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No.: **ICC-02/11-01/15**
Date: **15 January 2019**

TRIAL CHAMBER I

Before: **Judge Cuno Tarfusser, Presiding Judge**
Judge Olga Herrera Carbuccia
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE
IN THE CASE OF
THE PROSECUTOR v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

Public

Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart
Mr Eric MacDonald

Counsel for Mr Laurent Gbagbo
Mr Emmanuel Altit
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Mr Geert-Jan Alexander Knoops
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Legal Representatives of Victims
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Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

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States' Representatives

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REGISTRY

Registrar
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Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Dissenting Opinion of Judge Herrera Carbuccia

to the Chamber's Oral Decision of 15 January 2019 on the *'Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée'* and on the 'Ble Goude Defence No Case to Answer Motion'

1. For the reasons detailed below, I respectfully disagree with the decision of the Majority (Judge Cuno Tarfusser and Judge Geoffrey Henderson), first and foremost, delivering a decision without any reasoning, and secondly, on their conclusion to grant the Defence motions for judgment of acquittal on the basis that there is no evidence capable to sustain a conviction for either one of the two accused in this case.

2. Although the Majority of the Chamber has chosen to give their reasons orally, I consider that given the significance of this outcome, I am obliged to expose the reasoning for my disagreement in writing.

3. The dissent is often more than just a plea: it safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision.[1]

I. Procedural Background

4. On 28 January 2016, the trial against Mr Gbagbo and Mr Blé Goudé commenced.[2]

[1] William J. Brennan, Associate Justice of Supreme Court of the United States, In Defense of Dissents (1985). Available at: http://repository.uchastings.edu/tobriner/17.
[2] T-9-CONF-ENG.

5. On 19 January 2018, the last witness called by the Prosecutor testified in court.[3]

6. On 19 March 2018, upon instruction of the Chamber,[4] the Prosecutor filed a "Mid- Trial Brief" with a detailed narrative of the Prosecutor's case and the evidence in its support. [5]

7. On 23 April 2018, both Defence teams filed their responses to the Mid-Trial Brief.[6]

8. On 4 June 2018, the Chamber issued its "Second Order on the further conduct of proceedings" ("Second Order").[7]

9. On 23 July 2018, the Defence for Mr Gbagbo and the Defence for Mr Blé Goudé filed their motions seeking a judgment of acquittal ("Defence motions"),[8] to which the Prosecutor and the LRV responded on 10 September 2018.[9]

10. On 1 October 2018, a hearing was scheduled for final oral submissions in relation to the Defence motions. Upon request of the Defence teams, the Presiding Judge granted an extension of time limit and adjourned the said hearing until 12 November 2018. The Defence teams made their final oral submissions from 12 to 22 November 2018.[10] Before adjourning the hearing, the Presiding Judge stated as follows:

> I can say that the Chamber has now all elements to take a decision on the requests for acquittal submitted by both defence teams of the defendants,

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[3] T-220-CONF-ENG.
[4] Order on the further conduct of proceedings, 9 February 2018, ICC-02/11-01/15-1124.
[5] ICC-02/11-01/15-1136-Conf-Anx1 and Annexes A-E.
[6] ICC-02/11-01/15-1157-Conf ; ICC-02/11-01/15-1158-Conf.
[7] ICC-02/11-01/15-1174. On 13 June 2018, the Single Judge rejected the Prosecutor's request seeking clarification of the Second Order; Decision on "Urgent Prosecution's motion seeking clarification on the standard of a 'no case to answer' motion", ICC-02/11-01/15-1182, On 22 June 2018, the Single Judge, extended the time limits set out in the Second Order, ICC-02/11-01/15-1189.
[8] ICC-02/11-01/15-1199; ICC-02/11-01/15-1198.
[9] ICC-02/11-01/15-1207; ICC-02/11-01/15-1206-Conf.
[10] T-221 to T-230.

> and I can add that such decision will be issued in due course and, obviously, as soon as possible.[11]

II. Interpretation of the Statute. Article 74(5): One fully reasoned decision

11. Article 74 of the Rome Statute ("Statute") sets the requirements for the judgment that decides either on the acquittal or the conviction of the accused. Paragraph 5 of this provision disposes as follows:

> The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Chamber shall issue one decision. [emphasis added]

12. Two fundamental issues arise of the majority's choice to issue an oral acquittal with a summary of their findings, stating that reasons will follow as soon as possible (*sine die*):

    a. Is there a lacuna or ambiguity in the wording of Article 74(5) of the Statute or has the Majority violated the clear wording of this provision?

    b. Does Article 74(5) of the Statute allows for judicial discretion to render an oral decision instead of a written full reasoned statement and is it consistent with the Statute and internationally recognised human rights?

