting the broader purposes expressed in the preamble to the Statute. The Appeals Chamber has set a high threshold for a Trial Chamber to impose a stay of proceedings, requiring that it be impossible to piece together the constituent elements of a fair trial.[165]

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[164] *The Prosecutor v. Thomas Lubanga Dyilo,* Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486, paragraph 76. The Chamber notes that common law jurisprudence consistently finds that the proceedings shall not be stayed in situations where unfairness could be cured during the course of a Trial and that the Trial may provide sufficient protection to a defendant against prejudice. See *R. v. Feltham Magistrates' Court & Anor, ex p Ebrahim,* [2001] EWHC Admin 130 [Divisional Court, England], paragraphs 17 and 26. See also *Ali v. Crown Prosecution Service, West Midlands* [2007] EWCA Crim 691 [Court of Appeal, England], paragraph 29; and *Jago v. District Court of New South Wales*, [1989] HCA 46 [High Court of Australia], per Brennan J, paragraph 23.

[165] *The Prosecutor v. Thomas Lubanga Dyilo,* Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010, ICC-01/04-01/06-2582, paragraph 55.

2. *Impossibility of fair trial*

81. As the Chamber already noted, stay of proceedings is an exceptional remedy that should be confined to instances in which a fair trial would be impossible. In this regard, the Appeals Chamber has derived from Article 21(3) of the Statute that:

> *Where fair trial becomes* impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and must be stopped. [166]

82. The Chamber stresses that the significance of that pronouncement very much depends on a proper understanding of its premise—i.e. that it has become *clear* that a fair trial is impossible in light of the concrete circumstances of the case. The Appeals Chamber has noted, by reference to a decision of Trial Chamber I, that "[i]f, at the outset, it is *clear* that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process, it is necessary [...] that the proceedings should be stayed. "[167] [Emphasis added.]

83. In addition, the Appeals Chamber has noted that:

> Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed. To borrow an expression from the decision of the English Court of Appeal in Huang v Secretary of State, it is the duty of a court: "to see to the protection of individual fundamental rights which is the particular territory of the courts [...]" Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of

[166] ICC-01/04-01/06-772, paragraph 37.
[167] ICC-01/04-01/06-1486, paragraph 76.

> the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.[168]

84. The Appeals Chamber has also pronounced that the unfairness to the accused person may be of such nature that – at least theoretically – a fair trial might become possible at a later stage because of a change in the situation that led to the stay. Under such circumstances, "a conditional stay of the proceedings may be the appropriate remedy" if need be.[169]

85. Such a conditional, temporary stay may be lifted if the obstacles that led to the stay of the proceedings cease to exist.[170] As indicated by the Appeals Chamber, "If a trial that is fair in all respects becomes possible as a result of changed circumstances, there would be no reason not to put on trial a person who is accused of genocide, crimes against humanity or war crimes - deeds which must not go unpunished and for which there should be no impunity (see paragraphs 4 and 5 of the Preamble to the Statute)".[171] This implies an obligation upon the Chamber that has imposed a conditional stay to review, from time to time, its decision and determine whether a fair trial has become possible.[172]

86. The Appeals Chamber has stressed that the power to stay the proceedings is discretionary in nature and involves "an exercise of judicial assessment dependent on judgment rather than on any conclusion as to fact based on

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[168] ICC-01/04-01/06-772, paragraph 39.
[169] ICC-01/04-01/06-1486, paragraph 80.
[170] As indicated by the Appeals Chamber, a Chamber may decide to lift the stay if the obstacles that led to the stay of the proceedings fall away and if this would not occasion unfairness to the accused person for other reasons including, considerations under article 67 (1) (c) of the Statute. *Ibid.*
[171] *Ibid*
[172] *Ibid*, paragraph 81.

evidence."[173] The Appeals Chamber has indicated that "[a] Trial Chamber ordering a stay of the proceedings enjoys a margin of appreciation, based on its intimate understanding of the process thus far, as to whether and when the threshold meriting a stay of proceedings has been reached".[174]

87. Domestic jurisprudence and legal scholarship also recognise the nature of the discretion. For instance, it has been observed that "[w]hether a fair trial is possible will depend on the circumstances of the particular case, and it is a question on which even experienced judges might sometimes form different opinions."[175]

88. The Chamber notes that the remedy of judicial stay of proceedings on grounds of abuse of process is of common law origin, arising especially from the jurisprudence of England and Wales. In those jurisdictions, the general trend of judicial precedent on stay of proceedings largely supports the proposition that criminal courts should be extremely reluctant to impose a stay of proceedings "in the absence of any fault on the part of the complainant or the prosecution."[176]

89. In the view of the Chamber, for purposes of this Decision, it is unnecessary to consider the question of whether the remedy of a stay of the proceedings is available in the absence of prosecutorial fault. Indeed, for the reasons laid out below, the Chamber disposes of the Request on the basis that the defence has not

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[173] ICC-01/04-01/06-772, paragraph 28, citing to a decision of the English Court of Appeal, *R. v. S. (SP)*, 6 March 2006, [2006] 2 Cr App R. 23, page 341.
[174] ICC-01/04-01/06-1486, paragraph 84.
[175] See the short commentary of Professor Smith, appearing in the report of *R v. JAK* [1992] Crim LR 30 [Court of Appeal, England] pp 30—31. See also *R v. TBF* [2011] EWCA Crim 726 [Court of Appeal, England], paragraph 25.
[176] *Attorney-General's Reference (No 1 of 1990)*, [1992] 1 QB 630 CA, pages 643—644. See also *TBF*, paragraph 34; *R v. MacKreth*, [2009] EWCA Crim 1849, paragraphs 30 and 31; *R v. S (Stephen Paul)* [2006] EWCA Crim 756 [Court of Appeal, England], paragraph 21(ii).

shown any prejudice that, in the Chamber's view, cannot be remedied in the course of trial.

3. *The standard of proof*

90. Within the limits of its discretionary powers, the Chamber is of the view that the facts supporting the application need to be "properly substantiated".[177] The defence has not objected to this standard.[178] The Chamber needs to analyse whether the defence claim – that lines of defence and unspecified exculpatory evidence may become available if the defence is allowed to enter the Sudan – is sufficiently substantiated to meet the high threshold for a stay of proceedings.

91. The prosecution asserts that the Request should only be granted if the evidence that the accused persons claim to be unable to secure is relevant and relates to the heart of the case such that its absence will have "a decisive impact" on the outcome of the case.[179]

92. In the circumstances of the case, the evidence which the accused persons claim is unavailable to them must be relevant to the contested issues given that: (i) the trial will proceed only on the basis of the contested issues; and (ii) the parties shall not present evidence or make submissions other than on the issues that are contested.[180] The Majority agrees with the suggestion of the prosecution that the evidence shall relate to the "heart of the case" provided that these terms mean in

[177] The same approach was taken by Trial Chamber I in its Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings", 7 March 2011, ICC-01/04-01/06-2690-Red2, paragraph 169.
[178] ICC-02/05-03/09-274, paragraph 42.
[179] ICC-02/05-03/09-286-Conf, paragraph 23.
[180] Decision on the Joint Submission regarding the contested issues and the agreed facts, 28 September 2011, ICC-02/05-03/09-227, paragraph 46.

fact the contested issues. However, it will not require that the absence of the evidence have "a decisive impact" on the outcome of the case.[181] The Chamber considers that whether or not such impact may be decisive is contingent upon the entirety of the available evidence and the proceedings. In the circumstances of the case at hand, where no evidence has been submitted, requiring the defence to prove "a decisive impact" on the outcome of the case would be too onerous.

93. However, in the opinion of the Chamber, the defence will not have "properly substantiated" its Request if the unavailable evidence is not identified with sufficient specificity by the defence in light of the information available to it at this stage. This is the test to be applied by the Chamber.

94. This issue was discussed in the *Nahimana* case at the ICTR, and the Chamber has taken this jurisprudence into account.[182] In that case, the defence submitted that the accused could not have a fair trial because relevant and admissible evidence was not presented due to lack of cooperation by the Rwandan authorities in securing that evidence.[183] Because the defence merely claimed that it had indications that some materials or information could exist and that the existence of others could be inferred, the Chamber held that it failed to establish that the materials were in fact available.[184]

95. Moreover, the Chamber notes that national jurisdictions also have been careful to avoid granting applications of stay of proceedings on grounds of speculative

[181] ICC-02/05-03/09-286-Red, paragraph 23.
[182] ICTR, *Prosecutor v. Nahimana et al.*, *ICTR-99-52-T*, Decision on the Motion to Stay the Proceedings in the Trial of Ferdinand Nahimana, 5 June 2003, paragraphs 11 to 13.
[183] *Ibid.*, paragraph 1.
[184] *Ibid.*, paragraph 13. In addition, at paragraphs 14 to 19 of the same decision, the *Nahimana* Chamber stressed that it had acted within the limits of its powers to assist the defence. Because, as it noted, the defence had ample opportunity and resources to defend the accused under the same procedural conditions and with the same procedural rights as were accorded to the prosecution, it found no convincing basis for ordering a stay of proceedings.

or vague claims of impeded defence investigations. The analysis requires scrutiny of what exactly the defence is impeded from advancing in light of the detail of the particular charges.[185] With regard to missing evidence, allegations need to be specific as opposed to vague speculations that lost documents or unavailable witnesses might have assisted the defendants, and the Court should then critically examine how important the missing evidence is in the context of the case as a whole.[186] The evidence must both possess an *apparent* exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.[187] Mere speculation for which there is no evidential support falls short of that mark.[188]

C. *Have the rights encompassed in Articles 67(1)(b) and (e) of the Statute been infringed to such an extent that the trial can no longer be fair?*

1. *Preliminary remarks*

96. As set out above, pursuant to Articles 67(1)(b) and (e) of the Statute the accused persons have a right to be provided adequate time and facilities for the

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[185] In complaints of abuse of process, it has been stressed, "it is necessary to look at the charges and see *exactly* what defence it is that they are impeded from advancing."; *R v Cardiff Magistrates' Court, ex p Hole* [1997] COD 84 [Divisional Court, England]: available from LexisNexis as CO/4115/95 of 28 October 1996 (Transcript: Smith Bernal), pages 6 to 8 [Emphasis added]. Also cited in Young, Summers and Corker, *Abuse of Process in Criminal Proceedings*, Bloomsbury Professional, 3rd ed., 2009, §3.09.

[186] The Chamber notes the jurisprudence of the English Court of Appeal, *R v. TBF* [2011] EWCA Crim 726 [Court of Appeal, England]. "In assessing what prejudice has been caused to the defendant on any particular count by reason of delay, the court should consider what evidence directly relevant to the defence case has been lost through the passage of time. *Vague speculation that lost documents or deceased witnesses might have assisted the defendant is not helpful.* The court should also consider what evidence has survived the passage of time. *The court should then examine critically how important the missing evidence is in the context of the case as a whole*". *R v. TBF*, paragraph 37(iii) (emphasis added). See also *R v. E* [2012] EWCA Crim 791 [Court of Appeal, England], paragraphs 24-27 and 62; *R v. MacKreth,* [2009] EWCA Crim 1849, paragraph 47; *Gordon v Her Majesty's Advocate* [2010] HCJAC 44 [Appeal Court of the High Court of Justiciary] paragraph 63.

[187] *California v. Trombetta*, 467 US 479 (1984) [US Supreme Court], paragraph 489.

[188] See, for instance, *Strickler v. Greene*, 527 US 263 (1999) [US Supreme Court], paragraph 286.

preparation of their defence, to obtain the attendance of witnesses on their behalf under the same conditions as witnesses against them and to present other evidence.

97. In this section, the Chamber will analyse the defence submissions based on Article 67(1)(b) and (e) under the overarching principle that a stay of proceedings is the ultimate remedy only to be resorted to where a fair trial is impossible and there is no sufficient indication that any unfairness can be resolved later or relieved against by the Trial Chamber. This requires a preliminary assessment on whether the right to be provided adequate time and facilities for the preparation of their defence and to obtain the attendance of witnesses require, as a necessary component, on-site investigations.

98. If the answer to the foregoing question is in the negative, the Chamber will proceed to two other defence allegations, which need to be distinguished from one another: (i) the allegation that witnesses, who are potentially useful to the defence case and who could have been identified had the defence been allowed to conduct investigations in the Sudan, are inaccessible; and (ii) the claim that individuals identified by the defence who are currently residing in Darfur may provide critical exculpatory evidence. The latter point will involve a review of Article 67(2) materials that are available to the defence in order to ascertain whether such evidence disclosed so far may engage lines of defence which have been made known (or are apparent) to the Chamber. Subsequently, the Chamber will review the issue of disclosure of the identities of potentially exculpatory witnesses and their statements, issues of interviews between the defence and prosecution witnesses, issues of translation and cooperation and issues of

disclosure of documents, including those exculpatory documents received by the prosecution under confidentiality agreements pursuant to Article 54(3)(e).

2. *On-site investigations*

99. The Chamber has already indicated that the execution of requests for assistance directly by the prosecution on the territory of a State is *lex specialis* to be applied under the terms and conditions of Article 99(4).[189] Therefore, in the Chamber's view, Part 9 of the Statute does not include an absolute and an all-encompassing right by the prosecution and the defence to on-site investigations.

100. Given this legal framework, and as a general principle, the Chamber should not automatically conclude that a trial is unfair, and stay proceedings as a matter of law, in circumstances where States would not allow defence (or prosecution) investigations in the field even if, as a result, some potentially relevant evidence were to become unavailable. Furthermore, the investigation and prosecution of the most serious crimes of international concern should not become contingent upon a States' choice to cooperate or not cooperate with the Court. Instead, as developed below, the Chamber needs to be satisfied that the accused persons have been provided with adequate facilities for the preparation of their defence and the opportunity to obtain the attendance of witnesses on their behalf by means other than on-site investigations.

[189] Decision on "Defence Application pursuant to articles 57(3)(b) and 64(6)(a) of the Statute for an order for the preparation and transmission of a cooperation request to the Government of the Republic of the Sudan", 1 July 2011, ICC-02/05-03/09-169, paragraph 23.

3. *The defence claim under Articles 67(1)(b) and (e) of the Statute*

101. The defence argues that, given the obstructionist efforts of the GoS, it is unable to conduct interviews in order to identify and locate potential witnesses with knowledge of the facts relevant to the case.[190] According to the defence, because it cannot travel to Darfur it is unable to identify witnesses and it cannot be expected to particularise the contents of evidence from witnesses it cannot speak to.[191]

102. The Chamber considers that the defence has failed to properly substantiate this part of its Request. As indicated above, the unavailable evidence must be identified with sufficient specificity by the defence in light of the information available to it at this stage. The Chamber may take into consideration the difficulties encountered by the defence, when weighing the entirety of the evidence at the end of the trial, in order to resolve any unfairness towards the accused. Nonetheless, an unsubstantiated claim that lines of defence and exculpatory evidence might have become available had the defence been allowed to enter the Sudan is insufficient to meet the high threshold set out for a stay of proceedings

103. In addition, the defence alleges to have identified numerous potential defence witnesses who are believed to reside in Darfur.[192] These individuals are identified in the confidential and *ex parte* Annex H to the Request.[193]

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[190] ICC-02/05-03/09-274, paragraph 9.
[191] ICC-02/05-03/09-300-Conf, paragraph 16.
[192] ICC-02/05-03/09-274, paragraph 9.
[193] ICC-02/05-03/09-274, confidential and *ex parte* annexure H.

104. The defence contends that it cannot interview these individuals because the GoS has denied it access to the Sudan and has even criminalized cooperation with the Court.[194] It submits that even if access to the Sudan were to be granted, the individuals' fear of monitoring by the GoS would have adverse implications with regard to any defence investigation.[195] The defence has discussed protective measures with the VWU but none can be provided within the Sudan. Therefore, any person who cooperates with the defence or who chooses to testify and return to the Sudan would be unprotected.[196]

105. According to the defence, these potential witnesses are meant to provide a broad view of the operation of MGS Haskanita, in comparison with the narrow view provided by AMIS personnel who were within the base when it was attacked. This broader view, in the defence submission, will explain why the attack was lawful given the events on the ground prior to, during and after the attack, including intelligence activities by GoS agents at the base and their effect in furthering a criminal campaign by GoS against the civilian population in Haskanita and Darfur generally.[197] The defence claims that the evidence disclosed "to date" does not adequately address the many leads from exonerating evidence.[198] In particular, it states:

> 38. The starkest example is the failure of the OTP to properly investigate the activities of the GoS representatives present in MGS Haskanita, or the GoS' use of MGS Haskanita as an intelligence tool in its campaign of violence against the civilian population in Darfur. The OTP has not interviewed any of the GoS representative(s) or their superiors or any of the local civilian personnel who were working in the base and who might have evidence concerning the activities

[194] *Ibid.*, paragraph 4.
[195] *Ibid.*, paragraph 8; see above, paragraph 3 of this Decision.
[196] *Ibid.*, paragraph 22.
[197] *Ibid.*, paragraph 18.
[198] *Ibid.*, paragraph 37 (emphasis added).

> of the GoS representatives or spies in the base. Such interviews should have been the first step in any investigation of exculpatory material.
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> 39. Further, the OTP has been unable to obtain any of the contemporaneous documents produced by the AMIS force at MGS Haskanita which is referred to extensively in the OTP's disclosed evidence. This would assist inter alia in establishing what AMIS knew about the GoS representatives' activities in the base, the advice and/or orders given to the force at the MGS Haskanita, the steps AMIS took to address the GoS representatives' activities and the affect [*sic*] the GoS' intelligence and military offensive had on the civilian population in the area. Further, the AU documents will likely provide important information about the warnings issued by the Movements to AMIS about the GoS representatives' activities.[199]

106. The Chamber recalls that the parties shall not present evidence or make submissions other than on the contested issues,[200] which are confined to the following: (i) whether the attack on the MGS Haskanita on 29 September 2007 was unlawful; (ii) if the attack was unlawful, whether the accused persons were aware of the factual circumstances that established the unlawful nature of the attack; and (iii) whether AMIS was a peacekeeping mission in accordance with the Charter of the United Nations.[201] As a general proposition, a broad view of what was happening in Darfur,[202] the alleged existence of a violence campaign perpetrated by the GoS against the civilian population in Haskanita and Darfur generally,[203] and the effect the GoS' military offensive had on the civilian population in the area[204] do not readily appear to the Chamber to fall within the scope of the issues that the Chamber will review during the trial. Their relevance in the case must depend upon a clearly articulated connection to what the parties had delineated in their agreement as to the facts and the contested issues.

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[199] ICC-02/05-03/09-274.
[200] ICC-02/05-03/09-227, paragraph 46.
[201] *Ibid.*, paragraph 24.
[202] ICC-02/05-03/09-300-Conf, paragraph 13.
[203] ICC-02/05-03/09-274, paragraph 38.
[204] *Ibid.*, paragraph 39.

107. Furthermore, on 12 July 2012, upon questioning by the Chamber, the defence clarified that the individuals listed in Annex H are not the witnesses the defence wishes to call and provided further details related to these individuals.[205]

108. The submission of the defence seems to be that the existence of named individuals, who are currently residing in Darfur, is not only an indication that exculpatory evidence is unavailable to the defence, but also an indication that other potential lines of defence may arise if the defence is enabled to access Sudan. However, in the view of the Chamber, *ex parte* Annex H does not in any way substantiate the submission that other lines of defence, beyond those that may be reasonably apparent from the information contained in the Annex, are available, but inaccessible as a result of the obstructionist efforts of the Sudan. An unsubstantiated submission—that lines of defence and exculpatory evidence might have become available had the defence been allowed to enter the Sudan—is insufficient to meet the high threshold set out for a stay of proceedings. The Chamber notes the danger of staying criminal proceedings on the basis of speculative complaints about absent evidence and witnesses who are not known to be truly helpful to the defence case.[206]

109. That said, the Chamber now turns to the individuals, believed to reside in Darfur, who are identified in the *ex parte* Annex H to the Request. The Chamber explored with the defence during the *ex parte* status conference the potential relevance of this evidence under specific items[207] in order to better identify the underlying lines of argument. Prior to the status conference, the Chamber had

[205] Transcript of hearing on 12 July 2012, ICC-02/05-03/09-T-20-CONF-EXP-ENG ET, page 6, line 9; page 13, lines 12 and 13; page 13, lines 21 to 24; page 18, lines 16 to 21; page 26, line 23 and 24; page 28, lines 9 and 10.
[206] Reference is made to the difficulties described by the defence, *Ibid.*, page 18, lines 16 to 21.
[207] *Ibid.*, page 2, lines 10 to 20.

requested the prosecution to file a comprehensive and up-to-date report on the exculpatory evidence disclosed to the defence. The purpose of this exercise was to enable the Chamber to appreciate whether, broadly speaking, the disclosed Article 67(2) material may support lines of defence that may reasonably arise from the allegedly unavailable evidence. The analysis, outlined below, will also assist in determining whether a fair trial is impossible in the case.

110. At the outset, the Chamber notes that some degree of investigation in the Sudan appears to still be possible in the case in spite of the defence inability to travel to the Sudan.[208] In relation to telephone contacts between the defence and witnesses who reside in the Sudan, the Chamber recalls the defence submission that normal satellite phones are not considered secure because the GoS, in cooperation with the phone companies, was able to target these phones.[209]However, the Chamber takes note of the defence's submission that there may be other means of communication.[210]

111. The Chamber now turns to the critical question of whether the lines of defence that may reasonably arise from the allegedly unavailable evidence can be pursued by using other pieces of evidence that the defence has received from the prosecution.

4. Whether the evidence disclosed so far may cover for the lines of defence which have been made known to the Chamber

[208] ICC-02/05-03/09-274, paragraph 12; ICC-02/05-03/09-T-20-CONF-EXP-ENG ET, page 13, line 25 to page 14, line 2; page 28, lines 9 and 10.
[209] ICC-02/05-03/09-274, paragraph 12.
[210] ICC-02/05-03/09-T-16-CONF-EXP-ENG ET, page 5, line 4 to page 6, line 2; page 13, line 20 to page 14, line 5; ICC-02/05-03/09-375-Conf-Exp, paragraph 13.

112. Having reviewed the written and oral submissions of the parties, the Chamber has identified lines of defence that has either been revealed by the defence or arisen from the summaries contained in the confidential *ex parte* Annex H to the Request. For reasons of confidentiality, this information is discussed in a confidential *ex parte* defence Annex to the present Decision. In that annex, the Chamber has analysed whether the Article 67(2) and Rule 77 materials available to the defence engage these lines of defence. To that effect, the Chamber has considered a comprehensive prosecution's report that compiled the information that has been disclosed or made available to the defence pursuant to Article 67(2) and Rule 77 thus far.[211]

113. As specified in the Annex, the Chamber has suggested that, although the defence is not obliged to do so, in the particular circumstances of the case, as an alternative to the drastic remedy of a temporary stay of proceedings, the defence may consider revealing one line of argument to the prosecution in order to facilitate the search for, and disclosure of, relevant evidence and the investigation thereof.

114. The Chamber finds that the Article 67(2) evidence disclosed so far does involve lines of defence that the defence intends to pursue at trial. The disclosed material has been considered at face value and the Chamber notes that this conclusion does not in any way indicate the Chamber's position on whether the issues are established. Once the Chamber analyses the entirety of the evidence at the end of the trial, it may draw conclusions and strike a balance between the fairness of the proceedings and the fact that additional material supporting the same lines of argument could not have been obtained by the defence as a result

[211] ICC-02/05-03/09-343, and Confidential *ex parte* Annexes A and B.

of the lack of on-site investigations. Yet again, the Chamber rejects the submission that the situation cannot be resolved later. In other words, given the circumstances of the case, a fair trial is not prospectively impossible. Any prejudice resulting from unfairness can be relieved against by the Trial Chamber in the trial process.

5. *The identities of potentially exculpatory witnesses and their statements – The non-disclosure protocol*

115. The defence has stated its concern that if it cannot access concealed material covered by Article 67(2) and Rule 77, it cannot commence taking instructions and carrying out the already constrained investigations.[212] Indeed, the Chamber notes that some of this material collected by the prosecution has not been fully disclosed to the defence because of security concerns relating to the volatile security situation prevailing in the Sudan and in particular Darfur.[213] These concerns affect, *inter alia*, the disclosure of identities of some Article 67(2) or Rule 77 witnesses and the lifting of redactions to identifying information regarding third parties, whose consent the prosecution will need to obtain.

116. Appropriate disclosure of this material is particularly important in the circumstances of the present case. The Chamber notes that the redactions it has authorised to date are under ongoing scrutiny. The defence access to this material has been the subject of several oral and written orders. Recent developments indicate that there have been improvements in relation to the disclosure of the identities of the 11 known Article 67(2) or Rule 77 witnesses,

[212] ICC-02/05-03/09-T-17-ENG-ET, page 42, lines 14 to 22.
[213] ICC-02/05-03/09-370, and related 40 Annexes (Annex 1 – Annex 51/5).

namely witnesses 304, 305, 306, 312, 314, 421, 433, 441, 447, 466 and 484.

