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Annex 4: Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal of the Prosecutor against the oral verdict of Trial Chamber 1 of 15 January 2019 with written reasons issued on 16 July 2019

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Cour Pénale Internationale

International Criminal Court

Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza to the Judgment on the appeal of the Prosecutor against the oral verdict of Trial Chamber 1 of 15 January 2019 with written reasons issued on 16 July 2019

PROLEGOMENA

On the 31st of March 2021, the majority of the Appeals Chamber[1] (the 'Appeals Chamber's Majority') issued a judgment where they decided, Judge Bossa and myself dissenting, to confirm the decision of Trial Chamber I (the 'Trial Chamber') to grant Mr Gbagbo's and Mr Blé Goudé's no case to answer motions and acquit them of all charges. I am unable to agree with the decision of the Appeals Chamber's Majority to reject the first and the second grounds of the Prosecutor's appeal. I would have granted either ground of appeal and thus disagree with the Appeals Chamber's Majority's rejection of both grounds. Judge Bossa concurs with my disagreement regarding the rejection of the second ground appeal and, partly, with my views in the first ground of appeal. This appeal shows serious errors of law and procedure that have materially affected the Trial Chamber's decision and seriously undermined its reliability as well as the fairness and legality of the trial proceedings leading to such a decision. What has happened in this case is against the proclamation of justice and the object and purpose set out in the Preamble of the Rome Statute (the 'Statute'), and against the rights of the victims, as defined in article 68(3) of the Statute and in international human rights law. Therefore, I dissent completely from the outcome and the findings of the judgment of the Appeal Chamber's Majority, as expressed in this dissenting opinion.

Moreover, I am motivated to write this dissenting opinion for three reasons. First, I write because of my principled commitment to fairness and the proper administration of justice. This commitment is heightened at an international court of last resort, with aspirations of universality, such as the International Criminal Court ('ICC' or 'Court').

Second, the Statute, an international treaty entered into by States Parties of diverse legal cultures, established this Court as a *sui generis* system. It is neither common nor civil law, but rather a mixture of legal cultures (the 'Rome Statute System'). This system was carefully crafted on the basis of well-established principles of criminal law, universal human rights and peremptory norms of international law, such as the

[1] Judges Chile Eboe-Osuji, Howard Morrison and Piotr Hofmański.

principles of legality and due process of law, and the consequential guarantees of fairness. As a result, the Rome Statute System codifies a determined set of written norms that provides for a special balance that cannot be amended to introduce procedures that are not codified, such as the no case to answer procedure, without the agreement of the States Parties.

Third, the use of the no case to answer procedure, which is a common law institution that is not enshrined nor envisioned under the Statute and, thus, has no applicable rules of procedure and evidence, has completely disrupted the balance of the Rome Statute System in the case at hand. It not only disturbed the balance among legal cultures, but more importantly, the balance among the parties and participants in the case against Mr Gbagbo and Mr Blé Goudé.

It seriously affected the rights and expectations of most parties and participants, especially hundreds of Ivoirian victims of crimes against humanity who had no reason to expect that their pursuit of truth, justice and reparations would be affected by the application of such an uncertain procedure, alien to the Rome Statute System. Thus, by finalising the proceedings halfway through the trial, granting no case to answer motions, Judges Henderson and Tarfusser entered acquittals which are not in keeping with the object and purpose of the Statute and their duty as judges of this Court to find the truth.

This situation has clearly undermined the principles of fairness and due process of law on which the Rome Statute System is anchored. For the future, this situation has evidenced the impossibility and impracticability of implementing at the Court procedures that are not envisioned in the Statute, such as the no case to answer procedure. At the same time, importantly, it has shown that entering acquittals at the Court under the no case to answer procedure, without any written norm about it under the Statute, had the following effects:

i. Judges from different legal cultures were confronted, on their own initiative, with the difficult, if not impracticable, task of agreeing on common law issues that the States Parties decided not to incorporate in the Statute: the no case to answer procedure, the basis to enter

acquittals halfway through trial under such a procedure, and the standard of proof to make factual findings at that stage.

ii. This had an impact on the rights and the role of the victims that the Statute provides for under article 68(3). Under the assumption that the Prosecutor had presented her case and that it was thus the moment to entertain no case to answer motions before the accused presented their case, Judges Henderson and Tarfusser did not consider that the views and concerns of the victims, especially in the stages that would follow, could have an impact on the trial and thus made nugatory an effective participation of the victims. This affected the legitimacy of the Court, where justice must not only be done but also appear to be done.

Thus, my motivation to write this opinion is not only to express with clarity the issues and questions of law on which I disagreed with the Appeals Chamber's Majority regarding the first and second grounds of the Prosecutor's appeal. But, it is also to note the unsuitability of a procedure that is foreign to the Rome Statute System: the no case to answer procedure. With this opinion, I fundamentally hope (i) to promote legitimacy and respect for the rule of law, in accordance with the principles of legality and due process of law, and the rights of the parties and participants, (ii) to bring clarity and legal certainty for the parties and participants, as well as the international community, and (iii) to foster and materialise, through our judgments, the Statute's object and purpose—to put an end to impunity—through judgments that respect the internationally recognised human rights of both the accused and the victims.

We must not forget that this is a case about victims of murders, rapes, persecution and other inhumane acts committed as part of a widespread and systematic attack in Côte d'Ivoire. This is a case about Ivoirians, especially women, who marched in the streets for democracy, in the context of post-electoral violence. This is a case of victims who were persecuted, raped and in some instances killed for being perceived as supporters of a particular political candidate on the basis of their Muslim faith, ethnicity, or regional affiliation. We must not forget that the Statute is a victim-centred system. That is the *raison d'être* of this court. And this cannot be ignored by the judges, as has happened in this case.

I. KEY FINDINGS

1. The no case to answer procedure, which can prematurely lead to an acquittal before the trial is over, is not permissible under the Statute. It is not expressly foreseen in the Court's legal framework, nor is there a lacuna that could be filled by resorting to other sources of law under article 21(1)(b) or (c) of the Statute.

2. Notably, the no case to answer procedure cannot be based on the trial chambers' powers under article 64(6)(f) of the Statute. This provision only gives trial chambers the authority to regulate purely procedural matters, but it cannot be a basis to enter acquittals halfway through a trial. This would also violate the rights of victims under the Statute.

3. The Trial Chamber's decision in the present case to acquit Mr Gbagbo and Mr Blé Goudé had to comply with the mandatory requirements of article 74(2) and (5) of the Statute because this provision is applicable to all decisions of trial chambers on the guilt of accused persons. These mandatory requirements are essential safeguards for the fairness of the proceedings, proper decision-making on the substance of the case, and for the protections of the rights of all parties and participants.

4. The Trial Chamber's decision to acquit Mr Gbagbo and Mr Blé Goudé in the present case violated article 74(2) and (5) of the Statute in many respects. In my assessment, Judges Henderson and Tarfusser had not yet completed their decision-making process when they announced the verdict orally, in breach of said provision. Announcing a verdict orally, without having completed necessary agreements to write one decision with a full and reasoned statement of both judges' findings on the evidence and conclusions, made it impossible for the judges to write a different decision thereafter, or to find that, since their views on the no case to answer motions were incompatible, they could not write 'one decision', as is required under article 74(5) of the Statute.

5. The Trial Chamber should have informed the parties and participants clearly as to the applicable standard of proof for the no case to answer proceedings in order to comply with the due process of law and the fairness of the proceedings. The failure by Judges Henderson and Tarfusser to do so amounted to an error of law.

6. Assuming, *arguendo*, that no case to answer motions were possible in proceedings before this Court, the correct standard of proof would be whether, under a *prima facie* assessment, taking the evidence at its highest, a reasonable trial chamber *could* convict the accused, based on the evidence presented by the Prosecutor. In contrast, in the present case, Judge Henderson erroneously applied a higher standard of proof. Had he made a *prima facie* assessment, taking the evidence at its highest, he could have found that the applicable standard at the no case to answer stage had been met.

7. The errors identified materially affected the acquittals and the outcome of the no case to answer motions. Therefore, as per article 83(2) of the Statute, a new trial should have been ordered before a different trial chamber.

II. INTRODUCTION

8. The Appeals Chamber's Majority has decided to reject the two grounds of the Prosecutor's appeal against the acquittals of Mr Gbagbo and Mr Blé Goudé. In contrast, I would have granted either of the two grounds of appeal. Judge Bossa would have granted the second ground of appeal as well, and joined some of my views regarding the first ground of appeal.[2]

9. In this case, two judges of Trial Chamber I (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 to do so, as Judge Tarfusser himself observed.[3] Notably, 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 applicable standard of proof at the no case to

[2] *See* Dissenting Opinion of Judge Solomy Balungi Bossa, 31 March 2021, ICC-02/11-01/15-1400-Anx5, paras 45, 48.
[3] *See* Opinion of Judge Cuno Tarfusser, 16 July 2019, ICC-02/11-01/15-1263-AnxA (hereinafter: 'Judge Tarfusser's Opinion'), para. 65.

answer stage,[4] the applicability of article 74 of the Statute to the no case to answer decision,[5] and the system of admissibility of the evidence.[6]

10. In particular, as for the first ground of appeal, I find 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. These are errors of law and procedure that materially affected, and vitiated, the impugned decision. Moreover, as for the second ground of appeal, I find that their lack of agreement as to the standard of proof prevented them from making any valid 'findings on the evidence and conclusions'. Once again, these are errors of law and procedure that materially affected the impugned decision.

11. The chaos at trial started on 4 June 2018 when, despite the disagreements of the judges on the legal basis for no case to answer motions at the ICC and the applicable

[4] Speaking as a presiding judge of the Trial Chamber, Judge Tarfusser expressly said on 16 January 2019 that Judge Herrera Carbuccia was 'mistaken in stating that the majority has acquitted Mr Gbagbo and Mr Blé Goudé by applying the beyond a reasonable doubt standard' and that '[t]he majority limited itself to assessing the evidence submitted and whether the Prosecutor has met the onus of proof to the extent necessary for warranting the Defence to respond'. *See* Transcript of hearing, 16 January 2019, ICC-02/11-01/15-T-234-ENG, p. 4 lines 11-15. Despite of having said this, Judge Tarfusser six months later, on 16 July 2019, wrote in his opinion that the no case to answer proceedings 'have no place in the statutory framework of the Court and are unnecessary as a tool to preserve the interests and rights they are meant to serve', *and that the only applicable standard is 'beyond reasonable doubt*'. Judge Tarfusser's Opinion, para. 65. He further believed that 'Trial proceedings can only end either in acquittal or conviction, as emerging from article 74, read together with article 81'. Judge Tarfusser's Opinion, para. 65. *See also*, Transcript of hearing, 1 October 2018, ICC-02/11-01/15-T-221-Red-ENG, p. 18 lines 4-11, during which, Judge Tarfusser had already expressed the view that the procedure for a no case to answer motion could not be found in the structure of the Rome Statute. In contrast, Judge Henderson observed in his opinion that 'the key question to be determined in these proceedings, with respect to each charge, is whether the Prosecutor has submitted sufficient evidence in support of that charge such that a reasonable chamber could convict'. *See* Reasons of Judge Geoffrey Henderson, 16 July 2019, ICC-02/11-01/15-1263-AnxB-Red (hereinafter: 'Judge Henderson's Reasons'), para. 2.

[5] Judge Henderson stated in his opinion that 'article 74 does not […] provide the appropriate basis to render [...] decisions on motions for "no case to answer"'. Judge Henderson's Reasons, para. 13. In his view, '[t]he legal basis for the decision that the accused has no case to answer is thus article 66(2) of the Statute, which places the onus of proving the guilt of the accused squarely on the Prosecutor'. *See* Judge Henderson's Reasons, para. 15.

[6] As for the disagreement on the system of admissibility of evidence, Judges Tarfusser and Herrera Carbuccia had earlier decided, by majority, Judge Henderson himself dissenting, that the evidence submitted '[would] be deferred to the final judgment, except when an intermediate ruling [was] required under the Statute or otherwise appropriate'. Decision on the submission and admission of evidence, 29 January 2016, ICC-02/11-01/15-405, p. 10. However, Judge Henderson continued to hold a different position until the end of the case. Judge Henderson 'consider[ed] it necessary to re-state [his] disagreement' and that Judges Tarfusser and Herrera Carbuccia's 'approach does not strike the appropriate "balance" between the Chamber's discretion to rule on admissibility and relevance as well as its obligation to ensure that the trial is conducted in a fair and expeditious manner'. Judge Henderson's Reasons, para. 21.

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.[7] 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'.[8] While the two judges thus entered the acquittals without written reasons, Judge Herrera Carbuccia timely issued a dissenting opinion, duly reasoning her position, on the same day.[9] Judges Henderson and Tarfusser issued their written separate opinions six months later.[10]

12. Against this disorganised backdrop, the Prosecutor's appeal raised two grounds alleging errors of law and procedure. Under the first ground of appeal, the Prosecutor argues that Judges Henderson and Tarfusser erred by acquitting Mr Gbagbo and Mr Blé Goudé in violation of the mandatory requirements of article 74(5) of the Statute, or alternatively erred in the exercise of their discretion by doing so.[11] Under the second ground, the Prosecutor further argues that Judges Henderson and Tarfusser erred in law and/or procedure by acquitting Mr Gbagbo and Mr Blé Goudé without properly articulating and consistently applying a clearly defined standard of proof and/or approach to assessing the sufficiency of evidence. She further raises six examples to illustrate Judges Henderson and Tarfusser's disagreements on the standard of proof as well as other errors in Judge Henderson's evidentiary approaches.[12]

13. On appeal, the Appeals Chamber's Majority found that article 74 of the Statute applies to the decision granting the no case to answer motions of the accused and that

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[7] Second Order on the further conduct of the proceedings, 4 June 2018, ICC-02/11-01/15-1174, paras 9-10, *referring* to *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions, 3 June 2014, ICC-01/09-01/11-1334 (hereinafter: '*Ruto and Sang* Decision No. 5'), para. 16.
[8] Transcript of hearing, 15 January 2019, ICC-02/11-01/15-T-232-Eng (hereinafter: 'Oral Verdict'), p. 1, line 15 to p. 5, line 7.
[9] Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019, 15 January 2019, ICC-02/11-01/15-1234 (hereinafter: 'Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion').
[10] Judge Henderson's Reasons; Judge Tarfusser's Opinion.
[11] Prosecution Document in Support of Appeal, 17 October 2019, ICC-02/11-01/15-1277-Red (original confidential version filed on 15 October 2019) (hereinafter: 'Prosecutor's Appeal Brief'), paras 6-121.
[12] Prosecutor's Appeal Brief, paras 122-263.

the Prosecutor's appeal was correctly raised under article 81.[13] I agree with this finding. While I observe below in Section V that there is no legal basis under the Statute to entertain such motions, I nonetheless agree that the acquittals in this case were governed by, and had to meet, the requirements and guarantees of article 74. In my view, the no case to answer procedure is not envisioned in the Statute. I consider it inapplicable at the Court, not only because the Statute expressly provides for specific avenues to finish the trial (articles 65 and 74(5)), and the no case to answer procedure is not one of them, but also because it is not in keeping with the object and purpose of the Statute, the principles of legality and due process of law, and the related guarantees that ensure fairness to all parties and participants. That said, I am of the view that Judges Henderson and Tarfusser erroneously allowed motions to be filed under the no case to answer procedure and prematurely put an end to this case by granting such motions, halfway through the trial, to acquit the accused. Yet, even if their decision to acquit and the procedure to reach this decision did not meet the requirements of article 74, it was the final decision at trial. Therefore, the Prosecutor was entitled to bring her appeal against such a final, yet erroneous, decision, under article 81.

14. Nevertheless, the Appeals Chamber's Majority further found that Judges Henderson and Tarfusser did not commit an appealable error in the way they applied article 74(5),[14] and that they made a fully informed decision.[15] I disagree with these findings. In my view, the two judges did not issue 'one decision', 'with a full and reasoned statement', in writing, including their 'findings on the evidence and conclusions' or a 'summary thereof', nor were they able to reach 'one decision', fully informed, given their disagreements on essential points that were necessary to form a common *ratio decidendi*.

15. Judges Bossa and Hofmański partly agree with me in that Judges Henderson and Tarfusser did not strictly comply with the requirement to issue a decision in

[13] Judgment on the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions, 31 March 2021, ICC-02/11-01/15-1400 (hereinafter: 'Judgment of the Appeals Chamber's Majority'), section VI(B)(3).
[14] Judgment of the Appeals Chamber's Majority, section VI(C)(4).
[15] Judgment of the Appeals Chamber's Majority, section VI(D)(2).

writing and that this amounted to an error of law.[16] In particular, Judge Bossa agrees that the legal requirements and guarantees of article 74(2) and (5) of the Statute are mandatory, and that the parties and participants at this Court, as well as the States Parties and the public, have an expectation that trials be conducted as per the statutory framework and its procedural guarantees, and in particular, that an acquittal or conviction is entered in compliance with the requirements of article 74. In addition, Judge Bossa agrees with me in that Judges Henderson and Tarfusser did not comply with the requirements to issue a summary of its statement on the findings and conclusions and to issue its decision in time. Judge Bossa further agrees with my finding that Judges Henderson and Tarfusser did not comply with the requirement of article 74(2) to assess the evidence and the entire proceedings and that they failed to agree on the system of admissibility of the evidence. [17]

16. I disagree with the subsequent findings of the Appeals Chamber's Majority that Judges Henderson and Tarfusser had made a fully informed decision by the time they announced the verdict orally,[18] and that their failure to issue a written decision did not materially affect the acquittals, because, in its view, had Judges Henderson and Tarfusser made the acquittals in writing, the decision would have been the same.[19] I am unable to agree with their view that the error did not materially affect the impugned acquittals. I consider that, having entered the acquittal orally without providing the Trial Chamber's findings on the evidence and conclusions, Judges Henderson and Tarfusser were later prevented from writing anything different from what they had orally announced, when they finally engaged in the process of writing their findings on the evidence and conclusions. Had they completed this process without having previously entered the oral acquittal, they could have been able to find that the evidence could be sufficient to convict. Thus, I would have granted the first ground of appeal.

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[16] However, Judges Bossa and Hofmański did not consider that this error materially affected the impugned acquittals. Judgment of the Appeals Chamber's Majority, para. 189. *See also* Separate concurring opinion of Judge Piotr Hofmański, 31 March 2021, ICC-02/11-01/15-1400-Anx3, para. 9. *See also* Dissenting Opinion of Judge Solomy Balungi Bossa, 31 March 2021, ICC-02/11-01/15-1400-Anx5, paras 47-48.
[17] *See* Dissenting Opinion of Judge Solomy Balungi Bossa, 31 March 2021, ICC-02/11-01/15-1400-Anx5.
[18] Judgment of the Appeals Chamber's Majority, section VI(D)(2).
[19] Judgment of the Appeals Chamber's Majority, para. 265.

17. As for the second ground of appeal, the Appeals Chamber's Majority found that 'there is no lack of clarity or consensus between the judges in the [Trial Chamber's] majority as to how to approach the evidence at this stage of the proceedings'.[20] On the contrary, I find that, first, Judges Henderson and Tarfusser erred in failing to agree on a standard of proof when entering the acquittals. Second, 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. Third, in his separate opinion, Judge Henderson further erred in failing to make a *prima facie* assessment of the evidence, as he should have done at the no case to answer stage. Fourth, I also find errors in the evidentiary approaches that Judge Henderson applied when assessing the evidence, namely, his erroneous approach to assessing circumstantial evidence, corroboration, and evidence of sexual violence. All these are errors of law and procedure that also affected the fairness of the proceedings, materially affected the acquittals and rendered them unreliable. I would have granted the second ground of appeal and thus ordered a retrial. In this regard, I coincide with the views and the outcome expressed in Judge Bossa's dissenting opinion.[21]

18. As for the structure of this opinion, Section III presents the relevant background in this appeal. Section IV lays out the issues that will be addressed. Section V starts to address a preliminary crucial issue in this case: the impracticalities of the no case to answer procedure at the ICC. Section VI turns to address the issues arising under the first ground of appeal, and Section VII addresses those arising in relation to the second ground. Having found errors that materially affected the acquittals in the case at hand and the process to enter such acquittals, in Section VIII, I describe the relief that I would have found appropriate in this appeal. Finally, Section IX summarises the conclusions of this opinion.

19. I highlight that, before entertaining the two grounds of appeal, I will first elaborate in Section V on the no case to answer procedure, as a preliminary and crucial issue in this appeal, in order to understand what led to the major failures in this case, as well as the impracticalities of a procedure that is not established in the Statute

[20] Judgment of the Appeals Chamber's Majority, para. 339.
[21] Dissenting Opinion of Judge Solomy Balungi Bossa, 31 March 2021, ICC-02/11-01/15-1400-Anx5, para. 45.

nor regulated in any of the norms of the statutory legal framework. Its indiscriminate use can generate a chaotic situation, distorting the trial proceedings at this Court. As explained below, contrary to the *Ntaganda* (OA6) judgment, 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 (the 'Rules'). Furthermore, 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 when entering judgments on the guilt of the accused. Also, transplanting the no case to answer procedure from common law jurisdictions without having previously amended the Statute implies a violation of the principles of legality and *pacta sunt servanda*, and of the rights of the victims under the Statute or the Rules and international human rights law.

20. As further elaborated below in Section VI, after an in-depth analysis of the first ground of appeal, I have 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. I observe that the above-mentioned breaches amount, at the same time, to errors of law and procedure. I have found 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.

21. Regarding the second ground of appeal, I dissent from the approach and outcome of the Appeals Chamber's Majority regarding the second ground of appeal. According to the Appeals Chamber's Majority, a correct interpretation of the standard of proof applicable at the no case to answer stage 'necessarily entails assessment of credibility and reliability'.[22] In the view of the Appeals Chamber's Majority, if the prosecution's case 'upon its completion, is not strong enough to satisfy the standard of

[22] *See* Judgment of the Appeals Chamber's Majority, para. 315.

proof beyond reasonable doubt *at that stage*, a trial chamber may reasonably take the view that the evidence up to that point has been insufficient to support a conviction'.[23] Although I find no basis in the Statute to entertain no case to answer motions at this Court, as elaborated below, I nevertheless find that the correct standard of proof, as applied by the *ad hoc* tribunals and representative common law jurisdictions, though not uniform, is not as high as beyond reasonable doubt. In my view, it requires a *prima facie* assessment, where a reasonable trial chamber, taking the evidence at its highest, could convict the accused. Judge Henderson, who said that he was writing for the majority of the Trial Chamber, erroneously applied a higher standard of proof. That said, I further consider that Judges Henderson and Tarfusser erred in law and procedure by failing to agree on the applicable standard of proof and, further, 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. While that would have been sufficient to grant the Prosecutor's second ground of appeal, in Section VII below, I will expand on the arguments that the Appeals Chamber's Majority decided not to address or addressed in a way with which I am unable to agree. In this regard, I will further address Judge Henderson's erroneous evidentiary approaches to assessing circumstantial evidence, corroboration, and evidence of sexual violence, which, in my view, amount to errors of law. When addressing the arguments of the Prosecutor's second ground of appeal, I will address, where appropriate, the relevant parts of the examples she found to illustrate the errors under this ground of appeal.

22. Regarding the appropriate relief, as further explained below in Section VIII, under article 83(2) of the Statute, having granted either ground of appeal, I would have ordered, as appropriate remedy, a retrial before a new trial chamber. That said, I consider that the new trial chamber would have had the possibility to admit testimonies previously recorded at the original trial, and potentially excuse the accused from being present at trial, as per rules 68 and 134 *ter* of the Rules.

23. Having elaborated on the analysis introduced above, Section IX below summarises my findings and the conclusions of this opinion.

[23] Judgment of the Appeals Chamber's Majority, para. 311 (emphasis in original).

24. Finally, for outreach purposes, Section X appends summaries of this opinion, in English, French and Spanish.

III. RELEVANT BACKGROUND

A. Impugned decisions

1. Oral verdict of the acquittals

25. On 15 January 2021, the majority of Trial Chamber I, Judge Herrera Carbuccia dissenting, issued an oral decision, granting the no case to answer motions, thereby prematurely ending the trial by acquitting Mr Gbagbo and Mr Blé Goudé. According to Judges Henderson and Tarfusser, 'the Prosecutor [had] not satisfied the burden of proof in relation to several core constitutive elements of the crimes as charged'.[24] Having announced this verdict orally, Judges Henderson and Tarfusser stated that they would provide full and detailed reasons as soon as possible.[25] In their view, the need to provide a full reasoning with the decision was outweighed by the Chamber's obligation to interpret and apply the Statute in line with international human rights law.[26] They observed that an overly restrictive approach to Rule 144(2) would oblige the Chamber to delay proceedings that would not justify maintaining the accused in detention given the volume of evidence.[27]

26. On the same day, Judge Herrera Carbuccia issued a dissenting opinion, timely, duly reasoned and in writing. According to Judge Herrera Carbuccia, article 74(5) of the Statute 'sets the requirements for the judgment that decides either on the acquittal

[24] Oral Verdict, page 3, lines 2-4. Judges Henderson and Tarfusser held that they deemed it no longer necessary for the Defence to continue submitting evidence considering the Prosecutor failed to satisfy the burden of proof relating to 'core constitutive elements of the crimes as charged'. *See* Oral Verdict, p. 3, lines 2-4. In particular, Judges Henderson and Tarfusser stated that the Prosecutor failed to: identify a 'common plan' to keep Mr Gbagbo in power, prove the alleged policy to attack the civilian population on the basis of the alleged pattern of violence and other circumstantial evidence, demonstrate that the alleged crimes were committed in furtherance of a State or organisational policy to attack the civilian population, demonstrate that the public speeches by the defendants constituted ordering, soliciting or inducing the alleged crimes or that either knowingly or intentionally contributed to the commission of such crimes. *See* Oral Verdict, p. 3, lines 6-17.
[25] Oral Verdict, p. 3, line 18. *See also* p. 3, lines 19-23 (noting that, pursuant to Rule 144(2) of the Rules of Procedure and Evidence (hereinafter: 'Rules'), the Chamber has to provide copies of its full decision 'as soon as possible' following a decision, without a 'time limit in this regard').
[26] Oral Verdict, p. 3, lines 24-25 to p. 4, lines 1-2.
[27] Oral Verdict, p. 4, lines 3-9.

or the conviction of the accused'.[28] In her view, two issues arise from an oral decision:

> 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?
>
> Does Article 74(5) of the Statute allows [*sic*] 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?[29]

27. Regarding the issue of a possible lacuna in the wording of article 74(5) of the Statute, Judge Herrera Carbuccia clarifies that '[a]rticle 21(1) of the Statute clearly provides that that [*sic*] the Court shall apply in the first place, the Statute'[30] and 'other sources of law, including general principles of law derived by the Court from national legislation, may only be applied if there is a lacuna in the primary sources of law.'[31] Therefore, such application must obey the order described in article 21(1)(b) of the Statute. However, the use of secondary sources of law is limited and only justifiable when there is a lacuna. In addition, '[t]he 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.'[32]

28. In this particular case, Judge Herrera Carbuccia considered that there is no lacuna since '[a]rticle 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'.[33] The Chamber, according to Judge Herrera Carbuccia, can exercise its discretion by deciding 'whether it will read in open court: (a) a summary, or (b) the full written decision'.[34] Thus, '[a]rticle 74(5) of the Statute […] contains one substantive obligation'[35] and 'the Statute requires the Trial Chamber to provide "a full and reasoned statement of [its] findings on the evidence and conclusions"'[36] and that

[28] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 11.
[29] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 12.
[30] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 13.
[31] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 14.
[32] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 15.
[33] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 17.
[34] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 17.
[35] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 19.
[36] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 20.

requirement is also confirmed by Rule 144 of the Rules since 'reasoned judgments allow the parties and the public to know the legal and factual basis upon which the accused has been convicted or acquitted.'[37]

29. Judge Herrera Carbuccia concluded that Judges Henderson and Tarfusser 'violated [their] obligation to render one fully reasoned judgment'[38] given '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 […].'[39] Judges Henderson and Tarfusser stated that their decision 'will be issued in due course and, obviously, as soon as possible'.[40] Judge Herrera Carbuccia recalled that '[a]lthough 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"',[41] and that '[w]hat is reasonable will depend on the nature and complexity of each case.'[42]

30. According to Judge Herrera Carbuccia, in the present case, '[t]he right of the accused to be tried without undue delay 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.'[43] Furthermore, '[t]he right to a fair trial applies both to the Defence and the Prosecutor. 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 is hindered'[44] and '[v]ictims' right to seek justice and ultimately reparations is equally thwarted.'[45] In conclusion, the Dissenting Opinion says 'that the judges have breached fundamental rights of fair trial which undermine

[37] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 22.
[38] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 26.
[39] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 26.
[40] Transcript of hearing, 22 November 2018, ICC-02/11-01/15-T-230-ENG, p. 23, lines 10-11.
[41] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 28.
[42] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 29.
[43] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 35.
[44] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 35.
[45] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 35.

judicial impartiality and integrity when they decided to issue a judgment of acquittal orally and without reasons.'[46]

31. As far as the Defence motions are concerned, Judge Herrera Carbuccia recognises 'that every accused is presumed innocent until proven guilty, and the right to be released immediately in case of acquittal.'[47] In her view, however, even though the Trial Chamber 'has previously stated that a decision to allow a "no case to answer" or similar procedure is discretion of the Chamber'[48] such discretion '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.'[49]

32. Judge Herrera Carbuccia considered that '[t]he 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.'[50] Therefore, '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.'[51]

33. As far as the merits of the evidence submitted are concerned, Judge Herrera Carbuccia declares 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.'[52]

2. *Separate written opinions*

(a) Written Reasons, 16 July 2019

34. On 16 July 2019, the Trial Chamber issued an 8-page document entitled 'Reasons for the Oral Decision' and reproducing the procedural history and part of the

[46] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 36.
[47] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 37.
[48] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 39.
[49] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 39.
[50] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 41.
[51] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 41.
[52] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 48.

transcript of the 15 January 2019 oral verdict.[53] Appended to this document, Judges Henderson and Tarfusser each filed a separate opinion,[54] and Judge Herrera Carbuccia issued a further dissenting opinion.[55]

(b) Judge Henderson's Opinion

35. At the outset, Judge Henderson considered that article 74 of the Statute is the incorrect basis to render decisions on no case to answer motions, and that it should be article 66(2), given that a decision that there is no case to answer clears the accused of all charges and means that they cannot be tried again for the same facts and circumstances,[56] though it will have the same legal effect as an acquittal.