13. Article 21(1) of the Statute clearly provides that that the Court shall apply in the first place, the Statute.[12] Moreover, paragraph 3 states that the application and interpretation of the law "must be consistent with internationally recognised human rights".

14. Pursuant to Article 21(1)(c) of the Statute, other sources of law, including general principles of law derived by the Court from national legislation, may

[11] T-230-ENG, page 23, lines 9-11.
[12] Appeals Chamber, *The Prosecutor v. Bemba Gombo et al*, Judgment on Sentencing, 8 March 2018, ICC-01/05-01/13-2276-Red, para. 76.

only be applied if there is a lacuna in the primary sources of law.[13] Such application must also be in accordance with applicable international law as described in Article 21(1)(b), and internationally recognised human rights law pursuant to Article 21(3) of the Statute. Thus, the use of such external sources of law is limited and strictly auxiliary to the primary sources of law and internationally recognised human rights. Accordingly, domestic practice or legislation, even if amounting to "general principles of law" cannot be used if it is contrary to the Statute or in detriment to internationally recognised human rights.[14]

15. The Appeals Chamber also concluded that judges may not rely on purported "inherent powers", based on domestic or other international criminal jurisdictions when the legal framework of the Statute is clear and does not contain a lacuna. Doing so, may be an error in law and *ultra vires* action.[15] The following conclusion is relevant to the present case:

> [...] a lacuna does not exist when, for instance, a matter is exhaustively defined in the legal instruments of the Court. Similarly, the Appeals Chamber considers that when a matter is regulated in the primary sources of law of the Court, there is also no room for chambers to rely on purported "inherent powers" to fill in non-existent gaps. In addition, it is clear that not every "silence" in the legal framework of the Court constitutes a lacuna. The Appeals Chamber recalls that in order to determine whether the absence of a power constitutes a "lacuna", it has previously considered whether "[a] gap is noticeable [in the primary sources of law] with regard to the power claimed in the sense of an objective not being given effect to by [their] provisions". The nature and type of the concerned power, as well as of the matter to which it relates, are relevant considerations to determine whether

[13] ICC-01/05-01/13-2276-Red, para. 76.
[14] *See,* Bitti, G. Article 21 of The Statute Of The International Criminal Court And The Treatment Of Sources Of Law In The Jurisprudence Of The ICC, in: Stahn and Sluiter (ed), The Emerging Practice of the International Criminal Court, Brill Nijhoff (2009), page 300. The author states in relation to "general principles of law": *But even if such a principle existed, it would be difficult to apply it before an international criminal court since the structure of courts in a State is fundamentally different from the structure of an international court.* He also states: *[...] external sources mentioned in Article 21(1)(b) and (c) of the Rome Statute will be of limited use before the ICC. The most important source of law (in addition to the Statute and Rules of Procedure and Evidence) is likely to be Article 21(3) of the Statute, i.e. "internationally recognised human rights".*
[15] ICC-01/05-01/13-2276-Red, paras 76-79.

> there are gaps justifying recourse to subsidiary sources of law or invocation of "inherent powers"[Footnotes omitted and emphasis added].[16]

16. The Appeals Chamber has found that procedural errors often relate to alleged errors in a Trial Chamber's exercise of its discretion and that it will interfere with this discretion only when it is shown that an error of law, fact or procedure was made.[17]

17. As regards a decision on the innocence or guilt of an accused, the law is unequivocal. Article 74(5) of the Statute explicitly states that there shall only be one decision and that this single pronouncement shall contain a full and reasoned statement. The only choice or discretion left to the Chamber is to decide whether it will read in open court: (a) a summary, or (b) the full written decision. Considering that judgments of acquittal or convictions in this court require lengthy analysis, previous Trial Chambers have decided to read a summary of their reasoning in court. However, they have either clarified that only the fully reasoned written judgment is authoritative,[18] or that oral summary of the judgment read out in court is not official.[19]

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[16] ICC-01/05-01/13-2276-Red, para. 76.

[17] Appeals Chamber, *The Prosecutor v. Jean- Pierre Bemba Gombo*, Judgment, 8 June 2018, ICC-01/05-01/08-3636, para. 4: "[…] it will not interfere with the Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made. In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion. Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision" [Footnotes omitted]. See also, Appeals Chamber, *The Prosecutor v. William S. Ruto et al.*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011,ICC-01/09-01/11-307, para. 89; Appeals Chamber, *The Prosecutor v. Mathieu Ngudjolo Chui*, Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled "Judgment pursuant to article 74 of the Statute", 7 April 2015, ICC-01/04-02/12-271, para. 21.