117. First, the identities of Witnesses 421,[214] 447,[215] and 484[216] have been disclosed to the defence and the Chamber has authorised only limited redactions to the statements of these witnesses.[217]

118. The Chamber has heard numerous submissions and it has taken various decisions whereby it has addressed the security issues concerning the remaining Witnesses 304, 305, 306 and 312[218] and Witnesses 314, 433, 441, and 466.[219]

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[214] See non-redacted name on disclosed witness statement in DAR-OTP-0165-0544-R01.
[215] See non-redacted name on disclosed witness statement in DAR-OTP-0169-1160-R01.
[216] Annex D to Prosecution's Application for Redactions Pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence and Request for the Lifting of Certain Redactions Authorised Pursuant to Rule 81(4), 12 August 2011, ICC-02/05-03/09-198-Conf-Exp-AnxD (see the non-redacted name in DAR-OTP-0181-0108).
[217] *Witness 421*: Pre-Trial INCRIM package 2 on 8 July 2010. Rule 77 package 7 on 8 June 2012. ICC-02/05-03/09-351-Conf-AnxB, page 2; *Witness 447*: DAR-OTP-0169-1160-R01; *Witness 484:* DAR-OTP-0181-0108. Confidential *ex parte* prosecution and VWU only Decision on the Prosecution's Application for Redactions to Witness 484's Statement and Related Material, 3 July 2012, ICC-02/05-03/09-363-Conf-Exp , paragraphs 25 and 26.
[218] Prosecution's Provision of Further and Revised Information on Four Witnesses' Statements, 20 July 2011, ICC-02/05-03/09-183-Conf-Exp, paragraph 8. By email communication from a Legal Officer of the Trial Chamber to the prosecution at 12.00 on 29 July 2011, the Chamber ordered the prosecution to file a public redacted version of its Second Revised Prosecution Application. A public redacted version was filed on 1 August 2011: Public Redacted Version of "Prosecution's Provision of Further and Revised Information on Four Witnesses' Statements", 1 August 2011, ICC-02/05-03/09-183-Red; Decision on the prosecution's request for non-disclosure or redactions of material relating to Witnesses 304, 305, 306 and 312, 28 February 2012, ICC-02/05-03/09-265-Red, paragraphs 26 and 27; *Witness 304:* Annex A to Prosecution's Response to the Trial Chamber's Request for Written Submissions on Issues to be Addressed During the Status Conference on 19 April 2011, 14 April 2011, ICC-02/05-03/09-131-Conf-AnxA; Update on the outcome of the Prosecution's efforts to contact Witnesses P-0304, P-0305 and P-0306, 6 August 2012, ICC-02/05-03/09-377-Conf-Exp, paragraph 4; ICC-02/05-03/09-T-19-CONF-EXP-ENG ET, page 18, lines 11 to 21; page 19, lines 15 to 25; page 26, lines 3 to 12; page 26, lines 16 to 25; page 28, lines 1 to 16 and page 32 lines 1 to 10; *Witness 305*: ICC-02/05-03/09-131-Conf-AnxA; ICC-02/05-03/09-323-Conf-Exp-AnxD, paragraph 10; ICC-02/05-03/09-T-19-CONF-EXP-ENG ET, page 12, lines 3 to 7; *Witness 306*: ICC-02/05-03/09-131-Conf-Anx ; Decision on the prosecution's request for non-disclosure or redaction of material relating to Witnesses 304, 305, 306 and 312, 16 December 2011 (reported on 19 December 2011), ICC-02/05-03/09-265-Conf-Exp, paragraph 38; ICC-02/05-03/09-T-19-CONF-EXP-ENG ET, page 12, lines 11 to page 13, line 4; page 19, lines 3 to 25; page 21, lines 10 to 14; page 29, line 24 to page 30, line 15; ICC-02/05-03/09-T-17 ENG ET, page 35, lines 21 to 24, page 38, lines 17 to 19; ICC-02/05-03/09-377-Conf-Exp, paragraph 6; *Witness 312*: ICC-02/05-03/09-131-Conf-AnxA; ICC-02/05-03/09-323-Conf-Exp-AnxA, paragraph 8; ICC-02/05-03/09-323-Conf-Exp-AnxB, paragraph 14; ICC-02/05-03/09-323-Conf-Exp-AnxD, paragraph 10; ICC-02/05-03/09-343-Conf-Exp-AnxA, page 20; ICC-02/05-03/09-T-19-CONF-EXP-ENG ET, page 24, lines 5 to 17; ICC-02/05-03/09-T-17 ENG ET WT, page 35, lines 19 and 20; ICC-02/05-03/09-281-Conf-Exp, paragraph 8; ICC-02/05-03/09-T-19-CONF-EXP-ENG ET, page 29, line 24 to page 30, line 15; ICC-02/05-03/09-T-19-CONF-EXP-ENG ET, page 24, lines 18 to 22.
[219] Decision on the prosecution's request for non-disclosure of material relating to Witnesses 314, 433, 441 and 466, 18 April 2012, ICC-02/05-03/09-323-Conf-Exp, with Confidential and *ex parte* Annexures A, B, C and D available only to the Prosecution and the Victims and Witnesses Unit; *Witness 314* and *Witness 433*: ICC-02/05-03/09-333-Conf-Exp, paragraphs 2 and 15 to 16; ICC-02/05-03/09-T-19-CONF-EXP-ENG ET, page 19, lines 3 to 25; page 21,

Significant developments have taken place which will allow for the disclosure of their identities to the defence in due course.

119. During the July hearing, the prosecution was ordered to commence *inter partes* discussions with the defence in order to file a joint Protocol on the handling of confidential information and contact of a party with witnesses of the other party for investigation purposes.[220] There were several significant issues on which the parties diverged. Therefore, on 27 August 2012, after having consulted the VWU on 23 August 2012,[221] the prosecution filed a separate proposed protocol.[222] On 18 September 2012, the defence filed its response including its own proposed protocol.[223] The Chamber also received a number of additional flings and responses on the issue,[224] including the VWU's observations on both protocols proposed by the parties.[225]

120. It has been made clear that, once the redactions are lifted, the defence will

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lines 10 to 14; page 29, line 24 to page 30, line 15; *Witness 441*, ICC-02/05-03/09-T-19-CONF-EXP ENG ET, page 20, lines 3 to 20; ICC-02/05-03/09-333-Conf-Exp, paragraph 8; Victims and Witnesses Unit's updated report on the situation of Witnesses 441 and 466, 8 May 2012, ICC-02/05-03/09-332-Conf-Exp, paragraph 8; ICC-02/05-03/09-T-19-CONF-EXP-ENG ET, page 19, lines 3 to 25; page 21, lines 10 to 14; page 29, line 24 to page 30, line 15; *Witness 446*, ICC-02/05-03/09-T-19-CONF-EXP-ENG ET, page 20, line 22 to page 21, line 14; page 22, line 6 to 8.

[220] ICC-02/05-03/09-T-19-Conf-Exp-ENG ET, page 34, lines 10 to 13.

[221] Victims and Witnesses Unit's observations following Trial Chamber V's [sic] instructions dated 21 September 2012, 5 October 2012, ICC-02/05-03/09-400-Conf, paragraph 5.

[222] Annex to Prosecution's Submission of a Draft Protocol on the Handling of Non-Public Information and Contact of a Party With Witnesses of the Opposing Party, and Prosecution's Update on Expert Witness, 27 August 2012, ICC-02/05-03/09-389-AnxA.

[223] Defence Response to Prosecution's Submission of a Draft Protocol on the Handling of Non-Public Information and Contact of a Party with Witnesses of the Opposing Party, 18 September 2012, ICC-02/05-03/09-394-Conf with a Public Annex. A public redacted version was filed on the same day: ICC-02/05-03/09-394-Red.

[224] Observations en Réponse des Représentants Légaux Communs à la Version Publique Expurgée de la Soumission du Procureur relative au Projet de Protocole Concernant la Gestion des Informations Non Publiques et des Contacts par une Partie des Témoins de la Partie Adverse (ICC-02/05-03/09-389-31/08/2012) avec la Version Publique de son Annexe A (ICC-02/05-03/09-AnxA-31/08/2012), 21 September 2012, ICC-02/05-03/09-396, paragraphs 16 to 19; Defence Reply to the « Observations en Réponse des Représentants Légaux Communs à la Version Publique Expurgée de la Soumission du Procureur relative au Projet de Protocole Concemant la Gestion des Informations Non Publiques et des Contacts par une Partie des Témoins de la Partie Adverse (ICC-02/05-03/09- 389-31/08/2012) avec la Version Publique de son Annexe A (ICC-02/05-03/09-AnxA- 31/08/2012) », 4 October 2012, ICC-02/05-03/09-399; Defence Application for Leave to Reply to the Victims and Witnesses Unit's observations following Trial Chamber V's *(sic)* instructions dated 21 September 2012, 15 October 2012, ICC-02/05-03/09-405-Conf; Defence Reply to "Victims and Witnesses Unit's observations following Trial Chamber V's [sic] instructions dated 21 September 2012", 18 October 2012, ICC-02/05-03/09-406-Conf.

[225] ICC-02/05-03/09-400-Conf with annexes.

be afforded sufficient time to conduct the necessary investigations.[226] The Protocol, once approved by the Chamber, will alleviate the security concerns on these witnesses and, *in fine*, will allow for disclosure of their identities in a safe manner.

121. In the view of the Chamber, a stay of proceedings is an exceptional remedy to be resorted to only where the Chamber is convinced that the situation motivating the request for the stay cannot be resolved at a later stage or cannot be cured during the Chamber's conduct of the trial. The Chamber considers that the situation in relation to the defence's access to this information has improved significantly. In particular, there is a realistic prospect that that the implementation of the Protocol, once approved by the Chamber, will result in the disclosure of critical information to the defence prior to the commencement of the trial and thus enable defence investigations. The Chamber thus rejects the submission that there is no prospect that the situation can be resolved in due course and that the proceedings should be stayed, even temporarily, for this reason.

6. Defence access to prosecution witnesses

122. The Chamber notes that the defence has been provided with the identities of all 15 prosecution trial witnesses.

123. The defence states that in a further attempt to gain access to relevant evidence it has requested the prosecution to facilitate interviews with 10 prosecution witnesses.[227] The defence indicates that Witnesses 307, 314, 441 and

[226] ICC-02/05-03/09-265-Red, paragraph 39.
[227] ICC-02/05-03/09-274, paragraph 23.

466 informed the prosecution that they did not wish to be interviewed by the defence at all, and Witness 442 responded that he did not wish to be interviewed at that time. The prosecution has been unable to locate the remaining individuals, namely Witnesses 304, 305, 306, 309 and 312.[228]

124. During the July Status Conference, however, the prosecution submitted that it had contacted Witnesses 305, 306, 439, and 312. Witnesses 305 and 439 have now indicated their willingness to be questioned by the defence. Witness 312 has confirmed that he is unwilling to be interviewed by the defence. The prosecution has not yet been able to establish whether Witness 306 would agree to be interviewed by the defence, though it is confident that the witness will ultimately accept.[229] And, finally, Witness 304 could not be contacted.[230]

125. Moreover, Witnesses 314,[231] 441, and 466 have all indicated that they are not willing to be interviewed by the defence.[232] Witness 442, who indicated in the past that he would agree to an interview, could not be contacted.[233]

126. Witness 307 ultimately consented to the disclosure of his identity to the defence,[234] and the Chamber granted the prosecution's request for the lifting of redactions to Witness 307's name and identifying information on 12 September

[228] ICC-02/05-03/09-274, paragraph 23 and footnote 49, The prosecution confirmed that it has lost contact with Witnesses 304, 305, 306 and 312. It is still trying to contact Witness 439. Witnesses 307, 314, 441 and 466 declined to be interviewed by the Defence, and 442 declined to be interviewed at that time. The relevant correspondence is attached as Annex M.
[229] ICC-02/05-03/09-T-19-CONF-EXP-ENG ET, page 14, lines 1 to 4.
[230] ICC-02/05-03/09-T-17-ENG ET, page 35, lines 14 to 25.
[231] ICC-02/05-03/09-T-19-CONF-EXP-ENG ET, page 16, lines 16 to page 19, line 24.
[232] ICC-02/05-03/09-T-17-ENG ET, page 36, lines 2 to 4.
[233] ICC-02/05-03/09-T-17-ENG ET, page 36, lines 4 to 14; ICC-02/05-03/09-T-19-CONF-EXP-ENG ET, page 15, lines 6 to 25.
[234] ICC-02/05-03/09-386-Red.

2012.[235] Thus, the situation with regard to this witness has changed since the July hearing. His name has now been disclosed to the defence.

127. Moreover, the Chamber welcomes the recent developments with regard to the prosecution's ability to contact witnesses 304, 305 and 306,[236] a step that appeared difficult some time ago.[237] Finally, arrangements should be made for the defence to question Witnesses 305, 439 and 442, who have all indicated their willingness in that regard.

128. The Chamber is mindful that it is ultimately the witnesses' prerogatives to choose whether or not to agree to an interview with the defence.[238] However, given the difficulties experienced by the defence to conduct on-site investigations, the prosecution should spare no efforts to secure defence access to these individuals. The prosecution submitted that it cannot compel the witnesses, but "just put the scenario to them and let them decide".[239] The Chamber encourages the prosecution to consider doing more than just that. The Chamber notes that measures have been taken and that some progress has been made, but it nevertheless encourages the prosecution to continue its efforts to secure defence contacts or interviews with these witnesses.

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[235] Decision on the prosecution's applications for lifting redactions on material relating to Witnesses 307 and 484 pursuant to Regulation 42 of the Regulations of the Court, 12 September, 2012, ICC-02/05-03/09-393.
[236] Update on the outcome of the Prosecution's efforts to contact Witnesses 304, 305 and 306, 6 August 2012, ICC-02/05-03/09-377-Conf-Exp.
[237] ICC-02/05-03/09-274, paragraph 23 and footnote 49, The prosecution confirmed that it has lost contact with Witnesses 304, 305, 306 and 312. It is still trying to contact Witness 439. Witnesses 307, 314, 441 and 466 declined to be interviewed by the Defence, and Witness 442 declined to be interviewed at that time. The relevant correspondence is attached as Annex M; ICC-02/05-03/09-T-19-CONF-EXP ET, page 18, lines 11 to 21.
[238] Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses, 3 June 2008, ICC-01/04-01/06-1372, paragraph 11.
[239] ICC-02/05-03/09-T-19-CONF-EXP ET, page 14, lines 5 to 9.

129. Given the efforts and the progress made in order to secure contact, questioning or interviews between these witnesses and the defence, the Chamber rejects the argument that there is no possibility that the situation can be resolved in due course and that the proceedings should be stayed for this reason.

7. Translation

130. Another issue of relevance to the Request and to the overall ability for the accused to be able to advance a meaningful defence is the issue of languages. Since the beginning of the proceedings in the case, the Chamber has addressed several difficulties arising in this regard. During their initial appearance on 17 June 2010, the Pre-Trial Chamber explored what languages the accused, Mr Banda and Mr Jerbo, speak and understand.[240] Mr Banda specified that he speaks Zaghawa and does not speak Arabic very well.[241] Similarly, Mr Jerbo indicated that he understands and speaks Zaghawa, and does not "understand Arabic very well, but [ ] speak[s] it".[242] The practical implications arising from the obligation to disclose the statements of all prosecution witnesses in a language which the accused persons fully understand and speak, pursuant to Rule 76(3), have been described as follows:[243]

> i. Zaghawa is not a written language;
>
> ii. The Zaghawa vocabulary is limited to no more than 5,000 words, rendering it difficult to translate certain words and concepts from languages of the Court such as English, French and Arabic into Zaghawa;

[240] Transcript of hearing on 17 June 2010, ICC-02/05-03/09-T-4-ENG ET.
[241] ICC-02/05-03/09-T-4-ENG ET, page 6, line 24 to page 7, line 1 and page 9, line 25 to page 10, line 1.
[242] ICC-02/05-03/09-T-4-ENG ET, page 10, lines 13, 14, 20 and 21.
[243] Prosecution's Response to the Trial Chamber's Request for Written Submissions on Issues to be Addressed During the Status Conference on 19 April 2011, ICC-02/05-03/09-131, paragraph 10.

iii. Consequently, the relevant material would first have to be transliterated and then read on to audio tapes in Zaghawa;

iv. Other practical difficulties may also arise in translating annotations that are contained in certain witness related materials such as maps and sketches on to audio tape.

v. The current page-count of material that needs to be disclosed pursuant to Rule 76 is approximately 3700 pages. This includes the full witness statements, as well as the Document Containing the Charges and the updated List of Evidence. Discussions with the Language Services Unit of the Office of the Prosecutor indicate that this process will take approximately 30 months if three translators were to work on the material on a full-time basis.

131. During the status conference of 19 April 2011, the defence confirmed that the accused will require complete audio translations of the witness statements in relation to the contested issues.[244] On 16 August 2011, the Chamber directed the prosecution to immediately start translating into Zaghawa the witness statements that it intends to rely upon for the purposes of the trial.[245] On 12 September 2011, the Chamber issued its reasons for the order to translate the statements of prosecution witnesses into Zaghawa.[246] It based its decision on Rule 76(3) and Article 67(1)(a) and (f) of the Statute, which establish the rights of the accused, including the right to "be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks" and the right to "such translations as are necessary to meet the requirements of fairness, [...]".

132. As a result of several orders of the Chamber and the combined efforts of the prosecution and Registry, the accused persons have been provided with

[244] Transcript of hearing on 19 April 2011, ICC-02/05-03/09-T-10-ENG CT, page 23, lines 20 to 21.
[245] ICC-02/05-03/09-199.
[246] Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation, 12 September 2012, ICC-02/05-03/09-214, paragraphs 25 to 32.

audio translations into Zaghawa of the statements of 13 out of the 15 prosecution witnesses.

133. Although the prosecution had previously estimated that the remaining full transcripts of Witnesses 442 and 307's interviews will be disclosed in Zaghawa by the end of October and November 2012,[247] due to the unanticipated departure of one of the language assistants it is now anticipated that Witness 442's interviews will be completed by the end of December 2012.[248] It is submitted that the audio-translation of Witness 307's interview will be completed by early February 2013.[249]

134. In addition, the prosecution is aiming to start the translation of annexes to all witness statements in December 2012 and finalise the translation of evidence obtained pursuant to Rules 111 and 112 by March 2013.[250] The Chamber acknowledges the difficulties encountered by the prosecution but notes that the full translation of incriminatory evidence pursuant to Rule 76 of the Rules is in progress.

135. The efforts and the progress made in order to provide the accused persons with Zaghawa translations of the statements of witnesses in relation to the contested issues is an important factor to allow for meaningful defence investigations, including taking informed instructions from the accused persons.

[247] ICC-02/05-03/09-395, paragraphs 4 and 5.
[248] Fourth Prosecution Report on Translation Issues, ICC-02/05-03/09-408, paragraph 5.
[249] Fourth Prosecution Report on Translation Issues, ICC-02/05-03/09-408, paragraph 6.
[250] ICC-02/05-03/09-T-17-ENG ET, page 45, lines 17 to 19.

8. Cooperation and defence access to relevant exculpatory documents

136. In addition, the defence claims to be unable to obtain relevant, contemporaneous documents from the AU, UNSC, OCHA, UNMIS, and the Government of Nigeria.[251] The defence alleges that it has prepared requests for cooperation that were transmitted via the Registry, to no avail. In the defence's view, this is another avenue in which it may build a positive defence case, but it has been prevented from doing so.[252] The defence made reference, in particular, to documents it has not been able to access.[253]

137. During the July hearing, the prosecution submitted that it has obtained Article 67(2) documents from two organisations and that all those documents were disclosed to the defence previously, during the confirmation of charges hearing. In fact, it submits that much of the defence's case is based on such disclosed material.[254] The prosecution has stressed the ongoing nature of the contacts they make and it has pointed to the progress it can achieve via the communication channels it has opened.[255] The prosecution provided a written update to the Chamber on 27 August 2012 on the efforts to retrieve these documents.[256]

138. On 27 August 2012, the prosecution updated the Chamber on the status of cooperation.[257] In relation to one document, the Chamber notes that the

[251] ICC-02/05-03/09-274, paragraph 17; ICC-02/05-03/09-T-17-ENG ET, page 59, lines 18 to 21.
[252] *Ibid.*, page 60, lines 1 to 13.
[253] Transcript of hearing on 11 July 2012, ICC-02/05-03/09-T-18-CONF-EXP ET, page 5, line 22 to page 6 line 5.
[254] *Ibid.*, page 8, lines 3 to 7.
[255] *Ibid.*, page 2, lines 9 to 18; page 3, lines 6 to 18 and 23 to page 5, line 17; page 6, line 20 to page 8, line 8.
[256] *Ibid.*, page 13, lines 3 and 4.
[257] ICC-02/05-03/09-388-Conf-Exp.

prosecution has made several efforts to obtain the document. In the course of communications with the information providers it turned out that the majority of the information contained in the document is included in a report. This report, which is publicly available, has been disclosed to the defence.[258]

139. The prosecution has not been able to obtain copies of other documents. However, as a result of the prosecution's inquiries, it is now clear that they "exist" and they have been identified. Disclosure to the defence is contingent upon authorisation of various organisations that the prosecution, in its submissions, continues to consult.[259]

140. Moreover, the prosecution has requested another provider to give access to all relevant reports that relate to the attack on MGS Haskanita. A report on the status of the current discussions with that provider is pending.[260]

141. The Chamber notes that the prosecution has obtained and disclosed a number of documents from third parties and progress has been made in relation to some important documents received on the basis of confidentiality agreements, pursuant to Article 54(3)(e) of the Statute, as dealt with below in section nine. In particular, the Chamber notes that these confidential documents include situation reports such as those that, according to the defence, are relevant to its investigations. The situation with regard to these documents is addressed below in Section 9.

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[258] *Ibid.*, paragraph 4 footnote 5.
[259] *Ibid.*, paragraphs 7 to 10.
[260] *Ibid.*, paragraphs 11 to 13

142. The prosecution stated that it is in the process of obtaining other documents and information which it intends to transmit to the defence. The Chamber also takes note of the latest Registry's memorandum transmitting to the defence a letter from the UN.[261] The Chamber instructed the Registry to file this material in the record of the case.[262] Even though there have been delays, the Chamber considers that, in view of the progress made, it is premature to conclude that further efforts and attempts by the prosecution to secure these important documents would be unsuccessful.

143. Moreover, a cooperation request pursuant to Article 87(6) of the Statute has been transmitted to the AU urging it to provide the documents sought by the defence.[263] As noted by the prosecution, and in addition to the follow-up measures informed by the Registry,[264] requests of a similar nature can be transmitted to other organisations in order to obtain documents which the defence believes "are crucial to a proper investigation of the contested issues at trial".[265] In the view of the Chamber, this avenue may be explored in due course, and it is premature to conclude that it would be unsuccessful.

144. Given the progress made, the Chamber is unable to conclude that the situation cannot be resolved later.

[261] ICC-02/05-03/09-409-Conf-Anx.
[262] Email from the Legal Officer to the Trial Chamber to the Registry on 25 October 2012 at 12.35.
[263] Decision on the second defence's application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, 21 December 2011, ICC-02/05-03/09-268-Red.
[264] ICC-02/05-03/09-T-17-ENG ET, page 17, line 14.
[265] ICC-02/05-03/09-274, paragraph 17.

9. Documents obtained on the basis of confidentiality agreements pursuant to Article 54(3)(e) of the Statute

145. In the present case, the prosecution has received in the course of its investigations ten documents under confidentiality agreements pursuant to Article 54(3)(e) of the Statute. It received eight documents from a first information provider ("First Provider") and two documents from a second information provider ("Second Provider").

146. On 11 and 12 July 2012, the Chamber held an *ex parte* prosecution and Registry only status conference concerning these documents. After reviewing each of the documents, the Chamber requested the prosecution to consider counter-balancing measures such as "admissions".[266] With regard to the eight documents received from the First Provider the Chamber ordered the prosecution to seek the consent of the information provider to include additional pieces of information in the narrative summaries. With regard to the two documents received from the Second Provider, the Chamber directed the prosecution to reiterate its request and seek once again the provider's consent to disclosure of the material in full or at least in redacted or summary form and report back to the Chamber no later than 27 August 2012. [267] On that date, the prosecution filed an update on its consultations concerning the Article 54(3)(e) documents and application for protective measures.[268]

147. On 19 October 2012, the Chamber issued its Second Decision on Article 54(3)(e) documents. The Chamber found that it was clear, for the time being, that

[266] ICC-02/05-03/09-T-19-CONF ET, page 39, lines 1, 2, 10, 11; ICC-02/05-03/09-387-Conf-Exp, paragraph 10.
[267] ICC-02/05-03/09-T-19-CONF ET, page 49, lines 3 to 10.
[268] ICC-02/05-03/09-387-Conf-Exp.

the two information providers do not consent to the disclosure of the documents in full to the defence.[269] In light of the circumstances, the Chamber moved to determine which counter-balancing measures can be taken to protect that the rights of the accused, in spite of the non-disclosure of the information as requested.[270]

148. In relation to the documents originating from the First Provider the Chamber concluded that the information relevant to the preparation of the defence pursuant to Rule 77 was properly reflected in the amended narrative summaries. In order to expedite the proceedings pursuant to Article 64(2) of the Statute, the Chamber has granted the protective measures requested by the First Provider to the use of the narrative summaries of the eight documents, and it has ordered disclosure of the narrative summaries.[271]

149. In relation to the documents originating from the Second Provider, the Chamber has assessed the undisclosed material and an admission of fact advanced by the prosecution along with alternative evidence, and it has decided that the latter are sufficiently counterbalance measures. It has been stressed that, as proceedings move forward, if the Chamber notes that the said counterbalancing measures fail to provide an appropriate remedy the Chamber will review the issue and ensure that rights of the accused persons are protected.[272]

150. As set out above, a stay of proceedings is an exceptional remedy to be resorted to only where there is clear prejudice to a fair trial and insufficient

[269] Second Decision on Article 54(3)(e) documents, 19 October 2012, ICC-02/05-03/09-407-Conf-Exp.
[270] *Ibid.*, paragraph 8.
[271] *Ibid.*, paragraphs 11 to 16.
[272] *Ibid.*, paragraphs 17 to 20.

indication that the situation will be resolved later. The Chamber rejects the submission that there is no prospect that any prejudice resulting from the situation can be resolved in due course. To the contrary, important progress has been made in relation to the disclosure of the material obtained by the prosecution on confidentiality agreements pursuant to Article 54(3)(e) of the Statute. The Chamber will continue to explore available mechanisms to ensure that the counter-balancing measures are sufficient, including by means of the prosecution's admission of facts in relation to the eight documents it has received from the First Provider.

10. Inequality of arms vis-à-vis the victims

151. The defence alleges that it is prejudiced by an inequality of arms between it and the Legal Representatives of Victims since the former Legal Representatives of Victims a/6046/10 and a/6047/10 are able to travel to Darfur.[273] Although they are no longer legal representatives of victims in the case, they may still assist their clients in some capacity outside the courtroom or pass information to the current Legal Representatives.[274] As a result, individuals from Haskanita may be called to provide testimony at trial without the defence having been able to conduct investigations on their evidence.[275]

152. The Chamber does not need to discuss whether the principle of "equality of arms" (set out in Article 67(1) of the Statute) applies vis-à-vis participating victims. The issue of whether the defence had equal access to any evidence that victims may apply to submit at trial will be of relevance to the exercise of the

[273] ICC-02/05-03/09-274, paragraph 20.
[274] *Ibid.*, paragraph 20.
[275] *Ibid.*

Chamber's discretion if and when such applications are made. Moreover, when ruling on the relevance or admissibility of such evidence, the Chamber will take into account the prejudice that such evidence may cause to a fair trial, as required by Article 69(4) of the Statute. In view of these safeguards, the Chamber is not persuaded that this matter is of relevance to the determination of whether the proceedings should be stayed.

