

**Annex 3: Separate Concurring Opinion of Judge Piotr Hofmański in
relation to the Appeals Chamber’s ‘Judgment in the appeal of the
Prosecutor against Trial Chamber I’s decision on the no case to answer
motions’ of 31 March 2021**

Separate Concurring Opinion of Judge Piotr Hofmański

in relation to the Appeals Chamber's 'Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions' of 31 March 2021

1. I am in full agreement with the [Judgment of the Appeals Chamber](#), which rejects both grounds of the Prosecutor's appeal and confirms the decision of the Trial Chamber. I am also in full agreement with all of the reasoning in the Judgment.

2. The sole issue in relation to which I diverge from the views of my fellow majority judges, Judge Eboe-Osuji and Judge Morrison, is on the question of whether, on the facts of this case, the decision issued by the Trial Chamber on 15 January 2019 was 'in writing' within the meaning of article 74(5) of the Statute. I am therefore addressing that issue in this separate concurring opinion.

3. I agree with the legal finding in the Judgment that article 74(5) of the Statute requires both the operative part (the verdict) of the decision, and its reasons, to be issued in writing. I also agree that the operative part (the verdict) in this case was pronounced by the Trial Chamber in a hearing on 15 January 2019. However, where my view diverges from that of my fellow majority judges is that I do not consider that that pronouncement met the 'in writing' requirement of article 74(5).

4. I note that the Trial Chamber itself described what it pronounced on 15 January 2019 as its 'oral decision'. It did so both when rendering its decision orally in court on 15 January 2019;¹ and when describing that oral decision in its written reasons of 16 July 2019.² In contrast, in referring to the dissenting opinion of Judge Herrera Carbuccia,³ the Trial Chamber stated that it was 'in writing' and would be filed the same morning,⁴ thereby distinguishing that document from what the Trial Chamber termed its own 'oral decision'.⁵ I agree with that latter characterisation. I do not regard the transcript of the hearing of 15 January 2019 as being capable of transforming what was clearly an oral pronouncement into what article 74(5) of the

¹ See [15 January 2019 Decision](#), p. 5, line 7: 'This concludes the Chamber's **oral decision**' (emphasis added).

² See [Reasons for the 15 January 2019 Decision](#), which is entitled: 'Reasons for **oral decision** of 15 January 2019 [...]' and its preamble states that the Trial Chamber ('[...] hereby issues the reasons for the Majority's **oral decision** [...]') (emphasis added).

³ [Judge Herrera Carbuccia's Dissent to the 15 January 2019 Decision](#), which is entitled: 'Dissenting Opinion to the Chamber's **Oral Decision** of 15 January 2019' (emphasis added).

⁴ [15 January 2019 Decision](#), p. 5, lines 5-6.

⁵ [15 January 2019 Decision](#), p. 5, line 7.

Statute prescribes must be a decision ‘in writing’. Indeed, I find it difficult to read a provision that mandates that ‘[t]he decision shall be in writing’ as permitting the decision to be rendered exclusively orally, even if a transcript of that decision is simultaneously created.

5. Transcripts are produced of every oral hearing. While transcripts of hearings are authoritative,⁶ the specific and express requirement for a decision under article 74(5) to be ‘in writing’ reflects the significance of that decision to the proceedings as a whole. It is the final ruling of the Trial Chamber on the criminal responsibility of the accused in cases involving ‘the most serious crimes of international concern’.⁷ I therefore view this specific decision as requiring something more formal than a transcript that is ordinarily produced in the context of any oral hearing.

6. The decision under article 74(5), the most significant written decision of the trial chamber, should be formally filed with the Registry. That decision, with any accompanying opinions, bears the signature of the judges of the chamber concerned, confirming that they participated in the decision-making process. Furthermore, the complete text of such a significant decision is immediately apparent when it is in writing. There is no question of any part being missed out, or any risk of any technical difficulties affecting its full contents, as can happen in the context of a transcript of a hearing where, for example, a part of an oral hearing may be transcribed as having been inaudible. Indeed, the potential limitations of transcripts are expressly recognised in regulation 27(1) of the Regulations of the Court which specifically regulates transcripts and provides, in relevant part: ‘Real time transcripts of hearings shall be provided in at least one of the working languages of the Court *to the extent technically possible*’ (emphasis added).

7. Furthermore, the distinction between the oral and written decisions of a chamber is expressly recognised in regulation 31 of the Regulations of the Court. Regulation 31(5) regulates the notification of ‘*oral decisions or orders*’. They are ‘deemed effective on the day *the decision or order is rendered orally* by the Chamber’ unless:

- (a) A participant was not present or represented when the decision or order was pronounced, in which case that participant shall be notified of the *oral decision or order* in accordance with sub-regulation 2; or

⁶ See regulation 27(2) of the Regulations of the Court: ‘The transcripts constitute an integral part of the record of the proceedings. The electronic version of transcripts shall be authoritative’.

⁷ Article 1 of the Statute.

(b) The Chamber has indicated that a *written decision or order* will follow, in which case participants shall be notified of the *written decision or order* in accordance with sub-regulation 2. [all emphasis added].

8. There would be no need for this provision – and its distinction between these two types of decision – if the transcript of the oral decision were capable of transforming it into a written decision. In such circumstances, all decisions would be written decisions. Yet the provision is correct to distinguish oral decisions from written decisions because there is a clear difference between the two. In this case, the Trial Chamber issued its decision orally on 15 January 2019. It did so without following it up, at that time, with a written decision.

9. In the context of this case, separating the verdict from the reasons, and issuing the latter in writing, did not relieve the Trial Chamber from the responsibility of issuing its *full* decision in writing. One component of the article 74(5) decision in this case – the verdict – was pronounced orally by the Trial Chamber. As that verdict was rendered and enforced in January 2019, it should have been issued in writing, pursuant to article 74(5), by means of filing a written decision with the Registry in the normal way at that time, even if the full written reasons were to follow. This should have occurred in addition to the oral public pronouncement of the verdict. The Trial Chamber erred in failing to do so.

10. However, notwithstanding my finding of an error in this regard, I wholeheartedly agree with the Judgment of the Appeals Chamber that this error was patently incapable of materially affecting the Impugned Decision. It would, frankly, be absurd to suggest that, had the Trial Chamber filed its verdict in writing on 15 January 2019, in addition to its oral pronouncement, that verdict would have been different from what it had just stated in open court. As such, my opinion about whether or not the ‘in writing’ requirement of article 74(5) of the Statute was complied with in respect of the verdict that was issued on 15 January 2019 cannot have any impact upon the overall finding which the Appeals Chamber has reached on the Prosecutor’s first ground of appeal, with which I am in full agreement.

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



Judge Piotr Hofmański

Dated this 31st day of March 2021

At The Hague, The Netherlands