36. Judge Henderson further noted that due to the lack of resources to make expeditious determinations[57], he had not 'systematically assessed the credibility and reliability of the Prosecutor's testimonial evidence'.[58] He observed that he had chosen instead to take the Prosecution's case 'at its highest/most compelling'.[59]

37. Judge Henderson highlighted concerns over the Prosecutor's approach to the methodology implemented to assess the evidence, including: (i) the documentary and other non-oral evidence (lacking authenticity[60]), (ii) testimony (lacking reliability and credibility[61]), (iii) hearsay (lacked 'the evidential basis to properly evaluate its probative value'[62]), (iv) lack of corroboration, affecting the evidence's accuracy even if not necessary[63] and (v) reliance on circumstantial evidence that, if not narrowly

[53] Reasons for 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 Blé Goudé Defence no case to answer motion, 16 July 2019, ICC-02/11-01/15-1263.
[54] Judge Henderson's Reasons; Judge Tarfusser's Opinion.
[55] Dissenting Opinion Judge Herrera Carbuccia, 16 July 2019, ICC-02/11-01/15-1263-AnxC-Red (original confidential version filed on the same day) (hereinafter: 'Judge Herrera Carbuccia's Dissenting Opinion 16 July 2019').
[56] Judge Henderson's Reasons, paras 13-17.
[57] Judge Henderson's Reasons, para. 29.
[58] Judge Henderson's Reasons, para. 41.
[59] Judge Henderson's Reasons, paras 30.
[60] Judge Henderson's Reasons, para. 32-38.
[61] Judge Henderson's Reasons, paras 39-41.
[62] Judge Henderson's Reasons, paras 42-45.
[63] Judge Henderson's Reasons, paras 46-50.

evaluated, fails to satisfy the beyond a reasonable doubt standard given that it largely relies on reasonable inference.[64]

38. In his opinion, Judge Henderson explained the applicable standard for assessing the evidence in the context of no case to answer motions. Based on the standard decided in *The Prosecutor v Ruto and Sang*,[65] Judge Henderson observed that 'the key question to be determined in these proceedings, with respect to each charge, is whether the Prosecutor has submitted sufficient evidence in support of that charge such that a reasonable chamber could convict'.[66] In regard to the assessment of reliability and credibility of the evidence in no case to answer proceedings, Judge Henderson noted that even though '[a]ccording to the traditional no case to answer standard, as initially adopted by Trial Chamber V(A), trial chambers should not assess reliability and credibility but should consider the Prosecutor's evidence at its highest,'[67] in the present case, 'the [Trial] Chamber must engage in a full review of the evidence submitted and relied upon by the Prosecutor in order to determine whether such evidence is sufficient to support a conviction on the respective charge or charges.'[68]

39. In regard to the legal bases of a no case to answer decision, Judge Henderson acknowledged that 'the ICC's legal framework does not contain any specific provisions regulating the current procedure'.[69] He indicated, however, that '[i]n the context of a trial conducted within an adversarial framework, a decision that there is "no case" is made where a trial chamber concludes that the Prosecutor, having presented all her evidence, has not discharged her evidential burden by submitting sufficient evidence capable of supporting a conviction with respect to one or more of the charges'.[70] In this respect, Judge Henderson stated that 'the issue to be decided is whether the Prosecutor has discharged that burden.'[71] He noted that, therefore, '[t]he legal basis for the decision that the accused has no case to answer is thus article 66(2)

[64] Judge Henderson's Reasons, paras 51-52.
[65] Ruto and Sang Decision No. 5, para. 32.
[66] Judge Henderson's Reasons, para. 2.
[67] Judge Henderson's Reasons, para. 3, *referring to* Ruto and Sang Decision No. 5, para. 24.
[68] Judge Henderson's Reasons, para. 8.
[69] Judge Henderson's Reasons, para. 10.
[70] Judge Henderson's Reasons, para. 14.
[71] Judge Henderson's Reasons, para. 14.

of the Statute, which places the onus of proving the guilt of the accused squarely on the Prosecutor. This burden never shifts'.[72]

40. In relation to the legal consequences of a decision that there is no case to answer, Judge Henderson considered that '[t]he legal effect of the decision that the Prosecutor has submitted insufficient evidence to support a conviction on a charge, results in the discontinuation of the proceedings with respect to that charge and the acquittal of the accused on that or those evidentially unsupported charges'.[73] Accordingly, Judge Henderson further observed that 'even though a decision that there is no case to answer is not a formal judgment of acquittal on the basis of the application of the beyond reasonable doubt standard in accordance with article 74 of the Statute, it has an equivalent legal effect in that the accused is formally cleared of all charges and cannot be tried again for the same facts and circumstances', [74] and that '[t]he only possible exception to this is when the Prosecutor has not been able to present her case fully due to significant interference *during* the trial proceedings'.[75]

(c) Judge Tarfusser's Opinion

41. In his opinion, Judge Tarfusser observed that he agrees with Judge Henderson's findings that the evidence presented is 'flimsy, inconsistent or otherwise inadequate'.[76] He further noted that he agrees with Judge Henderson's views that the reading of the accused's conduct based on the facts and evidence lacked probative value and was 'highly confusing and unpersuasive'.[77] Judge Tarfusser further highlighted the need for focussed preparation to reduce the lengthy proceedings.[78]

42. That said, Judge Tarfusser pointed out the divergence in relation to the standard of proof with Judge Henderson,[79] and found that Judge Henderson's 'methods and style are not only unnecessary as a matter of law but also obstructive to the very accessibility and comprehensibility of international criminal justice'.[80] Judge

[72] Judge Henderson's Reasons, para. 15.
[73] Judge Henderson's Reasons, para. 16.
[74] Judge Henderson's Reasons, para. 17.
[75] Judge Henderson's Reasons, para. 17.
[76] Judge Tarfusser's Opinion, para. 10. .
[77] Judge Tarfusser's Opinion, para. 15.
[78] Judge Tarfusser's Opinion, para. 23-38.
[79] Judge Tarfusser's Opinion, paras 8-9.
[80] Judge Tarfusser's Opinion, para. 9.

Tarfusser further disagreed with Judge Henderson with regard to the evidence of the uncharged incidents in that far from being unreliable to corroborate the evidence of the five charged incidents, they 'all fall outside the scope of the charges'.[81]

43. Importantly, Judge Tarfusser stressed that no case to answer proceedings have no place in the statutory framework of the Court and are unnecessary as a tool, referencing beyond reasonable doubt as the appropriate evidentiary standard, also stressing that the only way to terminate trial proceedings is through acquittal or conviction.[82]

44. Judge Tarfusser found that 'there is no evidence in respect of which the Majority's determination as to the need for a defence case would have changed depending on the standard applied', and found that the circumstantial evidence does not support the charges against the accused.[83] He concluded that no link exists between the charged incidents and the accused.[84]

(d) Judge Herrera Carbuccia's Dissenting Opinion

45. Differing from Judge Henderson in several respects as to the assessment of evidence, Judge Herrera Carbuccia considered that sufficient evidence existed to conclude that a reasonable trier of fact could be satisfied[85] and she noted that discrepancies between witness accounts 'are not a bar to their reliability'.[86] She takes 'the view that the aim of permitting submissions of no case to answer is not to terminate a case prematurely.'[87]

46. The test applied by Judge Herrera Carbuccia in order to assess the evidence was 'that of "whether there is evidence on which a reasonable Trial Chamber could convict", and such determination should be made on the basis of the evidence as a whole'.[88] Therefore, in her view, at this moment of the procedure 'an assessment of the credibility of the evidence […] is exceptional and may be made only where the

[81] Judge Tarfusser's Opinion, para. 48. *See also* paras 65-74.
[82] Judge Tarfusser's Opinion, para. 65.
[83] Judge Tarfusser's Opinion, para. 68 and para. 47.
[84] Judge Tarfusser's Opinion, para. 76.
[85] Judge Herrera Carbuccia's Dissenting Opinion 16 July 2019, paras 97-113, 109, 141, 136, 75, 213, 217-218, 335-336.
[86] Judge Herrera Carbuccia's Dissenting Opinion 16 July 2019, para. 126.
[87] Judge Herrera Carbuccia's Dissenting Opinion 16 July 2019, para. 5.
[88] Judge Herrera Carbuccia's Dissenting Opinion 16 July 2019, para. 26.

evidence in question is incapable of belief by any reasonable Trial Chamber and, even then, within certain parameters'.[89] The opinion goes further to explain that 'to be "incapable of belief", the evidence must be obviously incredible or unreliable'[90] which does not seem to be in the present case.

B. The Prosecutor's appeal

47. The Prosecutor raises two grounds of appeal. Under her first ground of appeal, she argues that Judges Henderson and Tarfusser erred by acquitting Mr Gbagbo and Mr Blé Goudé in violation of the mandatory requirements of article 74(5) of the Statute, or alternatively erred in the exercise of their discretion by doing so.[91] In her view, convictions and acquittals must comply with specific legal requirements in article 74(5); this, to ensure all have full trust in it and regard it as legitimate.[92] She alleges that Judges Henderson and Tarfusser failed to comply with the requirements; there was an oral acquittal, unreasoned, and not fully informed.[93] According to the Prosecutor, the decision was unlawful and cannot produce the effect of an acquittal; the deficiencies were not cured by the provision of reasons later.[94]

48. In her second ground of appeal, the Prosecutor avers that Judges Henderson and Tarfusser erred in law and/or procedure by acquitting Mr Gbagbo and Mr Blé Goudé without properly articulating and consistently applying a clearly defined standard of proof and/or approach to assessing the sufficiency of evidence.[95] In her view, conformity with the applicable law also requires that rules are applied predictably and consistently; they must be clear from the start for parties and the public and should not change in the course of the trial.[96] The Prosecutor argues that 'the procedure was chaotic and fractured'; the 'no case to answer' rules were not clear to the parties, participants or within the Chamber. The Prosecutor brings six examples to show that Judge Henderson was equivocal and sometimes contradictory as to the evidentiary standards and approaches to apply in assessing the sufficiency of the evidence at this

[89] Judge Herrera Carbuccia's Dissenting Opinion 16 July 2019, para. 27.
[90] Judge Herrera Carbuccia's Dissenting Opinion 16 July 2019, para. 40.
[91] Prosecutor's Appeal Brief, paras 6-121.
[92] Prosecutor's Appeal Brief, para. 2.
[93] Prosecutor's Appeal Brief, para. 2.
[94] Prosecutor's Appeal Brief, para. 2.
[95] Prosecutor's Appeal Brief, paras 122-263.
[96] Prosecutor's Appeal Brief, para. 3.

stage.[97] According to the Prosecutor, the proceedings were effectively ruptured and, through the acquittal decision, the Prosecutor, victims and public were prejudiced.[98]

IV. ISSUES

49. I consider that the following issues must be clarified. First, as a preliminary crucial issue that impacted the trial proceedings in this case, and as the basis of all of the problems in this case, it is necessary to address the following question:

> Whether the no case to answer procedure is permissible under the Statute.

50. Having addressed that issue, the following issues are raised under the first ground of appeal:

i. Whether article 74 is mandatorily applicable, in particular, its paragraph (5), as argued by the Prosecutor, and paragraph (2);

ii. Whether the Trial Chamber complied with the legal requirements and guarantees of article 74, in particular those under paragraph (5) (i.e., '[t]he Trial Chamber's decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions'; '[t]he Trial Chamber shall issue one decision'; '[t]he decision or a summary thereof shall be delivered in open court'), and additionally, paragraph (2) (i.e., the 'Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings');

iii. Whether the acquittals of 15 January 2019, the opinions of 16 July 2019, or all of the above, were materially affected by lack of compliance with the legal requirements and guarantees of article 74 of the Statute.

51. As for the second ground of appeal, the issues are as follows:

[97] Prosecutor's Appeal Brief, para.3.
[98] Prosecutor's Appeal Brief, para. 3.

i. What is the correct standard of proof at the no case to answer stage and whether it was correctly applied in this case;

ii. Whether Judges Henderson and Tarfusser had a clear, agreed and correct standard of proof in mind when entering the acquittals on 15 January 2019;

iii. Whether there were other inconsistencies regarding Judge Henderson's approach to the evidence; and

iv. Whether the acquittals were materially affected.

V. PRELIMINARY AND CRUCIAL ISSUE: THE IMPRACTICALITIES OF THE NO CASE TO ANSWER PROCEDURE AT THE ICC

52. Embedded within both grounds of appeal, and causing chaos in this case, is the following issue: whether the no case to answer procedure is permissible under the Statute. This section will analyse the issue before entertaining the two grounds of the Prosecutor's appeal in the subsequent sections.

A. Findings of the Judgment of the Appeals Chamber's Majority with which I disagree

53. In the judgment of the majority,[99] the Appeals Chamber recalls that in *The Prosecutor v. Ntaganda* (OA6), it decided that the Court's framework permits a no case to answer procedure under article 64 of the Statute.[100] As elaborated below, I find convincing reasons to depart from the Appeals Chamber's previous jurisprudence on the no case to answer.[101]

[99] Judgment of the Appeals Chamber's Majority.
[100] Judgment of the Appeals Chamber's Majority, paras 104-105.
[101] I recall that the Appeals Chamber may depart from its jurisprudence; all it needs is to find 'convincing reasons' justifying such a departure. *See The Prosecutor v. Jean-Pierre Bemba Gombo*, Reasons for the 'Decision on the Participation of Victims in the Appeal against the "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa"', 20 October 2009, ICC-01/05-01/08-566 (OA2), para. 16. In an interlocutory appeal in the *Gbagbo and Blé Goudé* case, the Appeals Chamber held that 'absent "convincing reasons" it will not depart from its previous decisions'. *See* Reasons for the 'Decision on the "Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo's detention (ICC-02/11-01/15-134-Red3)"', 31 July 2015, ICC-02/11-01/15-172 (OA6), para. 14.

54. In particular, the Appeals Chamber's Majority, quoted, with approval, the following paragraphs of the *Ntaganda* (OA6) judgment:

> 42. As a prerequisite to assessing Mr Ntaganda's grounds of appeal, the Appeals Chamber must first consider whether a 'no case to answer' procedure is permissible under the legal framework of the Court.
>
> 43. In this regard, the Appeals Chamber observes that the Court's legal texts do not expressly provide for a 'no case to answer' procedure. Moreover, the Appeals Chamber is not aware of any proposals made or discussions held during the drafting of the Statute or Rules of Procedure and Evidence ("Rules") in relation to such a procedure.
>
> 44. Nevertheless, in the view of the Appeals Chamber, a 'no case to answer' procedure is not inherently incompatible with the legal framework of the Court. A Trial Chamber may decide to conduct such a procedure based on its power to rule on relevant matters pursuant to article 64(6)(f) of the Statute and rule 134(3) of the Rules. 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.
>
> 45. In view of the foregoing, the Appeals Chamber finds that while the Court's legal texts do not explicitly provide for a 'no case to answer' procedure in the trial proceedings before the Court, it nevertheless is permissible. A Trial Chamber may, in principle, decide to conduct or decline to conduct such a procedure in the exercise of its discretion.

55. The Appeals Chamber's Majority went on to 'reiterate[] the judicial precedent set so clearly in the foregoing pronouncements', asserting that '[t]he institution of "no case to answer" proceedings is a common feature of criminal procedural law at international courts and tribunals'.[102] To support this, the Appeals Chamber's Majority said:

> There has been a general recognition of the 'no case to answer' institution as a proper feature of the conduct of international criminal proceedings. The procedure is evident in rule 98*bis* of the ICTY Rules, rule 98*bis* of the ICTR Rules, rule 98 of the SCSL Rules, rule 167 of the STL Rules, rule 130 of the KSC Rules and rule 121 of the IRMCT Rules. All of them provide(d) for the no case to answer procedure.[103]

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[102] Judgment of the Appeals Chamber's Majority, para. 104, *referring to 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 (OA6) (hereinafter: '*Ntaganda* OA6 Judgment'), paras 42-45.
[103] Judgment of the Appeals Chamber's Majority, fn. 208.

56. However, as noted below, regardless of the rules and practices of other tribunals, the applicable law at the ICC, pursuant to article 21 of the Statute, makes the no case to answer motion, as well as any decision entertaining it, incompatible with the plain wording of the Statute, its object and purpose, the intention of the drafters, and its underlying principles. Notably, while the rules of procedure and evidence of the tribunals cited by the Appeals Chamber's Majority have a rule expressly providing for the no case to answer motion, the Statute, the Rules and the Regulations of the ICC do not have any such express provision. Entertaining no case to answer motions at the ICC without having previously amended the Statute and the Rules would be against the principles of legality and *pacta sunt servanda*, and the internationally recognised human rights of all parties and participants.

57. Moreover, although a previous composition of the Appeals Chamber[104] held in *Ntaganda* (OA6) that the no case to answer procedure was permissible,[105] it did so after finding, on the basis of insufficient research, that it was 'not aware of *any* proposals made or discussions held during the drafting of the Statute or the Rules of Procedure and Evidence […] in relation to such a procedure'.[106] Contrary to that finding, more expansive research on the drafting history shows that there was a proposal to incorporate in the Rules a provision with similar language to that which provides for the no case to answer procedure in the *ad hoc* tribunals.[107] However, this proposed rule was ultimately not included in, and thus implicitly rejected from, the Rules.

58. Moreover, the *Ntaganda* (OA6) judgment goes on to find that a trial chamber 'may decide to conduct such a procedure based on its power to rule on relevant matters pursuant to article 64 (6) (f) of the Statute and rule 134 (3) of the Rules'.[108] However, as explained below, article 64(6)(f) of the Statute grants judges discretion

[104] Besides two judges from the current composition (Judges Howard Morrison and Piotr Hofmański), the decision was made by two judges from the former composition of the Appeals Chamber (Judges Sanji Mmasenono Monageng (Presiding) and Christine Van den Wyngaert), and a trial judge sitting *ad hoc* (Judge Raul Cano Pangalangan).
[105] *Ntaganda* OA6 Judgment, para. 45.
[106] *Ntaganda* OA6 Judgment, para. 43 (emphasis added).
[107] Working Group of the American Bar Association, Section of International Law and Practice, Draft Rules of Procedure and Evidence for the International Criminal Court. Prepared by a Working Group of the American Bar Association, Section of International Law and Practice, 10 February 1999, Rule 95.
[108] *Ntaganda* OA6 Judgment, para. 44.

for purely procedural issues, as opposed to substantive matters such as a determination on the guilt or otherwise of the accused through the no case to answer procedure. Moreover, extending the scope of article 64(6)(f) of the Statute in this manner ignores the requirements of article 74 of the Statute to enter a judgment on such a substantive matter.

59. As explained below, article 21(1) of the Statute is the starting point in the analysis on whether or not the no case to answer procedure can be entertained at the ICC. Subparagraph 1(a) provides that the Court must apply, in the first place, the Statute, the Elements of Crimes and the Rules. Subparagraphs (1)(b) and (1)(c) cannot be applied unless there is a lacuna in the sources provided by subparagraph (1)(a).[109]

60. The criminal process under the Rome Statute System is *sui generis* and includes fundamental principles from all legal cultures, including both common and civil law. It provides for criminal proceedings that are not absolutely adversarial between prosecution and defence, as the victims have standing to present their views and concerns, based on the evidence, and seek reparations, within these proceedings. The purpose of criminal proceedings, under the Statute, is threefold: to reach a final determination on (i) the truth, (ii) the liability of the accused and (iii) the reparations award for the victims. While the latter is contingent on a final determination finding the accused guilty beyond reasonable doubt, the judges of this Court must always establish the judicial truth, as their procedural duty, regardless of whether or not the accused is found guilty.

61. Accordingly, taking this procedural design into account, I am of the view that nothing in the Statute, the Elements of Crimes or the Rules contains any provision allowing for a motion to finish the trial prematurely without having determined the truth on the basis of the evidence and the entire proceedings, as per article 74 of the Statute. Certainly, the Statute provides for the trial to finish with a decision pursuant

[109] *See The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation', 9 October 2014, ICC-01/09-01/11-1598 (OA8), para. 105; *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", 15 June 2017, ICC-01/04-02/06-1962 (OA5), para. 53.

to article 74 and, exceptionally, in cases of admission of guilt, under article 65 of the Statute. In any event, both procedures and the requirements and guarantees thereof are expressly provided in the Statute. This ensures that both procedures under articles 74 and 65 are consistent with the other norms of the Statute as well as with its object and purpose.

62. Now, the fact that the Statute, the Elements of Crimes and the Rules do not include a particular procedure does not necessarily mean that there is a lacuna. The criminal procedure of the Court, as incorporated in the Statute, is protected by the principle of legality, as explained below. If the procedure was entertained by the drafters but not incorporated, it is far from having been omitted, and cannot be incorporated if the drafters did not decide to do so. Having been entertained but not incorporated in the Rules, there is no lacuna on the no case to answer procedure. Worse yet, no interpretation can be made to include a procedure that is not in keeping with the Statute, its object and purpose as well as its norms, especially given that it is a treaty.

63. Lastly, even supposing that there is a lacuna in the Statute, the Elements of Crimes and the Rules, regarding the no case to answer procedure, in the below I find that the sources of law that would subsequently apply under article 21(1)(b)-(c) would not provide sufficient basis to introduce such a procedure.

B. Analysis

1. *The no case to answer procedure is incompatible with the Statute and the principles of legality and* pacta sunt servanda

64. As explained in this section, the Statute incorporates well established principles that bar the Judges of the Court from granting no case to answer motions under the current version of the Statute, unless amendments thereto are made.

(a) Principle of legality

65. As elaborated below, I consider that the principle of legality bars application of the no case to answer procedure at this Court until the Statute and the Rules are amended to expressly incorporate it. I am of the view that, under this principle, it is illegal to subject any person to laws and procedures that are not previously and

publicly available in writing so that parties and participants be on notice of them and their application.

66. I recall that, under article 21(1)(a) of the Statute, the judges of this Court, including the Trial Chamber and the current composition of the Appeals Chamber, must in the first place apply the Statute, the Elements of Crimes and the Rules. In this regard, the principle of legality is reflected in articles 22 to 24 of the Statute.[110]

67. Moreover, I recall that article 21(3) of the Statute requires that the Judges of this Court interpret and apply the Statute in light of internationally recognised human rights. In this regard, I recall that the principle of legality is further recognised in other international human rights instruments such as article 11 of the Universal Declaration of Human Rights (the 'UDHR'),[111] article 15 of the International Covenant on Civil and Political Rights (the 'ICCPR'),[112] article 7 of the European Convention on Human Rights (the 'ECHR'),[113] article 7 of the African Charter on Human and Peoples'

[110] Articles 22, 23 and 24 of the Statute read:

> Article 22
> *Nullum crimen sine lege*
> 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
> 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
> 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.
>
> Article 23
> *Nulla poena sine lege*
> A person convicted by the Court may be punished only in accordance with this Statute.
>
> Article 24
> *Non-retroactivity ratione personae*
> 1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
> 2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

[111] United Nations, General Assembly, article 11 of the Universal Declaration of Human Rights, 10 December 1948, 217 A (III) (hereinafter: 'UDHR').

[112] United Nations, General Assembly, article 15 of the International Covenant on Civil and Political Rights, 16 December 1966, 999 United Nations Treaty Series 14668 (hereinafter: 'ICCPR').

[113] Council of Europe, article 7 of the European Convention on Human Rights, 4 November 1950, 213 United Nations Treaty Series (hereinafter: 'ECHR').

Rights (the 'ACHPR'),[114] and articles 8(1) and 9 of the American Convention on Human Rights (the 'ACHR').[115]

68. Incorporated in the Statute and internationally recognised as a human right, the principle of legality provides for certainty in criminal law, by requiring that criminal laws be issued in writing, read strictly, with no possibility for analogies, and applied once they enter into force to situations happening thereafter.[116] That is, this principle should, in turn, be taken to encompass the following elements: (i) the principle of certainty, (ii) the prohibition of unwritten law, (iii) the prohibition of analogy, and (iv) the principle of non-retroactivity.[117] In Latin, this principle is also known as *nullum crimen nulla poena sine lege praevia* and the abovementioned elements have been reflected as *lex certa, lex scripta et lex stricta*.[118]

69. Specifically, the requirements that criminal laws be in writing and entered into force before they can be applied preclude the application at this Court of procedures to enter a judgment on the guilt or otherwise of the accused, such as the no case to answer procedure, before such procedures are regulated in writing, previously notified to, and known by, the parties and participants, as well as the public. The non-retroactivity requirement, in particular, is an 'essential attribute'[119] of the principle of

[114] African Union, article 7 of the African Charter on Human and Peoples' Rights, 27 June 1981, 1520 United Nations Treaty Series 26363 (hereinafter: 'ACHPR').
[115] Organization of American States, articles 8(1) and 9 of the American Convention on Human Rights, 22 November 1969, 1144 United Nations Treaty Series (hereinafter: 'ACHR').
[116] C. Kreβ, 'Nulla poena nullum crimen sine lege', *Max Planck Encyclopedia of Public International Law*, para. 1; S. Lamb, '*Nullum crimen, Nulla poena sine lege* in International Criminal Law', in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary Vol. II* (Oxford University Press, 2002), p. 734.
[117] C. Kreβ, 'Nulla poena nullum crimen sine lege', *Max Planck Encyclopedia of Public International Law*, para. 1; S. Lamb, '*Nullum crimen, Nulla poena sine lege* in International Criminal Law', in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary Vol. II* (Oxford University Press, 2002), p. 734.
[118] The International Committee of the Red Cross ('ICRC') has also found that it is a norm of customary international law. *See* ICRC, Customary IHL Database, Peru: Practice Relating to Rule 101. The Principle of Legality, rule 101. *See also* C. Kreβ, 'Nulla poena nullum crimen sine lege', *Max Planck Encyclopedia of Public International Law*, para. 1; S. Lamb, '*Nullum crimen, Nulla poena sine lege* in International Criminal Law', in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary Vol. II* (Oxford University Press, 2002), p. 734.
[119] S. Lamb, '*Nullum crimen, Nulla poena sine lege* in International Criminal Law', in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary Vol. II* (Oxford University Press, 2002), p. 734.

legality and may be characterised as its temporal corollary.[120] Proscribed under the prohibition of non-retroactivity, *ex post facto* law refers not only to definitions of criminal conduct but also, *inter alia*, to 'a law that changes the rules of evidence and receives less or different testimony than was required at the time of the commission of the offense in order to convict the offender' and to 'every law which, in relation to the offense or its consequences, alters the situation of a person to his disadvantage'.[121] This, in my view, includes decisions granting or denying no case to answer motions as, either way, they can change the situation and affect the victims or the accused.

70. The context of the provisions in the Statute reflecting the principle of legality shows that this principle, at the ICC, applies to procedures that lead to a judgment on the guilt or otherwise of the accused. I recall that article 31(1) of the VCLT requires that the terms of a treaty be interpreted, *inter alia*, 'in their context'.[122] Article 31(2)(b) of the VCLT states that the context includes 'any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'.[123] In this regard, article 51(4) of the Statute is instructive in that it incorporates the non-retroactivity prohibition with respect to procedural matters, by stating that '[a]mendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted'. Although this makes reference solely to the defence, as

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[120] M. Catenacci, 'The Principle of Legality', in F. Lattanzi and W. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court Vol. II* (Editrice il Sirente Piccola Cooperativa a.r.l., 2003) p. 100.
[121] Black's Law Dictionary (West Publishing Co., 6th ed., 1990), p. 580 (emphasis added). Also cited in R. Pangalangan, 'Article 24: Non-retroactivity *ratione personae*', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Hart Publishing, 2nd ed., 2008), p. 740: ('[…] a law which provides for the infliction of punishment upon a person for an act done which, when it was committed, was innocent; a law which aggravates a crime or makes it greater than when it was committed; a law that changes the punishment or inflicts a greater punishment than the law annexed to the crime when it was committed; *a law that changes the rules of evidence and receives less or different testimony than was required at the time of the commission of the offense in order to convict the offender*; a law which, assuming to regulate civil rights and remedies only, in effect imposes a penalty or the deprivation of a right which, when done, was lawful; a law which deprives persons accused of crime of some lawful protection to which they have become entitled, such as the protection of a former conviction or acquittal, or of the proclamation of amnesty; *every law which, in relation to the offense or its consequences, alters the situation of a person to his disadvantage*'.
[122] Article 31(1) of the Vienna Convention on the Law of Treaties, 1155 United Nations Treaty Series 18232, signed on 23 May 1969 and entered into force on 27 January 1980 (hereinafter: 'VCLT').
[123] Article 31(2)(b) of the VCLT.

explained below, I am of the view that the principle of legality, as incorporated in the Statute and as internationally recognised as a human right, is a guarantee for all parties and participants in the proceedings at this Court.

71. Furthermore, I recall that, under article 32 of the VCLT, the *travaux préparatoires* of a treaty may serve as supplementary means of interpretation. Although in the drafting history of the Statute the term 'principle of legality' was used interchangeably with the phrase '*nullum crimen sine lege*',[124] the drafters eventually arrived at a final text in articles 22-24, which 'unbundled' the various aspects of the principle of legality.[125] Notably, the drafters meant the principle of non-retroactivity to extend to substance and procedure, and thereby to any procedure that could lead to an early judgment on the guilt or otherwise of the accused, such as a judgment on a no case to answer motion. This is evident from the following.

72. The provision concerning the principle of legality in the 1993 and 1994 draft Statutes of the International Law Commission (respectively, article 39 then article 41) originally appeared alongside articles relating to a fair trial, the presumption of innocence, and 'equality of arms'. It is therefore noteworthy that the provision in the 1993 ILC Draft Statute dealing with the rules of the Court focused on the necessity of preserving 'the rights referred to in articles 38 to 44' (article 19 (1) (a)) of which the principle of legality was one.[126] Accordingly, from the early stages of the drafting process, the principle of legality (and its corollary the principle of non-retroactivity)

[124] C. Kreβ, 'Nulla poena nullum crimen sine lege', *Max Planck Encyclopedia of Public International Law*, para. 1. *See, e.g.*, Report of the Working Group on a draft statute for an international criminal court, Report of the International Law Commission on its Forty-Fifth Session, Draft Statute for an International Criminal Court, 3 May-23 July 1993, A/48/10, p.119, art. 41.
[125] On at least one occasion, a delegation used the terms *nullum crimen sine lege* and *ex post facto* interchangeably which, although consistent with the practice of the Nuremberg and Tokyo International Military Tribunals, is not correct given that the prohibition of *ex post facto* laws effectively constitutes the *lex specialis* to the *lex generalis* of the principle of legality. *See* R. Pangalangan, 'Article 24: Non-retroactivity *ratione personae*', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Hart Publishing, 2nd ed., 2008), pp. 735, 740.
[126] Report of the Working Group on a draft statute for an international criminal court, Report of the International Law Commission on its Forty-Fifth Session, Draft Statute for an International Criminal Court, 3 May-23 July 1993, A/48/10, p. 106.

was taken to apply not only to substantive law contained in the Statute but also to substantive and procedural law contained in any future 'Rules of the Tribunal'.[127]

73. In its report to the UN General Assembly, the Ad Hoc Committee noted how some delegations favoured the inclusion of a provision on the non-retroactivity of the Statute, bearing in mind article 28 of the VCLT.[128] Article 28 of the VCLT provides for the '[n]on-retroactivity of treaties'.[129] Given the broad terms in which this provision of the VCLT is phrased, procedural as well as substantive law may be said to fall within its scope and the fact that delegates used the VCLT provision as a comparison suggests that the delegates had in mind a broad interpretation of the principle when discussing non-retroactivity.

74. Moreover, the earliest equivalent of article 24(2), namely a proposal in the updated Siracusa Draft Statute of March 1996, referred broadly to 'the law' and 'the most lenient law' which most scholars have taken to refer to the applicable law including, *inter alia*, the rules of procedure and evidence.[130] After further consideration by the Working Group on General Principles, this provision was recommended to the Preparatory Committee[131], and subsequently by the Preparatory Committee in the draft consolidated text to the UN General Assembly without any objections, indicating agreement with the scope of this wording.[132]

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[127] *But see* R. Pangalangan, 'Article 24: Non-retroactivity *ratione personae*', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Hart Publishing, 2nd ed., 2008), p. 736, where the author makes clear the Statute's focus on non-retroactivity from the perspective of the principle of legality rather than from the perspective of the accused's rights.

[128] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, General Assembly Official Records Fiftieth Session, 7 September 1995, A/50/22, paras 28 and 89.

[129] Article 28 of the VCLT entitled 'Non-retroactivity of treaties' reads:

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

[130] Preparatory Committee on the Establishment of an International Criminal Court, General Rules of Criminal Law: non-paper, submitted by Sweden, 4 April 1996, p. 2. This interpretation is supported by Schabas, see W. Schabas, 'Article 24. Non-retroactivity *ratione personae*/Non-rétroactivité *ratione personae*', in W. Schabas (ed.), *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2013), p. 420.

[131] Preparatory Committee on the Establishment of an International Criminal Court (11-21 February 1997), Report of the Working Group on General Principles of Criminal Law and Penalties, 24 February 1997, A/AC.249/1997/L.3, para. 1.

[132] Draft Statute for the International Criminal Court, Addendum to the Report of the Preparatory Committee on the Establishment of an International Criminal Court, 14 April 1998, A/CONF.183/Add.1, pp. 48, 73-74.