11. Timing of a request for temporary stay of proceedings

153. The defence asserts that it has the duty to request a stay as soon as the accused persons' rights are violated[276] rather than proceeding with the "charade and wasted expense of a flawed trial" only for the Chamber to conclude later that the proceedings were unfair.[277] It relies on jurisprudence of the ICTY Appeals Chamber.[278]

154. By contrast, the prosecution suggests that it is premature to conclude that a fair trial will be impossible. Instead, it is submitted, that finding "can only be made at the end of the trial (or at a minimum at the end of the Prosecution's case), not before its commencement".[279] Only unfairness that cannot be resolved, rectified or corrected will trigger a stay of proceedings.[280] Such a finding cannot be confidently made, in the submission of the prosecution, without a trial record.[281]

[276] ICC-02/05-03/09-300-Conf, paragraph 7.
[277] ICC-02/05-03/09-274, paragraph 43; ICC-02/05-03/09-300-Conf, paragraph 9.
[278] ICTY, *Prosecutor v. Tadić*, *IT-94-1-A*, Appeals Chamber, Judgment, 15 July 1999, paragraph 55.
[279] ICC-02/05-03/09-286-Red, paragraph 11.
[280] *Ibid.*, paragraph 12.
[281] *Ibid.*

155. In the view of the Chamber, for purposes of this Decision, it is unnecessary to determine whether the remedy of a stay of the proceedings is only available, at a minimum, at the end of the prosecution's case. Indeed, for the reasons laid out above, the Chamber disposes of the Request on the basis that the defence has not shown any prejudice that, in the Chamber's view, cannot be remedied in the course of trial.

156. The defence argues that it is a waste of time and resources to go through a trial that may possibly result in a stay of proceedings after all. That argument is unpersuasive. For one, the primary consideration for the existence of this Court is to do justice. Economy of time and money will always be kept highly in mind. But it is only a secondary consideration.

157. The defence submitted that once witnesses have been called, the accused persons' rights against being twice tried for the same offence come into play and, as a result, if found at that stage that the defence's right to investigate has been compromised, the Chamber will be required to dismiss the charges.[282] This submission involves the interpretation of Article 20(2) of the Statute, which provides that "[n]o person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court". The Chamber understands this submission as follows. Once evidential hearing commences in a criminal trial, jeopardy attaches in the sense of *ne bis in idem*. A suspension or termination of the trial thereafter (such as on account of a finding of impossibility of fair trial) sets the stage for the plea of double jeopardy. An instance of double jeopardy would lead to dismissal of the charges when a second trial is initiated or commenced. In order to avoid this problem of

[282] ICC-02/05-03/09-300-Conf.

double jeopardy, the defence argues, the solution is to stay proceedings on the first occasion, as they now urge, when the complaint of possible unfairness was raised.

158. For the time being, the question is too abstract and remote to control the outcome of the present request. Therefore, the Chamber will not make any determinations in this respect. At this stage, it suffices to say only that it does not prejudice the defence that the possibility exists in the future to request a Chamber's ruling that the charges, in a subsequent hypothetical prosecution, should be dismissed on grounds of double jeopardy.

IV. CONCLUSION

159. In light of the reasoning set out above, the Chamber concludes that the better approach is for the case to go to trial. If need be, the defendant's complaint will be kept in mind in the course of the trial. At trial, the Chamber, the parties and the participants will be in a position to better assess the evidence adduced to see whether the complaints about fair trial are founded.

160. Therefore, the Chamber will invite the parties and the participants to file written submissions on the possible date for the commencement of the trial by 19 November 2012. Pursuant to Rule 132(1) of the Rules, the Chamber will then fix the date of trial at a status conference.

FOR THE FOREGOING REASONS, THE CHAMBER

(i) Rejects the defence request for a temporary stay of proceedings

(ii) Encourages the prosecution to continue its efforts to secure defence contacts or interviews with witnesses in the way suggested in paragraph 127 above.

(iii) Directs the parties and the participants to file written submissions on the possible date for the commencement of the trial by 19 November 2012.

Judge Eboe-Osuji appends a concurring and separate opinion.

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

Judge Joyce Aluoch
Presiding Judge

Judge Silvia Fernández de Gurmendi

Judge Chile Eboe-Osuji

Dated this 26 October 2012

At The Hague, The Netherlands

CONCURRING SEPARATE OPINION OF JUDGE EBOE-OSUJI

1. Not too long ago, in a judgment on stay of criminal proceedings, Justice Brennan (before he served as the Chief Justice of Australia) had this to say: 'Unfairness occasioned by circumstances outside the court's control does not make the trial a source of unfairness. When an obstacle to a fair trial is encountered, the responsibility cast on a trial judge to avoid unfairness to either party but particularly to the accused is burdensome, but the responsibility is not discharged by refusing to exercise the jurisdiction to hear and determine the issues. The responsibility is discharged by controlling the procedures of the trial by adjournments or other interlocutory orders, by rulings on evidence and, especially, by directions to the jury designed to counteract any prejudice which the accused might otherwise suffer.'[1] The outcome of the Chamber's decision issued today is consistent with Brennan J's observation. I fully concur with it. So, too, with much of the Chamber's reasoning that generated that outcome.

2. I do, however, have separate views on some of the questions of principle and policy involved in this sort of litigation at this tribunal; though their resolution would not control the outcome in the present case in its particular circumstances. My separate views concern the following questions: (i) whether, as a matter of principle, a Trial Chamber's proceedings on the charge may be stayed regardless of fault on the part of the prosecution or the victim; (ii) whether a Trial Chamber of this Court may, as a general question of policy, stay proceedings before the completion of the evidential hearing on the charge; and (iii) whether as a matter of principle the exercise of 'inherent jurisdiction', on any acceptation of the term, entitles a Trial Chamber of this particular Court to stay proceedings before the conclusion of the evidential hearing on a properly confirmed charge. I discuss these questions below, as part of the elaboration of my reasons for concurring in the outcome of the Chamber's decision. I divide this Opinion into two parts. Part I deals with the propriety of stay on this particular application, including the first and second questions indicated above. Part II engages the third question.

3. Before proceeding, I should stress, perhaps, that there had only been two occasions in the past on which stay of proceedings was ordered in this Court and litigated all the way through appeals. The resulting ICC jurisprudence is thus not set in stone on any reasonable view; but will continue to evolve, just as the law *is* continuing to evolve in the national jurisdictions that recognise the remedy of stay, despite their much longer history and much larger experience on the subject. As the law continues to develop in this new Court, it should not be prudent to ignore certain concerns, such as those engaged in this Opinion.

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[1] *Jago v District Court of NSW* [1989] HCA 46 [High Court of Australia], per Brennan J, para 23.

PART I: PROPRIETY OF STAY ON THIS APPLICATION

A Temporary Stay of Proceedings?

4. The Defence request is for a 'temporary' stay. It is tempting and possibly convenient to view that remedy as benign. But, the remedy as requested presents deeper ramifications that call for great care.

5. First, the factual allegations of the Defence are that they have suffered severe hindrance of access to both information and investigative facilities they need to prepare for trial. The complaint is that the Government of Sudan, certain UN agencies, the African Union, the Government of Nigeria and the International Committee of the Red Cross have not provided to the Defence information requested of them. The Government of Sudan, so goes the complaint, is the chief culprit. Not only has it denied access to information, but it has also denied the Defence request to travel to Sudan to conduct site-based investigations and possibly interview potential witnesses.

6. Ordinarily, the request of a defendant in that position would be for *adjournment*, to allow the needed correction to be made;[2] noting that 'adjournment' means the 'putting off of a court session or other meeting or assembly *until a later time*.'[3] Had the present request been for an adjournment, it would surely have been considered upon a different and less complex terrain of analysis. The remaining question might then have been whether there is a trial in progress, such that there is something to adjourn. [That remaining question is, of course, also engaged by a request for temporary stay of proceedings in which the complaint hinges upon hindered preparation for trial.] But, the Defence in the case at bar chose the strategy of requesting a 'stay of proceedings,' instead of the more prosaic application for adjournment.

7. In the records of this Court, it is not unusual to encounter curious usage of the terminology of 'stay of proceedings', when what was really meant was 'adjournment'.[4] But, Defence Counsel in this case are not guilty of that manner of confused usage. In their submissions, they made it clear that a *stay* of proceedings, specifically in the temporary form that they seek it, is a concept quite different from mere *adjournment*. Yet, two elements of the

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[2] See *R v Carosella* [1997] 1 SCR 80 [Supreme Court of Canada] para 26. See also *R v Vokey* (1992) 14 CR (4th) 311 [Court of Appeal, Newfoundland, Canada], p 329 para 95.

[3] See *Black's Law Dictionary* [emphasis added].

[4] One sees evidence of such confusing usage in materials such as the 'Prosecution's Urgent Request for Variation of Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with VWU', dated 7 July 2010, ICC-01/04-01/06-2515, filed in the case of *Prosecutor v Lubanga Dyilo*. It is clear from both that title and the substantive prayer stated in paragraph 2 of the filing ('that the trial proceedings be stayed pending consultations and implementation of necessary protective measures, in the interests of the overall safety and well-being of intermediary 143') that the alternative prayer in that request was for an *adjournment*, not for 'stay of proceedings' properly understood.

distinction that they offered present particular problems that are not, in my own mind, easily ignored in the outcome of the litigation. First, Counsel contemplate that a stay would mean an interruption of their own retainer. This is in the sense that they would no longer be eligible for remuneration for the duration of the stay.[5] It is not clear whether they intend still to render the usual professional services to their clients (but on a *pro bono* basis), or whether they would be unavailable to do so, for the duration of the stay if granted. Since there is no reason to suppose that lawyers in private practice (with offices and a team of supporting professionals and assistants) would elect to switch from a paid retainer to a *pro bono* mode for an indefinite period, it would be unwise to assume here that Counsel envisaged in their submissions that they would work for free on the case during the period of stay if granted. This presents a curious anomaly, then. The Defence, it is to be recalled, sought a stay of proceedings on grounds that they have been denied opportunity to carry out the investigations they need to prepare for trial. Yet, in their mind, the implication of the very remedy that they seek renders them unavailable to undertake the same trial preparation (the hindrance of which they complain about) should the missing information become available during the period of the stay of proceedings—without further litigation as to whether or not they should return to work on the case.

8. Another conception of the difference that Counsel contemplate between temporary stay and adjournment is that adjournment, in their view, concerns stoppages in proceedings, made necessary by difficulties within the requesting party's control or which could easily be corrected.[6] One implication of this understanding, as a matter of general principle, would then be that any stoppage in criminal proceedings occasioned by difficulties beyond the control of the moving party, or which could not easily be corrected, would provoke questions of a 'temporary stay of proceedings'. The unsatisfactory ramifications of this are self-evident. It will, in particular, make requests for stay of proceedings a matter of routine occurrence in criminal trials (as criminal trials are often afflicted by irregularities beyond any party's control or which could not easily be corrected), rather than the 'exceptional remedy'[7] that appellate courts have consistently emphasised even '[a]t the risk of repetition.'[8] The implications engage the mischief that Lord Lane CJ reproved in *Attorney-General's Reference (No 1 of 1990)*, as he stressed the exceptional nature of the remedy of stay of proceedings: 'If they were to become a matter of routine, it would be only a short time before the public, understandably, viewed the process with suspicion and mistrust.'[9] This

[5] See the transcript of Hearings and Status Conferences of 11 July 2012, ICC-02/05-03/09-T-17-ENG, p 20.
[6] See, *ibid*, p 21.
[7] See *Prosecutor v Lubanga Dyilo (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 ...)*, 8 October 2010, ICC-01/04-01/06-2582, para 55.
[8] *Attorney-General's Reference (No 1 of 1990)* [1992] QB 630 [Court of Appeal, England], p 644.
[9] *Ibid*, p 643.

undesirable outcome will become especially worrying if Defence Counsel's retainers are also to suffer interruption during such stays of proceedings. In short, criminal trials will not move.

9. In this connection, it is helpful to keep in mind the observations of Brennan J of the High Court of Australia (quoted in the opening paragraph of this opinion): to the effect that the mere fact that the origins of the unfairness complained about are outside the court's control will not necessarily justify a stay on the supposition that such manner of unfairness is beyond the relieving abilities of the judges in the course of the trial.

10. Second, I am also mindful of the October 2008 decision of the Appeals Chamber in *Prosecutor v Lubanga* on the question of stay of proceedings[10] [the 'Appeals Chamber's Lubanga Decision of 21 October 2008']. In that decision, the Appeals Chamber reasoned that the Trial Chamber's decision on stay 'was conditional and therefore potentially only temporary.'[11] In taking that view of the Trial Chamber's decision,[12] the Appeals Chamber did not subtract from the legal standards applied by the Trial Chamber in arriving at the decision under appeal, considering that the legal standards invoked by the Trial Chamber are the standards that ordinarily apply to permanent stay of proceedings.[13] A reasonable appreciation of the Appeals Chamber's Lubanga Decision of 21 October 2008 then potentially negates any difference between a permanent and temporary stay at the level of basic legal standards: the difference being only in the original temporal import of the stay—i.e. whether the Trial Chamber intended the stay to be permanent or temporary.

11. Third, in the Appeals Chamber's Lubanga Decision of 21 October 2008, the Appeals Chamber indicated—in a conjunctive way—the conditions under which a stay may be vacated. They are: (i) if the forensic obstacles that led to the stay 'fall away'; and (ii) if vacating the stay 'would not occasion unfairness to the accused person for other reasons, in particular in light of his or her right to be tried without undue delay'. The latter condition appears reiterated in the following addendum: 'If a trial that is fair in all respects becomes possible as a result of changed circumstances, there would be no reason not to put on trial a

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[10] See *Prosecutor v Lubanga Dyilo (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008")*, 21 October 2008, [ICC Appeals Chamber], ICC-01/04-01/06-1486.

[11] *Ibid*, paras 75 and 83.

[12] *Prosecutor v Lubanga Dyilo (Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008)*, 13 June 2008 [ICC Trial Chamber I], ICC-01/04-01/06-1401.

[13] *Ibid*, paras 90 and 91.

person who is accused of genocide, crimes against humanity or war crimes—deeds which must not go unpunished and for which there should be no impunity …'.[14]

12. From the foregoing pronouncements come the following implications: (a) what may begin as a benign remedy of 'temporary' stay may, in the future, harden into a situation of 'permanent' stay. This happens when the extended question is also triggered—i.e. whether vacating the stay 'would not occasion unfairness to the accused person for other reasons, in particular in light of his or her right to be tried without undue delay,' or whether the circumstances have changed such that a trial will be seen as 'fair in all respects,' thus warranting the vacation of the stay; and, (b) that a trial should continue or resume when the reasons for stay 'fall away', in the absence of any other reason militating against the trial, would mean that every stay of proceedings at the ICC is—elementally—a temporary stay of proceedings. In these circumstances it becomes merely academic to labour up the distinction between a temporary and a permanent stay at the ICC.

13. I am, therefore, persuaded by the Victims' submissions to the effect that the label of 'temporary' stay does not tell the whole story of the implications of this application. It is more sensible, then, to analyse the request on the same legal standards as obtain in cases of permanent stay.

Impossibility of Fair Trial

14. In this Opinion, there is heavy reference, mostly in an approving manner, to the jurisprudence of common law courts, especially that of England and Wales. This is deliberate: and the reason is simple. It is that jurisdiction that gave birth and credence to the idea of judicial stay of proceedings on grounds of abuse of process.[15] They have the longest and the largest experience working with the concept. It is wise, then, to track the evolution of that law in that legal culture, up to the present time, always with an eye—a contrasting eye, if need be—to parallel developments in international criminal jurisprudence, which were originally inspired by the common law in this respect.

15. One landmark judgment in the English case law is the decision of the Court of Appeal of England and Wales in *R v Feltham Magistrates' Court & Anor, ex parte Ebrahim.* There, Lord Justice Brooke usefully recalled that '[t]he two categories of cases in which the power to stay proceedings for abuse of process may be invoked in this area of the court's jurisdiction are (i) cases where the court concludes that the defendant cannot receive a fair

[14] Appeals Chamber's Lubanga Decision of 21 October 2008, *supra*, para 80.
[15] See *Prosecutor v Lubanga Dyilo (Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006)*, 14 December 2006 [ICC Appeals Chamber], ICC-01/04-01/06-772, para 26.

trial [due to disreputable conduct attributable to the prosecuting authorities], and (ii) cases where it concludes that it would be unfair for the defendant to be tried [due to prejudice that renders a fair trial impossible].'[16] In the reverse order, Lord Lowry had, in *R v Horseferry Road Magistrates' Court, ex p Bennett*,[17] stated the same proposition as follows: 'I consider that a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.' As with the *Ebrahim* case, the complaint of the Defence in the case at bar concerns abuse of process on grounds of *impossibility of fair trial*—in other words, claims of impossibility of a fair trial due to the obstruction of the Defence in their efforts fully to investigate the case and prepare for trial.

A Matter of Discretion

16. As seen in the statement of Lord Lowry, quoted above, a criminal court enjoys the 'discretion to stay any proceedings' on grounds of abuse of process resulting from either impossibility of a fair trial or improbity capable of attracting disrepute to the administration of justice.[18] In the *Lubanga* case, the Appeals Chamber of the ICC also captured the discretionary nature of the remedy.[19] I focus now on the matter of discretion. It deserves reiteration, as it is not always clear that international judges fully reflect the import of this principle in their judgments.[20] In *R v Jenkins*, the Court of Appeal of England correctly gave

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[16] *R v Feltham Magistrates' Court & Anor, ex parte Ebrahim* [2001] EWHC Admin 130 [Divisional Court, England], para 18.

[17] *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42 [House of Lords], p 74, per Lord Lowry.

[18] See *loc cit.* See also *Jago v District Court of NSW, supra*, per Mason CJ, para 14.

[19] *Prosecutor v Lubanga Dyilo (Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006), supra*, para 28.

[20] For instance, the separate opinion of Judge Shahabuddeen in *Prosecutor v Barayagwiza (Decision)* of 3 November 1999 adumbrates the failure of the ICTR Appeals Chamber to defer to the Trial Chamber's exercise of discretion when the Trial Chamber denied a request to stay proceedings in that case. [Vide the section on 'Limits on the competence of the Appeals Chamber' against the background of the preceding section, in Judge Shahabuddeen's separate opinion.] Also to be approached with great caution is the view, repeatedly expressed by Trial Chamber I in the *Lubanga* case, that 'the Appeals Chamber has endorsed the Trial Chamber's right—indeed *obligation*—to stay the proceedings if they constitute an abuse of the process, because "it is impossible to piece together the constituent elements of a fair trial"' [Emphasis added.]: *Prosecutor v Lubanga Dyilo (Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU)*, 8 July 2010 [ICC Trial Chamber I], ICC-01/04-01/06-2517-Red, para 30. See also *Prosecutor v Lubanga Dyilo (Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008)*, 13 June 2008 [ICC Trial Chamber I], ICC-01/04-01/06-1401, para 90 ['If particular circumstances exist, the Court has the *duty* to halt or "stay" the proceedings.' (Emphasis added)]. While the observation that the Appeals Chamber has endorsed a Trial Chamber's 'right' to stay proceedings is fully consistent with the general view that the remedy of stay of proceedings is a matter of

emphasis to the discretionary nature of the trial court's power of stay. This is evident in their observation that an appellate court would not interfere with the exercise of the discretion, even where the appellate court itself might have exercised the discretion differently, provided the trial judge had not erred in principle or abused the discretion.[21] The Supreme Court of Canada has made a similar observation in a number of cases.[22] Further emphasis was given to the discretionary nature of the power by appellate courts in England in their discouragement of ready recourse to judicial precedent, since each case will depend on its own specific facts and special circumstances.[23] These are persuasive views.

17. The nature of the discretion has also been acknowledged in legal scholarship on the subject. For instance, Professor Smith rightly observed that '[w]hether a fair trial is possible will depend on the circumstances of the particular case, and it is a question on which even experienced judges might sometimes form different opinions.'[24] The notorious ability of reasonable judges to form different opinions even on the same evidence did not escape mention in the classic case of *Connelly v DPP*, one of the watershed cases that recognized in judges 'the residual discretion to prevent anything which savours of abuse of process.'[25] There, Lord Devlin rightly observed, 'Human judgment is not infallible. Two judges or two juries may reach different conclusions on the same evidence, and it would not be possible to say that one is nearer than the other to the correct. Apart from human fallibility the differences may be accounted for by differences in the evidence.'[26] Indeed, Lord Devlin was speaking to an arguably different matter: rendering a *judgment* upon the evidence. But that recommends his observation even more powerfully in the sphere of exercise of *judgement* as a matter of *discretion*. In practical terms, this would mean that a bench of three judges at the ICC may reasonably take a view of a case at the stage prior to trial as revealing impossibility of a fair trial. But that would not make it wrong for another bench to take a contrary view; or better still, to prefer to defer the determination of that question until some or all of the

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'discretion' for the Trial Chamber, the questionable view is any interpretation that so readily mutates that discretion into an 'obligation' or 'duty' on the part of the Trial Chamber concerned.

[21] *R v Jenkins* [1998] Crim LR 411 [Court of Appeal, England].

[22] See, for instance, *R v Regan* [2002] 1 SCR 297 [Supreme Court of Canada], paras 117 and 118; *R v Carosella* [1997] 1 SCR 80 [Supreme Court of Canada], para 48; and *R v Bjelland* [2009] 2 SCR 651 [Supreme Court of Canada], para 15. See also *R v Kociuk (R J)*, 2011 MBCA 85 [Court of Appeal of Manitoba, Canada], para 7.

[23] See *R v Sheffield Stipendiary Magistrate ex p Stephens* [1992] Crim LR 873 [Divisional Court, England]. See also *R v Newham Justices, ex p C* [1993] Crim L R 130 [Divisional Court, England] pp 130—131: 'It was a mistake to seek to compare one case with another because the factors in each case were often substantially different'. See also *R v F (S)* [also known as *CPS v F (S)*] [2012] 2 WLR 1038 [Court of Appeal of England and Wales], para 18, alternative citation [2011] EWCA Crim 1844.

[24] *R v JAK* [1992] Crim LR 30 [Court of Appeal, England] pp 30—31. See also *R v TBF* [2011] EWCA Crim 726 [Court of Appeal, England], para 25.

[25] *Connelly v Director of Public Prosecutions* [1964] AC 1254 [House of Lords], per Lord Reid, p 1296.

[26] *Ibid*, per Lord Devlin at p 1353. In his own work as a judge, Benjamin Cardozo had observed it 'happen[ing] again and again, where the question is a close one, that a case which one week is decided one way might be decided another way the next if it were then heard for the first time': Benjamin Cardozo, *The Nature of the Judicial Process* [New Haven: Yale University Press, 1921], pp 149—150.

evidence has been heard in the case. Such is the value of exercise of discretion to stay proceedings.

18. Notably, the need to preserve the discretionary nature of the power of stay of proceedings has led some judges, including those in the ICC Appeals Chamber, to prefer seeing the matter as an exercise in judgement (in the acceptation of the word as a sensible conclusion) for the trial judge, rather than a question of conclusions compelled by the facts in evidence.[27] As the point was put in *R v S (Stephen Paul)*, 'the discretionary decision whether or not to grant a stay as an abuse of process, because of delay, is an exercise in judicial assessment dependent on judgment [sic[28]] rather than on any conclusion as to the fact based on evidence. It is, therefore, potentially misleading to apply to the exercise of that discretion the language of burden and standard of proof, which is more apt to an evidence-based fact-finding process.'[29] Notably, this observation was made in the context of delay. It thus applies to other abuse of process cases in which the prayer for stay of proceedings is the loss or non-availability of evidence, for that is the chief mischief of cases of delay.

Exercise of Discretion in the Present Case

19. It is right that the Chamber found that the questions of law and facts in the present case do not persuade it to exercise its discretion, at this time, to stay proceedings in the case. This conclusion derives from the fact that the present request is wholly hitched upon the doctrinal wagon of impossibility of fair trial.

20. As a distilled idea standing alone, it is seductively simple to say that criminal proceedings should be stayed where fair trial has become impossible. Simplicity is a cherished virtue in most cases. In this case, however, it betrays oversimplification. This is because the composite elements of the doctrine and its application, in particular, properly appreciated, do present a truly complex picture. Ultimately, jurisprudence on the remedy does not readily convey a compelling view that a criminal case should be stayed, rather than heard on the evidence.[30] But this is unsurprising. Much so the case, given the unbroken refrain (in

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[27] See *Prosecutor v Lubanga Dyilo (Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006)*, *supra*, para 28.

[28] 'Judgment' is generally accepted as a variant spelling for a sensible conclusion by the human mind without regard to any particular professional qualification or acumen. For present purposes, however, that sense of the word is represented by the spelling 'judgement', while the spelling 'judgment' is reserved for a formal decision of a court of law at the end of the litigation before it. See *Fowler's Modern English Usage* (3rd edn, by R W Burchfield) [Oxford: Clarendon Press, 1998], p 429.

[29] *R v S (Stephen Paul)* [2006] 2 Cr App R 23 [Court of Appeal, England], para 20, per Rose LJ (Vice President).

[30] This phenomenon is adequately portrayed in the run down of cases and their outcomes reviewed in some very helpful legal scholarship on the matter, such as Young, Summers and Corker, *Abuse of Process in Criminal Proceedings*, 3rd edn (2009), chapter 3.

the case law) that a stay of proceedings in a criminal case 'ought only to be employed in exceptional circumstances.'[31] It is in that vein that Lord Justice Brooke observed: 'The circumstances in which any court will be able to conclude, with sufficient reasons, that a trial of a defendant will inevitably be unfair are likely to be few and far between.'[32] Recently, in *R v F (S)* a five-member panel of the Court of Appeal of England and Wales described those occasions as likely to be 'almost vanishingly rare.'[33] Hardiman J of the Supreme Court of Ireland might be taken to have cast the exceptional nature of the remedy in sharp relief when, following a review of a sampling of English case law on the remedy, he leveled the criticism that 'the English test is one which, properly applied, is almost impossible to meet.'[34] That may seem an overstatement of the proposition. But English judges themselves have been known to make similar observations in their matter-of-fact assessment of the prospects of successful applications for stay in light of the legal tests that must be met.[35] For present purposes, however, it suffices only to observe that the request for a stay of proceedings on grounds of impossibility of a fair trial is not one that any counsel may make with any degree of confidence, let alone a sense of any right to the requested outcome.