[18] *Prosecutor v. Jean-Pierre Bemba*, Summary of Trial Chamber III's Judgment of 21 March 2016, pursuant to Article 74 of the Statute in the Case of The Prosecutor v. Jean-Pierre Bemba Gombo, para. 1. *"The Chamber notes that only the written judgment, to be issued after this hearing, is authoritative." Prosecutor v. Germain Katanga*, Transcript of 7 March 2014, ICC-01/04-01/07-T-343-FRA, page 2, line 15. "*La Chambre tient ¸ prØciser que seul fait autoritØ le jugement Øcrit.Prosecutor v. Mathieu Ngudjolo Chui,* Transcript of 18

18. In relation to the discretionary power of the Trial Chamber, the following Joint Separate Opinion of Judges Kourula and Usacka on the matter of discretion is of significance:

> In our view, the Trial Chamber erred in law when it found that article 63 (1) of the Statute does not impose a duty on the Chamber. Pursuant to article 21 (1) of the Statute, the Trial Chamber is bound to apply "[ijn the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence". Article 63 (1) of the Statute regulates the presence of the accused at trial and this provision was binding on the Trial Chamber in deciding on Mr Ruto's request for excusal. For the reasons set out hereunder, we would have found that article 63 (1) of the Statute establishes a requirement that the accused be present during the trial and that the Trial Chamber erred in law when it found that, in exceptional circumstances, the Chamber may exercise its discretion to excuse an accused, on a case-by-case basis, from continuous presence at trial. The interpretation of provisions of the Statute is governed by the Vienna Convention on the Law of Treaties, article 31 of which dictates that "[aJ treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose". In our view, the ordinary meaning of article 63 (1) of the Statute is clear and unambiguous: "[the accused shall be present during trial". The use of the word "shall" clearly establishes that the presence of the accused is a requirement of the trial. [emphasis added][20]

19. This approach is relevant to the interpretation of Article 74(5) of the Statute which contains one substantive obligation: "The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions".

20. The Appeals Chamber has also recently concluded that Article 74(5) of the Statute requires the Trial Chamber to provide "a full and reasoned statement of [its] findings on the evidence and conclusions". It also determined that if "a decision under article 74 of the Statute does not completely comply with this

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December 2012, ICC-01/04-02/12-T-1-FRA, page 1, lines 27-28. "*La Chambre entend donner connaissance d'un rØsumØ du jugement qu'elle rend 27 aujourd'hui, en application de l'article 74 du Statut.*"

[19] *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of the hearing of 14 March 2012, ICC-01/04-01/06-T-359-ENG, page 1, lines 16-17. "*The written version of this summary issued today and signed by the Judges is to be treated as the official version.*"

[20] *The Prosecutor v. William S. Ruto and Joshua Arap Sang*, Joint Separate Opinion of Judges Kourula and Usacka, ICC-01/09-01/11-1066-Anx, paras 5-6. Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial", 25 October 2013, ICC-01/09-01/11-1066, para. 63.

requirement, this amounts to a procedural error".[21] It also concluded that decisions on the guilt or innocence of the accused must clearly state the factual findings and the assessment of evidence.[22]

21. The judicial requirements and the mandatory language set out in Article 74(5) of the Statute apply to decisions on "no case to answer" motions that result in a full judgment of acquittal, as is the present case.[23] Rule 144 of the Rules of Procedure and Evidence ("Rules") further confirms that decisions such as a judgment of acquittal shall be in writing and that a copy of the decision shall be provided as soon as possible to all participants in the proceedings. This provision thus compels the Chamber to issue a written decision, which shall be notified as soon as possible to all participants and shall be pronounced in public.