75. Thus, the principle of legality, as incorporated in the Statute, must be interpreted to prevent, without a previous amendment to the Statute, the incorporation of the no case to answer proceeding. That is, the principle of legality, which is incorporated in the Statute, precludes the Judges of this Court from applying procedures that terminate trials halfway with early acquittals, such as the no case to answer procedure. Certainly, the principle of legality precludes the creation and application of criminal laws that have not been previously enacted and published. It requires that criminal laws be publicly enacted before their application, and that all parties and participants be on notice of such laws and procedures, in fairness to the accused as well as to the prosecution and the victims, and for predictability. In particular, the determination of the guilt of the accused must follow norms previously established, such as article 74 of the Statute, and cannot deviate from them by making determinations in ways that are not provided in the Statute. Hence, at the ICC, ending a trial through mechanisms not foreseen in the Statute or the Rules would breach the principle of legality.

(b) Pacta sunt servanda

76. The Statute is a treaty and as such it follows the principles and rules applicable to treaties. The *pacta sunt servanda* rule provides for 'the sanctity of treaties'.[133] The rule '"encapsulates in a few words the idea that a promise made today must be kept also tomorrow"'.[134] The preamble of the VCLT notes 'the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized'.[135]

77. Considering that the Statute is an international treaty, its text must be followed as it is and 'in the light of its object and purpose'.[136] Without prior amendments of the Statute, its text does not provide for the no case to answer procedure and as such, this

[133] International Court of Justice, *Cameroon v. Nigeria (Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria)*, Dissenting Opinion Of Judge Koroma, 10 October 2002, paras 7, 15.
[134] C. Binder and J. A. Hofbauer, 'The *Pacta Sunt Servanda* Principle or the Limits of Interpretation: the *Gabčíkovo-Nagymaros* Case Revisited', in S. Forlati, M. Moïse Mbengue, and B. McGarry (eds.), *The Gabčíkovo-Nagymaros Judgment and Its Contribution to the Development of International Law* (2020), p. 62 (quoting C. Tomuschat, *'Pacta sunt servanda'*, in A. Fischer-Lescano, H. P. Gasser, T. Marauhn, N. Ronzitti (eds.), *Frieden in Freiheit – Festschrift für Michael Bothe* (2008), p. 1047). *See also* S. Reinhold, 'Good Faith in International Law' in *2 UCL Journal of Law and Jurisprudence* (2013), pp. 47-48 ('The rationale behind the [*pacta sunt servanda*] maxim is seemingly self-evident: a need by the international community for a system that can ensure international order and prevent arbitrary behaviour and chaos') (*referring to* I. Ivanovich Lukashuk, 'The Principle Pacta Sunt Servanda and the Nature of Obligation under International Law', *83 AJIL* (1989), p. 513).
[135] Preamble of the VCLT.
[136] Article 31 of the VCLT.

procedure is not permissible under the Statute. In this regard, it is necessary that the States Parties follow the procedure provided in article 121 of the Statute to effect any amendment to the Statute. Similarly, to amend the Rules, it is necessary to follow, before the Assembly of States Parties, the procedure of amendment indicated in rule 3 of the Rules.

78. Adopting the no case to answer procedure without a statutory amendment would be against the *pacta sunt servanda* rule. The no case to answer procedure is a very specific institution specially provided for and regulated in some common law jurisdictions and at the *ad hoc* international tribunals. It is not explicitly provided for nor regulated at this Court.

79. The *pacta sunt servanda* rule is directly connected to the rules on treaty interpretation (as codified in article 31 of the VCLT), and thus to the rules of interpretation of the Statute, because 'interpretation is a stage comprehended in the proper and honest performance of a treaty'.[137] Binder and Hofbauer have noted that in practice, the *pacta sunt servanda* rule contains two elements: 'firstly, the binding nature of international legal obligations, and secondly, the obligation to carry out treaty obligations in good faith. In order to achieve the second element, a treaty must be interpreted in accordance with the rules contained in Articles 31 through 33 VCLT […]'.[138] To introduce the no case to answer procedure under article 64(6)(f) of the Statute is an overly broad interpretation of the article that is incompatible with the object and purpose of the Statute, and thus a violation of the *pacta sunt servanda* rule.

80. Without prior amendments of the Statute or the Rules, governing both the no case to answer procedure itself and the applicable standard of proof, there would be two different consequences with respect to the States Parties and in relation to the parties and participants of a specific proceeding in which it were followed. On the one

[137] C. Binder and J. A. Hofbauer, 'The *Pacta Sunt Servanda* Principle or the Limits of Interpretation: the *Gabčíkovo-Nagymaros* Case Revisited', in S. Forlati, M. Moïse Mbengue, and B. McGarry (eds.), *The Gabčíkovo-Nagymaros Judgment and Its Contribution to the Development of International Law* (2020), p. 63 (quoting R. Gardiner, *Treaty Interpretation* (first published 2008, Oxford University Press 2015), p. 169).
[138] C. Binder and J. A. Hofbauer, 'The *Pacta Sunt Servanda* Principle or the Limits of Interpretation: the *Gabčíkovo-Nagymaros* Case Revisited', in S. Forlati, M. Moïse Mbengue, and B. McGarry (eds.), *The Gabčíkovo-Nagymaros Judgment and Its Contribution to the Development of International Law* (2020), p. 63.

hand, for the States Parties to the Statute, it would be a violation of the *pacta sunt servanda* rule. On the other hand, for the parties and participants in proceedings at the Court, it would be a violation of the principle of legality to terminate proceedings halfway through trial, to enter an acquittal, following a no case to answer motion at the ICC.

2. The drafting history of the Rules shows that the no case to answer motion was considered but not incorporated

81. In *Ntaganda* (OA6), the Appeals Chamber observed that the Court's legal texts do not expressly provide for it, and that it was 'not aware of any proposals made or discussions held during the drafting of the Statute or the Rules of Procedure and Evidence […] in relation to such a procedure'.[139] However, it considered that it 'is not inherently incompatible with the legal framework of the Court' and that trial chambers 'may decide to conduct such a procedure based on its power to rule on relevant matters pursuant to article 64 (6) (f) of the Statute and rule 134 (3) of the Rules'.[140] It observed that '[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'.[141] It then concluded that 'while the Court's legal texts do not explicitly provide for a "no case to answer" procedure in the trial proceedings before the Court, it nevertheless is permissible' and that '[a] Trial Chamber may, in principle, decide to conduct or decline to conduct such a procedure in the exercise of its discretion'.[142]

82. Contrary to the assertion that the Appeals Chamber was not aware of any proposal or discussion during the drafting history of the Statute or the Rules as to the no case to answer,[143] the 1999 'Draft Rules of Procedure and Evidence for the International Criminal Court' did incorporate a provision on the no case to answer motion. This proposal was not adopted in the final version of the Rules. In my view, it was implicitly rejected.

[139] *Ntaganda* OA6 Judgment, para. 43.
[140] *Ntaganda* OA6 Judgment, para. 44.
[141] *Ntaganda* OA6 Judgment, para. 44, *referring to* *Ruto and Sang* Decision No. 5, paras 15, 16.
[142] *Ntaganda* OA6 Judgment, para. 45.
[143] *Ntaganda* OA6 Judgment, para. 43.

83. In February 1999, the Working Group of the American Bar Association, in its capacity as one of the organisations authorised to participate in the drafting of the Statute and the Rules,[144] submitted the 'Draft Rules of Procedure and Evidence for the International Criminal Court', which included a provision on the no case to answer.[145] Rule 95 of this draft reads:

> **Rule 95 Motion for Judgement of Acquittal**
>
> If, after the close of the case for the prosecution, the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more offences charged in the indictment, the Trial Chamber, on motion of an accused or proprio motu, shall order the entry of judgement of acquittal on that or those charges.
>
> *Source: ICTY Rule 98 bis*[146]

84. As reflected in the wording of the proposal, draft rule 95 contained express wording on the judgment of acquittal that a trial chamber could enter if the evidence was insufficient to sustain a conviction, referring to Rule 98 *bis* of the ICTY Rules of Procedure and Evidence, as the source.

85. However, nothing of this proposal remained in the final version of the Rules as adopted.[147] There is also no mention of the fact that a decision as to whether to entertain such a motion would be left to the discretion of judges. In other words, the

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[144] *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Non-Governmental Organizations Accredited to Participate in the Conference : Note by the Secretary-General, 5 June 1998, A/CONF-183/INF/3.

[145] *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Non-Governmental Organizations Accredited to Participate in the Conference : Note by the Secretary-General, 5 June 1998, A/CONF-183/INF/3.

[146] Working Group of the American Bar Association, Section of International Law and Practice, Draft Rules of Procedure and Evidence for the International Criminal Court. Prepared by a Working Group of the American Bar Association, Section of International Law and Practice, 10 February 1999, Rule 95.

[147] Although I recognise that the leading proposals were those presented by Australia and France, given that the American Bar Association had standing to present a further proposal and did so, I consider that it is therefore inaccurate to say that there was no proposal or discussion on the no case to answer. *See* R. S. Lee, *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), pp. 240-241, and p. 241, fn. 26 ('The delegations of Australia and France, who presented comprehensive proposals for rules had a particular role to play by assisting in merging and redrafting their own initiatives in light of the debates'). *But see* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Non-Governmental Organizations Accredited to Participate in the Conference : Note by the Secretary-General, 5 June 1998, A/CONF-183/INF/3; Working Group of the American Bar Association, Section of International Law and Practice, Draft Rules of Procedure and Evidence for the International Criminal Court. Prepared by a Working Group of the American Bar Association, Section of International Law and Practice, 10 February 1999, Rule 95.

proposal of a provision in the Rules governing the no case to answer procedure was rejected. In light of this, it is reasonable to say that the Appeals Chamber's assertion in the *Ntaganda* (OA6) judgment that it was not aware of any proposal on the no case to answer procedure was based on incorrect information. This would be sufficient for the Appeals Chamber to depart from its jurisprudence. As a judge of the Appeals Chamber, I consider this to amount to 'convincing reasons' justifying a departure from its previous judgment regarding the no case to answer procedure.[148]

3. Article 64(6)(f) gives no discretion to introduce the no case to answer procedure

2. As noted above, the Appeals Chamber's Majority quoted with approval the *Ntaganda* (OA6) finding that a trial chamber has discretion to conduct a no case to answer procedure 'based on its power to rule on relevant matters pursuant to article 64 (6) (f) of the Statute'.[149] I also note that while *Ntaganda* (OA6) was the only opportunity that the Appeals Chamber had before the instant case to consider the correctness of the no case to answer procedure, and that in that case the trial chamber decided not to follow the no case to answer procedure. Moreover, in a previous case, *The Prosecutor v. Ruto and Sang*, Trial Chamber V(A) outlined the standard and procedure that should guide the no case to answer motion in 'Decision No. 5 on the Conduct of Proceedings' (the 'Decision No. 5').[150] It should be noted at the outset that, in the *Ruto and Sang* case, the parties and participants were in agreement that a no case to answer motion was consistent with the statutory framework and should be

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[148] *See The Prosecutor v. Jean-Pierre Bemba Gombo*, Reasons for the 'Decision on the Participation of Victims in the Appeal against the "Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa"', 20 October 2009, ICC-01/05-01/08-566 (OA2), para. 16. In an interlocutory appeal in the *Gbagbo and Blé Goudé* case, the Appeals Chamber held that 'absent "convincing reasons" it will not depart from its previous decisions' *See* Reasons for the 'Decision on the "Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo's detention (ICC-02/11-01/15-134-Red3)"', 31 July 2015, ICC-02/11-01/15-172 (OA6), para. 14.

[149] Judgment of the Appeals Chamber's Majority, para. 104, *referring to* *Ntaganda* OA6 Judgment, para. 44.

[150] *Ruto and Sang* Decision No. 5. At a later stage in the 'Decision on Defence Applications for Judgments of Acquittal', the Majority Judges, in their respective reasons, revisited the Decision No. 5 regarding the standard of 'no case to answer' and provided clarifications on that point. *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, ICC-01/09-01/11-2027-Red-Corr.

permitted in that case.[151] In the case at hand, the Office of the Public Counsel for victims ('OPCV') has expressed its disapproval.[152]

86. I observe that article 64(6)(f), being a provision of a residual, subsidiary, miscellaneous nature, in a list of procedural powers, does not, in my view, give broad discretion to introduce a procedure not expressly provided in the Statute, to terminate halfway or prematurely a trial or to enter acquittals for that matter.

87. This is confirmed by an interpretation of article 64(6)(f) of the Statute pursuant to the Vienna Convention on the Law of Treaties ('VCLT'). Article 31(1) of the VCLT reads:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[153]

88. First of all, the object and purpose of the Statute can be found in its Preamble, in accordance with article 31(2) of the VCLT. The Statute, considering the suffering of the victims of the most serious crimes, established an independent permanent international criminal tribunal, '[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their

[151] *Ruto and Sang* Decision No. 5, para. 10. Trial Chamber V(A) noted that, while it is mindful of the fact that a no case to answer motion is innately linked to an adversarial model developed in the common law traditions, '[n]aturally, the court is not bound by the test or modalities adopted in domestic jurisdictions'; and, '[s]imilarly, while the jurisprudence of the ad hoc tribunals may provide relevant guidance, it is not controlling'. *See* *Ruto and Sang* Decision No. 5, para. 11. Trial Chamber V(A) thus held that '[a]ny utilisation of a "no case to answer" motion in the present case must be derived from the Court's statutory framework, having regard to the purpose such a motion would be intended to fulfil in the distinctive institutional and legal context of the Court'. *See* *Ruto and Sang* Decision No. 5, para. 11. With regard to the test to be applied for the determination of a no case to answer motion, Trial Chamber V(A) held that it is 'whether or not, on the basis of a *prima facie* assessment of the evidence, there is a case, in the sense of whether there is sufficient evidence introduced on which, if accepted, a reasonable Trial Chamber *could* convict the accused'. *See* *Ruto and Sang* Decision No. 5, para. 23. It noted that 'the emphasis is on the word "could" and the exercise contemplated is thus not one which assesses the evidence to the standard for a conviction at the final stage of a trial'. *See* *Ruto and Sang* Decision No. 5, para. 23. In this regard, Trial Chamber V(A) stated that a no case to answer determination 'does not entail an evaluation of the strength of the evidence presented, especially as regards exhaustive questions of credibility or reliability'. *See* *Ruto and Sang* Decision No. 5, para. 24. By reference to the jurisprudence of the *ad hoc* tribunals, the Trial Chamber held that it agrees with the approach taken in the *ad hoc* tribunals, which takes 'the prosecution evidence "at its highest" and to "assume that the prosecution's evidence was entitled to credence unless incapable of belief" on any reasonable view'. *See* *Ruto and Sang* Decision No. 5, para. 24.

[152] *See* Transcript of hearing, 23 June 2020, ICC-02/11-01/15-T-239-ENG, p. 38, line 14 to p. 41, line 22. *See also* Legal Representative's submissions on the questions raised by the Appeals Chamber in its Decision ICC-02/11-01/15-1338, 22 May 2020, ICC-02/11-01/15-1351, paras 3-4.

[153] Article 31(1) of the VCLT.

prosecution must be ensured', in order 'to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of these crimes'.[154] Introducing a motion that is not provided for in the Statute to acquit, halfway through a trial, accused persons who were arrested to be prosecuted for crimes against humanity, whose charges were confirmed, and who were thus standing trial for such crimes, cannot be consistent with the above-quoted object and purpose of the Statute.

89. As for a literal and contextual interpretation of subparagraph (6)(f), article 64(6) of the Statute reads:

> 6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:
>
> (a) Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;
>
> (b) Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;
>
> (c) Provide for the protection of confidential information;
>
> (d) Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;
>
> (e) Provide for the protection of the accused, witnesses and victims; and
>
> (f) Rule on any other relevant matters

90. Article 64(6) includes a list of procedural powers that a trial chamber enjoys to allow for a better conduct of the proceedings, *i.e.*: conducting proceedings after the confirmation of charges, compelling witnesses and production of documents, protecting confidential information, ordering the production of evidence, and protecting the accused, witnesses and victims. These are procedural powers as to matters that allow the better conduct of proceedings. Given that these elements of the list are purely procedural in nature and that the last element is qualified by the word 'relevant', the expression 'any other *relevant* matters' can only be understood as referring to matters purely procedural in nature.[155] That is, article 64(6)(f) is a residual power to deal with the purely procedural issues that arise in the day-to-day conduct of

[154] Preamble of the Statute.
[155] *See* article 64(6)(f) of the Statute (emphasis added).

a trial. It does not empower the judges to introduce a vehicle to determine a substantive matter, such as entering acquittals, especially through vehicles that the drafters discussed and decided not to incorporate, *viz.* the no case to answer procedure. Thus, the discretion provided in article 64(6)(f) of the Statute could only be exercised for discrete, purely procedural issues that are not regulated elsewhere.

91. This is different from substantive issues that entail a final determination on the guilt or otherwise of the accused, such as an acquittal, more so considering that such issues are regulated under article 74 of the Statute. As explained below in the discussion of the first ground of the Prosecutor's appeal, article 74 provides for the only ordinary avenue to enter a determination on the guilt or otherwise of the accused, and the only exception is a decision under article 65 when the accused makes an admission of guilt. In other words, the discretion granted by the Statute under article 64(6)(f) cannot be exercised to make decisions on the *substantia* of the case, namely, the guilt or otherwise of the accused. This is not only a substantive issue but is crucial for the objective of criminal proceedings.

92. At this Court, article 64(6)(f) has been used for purely procedural matters. In cases where trial judges have found no express direction in the Statute as to an issue that is purely procedural, article 64 of the Statute has served as a basis to note that 'silence on a particular *procedural issue* does not necessarily imply that it is forbidden'.[156] In *The Prosecutor v. Uhuru Muigai Kenyatta et al.*, Trial Chamber V was seized of the issue of whether witnesses may be prepared by the calling party. While the chamber found no specific provision applicable to this matter, it observed that '[a]rticle 64 of the Statute grants the Chamber flexibility in managing the trial', and that 'the fact that the *ad hoc* tribunals interpreted silence in their statutory provisions to confer flexibility regarding witness preparation is meaningful when evaluating the silence in this Court's analogous statutory provisions'.[157] It concluded

[156] Trial Chamber V, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on Witness Preparation, 2 January 2013, ICC-01/09-02/11-588, para. 31 (emphasis added).
[157] *See The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on Witness Preparation, 2 January 2013, ICC-01/09-02/11-588, paras 31, 33. *See also* Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 24 November 2010, ICC-01/05-01/08-1039, para. 10.

that Trial Chamber V's discretion was ample in relation to '*purely procedural* matters'.[158]

93. However, when a matter is more than purely procedural and/or regulated elsewhere in the Statute, a trial chamber cannot invoke article 64(6)(f) to create new procedural rules. In *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I granted the Netherlands and the Democratic Republic of the Congo leave to appeal 'on an interlocutory basis under Article 64(6)(f)'.[159] The Appeals Chamber held that the Trial Chamber had improperly granted leave to appeal 'outside of the context of articles 81 and 82 of the Statute', and that 'the fact that the granting of appeal may, in the eyes of the Trial Chamber, be desirable or even necessary does not justify departure from the clearly enumerated grounds of appeal in the Statute'.[160]

94. There is no fixed definition of the distinction between procedural and substantive rules under international law; indeed, domestic and international courts have adopted dissimilar approaches to drawing such a line.[161] Commentators have

[158] Trial Chamber V noted: 'Article 64 of the Statute grants the Chamber flexibility in managing the trial. Its formulation makes clear that the Statute is neither an exhaustive nor a rigid instrument, *especially on* ***purely procedural matters*** *such as witness preparation*, and that silence on a particular procedural issue does not necessarily imply that it is forbidden. Article 64 is formulated so as to give judges a significant degree of discretion concerning the procedures they adopt in this respect, as long as the rights of the accused are respected and due regard is given to the protection of witnesses and victims. […] [T]he fact that the *ad hoc* tribunals interpreted silence in their statutory provisions to confer flexibility regarding witness preparation is meaningful when evaluating the silence in this Court's analogous statutory provisions' (emphasis added). *See The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on Witness Preparation, 2 January 2013, ICC-01/09-02/11-588, paras 31, 33. *See also* Trial Chamber III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 24 November 2010, ICC-01/05-01/08-1039, para. 10.

[159] Decision on two requests for leave to appeal the "Decision on the request by DRC-DO1-WWWW-0019 for special protective measures relating to his asylum application", 4 August 2011, ICC-01/04-01/06-2779, para. 23.

[160] Decision on the "Urgent Request for Directions" of the Kingdom of the Netherlands of 17 August 2011, 26 August 2011, ICC-01/04-01/06-2799 (OA 19), para. 8.

[161] *See for example* International Court of Justice, *Jurisdictional Immunities of the State*, Judgment of 3 February 2012, para. 93 ('The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not conduct in respect of which the proceedings are brought was lawful or unlawful'). *See also* J. M. Carruthers, 'Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages' in *International and Comparative Law Quarterly 53(3)* (2004), fn. 25 (*quoting Naftalin v LMS Railway*, 1933 SLT 193, per Lord Murray, p. 200: 'No doubt procedure is a term of somewhat indefinite connotation but in his [Mr Dicey's] opinion the true view is that any rule of law which affects, not the enforcement of a right, but the nature of the right itself, does not come under the head of procedure; or, in other words, is not governed by the *lex fori.*').

expressed disparate views on the distinction between substantive and procedural rules; many have emphasised the inextricable link between substance and procedure and the ways in which they overlap.[162] The no case to answer motion has such a great bearing on the substantive law of a case that it cannot be considered a *purely* procedural matter.

95. Considering that the objective of the no case to answer motion is to discontinue a case and acquit the accused, it is more than a purely procedural matter. Indeed, the *ad hoc* tribunals entertained 'motions for judgments of acquittals' on the basis of a provision introduced to that effect, and not on the basis of the judges' discretion to conduct a trial. In July 1998, Rule 98 *bis*,[163] the specific rule governing no case to answer motions was first introduced in the ICTY Rules of Procedure and Evidence, and was subsequently amended twice, in November 1999,[164] and in December 2004,[165] and thereafter remained the same. The current version of the rule reads:

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[162] *See for example* E. G. Lorenzen, 'The Statute of Frauds and the Conflict of Laws' in *Yale Law Journal* 32(4) (1923), p. 325 (quoting Salmond, *Jurisprudence* (6th ed. 1920), pp. 437-438: 'Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained'); *See also* E. M. Schneider and Hon. N. Gertner, '"Only Procedural": Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases' in *57 New York Law School Law Review 767* (2012-2013), p. 768 ('Indeed, early rulings on procedural issues, such as dismissal motions and summary judgment, have often comprised an effective revision of substantive law through the back door'); *See also* T. O. Main, 'The Procedural Foundation of Substantive Law' in *Scholarly Works*, paper 741 (2010), p. 816 ('The assumption that categories of substance and procedure are mutually exclusive and exhaustive simply seems to defy reality. It is quite obvious that certain procedural rules, such as burdens of proof […] also have a substantive orientation'); *See also* E. Oluwatoyin Okebukola, 'A Universal Procedural Framework for War Crimes Tribunals' in *International Community Law Review 14(2)* (2012), p. 85 (quoting Jeremy Bentham, The Works of Jeremy Bentham, published under the Superintendence of his Executor, John Bowring: Chapter 2 Principles of Judicial Procedure, with the Outlines of a Procedure Code (1838-1843): '… it may be said that the course of procedure ought to have in every instance, for its main and primary end at least, the accomplishment of the will manifested in the body of substantive laws. For this is not only a use of it, but the only use for it').

[163] Rule 98 *bis* of ICTY Rules of Procedure and Evidence (adopted 10 July 1998) ('If, after the close of the case for the prosecution, the Trial Chamber finds that *the evidence is insufficient to sustain a conviction* on one or more offences charged in the indictment, the Trial Chamber, on motion of an accused or *proprio motu*, shall order the entry of judgement of acquittal on that or those charges') (emphasis added).

[164] Rule 98 *bis* of ICTY Rules of Procedure and Evidence (amended 17 November 1999) ('(A) An accused may file a motion for the entry of judgement of acquittal on one or more offences charged in the indictment within seven days after the close of the Prosecutor's case and, in any event, prior to the presentation of evidence by the defence pursuant to Rule 85 (A)(ii). (B) The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or *proprio motu* if it finds that *the evidence is insufficient to sustain a conviction* on that or those charges') (emphasis added).

[165] Rule 98 *bis* of ICTY Rules of Procedure and Evidence (amended 8 December 2004) ('At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral

> At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction.[166]

96. Nothing could be more substantive in criminal law than determining whether or not someone is guilty of an offence. It cannot fall within those discretionary powers of an ICC judge pertaining to purely procedural matters. Within the scheme of the Rome Statute System, there is no place for the no case to answer motion.

4. The no case to answer procedure is not a viable procedure and it cannot be derived from subsidiary sources of law

97. Article 21(1) of the Statute clearly establishes a hierarchy with respect to the sources of law that judges of this Court are bound to apply:

> The Court shall apply:
>
> (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
>
> (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

98. The Appeals Chamber has noted that 'recourse to other sources of law is possible only if there is a lacuna in the Statute or Rules of Procedure and Evidence'.[167] However, the fact that a procedure is not within the Statute, the Elements of Crimes and the Rules does not necessarily imply a lacuna.

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submissions of the parties, enter a judgement of acquittal on any count if *there is no evidence capable of supporting a conviction*') (emphasis added). Some scholars have argued that, compared with the wording in prior rules, this revised rule has lowered the evidentiary standard in favour of the Prosecution. *See* A. T. Cayley and A. Orenstein, 'Motion for Judgment of Acquittal in the Ad Hoc and Hybrid Tribunals' in *Journal of International Criminal Justice 8(2)* (2010), p. 581.

[166] Rule 98 *bis* of the ICTY Rules of Procedure and Evidence (amended 8 July 2015).

[167] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation', 9 October 2014, ICC-01/09-01/11-1598 (OA8), para. 105. *See also The Prosecutor*

99. The statutory framework does not include any specific provision allowing for a no case to answer procedure. Commentators confirm the lack of rules on this procedure.[168] As indicated above, the drafters of the Rules entertained a proposal on the no case to answer procedure. Thus, its absence from the Statute and the Rules shows no lacuna but rather means that it was rejected.

100. And even, *arguendo*, supposing that there were a lacuna in the sources of article 21(1)(a) of the Statute, article 21(1)(b) provides for the application of 'applicable treaties and the principles and rules of international law, including established principles of the international law of armed conflict'. The next sources of law that could be applied in case of lacuna, pursuant to article 21(1)(c) of the Statute, are the 'general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, *the national laws of States that would normally exercise jurisdiction over the crime*, provided that *those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards*' (emphasis added).

101. Three aspects must be highlighted in these provisions. First, subparagraph (1)(b) requires that any applicable treaty, principle or rule of international law be applied. Second, subparagraph (1)(c) gives prominence to the domestic laws of the State that would normally exercise jurisdiction, in the instant case, Côte d'Ivoire. Third, it requires that the general principles of law derived from national jurisdictions are not inconsistent with the Statute and internationally recognised norms and standards. For the reasons that follow, I find that

i. Under international law, no treaty, principle or rule provides for mandatory application of the no case to answer procedure;

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v. Bosco Ntaganda, Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", 15 June 2017, ICC-01/04-02/06-1962 (OA5), para. 53 ('The Appeals Chamber recalls that article 21 of the Statute requires the Court to apply "in the first place" its Statute, Elements of Crimes and Rules of Procedure and Evidence. Recourse to other sources of law is possible only if there is a lacuna in these constituent instruments'.).

[168] *See e.g.* P. Lewis, 'Trial Procedure', in R.S. Lee (ed.) *The International Criminal Court Elements of Crimes and Rules of Procedure and Evidence* (2001), p. 550.

ii. Neither the laws of Côte d'Ivoire nor domestic laws from common and other civil law countries provide a common basis from which to derive a general principle of law allowing application of the no case to answer procedure and the related standard of proof; and

iii. The no case to answer procedure could be inconsistent with the role that the Statute gives to the victims in a system that is neither common nor civil law-oriented.

(a) Under international law, no treaty, principle or rule provides for mandatory application of the no case to answer procedure

102. To the best of my knowledge, there is no international treaty on the no case to answer. Moreover, although the *ad hoc* tribunals had specific rules on the 'motion for judgment of acquittal',[169] such provisions could hardly be considered principles or rules of customary international law. If that were the case, almost all civil law jurisdictions would be in breach of such principles or rules of international law.

103. In any event, there is no common practice on the no case to answer procedure, neither at the *ad hoc* tribunals nor at domestic jurisdictions, to raise its application to the level of customary international law. The elements of customary international law are state practice and *opinio juris*.[170] As noted in the section that follows, the no case to answer is most often found in common law rather than civil law jurisdictions, and even within the common law, there is no common practice regarding the application of some essential aspects of the 'no case to answer', particularly, its standard of proof.[171] It would be incorrect to say that there is an international custom binding States to apply the no case to answer procedure.

[169] Rule 98 *bis* of the ICTY Rules of Procedure and Evidence (amended 8 July 2015).
[170] *See* article 38(1) of the Statute of the International Court of Justice. *See also* H. Steiner, P. Alston, R. Goodman, *International Human Rights in Context. Law, Politics, Morals* (3rd. ed., 2008), pp. 160-174; A. Roberts, 'Traditional and modern approaches to customary international law: A reconciliation' in *American Journal of International Law Vol. 95* (2001), p. 757.
[171] This will be further elaborated under the second ground of appeal below. *See infra* section VII(D)(1).

(b) The impossibility of deriving one single principle endorsing the no case to answer procedure from Côte d'Ivoire, other Romano-Germanic or civil law jurisdictions and even common law jurisdictions.

104. Unlike common law jurisdictions, continental, Romano-Germanic or '[c]ivil law countries do not generally have a procedural equivalent' to the no case to answer procedure.[172] The relevant commentary submits that '[c]riminal trials in civil law jurisdictions do not generally have provision for a motion of acquittal at the close of the prosecution case'.[173] Dividing the case between, first, the presentation of the evidence by the prosecution and, then, by the defence is a characteristic of common law proceedings.[174] This is a characteristic of purely adversarial proceedings. In most civil law jurisdictions, the evidence is a stage simultaneously running for all parties, and it is divided pursuant to the type of evidence: testimonial, documentary and other evidence. I note that in the original, inquisitorial system of continental or civil law, there is not such a division between the presentation of the prosecution case and the rest of the stages, because the testimonial and expert evidence is presented independently of the party who calls the evidence.[175] Professor Mirjan Damaška, expert on comparative law, observes that '[i]n the common law adversary procedure each party presents *his* case, calls *his* witnesses and examines them', whereas '[t]he civil law non-adversary trial is in the nature of an official inquiry presided over by the judge: whatever evidence he decides to examine becomes *his*—or, rather, the *court's*—evidence'.[176] He notes that '[a]ccordingly, there is strictly speaking no "prosecutor's case" and there are no "witnesses for the prosecution"' and that '[t]he bulk of questioning comes typically from the bench and it is the presiding judge who

[172] A. T. Cayley and A. Orenstein, 'Motion for Judgment of Acquittal in the Ad Hoc and Hybrid Tribunals' in *Journal of International Criminal Justice 8(2)* (2010), p. 579.
[173] A. T. Cayley and A. Orenstein, 'Motion for Judgment of Acquittal in the Ad Hoc and Hybrid Tribunals' in *Journal of International Criminal Justice 8(2)* (2010), p. 583.
[174] *See for example* United Kingdom, Rule 25.9 of the Criminal Procedure Rules, 2020 No. 759 (L. 19). *See also* United States of America, Rule 29 of the Federal Rules of Criminal Procedure, as amended to 1 December 2020.
[175] *See* M. Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' in *121 University of Pennsylvania Law Review 506* (1972-1973), p. 525. It is further noted that 'civil law nations do not regard discovery and trial as separate phases in a proceeding; evidence gathering occurs during the course of a trial. Unlike common law discovery, the judge controls the taking of evidence'. *See* J. Capowski, 'China's Evidentiary and Procedural Reforms, the Federal Rules of Evidence, and the Harmonization of Civil and Common Law' in *47 Texas International Law Journal 455* (2012), p. 462.
[176] M. Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' in *121 University of Pennsylvania Law Review 506* (1972-1973), p. 525 (emphasis in original).

begins the examination of witnesses'.[177] Commentators further note that 'unlike a common law trial, a civil law trial is not bifurcated where evidence is first presented by the prosecution and then by the defence; the formal closure of the prosecution's case does not exist in civil law jurisdictions'.[178]

105. To demonstrate that the no case to answer procedure does not fall within the category of article 21(1)(c), regarding 'general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime', the following subsections will address, firstly, the domestic jurisdiction of Côte d'Ivoire, which is a continental or civil law system, where the no case to answer procedure does not exist, and, secondly, domestic common law jurisdictions that regulate the no case to answer procedure with differences that cannot be reconciled to make for one general principle. As explained below, Côte d'Ivoire is *not* a common law jurisdiction from which one could derive any general principle of law dictating application of a no case to answer procedure or a lower standard of proof to enter acquittals before the trial has been conducted in its entirety. Moreover, some provisions in the Ivoirian Code of Criminal Procedure would impede any effort to derive a similar procedure from Ivoirian law. Additionally, as explained below, there are some inconsistencies even among the common law jurisdictions that provide for the no case to answer procedure. It could not be left to the judges' discretion to pick and choose from the varied procedures and standards of proof that these jurisdictions provide for the no case to answer stage. Such inconsistencies pose a bar for judges at this Court to derive any general principle from the different laws in common law jurisdictions providing for the no case to answer procedure, especially taking into account that the ICC is not a common law court.

