

Dissenting Opinion
Judge Herrera Carbuccia

1. I respectfully disagree with the order of the Majority to review, *proprio motu*, the detention of the accused at this stage of the proceedings.
2. As correctly noted by the Majority, the judges have the statutory duty and responsibility to ensure that the duration of the detention of the accused is not unreasonable. However, this right of the accused must be assessed on a case-by-case basis.¹ Although I agree that the Chamber retains the power to review detention *proprio motu*,² and that the accused have the right to apply for release,³ in this particular case, the Chamber must first and foremost decide on the two pending Defence requests for judgment of acquittal.
3. The Chamber received all written and oral submissions needed to deliberate and decide on the Defence requests. As noted by the Majority, no date has been set for the presentation of evidence by the Defence. However, such an affirmation must be put into context. It must be recalled that the Prosecutor called the last witness in January 2018 and that she requested the submission of the majority of evidence in support of the charges already in 2017. Thus, if no date has been set for the presentation of evidence by the Defence, it has been due to procedural steps taken either by the Chamber, the Presiding Judge or the Defence.
4. Both Defence teams have requested judgment of acquittal and immediate release of Mr Gbagbo and Mr Blé Goudé. They have not requested interim or

¹ European Court of Human Rights, *Kalashnikov vs Russia* (47095/99), (2002) 114; *Kudia v Poland* (30210/96) Grand Chamber (2000) 110.

² See for example. *Prosecutor v. Katanga and Ngudjolo Chui*, Pre-Trial Chamber I, ICC-01/04-01/07-330, Decision on the powers of the Pre-Trial Chamber to review *proprio motu* the pre-trial detention of Germain Katanga, 18 March 2008, para. 9.

³ Article 60(3) of the Statute.

conditional release. What is necessary and must be decided without further ado are the two pending Defence requests. The Majority's decision to trigger *proprio motu* at this point in time the proposed review of detention is unreasoned. From a procedural perspective, it triggers once again a round of submissions that will ultimately distract the Chamber from deciding on the two Defence motions, which are pending before the judges since July 2018. Furthermore, such a *proprio motu* procedure, at a critical juncture of the trial in which a motion of acquittal is pending, and deliberations are on-going, would risk predetermining (or at least appearing to predetermine) issues related to the two pending Defence requests.

5. Accordingly, to safeguard the integrity of our deliberations in relation to the pending Defence requests, and for the fairness of the proceedings I cannot concur with the Majority's decision to call this hearing at this stage of the proceedings.

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



Judge Olga Herrera Carbuccia

Dated 10 December 2018

At The Hague, The Netherlands