DISSENTING OPINION OF JUDGE HENDERSON

1. Although I agree with my colleagues that this appeal is not the appropriate place to challenge the majority's approach on the submission and admission of evidence as such, I disagree that no new issues arise from the Impugned Decision, which the Defence may challenge on appeal. In particular, there is nothing indicating that the original majority decision on submission of evidence[1] contemplated no case to answer proceedings. Given that such proceedings focus mainly on whether or not the Prosecutor has presented enough evidence to warrant continuing this trial, it seems that the question of admissibility takes centre stage much sooner than originally anticipated by the majority. Indeed, if the Chamber were to declare a large part of the Prosecutor's evidence inadmissible – e.g. because it is based on anonymous hearsay or because of lack of authentication – this might conceivably leave the Prosecutor without sufficient evidence in relation to certain material facts. For the reasons that follow, I dissent.

2. According to rule 64(3) of the Rules, Trial Chambers are not allowed to consider evidence that has been ruled inadmissible. Although rule 64(3) was obviously drafted with the final judgment in mind, it would be preposterous to suggest that the Chamber is not 'considering' the evidence when making its ruling on the no case to answer motions. By not ruling on admissibility at this stage, the Majority is thus potentially in breach of a clear and straightforward statutory provision.

[1] ICC-02/11-01/15-405

3. Even leaving legal considerations aside, from a purely pragmatic point of view, it seems pointless to continue this trial on the basis of evidence which the Chamber may later rule inadmissible. To reason that the Chamber cannot make final admissibility rulings at this stage because evidence that the Defence may or may not present might change the Chamber's assessment of the admissibility criteria, makes it difficult to not conclude how warped the Majority's approach really is. The question in no case to answer proceedings is not whether there will be enough evidence to convict the accused at the end of the trial. The question is whether there is enough evidence at this stage of the proceedings that could support a conviction. Whether there is enough evidence now depends, in no small part, on how much of the evidence the Prosecutor has submitted is ruled inadmissible. The Majority's approach therefore seems to put the cart before the horse by ruling on whether there is enough evidence before knowing how much evidence there actually is.

4. Of course, the Chamber can decide a no case to answer motion on the assumption that none of the evidence presented by the Prosecutor is inadmissible. If the Chamber still finds that the evidence is insufficient, from a practical point of view – as opposed to a principled position- neither the Prosecutor nor the Defence will have much to complain about. However, if the Chamber finds that there is a case to answer based on that assumption, the Defence may well be forced to put up a lengthy and costly defence case to challenge evidence which the Chamber may not even be allowed to consider, if the admissibility criteria are applied properly. This not only creates serious prejudice,[2] it also significantly affects the expeditiousness of the proceedings.

[2] ICC-02/11-01/15-405-Anx, para. 9.

5. For these reasons, I am of the view that this request for leave to appeal does meet the conditions of article 82(1)(d) of the Statute and I would accordingly have certified it.

Judge Geoffrey Henderson

Dated 12 July 2018

At The Hague, The Netherlands