22. In criminal cases, reasoned judgments allow the parties and the public to know the legal and factual basis upon which the accused has been convicted or acquitted. The right to a reasoned judgment is essential to a fair trial, in particular to protect against arbitrariness.[24] The right to a duly reasoned judgment is an element of a fair trial and enables a useful exercise of the right of appeal by the parties.[25] Undue delay in rendering a fully reasoned judgment impairs this fundamental right to a fair trial.[26]

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[21] ICC-01/05-01/08-3636, para. 49.
[22] ICC-01/05-01/08-3636, para. 52.
[23] *Ruto and Sang case*, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions, ICC-01/09-01/11-1334, para.22. "The effect of a successful 'no case to answer' motion would be the rendering of a full or partial judgment of acquittal".
[24] Fair Trial Manual, Amnesty International, Second Edition, 2014, p.173.
[25] ICTR, Appeals Chamber, *Prosecutor v. Bizimungu*, Judgement, 30 June 2014, ICTR-00-56B-A, para. 18; ICTY, Appeals Chamber, *Prosecutor v. Nikolic*, Judgement on Sentencing Appeal, 8 March 2006, IT-02-60/1-A., para. 96; ICTY, Appeals Chamber, *Prosecutor v. Kunarac*, Judgement, 12 June 2002, IT-96-23 & IT-96-23/1-A, para. 41.
[26] Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, para. 49. "The right to have one's conviction reviewed can only be exercised effectively if the convicted person is entitled to have access to a duly reasoned, written judgement of the trial court, and, at least in the court of first appeal where domestic law provides for several instances of appeal, also to other documents, such as trial transcripts, necessary to enjoy the effective exercise of

23. In fact, if the parties wished to exercise their right to appeal the Majority's decision acquitting the accused, they would do so pursuant to Article 81 of the Statute.[27] However, in issuing an oral decision with no reasoning, the Majority of the Chamber is effectively delivering a final decision on acquittal that impairs the parties' right to seek immediate appellate review.

24. The Inter-American Court of Human Rights has also concluded that judges have an obligation to give reasons for their decisions in order to avoid arbitrariness and ultimately, violation of human rights:

> The Court has underscored that the decisions adopted by national bodies that could affect human rights must be duly justified, because, if not, they would be arbitrary decisions. In such sense, the reasons given for a judgment must show that the arguments by the parties have been duly weighed and that the body of evidence has been analyzed. Moreover, a reasoned decision demonstrates to the parties that they have been heard and, when the decision is subject to appeal, it affords them the possibility to argue against it, and of having such decision reviewed by an appellate body. On account of all the foregoing, the duty to state grounds is one of the "due guarantees" included in Article 8(1) to safeguard the right to due process.[28]

25. The European Court for Human Rights has equally established the link between reasoned decisions and appellate review:

> *La Cour rappelle que, selon sa jurisprudence constante, les décisions judiciaires doivent indiquer de manière suffisante les motifs sur lesquels elles se fondent. L'étendue de ce devoir peut varier selon la nature de la décision et doit s'analyser à la lumière des circonstances de chaque espèce [...] Ainsi, en rejetant un recours, la juridiction d'appel peut, en principe, se borner à faire siens les motifs de la décision entreprise (voir, mutatis mutandis, l'arrêt Helle c. Finlande du 19 décembre 1997, §§ 59-60, Recueil 1997-VIII et Garcia Ruiz c. Espagne, no 30544/96, [GC], § 26, arrêt du 21 janvier 1999, CEDH 1999-I).*[29]

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the right to appeal. The effectiveness of this right is also impaired, and article 14, paragraph 5 violated, if the review by the higher instance court is unduly delayed in violation of paragraph 3 (c) of the same provision [footnotes excluded].

[27] Triffterer and Ambos, The Rome Statute of the International Criminal Court, A Commentary (Third Edition), page. 1830.

[28] Inter-American Court of Human Rights, *Apitz Barbera et al* v Venezuela, Judgment, 5 August 2008, para. 78.

[29] Cour Européenne des droits de l'homme, deuxième section, Affaire *Taxquet c. Belgique*, ArrŒt, 13 janvier 2009, RequŒte no 926/05, para40.

26. Accordingly, in light of the unequivocal wording of Article 74(5) of the Statute, together with the practice of previous Trial Chambers, and internationally recognised human rights, by rendering an oral summary of a decision on acquittal of both of the accused, the Majority of the Chamber violated its obligation to render one fully reasoned judgment. The Majority of the Chamber has thus made an error of law and incurred in an abuse of discretion.