(i) There is no provision for the no case to answer motion in Côte d'Ivoire

106. To begin with, Côte d'Ivoire is not a common law jurisdiction; it is a civil law system. Whereas the no case to answer is a 'motion', which under common law may

[177] M. Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' in *121 University of Pennsylvania Law Review 506* (1972-1973), p. 525.
[178] A. T. Cayley and A. Orenstein, 'Motion for Judgment of Acquittal in the Ad Hoc and Hybrid Tribunals' in *Journal of International Criminal Justice 8(2)* (2010), p. 583.

trigger a decision disposing of the merits of the case,[179] an '*incident*' under Ivoirian law must be resolved by the judges without ruling on the merits.[180] That is, judges would not make a determination on the guilt of the accused and would thus not terminate the case – only a judgment could do so:

> *Tous incidents contentieux sont réglés par la Cour, le Ministère public, les parties ou leurs conseils entendus.*
>
> *Ces arrêts ne peuvent préjuger du fond.*
>
> *Ils ne peuvent être attaqués par la voie du recours en Cassation qu'en même temps que l'arrêt sur le fond.*[181]

107. Moreover, the submissions of the victims are an essential part of the proceedings and the judges have to rule on them:

> *L'accusé, la partie civile et leurs conseils peuvent déposer des conclusions sur lesquelles la Cour est tenue de statuer.*
>
> *[…]*
>
> *Une fois l'instruction à l'audience terminée, la partie civile ou son conseil est entendu. Le Ministère public prend ses réquisitions.*
>
> *L'accusé et son conseil présentent leur défense.*
>
> *La réplique est permise à la partie civile et au Ministère public, mais l'accusé ou son conseil auront toujours la parole les derniers.*[182]

108. These provisions show that the no case to answer both in essence and as applied by Judges Henderson and Tarfusser in the case at hand is at odds with the laws of Côte d'Ivoire. This is important because article 21(1)(c) requires that general principles of law derived from domestic jurisdictions take into account the laws of the State that would normally have jurisdiction over the crimes at stake.

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[179] Motion is defined as 'an application to the court requesting an order or rule in favour of the applicant. […] Motions are generally made in relation to a pending **action** and may be addressed to a matter within the discretion of the judge, or may concern a point of law as in the case of a MOTION TO DISMISS which tests the adequacy of the **pleadings**. Motions may be made orally or more formally, in writing, by a NOTICE OF MOTION. They may be determined without notice to the adverse parties [**ex parte**] or argued by adverse parties'. *See* S. Giffis, *Law dictionary*, (Barrons, 6th ed.), p. 350.
[180] Article 316 of the Code de Procedure Penale.
[181] Article 316 of the Code de Procedure Penale.
[182] Article 315 of the Code de Procedure Penale.

109. In light of the foregoing, it is not possible to derive from Ivoirian law any principle allowing for the no case to answer. Doing otherwise would be against the prominence that article 21(1)(c) gives to the *lex loci* in a case where victims and accused are Ivoirians and the crimes happened on Ivoirian soil.

(ii) There are inconsistencies among the common law jurisdictions providing for the no case to answer procedure

110. As stated above, the no case to answer procedure is a common law institution, which is predominantly anchored in the jury system, originally for civil cases. I find four major obstacles for domestic laws on the no case to answer procedure in common law jurisdictions to make for, under article 21(1)(c), a general principle of law that is not inconsistent with the Statute.

111. First, there is no jury at the ICC. Rooted in the possibility for judges to withdraw a civil case from a jury and rule on it, the motion for a judgment of acquittal in criminal suits emerged from the separation of functions between the judge, as expert on the law, and the jury, as finder of fact.[183] Yet, the Statute does not contain the notion of juries and, hence, it does not make this separation at the Court. Judges are experts on the law and apply it to the facts presented to them. This is the first impediment to deriving a general rule on the no case to answer from jurisdictions that assign different functions to the judges.

112. A second obstacle is the differences in the standard of proof that the judges must apply at the no case to answer juncture of the proceedings. Although no standard of proof at the no case to answer stage in representative common law jurisdictions is as high as the beyond reasonable doubt standard, there are substantial differences among such jurisdictions in the wording and at times in the threshold for judges to

[183] J. Kneitel, 'The Forgotten Dinner Guest: Historical development of the motion for a judgment of acquittal' in *36 American Journal of Trial Advocacy 40* (2012), p. 40, *referring to* T. W. Phillips, 'The Motion for Acquittal: A neglected safeguard' in *70 Yale Law Journal 1151* (1961), pp. 1151-52. Eventually, the common law motion for non-suit emerged, followed by the civil motion for a directed verdict in the mid-nineteenth century. Commentators note that the earliest motions for acquittal did not cite 'any authority but apparently assumed such power was inherent in the judge's role as presiding officer'. *See* J. Kneitel, 'The Forgotten Dinner Guest: Historical development of the motion for a judgment of acquittal' in *36 American Journal of Trial Advocacy 40* (2012), p. 40, *referring to* T. W. Phillips, 'The Motion for Acquittal: A neglected safeguard' in *70 Yale Law Journal 1151* (1961), pp. 1151-52. *See also* R. Sauber and M. Waldman, 'Unlimited Power: Rule 29(a) and the Unreviewability of Directed Judgments of Acquittal' in *44 American University Law Review 433* (1994), pp. 439-41.

make a finding on the sufficiency of the evidence.[184] This is an obstacle to derive a uniform standard that could amount to a general principle of law under article 21(1)(c) of the Statute.

113. Thirdly, some jurisdictions differ on whether or not the credibility of witnesses should be assessed at the no case to answer stage or whether the evidence must be taken at its highest, assuming such credibility at that stage. For instance, England and Wales differ from other jurisdictions as to this question.[185] *Regina v. Galbraith*, which provides that the credibility of witnesses can be taken into account at the no case to

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[184] In *Australia*, 'a verdict of not guilty may be directed only if there is a defect in the evidence such that, *taken at its highest*, it will not sustain a verdict of guilty' (emphasis added). The judge is only concerned with the question of whether there is evidence that can legally lead to a conviction, *not whether the evidence lacks weight such that a conviction based upon it would be unsafe or unsatisfactory*. The exception is when 'the evidence is so *inherently incredible* that no reasonable person would accept its truth' (emphasis added). *See* A. T. Cayley and A. Orenstein, 'Motion for Judgment of Acquittal in the Ad Hoc and Hybrid Tribunals' in *Journal of International Criminal Justice 8(2)* (2010), p. 577-578.

In *Canada*, 'a motion for a directed verdict is judged based on whether there is "evidence upon which the trier of fact, whether judge or *jury*, properly instructed, *could* convict the accused"' (emphasis added). *See* A. T. Cayley and A. Orenstein, 'Motion for Judgment of Acquittal in the Ad Hoc and Hybrid Tribunals' in *Journal of International Criminal Justice 8(2)* (2010), p. 578. If the judge grants a motion for no case to answer, which is known as a motion for 'non-suit', the judge may withdraw the case from a *jury* and enter an acquittal himself or herself instead of directing the jury to acquit the accused. Supreme Court of Canada, *R v. Louis Edouard Paul*, 22 April 1975, [1977] 1 SCR 181.

In *South Africa*, Section 174 of the Criminal Procedure Act 1977 permits the court to acquit the accused: 'If at the close of the case for the prosecution at any trial, the court is of the opinion that *there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge*, it may return a verdict of not guilty' (emphasis added). South Africa, Section 174 of the Criminal Procedure Act 51 of 1977; South Africa, Supreme Court of Appeal, *State v. Michael Lubaxa*, 25 September 2001, Case No: 372/2000, para. 10 (Although the statutory provision refers to 'no evidence', the court decisions have interpreted it as meaning 'evidence upon which a reasonable person might convict'.).

In *the United Kingdom*, under *Regina v. George Charles Galbraith*, the Court of Appeal held that a no case to answer submission requires either (i) no evidence that the alleged crime was committed by the defendant or (ii) some evidence of a tenuous character, but 'the prosecution evidence, *taken at its highest*, is such that a *jury* properly directed could not properly convict upon it' (emphasis added). Conversely, where there is evidence upon which a jury could properly convict the accused, the submission of no case to answer will fail. Accordingly, a no case to answer motion provides a balance between the 'possible *usurpation by the judge of the jury's functions and the danger of an unjust conviction by a capricious jury*'(emphasis added). *See* United Kingdom, Court of Appeal, *R. v. George Charles Galbraith*, 19 May 1981, No. 5541/B/79, 1 W.L.R. 1039, pp. 1040-1042.

In *the United States of America*, the test is whether there is sufficient evidence, *if taken at its highest*, upon which a reasonable trier of fact could find *beyond reasonable doubt* that the accused is guilty. United States of America, D.C. Circuit Court of Appeals, *Curley v. U.S.*, 13 January 1947, 160 F.2d 229, pp. 232-33.

[185] A. T. Cayley and A. Orenstein, 'Motion for Judgment of Acquittal in the Ad Hoc and Hybrid Tribunals' in *Journal of International Criminal Justice 8(2)* (2010), pp. 576-577.

answer stage under exceptional circumstances,[186] is the leading case on this issue in England and Wales.[187] In other domestic jurisdictions, however, 'witness credibility and relevance are [generally] not taken into account when deciding no case to answer motions'.[188]

114. Fourth, the stage where the no case to answer decision is made in some jurisdictions may materially differ from the stage at which it was made in the case under appeal. In the United States, for instance, the decision could also be made after the verdict of the jury, that is, after the defence presented its evidence.[189] The acquittals in this case could thus have been made at a later stage if the general rule is derived from the United States.

115. Under the second ground of appeal, in Section VII of this opinion, I will address the different practices that chambers within the *ad hoc* tribunals followed on the applicable standard of proof for the no case to answer procedure, as well as the different approach followed in this regard by the majority in the judgment of the Appeals Chamber's Majority in this case.[190]

(iii) *The no case to answer procedure is inconsistent with the Statute and its application at the ICC would violate internationally recognised norms and standards, particularly the rights and interests of the victims*

116. The second requirement to derive a principle of law from domestic jurisdictions is that it cannot be inconsistent with the Statute or international law and internationally recognised norms and standards. However, the application of the no case to answer procedure is at odds with the Statute and applying it at this Court, in disregard of the Statute, would be a violation of internationally recognised norms. As noted above, applying a mechanism not provided by the Statute and thus unforeseen

[186] *See* A. T. Cayley and A. Orenstein, 'Motion for Judgment of Acquittal in the Ad Hoc and Hybrid Tribunals' in *Journal of International Criminal Justice 8(2)* (2010), pp. 576-577, *citing* United Kingdom, Court of Appeal, *R. v. George Charles Galbraith*, 19 May 1981, No. 5541/B/79, 1 W.L.R. 1039.
[187] *See* J. Chalmers, 'The no case to answer submission' in J. Chalmers, F. Leverick, and A. Shaw (eds.), *Post-Corroboration Safeguards Review Report of the Academic Expert Group*, (The Scottish Government, Edinburgh, 2014), p. 134.
[188] A. T. Cayley and A. Orenstein, 'Motion for Judgment of Acquittal in the Ad Hoc and Hybrid Tribunals' in *Journal of International Criminal Justice 8(2)* (2010), p. 577.
[189] *See* United States of America, Rule 29 of the Federal Rules of Criminal Procedure, as amended to 1 December 2020.
[190] *See infra* section VII.

by the parties and participants, and thus ending the proceedings earlier than expected in a way other than that provided in article 74, results in a violation of the Statute and its founding principles. Moreover, as elaborated in this subsection, finishing proceedings in this way would also be against the rights envisioned in the Statute for the parties and participants, and in particular, for the victims.

117. The no case to answer procedure is inconsistent with the rights of victims under the Rome Statute System, as well as their rights under internationally recognised principles and human rights. Besides being subjects with substantive rights, victims are subjects with procedural rights under the Statute. As explained below, the Statute, under articles 21(3) and 68(3), grants victims the rights to (i) have access to justice, (ii) submit their views and concerns as per the evidence presented, (iii) truth, (iv) reparations, and (v) have an effective remedy. However, the role that victims have in criminal cases under common law jurisdictions is not the same as their role under the Statute. In fact, entering an acquittal halfway through a trial, before the victims can realise all their rights, is incompatible with the role that the Statute gives to the victims.

118. The rationale behind the no case to answer motion, in the context of adversarial proceedings conducted as per the common law tradition of having the prosecution present its case before the defence, is that the defence is not required to present any evidence when the prosecution has no case for the defence to answer.[191] There is no opportunity for the victims, under such a tradition, to call any evidence. In this binomial constellation between prosecution and defence, victims are typically called to appear as witnesses during the prosecution's presentation of the evidence.[192] That

[191] *See* A. Niv, 'The Schizophrenia of the 'No Case to Answer' Test in International Criminal Tribunals' in *Journal of International Criminal Justice 14(5)* (2016), p. 1122 (The no case to answer 'is a corollary of the principle that an accused is presumed innocent until proven guilty. A defendant should not be compelled to testify or to present his defence unless the prosecution has presented the chamber with sufficient evidence that requires the accused to answer the case').
[192] *See* H. F. Antonsdóttir, '"A Witness in My Own Case": Victim-Survivors' Views on the Criminal Justice Process in Iceland' in *Feminist Legal Studies* (2018), pp. 307-308 ('In many jurisdictions, the criminal case is now conceptualised as a dispute between the state and the accused, with the victim–survivor being assigned the status of a witness to a crime against the state'); See *also* J. Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' in *Journal of Law and Society 32(2)* (2005), p. 294 ('Victims in common law jurisdictions have traditionally been unable to participate in criminal trials for a number of structural and normative reasons. They are widely perceived as "private parties" whose role should be confined to that of witnesses, and participatory rights for such third parties are rejected as a threat to the objective and public nature of the criminal justice system').

is, where the dispute is between the Prosecution and the Defence in common law jurisdictions, victims often have no specific rights other than those coming from their roles as witnesses. This is not the case under the Rome Statute System, where victims are participants with rights, as per articles 21(3) and 68(3) of the Statute. Moreover, under a typical no case to answer procedure in common law jurisdictions, when the prosecution finishes its case, the judge could enter a judgment of acquittal if the evidence presented at that stage could not sustain a conviction.

119. In contrast, under the framework of the Statute, article 68(3) of the Statute requires that '[w]here the personal interests of the victims are affected, the Court *shall* permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.[193] The word 'shall' denotes an obligation to permit victims' participation at any stage where the Court deems it appropriate, including trial.

120. This is also in keeping with article 21(3), under which it is a duty for judges of this Court to apply and interpret the law consistently with internationally recognised human rights.[194] The rights of access to justice and to an effective remedy are reflected in article 2(3) of the ICCPR;[195] articles 13 and 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[196] article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination;[197] article 2(c) of the Convention on the Elimination of all Forms of Discrimination against Women;[198] articles 13 and 16(4) of the Convention on the

[193] Emphasis added.
[194] Article 21(3) of the Statute reads:

> The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender […], age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

[195] Article 2(3) of the ICCPR.
[196] United Nations, General Assembly, articles 13 and 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, Resolution 39/46.
[197] United Nations, General Assembly, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, Treaty Series 660.
[198] United Nations, General Assembly, article 2(c) of the Convention on the Elimination of all Forms of Discrimination Against Women, 18 December 1979, Treaty Series 1249.

Rights of Persons with Disabilities;[199] articles 5(5) and 13 of the ECHR;[200] article 7(1)(a) of the ACHPR,[201] and article 25(1) of the ACHR.[202]

121. The Inter-American Court of Human Rights (the 'IACtHR') has indicated that 'the victims of human rights violations or their next of kin should have substantial possibilities of being heard and acting in the respective proceedings'.[203] More specifically, it has noted that a 'victim's participation in criminal proceedings is not limited to merely repairing the damage done but, is primarily designed to make effective [the victim's] rights to know the truth and obtain justice before the competent judicial authorities'.[204] It has held that victims 'must enjoy ample possibilities of being heard and participating in the related proceedings, in order to clearly establish the facts and the punishment applicable to the perpetrators of those acts, and to seek an appropriate relief'.[205] Importantly, that may include the possibility for victims to present evidence and make allegations thereon:

> [V]ictims can present arguments, receive information, provide evidence, make allegations, and, in synthesis, defend their interests.[206]

122. Similarly, in the case of *Perez v. France*, the European Court of Human Rights ('ECtHR') entertained the question of whether, besides the accused, victims of a crime have fair trial rights, under article 6 of the ECHR, in criminal proceedings.[207] Having recalled its jurisprudence stating that victims have fair trial rights when their 'civil rights' are at stake, the ECtHR found that 'it is conceivable that Article 6 may

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[199] United Nations, General Assembly, articles 13 and 16 of the Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106.
[200] Articles 5 and 13 of the ECHR.
[201] Article 7(1)(a) of the ACHPR. *See also* African Commission on Human and Peoples' Rights, Principle C of Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.
[202] Article 25(1) of the ACHR.
[203] IACtHR, *The 'Street Children' (Villagrán-Morales et al.) v. Guatemala*, Judgment of November 19, 1999 (Merits), Series C No. 63, para. 227. *See* IACtHR, *Heliodoro Portugal v. Panama*, Judgment (Preliminary objections, Merits, Reparations and Costs), 12 August 2008, Series C. No. 186, para. 247 (noting that 'the State must ensure that Heliodoro Portugal's next of kin have full access and capacity to act at all stages and in all instances of the said investigations and proceedings, in accordance with domestic law and the provisions of the American Convention'.).
[204] IACtHR, *Rosendo Cantú et al. v. Mexico*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 31 August 2010, Series C. No. 216, para. 167.
[205] IACtHR,, *Baldeón-García v. Perú*, Judgment (Merits, Reparations, and Costs), 6 April 2006, Series C. No. 147, para. 146.
[206] IACtHR, *Radilla-Pacheco v. Mexico*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 23 November 2009, Series C. No. 209, para. 247.
[207] *See* ECtHR, *Perez v. France*, Judgment, 12 February 2004, para. 31.

be applicable even in the absence of a claim for financial reparation: it suffices if the outcome of the proceedings is decisive for the "civil right" in question'.[208] Importantly, it noted that, 'even where criminal proceedings are determinative only of a criminal charge, the decisive factor for the applicability of Article 6 § 1 is whether, from the moment when the applicant is joined as a civil party until the conclusion of those criminal proceedings, *the civil component remains closely connected with the criminal* […], *in other words whether the criminal proceedings affect the civil component*'.[209]

123. The Trial Chamber did not give victims a meaningful opportunity to express their views. This was due to the fact that the no case to answer procedure comes from common law jurisdictions and the *ad hoc* tribunals, which do not provide the same role to the victims as does the Statute. Given that the procedure at this Court comes from a mixture between different legal cultures and no one shall prevail over the other,[210] and that the victims are also participants in this procedure, any domestic law providing for procedures that do not give victims the same prominent role, especially those in common law jurisdictions or the *ad hoc* tribunals, cannot be replicated nor endorsed at this Court without prior amendment of its statutory framework.

124. There is no dispute among commentators who were present during the drafting of the Statute and the Rules that the procedure envisaged for the ICC is not to be interpreted as civil or common law, but rather as procedure of a *sui generis* nature.[211] Accordingly, no single legal tradition should prevail over another nor should any of the legal institutions or procedures of one tradition override the Statute. Thus, an

[208] *See* ECtHR, *Perez v. France*, Judgment, 12 February 2004, para. 65.
[209] *See* ECtHR, *Perez v. France*, Judgment, 12 February 2004, para. 67 (emphasis added).
[210] *See* C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise' in *Journal of International Criminal Justice 1* (2003), p. 605; S. Fernández de Gurmendi, 'International Criminal Law Procedure' in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (1999), p. 238; K. Campbell, 'The Making of Global Legal Culture and International Criminal Law' in *Leiden Journal of International Law 26* (2013), p. 155; W. Schabas, 'Common Law, "Civil Law" et Droit Penal International: Tango (Le Dernier?) à La Haye' in *Revue québécoise de droit international 13(1)* (2000), p. 290.
[211] *See* C. Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise' in *Journal of International Criminal Justice 1* (2003), p. 605; S. Fernández de Gurmendi, 'International Criminal Law Procedure' in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute Issues, Negotiations, Results* (1999), p. 238; K. Campbell, 'The Making of Global Legal Culture and International Criminal Law' in *Leiden Journal of International Law 26* (2013), p. 155; W. Schabas, 'Common Law, "Civil Law" et Droit Penal International: Tango (Le Dernier?) à La Haye' in *Revue québécoise de droit international 13(1)* (2000), p. 290. .

interpretation of the Statute that does not give victims a meaningful opportunity to sustain their views with evidence nor to challenge evidence against their views is inconsistent with the Statute and the internationally recognised human rights of access to justice and to an effective remedy, in the specific context of victims' participation in criminal proceedings.

125. In the case at hand, more than 700 victims were authorised to participate in the trial.[212] However, having terminated the trial proceedings with an acquittal before these victims had the opportunity to intervene and propose evidence or examine witnesses who could have been brought by the defence, the Trial Chamber did not give the victims a meaningful opportunity to express their views by presenting oral testimony. This case shows that the no case to answer procedure is inconsistent with the rights that the victims have at this Court.

126. In my view, the rights of these 700 plus victims to express their views and concerns, as well as their rights to truth, justice and reparations, and to have an effective remedy, were at stake in this case. Having placed emphasis only on the rights of the accused, Judges Henderson and Tarfusser prematurely terminated the proceedings, without providing reasons.[213] In doing so, they did not seem to have considered the rights of the victims. I recall that human rights are interconnected and indivisible, and there is no one human right that is more important than another.[214] In my view, in no case can the rights of two accused be preferred over the rights of more than 700 victims without more, especially through a procedure that is not envisioned in the Statute, while the rights of the victims are duly established under

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[212] Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on victim participation, 6 March 2015, ICC-02/11-01/11-800, p. 24; Trial Chamber I, Decision on victims' participation status, 7 January 2016, ICC-02/11-01/15-379, paras 43-66, and p. 23. *See also* Third Transmission of the Updated Consolidated List of Participating Victims, 7 December 2018, ICC-02/11-01/15-1227, para. 6 ('the information presented in the List reflects the current total number of 716 participating victims').
[213] Oral Verdict, p. 3, lines 24-25 to p. 4, lines 1-2 (noting that the need to provide a full reasoning with the decision was outweighed by the Trial Chamber's obligation to interpret and apply the Statute in line with international human rights law, as per article 21(3)).
[214] There is not a hierarchy of human rights. *See* J. Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations Between Human Rights' in *30 Human rights Quarterly* (2008), p. 984 ('no human right can be fully realized without fully realizing all other human rights'). *See also* United Nations, International Conference on Human Rights, article 13 of the Proclamation of Tehran, 22 April to 13 May 1968, A/CONF.32/41. *See also* World Conference on Human Rights, article 5 of the Vienna Declaration and Programme of Action, 25 June 1993, A/CONF.157/23 ('the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis').

the Statute. Moreover, as explained below under my analysis of the first ground of appeal,[215] the rights to liberty of the accused were not at stake as they had been legally detained to stand trial,[216] including the presentation of the testimonial evidence,[217] the final submissions by all parties and participants, and the issuance of a fully reasoned decision. In any event, even if Judges Henderson and Tarfusser, being minded to acquit, had concerns as to the liberty of the accused, there was no need to terminate the trial prematurely as the Trial Chamber had been seized of submissions on the continued detention of the accused and the judges could have granted provisional release. Instead, Judges Henderson and Tarfusser decided not to entertain such submissions and rather acquit the accused, halfway through the trial, under the no case to answer motions.[218]

127. It is for these reasons that, in my view, the surprising application of the no case to answer procedure, which prematurely terminated the trial proceedings and resulted in acquittals in this case, prejudiced the human rights of more than 700 victims to

[215] *See* section VI(D).
[216] *See* Warrant Of Arrest For Laurent Koudou Gbagbo, 23 Novemer 2011, ICC-02/11-26; Warrant of Arrest for Charles Blé Goudé, 21 December 2011, ICC-02/11-02/11-1. *See also* Decision on the confirmation of charges against Laurent Gbagbo, 12 June 2014, ICC-02/11-01/11-656-Conf; Decision on the confirmation of charges against Charles Blé Goudé, 11 December 2014, ICC-02/11-02/11-186.
[217] While victims and the witnesses they intended to call ultimately did not appear in court, earlier in the case, the victims noted the possibility and their intention to seek the Trial Chamber's authorisation to appear in court, to present their views and concern, and also to call witnesses to the stand. *See* Submission of information pursuant to the oral Order dated 28 August 2017, 2 October 2017, ICC-02/11-01/15-1039, para. 4 ('[t]he Legal Representative recalls her submissions filed on 14 April 2015, and in particular her observations at paragraphs 13-26 in relation to the possibility to seek the Chamber's authorisation to call witnesses and/or to request the appearance of some victims in person to present their views and concerns; as well as her submissions filed on 3 February 2017') (footnotes omitted), 5 ('[t]he Legal Representative informs the Chamber that she has the intention to request the appearance of a maximum of four victims to present their views and concerns'), 8 ('[t]he Legal Representative informs the Chamber that she intends to request authorisation to call four witnesses. If authorised, the Legal Representative estimates that she would use between 12 and 15 hours in total for the questioning of the witnesses'). As for documentary evidence, the OPCV was able to submit a 'list of names of Nigerien nationals who were killed during the post-electoral crisis'. *See* Legal Representative's Application for the introduction of documentary evidence under paragraphs 43-44 of the Amended Directions on the conduct of the proceedings, 15 December 2017, ICC-02/11-01/15-1088, para. 2.
[217] *See* Reasons for 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 Blé Goudé Defence no case to answer motion, 16 July 2019, ICC-02/11-01/15-1263, p. 8 ('the [Trial] Chamber […] hereby […] DECIDES that the pending requests for provisional release have hereby become moot').
[218] *See* Reasons for 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 Blé Goudé Defence no case to answer motion, 16 July 2019, ICC-02/11-01/15-1263, p. 8 ('the [Trial] Chamber […] hereby […] DECIDES that the pending requests for provisional release have hereby become moot').

truth, justice and reparations. Notably, the no case to answer motions were submitted by the defence because the Trial Chamber, on its own initiative, invited the accused to file such motions.[219] Besides resulting in a chaotic situation, the conduct of the no case to answer procedure in this case prevented victims from effectively exercising their rights and thus affected their interests. This is at odds with article 68(3) of the Statute, as well as the victims' internationally recognised human rights to justice, truth, reparations, and to have an effective remedy in cases of grave breaches of core human rights.

128. Having entertained no case to answer motions despite the aforementioned inconsistencies between such motions and the Statute, the Trial Chamber allowed the trial to unfold in a way that clearly shows the practical inconsistencies that granting such motions imply for the parties and participants, especially the victims. As noted in the following sections, the proceedings that unfolded were erratic. The bench constantly disagreed on issues that were necessary to either entertain such motions or stick to the plain wording of the Statute, such as the applicability of article 74 of the Statute, the applicable standard of proof at the no case to answer stage, and the system for the admissibility of evidence. These issues remained unresolved after Judges Henderson and Tarfusser entered the acquittals, and even when they tried to put their findings on the evidence and their conclusions in writing. Besides affecting the rights of the victims, the trial and the acquittals as entered violated the principles of legality and *pacta sunt servanda*, as shown above, and they also affected the due process of law and the fairness of the proceedings, as elaborated in the next sections.

C. Conclusions on the impossibilities and impracticalities of the no case to answer procedure at the ICC

129. The no case to answer procedure does not belong to the legal framework of the Rome Statute System. 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.

130. The drafters of the Rules, seized of a proposal to incorporate it, decided not to include the no case to answer procedure within the Rome Statute System. They

[219] Second Order on the further conduct of the proceedings, 4 June 2018, ICC-02/11-01/15-1174, paras 9-10, *referring to* *Ruto and Sang* Decision No. 5, para. 16.

implicitly rejected it. To construct the silence in the Statute as a lacuna would be against the drafters' intention to not include this procedure.

131. Entertaining no case to answer motions without amendments clearly providing for the applicable law violates the principle of legality. Moreover, following such a procedure without first following an amendment of the agreement that the States Parties reached in the Statute and the Rules violates the *pacta sunt servanda* principle.

132. Article 74 of the Statute establishes that the only avenue to determine the guilt of a person is through a trial that finishes with a decision where the trial chamber, having assessed the evidence and the entire proceedings, includes its findings on the evidence and conclusions. The only exception is provided in article 65 for cases where the accused enters an admission of guilt. There is no other avenue to conclude the proceedings, let alone halfway through the trial under the no case to answer procedure.

133. Judicial discretion is not a source of law. It is an excessive interpretation and outside of the legal framework of the Rome Statute System to understand article 64(6)(f) of the Statute as providing for discretion to decide on a substantive matter, such as the guilt of the accused as per a no case to answer motion, and to decide on the early termination of trial and thus to disrespect the hierarchy of article 21(1) of the Statute.

134. A decision on the no case to answer motion is not a discretionary matter; the discretion that the Statute provides for purely procedural matters cannot be invoked to introduce the no case to answer procedure. Such an excessive interpretation of article 64(6)(f) is not only against the object and purpose of the Statute to prosecute alleged perpetrators of atrocity crimes and thus put an end to their impunity, but it is also at odds with article 74 of the Statute.

135. While the *ad hoc* tribunals applied the no case to answer procedure on a regular basis, the procedural framework of the *ad hoc* tribunals explicitly foresees in their statutes the no case to answer procedure, whereas, as mentioned, the Statute does not.

136. The laws of Côte d'Ivoire do not provide for the no case to answer motion. In fact, it contradicts Ivoirian law.

137. 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.

138. These inconsistencies 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 in this regard.

139. Entertaining no case to answer motions under the Statute would not only be against the role that the statutory framework grants to the victims to present their views and concerns, but also against their internationally recognised human rights to access to justice, truth, reparations, and to have an effective remedy.

140. With that, I will turn to address the first and second grounds of appeal.

VI. FIRST GROUND OF APPEAL

141. Without prejudice to my views on the no case to answer motions at this Court, in this section I will refer to the findings of the Appeals Chamber's Majority regarding the first ground of appeal. In brief, I am unable to agree with my esteemed colleagues' decision to reject the first ground of appeal. As elaborated below, Judges Henderson and Tarfusser did not follow the mandatory guarantees of due process and fairness in article 74(5). The failure to meet such guarantees materially affected the trial judges' ability to find that there was indeed a case to answer. Specifically, announcing their verdict orally, not having yet reached one decision and written their findings on the evidence and conclusions, Judges Henderson and Tarfusser erred in law and procedure. Such errors affected their decision-making process, considering that Judges Henderson and Tarfusser could have otherwise found that there was a case to answer but, having announced the verdict orally, with reasons to follow, they could no longer change it during the process of finding and writing the reasons for the verdict.

