CONCURRING SEPARATE OPINION OF JUDGE EBOE-OSUJI

1. I concur fully with the outcome of the Chamber's decision denying the request to stay proceedings. I also concur with much of the reasoning expressed in the Main Opinion. I prefer, however, to express myself differently, in light of divergent views—possibly a matter of important nuances—on some of the legal premises of the decision.

2. In the *Banda and Jerbo* case,[1] I had occasion to discuss at length (in a concurring separate opinion) the law concerning stay of proceedings as I understand it—a little differently on some operative aspects. It is not necessary to repeat that exercise in full here. But, I should only outline briefly some aspects of the earlier opinion. They are fully in support of the outcome of the decision of the Chamber in the case at bar.

I

3. It is asserted in the Main Opinion that the 'jurisprudence of this Court has consistently confirmed the availability of a stay of proceedings where it would be repugnant or odious to the administration of justice to allow the case to continue, or where the rights of the accused have been breached to such an extent that a fair trial has been rendered impossible.' Indeed, the power to stay proceedings has been asserted amply in the jurisprudence of the Court. I remain, however, of the humble view that certain difficulties attending the source of that power should positively undermine confidence—or recommend great modesty—in its exercise.

4. In the *Banda and Jerbo* separate opinion, discussion was conducted in some detail about the fundamental problem that confronts a Trial Chamber of the ICC in any exercise of the power to stay proceedings in a case that was instituted by the Prosecutor and properly confirmed by a Pre-Trial Chamber. In my view, there is a defect in original legitimacy in the source of the power—quite apart from the lack of a clear statutory basis for the power. The defect necessarily puts the exercise of the power on shaky legal grounds. The problem centres mainly[2]—though not exclusively[3]—on questions concerning the source of that power that is

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[1] *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (*Decision on the defence request for a temporary stay of proceedings*) 26 October 2012, ICC-01/05-03/09-410, Concurring Separate Opinion of Judge Eboe-Osuji.

[2] See *Banda & Jerbo*, Concurring Separate Opinion of Judge Eboe-Osuji, paras 98—130.

[3] Another source of the problem engages the impetus that generated the need to devise the remedy of stay of proceedings at common law, which is largely absent at the ICC. That impetus was the traditional absence of power in common law judges to prevent vexatious or frivolous cases being brought to court for trial. Common law judges had then to devise a creative way to remedy the handicap and retain control of their own processes: hence, the remedy of stay of proceedings. In contrast, ICC judges do not have that handicap. For, the Rome Statute contains carefully contrived procedures that entail 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 instance of defendants and States. These procedures are precisely intended to insulate the ICC processes against

often described as deriving from the 'inherent jurisdiction' of the court, in similar terms as the source of the common law court's power that had inspired the reception of the idea of stay of proceedings in international law. But, the source of the power for the ICC cannot be the same as the fountain of unlimited reserve of residual power that common law superior courts are said to possess (for purposes of their exercise of 'inherent jurisdiction' or any derivative power) by virtue of their history and heritage. Nor is the problem of legitimacy of this power (said to derive from 'inherent jurisdiction') wholly resolved merely by the cosmetic process of replacing the terminology of 'inherent jurisdiction' with 'incidental jurisdiction'. The latter term may be accepted as meaning the sum of powers conferred upon an international organisation 'by necessary implication *as being essential to the performance of its duties.*'[4] But, then, for purposes of the power of stay at the ICC, that meaning of *incidental* jurisdiction quickly throws its intended utility into the syllogistic snare of tail wags dog. This is the case when the derivative power is purportedly used to decline the exercise of the *primary* jurisdiction—which at the ICC is the jurisdiction to inquire into properly confirmed charges of criminal conducts that shock the conscience of humanity. As was observed in the *Banda and Jerbo* separate opinion: '[T]o 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 jurisdiction, rather than the servant that it should be. By any other description, this would be *ultra vires* exercise of power.'[5] This is a dilemma that common law courts are spared by their unique nature.[6]

5. As suggested in the *Banda and Jerbo* separate opinion: '[T]he 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.'[7] Though not articulated at

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the possibility of 'a prosecution which is oppressive or vexatious or undertaken for illegitimate reasons.' The result of those procedures is to diminish the need for the jurisdiction in a Trial Chamber to stay proceedings later. See *Banda & Jerbo*, Concurring Separate Opinion of Judge Eboe-Osuji, paras 94—97.

[4] 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.