III. Duty to deliver decisions and any other rulings without undue delay[30]

27. Irrespective of the view expressed above, the Majority has also decided to issue the reasons for their acquittal "as soon as possible" without specifying any given date, despite the Presiding Judge's assurance on 22 November 2018 that the Chamber had "all elements to take a decision" and that such a decision would be taken "obviously, as soon as possible".[31]

28. Although the statutory framework does not impose upon the Trial Chamber a deadline to render a decision on the acquittal or conviction of the accused, Rule 142(1) of the Rules provides that the Chamber's "pronouncement shall be made within a reasonable period of time after the Trial Chamber has retired to deliberate". Regulation 53 of the Regulations of the Court ("Regulations") may be a useful reference, as it is the sole provision imposing a time limit upon a Chamber. This provision states that the Pre-Trial Chamber's decision on the confirmation of charges shall be delivered within 60 days from the date the confirmation of charges hearing ends. Although the time limit is not comparable, it is important to note that this provision imposes on the Pre-Trial Chamber the obligation to render within that time

[30] Article 7 of the Code of Judicial Ethics, ICC-BD/02-01-05.
[31] T-230-CONF-ENG, page 23, lines 9-11.

limit a fully reasoned decision "setting out its findings on each of the charges". Thus, despite the strict time limit, Pre-Trial Chambers are equally barred from issuing a decision on the confirmation of charges "with reasons to follow as soon as possible."

29. What is reasonable will depend on the nature and complexity of each case. As summarised above, the Chamber heard the last oral submissions from the Defence teams on 22 November 2018. However, as noted above the Prosecutor called her last witness already in January 2018. Also, by 1 June 2018, the Chamber, by Majority, had authorised the submission of more than 4,000 items of evidence from the Prosecutor. Most of these items of evidence were subject of Prosecutor requests filed already before the Chamber in 2017.[32]

30. Moreover, in the course of the past year, the parties have produced extensive and thorough written submissions pursuant to deadlines established by the Chamber. For example, the Prosecutor was instructed to submit her "Mid-Trial Brief" to the Chamber within a five-week time limit. Defence responses were due within four weeks. As for the present Defence Motions, the Chamber's decision of 4 June 2018 provided the parties with approximately seven weeks to file their respective motions for judgement of acquittal and responses thereto.

31. The nature of the decision is also an important factor to take into consideration as regards what is "reasonable period of time". In the present case, where the Majority of the Chamber has made public its decision to acquit both accused, but its reasons are unknown to everyone related to this case. Most importantly, the immediate effect of an acquittal is the release of

[32] Decision concerning the Prosecutor's submission of documentary evidence on 28 April, 31 July, 15 and 22 December 2017, and 23 March and 21 May 2018, ICC-02/11-01/15-1172.

the accused. Both of these decisions, regardless of their lack of reasoning, are subject to appeal. In this regard, Rule 150 of the Rules is relevant, as the Chamber's timing of its "fully reasoned decision as soon as possible" has an impact on the parties' ability to file an appeal. Pursuant to this provision, parties have 30 days to file a notice of appeal against an acquittal. In such a motion, pursuant to Regulation 57 of the Regulations, the appellant must state the grounds of appeal, specifying alleged errors. Thereafter, pursuant to Regulation 58 of the Regulations, the appellant has 90 days to file the appeal brief. Needless to say that the parties will have no reasoning from the Majority of the Chamber (except for their lack of reasoning) to substantiate any appeal.

32. In the *Ruto and Sang case*, the only example of such a procedure in this Court, the Trial Chamber decided on the merits within two-and-a-half months.[33] At the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), where such motions were also regularly filed, Trial Chambers ruled within one to three months.[34] Domestic legal systems may also be useful in this regard, as they have set time limits to render a verdict in order to expedite the proceedings. Although this domestic legislation does not prevail over the Chamber's statutory obligation pursuant to Article 74(5) of the Statute to issue a written and reasoned decision, it may be useful as regards the timing of the decision, as this element is not defined in the Statute. For example, in some domestic legislation, it is possible for a Trial Chamber to render a conviction or acquittal judgment immediately after the end of the trial with reasons to

[33] The Chamber issued the decision on the motions for judgment of acquittal within five and half months since the filing of the submissions and two and half months after the hearing. See, ICC-01/09-01/11-2027-Red, paras 8-15.

[34] See for example, *Prosecutor v. Milosevic*, Decision on Motion for Judgment of Acquittal, 16 June 2004 (motion was filed on 3 March 2004); *Prosecutor v. Kordic and Cerkez*, Decision on Defence Motions for Judgment of Acquittal, 6 April 2000 (motions were filed on 17 March 2000 and the Prosecutor's Response was filed on 24 March 2000); *Prosecutor v. Kunarac*, Decision on Motion for Acquittal, 3 July 2000 (Defence motions were submitted on 20 June 2000).