A. Findings of the Appeals Chamber's Majority with which I disagree

142. At the outset, I am in agreement with the Appeals Chamber's Majority conclusion to reject Mr Blé Goudé's request that the Appeals Chamber dismiss the Prosecutor's appeal *in limine*. The Appeals Chamber's Majority found that the

decision in the case at hand to acquit following no case to answer motions, falls within the purview of article 74 of the Statute 'because that provision is intended to regulate the Trial Chamber's final judgment that puts an end to the trial – either by way of a conviction or by way of an acquittal'.[220] In the view of the majority, article 81's wording makes it clear that Article 74 of the Statute applies, *inter alia*, to decisions of acquittal.[221] Thus, contrary to Mr Blé Goudé's request to dismiss the Prosecutor's appeal *in limine*, the majority considers that article 74(5) requirements apply to the present case's acquittals and that the Prosecutor's appeal is admissible pursuant to article 81 of the Statute.[222]

143. While I am in agreement with this conclusion, I am nevertheless unable to agree with some of the reasons given by the Appeals Chamber's Majority to reach this conclusion. Without prejudice to my views regarding the no case to answer proceedings at this Court, I concur with the finding that article 74 is applicable to the acquittal in the case at hand and, hence, that the Prosecutor's appeal is admissible. However, I would have reached that conclusion in a different, simpler way. In my view, the fact that Judges Herrera Carbuccia and Tarfusser agreed that article 74 was applicable suffices to reject Mr Blé Goudé's request to reject the Prosecutor's appeal *in limine*.[223] While these two judges reached opposite outcomes, Judge Herrera Carbuccia and Judge Tarfusser started from the premise that the decision on the no case to answer motions was governed by article 74, and Judge Henderson was the only one who opined differently.[224] This would on its own be sufficient basis for the Prosecutor to understand that article 74 was applicable and that she could appeal directly under article 81.

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[220] Judgment of the Appeals Chamber's Majority, para. 109.
[221] Judgment of the Appeals Chamber's Majority, para. 112.
[222] Judgment of the Appeals Chamber's Majority, para. 124.
[223] Defence Response to the 'Prosecution Document in Support of Appeal', 9 March 2020, ICC-02/11-01/15-1315-Red, paras 2, 13 (original confidential version filed 6 March 2020) (hereinafter: 'Defence Response'). Mr Blé Goudé makes this argument under the first ground of appeal. However, the request is for dismissal of the appeal as a whole.
[224] In Judge Henderson's view, 'article 74 does not […] provide the appropriate basis to render [...] decisions on motions for "no case to answer"'. *See* Judge Henderson's Reasons, para. 13. On the other hand, Judge Tarfusser considered that '[t]rial proceedings can only end either in acquittal or conviction, as emerging from article 74, read together with article 81'. Judge Tarfusser's Opinion, para. 65. According to Judge Herrera Carbuccia, article 74(5) of the Statute 'sets the requirements for the judgment that decides either on the acquittal or the conviction of the accused'. *See* Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 11.

144. Regarding the issue of whether Judges Henderson and Tarfusser met the requirements of article 74(5), the Appeals Chamber's Majority finds that they did not err in announcing their verdict with reasons to follow and releasing Mr Gbagbo and Mr Blé Goudé.[225] In the majority's view, Judges Henderson and Tarfusser did not err in law or breach article 74(5) when not issuing their reasons at the same time as the verdict.[226] However, although Judges Bossa and Hofmański, like me, considered that the Trial Chamber did not strictly comply with the requirement to issue a decision in writing and that this thus amounted to an error of law,[227] the Appeals Chamber's Majority, in contrast with my views, went on to consider that the Trial Chamber's failure to issue a written decision did not materially affect the acquittals, because, in the view of the Appeals Chamber's Majority, had the Trial Chamber made the acquittals in writing, the decision would have been the same.[228] Moreover, holding that the Prosecutor fails to provide sufficient reasons to question the reliability of the Trial Chamber's verdict on 15 January 2019 or to show that the Trial Chamber's decision was not fully informed,[229] the Appeals Chamber's Majority rejects the Prosecutor's arguments that the Trial Chamber had not assessed all of the evidence nor reached all conclusions,[230] and that the Trial Chamber was not fully informed when entering the acquittals on 15 January 2019.[231]

145. While I agree with Judges Bossa and Hofmański, in that Judges Henderson and Tarfusser did not strictly comply with the requirement to issue a decision in writing and that this thus amounted to an error of law,[232] I disagree with the subsequent findings of the Appeals Chamber's Majority. In my view, Judges Henderson and Tarfusser had not yet completed their decision-making process when they announced the verdict orally and, not having issued by then the acquittals in writing, the judges failed to meet the requirements and guarantees of article 74. Such failure, which

[225] Judgment of the Appeals Chamber's Majority, section VI(C)(4).
[226] Judgment of the Appeals Chamber's Majority, section VI(C)(4)(c).
[227] Judgment of the Appeals Chamber's Majority, paras 189. *See also* Separate concurring opinion of Judge Piotr Hofmański, 31 March 2021, ICC-02/11-01/15-1400-Anx3, para. 9. *See also* Dissenting Opinion of Judge Solomy Balungi Bossa, 31 March 2021, ICC-02/11-01/15-1400-Anx5, para. 47.
[228] Judgment of the Appeals Chamber's Majority, para. 265.
[229] Judgment of the Appeals Chamber's Majority, section VI(D)(2).
[230] Judgment of the Appeals Chamber's Majority, section VI(D)(2)(b).
[231] Judgment of the Appeals Chamber's Majority, section VI(D)(2).
[232] Judgment of the Appeals Chamber's Majority, paras 189. *See also* Separate concurring opinion of Judge Piotr Hofmański, 31 March 2021, ICC-02/11-01/15-1400-Anx3, para. 9. *See also* Dissenting Opinion of Judge Solomy Balungi Bossa, 31 March 2021, ICC-02/11-01/15-1400-Anx5, para. 47.

amounts to errors of law and procedure, not only vitiated the proceedings and the acquittals, but, equally important, it materially affected the acquittals. Certainly, having announced a verdict orally, before reaching one decision with the full and reasoned statement of both judges' findings on the evidence and conclusions (especially, findings necessary to grant a no case to answer motion, including its basis at the ICC and the applicable standard of proof), it was impossible for the judges to later find reasons sustaining a different verdict, rejecting the no case to answer motions and continuing with the defence case. If the judges had completed their decision-making process before the verdict, they would have found that their views on the no case to answer motions were incompatible and thus that they could not issue 'one decision'.

146. Disregarding the mandatory nature of article 74(5) of the Statute, Judges Henderson and Tarfusser issued in this case an oral decision acquitting the accused, indicating that reasons would follow 'as soon as possible' and referring to rule 144(2) of the Rules. While this rule certainly uses the expression 'as soon as possible', I will elaborate below why it refers to a small window of time to finalise the copies of the decision to be delivered, and not to a blank cheque allowing a trial chamber to continue with the assessment of the evidence, deliberations or drafting of substantive parts of the decision. While the two judges issued separate written opinions six months later, and notwithstanding that Judge Tarfusser wrote that he joined the assessment made in Judge Henderson's opinion, the two separate opinions[233] do not amount to 'one decision' containing 'a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions', as required by article 74(5). This is essentially because the trial procedure and the two opinions themselves show disagreements between the two judges on essential issues that would make it logically impossible for them to form a majority sustaining the outcome announced in the oral decision. The two judges expressed contradictory views during the procedure, and later in their written opinions (especially regarding (i) the legal basis for no case to answer proceedings before this Court, (ii) the applicable standard of proof at the no case to answer stage, (iii) the applicable legal basis to enter an acquittal under the no

[233] While they are supposedly separate concurring opinions, in the aggregate, having contrasted one opinion against the other, I consider that they rather seem to be partly dissenting opinions.

case to answer procedure, and, equally important, (iv) the system of admissibility of the evidence that the judges should assess). As such, it is not logically possible to conclude that both judges relied on the reasons provided by only one of them—the one who considered that no case to answer proceedings are applicable at this Court—while the other found no legal basis for entertaining no case to answer motions at the ICC.

147. For the reasons that follow in this section, I find that article 74 of the Statute is mandatorily applicable to the impugned acquittals. Because of this, Judges Henderson and Tarfusser's lack of compliance with paragraphs (2) and (5) amount to errors of law and procedure that materially affected the acquittals in the case at hand. Thus, the Appeals Chamber should have ordered a retrial.

B. Arguments of the parties and participants

148. Under her first ground of appeal, the Prosecutor argues that Judges Henderson and Tarfusser erred in law and procedure by acquitting Mr Gbagbo and Mr Blé Goudé in violation of the mandatory requirements of article 74(5) of the Statute, or alternatively erred in the exercise of their discretion by doing so.[234] In her view, both convictions and acquittals must comply with specific legal requirements in article 74(5); this, to ensure all have full trust in it and regard it as legitimate.[235] She argues that Judges Henderson and Tarfusser failed to comply with the requirements as there was an oral acquittal, unreasoned, and not fully informed.[236] She thus submits that the decision was unlawful and cannot produce the effects of an acquittal, and that the deficiencies were not cured by the provision of reasons six months later.[237]

149. Contrary to the Prosecutor's submissions, counsel for Mr Gbagbo considers that Judges Henderson and Tarfusser acquitted him in accordance with the spirit and the letter of the Statute.[238] In his view, article 74 does not apply to the delivery of a

[234] Prosecutor's Appeal Brief, paras 6-121.
[235] Prosecutor's Appeal Brief, para. 2.
[236] Prosecutor's Appeal Brief, para. 2.
[237] Prosecutor's Appeal Brief, para. 2.
[238] Response of the Defence for Laurent Gbagbo to 'Prosecution Document in Support of Appeal', 13 March 2020, ICC-02/11-01/15-1314-Red-tENG (original confidential version filed 15 October 2019) (hereinafter: 'Counsel for Mr Gbagbo's Response'), paras 28-152.

decision following a no case to answer procedure.[239] He submits that the Prosecutor's position that article 74 governs acquittals under the no case to answer procedure, while article 64(2) applies to decisions rejecting the no case to answer motion, is 'nonsensical', because it would lead to a differentiation in the appeal procedures and whether a ruling on admissibility of the evidence is required.[240] He nevertheless considers that Judges Henderson and Tarfusser upheld the spirit of the Statute, including article 74(5) in particular, when they delivered the decision.[241]

150. Counsel for Mr Blé Goudé argues that there was no legal requirement to enter the impugned decision under article 74 of the Statute, and that the Trial Chamber was hence not bound by the requirements of article 74(5).[242] He submits that Trial Chamber V(A) in *Ruto and Sang* did not base its no case to answer decision on article 74, nor did it fulfil the requirements of article 74(5).[243] He avers that the Trial Chamber, nonetheless, complied with the requirements of article 74(5) of the Statute despite not being bound to do so.[244]

151. The OPCV largely concurs with the Prosecutor's submissions under this ground,[245] with some additional arguments.[246] It notes that only one of the judges in the majority of the Trial Chamber, Judge Henderson, referred to article 66(2) as a basis for the impugned decision, while Judge Tarfusser referred to article 74, read

[239] Counsel for Mr Gbagbo's Response, paras 33-61.
[240] Counsel for Mr Gbagbo's Response, paras 54-61.
[241] Counsel for Mr Gbagbo's Response, paras 62-146.
[242] Defence Response, para. 32.
[243] Defence Response, para. 33.
[244] Defence Response, paras 38-85.
[245] Victims' Observations on the issues on appeal affecting their personal interests, 22 April 2020, ICC-02/11-01/15-1326-Red (original confidential version filed on 8 April 2020) (hereinafter: 'OPCV's Observations'), para. 43. *See also* paras 66, 69, 73-75, 79-80, 83-84, 91, 100.
[246] The Victims add that human rights jurisprudence requires judgments to be timely written, reasoned and public, in order to avoid arbitrariness, maintain public confidence, and guarantee the right to appeal. OPCV's Observations, para. 45. They also refer to jurisprudence requiring that reasons be given sometime after the decision as long as the right to appeal is not affected and the main arguments by the parties are addressed. OPCV's Observations, para. 47. They also refer to the STL and the jurisdictions of Côte d'Ivoire, Croatia, DRC, Japan, and Venezuela, to indicate that judges must provide reasons or a summary thereof at the time of issuing a decision on the merits. OPCV's Observations, paras 48-49. As for the Reasons for the Oral Decision, the Victims argue that not rendering them orally violates article 74(5) of the Statute. OPCV's Observations, paras 83-90. In their view, the reasons 'were only notified in writing, but they should have also been delivered orally', and they 'do not provide a full and reasoned statement of the joint findings and conclusions of the Majority'. OPCV's Observations, paras 102, 104.

together with article 81.[247] It is important to note, in this regard, that Judge Herrera Carbuccia also refers to the applicability of article 74, specifically, its paragraph (5).[248]

C. Issues under the first ground of appeal

152. In light of the foregoing, the main issues under the first ground of appeal concern the applicability of article 74 of the Statute to no case to answer decisions: (i) whether article 74 of the Statute is mandatorily applicable, in particular, paragraph (5), as argued by the Prosecutor, and paragraph (2); and (ii) whether the Trial Chamber complied with the legal requirements and guarantees of article 74 of the Statute, in particular those under paragraph (5),[249] and additionally, paragraph (2).[250]

153. If so, under article 83(2) of the Statute, the Appeals Chamber would have had to entertain, as I do below, the question of whether 'the decision or sentence appealed from was materially affected by error of fact or law or procedural error'. In other words, the ultimate question is the following: (iii) whether the acquittals of 15 January 2019, the opinions of 16 July 2019, or all of the above, were materially affected by lack of compliance with the legal requirements and guarantees of article 74(2), (5), or both, of the Statute.

D. Analysis

1. Whether article 74 of the Statute is mandatorily applicable

154. For the reasons that follow, in my view, the legal requirements and guarantees of article 74(2) and (5) of the Statute are mandatory. While I agree with the Appeals Chamber's Majority consideration that the requirements of article 74(5) of the Statute ensure the guarantees of a fair trial for all parties and participants, as further elaborated below, I disagree with its indulgent reading that such requirements must not be strictly applied. [251] As explained in this subsection, I am of the view that article

[247] OPCV's Observations, para. 26.
[248] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 17.
[249] *I.e.*, '[t]he Trial Chamber's decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions'; '[t]he Trial Chamber shall issue one decision'; '[t]he decision or a summary thereof shall be delivered in open court'.
[250] *I.e.*, the 'Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings'.
[251] Judgment of the Appeals Chamber's Majority, paras 159-163.

74 provides for requirements that guarantee that the proceedings and decisions at this Court respect the due process of law and fairness. Failing to comply with these requirements, as the Prosecutor argues,[252] vitiates the process and invalidates any decision emerging from such a process. As further elaborated below, such requirements are mandatory, according to the plain reading of article 74, in several authentic versions under different languages, as well as a contextual interpretation in light of article 31 of the VCLT.

(a) Article 74 as a safeguard of fairness and due process of law

155. Article 74 of the Statute reads:

> **Article 74**
>
> **Requirements for the decision**
>
> 1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.
>
> 2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.
>
> 3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.
>
> 4. The deliberations of the Trial Chamber shall remain secret.
>
> 5. 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 Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

[252] According to the Prosecutor, the requirements of article 74 are 'so fundamental to ensuring a reliable decision that without them the decision can barely be considered a valid legal outcome'. Transcript of hearing, 22 June 2020, ICC-02/11-01/15-T-238-Red-ENG, p. 21, lines 2-4. *See also* Transcript of hearing, 22 June 2020, ICC-02/11-01/15-T-238-Red-ENG, p. 22, lines 2-5; Transcript of hearing, 24 June 2020, ICC-02/11-01/15-T-240-ENG, p. 55, lines 11-13. In her view, 'the violations of article 74(5) that occurred in this case were so fundamental as to render the decision *ultra vires* the Statute and thereby "null and void"'. Prosecution's submissions in response to the Chamber's questions on the Appeal, 22 May 2020, ICC-02/11-01/15-1349 (hereinafter: 'Prosecutor's Response to the Appeals Chamber's Questions'), para. 16.

156. This article provides for the legal requirements that guarantee fairness and due process of law in final decisions at the end of trials at the ICC. In her appeal brief, the Prosecutor recalls the Appeals Chamber's holding that '"the right to a reasoned decision is an element of the right to a fair trial […]"'[253], noting that this is confirmed by international human rights case law.[254] Like Judge Herrera Carbuccia and the OPCV, the Prosecutor also asserts that the Defence, the victims and the Prosecution all have the right to a fair trial.[255]

157. The OPCV adds that human rights jurisprudence requires judgments to be timely written, reasoned and public, in order to avoid arbitrariness, maintain public confidence, and guarantee the right to appeal.[256] It also refers to jurisprudence requiring that reasons be given sometime after the decision as long as the right to appeal is not affected and the main arguments by the parties are addressed.[257] As for the document entitled 'Reasons for the Oral Decision', the OPCV argues that when Judges Henderson and Tarfusser entered the acquittals, they violated article 74(5) of the Statute by not rendering a reasoned statement with their findings on the evidence

[253] Prosecutor's Appeal Brief, para. 93 (quoting *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, ICC-01/04-01/06-773 (OA5), para. 20; *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, ICC-01/04-01/06-774 (OA6), para. 30).
[254] Prosecutor's Appeal Brief, para. 93 (*referring to* Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, paras 24-25; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018, ICC-01/05-01/08-3636-Red, para. 50; ECtHR, Hadjianastassiou v. Greece, Judgment, 16 December 1992, application no. 12945/87, paras 31, 36-37; ECtHR, Van den Hurk v. The Netherlands, Judgment, 19 April 1994, application no. 16034/90, para. 61; ECtHR, García Ruiz v. Spain, Judgment, 21 January 1999, application no. 30544/96, para. 26 ('Although Article 6 §1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument'); ECtHR, Perez v. France, Judgment, 12 February 2004, application no. 47287/99, para. 81; ECtHR, Gorou v. Greece *(No. 2)*, Judgment, 20 March 2009, application no. 12686/03, para. 37; ECtHR, Hirvisaari v. Finland, Judgment, 27 September 2001, application no. 49684/99, para. 30 ('The Court reiterates that, according to its established case-law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based'); ECtHR, Suominen v. Finland, Judgment, 1 July 2003, application no. 37801/97, para. 37).
[255] Prosecutor's Appeal Brief, para. 93.
[256] OPCV's Observations, para. 45.
[257] OPCV's Observations, para. 47, *referring to* jurisprudence of the Special Tribunal for Lebanon and the jurisdictions of Côte d'Ivoire, Croatia, the Democratic Republic of the Congo, Japan, and Venezuela, the OPCV indicates that judges must provide reasons or a summary thereof at the time of issuing a decision on the merits. *See* OPCV's Observations, paras 48-49.

and conclusion.[258] In the OPCV's view, the reasons 'were only notified in writing, but they should have also been delivered orally', and they 'do not provide a full and reasoned statement of the joint findings and conclusions of the Majority'.[259]

158. The OPCV also points to Judges Tarfusser and Trendafilova's finding in the *Ngudjolo* case that all parties to the proceedings enjoy the right to a fair trial.[260] They further note that 'Judge Eboe-Osuji extended this right to the victims in the *Ruto* case, when he found that "[a] *trial must be fair to all the parties and participants in the case – the Defence and the Prosecution alike. And the victims, too*"'.[261]

159. In her dissenting opinion of 15 January 2019, Judge Herrera Carbuccia opined that Judges Henderson and Tarfusser breached the fundamental right to a fair trial by issuing a judgment of acquittal orally and without reasons.[262] She recalled that 'the right to a reasoned judgment is essential to a fair trial, in particular to protect against arbitrariness'[263] and to 'enable a useful exercise of the right of appeal by the parties'.[264] Judge Herrera Carbuccia further noted that the right to a fair trial is undermined by undue delay in the provision of a fully reasoned judgment.[265] Moreover, Judge Herrera Carbuccia clarified that the right to a fair trial belongs not

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[258] OPCV's Observations, paras 83-90.
[259] OPCV's Observations, paras 102, 104.
[260] OPCV's Observations, para. 7 (*referring to 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' - Joint Dissenting Opinion of Judge Ekaterina Trendafilova and Judge Cuno Tarfusser, 27 February 2015, ICC-01/04-02/12-271-AnxA, paras 6, 12).
[261] OPCV's Observations, para. 7 (*quoting* Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Public redacted version of Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, ICC-01/09-01/11-2027-Red-Corr, para. 190).
[262] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 36.
[263] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 22 (*referring to* Fair Trial Manual, Amnesty International, Second Edition, 2014, p. 173).
[264] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 22 (*referring to* ICTR, Appeals Chamber, *The Prosecutor v. Augustin Bizimungu*, Judgement, 30 June 2014, ICTR-00-56B-A, para. 18; ICTY, Appeals Chamber, *The Prosecutor v. Momir Nikolic*, Judgement on Sentencing Appeal, 8 March 2006, IT-02-60/1- A., para. 96; ICTY, Appeals Chamber, *The Prosecutor v. Kunarac et al.*, Judgement, 12 June 2002, IT-96-23 & IT-96- 23/1-A, para. 41).
[265] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 22 (*quoting* Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, CCPR/C/GC/32, 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 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]').

only to the accused, but also to the Prosecutor.[266] She stated that the Prosecutor's right to a fair trial must be upheld in order to safeguard the rights of victims to seek justice and reparations.[267] Thus, Judge Herrera Carbuccia, the Victims and the Prosecutor each consider that by issuing a judgment of acquittal orally and without reasons, Judges Henderson and Tarfusser failed to uphold the right to a fair trial for all parties. As discussed above, this failure to uphold the right to a fair trial amounts to a violation of the internationally recognised principles of due process of law.

160. I observe that the principle of due process of law can be understood as a concept encompassing a set of procedural safeguards to ensure the fair administration of justice.[268] In the international context, due process 'concerns issues such as, inter alia, the right to counsel, the right against self-incrimination, the right to confront witnesses, and the general right to a fair trial'.[269] The concept of due process of law is often conflated with the right to a fair trial; due process of law, however, is an expansive norm that underpins both the general right to a fair trial and the particular procedural guarantees that must be upheld in order to ensure a fair and expedient judicial process. One such procedural guarantee, for example, is the right to a 'competent, independent and impartial tribunal'.[270] In criminal matters, the due process of law applies concomitantly with the principle of legality.

161. The guarantees of due process of law, such as the right to a fair trial and the principle of legality, are outlined across various international human rights instruments. Article 14 of the ICCPR sets out the right to a 'fair and public hearing by a competent, independent and impartial tribunal'.[271] The right to a fair trial is also

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[266] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 35 (*referring to* ICTR, Trial Chamber III, *The Prosecutor v. Edouard Karemera et al.*, Decision on Severance of André Rwamakuba and Amendments of the Indictment, 7 December 2004, ICTR-98-44-PT, para. 26).
[267] Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 35 (*referring to The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Defence Applications for Judgments of Acquittal, Dissenting Opinion of Judge Herrera Carbuccia, 5 April 2016, ICC-01/09-01/11-2027-AnxI, para. 27; UNGA, 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, A/RES/60/147, principles 11-12).
[268] *See* C. DeFrancia, 'Due Process in International Criminal Courts: Why Procedure Matters' in *Virginia Law Review 87*(7) (2001); *See also* Icelandic Human Rights Centre, 'The Right to Due Process', 31 December 2020.
[269] C. DeFrancia, 'Due Process in International Criminal Courts: Why Procedure Matters' in *Virginia Law Review 87*(7) (2001), p. 1383.
[270] Article 8.1 of the ACHR.
[271] Article 14 of the ICCPR.

recognised in article 6 of the ECHR,[272] article 8 of the ACHR,[273] and article 7 of the ACHPR.[274] The principle of legality is recognized in article 11 of the UDHR,[275] article 15 of the ICCPR,[276] article 7 of the ECHR,[277] articles 8(1) and 9 of the ACHR,[278] and article 7 of the ACHPR.[279] Moreover, in article 27 of the ACHR, 'judicial guarantees have been given non-derogable status, which means that certain aspects of the right to a fair trial are non-derogable'.[280] Article 26 of the ACHPR obligates States to 'guarantee the independence of the Courts'.[281] In addition, various declarations, resolutions, and other international human rights instruments have addressed the right to a fair trial and other due process guarantees.[282]

162. The principle of due process of law and its guarantees are incorporated in the Statute. In particular, article 64(2) can be read as an articulation (or partial articulation) of the principle:

> The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

163. Moreover, the principle and its guarantees are also reflected in articles 67, 68(3), 74, and 81, among others. This incorporation is in keeping with the drafters' intention that 'whatever the precise structure of the court or other mechanism, it must guarantee due process, independence and impartiality in its procedures'.[283] Certainly,

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[272] Article 6 of the ECHR.
[273] Article 8 of the ACHR.
[274] Article 7 of the ACHPR.
[275] Article 11 of the UDHR.
[276] Article 15 of the ICCPR.
[277] Article 7 of the ECHR.
[278] Articles 8(1) and 9 of the ACHR.
[279] Article 7 of the ACHPR.
[280] Icelandic Human Rights Centre, 'The Right to Due Process', 31 December 2020. *See also* article 27 of the ACHR.
[281] Article 26 of the ACHPR.
[282] *See for example* UNGA, Basic Principles on the Independence of the Judiciary, 13 December 1985, UNGA Resolution 40/146; *See also* UNGA, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, A/RES/40/34; *See also* UNGA, 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, A/RES/60/147.
[283] *See for example* Report of the Working Group on a draft statute for an international criminal court, Report of the International Law Commission on its Forty-Fifth Session, Draft Statute for an International Criminal Court, 3 May-23 July 1993, A/48/10, para. 30.

the principle of due process can be said to underpin all of the fair trial rights and procedural guarantees set out in the Statute.

164. Given the unique mandate of the ICC, the right to a fair trial ought to extend to all parties and participants in ICC proceedings. That is, due process guarantees apply not only to the accused, but to the victims, and to the Prosecutor.[284]

165. Thus, in my view, the parties and participants at this Court, as well as the States Parties and the public, have an expectation that trials be conducted as per the statutory framework and its procedural guarantees, and in particular, that an acquittal or conviction is entered in compliance with the requirements of article 74.

[284] *See Situation in Uganda*, Pre-Trial Chamber II, "Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06", ICC-02/04-112, 19 December 2007, para. 27 ('[fairness] also extends to other parties in proceedings such as the Prosecution'). *See also 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' - Joint Dissenting Opinion of Judge Ekaterina Trendafilova and Judge Cuno Tarfusser, 27 February 2015, ICC-01/04-02/12-271-AnxA, paras 6 ('Although the notion of fair trial is perceived predominantly with respect to the accused, fairness "also extends to other parties in proceedings such as the Prosecution"'), 12 ('the judicial duty to ensure fairness of the trial, as enjoined by virtue of article 64(2) of the Statute, encompasses the obligation of the Trial Chamber to safeguard the rights of the accused and *equally* the procedural rights of the Prosecutor, acting in public interest'). *See also The Prosecutor v. Jean-Pierre Bemba Gombo*, Concurring Separate Opinion of Judge Eboe-Osuji, 14 June 2018, ICC-01/05-01/08-3636-Anx3, para. 51 ('the right of fair trial is a neutral right enjoyed at the ICC by the defendants, the Prosecution and the victims'). *See also* ECtHR, *Doorson v. The Netherlands*, Judgment, 26 March 1996, application no. 20524/92, para. 70 ('It is true that Article 6 (art. 6) does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 (art. 8) of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify'). Due process of law is especially applicable to victims of crimes adjudicated at the ICC. Considering that they have been subjected to violations of their core human rights or the core human rights of their next of kin, they have the rights to access justice for such violations, know the truth of what happened, obtain reparations for the harm they suffered, through effective remedies and under the principle of due process of law. *See* IACtHR, *The 'Street Children' (Villagrán-Morales et al.) v. Guatemala*, Judgment of November 19, 1999 (Merits), Series C No. 63, para. 227. *See also* IACtHR, *Heliodoro Portugal v. Panama*, Judgment (Preliminary objections, Merits, Reparations and Costs), 12 August 2008, Series C. No. 186, para. 247; IACtHR, *Rosendo Cantú et al. v. Mexico*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 31 August 2010, Series C. No. 216, para. 167.

(b) Interpretation of article 74 in accordance with the VCLT

166. First of all, I recall that the 'Appeals Chamber has confirmed that the principles of treaty interpretation set out in article 31 of the Vienna Convention also apply to the interpretation of the Statute'.[285]

167. In order to properly interpret the Statute as the treaty it is, article 31(1) of the VCLT provides:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

168. Accordingly, the text of article 74(2) and (5) of the Statute must be interpreted in good faith, in accordance with the ordinary meaning of their terms, in their context and in the light of the object and purpose of the Statute itself. To this end, it is important to recall that, according to article 31(2) of the VCLT, the object and purpose of the Statute can be found in its Preamble; that is, 'to put an end to impunity' and that the crimes under the Statute 'must not go unpunished'.[286]

(i) Ordinary meaning of the terms of article 74(2) and (5)

169. Paragraphs (2) and (5) of article 74 use the modal verb 'shall' when mandatorily requiring the trial chamber to follow specific legal requirements and guarantees regarding the decision under article 74. Pursuant to paragraph (2), the trial chamber's decision (i) '*shall* be based on its evaluation of the evidence and the entire proceedings and (ii) '*shall not* exceed the facts and circumstances described in the charges and any amendments to the charges'.[287] Paragraph (5) provides that: (iii) 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', (iv) the trial chamber '*shall* issue one decision', (v) failing to reach unanimity, the decision '*shall* contain

[285] *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2008, ICC-01/05-01/13-2275-Red (hereinafter: '*Bemba et al.* Appeal Judgment'), para. 675.
[286] Preamble of the Statute.
[287] *See* paragraph (2) of article 74 of the Statute (emphasis added).

the views of the majority and the minority', and (vi) the 'decision or a summary thereof *shall* be delivered in open court'.[288]

170. According to the Concise Oxford Dictionary of Current English, 'shall' must be understood 'in the 2nd and 3rd persons' as 'expressing a strong assertion or command rather than a wish (cf. WILL)'. It further states that 'shall' must be understood as 'expressing a command or duty (*thou shall not steal*; *they shall obey*)'.[289] The Cambridge Dictionary indicates that when it is not used in the first person, 'shall' is 'used to say that something certainly will or must happen, or that you are determined that something will happen'.[290] Neither of these two definitions leaves room for a discretionary interpretation of article 74 of the Statute, let alone for not complying with it.

171. From its plain reading, the use of 'shall' in the third person (as in article 74(2) and (5)'s reference to the 'Trial Chamber', the 'Trial Chamber's decision', or simply the 'decision') expresses 'a strong assertion or command rather than a wish'.[291] I also note, in any event, that the word 'shall' is meant to express 'a command or duty'.[292] Importantly, it means, indeed, that 'something certainly will or must happen, or that you are determined that something will happen'.[293]

172. That said, I recall that, according to article 128 of the Statute, English is not the only authentic text of the Statute. It would be incorrect to centre this discussion around nuances of the English language, simply on the grammatical uses of 'shall' in English. To make a correct interpretation of article 74(2) and (5), we must look at the way the provision is written in the authentic text of other languages, especially French.

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[288] *See* paragraph (5) of article 74 of the Statute (emphasis added).
[289] The Concise Oxford Dictionary of Current English, Eighth Edition, p. 1113.
[290] Cambridge English, Eighth Edition, available at https://dictionary.cambridge.org/dictionary/english/shall.
[291] *See* The Concise Oxford Dictionary of Current English, Eighth Edition, p. 1113. Note also that in English the auxiliary verbs that are used to express degrees of possibility are 'could' and 'may'. *See* Cambridge English, Eighth Edition, available at https://dictionary.cambridge.org/grammar/british-grammar/could-may-and-might.
[292] *See* The Concise Oxford Dictionary of Current English, Eighth Edition, p. 1113.
[293] Cambridge English, Eighth Edition, available at https://dictionary.cambridge.org/dictionary/english/shall.