21. This much is clear from a careful reading of the case law of the International Criminal Court, even in these early days of its case law on the subject. The Appeals Chamber has observed that its own case law on stay of proceedings 'sets a high threshold for a Trial Chamber to impose a stay of proceedings.'[36] The usual imagery employed by the Appeals Chamber to depict that high threshold involves the requirement that the impugned unfairness in the treatment of the accused must be seen to have 'ruptured' the trial process to such an extent that it is 'impossible to piece together the constituent elements of a fair trial.'[37] In that scenario, fair trial would have smashed to pieces; and the trial judges and all their best efforts could never put fair trial together again. But, outside the pages of a nursery rhyme, this is a scenario that is seldom seen. The Appeals Chamber's jurisprudence, properly understood, clearly demonstrates the difficulty. Broken down to its own constituent elements, the

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[31] See, for instance, *R v Feltham Magistrates' Court & Anor, ex p Ebrahim*, *supra*, para 17; *Attorney-General's Reference (No 1 of 1990)*, *supra*, p 643; *Director of Public Prosecution v Humphrys* [1977] AC 1 [House of Lords], p 26.
[32] *Ibid*, para 26.
[33] *R v F (S)*, *supra*, para 16.
[34] *Dunne v DPP* [2003] Part 4 Case 3 [Supreme Court of Ireland], per Hardiman J, para 58.
[35] In *R v Burke*, for instance, Hooper LJ had observed as follows: 'Prior to the start of the case *it will often be difficult, if not impossible*, to determine whether a defendant can have a fair trial because of the delay coupled with the destruction of documents and the unavailability of witnesses. Issues which might seem very important before the trial may become unimportant or of less importance as a result of developments during the trial, including the evidence of the complainant and of other witnesses including the defendant should he choose to give evidence. Issues which seemed unimportant before the trial may become very important' [emphasis added]: *R v Burke* [2005] EWCA Crim 29 [Court of Appeal, England], para 32.
[36] See *Prosecutor v Lubanga Dyilo (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 ...)*, 8 October 2010, ICC-01/04-01/06-2582, para 55.
[37] *Loc cit.*

jurisprudence reveals that a successful application for stay of proceedings, on grounds of impossibility of fair trial, is contingent upon the following events:

a. the complaint engages certain matters which are considered to be essential to and preconditions of a fair trial;

b. those essential preconditions are *clearly missing*;

c. a fair trial has become impossible, because of those clearly missing elements; and

d. there is insufficient indication that the situation would be resolved during the trial process.[38]

22. These pre-conditions are substantially consistent with the essential pre-conditions of stay of proceedings accepted in the case law of common law jurisdictions. Generally speaking, in relation to impossibility of fair trial type of cases: (a) it must be seen that a fair trial has become impossible due to a resulting prejudice to the defendant; and (b) the trial process in the particular case is unable to correct or relieve such prejudice to the defendant. Those pre-conditions were classically indicated in *Attorney-General's Reference (No 1 of 1990)* in the following way: (i) the complaint engages 'serious prejudice to the extent that no fair trial can be held'; and, (ii) '[i]n assessing whether there is likely to be prejudice and if so whether it can properly be described as serious, the following matters should be borne in mind: first, the power of the judge at common law and [applicable legislation] to regulate the admissibility of evidence; secondly, the trial process itself, which should ensure that all relevant factual issues arising from delay will be placed before the jury as part of the evidence for their consideration, together with the powers of the judge to give appropriate directions to the jury before they consider their verdict.'[39]

23. Indeed, like a thread through the case law runs the recognition that inherent in the circumstances of a criminal trial are the ability and responsibility of trial judges to control the process, in a manner that includes making every effort to relieve against complaints of prejudice against a party. In the process of stressing the exceptional nature of the remedy of stay, Brooke LJ, in *Ebrahim*, captured this ability and responsibility in the context of what he described as 'the policy of the courts' to ensure against delays of proceedings through collateral challenges, considering that '*in most cases* any alleged unfairness can be cured in the trial process itself.'[40] And further in his reasons, he adverted to 'the inherent strength of

[38] See Appeals Chamber's Lubanga Decision of 21 October 2008, *supra*, paras 76—78.
[39] *Attorney-General's Reference (No 1 of 1990)*, *supra*, p 644.
[40] *R v Feltham Magistrates' Court & Anor, ex p Ebrahim*, *supra*, para 17 [emphasis added].

the trial process itself to prevent unfairness' without staying proceedings on grounds of allegations of unfair trial.[41]

24. The recognition deserves continuation of the emphasis that Lord Lane CJ thought necessary to lay on it, when, in *Attorney-General's Reference (No 1 of 1990)*, the England Court of Appeal enhanced the existing principle 'by stressing a point which is sometimes overlooked, namely, that the trial process itself is equipped to deal with the bulk of complaints' which form the bases of applications for a stay.[42] In aid of the emphasis on this point, Lord Lane re-engaged attention to the jurisprudential value of *R v Heston-Francois*[43]— and described it as 'a case which merits more attention than it sometimes receives.'[44] In *R v Heston-Francois*, the trial judge had rejected an application for stay. It had been brought on the basis of an allegation that the police had seized from the accused his legally privileged documents (specifically prepared for the accused's defence) and shown them to prosecution witnesses in the case, for the alleged purpose of aiding them to adapt their evidence and frustrate his defence. The defence argued that such conduct on the part of the police amounted to going behind the accused's right to silence, and was therefore an abuse of process. The Court of Appeal held that the conduct in question 'falls to be dealt with in the trial itself by judicial control upon admissibility of evidence, the judicial power to direct a verdict of not guilty, usually at the close of the prosecution's case, or by the jury taking account of it in evaluating the evidence before them.'[45] In *R v Cardiff Magistrates' Court, ex parte Hole*, a stipendiary magistrate denied an application to stay committal proceedings urged upon him as an abuse of process. He had concluded that many of the complaints that gave rise to the application 'could adequately be dealt with within the flexibility of the trial process itself.'[46] On application for judicial review of the decision, he was criticized on grounds that he had 'wrongly over-emphasised the flexibility of the trial process.' Lord Bingham CJ rejected the criticism, saying: 'That is, in my judgment, a wrong criticism. The authorities make it plain that the power of the trial judge to make sure that the proceedings are fair is an important ingredient in a situation of this kind and the acting stipendiary magistrate was, in my judgment, doing no more than giving proper effect to those authorities.'[47] For their part, the House of Lords observed in *Attorney-General's Reference (No 2 of 2001)* that a stay 'will not be the appropriate course if the apprehended unfairness can be cured by exercise of the trial judge's discretion within the trial process.'[48] Dealing

[41] *Ibid*, para 26.
[42] *Ibid*, p 642.
[43] *R v Heston-Francois* [1984] QB 278 [Court of Appeal, England].
[44] *Attorney-General's Reference (No 1 of 1990)*, *supra*, p 642.
[45] *R v Heston-Francois*, *supra*, p 290.
[46] *R v Cardiff Magistrates' Court, ex p Hole* [1997] COD 84 [Divisional Court, England]: available from LexisNexis as CO/4115/95 of 28 October 1996 (Transcript: Smith Bernal), p 4.
[47] *Ibid*, p 7.
[48] *Attorney-General's Reference (No 2 of 2001)* [2003] UKHL 68 [UK House of Lords], para 13.

with a similar complaint of unfair trial in *DPP v Cooper*, the Divisional Court observed that '[i]t must not be forgotten that the justices are experienced and able to deal with these matters on a sensible basis.'[49]

25. In *Ali v Crown Prosecution Service of West Midlands*, the foregoing observations were particularly accentuated as 'the second principle' identified in *Ebrahim.* According to the England Court of Appeal: 'The authorities are replete with examples of cases where evidence has been lost or destroyed but nevertheless this court has ruled that the trial judge was correct in refusing to stay the trial. This court has repeatedly emphasised that, during the course of a trial, there are processes ... which may provide sufficient protection to a defendant against prejudice caused by delay. That is the second principle identified by Brooke LJ (in *R Ebrahim v Feltham Magistrates Court* [2001] 2 Cr App R 23 at para 74). ... The mere fact that missing material might have assisted the defence will not necessarily lead to a stay.'[50] In *Jago v District Court of New South Wales*, Brennan J (as he then was) of the High Court of Australia also observed that obstacles to fair trial are regular occurrences in criminal cases; and, just as often, trial judges are able to resolve them without resorting to the remedy of stay of proceedings. In his words (the prelude to the quote with which I began this Opinion):

> *Obstacles in the way of a fair trial are often encountered in administering criminal justice. Adverse publicity in the reporting of notorious crimes ..., adverse revelations in a public inquiry ..., absence of competent representation ..., or the death or unavailability of a witness, may present obstacles to a fair trial; but they do not cause the proceedings to be permanently stayed.* Unfairness occasioned by circumstances outside the court's control does not make the trial a source of unfairness. When an obstacle to a fair trial is encountered, the responsibility cast on a trial judge to avoid unfairness to either party but particularly to the accused is burdensome, but the responsibility is not discharged by refusing to exercise the jurisdiction to hear and determine the issues. The responsibility is discharged by controlling the procedures of the trial by adjournments or other interlocutory orders, by rulings on evidence and, especially, by directions to the jury designed to counteract any prejudice which the accused might otherwise suffer.[51]

26. Brennan J's point was to highlight the ability and duty of the trial judge to avoid unfairness in the course of a criminal trial. It underscores the clarity with which the jurisprudence conveys the following moral. What makes a trial unfair is not the presence of any grade of procedural impurities or obstacles. It is rather the inability of the trial process or its failure, in a particular case, to relieve against them or take them materially into account in the function of justice that is performed when a case is tried on its merits.

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[49] *Director of Public Prosecutions v Cooper* [2008] EWHC 507 [Divisional Court, England], para 10.
[50] *Ali v Crown Prosecution Service, West Midlands* [2007] EWCA Crim 691 [Court of Appeal, England], para 29.
[51] *Jago v District Court of NSW, supra*, per Brennan J, para 23 [emphasis added].

Renewed Emphasis on Doing Justice

27. 'The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence,' wrote Benjamin Cardozo many years ago.[52] As we make our way through the forest of the various legal considerations here at play, it is helpful to keep that counsel in mind. In no area of the law are these words more significant than in the area of the law concerning stay of criminal proceedings; noting the particular utility of that observation to the objectives of criminal law.[53] It is for that reason that the courts have insisted upon the need for a balancing process between the interests of the defendants and those of society, when dealing with applications for stay of proceedings. Notably in this connection, the High Court of Australia, in *Dupas v R*, correctly stressed the need to take into account the 'social imperative' in the manner of 'substantial public interest of the community' in seeing that those charged with crimes are tried.[54] In *Jago v District Court of NSW*, Chief Justice Mason expressed the test of fairness as follows: 'The test of fairness which must be applied involves a balancing process, for the interests of the accused cannot be considered in isolation without regard to the community's right to expect that persons charged with criminal offences are brought to trial.'[55] In *Ebrahim*, Lord Justice Brooke recalled that the 'ultimate objective' in the exercise of the discretion to stay proceedings 'is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, because the fairness of a trial is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted.'[56] The Supreme Court of Canada in *R v Askov*[57] and *R v Morin*[58] also recognized the need to balance the rights of the accused against the societal interest.

28. The significance of these observations resonates deeply in the administration of justice at the International Criminal Court. For, the injustice of impunity that humanity, particularly victims, feel is never abated by the argument that an alleged perpetrator of 'unimaginable atrocities that deeply shock the conscience of humanity'[59] was set free by

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[52] Benjamin Cardozo, *supra*, p 66.
[53] Smith and Hogan agree that the American Law Institute's Model Penal Code contains what 'might be taken as a statement of the objectives of the substantive law of crime in *a modern legal system*': Smith and Hogan, *Criminal Law*, 12th edn (by David Ormerod) [Oxford: Oxford University Press, 2008] p 3. Those objectives are as follows: to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests; to subject to public control persons whose conduct indicates that they are disposed to commit crimes; to safeguard conduct that is without fault from condemnation as criminal; to give fair warning of the nature of the conduct declared to be an offence; to differentiate on reasonable grounds between serious and minor offences. See American Law Institute, Model Penal Code, §1.02(1).
[54] *Dupas v R* (2010) 241 CLR 237 [High Court of Australia], p 251.
[55] *Jago v District Court of NSW*, *supra*, per Mason CJ, para 20.
[56] *R v Feltham Magistrates' Court, ex p Ebrahim*, *supra*, para 25.
[57] *R v Askov* [1990] 2 SCR 1199 [Supreme Court of Canada], pp 1219—1220.
[58] *R v Morin* [1992] 1 SCR 771 [Supreme Court of Canada], p 787.
[59] Preamble to the Rome Statute of the International Criminal Court.

judicial fiat—without a trial—as a consequence of wrongful conducts of process for which victims of the crime are not at all to blame. Indeed, the Appeals Chamber has made sure to signal the need for cautious employment of the 'drastic remedy' of stay of proceedings, which has the potential to 'frustrat[e] the objective of the trial of delivering justice in a particular case as well as affecting the broader purposes expressed in the preamble to the Rome Statute.'[60] It is for that reason that the Appeals Chamber has, it must be presumed, discouraged Trial Chambers from resorting to stay of proceedings, without having exhausted the use of 'the tools available within the trial process itself, to cure the underlying obstacles to a fair trial, thereby allowing the trial to proceed speedily to a conclusion on its merits. Doing so, rather than resorting to the significantly more drastic remedy of a stay of proceedings, is in the interests, not only of the victims and of the international community as a whole who wish to see justice done, but also of the accused, who is potentially left in limbo, awaiting a decision on the merits of the case against him by the International Criminal Court or another court.'[61]

29. As noted earlier, the criminal practice of England and Wales has been long acknowledged as the source of the law of stay of proceedings. The law in that jurisdiction continues to evolve.[62] That evolution is only typical of the process of constant 'retesting and reformulating' that is the hallmark of the common law.[63] Cardozo adequately captured the process in his approving quote of Monroe Smith as follows:

> In their effort to give to the social sense of justice articulate expression in rules and in principles, the method of the law finding experts has always been experimental. The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.[64]

30. Evidence of that continuing evolution—of 'retesting and reformulating'—is seen in the recent case of *R v TBF*, where the Court of Appeal of England noted that the basic principles of the law of stay of proceedings had not changed over the last decade, except to the extent that 'the courts were now astute to pay real and not mere lip service to a concern to

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[60] See *Prosecutor v Lubanga Dyilo (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 ...)*, 8 October 2010, ICC-01/04-01/06-2582, para 55.
[61] See *ibid*, para 60.
[62] See *R v Bow Street Metropolitan Stipendiary Magistrate, ex p DPP* (1992) 95 Cr App R 9 [Divisional Court, England] at p 16. See also *R v Beckford* [1996] 1 Cr App R 94 [Court of Appeal of England and Wales], p 102.
[63] See Benjamin Cardozo, *supra*, 24.
[64] See *ibid* 23.

do justice in such cases.'[65] As will be seen presently, the law of stay of proceedings on grounds of abuse of process was pointedly reformulated in *TBF* in a significant way, since the days of *Connelly v DPP*[66] and *DPP v Humphrys*[67] when the doctrine was spiritedly ushered into the criminal sphere.

31. Somewhere deep in the forest of common law jurisprudence on stay, one may encounter a certain pronouncement to the effect that in considering requests for stay of proceedings, judges are to have no regard to the gravity of the offence charged. I do not agree that this is a comprehensive statement of the guiding legal principle. The view would be tolerable if it suggests only that gravity of the offence should not be the only—even the overpowering—consideration. A farther intendment of the proposition calls for great caution. For, in the administration of criminal justice, there is a proper place for the following view expressed by Sopinka J in *R v Morin*: 'As the seriousness of the offence increases, so does the societal demand that the accused be brought to trial.'[68] It is a legitimate societal demand to which judges must pay heed. The need to keep the contrary proposition within its limits is particularly accentuated if what it contemplates is that the proceedings are either stayed or the trial is taken to the usual conclusion (complete with verdict of guilty or not guilty) on the merits of the evidence, despite the complaint that occasioned the request for stay. As indicated elsewhere in this Opinion, it is possible to stay proceedings between conclusion of the evidence and the rendering of the verdict. It is also possible to reflect a meritorious case of complaint of unfair trial in the verdict itself, by way of a directed verdict of acquittal on grounds that procedural impurities make it unsafe to convict.

Avoidance of Speculation

32. In cases of applications for stay of proceedings, the courts have been careful to avoid granting such a remedy on grounds of speculative or vague claims of impeded defences. English authorities are strong on the point. As seen earlier,[69] there must be prejudice that is both *demonstrable* and *serious*.

33. In *R v Cardiff Magistrates' Court, ex p Hole*, Lord Bingham CJ reasoned that in complaints of abuse of process, 'it is necessary to look at the charges and see *exactly* what defence it is that they are impeded from advancing.'[70] In that vein, Lord Bingham gave short shrift to a specific complaint that in dismissing the application for stay of proceedings, the

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[65] *R v TBF*, *supra*, para 34. See also *R v MacKreth* [2009] EWCA Crim 1849 [Court of Appeal, England, per Rix LJ], para 39.
[66] *Connelly v DPP* (1964), *supra*.
[67] *DPP v Humphrys* (1977), *supra*.
[68] *R v Morin*, *supra*, p 787.
[69] See para 21 above.
[70] *R v Cardiff Magistrates' Court, ex p Hole*, *supra*, p 6 [emphasis added]. Also cited in Young, Summers and Corker, *Abuse of Process in Criminal Proceedings*, *supra*, §3.09.

stipendiary magistrate had 'failed to address in detail the documents which the applicants required for the purpose of their defence but which they were unable to obtain and also the question of oral evidence from witnesses whom they would have wished to call, but in the event could not.'[71] In rejecting the complaint, Lord Bingham held as follows: 'To have any force this complaint, in my judgment, must be closely tied to the detail of particular charges so that the court can be told not that there are many documents which are unavailable to a defendant and which have been dispersed to a number of agencies and other bodies, but that the documents on which the defendant would wish to rely and on which he is prevented from relying relate to a particular charge. Equally with oral evidence it is, in my judgment essential, if a defendant is to satisfy the burden which lies upon him, to identify the witness he would have wished to call and which in the circumstances he cannot.'[72]

34. As indicated earlier in these reasons,[73] Moses LJ had observed that the mere fact that missing evidence might have assisted the defence will not necessarily lead to a stay.[74] It is, therefore, unsurprising that this is one of the five propositions indicated in *R v TBF*, as having crystallised in English case law. As the proposition was stated in that case:

> In assessing what prejudice has been caused to the defendant on any particular count by reason of delay, the court should consider what evidence directly relevant to the defence case has been lost through the passage of time. *Vague speculation that lost documents or deceased witnesses might have assisted the defendant is not helpful.* The court should also consider what evidence has survived the passage of time. *The court should then examine critically how important the missing evidence is in the context of the case as a whole.*[75]

35. Recently, in *R v E*, the Court of Appeal of England very clearly reiterated the futility of speculations as to the forensic value that missing documents and dead witnesses might hold to the case for the defence.[76] In *R v MacKreth*, the Court of Appeal had also highlighted 'the importance of missing documentation being specifically linked to real issues' in the case.[77] On the facts of that case, the Court had observed with disapproval that '[r]eference to missing documentation was only for the purpose of raising speculative possibilities and was not tied to any specific issues.'[78]

36. Notably, in England, in the wake of *Ebrahim*, reiterating *Attorney-General's Reference (No 1 of 1990)*,[79] it has been observed that the principle is now settled that 'an

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[71] *R v Cardiff Magistrates' Court, ex p Hole, supra*, p 8.
[72] *Loc cit.*
[73] See para 24 above.
[74] *Ali v Crown Prosecution Service* [2007] EWCA Crim 691 [Court of Appeal, England], para 29.
[75] *R v TBF, supra*, para 37(iii). [Emphasis added.]
[76] *R v E* [2012] EWCA Crim 791 [Court of Appeal, England], paras 24—27.
[77] *R v MacKreth, supra*, para 47.
[78] *Ibid*, para 62.
[79] *Attorney-General's Reference (No 1 of 1990), supra.*

element of prejudice will not suffice and must be tolerated.'[80] It is now settled that the prejudice complained about must be seen to be 'serious'.[81] In *R v Joynson*, the Court of Appeal observed that the Court 'must consider whether the case was so strong and/or whether there were sufficient safeguards that the convictions may nevertheless be regarded as safe, despite such prejudice. This is a fact-specific exercise and it calls for close scrutiny.'[82] In *A-G's Reference (No 1 of 1990)*[83] and *Ebrahim*,[84] it was stressed that unless the defendant shows on the balance of probabilities that he will suffer 'serious prejudice' to the extent that no fair trial can be held, the discretion to stay should not be exercised in favour of a stay. One sees an illustration of the application of this principle in *R v Dobson*. A complaint of unfair trial was grounded on the failure of police officers to obtain, view and retain some CCTV footage that was relevant to his defence of alibi. In dismissing the complaint, the Court of Appeal observed as follows: 'Whilst there was plainly a degree of prejudice to Dobson being deprived of the opportunity of checking the footage in the hope it supported his case, that prejudice was not "serious prejudice", given the uncertainty of the likelihood that it would assist ...'.[85]

37. In Scotland, there is also a strong line of authorities that abjure speculative claims of prejudice to fair trial. In *Gordon v Her Majesty's Advocate*, Scotland's Appeal Court of the High Court of Justiciary stated the proposition in this way:

> The Crown had a duty, both at common law and in terms of Article 6 of the European Convention on Human Rights and Fundamental Freedoms, to disclose, in advance of trial, information in their possession which was capable of either weakening the prosecution case or strengthening the defence case ... . However, "it by no means necessarily follows" that failure to disclose material has resulted in an accused not having a fair trial and thus suffering a miscarriage of justice ... . Although, in terms of *Holland* v *HM Advocate* ... and *Sinclair* v *HM Advocate* ..., all statements are now disclosed as a matter of routine, it did not follow that a failure to do so would amount to a breach of the obligation to disclose, far less that it would result in an unfair trial. In order to demonstrate unfairness, an appellant required to satisfy the court that: (i) the statement was disclosable upon the *McLeod* test of whether it materially weakened the Crown case or bolstered the defence; and (ii) the non-disclosure had resulted in a miscarriage of justice. It was not sufficient that denial of access to a particular statement "might possibly" have affected the outcome of the case ... . In determining whether a miscarriage had occurred, a "robust" test was required ...[86].

38. In the recent case of *Kinsella v Her Majesty's Advocate*, the Appeal Court of Scotland criticized the conclusions of the Commission below as unfair and considerably speculative, when the Commissioner concluded that: 'It is sufficient for us to say that the appellants were

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[80] See Young, Summers and Corker, *Abuse of Process in Criminal Proceedings*, *supra*, §3.26.
[81] *Loc cit.*
[82] *R v Joynson* (2008) EWCA Crim 3049 [Court of Appeal, England], para 31.
[83] *Attorney-General's Reference (No 1 of 1990)*, *supra*, p 644
[84] *R v Feltham Magistrates' Court, ex p Ebrahim*, *supra*, para 28.
[85] *R v Dobson* [2001] EWCA 1606 [Court of Appeal, England], para 36.
[86] *Gordon v Her Majesty's Advocate* [2010] HCJAC 44 [Appeal Court of the High Court of Justiciary], para 63, internal citations omitted.

deprived of the opportunity to lead all of the evidence that would have been favourable to their defence and of arguing its full significance before the jury. They were therefore deprived of a fair trial. In this respect, too, they suffered a miscarriage of justice.' The Court of Appeal disagreed, and said as follows:

> We consider that these comments are unfair and reflect a considerable degree of speculation on the part of the Commission. It is not apparent to us that the analogy drawn by the Commission between this case and *Johnston and Allison* v *HMA* is apt. In that case there was suppression of evidence by police officers who failed to pass to the procurator fiscal statements favourable to the defence case. It is in that context that the observations of the Lord Justice Clerk quoted by the Commission should be considered. There is no suggestion of suppression of evidence in this case nor, in our view, can it be asserted that the appellant was deprived of an opportunity to lead evidence "that *would* (*our emphasis*) have been favourable" to his defence.[87]

39. For their part, the United States Supreme Court rejected long ago what they described as the 'sporting theory of justice': according to which the defence must receive disclosure of *any* information that *might* affect the jury's verdict, lest the trial be seen as vitiated on grounds of unfairness. As the Supreme Court put the observation in *United States v Agurs*:

> The Court of Appeals appears to have assumed that the prosecutor has a constitutional obligation to disclose *any* information that *might* affect the jury's verdict. That statement of a constitutional standard of materiality approaches the "sporting theory of justice" which the Court expressly rejected in *Brady*. For a jury's appraisal of a case "might" be affected by an improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt.[88]

40. As the Court further observed: '[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish "materiality" in the constitutional sense.'[89] In this regard, in *Strickler v Greene*,[90] the Supreme Court reiterated the importance of the need to demonstrate prejudice in the sense of 'reasonable probability' that the verdict or sentence would have been different had the suppressed documents been disclosed to the defence.[91] The sort of materials that the US Supreme Court has given constitutional cognizance as capable of vitiating the fair trial—or the 'due process'—rights of the Defence have been held to be 'limited to evidence that might be expected to play a significant role' in the accused's defence.[92] To meet this standard, the evidence must both possess an *apparent* exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably

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[87] *Kinsella v Her Majesty's Advocate* [2011] HCJAC 58 [Scotland's Appeal Court of the High Court of Justiciary], para 22.
[88] *United States v Agurs*, 427 US 97 (1976) [US Supreme Court], p 109 [emphasis added].
[89] *Ibid*, p 110.
[90] *Strickler v Greene*, 527 US 263 (1999) [US Supreme Court].
[91] *Ibid*, p 289. See also *Kyles v Whitley*, 514 US 419 (1995) [US Supreme Court], p 434.
[92] *California v Trombetta*, 467 US 479 (1984) [US Supreme Court], para 489.

available means.[93] 'Mere speculation' for which there is 'no evidential support' falls short of that mark.[94]

41. To all that may be added the observation that the requirement of the Defence to identify the prejudice caused them in specific terms has the advantage of not only militating against 'unscrupulous and opportunist[ic]' claims of prejudice;[95] but also the added advantage of enabling a realistic appreciation of which party might have been more likely harmed by the absence of particular evidence;[96] as well as whether relief against the particular prejudice was possible. Much of these considerations were captured by the England Court of Appeal in *TBF*, as some of the propositions distilled from English jurisprudence: 'Having identified the prejudice caused to the defence by reason of the delay, it is then necessary to consider to what extent the judge can compensate for that prejudice by emphasising guidance given in standard directions or formulating special directions to the jury. Where important independent evidence has been lost over time, it may not be known which party that evidence would have supported. There may be cases in which no direction to the jury can dispel the resultant prejudice which one or other of the parties must suffer, but this depends on the facts of the case.'[97]

42. The case law of the European Court of Human Rights reveals a similar reluctance to accept speculative claims of prejudice arising from allegations of violation of the right to fair trial in cases of absence of investigative opportunity; notably, where such an absence encumbers the prosecution as much as it does the Defence. This is so, even when the fault resulted from the fault of the prosecuting authorities in the manner of innocent blunders. In *Sofri et al v Italy*,[98] a complaint was made that article 6 of the European Convention on Human Rights had been violated. The complaint arose from the destruction of evidence in the possession of the prosecuting authorities. The case arose from the May 1972 assassination of Mr Luigi Calabresi, a superintendent involved in the investigation of acts of terrorism in Italy in the late 1960s and early 1970s. In July 1988, Mr Adriano Sofri, a leader of a far left political movement, and some of his confederates were charged with complicity in the murder. But key pieces of evidence were not made available to them: the murder victims clothing had disappeared; the bullets from the body destroyed; so, too, the assassin's getaway car which had been impounded by the police and subjected to forensic tests. But the European Court of Human Rights held that the mere loss of evidence 'is not sufficient for the

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[93] *Loc cit.*
[94] See, for instance, *Strickler v Greene*, *supra*, p 286.
[95] See Young, Summers and Corker, *Abuse of Process in Criminal Proceedings*, *supra*, §3.09.
[96] In *Kinsella*, for instance, the complaint was that the failure to recover the records of a taxi company had resulted in an unfair trial, in view of the inability of the defence to identify the taxi driver and call him as a witness for the defence. The Appeal Court of Scotland rejected 'the submission that the availability of that witness would necessarily have operated to the advantage of the appellant', para 24.
[97] *R v TBF*, *supra*, para 37(iv).
[98] *Sofri et al v Italy* (2003) Application No 37235/97, Decision of 4 March 2003 [European Court of Human Rights].

court to find a violation of Article 6 of the Convention.'[99] Nor did it adversely affect equality of arms, since '[i]t must also be established that the consequences of the malfunctioning put the applicants at a disadvantage compared to the prosecution.'[100] In particular regard to the latter consideration, the Court observed that 'that the public prosecutor's office found itself in a similar situation to the applicants, as the inability to perform forensic tests also prevented the public prosecutor's office from relying on the evidence that had been lost or destroyed. In these circumstances, the parties to the trial were therefore on an equal footing.'[101]

43. In contrast, the ECtHR found a violation of article 6 rights to fair trial in *Papageorgiou v Greece*.[102] There, a bank clerk had been convicted of fraud. The conviction was based largely on photocopies of the cheques he was accused of forging; as well as on pages from the electronic schedule of the bank's computer which he was accused of using to commit the fraud, which was also the schedule for the day on which the fraud allegedly occurred. Despite repeated requests from the applicant, these were not disclosed to him nor produced at trial. In finding that the proceedings did not fulfil the requirements of a fair trial, the Court considered, among other things, that it was essential to the applicant's defence that those items of evidence should have been produced because 'they would have'[103] enabled the applicant to show that the persons who gave the instructions to make the payments in question were bank employees and not himself and that therefore the charge of fraud would have been found to be devoid of any foundation.