follow. However, in many legal systems, this must be done only exceptionally, and within a strict time limit.[35] The time constraint granted to Chambers also safeguards judicial impartiality. A limited time between the disposition and the reasons for a decision prevents judges from taking decisions hastily, before having fully analysed and considered the facts and assessed all the evidence submitted.[36] If a judge has analysed all the facts and the evidence before him or her, the judge must be able to issue a fully reasoned decision or at least provide the parties with a strict time limit to issue its reasons. Unless the Majority issues the legal and factual basis for their acquittal within a reasonable time, it may also breach their duty to deliver justice without undue delay.[37]

33. In this regard, the following finding of a Canadian Court of Appeal serves as guidance on the importance of timely reasoned decisions:

> Although not precluded from announcing a verdict with "reasons to follow", a trial judge in all cases should be mindful of the importance that justice not only be done but also that it appear to be done. Reasons rendered long after a verdict, particularly where it is apparent that they were crafted after the announcement of the verdict, may cause a reasonable person to apprehend that the trial judge engaged in result-driven reasoning. The necessary link between the verdict and the reasons will not be broken, however, on every occasion where there is a delay in rendering reasons after the announcement of the verdict. [...] Without this requisite link, the written reasons provide no opportunity for meaningful appellate review of correctness of the decision.[38]

34. Although I agree with my colleagues that in case of acquittal the accused must be released immediately, this same reasoning cannot justify the

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[35] Criminal Procedure Code of Peru, article 396 (8 days); Criminal Procedure Code of Colombia, article 447 (15 days); Criminal Procedure Code of Costa Rica, article 364 (5-day time limit); Criminal Procedure Code of Dominican Republic, article 335 (15-day time limit); Criminal Procedure Code of the Province of Buenos Aires, Argentina, article 374 (5 or 7-day time limit); Polish Code of Criminal Procedure ("KPK"), article 411 § 1 and 2; article 423 § 1 (7-day time limit); German Code of Criminal Procedure ("StPO"), § 268 II, and 275 I (5 weeks; extension is possible for every ten days of main hearing).
[36] *See* Article 4 of Code of Judicial Ethics, ICC-BD/02-01-05.
[37] *See* Article 7 of the Code of Judicial Ethics, ICC-BD/02-01-05.
[38] Court of Appeal for Alberta, R. v. Teskey (2007 SCC 25), File No. 3154, 7 June 2007. *See also*, Court of Appeal for Ontario, R. v. Cunningham (106 O.R. (3d) 641, 3 August 2011.

Majority's view that this serves as a justification to depart from the statutory obligations.

35. The right of the accused to be tried without undue delay[39] must be weighed with other fundamental rights to a fair trial, including the right to know the reasons for the judgment and the right to appeal. These rights do not only belong to the accused. The right to a fair and impartial trial is a paramount pillar of international justice. The Chamber must ensure the respect of the interests of justice. The right to a fair trial applies both to the Defence and the Prosecutor. [40] Without these fundamental rights the Prosecutor's obligation to act before the court pursuant to Article 42(1) of the Statute and on behalf of the international community[41] is hindered. Victims' right to seek justice and ultimately reparations is equally thwarted. [42]

36. Accordingly, it is my view that the judges have breached fundamental rights of fair trial which undermine judicial impartiality and integrity when they decided to issue a judgment of acquittal orally and without reasons.

IV. The Defence Motions

37. I respect the majority's decision to acquit the accused. I recognise that every accused is presumed innocent until proven guilty,[43] and the right to be

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[39] Article 67(1)(c) of the Rome Statute; Article 6(1) of the European Convention on Human Rights; Article 14(3)(c) of the ICCPR; , Article 8(1) of the American Convention on Human Rights; Article 7(1)(d) of the African Charter on Human and People's Rights.

[40] ICTR, Trial Chamber III, Decision on Severance of AndrØ Rwamakuba and Amendments of the Indictment, 7 December 2004, ICTR-98-44-PT, para. 26

[41] *Ruto and Sang case*, Decision on Defence Applications for Judgments of Acquittal, Dissenting Opinion of Judge Herrera Carbuccia, ICC-01/09-01/11-2027-AnxI, para. 27.

[42] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 21 March 2006, Resolution 60/147, adopted by the General Assembly, principles 11-12.

[43] Article 11 of the Universal Declaration of Human Rights, Article 14(2) of the International Covenant on Civil and Political Rights, Article 7(1)(b) of the African Charter on Human and People's Rights, Article 8(2) of the American Convention on Human Rights, Article 6(2) of the European Convention on Human Rights, and Article 66 of the Rome Statute.

released immediately in case of acquittal. However, it is a moral duty of the jurisdiction to bring independent and impartial justice not only for the accused but also for the victims.