173. Certainly, when article 31(1) of the VCLT refers to the 'ordinary meaning' of a treaty's terms it refers to any language in which the treaty is authentic and not just English. To that effect, article 33(3) of the VCLT provides that

> [t]he terms of the treaty are presumed to have the same meaning in each authentic text.[294]

174. This has been understood as an interpretative requirement that 'every effort should be made to find a common meaning for the texts before preferring one to another'.[295] Thus, in seeking the ordinary meaning of specific treaty provisions, other international tribunals have relied on grammatical forms in the different languages of the authenticated texts.[296]

175. Article 128 of the Statute reads:

> The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States

176. The French version of article 74(2) and (5) reads:

> **Article 74**
>
> **Conditions requises pour la décision**
>
> […]
>
> 2. La Chambre de première instance fonde sa décision sur son appréciation des preuves et sur l'ensemble des procédures. Sa décision ne peut aller au-delà des faits et des circonstances décrits dans les charges et les modifications apportées à celles-ci. Elle est fondée exclusivement sur les preuves produites et examinées au procès.
>
> […]

[294] Article 33(3) of the VCLT ('The terms of the treaty are presumed to have the same meaning in each authentic text'.).
[295] United Nations International Law Commission, 'Yearbook of the International Law Commission', Volume II, 1966, A/CN.4/SER.A/1966/Add.1, p. 225, para. 7.
[296] ICJ, *Georgia v. Russian Federation (Application of the International Convention on the Elimination of All Forms of Racial Discrimination)*, Judgment (Preliminary Objections), 1 April 2011, ICJ Reports 2011, para. 135. *See also* O. Dörr, 'Article 31. General rule of interpretation', in O. Dörr, et al. (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012), p. 521, at para. 42.

> 5. La décision est présentée par écrit. Elle contient l'exposé complet et motivé des constatations de la Chambre de première instance sur les preuves et les conclusions. Il n'est prononcé qu'une seule décision. S'il n'y pas unanimité, la décision contient les vues de la majorité et de la minorité. Il est donné lecture de la décision ou de son résumé en audience publique.

177. The Spanish version of the same provision reads:

> **Artículo 74**
>
> **Requisitos para el fallo**
>
> […]
>
> 2. La Sala de Primera Instancia fundamentará su fallo en su evaluación de las pruebas y de la totalidad del juicio. El fallo se referirá únicamente a los hechos y las circunstancias descritos en los cargos o las modificaciones a los cargos, en su caso. La Corte podrá fundamentar su fallo únicamente en las pruebas presentadas y examinadas ante ella en el juicio.
>
> […]
>
> 5. El fallo constará por escrito e incluirá una exposición fundada y completa de la evaluación de las pruebas y las conclusiones. La Sala de Primera Instancia dictará un fallo. Cuando no haya unanimidad, el fallo de la Sala de Primera Instancia incluirá las opiniones de la mayoría y de la minoría. La lectura del fallo o de un resumen de éste se hará en sesión pública.

178. The formulations reproduced in the table below show that neither the French nor the Spanish texts of article 74(2) and (5) include any optional, discretional or directive wording. On the contrary, both versions are drafted in a rather plain and straightforward manner. Namely, the French version mostly includes verbs conjugated (i) in present tense (*i.e.*, '*fonde*' and '*contient*'), (ii) in passive voice (*i.e.*, *la décision est présentée par écrit, Il est donné lecture de la décision ou de son résumé en audience publique*), emphasising the object (decision), the action (delivered, read) and the mode (in writing, in public hearing),[297] or (iii) using an imperative construction (*i.e.*, '*ne peut pas aller*'). Similarly, the Spanish version was drafted in the pure and simple future tense denoting something that the drafters

[297] Regarding the use of the passive voice in different languages, linguist J. Saeed notes: 'One conclusion from comparing passives across languages seems to be that the phenomenon is typically a cluster of functions: in each case following the general pattern of allowing the speaker planning her discourse some variation in the linkage between thematic and grammatical roles, but with considerable variation in the associated semantic and grammatical elements of the cluster'. J. Saeed, *Semantics* (Willey-Blackwell, 3rd ed.), section 6.7.2.

considered must always happen in the future of the Court (‘*fundamentará’*, ‘*referirá’*, ‘*constará’*, ‘*incluirá*’).

English	French	Spanish
‘shall be based’	‘*fonde’*	‘*fundamentará’*
‘shall not exceed the facts’	‘*ne peut aller au-delà des faits’*	‘*se referirá únicamente’*
‘shall be in writing’	‘*est présentée par écrit’*	‘*constará por escrito’*
‘shall contain a full and reasoned statement’	‘*contient l'exposé complet et motivé des constatations’*	‘*incluirá una exposición fundada y completa’*
‘shall be delivered’	‘*Il est donné lectura’*	‘*La lectura […] se hará’*

179. Thus, the plain reading of article 74(2) and (5) reflects a mandatory command. Consistency between the authentic versions of English, French and Spanish would demand that the requirements under article 74 (2) and (5) are to be considered mandatory.

(ii) Contextual interpretation

180. A contextual interpretation further shows that the drafters used ‘shall’ in paragraphs (2) and (5) to express a mandatory command. I recall that ‘[i]nterpretative value can be found in the position of a particular word in a group of words or in a sentence, of a particular phrase or sentence within a paragraph, of a paragraph within an article or within a whole set of provisions, of an article within or in relation to the

whole structure of scheme of the treaty'.[298] No phrase can be detached from its function in the sentence, paragraph or article.[299]

181. In glaring contrast with paragraphs (2) and (5), for example, paragraph (1) uses the modal verb 'may' to say that the Presidency '*may*, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending'. The fact that to date alternate judges have not been appointed in the trials at this Court shows that this is a discretionary provision for the Presidency.

182. Importantly, the discriminate use of 'may' in paragraph (1) shows that the drafters decided not to use 'shall' when they wanted to provide discretion. Moreover, it shows that the drafters could have used 'may' instead of 'shall' if they did not want the legal requirements and guarantees in paragraphs (2) and (5) to be binding, but rather discretionary.

(iii)Conclusion

183. In light of the foregoing, as for the question of whether or not the wording of article 74 is mandatory, a literal and contextual interpretation of article 74(2) and (5) indicates that the answer is yes.

2. Whether the Trial Chamber complied with the legal requirements and guarantees of article 74 of the Statute

184. In my view, for the reasons that follow, the Trial Chamber did not comply with the requirements of article 74. In particular, it did not comply with paragraph (2) nor with paragraph (5).

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[298] O. Dörr, 'Article 31. General rule of interpretation', in O. Dörr, et al. (eds.), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012), p. 521 at para. 45. ('The entire text of the treaty is to be taken into account as "context", including title, preamble and annexes […] and any protocol to it, and the systematic position of the phrase in question within that ensemble. Interpretative value can be found in the position of a particular word in a group of words or in a sentence, of a particular phrase or sentence within a paragraph, of a paragraph within an article or within a whole set of provisions, of an article within or in relation to the whole structure of scheme of the treaty'.).

[299] *See* PCIJ, *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, Advisory Opinion, 12 August 1922, p. 23 ('it is obvious that the Treaty must be read as a whole, and that its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense'.).

(a) The acquittal does not meet the legal requirements and guarantees of article 74(5) of the Statute

185. The Prosecutor says that Judges Henderson and Tarfusser failed to comply with the requirements of article 74(5) of the Statute and that these deficiencies could not be cured by the written reasons which were provided six months later.[300] As elaborated below, I am of the view that this is correct.

186. I recall that article 74(5) reads 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 Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

187. To recapitulate, paragraph (5) provides for the legal requirements and guarantees to issue a decision that amounts to the final disposition on the matter of the guilt or otherwise of the accused. Such requirements are (i) that the 'decision shall be in writing', (ii) that it 'shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions', (iii) that the 'Trial Chamber shall issue one decision', (iv) that 'the Trial Chamber's decision shall contain the views of the majority and the minority', and (v) that '[t]he decision or a summary thereof shall be delivered in open court'. Thus, this paragraph commands trial chambers to follow strict requirements and guarantees to issue and communicate its reasoned decision on the substantive issue of the guilt or otherwise of the accused. This must be done in one decision and in writing. Moreover, by requiring that the decision contain a full and reasoned statement of the trial chamber findings, paragraph (5) requires trial chambers to reflect its internal decision-making process through a reasoned statement containing all the findings on the evidence and conclusions.

188. I am of the view that, in the case at hand, the Trial Chamber did not reach 'one decision' 'in writing', containing the 'Trial Chamber's findings on the evidence and conclusions', or a 'summary thereof', and that such failures invalidated the proceedings and materially affected the resulting acquittals. While I agree with the Appeals Chamber's Majority consideration that the requirements of article 74(5) of

[300] Prosecutor's Appeal Brief, para. 2.

the Statute ensure the guarantees of a fair trial for all parties and participants, I disagree with its indulgent reading that such requirements must not be strictly applied. I agree with its findings that 'the overall object and purpose of article 74(5), situated in Part 6 of the Statute entitled "The Trial", is to ensure' that: (i) 'a decision of such importance, concluding the trial, is issued in accordance with formalities generally accepted as necessary for fair trial, for the benefit of the parties, the victims and the general public',[301] (ii) '"each party and participant to the case is fully apprised of the outcome in a predictable manner, which must be public and reasoned"' in order also 'to guarantee the right to appeal'.[302] I also agree that '[t]hese protections are similarly guaranteed through the application of article 21(3), and internationally recognised human rights'.[303]

189. Nevertheless, I disagree with the unrestricted and indulgent reading that followed. Certainly, I am unable to agree with the observations of the Appeals Chamber's Majority that '[a] rigid, exclusively textual, and formalistic reading of the requirements of article 74(5) would disregard this background, and permit the issuance of only one physical document, without judges appending individual opinions, and require that all the components of that decision (including the verdict and reasoning) *must* be issued at the same time, in writing, whatever the circumstances'.[304] Saying, as the Appeals Chamber's Majority said, that 'trial chambers may be faced with facts and circumstances, demonstrating the importance of being fully equipped to be able to deal, in full justice, with the realities of what comes before them', not only creates an undefined category of 'facts and circumstances' to excuse compliance with article 74(5), but it further allows so using 'full justice' as a pretext. The Appeals Chamber's Majority justifies the Trial Chamber's lack of compliance indicating that in the instant case, 'the object and purpose of the formalities in article 74(5) cannot require retaining people in detention even when their detention can no longer be justified because a trial chamber has definitively decided to acquit' and that it has not 'been shown that this is required by internationally recognised human rights which […] apply to the interpretation of

[301] Judgment of the Appeals Chamber's Majority, para. 161.
[302] Judgment of the Appeals Chamber's Majority, para. 161.
[303] Judgment of the Appeals Chamber's Majority, para. 161.
[304] Judgment of the Appeals Chamber's Majority, para. 162 (emphasis in original).

article 74(5), as a result of article 21(3) of the Statute'.[305] As explained below, besides confusing the provisions applicable to provisional release and the requirements to issue a decision of acquittal whose effects are the liberty of the accused, this reading of the Appeals Chamber's Majority also allows for the use of 'human rights' as a pretext to breach the requirements that guarantee fairness and provides for an unbalanced application of the human rights of the accused when they apparently conflict with the rights of other parties and participants, particularly, the victims. This reading opens the door for a circumvention of the Statute.

190. For the reasons that follow, I am unable to agree with the conclusion of the Appeals Chamber's Majority that, despite the guarantees of article 74(5) of the Statute, 'the Trial Chamber correctly prioritised liberty over formality, in a process that satisfied the requirements of publicity, and provided detailed and lengthy reasoning for its decision'.[306] As explained below, this assertion assumes that the rights to liberty of the accused were at stake, while, pursuant to international human rights law, they had been lawfully detained to stand trial until the end, that is, including the writing of the final decision. Moreover, the Trial Chamber had been seized of submissions on provisional release, which could have been granted, without the need to enter a determination on the guilt of the accused, and rather continue with the case until the end. In my view, article 74 of the Statute does not provide for 'mere formalities', but actually contains guarantees of fairness for all parties and participants. It is a provision of mandatory application. I am therefore unable to agree with the Appeals Chamber's majority on this point.

191. The following subsections will address the main reasons why the Appeals Chamber's Majority considered that some of those requirements were not necessarily breached by the Trial Chamber and why, having found that one of the requirements was breached, the Appeals Chamber's Majority did not consider that the Trial Chamber's failure amounted to an appealable error that materially affected the acquittals. As explained below, I find that the Trial Chamber committed more than one failure and that such failures amount to appealable errors of law and procedure that invalidated the proceedings and materially affected the resulting acquittals.

[305] Judgment of the Appeals Chamber's Majority, para. 162.
[306] Judgment of the Appeals Chamber's Majority, para. 216.

(i) In relation to the reasons of the Appeals Chamber's Majority that the human right to liberty justified entering acquittals without reasons

192. The Appeals Chamber's Majority's found that, in light of the human right to liberty of the accused, Judges Henderson and Tarfusser were justified in entering the acquittals with reasons to follow. As explained below, I am unable to agree with this finding because the right to liberty is not illegally restricted when a person is detained to be tried as per charges legally brought against them, and such right cannot thus justify that the person be acquitted before the case is legally finished with a final decision entering a determination on the guilt or otherwise of the accused, as per article 74 of the Statute.

193. I am of the view that the issue of continued detention of the accused is a simple procedural matter. It has a separate treatment in the Statute and such an issue cannot be confused as a way to acquit with written reasons to follow. In cases where a person has been arrested pursuant to an arrest warrant under article 58(1)(b) of the Statute, a chamber may assess whether detention continues to be necessary '[t]o ensure the person's appearance at trial', '[t]o ensure that the person does not obstruct or endanger the investigation or the court proceedings', or '[w]here applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances'. The matter of continued detention or provisional release is not linked to the determination of the guilt or otherwise of the accused.

194. In contrast, having concluded that the Trial Chamber did not err when issuing a verdict with reasons to follow because the need to release the accused was of greater importance and consistent with the chamber's obligations under international human rights,[307] the Appeals Chamber's Majority seems to confuse the liberty of the accused following an acquittal and the provisional release of the accused during trial. However, the command of article 81(3)(c) that '[i]n case of an acquittal, the accused shall be released immediately' not only is subject to exceptional circumstances and subject to appeal, but, notably, this command is based on the premise of article 81(1) that such an acquittal is entered pursuant to article 74 of the Statute. This was not the

[307] Judgment of the Appeals Chamber's Majority, paras 160-212.

case in the appeal before us. The Trial Chamber had not yet made its decision as per article 74 and had rather been seized of requests for provisional release from the accused. Thus, the assessment that the Trial Chamber should have made, pending the writing of its decision, was whether continued detention was necessary under article 58(1)(b) of the Statute. The issue of whether or not the accused were guilty was a substantially different question.

195. Certainly, articles 58(1)(b) and 81(3)(c) of the Statute provide for two different avenues, one regarding the detention of the accused, pending continuation of the trial, including the writing of the final decision, and the other concerning their full release following an acquittal. Interim release is a provisional measure before entering a determination on the guilt of the accused at the end of the proceedings, while the acquittal is the result of the proceedings and depends on their entire completion, including the writing of the final decision. Given the existence of a specific avenue to release the accused in the interim, before writing the decision that finalises the trial stage, the right to liberty of the accused persons cannot be used as a pretext to justify lack of compliance with article 74 of the Statute.

196. In the case at hand, the Trial Chamber was especially prompted to separately apply these discrete provisions because the accused had made submissions on their provisional release, but it decided not to entertain them and rather enter their acquittals orally without reasons.[308] The correct procedure for the Trial Chamber would have been to entertain such submissions and grant provisional release if satisfied that the requirements were met while it completed its decision-making process to issue the final judgment, instead of acquitting Mr Gbagbo and Mr Blé Goudé and ordering their release circumventing the requirements of article 74(5) of the Statute.

197. The Appeals Chamber's Majority considered that the human rights principles in relation to the right to liberty that urge the need for expeditious review and release 'apply with even greater force to a situation in which it has been decided that the

[308] *See* Reasons for 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 Blé Goudé Defence no case to answer motion, 16 July 2019, ICC-02/11-01/15-1263, p. 8 ('the [Trial] Chamber […] hereby […] DECIDES that the pending requests for provisional release have hereby become moot').

accused person is to be acquitted'.[309] However, as I turn to explain, in my view, the rights to liberty of Mr Gbagbo and Mr Blé Goudé were not at risk of being violated.

198. To begin with, article 9 of the ICCPR defines the right to liberty by providing that '[n]o one shall be deprived of his liberty *except on such grounds and in accordance with such procedure as are established by law*'.[310] That is, considering that Mr Gbagbo and Mr Blé Goudé had been detained in accordance with the Statute, following arrest warrants and corresponding orders confirming charges against them,[311] they were detained in accordance with a procedure established by law. This was not a case of illegal or arbitrary detention. A final decision had to be reached, written and issued by the Trial Chamber. The accused would have been legally detained until the case ended with such decision on the determination of their guilt or otherwise. In the case at hand, the Trial Chamber had been seized of requests for the provisional release of the accused. If the Trial Chamber was minded to release the accused, it would have been sufficient to entertain such requests. It was not necessary to announce a verdict, without having reached a fully informed and written decision as required by article 74 of the Statute.

199. Although in my view, Mr Gbagbo's and Mr Blé Goudé's rights of liberty were not under discussion, even if, *arguendo*, Judges Henderson and Tarfusser nevertheless considered such rights to be at stake, they ought to have conducted a different analysis. As noted above, the rights of victims to justice, truth and reparations, through effective remedies and pursuant to the principles of due process of law and the guarantees of fairness, were also at stake in this case.[312] As they considered whether the rights of the two accused were at stake, Judges Henderson and Tarfusser

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[309] Judgment of the Appeals Chamber's Majority, para. 165.
[310] Emphasis added. Similarly, article 6 of the ACHPR reads, in relevant part: 'No one may be deprived of his freedom *except for reasons and conditions previously laid down by law*' (emphasis added). Article 7(2) of the ACHR reads: 'No one shall be deprived of his physical liberty *except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto*' (emphasis added). Article 5(1) of the ECHR reads: 'No one shall be deprived of his liberty save in [specific cases outlined in this article] and in accordance with a procedure prescribed by law […]'.
[311] *See* Warrant Of Arrest For Laurent Koudou Gbagbo, 23 November 2011, ICC-02/11-26; Warrant of Arrest for Charles Blé Goudé, 21 December 2011, ICC-02/11-02/11-1. *See also* Decision on Mr Gbagbo confirmation of charges, 12 June 2014, ICC-02/11-01/11-656-Conf; Decision on Mr Blé Goudé confirmation of charges, 11 December 2014, ICC-02/11-02/11-186.
[312] *See supra* section V(B)(4)(b)(iii).

should have considered any conflicting rights of other parties and participants in the case, specifically those of the more than 700 participating victims.

200. I recall that human rights do not exist in a hierarchy, and 'no human right can be fully realized without fully realizing all other human rights'.[313] When human rights are in apparent conflict, it is necessary to carry out a proportionality test to determine how to resolve the conflict, which does not imply the absolute negation of any of the rights in conflict, but may require placing restrictions around the exercise of a right for one or more of the parties. To the extent that one right actually impedes application of others, judges must then weigh and balance the circumstances to safeguard the core of all rights and in any event cause the least possible harm.[314]

201. That said, as explained above, the rights to liberty of the accused in the case at hand were not at stake as they had been legally detained. There was no justification for Judges Henderson and Tarfusser to acquit the accused without reasons instead of entertaining their requests for provisional release. And even if the judges had wrongly considered that the right to liberty was at stake, they should have conducted a proportionality test vis-à-vis the rights of the victims in this case.

(ii) The Trial Chamber did not issue a summary of its statement on the findings and conclusions

202. I am unable to agree with the reasoning of the Appeals Chamber's Majority that, notwithstanding its finding that the Trial Chamber's 'summary' was 'certainly brief', 'it contained the most important parts of the reasoning which were needed'.[315] I recall that article 74(5) of the Statute requires trial chambers to deliver in open court 'the decision or a summary thereof'. In my view, this implies that for there to be a summary there must already exist a full decision beforehand. In fact, there cannot be a

[313] Nickel, 'Rethinking Indivisibility: Towards a Theory of Supporting Relations Between Human Rights' in *30 Human rights Quarterly 984* (2008) ('Nickel'), p. 984.
[314] According to the jurisprudence of the Inter-American Court of Human Rights, when rights are in apparent conflict, judges must analyse: (i) the level of harm to one of the rights at stake, determining whether the level of this harm was serious, intermediate or moderate; (ii) the importance of ensuring the contrary right, and (iii) whether ensuring the latter justifies restricting the former. *See Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica,* Judgment of November 28, 2012 (Preliminary objections, merits, reparations and costs), para. 274. *See also Usón Ramírez v. Venezuela*, Judgment of November 20, 2009 (Preliminary Objections, Merits, Reparations, and Costs), paras 79-80. *See also Kimel v. Argentina,* Judgment of May 2, 2008 (Merits, Reparations, and Costs), para. 84.
[315] Judgment of the Appeals Chamber's Majority, para. 188.

summary of the decision if the decision, including its legal conclusions and findings of fact, has not been agreed nor finalised, including the process of writing it.

203. While the Appeals Chamber's Majority went on to indicate why it concluded that the so-called 'summary' of 15 January 2019 contained the necessary reasoning, in my view, that 'summary' that Judge Tarfusser read in open court on 15 January 2019 does not include the findings of fact made pursuant to the assessment of the evidence made in Judge Henderson's opinion six months thereafter. Certainly, comparing what Judge Tarfusser read on 15 January 2019 with what Judge Henderson wrote on 16 July 2019, it would be excessively indulgent to say that Judge Tarfusser's statement summarises even the essence, the *ratio decidendi*, of the findings and conclusions included in Judge Henderson's opinion (findings which Judge Tarfusser supposedly joined).

204. In my view, these two judges did not reach 'one decision', as explained below, nor did they provide a 'summary thereof', because the decision, which requires an agreement on all its essential elements, had not yet been reached. What Judge Tarfusser read in open court did not summarise any of the findings of fact that either Judge Tarfusser or Judge Henderson made in their written opinions. Those words mainly contained a verdict, rather than a summary of any findings.

(iii)The Trial Chamber did not issue its decision in writing

205. I am unable to agree with the conclusion of the Appeals Chamber's Majority's that this error was 'patently incapable of materially affecting the Impugned Decision'.[316] As explained below in subsection D(3), I find that Judges Henderson and Tarfusser's failure to issue their decision in writing, together with other errors, materially affected the acquittals entered by Judges Henderson and Tarfusser.

206. In my view, not complying with the commands expressed with the word 'shall' in article 74 can only amount to an error of law and procedure. Rather than mere formalities, paragraph (5) establishes mandatory legal requirements and provides for guarantees of due process of law and fair trial, providing for effective judicial protection to the parties and participants. Regardless of how the decision is notified to

[316] Judgment of the Appeals Chamber's Majority, para. 189.

the parties, the participants and the public, I consider that paragraph (5) requires that the process of decision-making be reflected in the writing of the decision. The logic behind a decision issued following the commands of article 74(5) is to evince the decision-making process that should have been conducted and completed by the judges pursuant to article 74(2) of the Statute.

207. Given the amount of evidence and submissions in the kind of trials before this Court, to ensure the guarantees of a fair trial in light of the principle of due process of law, trial chambers must meet the requirements of assessing the evidence and the entire proceedings, and at the same time issuing a decision in writing with the trial chamber's findings on the evidence and conclusions. Thus, the decision-making process includes two sides of the same coin that judges must conduct concomitantly. One side is the internal process where the trial judges assess all the evidence, both separately and holistically considered, along with the entire proceedings, as per article 74(2). This is the internal side where judges engage in a deliberative and dynamic process, through which it is possible to make findings and conclusions from the evidence. The other side is the act of putting such findings and conclusions into writing, supporting the final outcome on the guilt or otherwise of the accused, as per article 74(5). Certainly, writing the final judgment is the external side of the decision-making process. Both sides run concurrently. Only through this twofold process is it possible to obtain a reliable decision for all parties and participants.

208. It is noted that under some common law jurisdictions, it is possible for a verdict to be announced without reasons.[317] However, this is because the trier of fact and the

[317] In common law jurisdictions, '[i]n pre-modern times, the failure to pronounce reasons [for decisions], even to the parties themselves, did not constitute an error of law…However, the position in Australia, as in most other common law countries, has evolved… the development of the duty to provide reasons is such that it is now seen not only as an "incident of the judicial process" but also by some courts as an *expression* of the open justice principle. Consequently, it is argued that an additional rule based on the open justice principle – the "public reasons rule", as we have called it – appears to have emerged in the case law, which imposes an obligation on courts to give public reasons for all but minor interlocutory decisions. *The rule, however, is in nascent form and is far from universally accepted*' (emphasis added). J. Bosland and J. Gill, 'The Principle of Open Justice and the Judicial Duty to Give Public Reasons' in *38 Melbourne University Law Review 482* (2014), p. 486. In Australia, it has been held that 'where a "decision constitutes what is in fact or in substance a final order, the case must be exceptional for a judge not to have a duty to state reasons"'. J. Bosland and J. Gill, 'The Principle of Open Justice and the Judicial Duty to Give Public Reasons' in *38 Melbourne University Law Review 482* (2014), p. 504, citing New South Wales Court of Appeal, *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, p. 279.

trier of law are embodied in different persons who deliberate separately.[318] The juries, being laypersons, have no obligation to provide legal reasons.[319]

209. In contrast, under the Rome Statute System, the trier of fact and the trier of law are embodied by professional judges. The process of analysing the evidence must not be separated from the process of reasoning a decision on the findings from the evidence. The judges assess questions of law and fact, simultaneously. They have a duty to show the parties and participants, and the public, reasons for their decisions, and that such reasons are not mere afterthoughts to support a pre-judgment made before all evidence has been assessed.

210. Once the judges' deliberations have been concluded, it is necessary that the external aspect of the decision-making process also be completed, subject only to editorial work. As per article 74(5), the 'one decision' must be a single, written judgment with the Trial Chamber's finding and conclusions, thereby evincing that the decision-making process was duly completed. To reach this 'one decision', it is not possible to issue a verdict without having first agreed on the reasons in a written document. That is why I sustain that the existence of one written decision on the guilt or otherwise of the accused guarantees the proper administration of justice.

211. I am of the view that, in the case at hand, the Trial Chamber, or its majority, had not finished the decision-making process, in the manner provided by article 74(2) and (5) of the Statute. When Judges Henderson and Tarfusser entered their acquittal orally, there was no way to evince that they had completed their internal deliberative

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[318] *See* A. Niv, 'The Schizophrenia of the 'No Case to Answer' Test in International Criminal Tribunals' in *Journal of International Criminal Justice 14(5)* (2016), p. 1121 ('Keeping in mind that a judge in common law systems sits as a trier of law, whereas the jury is the trier of fact, a "no case to answer" motion embodies a balance between the possible usurpation by the judge of the jury's functions and the danger of an unjust conviction by a capricious jury').

[319] '[T]he [criminal] trial by jury, or the country, per patriam, is also that trial by the peers, of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter…' Sir William Blackstone, 'Commentaries on the Law of England', 342 (Robert Bell 1772) (1765), Chapter 27. *See also* M. Coen and J. Doak, 'Embedding Explained Jury Verdicts in the English Criminal Trial' in *Legal Studies* (2017), p. 1 (discussing unexplained jury verdicts in English criminal trials and 'the common law convention that jury verdicts are not accompanied by reasons'; 'It is widely known that the options available to contemporary juries are a general verdict of "guilty" or "not guilty"'). *See also* Court of Criminal Appeal of England, *Regina v Larkin*, 1943 KB 174 ('In this country we consider that a jury is the best possible tribunal yet devised for deciding whether or not a man is guilty… but no one has ever suggested that a jury is composed of persons who are likely at a moment's notice to be able to give a logical explanation of how and why they arrived at their verdict').

process, which should have included their assessment of the evidence and the entire proceedings. They announced a verdict without evincing the internal decision-making process to make any findings and final conclusions that could sustain their oral verdict. Thus, the verdict's operative part to grant Mr Gbagbo's and Mr Blé Goudé's no case to answer motions and acquit them of all charges, as it was read on 15 January 2019, did not provide a 'full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions', as per article 74(5) of the Statute.

(iv) The Trial Chamber did not issue its decision in time

212. Contrary to the finding of the Appeals Chamber's Majority that issuing the reasons six months after the verdict is within the time limits for article 74 decisions,[320] I consider that the delay of Judges Henderson and Tarfusser in issuing their opinions amount to a violation of article 74(5). To support their finding, the Appeals Chamber's Majority refers to cases where the chambers in the *ad hoc* tribunals issued their decisions with delays of three days, eight days, one month and 18 days, one month and 22 days and two months, and only one case at the ECCC, with a delay of nearly four months.[321] For the reasons that follow, I consider that these cases are not comparable to the case at hand: the time was notably shorter at the *ad hoc* tribunals and the judgments explain that the editorial, rather than the deliberative, process caused the delay, which is not the case here. Otherwise, the oral verdict was announced after the judges in the other tribunals had considerable time to assess the

[320] Judgment of the Appeals Chamber's Majority, para. 199.
[321] Judgment of the Appeals Chamber's Majority, fn. 442 *referring to* ICTR, Trial Chamber, *The Prosecutor v. Ildéphonese Nizeyimana*, Judgement and Sentence, 19 June 2012, ICTR-00-55C-0536/1 (hereinafter: '*Nizeyimana* Trial Judgment'), fn. 1 (3 days); ICTR, Trial Chamber, *The Prosecutor v. Gaspard Kanyarukiga*, Judgement and Sentence, 1 November 2010, ICTR-02-78-0325 (hereinafter: '*Kanyarukiga* Judgment'), para. 2 (8 days); SCSL, Trial Chamber, *The Prosecutor v. Charles Ghankay Taylor*, Transcript of hearing, 26 April 2012, SCSL-03-01-T-49623, p. 49624, and SCSL, Trial Chamber, *The Prosecutor v. Charles Ghankay Taylor*, Judgement, 18 May 2012, SCSL-03-01-1281 (1 month, 3 days); ICTY, Trial Chamber, *The Prosecutor v. Zlatko Aleksovski*, Judgement, 25 June 1999, Case No. IT-95-14/1, para. 245, and ICTY, Trial Chamber, *The Prosecutor v. Zlatko Aleksovski*, Transcript of hearing, 7 May 1999, Case No. IT-95-14/1, pp. 4348, 4349 (1 month, 18 days); ICTR, Trial Chamber, *The Prosecutor v. Théoneste Bagosora et al.*, Judgement and Sentence, 18 December 2008, Case No. ICTR-98-41 (hereinafter: '*Bagosora* Judgment'), fn. 1 (1 month, 22 days); ICTR, Trial Chamber, *The Prosecutor v. Grégoire Ndahimana*, Transcript of hearing, 17 November 2011, Case No. ICTR-01-68 ICTR, pp. 1-2, and ICTR, Trial Chamber, *The Prosecutor v. Grégoire Ndahimana*, Judgement and Sentence, 30 December 2011, ICTR-01-68-0154/1 (2 months, 1 day); ICTR, Trial Chamber, *The Prosecutor v. Hormisdas Nsengimana*, Judgement, 17 November 2009, ICTR-01-69-0171/1 (hereinafter: '*Nsengimana* Judgment'), para. 866 (2 months, 1 day); and ECCC, Trial Chamber, *Case 002/02*, Summary of Judgement, 16 November 2018, 002/19-09-2007/ECCC/TC, para. 1 (4 months, 12 days).

evidence between the last trial hearing and the oral verdict, which was not the case here, or the time served by the accused in detention was longer than his sentence, which was not the case here either. In any event, the statutory frameworks of the tribunals to which the Appeals Chamber's Majority referred are different from the ICC's statutory framework.