44. Now, a certain clarification should be made before proceeding further. The point I press here is not that the Defence is initially to be (a) barred from access to information or facilities in the possession or control of the Prosecution (or even of third parties) that the Defence may need to investigate or prepare for trial, and (b) permitted access only when able to show precisely in advance the prejudice that may result in the absence of such information or facilities. To put it differently, disclosure and inspection of relevant materials in the possession and control of the prosecution (and possibly third parties) should be made available to the Defence in the ordinary course, as a general rule of criminal procedure, without the requirement of proving the precise prejudice it may suffer in the absence of those materials. Such is the incidence of the defendant's *right* to disclosure and inspection as a generally accepted practice in the administration of criminal justice. But, the point now under consideration concerns a slightly different question. That is whether stay of proceedings is the proper *remedy* that the Court should decree in any case in which a claim of frustration of

[99] *Ibid*, p 22 [of English translation extracts].
[100] *Loc cit.*
[101] *Ibid*, pp 22-23.
[102] *Papageorgiou v Greece* (2004) 38 EHRR Application No 59506/00, Judgment of 9 May 2003 [European Court of Human Rights].
[103] *Ibid*, para 37.

access to information or facilities needed for trial preparation has been made. Though related, the two questions are not identical in their jural consequences. Every defendant is entitled to fair trial, but none is entitled to stay of proceedings as a particular remedy. And, to conceive of stay of proceedings as the inexorable *remedy*, even when the *right* of fair trial has been evidently violated, is truly to diminish the ability and responsibility of trial judges to relieve unfairness as part of the trial process.

45. For the foregoing reasons, I am persuaded by the submissions of the Prosecution to the effect that the remedy of stay of proceedings (on grounds of deprived evidence) should only be granted if the concerned evidence is one that would have a 'decisive impact' on the outcome of the case. In my view, that should be the correct test where the complaint of unfair trial is based on absent evidence. [One can ignore that the phrasal doublet 'the heart of the case' was also invoked by the Prosecution, as its value is adequately subsumed in the import of the 'decisive impact' test]. To say that the evidence complained of as deprived must be one that would have a 'decisive impact' on the outcome of the case is really to say that the Chamber ought not stay proceedings on account of absence of evidence that is not shown to have the quality of *materiality in relation to the outcome of the case*. That proposition is entirely consistent with the principle of materiality in international criminal law. In the Rome Statute, a prominent instance of that principle finds expression in article 83(2), which permits the Appeals Chamber to intervene against a judgment affected by a *material* error of fact or law or procedure.[104] The same principle is expressed in article 24(1) and article 25(1) of the respective statutes of the ICTR and the ICTY that permit the Appeals Chambers of those tribunals similarly to intervene against a judgment vitiated by an error of law that *invalidated a decision* or an error of fact that *occasioned a miscarriage of justice*. The same principle of materiality to outcome is also seen at play in the inverted circumstances in which complaints of violation of fair trial rights concern the presence—rather than the absence—of certain evidential matter in the trial. A notable line of cases in this regard concern reliance on hearsay evidence—out-of-court statements type. In one line of cases, the ECtHR held that in order for reliance on such evidence to amount to violation of the accused's fair trial right of adversarial confrontation, the evidence must be the 'only item of evidence' relied upon for conviction.[105] In another case, a differently constituted panel held that while the impugned evidence was not the only evidence relied upon for conviction, the accused's fair trial right of adversarial confrontation was violated because the out-of-court statement had 'played a part

[104] Notably, article 83(2) also permits the ICC Appeals Chamber to intervene where the proceedings appealed from were unfair 'in a way that affected the reliability' of the judgment. That, too, is an expression of the principle of materiality, for a decision does not become unreliable on account of a procedural impurity that did not resonate in its outcome.

[105] See *Asch v Austria* (1991) Application No 12398/86, Judgment of 26 April 1991, para 30. See also *Artner v Austria* (1992) Application No 39/1991/291/362, Judgment of 25 June 1992, para 24; *Delta v France* (1990) Application No 11444/85, Judgment of 19 December 1990, para 37; *Saidi v France* (1993) Application No 14647/89, Judgment of 20 September 1993, para 44.

in establishing the facts which led to the conviction.'[106] The essence of this corpus of jurisprudence was recently restated by the Grand Chamber of the ECtHR in the leading case of *Al-Khawaja and Tahery v United Kingdom*, where the principle was confirmed to the effect that the imperatives of fair trial in criminal cases view with disfavour convictions based 'solely or to a decisive degree' on hearsay evidence.[107] In a helpful explanation, the Grand Chamber clarified that the word 'decisive' in the context of that test means more than 'probative' and entails more than the ability of the evidence in question, in its absence, to reduce chances of conviction while enhancing chances of acquittal. 'Instead, the word "decisive" should be narrowly understood as indicating evidence of such significance or importance as is likely to be determinative of the outcome of the case.'[108]

46. No less a test should be required of an ICC decision that contemplates the drastic remedy of stay of proceedings on grounds of violation of fair trial rights of the accused on the complaint of absent evidence. The evidence must be seen as capable of having a decisive impact on the outcome of the case.

47. The value of the 'decisive impact' test of stay would have been adequately demonstrated, if the discussion were left at that. But there is even more to it. The test has a value well beyond mere analogy with appellate complaints, as offspring of the principle of materiality. Indeed, the juridical value of the test flows directly into the principle of materiality of appellate complaints. That integrated value is clear from the following example. Imagine that there are two cases on trial from the same episode of violence. Imagine also that Defence Counsel in both cases are faced with an identical difficulty of deprivation of evidence. As a result, Defence Counsel in one of the cases chooses to apply for stay of proceedings prior to the commencement of the trial. But his learned friend in the second case makes a different strategic choice. She elects to proceed to trial, but to roll her complaint (of deprivation of evidence) into her closing arguments on the merits of the case, upon completion of the evidential hearing. Imagine that her client is convicted, despite her complaint about the effects of the missing evidence. Would she not, on appeal, be required to address the question whether the missing evidence was material to the outcome? Such a requirement of her makes it clear that her colleague in the first case should not be allowed to avoid the same question by the strategic choice of the application for stay of proceedings prior to commencement of the trial. To allow him to avoid that question of materiality to outcome would be to ignore the much hackneyed sentiment that the processes of this Court exist to ensure that power of impunity is held accountable to justice. It then does not permit

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[106] *Lüdi v Switzerland* (1992) Application No 12433/86, Judgment of 15 June 1992, para 47.
[107] See *Al-Khawaja and Tahery v UK* (2011) Application Nos 26766/05 & 22228/06, Judgment of 15 December 2011, paras 49, 90, 91, 119, 128, 131 and 147.
[108] *Ibid*, para 131.

critical questions of justice to be avoided by the mere incidence of strategic choices that counsel make—either for the prosecution or the defence.

48. One must grant that the 'decisive impact' test entails an onerous threshold. But, in my own view, the test is not undue, in an undesirable way. For, that is the very essence of the widely accepted proposition that a stay of proceedings is an exceptional remedy, one that would be well-founded only in circumstances that are 'vanishingly rare.'

The Question of Fault

49. Notwithstanding the contrary view expressed by our colleagues in Trial Chamber I in the *Lubanga* case,[109] the overwhelming flow of judicial precedents on stay of proceedings has now set the proposition that criminal courts should be extremely reluctant to impose a stay of proceedings 'in the absence of any fault on the part of the complainant or the prosecution.'[110] That, indeed, is to cast the proposition at its minimum level of appreciation. For, as will be seen soon, some Courts have been even more categorical in their rejection of stay of proceedings in the absence of fault on the part of the prosecution or the complainant.

50. This extreme reluctance or outright refusal to grant stay in the absence of prosecutorial fault is perfectly sensible, as a matter of justice, at the instance of suffering victims of crimes who would have played no part in the procedural wrongs against which the accused complained. It is wholly consistent with the observation of Lord Diplock in *R v Sang* that 'the fairness of a trial ... is not all one-sided.'[111] And as Sir Roger Ormrod observed in *R v Derby Crown Court, ex parte Brooks*, it 'involves fairness both to the defendant and the prosecution.'[112]

51. The public interest in seeing justice done is not quite so apparent, in circumstances in which 'justice' is claimed to have been done at the instance of the accused whose trial is aborted (upon complaints of abuse of process in which victims played no part or in which the prosecution is not at fault); while victims are forced to live with injustice by the failure to inquire into the merits of the alleged conduct of the accused that resulted in harm to the

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[109] *Prosecutor v Lubanga Dyilo (Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008)*, 13 June 2008 [ICC Trial Chamber I], ICC-01/04-01/06-1401, para 90 ['It is not a necessary precondition, therefore, for the exercise of this jurisdiction that the prosecution is found to have acted *mala fides*. It is sufficient that this has resulted in a violation of the rights of the accused in bringing him to justice'].

[110] *Attorney-General's Reference (No 1 of 1990)*, *supra*, pp 643-644. See also *TBF*, para 34; *MacKreth, supra*, paras 30 and 31; *R v S (Stephen Paul)* [2006] EWCA Crim 756 [Court of Appeal, England], para 21(ii).

[111] *R v Sang* [1980] AC 402 [House of Lords], p 437.

[112] *R v Derby Crown Court, ex parte Brooks* (1984) 80 Cr App R 164 [Divisional Court, England], pp 168-169.

victims. It is intuitively correct therefore to make fault (on the part of the complainant and the prosecuting authorities) a factor to be considered in any inquiry on stay of proceedings.

52. Indeed, the focus on fault appears now to be directed by something more than mere intuition. It has become a systematic feature of the law of stay of proceedings in the UK. The commentators Young, Summers and Corker account for it in the evolution of the law in that jurisdiction since 1997, following the entry into effect of the Criminal Procedure and Investigation Act (1996) Code of Practice. As they observed: 'Where previously the courts had almost exclusively focused attention on the consequential effect of prejudice on a fair trial, from 1997 the equation entertained additional factors involving concepts of "fault" and "duty"'.[113] In the leading case of *Ebrahim* (involving complaints of missing CCTV footage), the Divisional Court was even more categorical in their rejection of the motion for stay of proceedings on this basis, as part of the recommended approach that English judges should follow when called upon to stay proceedings on grounds of missing evidence. At the conclusion of their judgment at paragraph 74, the Divisional Court recommended a four-step adjudicatory process that depends on the question of fault and duty. As the Court put it: 'We would suggest that in similar cases in future, a court should structure its inquiries in the following way: (1) In the circumstances of the particular case, what was the nature and extent of the investigating authorities' and the prosecutors' duty, if any, to obtain and/or retain the videotape evidence in question? Recourse should be had in this context to the contents of the 1997 code and the Attorney-General's guidelines. (2) *If in all the circumstances there was no duty to obtain and/or retain that videotape evidence before the defence first sought its retention, then there can be no question of the subsequent trial being unfair on this ground.* (3) If such evidence is not obtained and/or retained in breach of the obligations set out in the code and/or the guidelines, then the principles set out in paragraphs 25 and 28 of this judgment should generally be applied. (4) If the behaviour of the prosecution has been so very bad that it is not fair that the defendant should be tried, then the proceedings should be stayed on that ground. ...'. [Emphasis added.] Notably, in paragraph 25, the Court had recalled the following familiar principles (frequently invoked in these cases): (i) that 'the ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, because the fairness of a trial is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted'; and (ii) that '[t]he trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded.' And, in paragraph 28, the Divisional Court had recalled the imperative laid down by Lord Lane CJ in *Attorney-General's Reference (No 1 of 1990)* that 'no stay should be imposed "... unless the defence

[113] Young, Summers and Corker, *Abuse of Process in Criminal Proceedings*, *supra*, §3.37.

shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words, that the continuance of the prosecution amounts to a misuse of the process of the court.'"

53. Thus, Step 2 of the *Ebrahim* guidance conveys an emphatic rejection of stay of proceedings when there has been no fault on the part of the prosecuting authorities. Furthermore, by virtue of Step 3 of the *Ebrahim* guidance, even the presence of such fault will not necessarily result in a stay of proceedings.

54. In *R v Swingler*, it was held that bad faith or serious fault on the part of prosecuting authorities was necessary for a finding of abuse of process on grounds of missing evidence.[114]

55. Some commentators have observed that the recent insistence in English case law on the presence of fault and duty has become something 'almost akin to some sort of quasi-criminal tort of negligence, where a "duty of care" was owed.'[115] While the adjective 'quasi-criminal' might not improve knowledge of the matter, it is certainly the case that the question of fault invites inquiries into the concept of negligence and its implicit notion of duty of care. In *R v La*, the Supreme Court of Canada was very clear about that: there will be no violation of the right to fair trial as a constitutional right, unless the prosecuting authorities have failed to take reasonable care to retain the material in question. There, an interviewing police constable had inadvertently misplaced and lost a taped conversation with the complainant in a case involving the pimping of a 13-year-old girl. The Supreme Court held that stay of proceedings was inappropriate in the circumstances. As the Court reasoned, since 'the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached.'[116]

56. The case law of the United States Supreme Court reveals the more nuanced approach of differentiating between appreciably material evidence and potentially useful evidence. In the leading case of *Brady v Maryland*, the Court held that when evidence that '*is material* either to guilt or to punishment' is not disclosed, the finding of violation of the defendant's due process right will not require bad faith on the part of the prosecuting authorities.[117] In *United States v Bagley*, the Court explained the contemplated type of evidence in the terms of 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient

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[114] *R v Swingler* (1998) (97/06856/X5); also cited in *R v Feltham Magistrates' Court & Anor, ex p Ebrahim, supra*, para 29.
[115] Young, Summers and Corker, *Abuse of Process in Criminal Proceedings, supra*, §3.37.
[116] *R v La* [1997] 2 SCR 680 [Supreme Court of Canada], para 20. See also *R v Kociuk (R J)*, 2011 MBCA 85 [Court of Appeal of Manitoba, Canada], para 21.
[117] *Brady v Maryland*, 373 US 83 (1963) [US Supreme Court], pp 86—87 [emphasis added].

to undermine confidence in the outcome.'[118] However, in the subsequent leading case of *Arizona v Youngblood*, the Court ruled that a finding of fault in the nature of 'bad faith' must be established when the allegation of violation of due process rights concerns loss of 'evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.'[119] This restricted approach resulted from the US Supreme Court's 'unwillingness to read the "fundamental fairness" requirement of the Due Process Clause ... as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution.'[120] Hence, the Court held that 'unless a criminal defendant can show *bad faith* on the part of the police, failure to preserve *potentially useful* evidence does not constitute a denial of due process of law.'[121]

57. It is also instructive to note, as Justice L'Heureux-Dubé had observed at the Supreme Court of Canada, in a commentary on American law: 'For the most part, however, there is considerable doubt as to whether an accused is even able to raise a constitutional motion to suppress in cases where the evidence has been lost or destroyed by a third party where no government involvement is demonstrated.'[122] Notably, the state Supreme Court of Rhode Island has clearly removed any such doubt. In *State v Waite*, it rejected the defence grievance that the due process right of the accused was violated to the point of excluding the victim's testimony, because a rape crisis centre had destroyed the notes of an interview between the victim and a counselor. There had been no bad faith or negligence on the part of prosecuting authorities who had not been implicated in the destruction. The Court also dismissed as 'mere speculation' claims of prejudice resulting from the destruction. As Shea J expressed the matter:

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[118] *United States v Bagley*, 473 US 667 (1985) [US Supreme Court], p 682. See also *Strickler v Greene*, *supra*, p 280.
[119] *Arizona v Youngblood*, 488 US 51 (1988) [United States Supreme Court], p 57.
[120] *Ibid*, p 58.
[121] *Loc cit* [emphasis added].
[122] *R v Carosella*, *supra*, para 84. Justice L'Heureux-Dubé was referring to *United States v Castro*, 887 F2d 988 (9th Cir 1989); *Smith v Secretary of New Mexico Department of Corrections*, 50 F3d 801 (10th Cir 1995); and *People v Webb*, 862 P2d 779 (Cal 1993, leave to appeal to the US SC denied). In *United States v Castro*, the US Court of Appeals for the 9th Circuit (California), in a bank fraud case, rejected as 'meritless' a defendant's claim of violation of his due process rights arising from the removal of alleged exculpatory bank files by bank officers and not the prosecution; in *Smith v Secretary of New Mexico Department of Corrections*, the US Court of Appeals for the 10th Circuit (New Mexico) restated the American principle that 'the prosecutor is the party who is ultimately accountable for the nondisclosure of evidence', and 'the "prosecution" ... encompasses not only the individual prosecutor handling the case, but also extends to the prosecutor's entire office ..., as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture'; and, in *People v Webb*, the US Court of Appeal for the 9th Circuit (California) questioned whether records stemming from a prosecution witness's voluntary treatment by private and county therapists could be deemed "in the possession" of the "government" for purposes of disclosure. 'The records were not generated or obtained by the People in the course of a criminal investigation, and the People have had no greater access to them than [the] defendant. Given the strong policy of protecting a patient's treatment history, it seems likely that defendant has no constitutional right to examine the records even if they are "material" to the case.'

> [T]here is no indication that the state acted in bad faith or was negligent. The records were destroyed by employees of the Rape Crisis Center at the direction of its board of directors. The state is not responsible for the actions of a private agency that destroys its own records. At no time were these records within the possession, custody, or control of the state. The defendant's simple assertion that the records were destroyed while the state "stood idly by" is not enough to warrant a finding of either bad faith or negligence. Furthermore, in the absence of any factual basis from defendant, any prejudice alleged from the loss of the records of notes of conversations between the counselor and the victim is mere speculation. Therefore, denial of defendant's motion was proper.[123]

58. The California state Court of Appeals has similarly put third parties—not related to the government or the criminal investigation process—beyond the discovery process in criminal cases.[124]

The Question of Timing

59. When called upon to exercise the discretion to stay proceedings on grounds of missing evidence, another factor to consider should be the timing of the application if not its adjudication. Notably, in *TBF*, the England Court of Appeal made the following observation as the second proposition revealed in the review of English case law: 'It is now recognised that usually the proper time for the defence to make such an application and for the judge to rule upon it is at trial, after all the evidence has been called.'[125] Notably, there are many dicta to that effect in English case law. They include those in *R v B (Brian Selwyn)*[126] and *R v Joynson*;[127] culminating in *R v Smolinski*, where the Court of Appeal gave the following guidance: 'If an application is to be made to a judge, the best time for doing so is after any evidence has been called.'[128] In *R v Burke*, decided by the Court of Appeal the following year, Hooper LJ very usefully explained the rationale for this approach in this way: 'Prior to

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[123] *State v Waite*, 484 A 2d 887 (RI 1984) [Supreme Court of Rhode Island], pp 891-92. See also *State v Motyka*, 893 A 2d 267 (RI 2006) [Supreme Court of Rhode Island]; and *State v Juarez*, 570 A 2d 1118, 1120 (RI 1990) [Supreme Court of Rhode Island].

[124] See *Teal v Superior Court*, 117 Cal App 4th 488 (Cal 2004) [Court of Appeal of California, 4th Appellate District, Div One]; *People v Superior Court (Barrett)*, 80 Cal App 4th 1305 (Cal 2000) [Court of Appeal of California, 4th Appellate District, Div One]; *People v Superior Court (Broderick)*, 231 Cal App 3d 584 (Cal 1991) [Court of Appeal of California, 4th Appellate District, Div One].

[125] *R v TBF*, *supra*, para 37(ii).

[126] *R v B (Brian Selwyn)* (2003) EWCA Crim 319 [Court of Appeal, England], para 19: 'On the whole, the best time to assess whether a case is fit to be left to the jury is not before the trial has started but at the end of the trial when a judge is in a position to take into account the actual evidence presented to the jury by the prosecution and by the defence. As far as we are aware no application was made to this judge to rule again at the end of the trial. We certainly do not criticise those who were involved in the case for that. If the judge had been minded to take a different view to that he had indicated on the application for a stay, we are confident that he would have made that clear to counsel, and counsel, no doubt appreciating that, were not going to make an unnecessary application. Accordingly, we are satisfied that no complaint can be made about the judge's decision to allow the case to go to the jury for a verdict.'

[127] *R v Joynson*, *supra*, para 13: '[I]t is necessary for us to consider the prejudice alleged in relation to the specific complainants and then to stand back and look at the matter in the round.'

[128] *R v Smolinski* [2004] 2 Cr App R 40 [Court of Appeal, England], para 9. See also para 8. See also *Robson & Ors v R* [2006] EWCA Crim 2754 [Court of Appeal, England], para 7.

the start of the case it will often be difficult, if not impossible, to determine whether a defendant can have a fair trial because of the delay coupled with the destruction of documents and the unavailability of witnesses. Issues which might seem very important before the trial may become unimportant or of less importance as a result of developments during the trial, including the evidence of the complainant and of other witnesses including the defendant should he choose to give evidence. Issues which seemed unimportant before the trial may become very important.'[129]

60. In their book, Young, Summers and Corker described the *Smolinski* guidance as amounting to 'a significant departure in the approach previously taken on the question of timing.'[130] This view of the approach is not free from doubt: or, perhaps, the critics had paid insufficient attention to the antecedent case law. It is notable that twenty years before the *Smolinski* judgment, the Court of Appeal of England had surely indicated such an approach in *Heston-Francois*. And twelve years before *Smolinski*, the Court of Appeal had, in *Attorney-General's Reference (No 1 of 1990)* implicitly endorsed the approach in *Heston-Francois* when it described the case (seen earlier) as 'a case which merits more attention than it sometimes receives.'[131] In *Heston-Francois*, the facts of which have been reviewed above, the trial judge had rejected an application urging a pre-trial inquiry into allegations of improper conduct on the part of the police, for purposes of enabling the judge to exercise his discretion to stay the proceedings. In their judgment, the Court of Appeal generally signalled the preference that such cases should proceed to trial, in the course of which a more accurate view may be had of the extent of prejudice caused the accused. This preference appears clearly in a series of pronouncements of the Court. First, the Court recalled the two trials arising from *Connelly v DPP* itself as a good illustration of the 'dangers inherent in the exercise by a trial judge of a general duty to stop a prosecution *in limine* because it conflicts with his own sense of fairness.'[132] In *Connelly v DPP*, the murder conviction in the first trial had been quashed. But the second trial, involving the charge of robbery arising from the same incident, proceeded to trial and resulted in conviction, following an unsuccessful application to stay the proceedings on grounds of abuse of process by reason of the plea of *autrefois acquit* (or *non bis in idem*, as the equivalent concept is known in international criminal law) because of the outcome of the first trial. Hence, the Court of Appeal observed as follows: 'Had the judge stayed the proceeding on the indictment [in the second trial], a criminal whom

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[129] *R v Burke* [2005] EWCA Crim 29 [Court of Appeal, England], para 32.
[130] Young, Summers and Corker, *Abuse of Process in Criminal Proceedings*, *supra*, §10.136.
[131] As the Court of Appeal expressed itself in *Attorney-General's Reference (No 1 of 1990)*: 'We would like to add to that statement of principle by stressing a point which is sometimes overlooked, namely, that the trial process itself is equipped to deal with the bulk of complaints which have in recent Divisional Court cases founded applications for a stay. This was pointed out in clear terms in a case which merits more attention than it sometimes receives, namely, *Reg. v. Heston-Francois...*': *Attorney-General's Reference (No 1 of 1990)*, *supra*, p 642.
[132] *R v Heston-Francois*, *supra*, p 288.

the Court of Appeal and the House of Lords subsequently held to have been rightly convicted on the second indictment would have gone free.'[133] Second, in rejecting the duty to make an *in limine* inquiry on an application for stay, the Court of Appeal observed further: 'It is easy to foresee that the performance of such a duty in case such as that before us would present difficult procedural problems, for example, (i) of defining the issues claimed to exist (which may be very complex); (ii) of providing for representation of persons whose conduct is impugned; (iii) of ensuring that the persons affected are sufficiently aware of the case they have to meet.'[134] Third, the Court observed that '[w]hilst these problems may be overcome the issues referred to are best left, we think, to be dealt with during the course of the trial and if necessary later by the Court of Appeal. The Court of Appeal will have the advantage—one of which we have had the benefit in this case—of assessing whether the defendant has suffered any actual prejudice in the course of the trial.'[135] Hence, it appears clear that long before *Smolinski*, the Court of Appeal of England had been indicating a preference for the approach that culminated in the guidance given in 2004 in the *Smolinski* judgment. So, the *Smolinski* approach was not such a revolutionary departure from the approach previously indicated in the Court of Appeal's case law. It was merely the crystallisation of the flow of English jurisprudence along the groove made so obvious by the *Smolinski* judgment.