38. Upon analysis of the evidence submitted on the record, it is my view that there is evidence upon which a reasonable Trial Chamber could convict the accused.

A. Applicable Standard

39. This Chamber has previously stated that a decision to allow a ¨no case to answer¨ or similar procedure is discretion of the Chamber.[44] However, as with any other discretionary power, this is not absolute and is limited by the obligation to ensure that a trial is fair and expeditious and conducted with full respect for the rights of the accused.[45]

40. In its Second Order, the Chamber authorised the Defence to make "concise and focused submissions on the specific factual issues for which, in their view, the evidence presented is insufficient to sustain a conviction and in respect of which, accordingly, a full or partial judgment of acquittal would be warranted" (emphasis added).[46] In a subsequent decision, the Single Judge indicated that it was not necessary to take a position in relation to the standard to be adopted for the analysis of evidence in these mid-trial proceedings.[47] Although I respect the views of the Presiding Judge and his powers pursuant to Article 64(8)(b) of the Statute, I consider that the

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[44] ICC-02/11-01/15-1174, para. 8; Appeals Chamber, *The Prosecutor v Bosco Ntaganda*, Judgment on the Appeal of Mr Bosco Ntaganda against the 'Decision on Defence Request for Leave to File a "no case to answer" motion', 5 September 2017, ICC-01/04-02/06-2026, paras 52-56.
[45] ICC-01/04-02/06-2026, para. 44. The Appeals Chamber concluded: "A decision on whether or not to conduct a 'no case to answer' procedure is thus discretionary in nature and must be exercised on a case-by-case basis in a manner that ensures that the trial proceedings are fair and expeditious pursuant to article 64 (2) and 64 (3) (a) of the Statute."
[46] ICC-02/11-01/15-1174, para. 10.
[47] ICC-02/11-01/15-1182, para.13-15.

applicable standard is that of "whether there is evidence on which a reasonable Trial Chamber could convict".[48] I consider that if this standard would have applied and would have been clearly informed to the parties, the Chamber would have been able to render a reasoned decision in an expeditious manner and in respect to the rights of the accused and other parties in the proceedings. It is my view that the application of any other standard, and the lack of clarity as to the applicable standard in these proceedings, attempts against the purpose of such proceedings and ultimately against the rights of all the parties, including the accused.

41. The Chamber must analyse the evidence bearing in mind the nature and purpose of this "halfway stage", which will not conclude with a determination of the truth or a decision based on a "beyond reasonable doubt" standard.[49] In essence, such a mid-trial motion ought to be expeditious and superficial (*prima facie*) in order not to preclude the judges from continuing with the trial (or be disqualified) if the Chamber decides to dismiss the motions for acquittal and carry on with the trial.[50]

42. In addition to the potential problems of disqualification described above, in the case of an acquittal such as this, one can only imagine what would happen if the Appeals Chamber would decide to reverse the Majority's Decision, as the accused will still have right to present a defence case in order to contest the credibility of the Prosecutor's evidence.

43. The fact that these proceedings were initiated already in February 2018,[51] and that the Majority of the Chamber is unable to make a determination in over

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[48] ICC-01/09-01/11-1334, para. 32. *See also*, ICC-01/09-01/11-2027-AnxI, para. 17. ICTY, *Prosecutor v, Kunarac et al*, Case No. IT-9623 & 23/1, Trial Chamber II, Decision on Motion for Acquittal, 3 July 2000, para. 7.
[49] ICC-01/09-01/11-2027-AnxI, para. 16.
[50] ICC-01/09-01/11-2027-AnxI , para. 3.
[51] ICC-02/11-01/15-1124.

six months after the Defence motions were filed, speaks for itself about the lack of expeditiousness of the current proceedings. The absence of clarity as to the applicable standard and the resulting lengthy proceedings (amounting to 11 months and thousands of pages of litigation), have defeated the purpose of the "no case to answer" proceedings, which the Chamber stated was to "contribute to a shorter and more focused trial".[52]

44. The following conclusion of the ICTY Appeals Chamber in the case of *The Prosecutor v Goran Jelisic*, is useful to understand the nature of this phase of the proceedings and how they have been distorted in this case:

> The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt.[53]

45. The Appeals Chamber has also described this mid-trial procedure as one that protects "the right of an accused not to be called on to answer a charge unless there is credible evidence of his implication in the offence in which he is charged."[54] In reaching its conclusion, the Appeals Chamber referred to another ICTY case, *Prosecutor v. Strugar*, which determined that at this mid-trial stage that Chamber should not enter a decision "beyond reasonable doubt", "but rather, and quite differently, whether it would be properly open to a Trial Chamber, taking the evidence at its highest for the prosecution, to be