[5] See *Banda & Jerbo*, Concurring Separate Opinion of Judge Eboe-Osuji, *supra*, para 109.

[6] As was explained in *Banda & Jerbo*, Concurring Separate Opinion of Judge Eboe-Osuji: '[S]uch 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': *ibid*, para 110.

[7] *Ibid*, para 111.

the level of a conscious judicial policy, I nevertheless underscore, in this connection, the correctness and congruency of the Chamber's decision dismissing the current application: for lack of a showing that any prejudice complained of is a prejudice that is beyond the corrective abilities of the Trial Chamber as part of the trial process.

II

6. Much that is said in the Court's case law on stay of proceedings is amenable to the following observation of Lon Fuller: 'In law the pressure of new cases, presenting varied situations of fact, will in time compel the judge either to clarify rules previously obscure or to draw with some precision the line at which the constraints of law leave off. Neither task is easy.'[8]

7. It is said in the Main Opinion that 'in imposing a stay of proceedings, it is not necessary to find that the Prosecution acted in bad faith ...'. I would respectfully urge caution in both the expression and comprehension of that proposition, stated indeed in that way in the Court's case law. In my view, this is one of those statements of legal principle that 'the pressure of new cases, presenting varied situations of fact' will compel this Court to clarify or sharpen 'in time'. In that regard, it is to be kept in mind that the law in common law jurisdictions has continued to evolve in relation to stay of proceedings,[9] notwithstanding their longer practice at it. There is, therefore, no reason to consider the law as settled in any respect in the adoptive sphere of international law.

8. For purposes of evolution of the Court's case law, in relation to the question of prosecutorial bad faith as a factor or not in stay of proceedings, a review of legal developments in the common law jurisdictions was conducted in the *Banda and Jerbo* separate opinion. It led to the following conclusion: '[T]he 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." [Internal footnote omitted.] That, indeed, is to cast the proposition at its minimum level of appreciation. For, ..., 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.'[10]

9. It is for the foregoing reasons that I approach with caution the proposition that 'it is not necessary to find that the Prosecution acted in bad faith' in considering applications for stay of proceedings at the ICC. And, I am less inclined to accept any proposition to the effect

[8] Lon L Fuller, *Legal Fictions* [Stanford: Stanford University Press, 1967] p xi.
[9] 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.
[10] *Banda & Jerbo*, Concurring Separate Opinion Eboe-Osuji, *supra*, paras 49—58, especially at para 49.

that a Trial Chamber may order a stay of proceedings on account of the impugned conducts of third parties that were not procured or condoned by the Prosecution or the victims.

III

10. In his submissions opposing the application for stay of proceedings, the victims' counsel pointed out that this application for stay was made in the context of other extra-judicial efforts (notably at the African Union and the UN Security Council) aimed at preventing the commencement of the trial. It is an observation with which I have much sympathy. It is also noted in that context that this is the second time the Defence Counsel have brought an application for stay of proceedings. On the first occasion, the application came with other requests aimed at preventing the case from proceeding to trial.

11. I have observed once before that the Defence Counsel in this case are jointly and severally among the most experienced in the practice of international criminal law. If it had truly appeared to them that the case they make in these applications could conceivably attract the very drastic and exceptional remedy of permanent stay of proceedings, it surely must have occurred to them that they could—more profitably—convert their complaint into a strategy of a criminal defence that is aimed at raising reasonable doubt on the merits of the case. But they seek, rather, a strategy the aim of which is to abort trial—amidst widely publicised extra-judicial manoeuvres that were similarly aimed at aborting trial on the merits. Is it unfair then for the victims' counsel to convey the impression of these applications as he has done on behalf of his clients?

12. In the circumstances, I am constrained to reiterate an earlier observation. The indictment in this case has been confirmed by a Pre-Trial Chamber in a carefully considered decision following an inquiry. In the intermediate outcome, a judicial inquiry has been primed to try and find out whether the accused is criminally responsible, as charged, for any aspect of a violent national upheaval that resulted in the death of very many human beings; and the maiming and the displacement and the dispossession of many more. The balance of justice swings in favour of conducting that judicial inquiry—and not in favour of legal technical or extra-judicial manoeuvres that are aimed at aborting the trial. Let the victims have their inquiry, while the accused continues to enjoy his presumption of innocence.

13. I fully join the Chamber in dismissing the application.

Chile Eboe-Osuji
Judge

Dated this 5 December 2013
The Hague, the Netherlands.