61. As with most solutions to legal problems, dissenting views have been expressed. Nevertheless, the skeptics in the minority acknowledge the *Smolinski* guidance as the dominant approach.[136] Indeed, as rightly indicated in the Canadian case of *R v La* (discussed below), the preference for the approach in particular cases is subsumed within the broader discretion of the trial judge who is required to rule on an application for a judicial stay of proceedings. That is to say, as it is a matter of discretion for a judge to reject or grant the

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[133] *Loc cit.*
[134] *Loc cit.*
[135] *Ibid*, pp 288—289.
[136] See, for instance, *R v F (S)*, *supra*, paras 43-45. See also Andrew L-T Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings*, 2nd edn (2008), pp 168-169. See also *R v Sarpong* [2011] EWCA Crim 3270 [Court of Appeal, England], para 25. *Sarpong* would be an improbable contradiction of the *Smolinski* guidance. First, *Sarpong* does no more than cite *R v F (S)*, with neither elaboration nor any mention of the *Smolinski* guidance, let alone any discussion as to the relative merits of the two approaches. Second, *Sarpong* (involving the Brendon Lawrence fatal shooting case, in which a request for stay was dismissed) is in fact a very robust support for the general current of the case law that the trial process is sufficiently equipped to relieve against complaints of unfair trials. [See paras 36-44.] This would mean, in fact, that it is better to consider complaints of serious prejudice at the point where a clearer—and less speculative—assessment may be made as to the inability of the court to relieve the prejudice complained about. Ultimately, then, *Sarpong* appears to offer, upon closer examination, ample substantive support for the *Smolinski* guidance, the main advantage of which is to hear the evidence in order to more clearly appreciate the extent of the complaint of prejudice claimed to hamper a fair trial. For instance, the Court of Appeal was able to see clearly certain holes in prosecution investigation that the Defence had been deprived of the opportunity to investigate themselves: primarily involving the prosecution failure to investigate the unreliability of a key witness for the prosecution who had been kept anonymous to the Defence for a long time during the investigation period. All in all, it appears that what the Court of Appeal did in citing *R v F (S)* was for the purpose of separating the issue of stay of proceedings from the issue of probative assessment of the evidence on the merits of the case and considering the former issue as the first order of business. That is not a departure from the *Smolinski* guidance.

remedy, so, too, is it within that discretion to reserve the decision on stay until the end of the evidence in the case, or dismiss the pre-trial request without prejudice to the moving party's disposition to bring back the motion at the end of the evidence in the case.

62. The trial judge who elects to follow the *Smolinski* approach is assisted by its relative merits: not only in terms of the observations in *Burke* and *La*, quoted above, but also for the following additional reasons, among others. For one thing, it lends greater apparency to the doing of justice more on the side of the merits of the case than on the side of apparent 'technicalities'. For, it is easier to see that justice has been done, if upon appreciation of the evidence in the case (together with a full, non-speculative appreciation of the extent of prejudice caused the defendant by the deprivation of needed information or investigative opportunity), the judge rules it unsafe to convict the defendant because of evident difficulties presented to his defence by the deprivation of information or investigative opportunities that had a reasonable probability of supporting his defence. What is more, the accused will not truly be cheated in the ultimate bargain. This is considering that the outcome would have squarely moved the case deep into the realms of double jeopardy, thus making it harder for the prosecution to re-indict the defendant on the charge(s) concerned. In contrast, a stay of proceedings before the evidence is heard in the case would still leave the prosecution with a stronger possibility of trying the case eventually, 'if the obstacles that led to the stay of the proceedings fall away' in the future.[137]

63. This brings me to the discussion of a certain recent development in English case law on stay. In an otherwise very helpful effort to streamline the 'very large number of authorities, decisions of this court which have not always been consistent' on stay of proceedings,[138] the Court of Appeal in *R v F (S)* [also known as *CPS v F (S)*]—significantly composed of a panel of five judges, as opposed to the usual three—signalled a departure from the *Smolinski* guidance. Unfortunately, the reasoning on the attempted departure leaves, in my respectful view, more questions in doubt than it answers. First, the premise for the attempted departure is not very persuasive. That premise is the apparent suggestion, in paragraph 22, that the Court had not held in *Smolinski* 'that applications to stay on grounds of abuse ought to be determined at the close of the evidence.'[139] An effort was made in paragraph 43 to demonstrate that suggestion, by quoting certain passages in *Smolinski* as not supporting authority for what has come to be known as the *Smolinski* guidance. As the Court expressed itself:

> Since *Smolinski* the practice appears to have developed that a ruling on an application to stay should be deferred until the evidence is complete. On close examination, this is not what the

[137] See Appeals Chamber's Lubanga Decision of 21 October 2008, *supra*, para 80.
[138] *R v F (S)*, *supra*, para 13.
[139] *Ibid*, para 22. See also para 43.

court suggested, at any rate in the context of an abuse of process rather than a *Galbraith* submission:

> "8. ... having regard to the period of time which elapsed, the court expects that careful consideration has been given by the prosecution as to whether it is right to bring the prosecution at all. If having considered the evidence to be called and the witnesses having been interviewed on behalf of the prosecution, a decision is reached that the case should proceed, then in the normal way we would suggest that it is better not to make an application based on abuse of process. It will take up the court's time unnecessarily. Unless the case is exceptional, the application would be unsuccessful...
> "9. ... it seems to us that on the whole it is preferable for the evidence to be called and for the judge then to make his decision as to whether the trial should proceed or whether the evidence is such that it would not be safe for a jury to convict. ..."[140]
> [Elision in the original.]

64. With respect, it is hard to accept these excerpts as all that was said—or even the controlling thought—on the matter in *Smolinski*. Upon a certain view, the selected texts quoted above are arguably subtexts to the main sense conveyed in *Smolinski*. According to this view, the main sense communicated by the Court of Appeal in *Smolinski* appears in the opening paragraphs of the same paragraphs 8 and 9 elided by the Court as quoted above. In paragraph 8 of *Smolinski*, the opening texts appear as follows: 'The making of applications to have cases stayed where there has been delay on the basis of abuse of process has become prevalent. In making his application Mr James followed what has become the usual practice in cases of this nature. This Court does not criticise him for doing so. However, *the Court questions whether it is helpful to make applications in relation to abuse of process before any evidence has been given by the complainants in a case of this nature. ...*'[141]. And, in the same vein, the very opening message in paragraph 9 was this: '*If an application is to be made to a judge, the best time for doing so is after any evidence has been called. ...*'[142]. It seems awkward, then, to say in *R v F (S)* that the Court of Appeal in *Smolinski* had not said that rulings on applications for stays ought to be deferred until the calling of the evidence. Second, such a negating interpretation of *Smolinski* is especially harder to sustain even on the basis of paragraph 9 as it was excerpted by the Court itself in *R v F (S)*. The excerpt appears as follows: "9. ... it seems to us that *on the whole it is preferable for the evidence to be called and for the judge then to make his decision as to* whether the trial should proceed or *whether the evidence is such that it would not be safe for a jury to convict.*"[143] That passage engages the large question whether the *Smolinski* Court could reasonably have been taken to mean that a trial judge may, upon a preliminary motion made before any evidence is called, 'make his decision as to ... whether the evidence is such that it would not be safe for a jury to convict.' The only way in which that passage makes any sense is that the Court in *Smolinski*

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[140] *Ibid*, para 43.
[141] *R v Smolinski*, *supra*, para 8 [emphasis added].
[142] *Ibid*, para 9 [emphasis added].
[143] *R v F (S)*, *supra*, para 43 [emphasis added].

had meant to say—as all indications suggest it was saying—that applications for stay ought to be made at the conclusion of evidence, but before the rendering of verdict: thus, putting the judge in the position 'then to make his decision as to whether the trial should proceed [to verdict] or whether the evidence is such that it would not be safe for a jury to convict.' It is, of course, one thing for a differently (and more authoritatively) constituted appellate court to choose to change—as they are entitled to do—the course of jurisprudence on a subsequent occasion, upon a re-examination of the continued wisdom of an underlying policy or for any other proper reason. But it is another thing for the new panel to base the change on the claim that the earlier panel had not *in fact* said what was apparently communicated.

65. Second, it is clear that what moved the *R v F (S)* panel to signal the departure from the *Smolinski* guidance was the desire to avoid a danger of confusing the functions of the judge and the jury in the administration of justice in serious criminal cases in England where that separation of functions exists. The confusion of roles arises when the trial judge is invited to rule on an application for stay on grounds of abuse of process (which properly belongs to the trial judge), as part of which the judge feels called upon to rule that elements of the complaints make it unsafe to convict (which evaluation properly belongs to the jury). Hence, the Court of Appeal was particularly keen, throughout its reasoning, to insist that 'the judge must bear in mind the constitutional primacy of the jury, and not usurp its function.'[144] And that danger of usurpation appears at its highest if the trial judge were to rule in favour of the application for stay at the completion of the evidence in the case.[145] The concern is legitimate. But it is not categorically inconsistent with the *Smolinski* approach, so as to recommend a reversal of that approach the only correct solution.

66. In other words, there might not have been a need to attempt to throw the *Smolinski* baby out with the bath water, as the *R v F (S)* panel seems to have done. It seems to me that the better approach might have taken the form of a comminuted reasoning that targeted the identified concern in itself for a tailored solution. In that regard, it should have been enough to alert trial judges or reiterate to them the need to be scrupulous in their respect of the jury's fact-finding territory. Surely, experienced and professional judges quite used to advising themselves—and issuing instructions to juries—on all manner of intricate legal details of complex cases could 'safely be left' to know the appropriate place to draw the line in good faith, if reminded of its existence and importance, even in borderline cases.[146] Something similar was done in 1981, when, in *R v Galbraith*,[147] the Court of Appeal straightened out the

[144] *Ibid*, para 36.
[145] See *ibid*, para 45B, in [2012] 2 WLR 1038, p 1054.
[146] In *R v Galbraith*, concerning the separation of roles of the judge and jury in rulings on 'no case' submissions, Lord Lane CJ concluded his guidance with the observation: 'There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge': *R v Galbraith* [1981] 1WLR 1039 [Court of Appeal, England], p 1042E.
[147] *Ibid.*

confusion prevailing then in the respective roles of judge and jury concerning submissions of 'no case to answer' made to withdraw a case from the jury at the end of the prosecution case. The problem at the time was not sought to be resolved by questioning the wisdom of making the 'no case' submission and ruling on it after all the prosecution evidence has been called in a case. As it was with *Galbraith*, I see no need now to blame the *Smolinski* approach, and discourage its use, because of the apparent danger of confusion of the respective roles of judge and jury when an application for stay is made upon conclusion of the evidence. A word of caution to trial judges would have been quite enough.

67. At any rate, whatever be the merits of this concern, and regardless of the question that must remain open as to whether dilution of the *Smolinski* guidance is the best way to address it, it is hardly an issue that should trouble a judge—especially legal professionals—who sit alone in criminal trials in the combined role of judge and jury. Such is the case at the ICC.

68. Finally, another motivation indicated by the *R v F (S)* panel against the *Smolinski* guidance is that 'if the issue [of stay of proceedings] is not dealt with before the evidence is heard, the [victim of the alleged crime], whose account may ... be a truthful one, will have been through the ordeal of giving evidence within and as part of a trial process which, afterwards, will then be held to have been an abuse of that very process. That is hardly fair.'[148] The indicated empathy is a powerful one. Yet, the suggested solution may not, all things considered, always fully serve the requirements of that empathy. For one thing, the suggested solution is inconsistent with what the *R v F (S)* panel itself had earlier described in another respect as 'the sensible rule that in the operation of the criminal justice system it is never wise to say "never".'[149] With that wise pragmatism in mind, it is not clear that it can confidently be supposed that in no case, if not the majority of cases, may the victim prefer to 'have his or her day in court' and let the forensic chips fall where they may upon a consideration of an abuse of process application made or decided at the conclusion of the evidence. What is more, the conditionalities of the stay remedy, in their cumulative number, appear to overtake the offered solution as the preferred method of protection of the sensibilities of the victim as indicated by the *R v F (S)* panel as a reason against the *Smolinski* guidance. As we have seen in this discussion, those conditionalities include but are not limited to the following: the occasions in which the Court will grant a stay of remedy are exceptionally rare—'almost vanishingly rare' as the *R v F (S)* panel itself described them[150]; for the most part, the complaints of abuse of process implicate situations that the trial process is well equipped to handle; balance is to be struck between the social imperative of proceeding with prosecution relative to the interests of the accused in receiving a fair trial;

[148] *R v F (S)*, *supra*, para 45C.
[149] *Ibid*, para 16.
[150] *Loc cit.*

the accused must show serious prejudice—not mere prejudice—to his fair trial; and, such serious prejudice must be clearly tied to specific defence to be put in the case. In view of all these considerations, it would seem then more reasonable to surmise that the average victim fully informed of all the circumstances will take his chances with proceeding with the trial and having the judge decide the stay application after the evidence is called.

69. Perhaps, the better view of *R v F (S)* is that it attenuated any peremptory stature that the *Smolinski* guidance might have had, while still allowing the guidance residual value as an option for English trial judges in future cases. In this regard, it is notable that the Court of Appeal in *R v F (S)*, clearly said they 'do not propose to be prescriptive' in their signal of the departure from the *Smolinski* guidance;[151] and that '[i]n the end of course the time when it should be dealt with by argument and ruling is a matter for the trial judge.'[152] That leaves the *Smolinski* guidance still an option for a trial judge in whose discretion it may still be considered the more sensible approach in the specific case. Furthermore, that the *Smolinski* guidance is still an option for the trial judge is reinforced by the following remarks of the Court in *R v F (S)*: '*unless there is a specific reason for deferment*, an application to stay on abuse of process grounds is preliminary to the trial, and *ought normally* to be dealt with at the outset.'[153] Such specific reason may, of course, include the inability of a trial judge fully to appreciate the extent of the prejudice claimed by the applicant; thus necessitating proceeding to trial, in order to allow the judge a better appreciation of the asserted prejudice to a fair trial. In most cases save for the very plainest, this determination will be within the ambit of the discretion of the trial judge. It may then not be readily second guessed on appeal. Further still, the last point finds precise support in what the Court itself said in *R v F (S)*: 'Although we can envisage cases in which, for example, the application is based on prejudice resulting from the absence of long-lost evidence, such as institutional records, *and where the evaluation of the significance of the absence of such evidence may best be undertaken at the close of the Crown's case*, in general the question whether the trial should proceed at all should take place before evidence is called.'[154] It is thus apparent that what the Court did in *R v F (S)* was recast the *Smolinski* approach as the exception to the 'general' rule. That exception, if it be so, then remains a viable option in the administration of criminal justice.

70. And, quite notably, after all said and done, the Court also ended up effectively supporting the *Smolinski* approaching with the following concluding remark: '... even when the pre-condition to a successful application, serious prejudice, may have occurred, the best

[151] *Ibid*, para 45C, p 1054.
[152] *Ibid*, para 45H, pp 1053-1054.
[153] *Ibid*, para 45C, p 1054 [emphasis added].
[154] *Ibid*, para 45A, p 1054 [emphasis added].

safeguard against unfairness to either side in such cases is the trial process itself, and an evaluation by the jury of the evidence.'[155]

71. In their critique of the approach, Young, Summers and Corker did not dispute that the *Smolinski* guidance 'may be the proper approach for trial judges to adopt in the majority of cases'.[156] But, they maintained that 'there will be cases where it will be entirely appropriate to hear an application to stay before the trial commences.' Such is the case *'[w]here there is no issue between the prosecution and the defence over the question of serious prejudice* by virtue of the delay, for example (in the light of lost documentation or missing witnesses), and *no issue of apparent inconsistencies in witness accounts, leaving the argument to revolve around the appropriate remedy* (stay or judicial direction on prejudice), then, in these circumstances, we submit it would be both inappropriate and unnecessary to put complainants through the ordeal of trial. On these occasions a sound exercise of judicial judgment may still be possible on the face of the papers, and agreed facts.'[157] These are wholly appropriate observations. But they are not at all contradictory of the *Smolinski* guidance; inasmuch as they are premised on the absence of a disagreement between the prosecution and the defence that serious prejudice had indeed been suffered. It is noted in this connection that the *Smolinski* guidance is implicitly founded upon such a contingent existence of a disagreement between the prosecution and the defence. This is apparent in the following observation of Lord Wolf CJ: 'Clearly, having regard to the period of time which has elapsed, the court expects that careful consideration has been given by the prosecution as to whether it is right to bring the prosecution at all. If, having considered the evidence to be called, and the witnesses having been interviewed on behalf of the prosecution, a decision is reached that the case should proceed, then in the normal way we would suggest that it is better not to make an application based on abuse of process.'[158] We have precisely such a disagreement in the case at bar. The Defence and the Prosecution disagree on whether serious prejudice has been suffered. The Defence want to stay. But the Prosecution insists on proceeding, on grounds that seriousness of the prejudice is either negative or not shown.

72. It is notable, in the end, that before *R v F (S)* came along, a preponderance of senior judicial opinions in England (as we have seen) and elsewhere across the common law world preferred an approach that is similar to the *Smolinski* guidance. In my view, the wisdom of that approach remains undisturbed by the apparent hesitation that the Court of Appeal of England recently signalled in *R v F (S)*.

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[155] *Ibid*, para 45D, p 1054.
[156] Young, Summers and Corker, *Abuse of Process in Criminal Proceedings*, *supra*, §10.138.
[157] *Loc cit* [emphasis added].
[158] *R v Smolinski*, *supra*, para 8.

73. For authorities from other jurisdictions, it is noted that Canadian appellate courts have expressed a clear preference for the ruling on stay to be made after hearing the evidence in the case. We clearly see that preference in the following observations of the Supreme Court of Canada in *R v La*:[159]

> The appropriateness of a stay of proceedings depends upon the effect of the conduct amounting to an abuse of process or other prejudice on the fairness of the trial. This is often best assessed in the context of the trial as it unfolds. Accordingly, the trial judge has a discretion as to whether to rule on the application for a stay immediately or after hearing some or all of the evidence. Unless it is clear that no other course of action will cure the prejudice that is occasioned by the conduct giving rise to the abuse, it will usually be preferable to reserve on the application. This will enable the judge to assess the degree of prejudice and as well to determine whether measures to minimize the prejudice have borne fruit. This is the procedure adopted by the Ontario Court of Appeal in the context of lost evidence cases. In *R v B (D J)* (1993), 16 CRR (2d) 381, the court said at p 382:
>
> > The measurement of the extent of the prejudice in the circumstances of this case could not be done without hearing all the relevant evidence, the nature of which would make it clear whether the prejudice was real or minimal.
>
> Similarly, in *R v Andrew (S)* (1992), 60 OAC 324, the court found at p 325 that unless the Charter violation "is patent and clear, the preferable course for the court is to proceed with the trial and then assess the issue of the violation in the context of the evidence as it unfolded at trial". See also: *R v François (L)* (1993), 65 OAC 306; *R v Kenny* (1991), 92 Nfld & PEIR 318 (Nfld SCTD).

74. Writing to a similar effect at the High Court of Australia, Brennan J observed as follows in *Jago v District Court of NSW* (in the context of an effort to stay proceedings on grounds of abuse of process on account of breach of what was asserted as a common law right to speedy trial): 'If a new common law right to a speedy trial were being devised, there would be much to be said for a right which attracted a remedy not to prevent a trial but to do what is just after the significance of the delay is assessed in the context of the evidence at the trial. That, of course, is really what the courts are accustomed to doing—especially by giving appropriate directions to the jury—in order to ensure a fair trial for an accused.'[160] Surely, the wisdom of that observation, though made in the context of the right to speedy trial, applies with equal force to stay of proceedings on other grounds of violation of the right to fair trial, such as hindered investigative opportunities.

75. Recently, in *R v Clarke*, McLaughlin J of the Crown Court of Northern Ireland appeared to have cited the *Smolinski* guidance with approval.[161]

76. Before concluding the review of the applicable case law in this part, it is perhaps useful to address a certain tendency to view the available options as one of either stay the

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[159] *R v La, supra*, para 27.
[160] *Jago v District Court of NSW, supra*, per Brennan J, para 17.
[161] *R v Clarke* [2011] NICC 12 [Crown Court of Northern Ireland], paras 48 and 55.

proceedings at the stage prior to trial or convict a probably 'innocent' defendant. One sees such a tendency of view in statements such as the following (not unusual to see in the discourse on judicial stay of proceedings on grounds of abuse of process): '[T]he underlying tension between, on the one hand, the pressure to permit all proceedings *to continue to a verdict*, and, on the other hand, the need to *protect the innocent from conviction*, is a very real one.'[162] Even accepting the correctness of the *assumption*—as opposed to the legal *presumption*—of innocence of every accused whose case is stayed on grounds of a genuine case of impossibility of fair trial, there are other difficulties with the further assumption that the only options available to the court are either proceed to verdict or set the 'innocent' accused free without trial. For one thing, there is an implicit assumption in that proposition that the 'verdict' is necessarily one of 'conviction', from which that 'innocent' defendant needs to be protected. This is an erroneous assumption, considered from the elementary perspective of the criminal justice process, at the end of which a verdict may be one of not guilty on grounds of the prosecution's failure to prove the essential elements of the crime. That error acquires a special significance in the context of the judicial function in a case in which a request for stay had been made on grounds of impossibility of a fair trial. This is in the sense that the judge who declines to order a stay at the stage prior to trial would necessarily have been prompted to appraise the complaint of the defendant against the background of the unfolding trial. This may result in a verdict of acquittal, on grounds of procedural impurities that could undermine confidence in a safe conviction. Furthermore, the conclusion of the evidence in the case may even prevent any verdict after all. This is because the judge may finally render a decision granting the stay at the point between the conclusion of the evidence and the verdict, thereby forestalling the verdict in the case. But, these are not novel notions in criminal procedure. In *R v Heston-Francois*, the England Court of Appeal made explicit reference to such a scenario when it noted 'the judicial power to direct a verdict of not guilty, usually at the close of the prosecution's case, or by the jury taking account of it in evaluating the evidence before them.'[163] These considerations render unpersuasive the apparent supposition of the Defence Counsel in this case that if an application for stay is not made and determined at the stage prior to trial, the only other time to do so would be on appeal following the conclusion of the case.[164] The supposition is mistaken. It will be possible to take up the grievance at the critical point in the case, between the completion of the evidence and the verdict.

77. I am mindful that the Defence counsel in this case have other reasons for not favouring this approach. They argue that it is a waste of time and resources to go through a trial that may possibly end in the grant of stay of proceedings after all. That argument is

[162] See, for instance, Choo, *supra*, pp 12-13 [emphases added].
[163] See *R v Heston-Francois*, *supra*, p 290.
[164] See para 43 of their motion paper: 'Where no other remedy exists, it is the duty of the Defence to make this application now rather than proceeding through a flawed trial and reserving the issue for appeal.'

unpersuasive to me. For one thing, the primary consideration for the existence of this Court is to do justice. Economy of time and money will always be borne highly in mind. But that consideration is collateral. Even so, time and money is not ultimately saved if proceedings are stayed and the case goes cold. The additional costs involved in an effort to rekindle it in future must not be ignored. The *Smolinski* approach would indeed be the closest approximation of the ideal of justice, in the circumstances, for the victims, the defendant, the international community and the economics of justice, than to abort the trial at the stage prior to trial by a judicial stay of proceedings. At any rate, the Defence is in no better position to worry about judicial economics (of time and money) by arguing for stay of proceedings than is the Prosecution in insisting that the case should proceed to trial.

78. I am also mindful of a possible concern that the recommendation of a standing policy at the ICC in the manner of the *Smolinski* approach does appear at a glance to run against the grain of the Appeals Chamber's pronouncement that '*[w]here* a fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. [...] *If* no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.'[165] Surely, the terms of that pronouncement do contemplate, at face value, the *possibility* of stay of proceedings before the conclusion of the evidence in the case.

79. Upon deeper reflection, however, there is really no substantive contradiction between that pronouncement and a standing policy that discourages applications for stay or rulings on them until the conclusion of the evidence. That point begins to clear in if it is always kept in mind that the Appeals Chamber gave only a contingency reasoning—dependent upon the conditional clauses 'where a fair trial becomes impossible', or 'if no fair trial can be held.' But, this is a conditional statement that should not be viewed in isolation, if one is to see the extent of the value of the *possibility* (of stay prior to trial) that some might employ the pronouncement to preserve. Rather, the evaluation must be made in the context of two more considerations: (a) the consistent observations of senior appellate judges who have considered the incidence of stay of proceedings, but ended up concluding that the occasion in which a fair trial may truly be found to be impossible is 'almost vanishingly rare' or 'often ... difficult, if not impossible' or words to that effect; and (b) questions about the functional value of that theoretical possibility, compared to the relative costs of its continued preservation, in terms of procedural interruptions that applications for stay—and appeal-sensitive Trial Chamber decisions granting them—cause in criminal proceedings, in the preponderant instances in which such applications have been unsuccessfully made.

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[165] See *Prosecutor v Lubanga Dyilo (Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 ...)*, 8 October 2010, ICC-01/04-01/06-2582, para 55 [emphases added].