213. It took *six* months for Judges Henderson and Tarfusser to issue their opinions. I do not consider that cases from other tribunals where editorial issues caused delays up to two months justify a delay of six months in this case. To begin with, a delay of three or eight days, or even two months, is substantially lower than a delay of six months. Out of the six cases of the *ad hoc* tribunals, four of them explain that the delay was caused by the editorial process, which took from three to 62 days: *Nizeyimana* (three days), *Kanyarukiga* (eight days), *Bagosora* (53 days), *Nsengimana* (62 days).[322] Other than that, while decisions may require an editorial process that could take days, weeks and, exceptionally, a couple of months, I do not consider that that was the main cause of the delay to issue the separate opinions of Judges Henderson and Tarfusser six months after the verdict.

214. It is important to consider the short time that it took Judges Henderson and Tarfusser to anticipate their verdict after having adjourned the hearings. In the cases of the other tribunals to which the Appeals Chamber's Majority referred, although the oral verdict was announced with reasons to follow, the judges had considerable time to assess the evidence between the last trial hearing and the oral verdict, which is not the case here. As the Prosecutor submits,[323] the Trial Chamber heard the last submissions on no case to answer on 22 November 2018,[324] and held a further hearing on provisional release, on 13 December 2018, considering the 'imminence of the

[322] *See* *Nizeyimana* Trial Judgment, p.1, fn.1 ('The Chamber pronounced its judgement on 19 June 2012. The written judgement was filed on 22 June 2012 after the conclusion of the editorial process'); *Kanyarukiga* Judgment, para. 2 ('The Chamber pronounced its unanimous judgement on 1 November 2010 and the written judgement was filed on 9 November 2010 after the conclusion of the editorial process'); *Bagosora* Judgment, p. 1, fn 1('It pronounced its unanimous judgment on 18 December 2008. The written judgement was filed on 9 February 2009 after the conclusion of the editorial process'); *Nsengimana* Judgment, para. 866 ('The Chamber delivered the oral summary of its judgement on 17 November 2009. It acquitted Nsengimana of all counts and ordered his immediate release. [...] The written version of the judgement was filed on 18 January 2010 after the completion of the editorial process').
[323] Prosecutor's Appeal Brief, para. 16.
[324] Transcript of hearing, 22 November 2018, ICC-02/11-01/15-T-230-ENG.

winter recess and the festive period'.[325] After the winter recess, Judge Tarfusser announced the oral verdict on 15 January 2020.[326] The Trial Chamber had less than two months to assess the evidence, deliberate and make a decision, or even less, considering the 'winter recess and the festive period'.[327] In contrast, while there were delays of 34 days through four months to issue the written reasons in the remaining cases of the *ad hoc* and other tribunals to which the Appeals Chamber's Majority referred, in such cases, it was clearly apparent that the trial chambers announced their decision after having sufficient time to complete their evidentiary assessment and deliberative process. In *Taylor*, SCSL Trial Chamber II had its last trial hearing on 11 March 2011, and announced its oral verdict nearly a year and a month later, on 26 April 2012.[328] In *Case 002/02*, the ECCC Trial Chamber received closing statements on 13-23 June 2017 and read the oral verdict around a year and five months later, on 16 November 2018.[329]

215. As for *Aleksovski* (49 days), it was exceptional in that the accused had been detained for a time longer than his maximum sentence. Thus, no matter the final decision, the ICTY Trial Chamber had to release him. This explains why the ICTY Trial Chamber announced the oral verdict on 25 June 1999, and issued the written decision 49 days later.[330]

216. Moreover, the tribunals to which the Appeals Chamber's Majority referred do not have a provision such as article 74(5) requiring them to issue their 'one decision', containing 'a full and reasoned' statement of their findings on the evidence and conclusions, or a 'summary thereof' in 'open court'. At the ICTY, ICTR and SCSL, the analogous provisions state that the judgment 'shall be delivered by the Trial

[325] Order convening a hearing on the continued detention of the accused, 10 December 2018, ICC-02/11-01/15-1229, para 12, p. 6. *See also* Transcript of hearing, 13 December 2018, ICC-02/11-01/15-T-231-Red-ENG, p. 67.
[326] *See* Oral Verdict.
[327] Order convening a hearing on the continued detention of the accused, 10 December 2018, ICC-02/11-01/15-1229, para. 12. *See also* Transcript of hearing, 13 December 2018, ICC-02/11-01/15-T-231-Red-ENG, p. 67.
[328] *The Prosecutor v. Charles Ghankay Taylor*, Annex B to Judgement, 18 May 2012, SCSL-03-01-1281, p. 2511.
[329] ECCC, Trial Chamber, *Case 002/02*, Case 002/02 Judgment, 16 November 2018, 002/19-09-2007/ECCC/TC, para. 13. *See also* ECCC, Trial Chamber, *Case 002/02*, Summary of Judgement, 16 November 2018, 002/19-09-2007/ECCC/TC.
[330] ICTY, Trial Chamber, *The Prosecutor v. Zlatko Aleksovski*, Judgement, 25 June 1999, Case No. IT-95-14/1, para. 245, and ICTY, Trial Chamber, *The Prosecutor v. Zlatko Aleksovski*, Transcript of hearing, 7 May 1999, Case No. IT-95-14/1, pp. 4348, 4349 (1 month, 18 days).

Chamber in public' and 'shall be accompanied by a reasoned opinion in writing'.[331] While judges had to announce their decision in public, it was not expressly required that the accompanying reasoned opinion in writing be delivered in public as well. Similarly, although the requirements of rule 101 of the ECCC Rules can only be met in writing,[332] rule 98(1) allows for it to be announced in open court, as early as the final hearing: '[w]here the judgment is not pronounced during the final hearing, the President of the Chamber shall notify the parties of the date for pronouncement of the judgment'.[333] Certainly, at these tribunals, it is not expressly required that the judges issue in open court either the 'full reasoned' decision or a 'summary thereof', as article 74(5) of the Statute so requires. At the ICC, this provision ensures that by the time such a decision is delivered, it has been fully reasoned, and reached unanimously.

217. Disregarding the mandatory nature of article 74(5) of the Statute, on 15 January 2019, Judges Henderson and Tarfusser issued an oral decision acquitting the accused, indicating that reasons would follow 'as soon as possible' and referring to rule 144(2) of the Rules. On 16 July 2019, each judge appended a separate opinion attached to an 8-page document that included the procedural history of the case and transcribed part of the transcripts of what was orally said on 15 January 2019.

218. It seems that Judges Henderson and Tarfusser interpreted the expression 'as soon as possible' in rule 144(2) to allow decisions to be issued six months after the verdict. The Appeals Chamber's Majority has sustained this interpretation. I consider such interpretation to be incorrect.

219. Rule 144 of the Rules reads:

> Delivery of the decisions of the Trial Chamber
>
> 1. Decisions of the Trial Chamber concerning admissibility of a case, the jurisdiction of the Court, criminal responsibility of the accused, sentence and reparations shall be pronounced in public and, wherever possible, in the presence of the accused, the Prosecutor, the victims or the legal representatives

[331] *See* ICTY, Updated Statute of the International Criminal Tribunal for the former Yugoslavia, September 2009, article 23; ICTR, Statute of the International Tribunal for Rwanda, January 2010, article 22; SCSL, Statute of the Special Court for Sierra Leone, 14 August 2000, article 18.
[332] *See* rule 101 of the Internal Rules (Rev. 9) of the ECCC, 16 January 2015.
[333] *See* rule 98(1) of the Internal Rules (Rev. 9) of the ECCC, 16 January 2015.

> of the victims participating in the proceedings pursuant to rules 89 to 91, and the representatives of the States which have participated in the proceedings.
>
> 2. Copies of all the above-mentioned decisions shall be provided as soon as possible to:
>
> (a) All those who participated in the proceedings, in a working language of the Court;
>
> (b) The accused, in a language he or she fully understands or speaks, if necessary to meet the requirements of fairness under article 67, paragraph 1 (f).

220. While this rule certainly uses the expression 'as soon as possible', it refers to a small window of time to finalise the copies of the decision to be delivered. In this regard, the Prosecutor is correct in saying that a trial chamber's discretion to separate written reasons from the verdict should only be permitted on editorial grounds.[334] Certainly, rule 144(2) is not a blank cheque to continue with the assessment of the evidence, deliberations or drafting of substantive parts of the decision. Otherwise, rule 144(2) would be against the object and purpose, plain reading and context of the mandatory requirements of article 74(5) of the Statute. As explained above,[335] and also pursuant to the Appeals Chamber's Majority,[336] this article ensures fairness to all parties and participants. Its plain reading makes it mandatorily applicable to all final decisions on the guilt of the accused.[337] And, in light of paragraph (2) of the same article, which requires that the decision be made in light of the entire proceedings and evidence, the contextual interpretation of article 74(5) requires that, by the time the decision is issued, it should have been unanimously made and its reasons should have already been written.[338]

221. To say that rule 144(2) allows for a window of time where such requirements not only could be circumvented, but where the parties and participants could not ensure that the requirements were followed, would be against article 74. In this regard, I recall that article 51(4)-(5) of the Statute requires that '[t]he Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute', and that '[i]n the event of conflict between the Statute

[334] Prosecutor's Appeal Brief, para. 111.
[335] *See supra* section VI(D)(1)(b).
[336] Judgment of the Appeals Chamber's Majority, para. 161.
[337] *See* section VI(D)(1).
[338] *See* section VI(D)(2)(a)(iii)-(iv).

and the Rules of Procedure and Evidence, the Statute shall prevail'. I therefore consider that rule 144(2) of the Rules could not be read to provide for periods as long as six months.

222. In any event, the delayed, written opinions filed in July 2019 did not cure the error already made, among other things, because they did not reflect agreements that would have been essential in order for there to be 'one decision' with a *ratio decidendi* as the basis for the acquittals. As elaborated below, the two opinions show that there was no 'one decision' as to the applicability of article 74 of the Statute, the legal basis for the no case to answer, its legal standard or the system for the admissibility of the evidence.

(v) The Trial Chamber did not reach 'one decision'

223. I am unable to agree with the finding of the Appeals Chamber's Majority that 'it was not necessary for Judge Tarfusser to have agreed with all of Judge Henderson's reasoning (or vice versa) in order to take a decision by majority',[339] and that 'the arguments made as to possible disagreements between the two majority judges do not affect the legal requirement for "one decision"'.[340] It went on to say that 'what was set out in the Reasons for the 15 January 2019 Decision in this case was the minimum that is required'.[341]

224. In my view, given that Judges Henderson and Tarfusser disagreed with respect to the essence or *ratio decidendi* of the main decision, they cannot be considered to form a majority. For judges to form a majority they need to agree on at least the essence or *ratio decidendi* of the judgment. Contrary to the finding that '[j]udges cannot be forced to agree',[342] in my view, if judges disagree on essential points, they have a mandate to continue in deliberations until they agree on the *ratio decidendi*, or at least agree to disagree. If the judges leave deliberations without an agreement on the *ratio decidendi* of a decision, there is simply no majority. Considering that in 'no case to answer' proceedings judges are seized of defence motions requesting them to discontinue the case, no agreement among the judges means that the motions cannot

[339] Judgment of the Appeals Chamber's Majority, para. 202.
[340] Judgment of the Appeals Chamber's Majority, para. 202.
[341] Judgment of the Appeals Chamber's Majority, para. 209.
[342] Judgment of the Appeals Chamber's Majority, para. 207.

be granted. In the case at hand, failure to reach a majority decision would have meant refraining from granting the no case to answer motions and thus continuing with the proceedings and with the defence submissions and presentation of the evidence, if any.

225. As shown below, Judge Henderson's opinion cannot be considered to be the reasoned statement of the Trial Chamber or its majority because Judge Henderson and Judge Tarfusser disagreed on pivotal issues such as (a) the (lack of) statutory support for the no case to answer procedure at the ICC, (b) the very nature of the decision they were issuing, and (c) the applicable standard of proof. This is a grave flaw in this case.

(1) No agreement on the legal basis for the no case to answer at the ICC

226. First, in the case at hand, Judges Henderson and Tarfusser orally announced their decision to acquit Mr Gbagbo and Mr Blé Goudé on 15 January 2019, without following the requirement of article 74(5) of the Statute to issue 'one decision' containing 'a full and reasoned statement' of their 'findings on the evidence and conclusions'. Six months later the two judges issued two separate opinions. Judge Tarfusser said in the first paragraph of his opinion that he subscribed to the findings in Judge Henderson's opinion.[343]

227. However, in reality, their opinions reflect divergence with respect to critical issues on which the judges were unable to agree when announcing the acquittals on 15 January 2019. While Judge Tarfusser announced the end of the trial because the no case to answer motions had been granted, he also noted that such a motion has no basis at the ICC. he did so not only before and during the proceedings, but also after he granted the motions. Indeed, on 1 October 2018, Judge Tarfusser noted that the procedure for a no case to answer motion could not be found in the framework of the Statute.[344] Yet, subsequently, on 15 January 2019, Judge Tarfusser, speaking for the majority of the Trial Chamber, stated that

[343] Judge Tarfusser's Opinion, para. 1 ('I confirm that I subscribe to the factual and legal findings contained in the "Reasons of Judge Henderson"').
[344] *See* Transcript of hearing, 1 October 2018, ICC-02/11-01/15-T-221-Red-ENG, p. 18 lines 4-11.

> the Chamber, by majority, Judge Herrera Carbuccia dissenting, hereby […] GRANTS the defence motions for acquittal from all charges against Mr Laurent Gbagbo and Mr Charles Blé Goudé.[345]

228. This was replicated in the 8-page document that encloses the three opinions.[346]

229. While Judge Henderson in his opinion considered that there is 'a legal basis for entertaining no case to answer motions',[347] Judge Tarfusser, in paragraph 65 of his opinion, stated the opposite:

> My views on the no case to answer proceedings are well-known at this stage: they have no place in the statutory framework of the Court and are unnecessary as a tool to preserve the interests and rights they are meant to serve.[348]

230. It is not logically possible for Judge Tarfusser to be part of the majority granting the no case to answer motions and at the same time challenge the basis of the no case to answer procedure at the ICC.

(2) No agreement on the applicability of article 74

231. Second, Judges Henderson and Tarfusser did not agree as to the nature of the decision they entered on 15 January 2019. Judge Henderson stated in his opinion that 'article 74 does not […] provide the appropriate basis to render [...] decisions on motions for "no case to answer"'.[349] In his view, '[t]he legal basis for the decision that the accused has no case to answer is thus article 66(2) of the Statute, which places the onus of proving the guilt of the accused squarely on the Prosecutor'.[350]

232. In contrast, Judge Tarfusser stated in his opinion that '[t]rial proceedings can only end either in acquittal or conviction, as emerging from article 74, read together

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[345] Oral Verdict, p. 1, line 15 to p. 4, line 18.
[346] Reasons for 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 Blé Goudé Defence no case to answer motion, 16 July 2019, ICC-02/11-01/15-1263, p. 8.
[347] Judge Henderson's Reasons, para. 10.
[348] Judge Tarfusser's Opinion, para. 65 (emphasis added). *See also*, Transcript of hearing, 1 October 2018, ICC-02/11-01/15-T-221-Red-ENG, p. 18 lines 4-11, during which Judge Tarfusser had already expressed the view that the procedure for a no case to answer motion could not be found in the structure of the Rome Statute).
[349] Judge Henderson's Reasons, para. 13.
[350] *See* Judge Henderson's Reasons, para. 15.

with article 81'.[351] That is, while Judge Henderson invoked article 66(2) of the Statute as the basis for the acquittal, Judge Tarfusser considered that it was article 74.

(3) No agreement on the applicable standard of proof

233. Third, Judges Henderson and Tarfusser also disagreed with respect to the applicable standard of proof at the no case to answer stage. While this will be further elaborated below under the second ground of appeal,[352] this subsection provides a summary of my position. Judge Henderson observed in his opinion that 'the key question to be determined in these proceedings, with respect to each charge, is whether the Prosecutor has submitted sufficient evidence in support of that charge such that a reasonable chamber could convict'.[353] That is, his standard assessed the sufficiency of the Prosecutor's evidence at its highest to determine whether any trial chamber could convict.

234. He concluded that 'the Chamber must engage in a full review of the evidence submitted and relied upon by the Prosecutor in order to determine whether such evidence is sufficient to support a conviction on the respective charge or charges'.[354]

235. In contrast, Judge Tarfusser showed in his opinion a different understanding of the standard of proof, by indicating that '[t]here is only one evidentiary standard and there is only one way to terminate trial proceedings' and that '[t]he evidentiary standard is set forth in article 66, paragraph 3: '[i]n order to convict the accused, the Court must be convinced of the guilt of the accused "*beyond reasonable doubt*"'.[355]

[351] Judge Tarfusser's Opinion, para. 65. Judge Tarfusser and Judge Herrera Carbuccia, who was dissenting, both considered that article 74 was applicable to the Impugned Decision, while Judge Henderson did not consider so. According to Judge Herrera Carbuccia, article 74(5) of the Statute 'sets the requirements for the judgment that decides either on the acquittal or the conviction of the accused'. *See* Judge Herrera Carbuccia's 15 January 2019 Dissenting Opinion, para. 11..
[352] *See infra* section VII(D)(2).
[353] Judge Henderson's Reasons, para. 2.
[354] Judge Henderson's Reasons, para. 8.
[355] Judge Tarfusser's Opinion, para. 65. *See also*, Transcript of hearing, 1 October 2018, ICC-02/11-01/15-T-221-Red-ENG, p. 18 lines 4-11, during which Judge Tarfusser had already expressed the view that the procedure for a no case to answer motion could not be found in the structure of the Rome Statute).

(4) No agreement as to the system of admissibility of the evidence

236. Fourth, as explained above, Judge Henderson acted against a previous decision of Judges Tarfusser and Herrera Carbuccia by writing in his separate opinion that, in contrast to their decision of considering in the final decision all evidence submitted on the record, he would only review the evidence to which the Prosecutor referred in her mid-trial brief. In my view, Judge Henderson should have reviewed all evidence in the record in a holistic manner.

237. Judge Henderson 'consider[ed] it necessary to re-state [his] disagreement' and that Judges Tarfusser and Herrera Carbuccia's 'approach does not strike the appropriate "balance" between the Chamber's discretion to rule on admissibility and relevance as well as its obligation to ensure that the trial is conducted in a fair and expeditious manner'.[356] He considered that authorising the defence to bring no case to answer motions 'in the face of large quantities of evidence that the Chamber itself has not yet determined to be "not irrelevant" and/or "not inadmissible" at the close of the case for the Prosecutor does not further the fairness or expeditiousness of a trial'.[357] In contrast, Judges Tarfusser and Herrera Carbuccia earlier in the proceedings decided that the admissibility of evidence '[would] be deferred to the final judgment, except when an intermediate ruling [was] required under the Statute or otherwise appropriate'.[358] While the Appeals Chamber found no error in the practice of deferring admissibility of evidence until the final judgment in *Gbagbo & Blé Goudé* (OA12),[359] Judge Henderson challenged this and did not follow the Appeals Chamber's decision, but rather restated his disagreement. Most importantly, it is difficult to say that Judge Tarfusser could have accepted this, because his decision to the contrary was still standing.

[356] Judge Henderson's Reasons, para. 21.
[357] Judge Henderson's Reasons, para. 26.
[358] Decision on the submission and admission of evidence, 29 January 2016, ICC-02/11-01/15-405, p. 10.
[359] Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against Trial Chamber I's decision on the submission of documentary evidence', 24 July 2017, ICC-02/11-01/15-995 (OA12), para. 65.

(5) Conclusion on the lack of agreements

238. While I sustain the view that each judge as an individual is free to express their concurring or dissenting views through separate opinions, he or she is also part of a bench and in that capacity he or she and his or her colleagues in that bench have the obligation to reach a decision, at least by majority. In the case at hand, three separate opinions were attached to an eight-page cover document on 16 July 2019, without presenting reasons other than the postulates enunciated in the 15 January 2019 verdict. Comparing the three opinions, it is not clear whether there is a majority on the main issues of this case, particularly those four issues analysed above, regarding essential aspects of the no case to answer procedure.

239. The opinions of Judges Henderson and Tarfusser, taken individually or altogether, do not amount to 'one decision' under article 74(5) of the Statute. Despite a remarkable total of more than one thousand pages, these documents lack a uniform, 'full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions' as required per article 74(5) of the Statute.

(vi) The verdict was not fully informed

240. Holding that the Prosecutor fails to provide sufficient reasons to question the reliability of the Trial Chamber's statement on 15 January 2019 or to show that the Trial Chamber was not fully informed,[360] the Appeals Chamber's Majority rejects the Prosecutor's argument that the Trial Chamber had not assessed all of the evidence nor reached all conclusions.[361]

241. The Appeals Chamber's Majority concluded that

> there is a certain lack of clarity, as between the relevant documents, with regard to whether the judges considered that article 74 applied to the decision they were issuing. However, the Appeals Chamber is not persuaded as to the relevance of this to the issue being argued here; a lack of clarity in the eyes of the beholder as to the precise legal basis for the decision does not mean that the decision itself was not fully informed. In particular, Judge Tarfusser made it clear that he did not consider it necessary or wise to engage in a debate about the nature of the decision.[362]

[360] Judgment of the Appeals Chamber's Majority, section VI(D)(2).
[361] Judgment of the Appeals Chamber's Majority, section VI(D)(2)(b).
[362] Judgment of the Appeals Chamber's Majority, para. 246.

242. I observe that the Prosecutor's allegation is not about the integrity of the judges. I agree with the Appeals Chamber's majority that the integrity of judges is to be presumed.[363] However, the Prosecutor is not challenging that. This case is about the working methods of the majority of the Trial Chamber and how those methods are in breach of the principles and guarantees of fairness in the proceedings at this Court.

243. So, even if the Presiding Judge on 15 January 2019 stated that the Trial Chamber had, before reaching its verdict, 'thoroughly analysed the evidence and taken into account […] all legal and factual arguments submitted both orally and in writing by the parties and participants',[364] we cannot simply base our appellate review on the presumption of integrity of these judges. Although I respect and highly praise my fellow colleagues Judges Henderson and Tarfusser the Prosecutor and the OPCV have put arguments that the Appeals Chamber must fully assess regardless of any presumption that is not being challenged.

244. Judges Henderson and Tarfusser did not issue 'one decision' with their findings on the evidence and conclusions, supporting their oral verdict, as required by article 74(5). Indeed, Judges Henderson and Tarfusser orally entered the acquittals of Mr Gbagbo and Mr Blé Goudé on 15 January 2019.[365] The verdict read on 15 January 2019 was neither a reasoned decision nor a summary, as it did not contain nor did it summarise, the findings of fact on each of the charges brought by the Prosecutor and the legal conclusions.

245. It took Judges Henderson and Tarfusser six months (while the deliberation process had supposedly already finished) to articulate and separately write their reasons for the acquittal in two opinions that were attached to a written decision on 16

[363] Under its administrative capacity, the Presidency of this Court has noted that 'there is a strong presumption of impartiality attaching to a judge that is not easily rebutted'. Presidency, *The Prosecutor v. Germain Katanga*, Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the disqualification of Judge Christine Van den Wyngaert from the case of The Prosecutor v Germain Katanga, 22 July 2014, ICC-01/04-01/07-3504-Anx, para. 40. It has further noted that '[i]t is presumed that the judges of the Court are professional judges, and thus, by virtue of their experience and training, capable of deciding on the issue before them while relying solely and exclusively on the evidence adduced in the particular case'. Presidency, *The Prosecutor v. Abdallah Banda Abakaer Nourain*, Decision of the plenary of the judges on the "Defence Request for the Disqualification of a Judge" of 2 April 2012, 5 June 2012, ICC-02/05-03/09-344, para. 14. *See also* Judgment of the Appeals Chamber's Majority, para. 321.
[364] Oral Verdict, p. 2, line 25 to p. 3, line 2.
[365] Oral Verdict, p. 1, line 15 to p. 5, line 7.

July 2019:[366] the 'Opinion of Judge Cuno Tarfusser'[367] and the 'Reasons of Judge Geoffrey Henderson'.[368] Judge Herrera appended her 'Dissenting Opinion'.[369]

246. Even when Judges Henderson and Tarfusser issued their written opinions, they failed to provide a 'full and reasoned statement' of their findings and conclusions as required by article 74(5). Rather, the opinions demonstrate that Judges Henderson and Tarfusser did not reach agreements on pivotal issues that concern the decision-making process (*i.e.*, the legal basis for the no case to answer, the standard of proof and applicability of article 74, as explained above.

247. Despite the assertion to the contrary,[370] there was no evidence that Judges Henderson and Tarfusser had assessed all evidence and made their findings and conclusions in one decision, nor even a summary thereof. The judges simply announced a verdict. Judges Henderson and Tarfusser did not deliver a document with the legal findings of the Trial Chamber or of its majority.

248. I observe that the Appeals Chamber's Majority further rejected the Prosecutor's argument that the Trial Chamber was not fully informed in its 15 January 2019 Decision because of substantive inconsistencies, and held that the Trial Chamber was fully informed when reaching its 15 January 2019 Decision.[371] On the contrary, I consider that the Prosecutor has demonstrated that the verdicts of acquittal of 15 January 2019 were not fully informed.

249. I recall that, on 16 January 209, speaking as a presiding judge of the Trial Chamber, Judge Tarfusser said that Judge Herrera Carbuccia was 'mistaken in stating that the majority has acquitted Mr Gbagbo and Mr Blé Goudé by applying the beyond a reasonable doubt standard'.[372] However, six months later, on 16 July 2019 wrote that '[t]here is only one evidentiary standard' and that '[t]he evidentiary standard is

[366] Reasons for 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 Blé Goudé Defence no case to answer motion, 16 July 2019, ICC-02/11-01/15-1263.
[367] Judge Tarfusser's Opinion.
[368] Judge Henderson's Reasons.
[369] Judge Herrera Carbuccia's Dissenting Opinion 16 July 2019.
[370] *See* Oral Verdict, p. 2, line 25 to p. 3, line 2. .
[371] Judgment of the Appeals Chamber's Majority, section VI(D)(2).
[372] Transcript of hearing, 16 January 2019, ICC-02/11-01/15-T-234-ENG, p. 4 lines 11-15.

set forth in article 66, paragraph 3: "[i]n order to convict the accused, the Court must be convinced of the guilt of the accused *beyond reasonable doubt*"'.[373] The two statements are contradictory.

250. In my view, if Judge Tarfusser had orally decided something on 15 January 2019 and then six months later he changed his mind to decide something different, it can only mean that his deliberative process had not yet concluded. When Judge Tarfusser joined Judge Henderson on 15 January 2019, his vote and, therefore, the acquittals were not fully informed as to, *inter alia*, the applicable standard of proof to assess no case to answer motions, the legal basis for such motions at the ICC, and the applicability of article 74 of the Statute to grant them. Considering that the decision the judges had to make was whether or not to grant no case to answer motions, they had to be informed and agree on such issues to be able to grant such motions. As such, the applicable standard of proof to assess no case to answer motions, their legal basis at the ICC and the applicability of article 74 of the Statute were fundamental factors that necessarily determine the *ratio decidendi* of the acquittal they entered by granting the motions. In particular, the disagreement as to the applicable standard of proof will be elaborated further below under the second ground of appeal.

(vii) Conclusion

251. Accordingly, even if one were, for the sake of discussion, to ignore that the acquittal on 15 January 2019 had no written reasons nor a summary thereof, there is no way to conclude, as the Appeals Chamber's Majority suggests, that such error was cured with the written opinions six months later. This is because the opinions do not form 'one decision' nor do they provide 'a reasoned statement of the Trial Chamber's findings on the evidence and conclusions' or, for that matter, a reasoned statement by the majority.

252. Two separate opinions with diverging views do not make a judgment. The Trial Chamber failed to issue (i) one, (ii) written statement, (iii) containing a full and reasoned statement of its findings on the evidence and conclusions. These failures amount to errors of procedure and law.

[373] Judge Tarfusser's Opinion, para. 65.

253. Because the requirements of article 74(5) are guarantees of due process of law and fairness, failing to follow them invalidates the decision. In any event, the errors in this case materially affected the acquittals, as elaborated in subsection D(3) below.

(b) The Trial Chamber additionally failed to comply with the legal requirements and guarantees of article 74(2) of the Statute

254. As explained above, article 74 contains guarantees of due process and fairness. Paragraph (5) must be read in the context of other paragraphs in that article, in particular, paragraph (2). As explained in this section, besides violating paragraph (5) of article 74 of the Statute, Judges Henderson and Tarfusser violated paragraph (2) thereof.

255. I recall that paragraph (2) of article 74 reads:

> 2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

256. As I turn to explain, there were two breaches of this provision by the Trial Chamber to this provision: first, the early termination of the proceedings, which impacted the guarantee that judges shall make an 'evaluation of the evidence and the entire proceedings', and, second, the absence of the required evaluation of the evidence.

(c) The acquittals were entered prematurely before the end of the entire proceedings

257. Pursuant to my views that the no case to answer is not permissible under the Statute, I consider that, having granted no case to answer motions and thus finished the trial prematurely, the Trial Chamber did not conduct the entire proceedings. After the end of the Prosecutor's presentation of evidence, the Trial Chamber halted the trial and thus entered acquittals without having made 'its evaluation of the evidence and the entire proceedings' under article 74(2) of the Statute.

258. Article 74(2) requires that the 'Trial Chamber's decision shall be based on its evaluation of the evidence and the *entire proceedings*' (emphasis added).

259. Although article 74 does not specify which decisions are covered by the provision, a contextual interpretation of this provision shows that all acquittals and convictions must abide by the legal requirements and guarantees of article 74 of the Statute. Indeed, both the title of article 81 and its paragraph (1) imply that decisions reached under article 74 are either acquittals or convictions.[374] Commentators agree that article 74 applies to decisions on the guilt or innocence of the accused.[375]

260. Thus, in principle, a trial chamber has only two options to put an end to a trial under article 74 of the Statute: acquittals and convictions. For both decisions, convictions and acquittals, paragraph (2) of article 74 requires an 'evaluation of the evidence and the entire proceedings'. This implies that for the trial judges to issue either a conviction or an acquittal, which must be based on their assessment of the evidence and the entire proceedings, it is obviously necessary to have conducted the entire proceedings. As noted above, the drafters did not consider that the no case to answer procedure was an available avenue for the judges to finalise a case. Therefore, the 'entire proceedings' must necessarily refer to the complete trial.

261. The only exception provided by the Statute other than a decision under article 74(2) of the Statute, is that proceedings can be terminated earlier when there is an admission of guilt by the accused. Unlike the no case to answer procedure, the procedure for an early termination of the trial on the account of an admission of guilt is expressly provided for and regulated under the statutory framework. If an admission of guilt is made by the accused, the trial chamber must make a series of

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[374] Article 81 of the Statute reads:

> **Article 81**
> **Appeal against decision of acquittal or conviction or against sentence**
> 1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:
> (a) The Prosecutor may make an appeal on any of the following grounds:
> (i) Procedural error,
> (ii) Error of fact, or
> (iii) Error of law;
> (b) The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:
> (i) Procedural error,
> (ii) Error of fact,
> (iii) Error of law, or
> (iv) Any other ground that affects the fairness or reliability of the proceedings or decision.

[375] G. Bitti, 'Article 64' in O. Triffterer and K. Ambos (eds.) *Commentary on the Rome Statute of the International Criminal Court* (2015), p. 1830.

determinations on the basis of factors clearly and expressly indicated in article 65(1) of the Statute.[376] The 'entire proceedings' in that event would be the proceedings as established in article 65 of the Statute.