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[52] ICC-02/11-01/15-1174, para. 9.
[53] The Prosecutor v. Goran Jelisic, IT-95-10-A, Appeals Judgement, 5 July 2001, para. 37.
[54] ICC-01/04-02/06-2026, para. 46. The Appeals Chamber referred to: ICTY, Trial Chamber II, *Prosecutor v. Strugar*, "Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98 *bis*", 21 June 2004, para. 13.

persuaded beyond reasonable doubt to convict the accused".[55] Under this standard an item of evidence or the testimony of a witness may only be excluded when the evidence in question is incapable of belief by any reasonable Trial Chamber.[56]

46. It must be noted that the Majority of the Chamber (Judge Henderson dissenting), authorised the submission of the following evidence on the record: over 4.500 items of evidence (including documents, audio-video files, and forensic records), 25 witness statements pursuant to Rule 68(3) of the Rules, and 15 witness statements pursuant to Rule 68(2) of the Rules. At the outset of the proceedings, the Majority of the Chamber (Judge Henderson dissenting), determined that the individual analysis of each item of evidence would be deferred until the end of the trial.[57] The Chamber further explained that this approach would "prevent multiple determinations on one and the same item of evidence are made at different stages of the trial"[58].

47. At this stage, and considering that the Majority of the Chamber (Judge Tarfusser and Judge Henderson) have issued an oral summary, contrary to "a reasoned statement" pursuant Article 74(5) of the Statute, and although they have stated that they have "already arrived at its decision upon the assessment of the evidence", it is not evident if they have complied with their duty to consider the 'relevance, probative value and potential prejudice to the accused of each item of evidence.[59] This individual analysis is required in

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[55] ICTY, Trial Chamber II, *Prosecutor v. Strugar*, "Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98 *bis*", 21 June 2004, para. 16.
[56] ICC-01/09-01/11-2027-AnxI, para. 19. The Chamber should be guided by the practice in the ad-hoc tribunals, where this analysis was done when the Prosecution's case had completely broken down, either on its own presentation, or as a result of such fundamental questions being raised through examination as to the reliability and credibility of witnesses that the Prosecution is left without a case. *See*, ICTY, *Prosecutor v. Kordic and Cerkez*, IT-95-14/2, Trial Chamber, Decision on Motions for Acquittal, 6 April 2000, para. 28; *The Prosecutor v. Goran Jelisic*, IT-95-10-A, Appeals Judgement, 5 July 2001, para.55.
[57] ICC-02/11-01/15-405, para. 12.
[58] ICC-02/11-01/15-405, para. 14.
[59] ICC-02/11-01/15-405, para. 10.

order to reach a determination beyond reasonable doubt which they have reached, albeit without reasoning.[60]

B. Merits of the Defence Motions

48. On the basis of the evidence submitted and the standard of review summarised above, it is my view that there is sufficient evidence upon which a reasonable Trial Chamber could convict both accused for crimes against humanity pursuant to Article 7 of the Statute. I will issue my fully reasoned opinion in due course, bearing in mind the obligation to perform my judicial duties properly and expeditiously and without undue delay.[61] Trial proceedings should not be disproportionately lengthy[62] because it affects the public trust in the effectiveness of international criminal proceedings.

V. Conclusion

49. In light of the above, I strongly disagree with the Majority's decision to render an oral summary instead of a fully reasoned written decision explaining the basis of their judgment of acquittal for both of the accused.

50. I also respectfully disagree with their standard of review they applied in the present proceedings and ultimately the outcome to decide on an acquittal using the beyond reasonable doubt standard.

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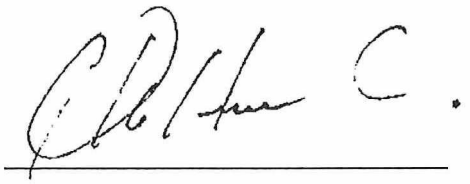
[60] Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, ICC-01/05-01/08-1386, para. 37. Moreover, it should be underlined that irrespective of the approach the Trial Chamber chooses, it will have to consider the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings - when evidence is submitted, during the trial, or at the end of the trial.

[61] Article 7 of the Code of Judicial Ethics, ICC-BD/02-01-05.

[62] German Bundestag, Strengthening the International Criminal Court, 19th legislative period, Berlin, 26 June 2018, 19/2983.

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



Judge Olga Herrera Carbuccia

Dated 15 January 2018

At The Hague, The Netherlands