80. In the *Lubanga* case, for instance, Trial Chamber I granted stay of proceedings on two occasions. The Trial Chamber reasoned on both occasions that a fair trial had become impossible. For that reasoning, it cited the pronouncement of the Appeals Chamber indicated above. But on both occasions, the Appeals Chamber reversed the Trial Chamber, effectively disagreeing with the assessment that a fair trial had become impossible. On the second occasion, the Appeals Chamber particularly adumbrated what must be taken as a principle that 'rather than resorting to the significantly more drastic remedy of a stay of proceedings', Trial Chambers must first use 'tools within the trial process itself, to cure underlying obstacles to a fair trial, thereby allowing the trial to proceed speedily to a conclusion on its merits.'[166] Those observations, taken together with the appellate outcomes in the two *Lubanga* stay litigations—and the Chamber's decision in the case at bar and those of the other international criminal courts dismissing applications for stay—are not only consistent with the general view that the circumstances are 'almost vanishing rare' in which the courts will find that a fair trial has become truly impossible so as to warrant a stay; they are also strikingly reminiscent of Lord Justice Brooke's observation that it is 'the policy of the courts' to ensure against delays of proceedings through collateral challenges, since '*in most cases* any alleged unfairness can be cured in the trial process itself.' [Emphasis added.][167]

81. It may be instructive also to consider the general approach of the ECtHR in the evaluation of complaints of violation of fair trial rights under article 6(1) of the European Convention on Human Rights. As recently restated by the Grand Chamber: '[T]he Court's primary concern under Article 6 § 1 is to evaluate the *overall fairness of the criminal proceedings* .... In making this assessment the Court will look at *the proceedings as a whole* having regard to *the rights of the defence but also to the interests of the public and the victims that crime is properly prosecuted* ... and, where necessary, to the rights of witnesses...'.[168] In doing so, the Court will have 'regard to such factors as the way in which statutory safeguards have been applied, the extent to which procedural opportunities were afforded to the defence to counter handicaps that it laboured under and the manner in which the proceedings as a whole have been conducted by the trial judge'.[169] It is an eminently sensible approach. And, consistent with it is a judicial policy that encourages deferment of the adjudication of complaints of fair trial violations until the completion of the evidence in the case.

82. In view of all these considerations, there is better practical sense in a judicial policy of discouraging applications for stay (or at least rulings on such applications) until the

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[166] See *ibid*, para 60.
[167] *R v Feltham Magistrates' Court & Anor, ex p Ebrahim*, *supra*, para 17.
[168] *Al-Khawaja and Tahery v UK*, *supra*, para 118 [emphases added].
[169] *Ibid*, para 144. See also *Stanford v UK* (1994) Application No 16757/90, Judgment of 23 February 1994, para 24.

conclusion of evidence in the case; in order to be sure that the unfairness in question had truly defied the curative abilities of the trial process itself.

83. For the foregoing reasons, I find merit in the submissions of the Prosecution to the effect that a finding of impossibility of fair trial, rationalising a stay of proceedings, cannot be *confidently* made at the stage prior to trial, in a manner that contemplates a stay of proceedings in a trial involving allegations of crimes that shock the conscience of humanity.

Application to the Case at Bar

84. In relation to the case at bar, it is appropriate, perhaps, to say that the vagaries of the law of stay of proceedings, as seen in the foregoing analysis, fully bear out the initial caution that a request for stay of proceedings is not to be made with any degree of confidence, let alone a sense of entitlement to the requested outcome. Indeed, that caution is stoutly supported by the similar caution recently made in *Hereworth v R* that '[t]he principles contained within the jurisprudence relevant to staying a case on the grounds of missing evidence or documents will not provide a clear answer in every case.'[170]

85. The factual matrix of this case would make it highly speculative at this stage to make judicial pronouncements of the existence or non-existence of impossibility of fair trial; especially where the Prosecution and the Defence disagree on the question. In the circumstances, the better approach is to allow the case to proceed to trial. If necessary, the defendants' complaint will be kept in mind in the course of the trial. At trial, any prejudice complained against will become clearer to the Chamber in its effects and extent and in concrete terms: assuming that the complaints of the Defence as made remain outstanding at that time; and, they indicate precisely, in the appropriate place, the case that they would have made but were prevented from making. Among other things, it is noted in particular, that it is often the case that trial counsel would ordinarily not, for strategic reasons, reveal in advance how they would employ particular pieces of evidence which they claim to lack during preparations for trial. Nor will the bench always be in a good position to give advance ruling on the relevance and permissibility of such evidence and use; especially if counsel are playing precise use of particular items of evidence so close to the chest at the stage prior to trial. In those circumstances, it becomes highly speculative and questionable to suppose that the information or evidence claimed to be absent would result in such serious prejudice as to make fair trial impossible. But, in the course of actual trial all posturing comes off. Parties must confront and lay bare their cases. The precise use of particular evidence must be revealed. Any forensic effects of its absence become clear. Hence, any implications to (im)possibility of fair trial become easier to see in their actual light.

[170] *Hereworth v R* [2011] EWCA Crim 74 [Court of Appeal, England], para 10.

86. It needs also to be said that the Appeals Chamber's invocation, in *Lubanga*, of the right to speedy trial as an incident of a stay of proceedings will necessarily task the discretion of the Trial Chamber in an obvious way. This is in the manner of leaving the Chamber with the choice of deciding whether to sacrifice the right to speedy trial upon the altar of present grant of the requested stay at the stage prior to trial, on grounds of hindered investigation or trial preparation. In other words, the Trial Chamber's choice would be to either (a) preserve the right to speedy trial by requiring the case to proceed to trial, at the end of which any complaint of serious prejudice to fair trial is considered as part of the overall evaluation of the case; or (b) stay proceedings at the stage prior to trial for an indefinite period of time, at the end of which the case may be resumed when the obstacles to fair trial fall away. The choice becomes particularly stark when the arguments for stay at the stage prior to trial do not overcome the considerations indicated in the case law as speculative.

87. I am also mindful that impossibility of fair trial is made the more difficult to presume ahead of time in the average case, on grounds of missing evidence that is not known to favour any particular side. In the case at bar, much of the evidence that the Defence claims to be unavailable to it belongs to that category. Whom such evidence may truly favour is especially difficult to predict in the context of this case; where the Prosecutor in particular is barred access to Sudan, and some may say that the Defence is suffering perhaps a derivative hostility in that regard.

88. Finally, I am mindful of the predicament presented by the fact that the sources of the Defence complaint lie outside the control of this Court, in relation to the difficulties complained of as stemming not only from the Government of Sudan, but also from the UN, the African Union, the Government of Nigeria and the International Committee of the Red Cross. But the wisdom of Brennan J's observation should be a persuasive source of guidance. This is to the effect, as indicated earlier, that the mere fact that the difficulties complained about are outside the Court's control will not necessarily justify a stay of proceedings; since that manner of difficulties does not presumptively override the relieving abilities of the judges in the course of the trial.[171]

Non-Disciplinary Jurisdiction

89. In their submissions for stay, Defence Counsel notably directed a scorching flow of indignation at the Government of Sudan for its obstructionist attitude towards the Court, such as hampers the work of both the Defence and the Prosecution. Counsel also expressed, albeit

[171] See *Jago v District Court of NSW*, *supra*, per Brennan J, para 23.

in a more modulated manner, associated frustration towards the UN Security Counsel for not doing much to bring the Government of Sudan to heel. Sentiments of frustration were also directed at certain UN agencies, the AU and the Government of Nigeria for failing thus far to provide access to information that the Defence avers to know, suspect or expect to exist.

90. In terms of strategy, the forensic value of the vented umbrage is, regrettably, unclear to me; notwithstanding the great sympathy they attract and their moral merit on an appropriate occasion. Notably, they have very little juridical value in the litigation on stay of proceedings. It would have been enough to show without drama that needed information had not been forthcoming and that fair trial will be impossible. This is for the simple reason of the strong line of authorities that maintains that the power to stay proceedings does not engage the punitive or disciplinary jurisdiction of a criminal court. In that regard, Lord Lowry in *R v Horseferry Road Magistrates' Court, ex p Bennett* was careful to caution that 'the discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct .... "*pour encourager les autres.*"'[172] That caution was recently recalled in the respective judgments of the Privy Council in *Warren & Ors v Her Majesty's Attorney General of the Bailiwick of Jersey*[173] and of the UK Supreme Court in *R v Maxwell*.[174] I am not persuaded to a different view.

91. If the public display of outrage is that wholly unhelpful as a strategy of legal persuasion, one then wonders whether to argue in that manner is devoid of all harm, by potentially muddying even further the already muddy stream of cooperation that appears to be so important in the work of courts like this. That manner of advocacy is to be discouraged.

92. That said, the third parties implicated in the Defence complaint (i.e. the Government of Sudan, the UN agencies, the AU, the Government of Nigeria) are strongly encouraged, at least as a matter of comity towards the administration of justice in this Court (if not as a matter of their responsibility to protect), to take seriously the possible implications of failure to allow the Defence access to information that they ought to be allowed access under appropriate procedural norms of this Court. In this regard, it helps to recall that States Parties to the Rome Statute made an effort to balance the legitimate interests of third parties (especially security interests of States) against the interests of the Prosecution and the Defence to investigate and litigate cases before the Court. Where, for instance, a State (upon whom access to information request has been made) claims a legitimate concern of security,

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[172] *R v Horseferry Road Magistrates' Court, ex p Bennett, supra*, p 74, per Lord Lowry. See also *R v Crown Court at Norwich ex parte Belsham* (1992) 94 Cr App R 382 [Divisional Court, England], p 395, per Watkins LJ.

[173] *Warren and others v Her Majesty's Attorney General of the Bailiwick of Jersey* [2011] UKPC 10 [Privy Council], para 37.

[174] *R v Maxwell* [2010] UKSC 48 [UK Supreme Court], para 24.

she is entitled to assert that concern in the proper manner; and the matter will be resolved according to the provisions of the Rome Statute.[175] What is not helpful is the extra-judicial reaction of silence (in which it is unclear whether the request is being denied); nor, indeed, an arbitrary denial. Such an extra-judicial reaction may well lead to frustration of justice, if upon a correct view of the matter, at the appropriate stage, it becomes clear that the reaction had truly resulted in the impossibility of a fair trial of the accused. The ultimate victims of such an outcome will be the very victims of alleged violations, if there is no judicial conclusion on the merits as to what happened to them.

PART II: INHERENT JURISDICTION TO STAY PROCEEDINGS AT THE ICC

93. The foregoing analysis affords wholly sufficient a basis to dispose of the present request. As a matter of principle, however, the need is felt to invite reconsideration of doctrinal premise of this manner of jurisdiction in the first place. In particular, it is said that the sort of power that this Chamber has been asked to exercise derives from 'inherent jurisdiction' of the Court, generally assumed as empowering international criminal courts to stay proceedings. This Court should beware of that assumption, considering the weak foundations on which it is based.

The Question of Jurisdiction

94. The question then remains open regarding the jurisdiction of the ICC, in its own legal framework, to stay proceedings in a case initiated by the Prosecutor and properly confirmed by the Pre-Trial Chamber, following the procedures carefully laid down in the Rome Statute. I note immediately their striking differences from the manner of initiation of those proceedings that have guided the development of the regime of stay of proceedings in the common law jurisdictions. Consider, for instance, the stated need of common law courts to control their own processes, as a chief reason for the development of the remedy of stay of proceedings. The problem was that common law judges had little or no control over the initiation of proceedings in their courts when statements of claim are filed in civil cases, and informations and indictments are issued in criminal cases.[176] This handicap comes through in the following observation:

> The court has no power, even under its inherent jurisdiction, to prevent a person from commencing proceedings which may turn out to be vexatious. It is possibly by virtue of this principle that many a litigant in person, perhaps confusing some substratum of grievance with

[175] See articles 72 and 73 of the Rome Statute.
[176] See, for instance, I H Jacob, 'The Inherent Jurisdiction of the Court,' (1970) *Current Legal Problems* 23, pp 40-44.

> an infringement of legal right, is lured into using the machinery of the court as a remedy for his ills only to find his proceedings summarily dismissed as being frivolous and vexatious and an abuse of the process of the court.[177]

95. That observation which is very accurate as regards civil litigation in common law jurisdictions holds some truth for the criminal process as well. Consider, for instance, Lord Scarman's observation in *R v Sang* that the 'judge's control of the criminal process begins and ends with trial, though his influence may extend beyond its beginning and conclusion.'[178] Viscount Dilhorne had similarly observed in *DPP v Humphrys* that a 'judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution. The functions of prosecutors and of judges must not be blurred. If a judge has power to decline to hear a case because he does not think it should be brought, then it soon may be thought that the cases he allows to proceed are cases brought with his consent or approval.'[179] Lord Salmon had disagreed with Viscount Dilhorne in the judgment, but not on this point. Lord Salmon agreed that 'a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that as a matter of policy, it ought not to have been brought.'[180] Rejecting the submission, in *Barton v R*,[181] that judges have a power of judicial review over the prosecutorial discretion to issue an information [document containing charges of misdemeanor], described as 'the prerogative power to issue an information',[182] the High Court of Australia observed as follows: 'It would be surprising if Parliament intended to make the Attorney's information subject to review. It has generally been considered to be undesirable that the court, whose ultimate function it is to determine the accused's guilt or innocence, should become too closely involved in the question whether a prosecution should be commenced ... though it may be that in exercising its power to prevent an abuse of process the court will on rare occasions be required to consider whether a prosecution should be permitted to continue.'[183]

96. Left, then, without a say in what cases are brought into their courtrooms for civil or criminal trials, common law judges had to devise a creative way to remedy this handicap and retain control. One way of doing that was to dig into their reserve of 'inherent jurisdiction', enabling them to claim the power to stay proceedings. Professor T R S Allan rues the denial of power of judicial review of prosecutorial discretion as he celebrates the genius of 'inherent jurisdiction' to prevent abuse of the criminal process. According to him:

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[177] Jacob, p 43.
[178] *R v Sang, supra.*
[179] *DPP v Humphrys, supra*, p 26.
[180] *Ibid*, p 46.
[181] *Barton v R* [1980] HCA 48; (1980) 147 CLR 75 [High Court of Australia].
[182] *Ibid*, para 22.
[183] *Ibid*, para 29. See also *R v Comptroller-General of Patents, Designs, and Trade Marks* (1899) 1 QB 909 [Court of Appeal, England], p 914; *Gouriet v Union of Post Office Workers* [1978] AC 435 [House of Lords].

> It may be doubted whether denial of review of the decision to prosecute, as a matter of administrative law, is consistent in principle with the inherent jurisdiction of a criminal court to prevent an abuse of process. The court's intervention would have a similar justification in each case: it is hard to defend the legality of a decision to prosecute if the proceedings, once commenced, would constitute an abuse of the process of the court. Even if the institution of proceedings is generally beyond judicial control, in deference to the strict separation of functions between judge and prosecutor, *the defendant's right to a fair trial demands a power to stop a prosecution which is oppressive or vexatious or undertaken for illegitimate reasons*.[184]

97. That is truly a legitimate complaint in common law jurisdictions. In contrast, ICC judges do not have that complaint. This is apparent if one considers the careful procedures laid down in the Rome Statute, entailing clear role and controlling power for the ICC judiciary in the processes of initiation of investigations, issuing of arrest warrants, and summonses to appear, confirmations of charges, and determinations of questions of admissibility of cases either on their own or at the suit of defendants and States—all of which are precisely intended to insulate the ICC processes against the possibility of 'a prosecution which is oppressive or vexatious or undertaken for illegitimate reasons.'

98. It thus seems that the exercise of the power of ICC judges to stay proceedings on grounds of abuse of process is something to be approached with that overarching distinction in mind, rather than something abandoned to the seduction of pleasing platitudes—like 'very essence', 'very life-blood', 'immanent attribute' and hitching 'substance' to form of superior courts—found in the commentaries relating to common law jurisdictions where local circumstances and history may make the concept apt and even necessary.

99. The source of a power so radical requires very close and careful reasoning, particularly as it leads to the dangerous zones of the very antithesis of the reason for the existence of this particular Court—the prevention of impunity for the gravest crimes.

Inherent Jurisdiction

100. Occasional difficulties in explaining the source of 'inherent jurisdiction' have led to cynical descriptions of the power as 'metaphysically conceived'.[185] There is, however, an appreciable theory for the source of that jurisdiction. Mr Justice Hillary, a 14th century English judge, provides an inconvenient clue. He was reported to have once observed that the law is what the judges will. Pollock benevolently presumed, five centuries later, that Hillary

[184] T R S Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* [Oxford: OUP, 1994] p 225 [emphasis added].
[185] Editorial Board, 'Civil and Criminal Contempt in the Federal Courts' (1947) 57 *Yale Law Journal* 83, p 85.

must have spoken in jest.[186] But, was that so? If Hillary was truly joking, his 19th century American counterpart, Justice Oliver Wendell Holmes, was decidedly serious when he famously asserted in similar language that '[t]he prophesies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.'[187] Apparently, President Theodore Roosevelt did not entirely disagree.[188] These observations are certainly uncomfortable, as they should be, for modern-day judges. But they once had a respectable place in the evolutionary history of the jurisdiction of the superior court in the common law world. A monument of that history, the Royal Coat of Arms, still hangs above the bench in superior courts in common law constitutional monarchies like England, Canada and Australia. It is a reminder that the superior courts are 'Royal Courts' and that their jurisdiction was originally delegated to them by the monarch as the fountain of justice. This is fully consistent with the insistence of Hobbes, Bentham, Austin, and many others, in their time, that 'all law emanates from the sovereign, even when the first human beings to enunciate it are the judges', as Holmes would note.[189] Blackstone wrote of the 'course of justice flowing in large streams from the king, as the fountain, to his superior courts of record; and being then subdivided into smaller channels, till the whole and every part of the kingdom were plentifully watered and refreshed.'[190] And, Bracton had expressed the same view.[191]

101. The theory that the monarch was the fountain of justice would presume then that there was never a lacuna in the jurisdiction to do justice, especially in the 'immemorial' era (before Parliament) to which the common law is traceable.[192] Therein lay the genesis of the idea of the existence of an 'inherent jurisdiction' to do justice among the king's (or queen's) subjects. Therefore, for purposes of the administration of justice, this 'inherent jurisdiction' flowed from the king or queen to the common law superior court judges, who were his or her

[186] Sir Frederick Pollock, *The Genius of the Common Law* [New York: Columbia University Press, 1912], p 2.
[187] Oliver Wendell Holmes Jr, 'The Path of the Law' (1897) 10 *Harvard Law Review*, p 457.
[188] In his State of the Union address of 8 December 1908, President Roosevelt had said as follows: 'The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making': Theodore Roosevelt, *State of the Union Addresses of Theodore Roosevelt* [Middlesex, Echo Library: 2007] p 262. See also <http://www.let.rug.nl/usa/presidents/theodore-roosevelt/state-of-the-union-1908.php>
[189] Oliver Wendell Holmes Jr, 'The Path of the Law', *supra, loc cit.*
[190] Sir William Blackstone, *Commentaries on the Laws of England* [Oxford: Clarendon Press, 1765-1769], Bk III, ch 4. See also Bk III, ch 3.
[191] Pollock and Maitland, citing Bracton, explained the source of that jurisdiction in the following way: 'Who, asks Bracton, ought to be judge in temporal causes? The king; no one else:—this is the meaning of the kingship, that the king should do justice to all. It is want of time and strength that authorizes and compels him to depute his duties to others. All temporal judges are his delegates. But Bracton was a royal justice, and, though he could easily show that he and his fellows derived their authority from the king, he does not attempt to prove, and could hardly have succeeded in proving, that even in legal theory, all the jurisdictional powers of the feudal lords were delegated to them by the king': Frederick Pollock and Frederic Maitland, *The History of English Law before the Time of Edward I*, 2nd edn, vol 1 [Cambridge: CUP, 1898], p 528.
[192] See Sir Matthew Hale, *The History of the Common Law of England* (3rd edn, corrected) (1739) pp 1-3 and 23.

majesty's delegates—'Her Majesty's Judges' as Viscount Simonds called them in recent memory.[193]

102. It is clear then that this theory of jurisdiction is wholly out of place in relation to the judges of the ICC.

Inherent Jurisdiction to Stay Proceedings at the ICC

103. Yet, it has become commonplace for international judges and lawyers, evidently seduced by the language of the discourse in common law jurisprudence, to assume not only that an international criminal court has power to stay criminal proceedings; but that such power stems from the 'inherent jurisdiction' of the international court in question.[194]

104. Terminology remains, of course, to be clarified or reconciled when the phrase 'inherent jurisdiction' is employed. Perhaps, what is intended is 'incidental jurisdiction' or 'implied powers'. The difficulty is apparent in the following explanations of 'inherent jurisdiction' indicated by the Appeals Chamber of the Special Tribunal for Lebanon:

> With regard to the Tribunal, by 'inherent jurisdiction' we mean the power of a Chamber of the Tribunal *to determine incidental legal issues* which arise as a direct consequence of the procedures of which the Tribunal is *seized by reason of the matter falling under its primary jurisdiction.*[195]

105. A more involved definition was indicated by the International Court of Justice as follows:

> [I]t should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand, *to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court*, and *to 'maintain its judicial character'* ... . Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the

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[193] *Shaw v DPP* [1962] AC 220 [House of Lords].

[194] The Appeals Chamber of the Special Tribunal for Lebanon has made a helpful summary of some of the relevant jurisprudence. See, for instance, *Decision on Appeal of Pre-Trial Judge's Order regarding Jurisdiction and Standing*, 10 November 2010 [Appeals Chamber, Special Tribunal for Lebanon], para 46. See also *Prosecutor v Barayagwiza (Decision)*, 3 November 1999 [ICTR Appeals Chamber], para 75, quoting the Privy Council in *Bell v DPP of Jamaica* to the effect of 'inherent power' of the court to decline to adjudicate on grounds of abuse of process. See also *Prosecutor v Lubanga (Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006)*, 14 December 2006 [ICC Appeals Chamber], ICC-01/04-01/06-772, paras 29 and 35.

[195] *Decision on Appeal of Pre-Trial Judge's Order regarding Jurisdiction and Standing*, 10 November 2010 [Appeals Chamber, Special Tribunal for Lebanon], para 45 [emphasis added].

> mere existence of the Court as a judicial organ established by the consent of the States, and is conferred upon it in order that its basic judicial functions may be safeguarded.[196]

106. If 'inherent jurisdiction' is generally accepted as meaning 'incidental jurisdiction'—or 'implied power', as some commentators have also termed the same idea—the contemplated notion may then not attract reasonable quarrel. There would be a sound foothold for it in international law. It is generally allowed that an international body or organisation 'must be deemed to have those powers which, though not expressly provided in the [constitutive instrument], are conferred upon it by necessary implication *as being essential to the performance of its duties.*'[197] Yet, the wielder of such a power must remain conscious that it involves a dance in borrowed robes: one may not dance with vigour.

107. A major point of division of opinion would then remain how far afield the cord of implied power may be acceptably drawn from the express language of the jurisdiction expressly conferred, and to what uses it may be put.

108. Notably, in the *Reparations Case*, Judge Hackworth had expressed a dissenting view: 'Implied powers flow from a grant of expressed powers, and are limited to those that are "necessary" to the exercise of powers expressly granted.'[198] Speaking, as he did, in relation to the United Nations, he insisted that there was 'no gainsaying the fact that the Organization is one of delegated and enumerated powers. It is to be presumed that such powers as the Member States desired to confer upon it are stated either in the Charter or in complementary agreements concluded by them. Powers not expressed cannot freely be implied.'[199]

109. This engages a fundamental difficulty as regards the exercise of the power to stay proceedings before the completion of the evidential hearing on the charge. If the aim of 'incidental powers' is to enable an entity to achieve the object of its existence—the enjoyment of powers 'essential to the performance of its duties'—idea then becomes quickly ensnared by the broken logic of using a subsidiary power to defeat the primary object of the power itself. At the ICC, that primary object is to conduct inquiry on a properly confirmed charge of criminal conduct involving 'unimaginable atrocities that shock the conscience of humanity'. Hence, to exercise 'incidental power' in a manner that results in a refusal to pursue that primary object is truly to make 'incidental power' the overlord of the primary

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[196] *Nuclear Tests Case (New Zealand v France)*, (1974) ICJ Reports [International Court of Justice,] para 23 [emphasis added].
[197] See *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations* (1949) ICJ Reports 174, p 182 [emphasis added]. See also G G Fitzmaurice, 'The Law and Procedure of the International Court of Justice: International Organizations and Tribunals' (1952) 29 *British Yearbook of International Law* 1 pp 5 to 6; and C F Amerasinghe, *Jurisdiction of International Tribunals* [The Hague: Kluwer, 2003], p 171.
[198] *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations, supra*, p 198.
[199] *Ibid*, p 198.

jurisdiction, rather than the servant that it should be. By any other description, this would be *ultra vires* exercise of power.

110. It is important to note, perhaps, that such questions of *vires* seldom troubled a common law superior court in the exercise of its inherent jurisdiction. This is because the full sense of the term is 'inherent jurisdiction *to do justice*'—not just incidental jurisdiction to fulfil something else specifically spelt out for it as the primary object in a parent statute. And, 'to do justice', in the fullest sense of the idea in the context of the common law jurisdiction of the superior court, fully embraces the power to decline to exercise any other jurisdiction conferred by a statute. Hence, a common law superior court's 'inherent jurisdiction to do justice' is, by virtue of its primordial origins and sovereign heritage, arguably the true overlord of an item of jurisdiction expressly conferred by statute. That is not so at the ICC.

111. As suggested above, the better approach at the ICC lies in a conscious judicial policy that favours proceeding with the trial, but to reflect the effects of the abused process in the ultimate outcome of the proceedings. Such an approach would give trial of the charge the existential social value that belongs to it as the primary object of the exercise of jurisdiction, while also giving to a just complaint of unfair trial its own proper due as the object of exercise of incidental jurisdiction.

