SUMMARY OF DISSENTING OPINION OF JUDGE LUZ DEL CARMEN IBÁÑEZ CARRANZA TO THE JUDGMENT ON THE APPEAL OF THE PROSECUTOR AGAINST THE ORAL DECISION OF TRIAL CHAMBER 1 OF 15 JANUARY 2019 WITH WRITTEN REASONS ISSUED ON 16 JULY 2019 IN THE CASE OF THE PROSECUTOR V. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ

1. Judge Ibáñez dissents from the final outcome and the findings made by the majority of the Appeals Chamber regarding both grounds of appeal. In her view, either of the two grounds of appeal should have been granted. As for the first ground of appeal, Judge Ibáñez finds that Judges Henderson and Tarfusser failed to reach 'one decision', based on '[their] evaluation of the evidence and the entire proceedings', and 'with a full and reasoned statement of [their] findings on the evidence and conclusions', as required by article 74(2) and (5) of the Statute. In her view, these are errors of law and procedure that materially affected, and vitiated, the impugned decision. As for the second ground of appeal, Judge Ibáñez finds that lack of agreement between Judges Henderson and Tarfusser as to the standard of proof prevented them from making any valid 'findings on the evidence and conclusions'. Once again, in her view, these are errors of law and procedure that materially affected the impugned decision.

2. In Judge Ibáñez's view, the failures in this case started on 4 June 2018 when, despite the disagreements between the majority of the trial judges on the legal basis for no case to answer motions at the ICC and the applicable standard of proof for assessing the evidence when entertaining such motions, the Trial Chamber, on its own initiative, invited the accused to file such motions. On 15 January 2019, Judges Henderson and Tarfusser rendered an oral verdict, by majority, granting Mr Gbagbo's and Mr Blé Goudé's no case to answer motions, acquitting them of all charges, and noting that they would deliver their reasons 'as soon as possible'. While the two judges thus entered the acquittals without written reasons, Judge Herrera Carbuccia timely issued a dissenting opinion, duly reasoned and in writing, on the same day. Judges Henderson and Tarfusser issued their written separate opinions six months later.

3. According to Judge Ibáñez, a preliminary and crucial issue, in order to understand the big failures in this case, is that the no case to answer procedure does not belong to the legal framework of the Rome Statute System. In her view, while the no case to answer procedure is a common law institution *par excellence*, the Rome Statute System is not a common law system

but a mixture of all the systems of the world. She observes that the drafting history shows that the no case to answer motion was proposed but not included in, and thus rejected from, the text of the Rules of Procedure and Evidence. Furthermore, she considers that the discretion granted to trial chambers under article 64(6)(f) of the Statute is for discrete, purely procedural matters, and cannot be used to rule on substantive issues such as the guilt of the accused, let alone to ignore the mandatory requirements provided for in article 74 of the Statute when entering judgments on the guilt of the accused. Also, in her view, transplanting the no case to answer procedure from common law jurisdictions without previous amendments to the Statute implies a violation of the principles of legality and *pacta sunt servanda*, and of the rights of the victims under the Statute and the Rules and under international human rights law.

4. Judge Ibáñez notes that, while the *ad hoc* tribunals applied the no case to answer procedure on a regular basis, the procedural frameworks of such tribunals explicitly foresee in their statutes the no case to answer procedure, whereas, as mentioned, the Statute does not. Moreover, she notes that some inconsistencies among various jurisdictions show that no international rule or custom can be drawn on the no case to answer, and that no general principle of law can be derived from domestic jurisdictions to support application of this procedure or to clarify the related standard of proof. She observes that, similarly, the laws of Côte d'Ivoire do not provide for the no case to answer motion, and that, in fact, it contradicts Ivoirian law. Notably, in her view, domestic common law jurisdictions, where the no case to answer procedure is regulated, show no uniform practice on the no case to answer procedure, particularly with respect to the standard of proof applicable at this stage.

5. Judge Ibáñez would have granted the first ground of appeal, because she has found in the present case breaches of the legal requirements and guarantees of fairness and due process of law of article 74(2) and (5) of the Statute. Judge Ibáñez observes that the above-mentioned breaches amount, at the same time, to errors of law and procedure. Judge Ibáñez considers that Judges Henderson and Tarfusser made the following errors breaching article 74(5): (i) the decision of acquittal was not in writing; (ii) there was not 'one decision' with the 'Trial Chamber's findings on the evidence and conclusions', or with the findings and conclusions of a majority, for that matter; and (iii) only the acquittal was announced in open court, while the Trial Chamber's conclusions and findings on the evidence were not delivered at that time, nor was a summary thereof. They simply announced their verdict.

6. Judge Ibáñez observes that two judges of the Trial Chamber, Judges Henderson and Tarfusser, halfway through the trial of the Prosecutor against Mr Gbagbo and Mr Blé Goudé, granted no case to answer motions to acquit both of the accused, despite the lack of any basis in the Statute for doing so, as Judge Tarfusser himself observed. In her view, the two judges failed to agree, in order to form a majority, specifically on the issue of the legal basis upon which to entertain no case to answer motions, and additionally regarding other issues essential to making a decision, by majority, in this case: the applicability of article 74 of the Statute to the decision, the applicable standard of proof, and the system of admissibility of the evidence.

7. Regarding the second ground of appeal, Judge Ibáñez dissents from the approach and outcome of the Appeals Chamber's Majority. Although Judge Ibáñez finds no basis in the Statute for entertaining no case to answer motions at this Court, she nevertheless finds that the correct standard of proof, as applied by the *ad hoc* tribunals and representative common law jurisdictions, although not uniform, is not as high as beyond reasonable doubt. In her view, it requires a *prima facie* assessment, where a reasonable trial chamber, taking the evidence at its highest, *could* convict the accused. She considers that Judge Henderson, in his separate opinion, erroneously applied a higher standard of proof.

8. She further considers that Judges Henderson and Tarfusser erred in law and procedure by failing to agree on the applicable standard of proof. Moreover, they failed to inform the parties and participants clearly as to what the applicable standard of proof was for the no case to answer proceedings.

9. While, in Judge Ibáñez's view, this would have been sufficient for granting the Prosecutor's second ground of appeal, she expands on other arguments presented by the Prosecutor. In this regard, Judge Ibáñez further addresses Judge Henderson's erroneous approach to corroboration of evidence and to assessing evidence of sexual violence, which, in her view, amount to errors of law. When addressing the arguments of the Prosecutor's second ground of appeal, Judge Ibáñez addresses, where appropriate, the relevant parts of the examples raised by the Prosecutor to illustrate the errors under this ground of appeal.

10. Regarding the appropriate relief, in the terms of article 83(2) of the Statute, Judge Ibáñez considers that Judges Henderson and Tarfusser's breaches of article 74 amount to errors of law and procedure that materially affected the decision of acquittal. Likewise, she considers that the errors under the second ground of appeal, regarding the applicable standard of proof at the

no case to answer stage, the failure of Judges Henderson and Tarfusser to agree on the applicable standard, and Judge Henderson's erroneous evidentiary approaches made the procedure unreliable and materially affected the outcome of the case. Such errors include, *inter alia*, his incorrect assessment of circumstantial evidence, his failure to look at the evidence in its totality, his erroneous approach to corroboration, and, notably, his incorrect and inappropriate assessment of sexual violence For that reason, Judge Ibáñez would have granted the second ground of appeal as well. Having granted either ground, Judge Ibáñez would have considered appropriate the remedy of a retrial before a new trial chamber.

Dated this 31st day of March 2021

At The Hague, The Netherlands