112. But, the disagreement as to the meaning of 'inherent jurisdiction' has another dimension that should be of interest to the ICC. There is a strong line of authority and understanding that rejects its translation to 'implied powers' which a court of any description may enjoy by virtue of merely being a court of law. To this school of thought, it is only 'courts of a particular description' that enjoy inherent jurisdiction. Those are courts of 'unlimited jurisdiction'. A leading statement in this regard is the judgment of the High Court of Australia in *R v Forbes, ex parte Bevan*, where Menzies J observed as follows:

> "Inherent jurisdiction" is the power which a court has simply because it is a court of a particular description. Thus the Courts of Common Law without the aid of any authorizing provision had inherent jurisdiction to prevent abuse of their process and to punish for contempt. Inherent jurisdiction is not something derived by implication from statutory provisions conferring particular jurisdiction; if such a provision is to be considered as conferring more than is actually expressed that further jurisdiction is conferred by implication according to accepted standards of statutory construction and it would be inaccurate to describe it as "inherent jurisdiction", which, as the name indicates, requires no authorizing provision. Courts of unlimited jurisdiction have "inherent jurisdiction".[200]

113. In the earlier case of *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section*, the same court had found that the power to punish summarily for contempt of court by imprisonment or fine was an incident of

[200] *R v Forbes, ex Parte Bevan* [1972] HCA 34 [High Court of Australia], para 5.

'inherent jurisdiction'; and, as such, it belonged only to a superior court of record, as a matter of common law.[201] In both *Forbes* and *Metal Trades*, the Australian High Court found that although a court of law created by statute may be described as a 'superior court of record', it may not enjoy 'inherent jurisdiction', if it is not a common law court, with unlimited jurisdiction.

114. A similar understanding had led some appellate judges in England to hold that the Court of Appeal does not enjoy 'inherent jurisdiction'. Lord Justice Salmon said so in *R v Collins*: 'Mr Campbell frankly admits that he cannot find any provision in any of the statutes which confers jurisdiction on this Court to hear the motion which he is seeking to make. He says, however, that we have an inherent jurisdiction to hear such a motion. We do not accept that submission. *A Court of Appeal created by statute has no jurisdiction beyond that which Parliament confers upon it*'.[202]

115. The websites of many courts in the common law world consistently convey the same message. A classic example is the following information to be found on the website of the Court of Appeal of Cayman Islands: 'Appeals from the Grand Court go to the Court of Appeal. Like the Grand Court, the Court of Appeal is a Superior Court of Record. Unlike the Grand Court, however, the Court of Appeal does not exercise inherent jurisdiction but is a creature of statute and of the Constitution.'[203]

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[201] *R v Metal Trades Employers' Association, ex parte Amalgamated Engineering Union, Australian Section* [1951 HCA 3 [High Court of Australia].

[202] *R v Collins* (1970) 54 Cr App R 19, p 19-21 [Court of Appeal, England] [emphasis added]. See also *R v Grantham* [1969] 2 QB 574 [Courts Martial Appeal Court, England], p 579E and 580B; *R v Jeffries* [1969] 1 QB 120 [Court of Appeal, England]; *R v Shannon* [1975] AC 717 [House of Lords], *R v McIlkenny & Ors* [1992] 2 All ER 417, p 424 [Court of Appeal, England] and *R v Maguire & Ors* [1992] QB 936, p 944G [Court of Appeal, England]; *Roberts v Canada* [1989] 1 SCR 322, p 331 [Supreme Court of Canada]; *Canada (Human Rights Commission) v Canadian Liberty Net* [1998] 1 SCR 626 [Supreme Court of Canada]. In a recent case in New Zealand, Justice Gendall said as follows: 'The ability to grant remedies in equity is not the equivalent of having inherent jurisdiction in the Family Court to declare a trust a sham. This Court is not bound by Family Court decisions which have effectively held otherwise. I respectfully do not agree with those conclusions as to jurisdiction. The District and Family Courts jurisdiction arises from statute. Inherent jurisdiction is vested only in the High Court': *F v W* (High Court, Wellington CIV-2009-485-531, 3 August 2009), para 39.

[203] www.judicial.ky/courts/the-court-of-appeal. Similar information appears at the website of the Supreme Court of Canada, in the following terms: 'The Supreme Court of Canada stands at the apex of the Canadian judicial system. The Canadian courts may be seen as a pyramid, with a broad base formed by the provincial and territorial courts whose judges are appointed by the provincial and territorial governments. At the next level, there are the provinces' and territories' superior courts whose judges are appointed by the federal government. Judgments from the superior courts may be appealed to the next level, the provincial or territorial courts of appeal. As well, there are the Federal Court of Appeal, the Federal Court, the Tax Court of Canada and the Court Martial Appeal Court. Unlike the provincial superior courts, which exercise inherent jurisdiction, the jurisdiction of these courts is granted by statute and encompasses matters falling within the competence of the federal government': www.scc-csc.gc.ca/court-cour/role/index-eng.asp. On the website of Ontario's Superior Court of Justice: 'The Superior Court of Justice is a "superior court" of general jurisdiction. It has jurisdiction over matters granted to it by federal and provincial statutes. The Superior Court also has an "inherent" jurisdiction arising from Ontario's common law traditions. For example, the Superior Court's "inherent" jurisdiction gives it authority to hear any matter not specifically assigned to another level of court. As well, the Superior Court is the court of first appeal with respect to criminal cases arising in the Ontario Court of Justice':

116. This necessarily raises the question: as the ICC is famously a statutory creature, how does it escape the doctrine that courts created by statute do not enjoy inherent jurisdiction, beyond what has been granted to it in its parent statute?

117. Indeed, beyond the parameters of its possible acceptation as 'incidental jurisdiction', the notion of 'inherent jurisdiction' assumes a significantly more troubling posture at the ICC. The controversy attends not only the source and content of what may be understood as 'inherent jurisdiction', but also its limits in terms of the question whether it affords a proper basis for ICC judges to decline to try a charge properly laid, on grounds of such adjectival considerations as an improper conduct (by the prosecution or a third party) that leave even an overpowering stench on the continued exercise of substantive jurisdiction. The concern here is not minor. Reasonable persons may consider that the ghosts of the victims of gross human rights violations may weep in urge of ICC trial judges to pinch their noses (at any horrid behaviour of the Prosecution or third parties) and inquire into the factual merits of alleged conducts found to have met the threshold test of 'substantial reason to believe' as amounting to 'most serious crimes of concern to the international community'; while employing other judicial measures to relieve against the effects of any horrid behaviour of the Prosecution or third parties.

118. But, how do the origins and content of what may be understood as 'inherent jurisdiction' engage greater controversy beyond the acceptation of 'incidental jurisdiction'? The starting point for this answer lies with the idea of stay of proceedings in the administration of international criminal justice and the tendency to give common law courts credit for the idea.[204] As a paramount court of law, there is surely much that the ICC shares in

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www.ontariocourts.ca/scj/en/about/jurisdiction.htm. The website of the Courts of British Columbia: 'The Supreme Court is the province's superior trial court. It is a court of general and inherent jurisdiction, which means that it can hear any type of case, civil or criminal. It also hears most appeals from the Provincial Court, in both civil and criminal cases': www.courts.gov.bc.ca/about_the_courts/. At the website of Canada's Department of Justice, explaining the Canadian court system, the following information appears: 'Each province and territory has superior courts. These courts are known by various names, including Superior Court of Justice, Supreme Court (not to be confused with the Supreme Court of Canada), and Court of Queen's Bench. But while the names may differ, the court system is essentially the same across the country, with the exception, again, of Nunavut, where the Nunavut Court of Justice deals with both territorial and superior court matters. The superior courts have "inherent jurisdiction," which means that they can hear cases in any area except those that are specifically limited to another level of court. The superior courts try the most serious criminal and civil cases, including divorce cases and cases that involve large amounts of money (the minimum is set by the province or territory in question)': www.justice.gc.ca/eng/dept-min/pub/ccs-ajc/page3.html. And on the website of the Courts of New Zealand: 'The jurisdiction of the High Court is largely conferred or systematised by statutes. In addition, however, the High Court has inherent common law jurisdiction. No other court within the New Zealand legal system has a non-statutory substantive jurisdiction. The existence of such inherent jurisdiction means there is never a vacuum in obtaining vindication of right according to law': www.courtsofnz.govt.nz/about/high/role-structure.

[204] See *Prosecutor v Barayagwiza (Decision)* 3 November 1999 [ICTR Appeals Chamber], paras 74-77; *Prosecutor v Slobodan Milošević (Decision on Preliminary Motions)*, 8 November 2001 [ICTY Trial Chamber], para 49; *Prosecutor v Brima & Ors (Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process)*, 31 March 2004 [Trial Chamber, Special Court for Sierra Leone], paras 21-25.

attributes with the superior court of record in the classic common law jurisdiction. But, there are also attributes that are fundamentally different. Much of those differences are partly explained by their different histories. The origins of their respective jurisdictions are one of the emanations of these dissimilarities. The concept of 'inherent jurisdiction' is squarely implicated in these dissimilarities.

119. In his classic essay on the subject, I H Jacob observes that it will 'be found that the superior courts of common law have exercised the power which has come to be called "inherent jurisdiction" from the earliest of times, and that the exercise of such power developed along two paths, namely, by way of punishment for contempt of court and of its process, and by way of regulating the practice of the court and preventing the abuse of its process.'[205] Jacob was correct in observing that the inherent jurisdiction of the superior courts of common law is traced back to the earliest of times. What is less certain is that such jurisdiction did develop along only the 'two paths' he had indicated. To the contrary, the inherent jurisdiction of the court also encompassed such questions of substantive import as the *parens patriae* jurisdiction of the superior court in common law jurisdictions—i.e. the power of the court to protect vulnerable citizens as best it can. Common law superior courts have employed this power to make decisions or override decisions concerning questions of sterilisation, consent to medical treatment, etc, of minors or of persons with mental disability.[206] Similarly, the influence of the notion of 'inherent jurisdiction' of the common law court has also been felt in the somewhat persistent view that superior courts of England can substantively create new crimes, in exercise of their *custodes morum* jurisdiction of common law superior court judges—i.e. their jurisdiction as the custodians of public morals.[207] So, too, has inherent jurisdiction to do justice allowed the common law superior court to entertain a civil action that does not fit into any other established tort category, if the action is filed as an 'action on the case.'

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[205] Jacob, *supra*, p 25.

[206] See, for instance, Robert L Stenger, 'Exclusive or Concurrent Competence to Make Medical Decisions for Adolescents in the United States and United Kingdom' (1999) 14 *Journal of Law and Health* 209: 'Courts in both countries recognize the inherent jurisdiction of a court to exercise its *parens patriae* authority: it is the duty and responsibility of a judge to ensure so far as possible the protection of those who cannot provide for themselves because of age or disability.' See also *DL v A Local Authority & Ors* [2012] EWCA Civ 253 [Court of Appeal, England, Civil Division]; *E (Mrs) v Eve* [1986] 2 SCR 388 [Supreme Court of Canada], para 37; and, *Eyre v Shaftsbury* [1722] 24 ER 659, p 664.

[207] One notes in this connection Viscount Simonds's speech as recently as 1961, when he wrote as follows: 'When Lord Mansfield, speaking long after the Star Chamber had been abolished, said that the Court of King's Bench was the *custos morum* of the people and had the superintendency of offences *contra bonos mores*, he was asserting, as I now assert, that there is in that Court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society. ... Or must we wait until Parliament finds time to deal with such conduct? I say, my Lords, that if the common law is powerless in such an event, then we should no longer do her reverence. But I say that her hand is still powerful and that it is for Her Majesty's Judges to play the part which Lord Mansfield pointed out to them': *Shaw v DPP* [1961] AC 220 [House of Lords].

120. One resulting concern about the notion of 'inherent jurisdiction' is the infinite largeness of it. According to one commentator, '[t]he concept resists analysis in view of judicial claims to exercise the jurisdiction wherever necessary for the administration of justice. Its ubiquitous nature precludes any exhaustive enumeration of the powers which are thus exercised by the courts.'[208] Specifically mindful of the 'very plenitude of this inherent jurisdiction', which 'may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways', the Supreme Court of Canada was prompted to recommend that it be exercised sparingly and with caution.[209]

121. A leading champion of the concept, Jacob had for his part defined inherent jurisdiction as 'the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.'[210] But he had also acknowledged that 'the limits of such jurisdiction are not easy to define, and indeed appear to elude definition.'[211] An indication of the infinite scope of the power is Jacob's observation that 'the inherent jurisdiction of the court may be invoked not only in relation to the litigant parties in pending proceedings, but in relation also to anyone, whether a party or not, and in respect of matters which are not raised as issues in the litigation between the parties.'[212] Recognising the inevitable controversy that may attend a theory of power so large, Jacob acknowledged that '[i]t may be objected that this view of the nature of the inherent jurisdiction of the court postulates the existence of an amplitude of amorphous powers, which may be arbitrary in operation and which are without limit in extent.'[213] Yet, Jacob made no effort to answer the objection by suggesting any possible limits to the jurisdiction. This is unsurprising, as he had already made that admission. Rather, the sum of his answer to the objection is an insistence 'that a jurisdiction of this kind and character is a necessary part of the armoury of the courts to enable them to administer justice according to law.'[214]

122. The trouble with Jacob's conception of 'inherent jurisdiction' is that critical aspects of it do struggle to escape regard as 'a flourish of doubtful expressions', as Locke might say.[215] Consider, for instance, Jacob's rather popular rationale for inherent jurisdiction: 'Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent

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[208] Keith Mason, 'The Inherent Jurisdiction of the Court' (1983) 57 *Australian Law Journal,* p 449.
[209] *R v Caron* [2011] 1 SCR 78 [Supreme Court of Canada], paras 29 and 30.
[210] Jacob, *supra,* p 51.
[211] *Ibid,* p 24.
[212] *Ibid,* p 25.
[213] *Ibid,* pp 51-52.
[214] *Ibid,* p 52.
[215] John Locke, *Two Treatises of Government* [London: Awnsham Churchill, 1690), Preface.

attribute. Without such a power, the court would have form but lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfill itself as a court of law.'[216]

123. The broad, sweeping broom of that hypothesis calls for great care in its handling. It may not hold together under scrutiny. To begin with, it indicates a mindset that would dismiss a thing as to what it should be, although the thing possesses certain obvious elements or attributes objectively required to justify its existence as such by any other view. This is so, if the thing lacks other elements or attributes which may or may not be required to give it wholesome belonging to a species or class beyond itself. By this mindset, a human being will lose the human quality if she or he is unable to live life in a certain way that is considered by some as epitomizing the 'very essence' or the 'immanent attribute' of humanness. For instance, to be born blind or with some other deformity or become so would then deprive a person of essential character as a human being! The mindset is arbitrary, to say the least. And, the authority of Jacob is, I regret to say, of questionable weight to recommend it for reliance in actual cases in relation to courts of law.

124. Beyond this general weakness of the theory, there are specific ones as well. Quite notably, Jacob's hypotheses quickly run into both internal and external contradictions. First, he would only admit that 'inherent jurisdiction' in its amplitude that is limitless is an attribute of only the superior court. Faced with the generality of his hypothesis that without 'inherent jurisdiction' a superior court will have form but not substance, Jacob had to resolve the conundrum of whether courts other than superior courts also possess 'inherent jurisdiction'. Are they not also courts of law, too? Do they not administer justice, as well? Do they not also need to have both form and substance? In two short paragraphs, Jacob made an effort to apply 'inherent jurisdiction' to other descriptions of courts. He had to say that they, too, enjoy 'inherent jurisdiction.' But this, he wrote, is only to the limited extent that an inferior court 'of record'[217] has power to punish contempt of court in the face of the court (but they lack

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[216] Jacob, *supra*, p 27.

[217] Blackstone provides a useful explanation of what is a 'court of record': 'FOR the more speedy, universal, and impartial administration of justice between subject and subject, the law hath appointed a prodigious variety of courts, some with a more limited, others with a more extensive jurisdiction; some constituted to enquire only, others to hear and determine; some to determine in the first instance, others upon appeal and by way of review. ... [S]ome of them are courts of record, others not of record. A court of record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony: which rolls are called the records of the court, and are of such high and supereminent authority, that their truth is not to be called in question. For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary. And if the existence of a record be denied, it shall be tried by nothing but itself; that is, upon bare inspection whether there be any such record or no; else there would be no end of disputes. But if there appear any mistake of the clerk in making up such record, the court will direct him to amend it. All courts of record are the king's courts, in right of his crown and royal dignity, and therefore no other court hath authority to fine or imprison; so that the very erection of a new jurisdiction with power of fine or imprisonment makes it instantly a court of record. A court not of record is the court of a private man, whom

power to punish contempt of court committed out of court); a court that is not a 'court of record' has no jurisdiction to punish contempt without express statutory grant of the power; as for abuse of process, a county court has 'an inherent jurisdiction to stay or dismiss an action which is frivolous and vexatious.' And he tentatively added that it 'may well be that these powers, although exercised under the inherent jurisdiction of the court, are not original, but derived from powers of the High Court conferred on the county court by statute'.[218] But, if the rationale for 'inherent jurisdiction' is that without it a so-called court is not really a court, then there is no reason to discriminate among courts in the enjoyment of their 'very life-blood', their 'very essence' and their 'immanent attribute'; allowing some courts to enjoy such attributes only to a very narrowly limited extent while others may enjoy them without limitation.

125. Secondly, courts in the common law world have clearly said that only 'superior courts' of general jurisdiction enjoy 'inherent jurisdiction'. Other superior courts—including the Federal Court of Canada—created by statute do not enjoy 'inherent jurisdiction'. Their jurisdiction is limited to the jurisdiction granted them in their parent statutes. Not even superior courts of appeal created by statute may enjoy 'inherent jurisdiction', except to the extent that their parent statutes permit them the powers (together with the inherent jurisdiction) of the superior courts below. Notably, in England, the Court of Appeal (Criminal Division) and the Courts Martial Appeals Court have been known to make such rulings about their own jurisdiction. The significance of this re-engages Jacob's rational for inherent jurisdiction. Is it really true that, in the common law world, superior courts created by statute, including appellate courts, have all along 'lack[ed] substance' and have not 'fulfilled [themselves] as court[s] of law', because of their own rulings that they lacked 'inherent jurisdiction'?

126. The constant association of 'inherent jurisdiction' in the common law world as an attribute of the superior court, together with the apparent limitless nature of it, makes it difficult to separate the notion from the jurisdiction of the common law superior court which has been expressed as follows: 'Nothing shall be intended to be out of the jurisdiction of a superior court but that which especially appears to be so ...'.[219] In *MacMillan Bloedel v Simpson*,[220] the Supreme Court of Canada held that the unlimited general jurisdiction of the superior court, directly descended from the English superior courts,[221] had been incorporated

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the law will not intrust with any discretionary power over the fortune or liberty of his fellow-subjects. ...': Blackstone, *supra*, Bk III, ch 3.

[218] Jacob, *supra*, pp 49-50.

[219] *Peacock v Bell* (1667) 1 Saund, 74; *London v Cox*, LR 2 HL 259. See also *Board v Board* [1919] AC 956; *Re Nichia Estate and City of Toronto* (1968) 66 DLR (2d) 200.

[220] *MacMillan Bloedel v Simpson* [1995] 4 SCR 725 [Supreme Court of Canada].

[221] Writing for the majority, Chief Justice Lamar cited with approval the following observation by Professor Cromwell: 'At the centre of the Canadian conception of constitutional review is the notion of the general

into the Canadian constitution.[222] As a result, Parliament had become powerless to remove any aspect of that power, without a constitutional amendment.

127. The company that 'general jurisdiction' of the superior court of record frequently keeps with its 'inherent jurisdiction' in the legal literature of the common law world—the native place of those phrases and of the idea of stay of proceedings—impedes confident acceptance of any claim that they mean different things; especially when they jointly and severally connote 'unrestricted and unlimited'[223] power for the superior court. Jacob attempted that distinction. But he cited no authority beyond his own suppositions.[224] And, indeed, the functional significance of that distinction proved elusive by Jacob's very own admission, as we have seen, of the unlimited scope of 'inherent jurisdiction', which is precisely the attribute of 'general jurisdiction' of the common law superior court.

128. The criticism against Jacob's hypothesis reviewed above stems mainly from his attempt to make idea of 'inherent jurisdiction' the property of all courts of law in equal opportunity. That effort ignored the fact that the strongest rational footing for the idea of 'inherent jurisdiction' in common law jurisdictions hinges on the fiction of its origins and heritage, which traditionally limited its enjoyment as the preserve of common law superior courts. Those hinges are unassailable in the domestic legal cultures that have embraced them. But those hinges also serve to limit the operation of the concept of 'inherent jurisdiction' outside its original remit. They do not work well at the ICC.

129. As a final matter of concern about the operation of 'inherent jurisdiction' at the ICC in a manner that is not clearly and directly circumscribed by the Rome Statute, I must recall John Locke's famously spirited rejection of Robert Filmer's theory of 'unlimited power' of the king.[225] Locke protested that such theories tend to 'flatter the natural vanity and ambition

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jurisdiction superior courts of the provinces, which are the direct descendants of the English superior courts. The importance of these tribunals has been emphasised and reinforced in a variety of contexts. For example, the superior courts are said to possesses "inherent jurisdiction" and to have original jurisdiction in any matter unless jurisdiction is clearly taken away by statute.': T A Cromwell, 'Aspects of Constitutional Judicial Review in Canada' (1995) 46 *South Carolina Law Review* 1027, pp 1030-1031. Cited with approval in *MacMillan Bloedel v Simpson*, para 32.

[222] The perpetuation of the powers the superior court of record in Canada, as a matter of constitutional law, occurred chiefly by virtue of s 129 of the Constitution Act, 1867 (which provides, among other things, that except as provided for in the Act, 'all Laws in force ... at the Union, and all Courts of Civil and Criminal Jurisdiction, and all legal Commissions, Powers, and Authorities, and all Officers, Judicial, ... existing therein at the Union, shall continue ... as if the Union had not been made']; jointly with s 96 (which reserves for the Governor-General, the Queen's representative in Canada, the power to appoint superior court judges).

[223] See, for instance, Jacob, *supra*, p 23.

[224] *Ibid*, pp 23—24.

[225] In his book, *Patriacha* [London: Chiswell, 1680] subtitled 'The Natural Power of Kings,' Sir Robert Filmer argued in an unreserved defence of the idea of absolute monarchy; that the power of kings came from God; and, that the king was therefore the patriarch of the nation, in the same way as a father is the patriarch of the family. To Filmer, there was no limit to the power of the king—even of life and death and of enslavement over his

of men, too apt of itself to grow and increase with the possession of any power.' And that it persuades 'those, who, by the consent of their fellow-men, are advanced to great but limited degrees of it, that by that part which is given them, they have a right to all that was not so; and therefore may do what they please, because they have authority to do more than others, and so tempt them to do what is neither for their own, nor the good of those under their care; whereby great mischief cannot but follow.'[226] The currency of Locke's complaint holds value still. And I have found no guarantee of its irrelevance to the theory of unlimited inherent jurisdiction in the hands of judges of an international court such as this.

130. In that connection, it must be observed here with respect that the notion of 'inherent jurisdiction' of international courts is not helped very far along the path of acceptance by the suggestion that the many pronouncements of international judges recognizing it have thus produced a rule of customary international law.[227] The suggestion ignores the usual arrangement that confines judicial decisions to the status of '*subsidiary* means for the determination of rules of law',[228] while, on the higher plane, recognizing, for purposes of formation of customary international law, practice of states accepted as law, in their relations with each other. The point here is not to diminish judicial decisions as a source of international law. They remain important as such. But, it is unhelpful for judges to attempt to promote the stature of their own decisions, beyond their proper station, as a source of international law.

CONCLUSION

131. To sum up, as I fully support the outcome of the Chambers decision and much of its reasoning, I am also of the separate opinion, first, that in view of the *almost vanishing rareness* of the possibility of prevailing on an application to stay proceedings before the completion of the evidence, there is much practical sense in a judicial policy that discourages applications for stay, or defers rulings on such applications, until the conclusion of evidence in the case. The procedural costs of such litigation do not justify a rampant system of judicial indulgence of counsel in wispy hopes of bagging the wild goose of stay at the stage prior to trial. A policy that discourages such applications or encourages deferment of their determination until the end of the evidence will enable the Trial Chamber to see not only the fullest scope of any prejudice resulting from obstacles to fair trial, but also that the unfairness in question had indeed defied the power of the Trial Chamber to relieve against such prejudice.

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subjects. With equal abandon, Locke disagreed; dismissing Filmer's theory as, among other things, 'so much glib nonsense put together in well sounding English'. See Locke, *supra*, Preface.

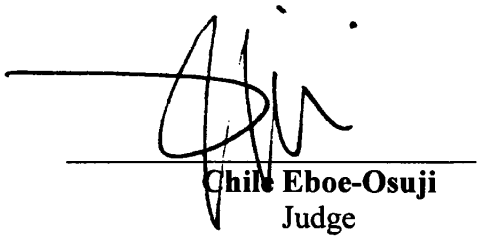
[226] *Ibid*, ch 2, §10.

[227] *Decision on Appeal of Pre-Trial Judge's Order regarding Jurisdiction and Standing*, 10 November 2010 [Appeals Chamber of the Special Tribunal for Lebanon], para 47.

[228] See article 38(1)(d) of the Statute of the ICJ [emphasis added].

132. Second, as a matter of principle, fault on the part of the prosecution or the victim should be a factor to be considered in any inquiry on stay of proceedings. This is a matter of fairness and justice now largely accepted by pre-eminent national courts with great experience in the administration of criminal justice, and whose concerns for fair trial are no less keen than those of this Court. The approach is consistent with the view that fairness of trial is not a prerogative of defendants alone, but something in which prosecutors and victims have a share. And the good sense of that approach is evident with a judicial policy that favours deferring decisions on stay applications until the completion of the evidence, when the Trial Chamber is best able to take all factors of possible unfairness of trial, including their origins, into account in the ultimate outcome in the case—which may be a stay at that point or a verdict of acquittal on grounds of unfair trial.

133. Finally, there is a fundamental problem that confronts this particular Court as regards the idea of exercise of the power to stay proceedings. It is a problem of legitimacy that lies at the very root of that manner of jurisdiction. The problem centres on questions as to the source of that power, often described as 'inherent jurisdiction.' Its source cannot be the same as the fountain of unlimited reserve of residual power that common law superior courts are said to possess by virtue of their history and heritage. Nor is the problem of legitimacy of this 'inherent jurisdiction' wholly resolved by embracing the humbler usage of the term as meaning 'incidental jurisdiction.' For, the proper meaning of incidental jurisdiction is logically inconsistent with its use to decline to engage in the exercise of the primary jurisdiction—which at the ICC is to inquire into properly confirmed charges of criminal conducts that shock the conscience of humanity.



Chile Eboe-Osuji
Judge

Dated this 26 October 2012

The Hague, the Netherlands.