262. In principle, as per article 64(3) of the Statute, the trial phase starts once the case is assigned to a trial chamber and concludes with the issuance of a judgment.[377] As per article 64(8)(a), a trial commences with the reading of the charges to the accused,[378]and opening statements. The last stage of the trial, as per rule 141 of the Rules is the closure of the presentation of the evidence and parties and participants are invited to make closing arguments.[379] Rule 142 of the Rules provides that '[a]fter the closing statements, the Trial Chamber shall retire to deliberate, in camera'.

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[376] The test is composed of the following elements: (a) whether the accused understands the nature and consequences of his/her admission; (b) whether the accused made this admission voluntarily after sufficient consultation with his defence counsel; (c) whether the admission is supported by the facts contained in (i) the charges brought by Prosecutor and admitted by the accused, (ii) any materials presented by the Prosecutor and accepted by the accused supplementing the charges, and (iii) any other evidence. If the trial chamber is satisfied, the next step is to consider the admission of guilt along with the evidence presented to prove the admitted crime in order to determine, at the chamber's discretion, whether or not to convict the accused of the admitted crime. If the chamber is not satisfied, it shall disregard the admission and order trial proceedings to be continued or may also remit the case to a different trial chamber. Moreover, if the chamber considers that a 'more complete presentation of the facts is required under the interests of justice', it may either request more evidence to the Prosecutor or disregard the admission of guilt with the further possibility to assign the case to a different trial chamber. Every aspect is specifically regulated.

[377] In this regard, article 64(3) of the Statute establishes that

> Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:
>
> (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;
>
> (b) Determine the language or languages to be used at trial; and
>
> (c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

[378] Article 64(8)(a) of the Statute reads: 'At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber'.

[379] Rule 141 of the Rules reads:

> Closure of evidence and closing statements
>
> 1. The Presiding Judge shall declare when the submission of evidence is closed.
>
> 2. The Presiding Judge shall invite the Prosecutor and the defence to make their closing statements. The defence shall always have the opportunity to speak last.

263. There is no other way to finalise trial proceedings under the Statute. In the present case, the evidentiary stage was not finished: the Trial Chamber did not call evidence for the determination of the truth as per any of the participants' requests, nor did the accused present evidence, the Trial Chamber did not hear the closing statements as required by rule 141 of the Rules. In contrast, in the instant case, Judges Henderson and Tarfusser decided to end the case halfway through trial on 15 January 2019. They did so without having given the victims the opportunity to examine the witnesses they intended to call,[380] without having heard whether the defence would have called any evidence, and without having received the final submissions from all parties and participants. Having ended the case prematurely, Judges Henderson and Tarfusser did not comply with the requirement of article 74(2) to base their decision on their 'evaluation of the evidence and the *entire proceedings*' (emphasis added). Hence, the procedure they followed is in clear contravention of article 74(2) of the Statute. Moreover, not having complied with the requirements of paragraph (2) of article 74 of the Statute, Judges Henderson and Tarfusser were also unable to meet the requirements of paragraph (5) thereof.

264. The procedure as followed by the Trial Chamber, in addition to the errors of law and procedure regarding article 74(5), amounts to clear errors of law and procedure in relation to article 74(2) of the Statute.

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[380] While victims and the witnesses they intended to call ultimately did not appear in court, earlier in the case, the victims noted the possibility and their intention to seek the Trial Chamber's authorisation to appear in court, to present their views and concern, and also to call witnesses to the stand. *See* Submission of information pursuant to the oral Order dated 28 August 2017, 2 October 2017, ICC-02/11-01/15-1039, para. 4 ('[t]he Legal Representative recalls her submissions filed on 14 April 2015, and in particular her observations at paragraphs 13-26 in relation to the possibility to seek the Chamber's authorisation to call witnesses and/or to request the appearance of some victims in person to present their views and concerns; as well as her submissions filed on 3 February 2017') (footnotes omitted), 5 ('[t]he Legal Representative informs the Chamber that she has the intention to request the appearance of a maximum of four victims to present their views and concerns'), 8 ('[t]he Legal Representative informs the Chamber that she intends to request authorisation to call four witnesses. If authorised, the Legal Representative estimates that she would use between 12 and 15 hours in total for the questioning of the witnesses'). As for documentary evidence, the OPCV was able to submit a 'list of names of Nigerien nationals who were killed during the post-electoral crisis'. *See* Legal Representative's Application for the introduction of documentary evidence under paragraphs 43-44 of the Amended Directions on the conduct of the proceedings, 15 December 2017, ICC-02/11-01/15-1088, para. 2.

[380] *See* Reasons for 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 Blé Goudé Defence no case to answer motion, 16 July 2019, ICC-02/11-01/15-1263, p. 8 ('the [Trial] Chamber […] hereby […] DECIDES that the pending requests for provisional release have hereby become moot').

(d) Absence of an assessment of all the evidence and the entire proceedings

265. What does it mean, in the terms of article 74(2) of the Statute, and in the context of article 74 decisions, to evaluate 'the evidence and the entire proceedings'? It certainly does not mean that the items of evidence can be cherry-picked or that judges can make a piecemeal analysis of it. It rather implies an impartial, objective and reasoned evaluation of the totality of the items of evidence and every submission in the proceedings.

266. As noted above, in the case at hand there is no one decision containing the findings of the majority. It is noteworthy that Judge Tarfusser did not present a separate assessment of all the evidence. He limited himself to endorsing the factual findings of Judge Henderson but at the same time challenged the applicable standard of proof. In fact, in the very first paragraph of his opinion, Judge Tarfusser 'confirm[s] that [he] subscribe[s] to the factual and legal findings contained in the "Reasons of Judge Henderson"'.[381]

267. However, because Judge Henderson had dissented from Judges Tarfusser and Herrera Carbuccia as to the admissibility of evidence, he did not assess (or at least did not provide an assessment of) all of the evidence presented by the Prosecutor. Judge Henderson dissented on this issue during the proceedings, and continued to disagree as to the system adopted by the Trial Chamber also in his written opinion. Also, as explained below, instead of assessing all 'submitted' evidence on the record, Judge Henderson limited his assessment to the evidence referred to in the mid-trial brief. This contradicts the jurisprudence of the Appeals Chamber, as explained below.

268. Judge Henderson acknowledged that he reviewed 'the pieces of evidence that [he] ha[s] considered for the purposes of the present decision'.[382] That is, having noted that 'the present proceedings are premised on the Prosecutor presenting her "detailed narrative" referring to the evidence in support of the charges, drawn from the larger pool of evidence "submitted" before the Chamber',[383] Judge Henderson based his assessment on the 'evidence relied upon by the Prosecutor in the Mid-Trial

[381] Judge Tarfusser's Opinion, para. 1.
[382] Judge Henderson's Reasons, para. 18.
[383] Judge Henderson's Reasons, para. 18.

Brief and subsequent submissions'.[384] He further limited his review by saying that '[t]his is meant to include *only* the portions of such items of evidence that have been referenced in support of a particular proposition as part of her detailed narrative'.[385] Without any reference to the statutory framework, he considered that '[t]he Prosecutor is not entitled, at this stage, to relegate sufficiency to a larger undefined group of evidence to the detriment of the parties and the participants'.[386]

269. While Judge Henderson, referring to all judges in the Trial Chamber and not solely to his assessment in his opinion, said that '[i]n this case the Chamber has not confined itself to considering the material discussed before it',[387] it is unclear, from the statements he made thereafter, whether he assessed, or was able to assess, all evidence referred to in the Prosecutor's mid-trial brief and, for that matter, all evidence on the record. Judge Henderson noted that 'the Chamber *may* consider such evidence',[388] but it remained unclear whether he actually did so.

270. Judge Henderson turned to restate his disagreement with the Trial Chamber's approach as to the admissibility of evidence, despite the Appeals Chamber's finding that there was no issue with Judges Tarfusser and Herrera Carbuccia's approach of deferring an admissibility assessment until the end of the trial.[389] As Judge Henderson recalled, Judges Tarfusser and Herrera Carbuccia had earlier decided, by majority, Judge Henderson himself dissenting, that the evidence submitted '[would] be deferred to the final judgment, except when an intermediate ruling [was] required under the Statute or otherwise appropriate'.[390] This was confirmed by the Appeals Chamber when it entertained the interlocutory appeal *Gbagbo and Blé Goudé* (OA12) to find that Judges Tarfusser and Herrera Carbuccia's approach 'did not incorrectly balance its discretion to defer its consideration of the admissibility of the items with its

[384] Judge Henderson's Reasons, para. 18.
[385] Judge Henderson's Reasons, para. 18 (emphasis added).
[386] Judge Henderson's Reasons, para. 18.
[387] Judge Henderson's Reasons, para. 19.
[388] Judge Henderson's Reasons, para. 19 (emphasis added).
[389] *See* Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against Trial Chamber I's decision on the submission of documentary evidence', 24 July 2017, ICC-02/11-01/15-995 (OA12), para. 65.
[390] Decision on the submission and admission of evidence, 29 January 2016, ICC-02/11-01/15-405, p. 10.

obligations under article 64 (2) of the Statute'.[391] Furthermore, afterwards in *Bemba et al* (A-A5), the Appeals Chamber considered that

> a trial chamber, upon the submission of an item of evidence by a party, has discretion to either: (i) rule on the relevance and/or admissibility of such item of evidence as a pre-condition for recognising it as "submitted" within the meaning of article 74 (2) of the Statute, and assess its weight at the end of the proceedings as part of its holistic assessment of all evidence submitted; or (ii) recognise the submission of such item of evidence without a prior ruling on its relevance and/or admissibility and consider its relevance and probative value as part of the holistic assessment of all evidence submitted when deciding on the guilt or innocence of the accused.[392]

271. The Appeals Chamber went on to find:

> *Any item of submitted evidence that is not excluded at trial must therefore be presumed to be considered by a trial chamber not to be inadmissible under any applicable exclusionary rule.* For this reason, both the procedure for the submission of evidence at trial and the status of each piece of evidence as "submitted" within the meaning of *article 74 (2) of the Statute must be clear. This is a fundamental guarantee for the rights of the parties at trial as well as for the purpose of any subsequent appellate review.*[393]

272. Although, having been settled by the Appeals Chamber, the correctness of Judges Herrera Carbuccia's and Tarfusser's preference to review all evidence submitted at the end of the case had *res judicata* effects for the *Gbagbo and Ble Goudé* case,[394] Judge Henderson continued to hold a different position until the end of the case. Despite the Appeals Chamber's finding no error in the practice of deferring admissibility of evidence until the final judgment in *Gbagbo and Blé Goudé* (OA12),[395] Judge Henderson 'consider[ed] it necessary to re-state [his] disagreement' and that Judges Tarfusser and Herrera Carbuccia's 'approach does not strike the appropriate "balance" between the Chamber's discretion to rule on admissibility and relevance as well as its obligation to ensure that the trial is conducted in a fair and

[391] Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against Trial Chamber I's decision on the submission of documentary evidence', 24 July 2017, ICC-02/11-01/15-995 (OA12), para. 65.
[392] *Bemba et al.* Appeal Judgment, para. 598.
[393] *Bemba et al.* Appeal Judgment, para. 599 (emphasis added).
[394] Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against Trial Chamber I's decision on the submission of documentary evidence', 24 July 2017, ICC-02/11-01/15-995 (OA12), para. 65.
[395] Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against Trial Chamber I's decision on the submission of documentary evidence', 24 July 2017, ICC-02/11-01/15-995 (OA12), para. 65.

expeditious manner'.[396] He considered that authorising the defence to bring no case to answer motions 'in the face of large quantities of evidence that the Chamber itself has not yet determined to be "not irrelevant" and/or "not inadmissible" at the close of the case for the Prosecutor does not further the fairness or expeditiousness of a trial'.[397] Judge Henderson acted against a final order with *res judicata* effects, as Judges Tarfusser and Herrera Carbuccia had already decided otherwise in the proceedings and the Appeals Chamber had already confirmed that it was not an error on their part to have done so.

273. Moreover, Judge Henderson went on to challenge the Appeals Chamber's unconditioned finding in *Bemba et al* (A-A5) that '[a]ny item of submitted evidence that is not excluded at trial must therefore be presumed to be considered by a trial chamber not to be inadmissible under any applicable exclusionary rule'.[398] He conditioned and restricted the Appeals Chamber's finding by noting that, '[w]hilst [such presumption] may not seem prejudicial to the accused if a chamber eventually finds that the evidence was indeed insufficient, this may not always be the case otherwise',[399] and insisted that 'rulings on admissibility and relevance before this stage of the proceedings were necessary and should have been made'.[400]

274. Taking the above into account, Judge Henderson's assessment of the evidence reflects at least one failure *vis-à-vis* the requirement of article 74(2) of the Statute. For one, he admitted to have reviewed only the evidence to which the Prosecutor referred

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[396] Judge Henderson's Reasons, para. 21.
[397] Judge Henderson's Reasons, para. 26.
[398] *Bemba et al.* Appeal Judgment, para. 599.
[399] Judge Henderson's Reasons, para. 27.
[400] Judge Henderson's Reasons, para. 28. Worse yet, Judge Henderson acknowledged that his disagreement affected his assessment of the evidence:

> I note my disagreement for the purposes of the present opinion because, as explained below, *it affects how I have proceeded with my analysis*. In this regard, I note that I do not have, at my disposal, the resources that a chamber could have in order to make these determinations in an expeditious manner, on a rolling basis or otherwise, so as to render a complete opinion on the submissions at this stage within a reasonable time. In addition, *even if I did have the means to make reasoned rulings on the admissibility of all pieces of evidence relied upon, the present opinion would not amount to excluding any piece of evidence as 'ruled irrelevant or inadmissible' within the meaning of rule 64(3)*. I am therefore required to evaluate the evidence considered "submitted" before the Trial Chamber, regardless of how I would have actually proceeded with respect to admissibility. This leaves me with little choice but to carry on without making admissibility rulings that I consider necessary [Judge Henderson's Reasons, para. 29 (emphasis added)].

in her mid-trial brief, as opposed to all the evidence submitted on the record. Moreover, he continued to hold the view that the Trial Chamber should have made rulings on the admissibility of evidence in the course of the trial, in contrast to the decision of his fellow trial judges that all evidence submitted 'will be deferred to the final judgment'.[401] While Judge Henderson later said he found a compromise,[402] I find that his restatement of his disagreement with respect to the assessment of the evidence is not only worrisome but it shows an error in not assessing all evidence as per article 74(2) of the Statute. Precisely because Judge Henderson does not consider that the decision granting a no case to answer motion is a final judgment under article 74 of the Statute,[403] it is unclear whether he assessed all submitted evidence referred to in the mid-trial brief as he should have done when entering a final judgment.

275. In my view, article 74(2) and the decision of his fellow trial judges,[404] as confirmed by the Appeals Chamber,[405] required Judge Henderson to holistically assess all evidence on the record and the entire proceedings, at the end of the trial. This is especially important in a case of crimes against humanity, such as the instant one, where the Prosecutor was requiring the Trial Chamber to admit direct and circumstantial evidence about the crimes and the contextual elements.

3. Whether the acquittals were materially affected by lack of compliance with the legal requirements and guarantees of article 74 of the Statute

276. The Appeals Chamber's Majority considered that the Trial Chamber's failure to issue a written decision did not materially affect the acquittals, because, in the view of the Appeals Chamber's Majority, had Judges Henderson and Tarfusser made the acquittals in writing, the decision would have been the same.[406] I dissent from these findings because I consider that, but for the Trial Chamber's failure to follow the

[401] Decision on the submission and admission of evidence, 29 January 2016, ICC-02/11-01/15-405, p. 10. *See also* Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against Trial Chamber I's decision on the submission of documentary evidence', 24 July 2017, ICC-02/11-01/15-995 (OA12), para. 65.
[402] Judge Henderson's Reasons, para. 30.
[403] Judge Henderson's Reasons, paras 13-15.
[404] *See* Decision on the submission and admission of evidence, 29 January 2016, ICC-02/11-01/15-405, p. 10.
[405] *See* Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against Trial Chamber I's decision on the submission of documentary evidence', 24 July 2017, ICC-02/11-01/15-995 (OA12), para. 65.
[406] Judgment of the Appeals Chamber's Majority, para. 265.

requirements of article 74(2) and (5), particularly, to reach one decision with a written statement of its findings on the evidence and conclusions, the Trial Chamber would have been able to find that there was a case to answer and that it had to continue with the trial until the end.

(a) Arguments of the parties and participants

277. The Prosecutor argues that the violations of article 74(5) of the Statute rendered the impugned decision unlawful and, therefore, null and void.[407] According to the Prosecutor, the requirements of article 74 are 'so fundamental to ensuring a reliable decision that without them the decision can barely be considered a valid legal outcome'.[408] In her view, 'the violations of article 74(5) that occurred in this case were so fundamental as to render the decision *ultra vires* the Statute and thereby "null and void"'.[409]

278. In addition, according to the Prosecutor, the errors had a material effect on the acquittals because 'a partially informed decision to acquit is substantially different from a fully informed decision to acquit'.[410] The Prosecutor submits:

> Further or in the alternative, the errors in the first ground materially affected the 15 January 2019 Oral Acquittal Decision, read together with the 16 July 2019 Reasons, because the Majority's decision to acquit was not fully informed. As shown above, when the Majority orally acquitted Mr Gbagbo and Mr Blé Goudé on 15 January 2019, and despite its assertion to the contrary, it had not yet completed the necessary process of making all its findings on the evidence and reaching all its conclusions, *nor* had it completed the written articulation of its findings and conclusions. Hence, the Majority had not yet completed its fully informed reasoning. This led to significant inconsistencies between the Majority's remarks on 15 and 16 January 2019 about its verdict and its 16 July 2019 Reasons. It also led to inconsistencies in the application of the standard of proof and/or approach to assessing the sufficiency of evidence, even within Judge Henderson's Reasons. In plain terms, the errors materially affected the 15

[407] Prosecutor's Appeal Brief, paras 99, 116-118. *See* Prosecutor's Appeal Brief, para. 118:
> the errors described in the first ground materially affected the 15 January 2019 Oral Acquittal Decision. They impacted not only the validity of the Majority's decision to acquit Mr Gbagbo and Mr Blé Goudé in its 15 January 2019 Oral Acquittal Decision, but also the most important effect of that decision—the dismissal of all charges. The subsequently issued the [*sic*] 16 July 2019 Reasons cannot retroactively give effect to a previous decision that is null and void and thus cannot undo or cure the impact that the errors had on the 15 January 2019 Oral Acquittal Decision.

[408] Transcript of hearing, 22 June 2020, ICC-02/11-01/15-T-238-Red-ENG, p. 21, lines 2-4. *See also* Transcript of hearing, 24 June 2020, ICC-02/11-01/15-T-240-ENG, p. 55, lines 11-13.

[409] Prosecutor's Response to the Appeals Chamber's Questions, para. 16.

[410] Prosecutor's Appeal Brief, para. 120.

> January 2019 Oral Acquittal Decision because a partially informed decision to acquit is substantially different from a fully informed decision to acquit.[411]

279. The OPCV argues that 'the trial should be rendered invalid because of the numerous errors of law and/or procedure that critically affected the fairness of the proceedings'.[412]

280. For the reasons that follow, I find the Prosecutor's submissions to be correct.

(b) Applicable law regarding materiality of an error

281. Article 83(2) of the Statute is the starting point for this analysis. It reads as follows:

> Article 83
>
> Proceedings on appeal
>
> […]
>
> 2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or *that the decision or sentence appealed from was materially affected by error of fact or law or procedural error*, it may:
>
> (a) Reverse or amend the decision or sentence; or
>
> (b) Order a new trial before a different Trial Chamber (emphasis added).

282. In light of the language of article 83(2) of the Statute, I am unable to agree with the Appeals Chamber's Majority reading of the jurisprudence in *Ngudjolo* to say that 'this standard is high'[413] and that, in its view, 'it has to be established in relation to the errors of law and procedural errors alleged that there is a high likelihood that the Trial Chamber, had it not committed the alleged errors, would not have acquitted Mr Gbagbo and Mr Blé Goudé'.[414]

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[411] Prosecutor's Appeal Brief, para. 120.
[412] OPCV's Observations, para. 177.
[413] Judgment of the Appeals Chamber's Majority, para. 258, *referring to 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-Corr (hereinafter: '*Ngudjolo Chui* Appeal Judgment'), para. 285.
[414] Judgment of the Appeals Chamber's Majority, para. 259, *referring to* *Ngudjolo Chui* Appeal Judgment, para. 285.

283. I observe that, in *Situation in the Democratic Republic of the Congo* and *The Prosecutor v. Thomas Lubanga Dyilo*, the Appeals Chamber has identified that a judgment is 'materially affected' by an error of law 'if the Pre-Trial or the Trial Chamber would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error'.[415] The Appeals Chamber has noted that even where the result of a decision remains unchanged, if the outcome of the decision is to be reached based upon the application of a different legal assessment than originally applied, then it may be considered a substantially different decision, thereby amounting to a material error.[416] It has further noted that the same rationale applies for procedural errors.[417]

(c) Analysis

284. In light of the foregoing, the question is whether, absent the errors, the Trial Chamber would have made a substantially different decision. What the substantially different decision in the case at hand would have been flows from the operative part of the oral verdict of 15 January 2019. It reads, in relevant part, as follows:

> the Chamber, by majority, Judge Herrera Carbuccia dissenting, hereby […] GRANTS the defence motions for acquittal from all charges against Mr Laurent Gbagbo and Mr Charles Blé Goudé.[418]

285. This shows that the opposite decision would have been to decline to grant the motions. And, considering that Judge Herrera Carbuccia dissented, the test as to whether or not the Trial Chamber would have issued this different decision of not granting the motions ought to focus on the judges who granted the motion, namely, Judges Henderson and Tarfusser.

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[415] *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, ICC-01/04-169 (hereinafter: 'DRC Appeal Judgment'), para. 84. *See also The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red (hereinafter: '*Lubanga* Appeal Judgment') paras 18-19; *Ngudjolo Chui* Appeal Judgment, para. 20.

[416] DRC Appeal Judgment, para. 84.

[417] *Lubanga* Appeal Judgment, para. 20; *Ngudjolo Chui* Appeal Judgment, para. 21, *quoting* *Lubanga* Appeal Judgment, para. 20:

> "[A]n allegation of a procedural error may be based on events which occurred during the pre-trial and trial proceedings. However, as with errors of law, the Appeals Chamber will only reverse a decision of acquittal if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the decision would have substantially differed from the one rendered."

[418] Oral Verdict, p. 1, line 15 to p. 4, line 18.

286. I am of the view that, being unable to agree on essential topics on the no case to answer procedure in a case where the Trial Chamber was seized with no case to answer motions, Judges Henderson and Tarfusser's only natural conclusion would be to reject the no case the motions. In a case where the decision the judges had to make was whether or not to grant these motions, issues such as the legal basis for said motion and the test or standard for granting it form the *ratio decidendi* of the decision. Disagreements on whether there is even a legal basis for presenting such motions, and on the applicable test or standard for assessing the evidence at that stage, undermine the very basis for the decision. This is because, if a judge considers that there is no legal basis for presenting a motion, it is logically impossible to grant it. Similarly, having distinct standards of proof in mind would prevent judges from making findings of fact together; if one judge holds that a fact is established under a *prima facie* assessment, another judge who considers that the standard is beyond reasonable doubt would not necessarily agree that such a finding of fact can be made.

287. However, these disagreements were made immediately apparent in the writing of the separate opinions of the two judges. This happened after the judges had already announced, orally, in open court, their decision to grant the motions. By then, the judges were unable to change the outcome. They could not take it back nor turn back time.

288. Certainly, announcing a verdict orally, without having completed necessary agreements to write one decision with a full and reasoned statement of both judges' findings on the evidence and conclusions, made it impossible for the judges to write a different decision, rejecting the no case to answer motions and continuing with the defence case. If the judges had completed their decision-making process before the verdict, they would have found that their views on the no case to answer were incompatible. When the oral verdict was announced, there was not even a summary of the judges' reasoning to bring to light the fact that they disagreed on issues that form the *ratio decidendi* of the verdict.

289. Once they had announced the verdict, the judges could not find otherwise and had to find reasons in writing for what they had announced in open court. Six months after the verdict, instead of rendering one document with their reasons, the two judges

of the majority issued their separate opinions. These opinions finally made apparent their lack of agreement on the *ratio decidendi*.

290. In fact, when reading closely the opinions of Judges Henderson and Tarfusser, it is clear to find that they continued to disagree on essential points that were necessary to making one uniform decision, such as: the legal basis for the no case to answer; the basis for issuing a decision granting the motions of the accused; and the applicable standard of proof and other evidentiary approaches.

291. The material effect in this case is evidenced by the fact that Judges Henderson and Tarfusser rushed to announce the outcome of this case before writing their reasons. This removed the possibility for them to double check their suppositions and impressions through the making of a calm, thorough and holistic assessment of the evidence, the transcripts, cross-checking with such things as documentary evidence, expert evidence, and audio-visual evidence and, importantly, reading the final written submissions, which in this case were voluminous and required significant time to digest (briefs filed at the mid-trial stage and their numerous annexes). Most importantly, the trial finished without the Trial Chamber, or at least a majority of it, having agreed on how to assess the evidence.

292. Had Judges Henderson and Tarfusser not announced the acquittal orally on 15 January 2019, when they embarked on the writing of their findings on the evidence and conclusions as required by article 74(2) and (5) of the Statute, they would have been in a position to reach a different conclusion based on the Prosecutor's evidence. For instance, the assessment of examples considered under the second ground of appeal shows that, had the judges applied the correct standard of proof at the no case to answer stage, they would have found that this standard was met.[419]

293. In conclusion, when Judges Henderson and Tarfusser openly and orally announced the verdict of the case against Mr Gbagbo and Mr Blé Goudé, without giving the reasons to support the acquittals or even a summary thereof, they had not finalised their decision-making process. Had they not made this announcement, but rather completed such decision-making process as per article 74(2) and (5) of the

[419] *See infra* section VII(D).

Statute, they would have been in a position to reach a different conclusion based on the Prosecutor's evidence and they would have continued with the case until the end of the trial. Instead, with the premature, oral and public announcement of the verdict, before completing the decision-making process, the acquittals were materially affected because from this moment onwards, those judges were bound to the outcome they had previously announced. But for this oral verdict, the judges would still have been able to further assess the entire case, proceedings and evidence, with the expected caution and necessary agreements on the standard of proof and evidentiary approaches, and to reach a different outcome.

294. In light of the foregoing, the errors of law and procedure in this case materially affected the acquittals. Therefore, I would have granted the first ground of appeal.

E. Conclusions on the first ground of appeal

295. As shown in this opinion, in the case at hand, it was the lack of clarity on issues related to the no case to answer motions (the lack of any basis to entertain them at the ICC, the applicability of article 74 to decisions granting them, the applicable standard of proof) that resulted in chaotic and unfair proceedings before the Trial Chamber and the lack of one unequivocal decision by the Trial Chamber or its majority. There is no document that can be called the impugned decision in this case, as, besides the eight-page cover document issued on 16 July 2019, there are three documents saying different things. The opinions of Judges Henderson and Tarfusser, who claimed to form a majority, disagreed on important points, such that their opinions cannot form one decision. This contributed to the chaos in this case.

296. Additionally, the language (in different authentic texts) of article 74(2) and (5) of the Statute is mandatorily applicable to trial decisions on the guilt of the accused. This is because it contains specific legal requirements for the reasoning and decision-making process that need to be complied with to reach such decisions, and it contains guarantees of fairness, due process of law and effective judicial protection for all parties and participants. As explained below, the drafters used commanding language, such as modal verbs and specific tenses, to formulate such requirements in paragraphs (2) and (5) of article 74, while they used discretional wording in other provisions regarding purely procedural matters. This is consistent in different authentic texts of the Statute, particularly, in English, French and Spanish.

297. Similarly, while Judge Henderson's opinion makes an assessment of the evidence and Judge Tarfusser said he joined this assessment, Judge Henderson stated that he limited his assessment to the evidence to which the Prosecutor referred in her mid-trial brief. It does not say that he assessed *all* evidence submitted on the record, and it is hence impossible to conclude that either written opinion was 'based on [the Trial Chamber's] evaluation of the evidence and the entire proceedings', as per article 74(2) of the Statute, or on the evaluation by either Judge Henderson or Tarfusser, for that matter. Incidentally, being a no case to answer procedure, the oral decision and the opinions did not take into account the 'entire proceedings' as required by article 74(2). This reflects that when announcing the verdict of the acquittals, on 15 January 2019, Judges Henderson and Tarfusser had not completed the decision-making process nor had they issued a document with their findings and conclusions on the evidence and the evaluation of the entire proceedings, as required by the Statute.

298. In my view, paragraphs (2) and (5) of article 74 are requirements providing for guarantees in the decision-making process and to ensure the issuance of a fair decision on the substance of the case – *i.e.*, the guilt or otherwise of the accused. I consider that, given the nature and amount of evidence and submissions in atrocity trials, trial chambers must simultaneously meet the requirements of assessing the evidence and entire proceedings, and issuing a decision in writing with the trial chamber's findings on the evidence and conclusions. Accordingly, I have also found that the failure of Judges Tarfusser and Henderson to meet these requirements materially affected the process they followed, before and after announcing their verdict, and ultimately their decision to acquit.

299. In my view, Judges Henderson and Tarfusser had not yet completed their decision-making process when they announced the verdict orally and, not having issued the acquittals in writing by then, the judges failed not only to meet the requirements and guarantees of article 74, thereby vitiating the proceedings and the acquittals, but, equally important, this failure amounts to an error of law and procedure that materially affected the acquittals. Certainly, announcing a verdict orally, without having completed necessary agreements to write one decision with a full and reasoned statement of both judges' findings on the evidence and conclusions, made it impossible for the judges to write a different decision thereafter, for example

rejecting the no case to answer motions and continuing with the defence case. If the judges had completed their decision-making process before the verdict, they would have been able to find that their views on the no case to answer motions were incompatible and as such that they could not write 'one decision'. I would therefore have granted the first ground of appeal and ordered a new trial.

VII. SECOND GROUND OF APPEAL

300. As for the second ground of appeal, the Prosecutor essentially argues that the 'Trial Chamber failed to define or articulate a clear and consistent standard of proof or approach to assess the sufficiency of evidence in the no case to answer proceedings in this case'.[420] According to the Appeals Chamber's Majority, a correct appreciation of the standard of proof applicable at the no case to answer stage 'necessarily entails assessment of credibility and reliability',[421] and in its view if the prosecution's case 'upon its completion, is not strong enough to satisfy the standard of proof beyond reasonable doubt *at that stage*, a trial chamber may reasonably take the view that the evidence up to that point has been insufficient to support a conviction'.[422] The Appeals Chamber's Majority further found that 'there is no lack of clarity or consensus between the judges in the [Trial Chamber's] majority as to how to approach the evidence at this stage of the proceedings'.[423] I am unable to agree with this finding of my esteemed colleagues. Instead, although I find no basis in the Statute to entertain no case to answer motions at this Court, as elaborated below, I nevertheless find 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 my view, it requires a *prima facie* assessment, where a reasonable trial chamber, taking the evidence at its highest, could convict the accused. Judge Henderson, who said that he was writing for the majority of the Trial Chamber, erroneously applied a higher standard of proof. Moreover, as I turn to explain in this section, I find that there were disagreements among the trial judges that amount to errors of law and procedure, and materially affected the impugned acquittals. Additionally, as shown below, referring to the Prosecutor's examples, I consider that

[420] Prosecutor's Appeal Brief, para. 122.
[421] *See* Judgment of the Appeals Chamber's Majority, para. 315.
[422] Judgment of the Appeals Chamber's Majority, para. 311 (emphasis in original).
[423] Judgment of the Appeals Chamber's Majority, para. 339.

Judge Henderson's evidentiary approaches to corroboration and sexual violence amount to errors of law.

301. For the reasons that follow, I would have granted this ground of appeal. Certainly, even though I have found above that the first ground of the Prosecutor's Appeal should have been granted, rendering it unnecessary to entertain the second one, I will elaborate on this ground to address the reasons of the Appeals Chamber's Majority on which I am unable to agree.

A. Findings of the Judgment of the Appeals Chamber's Majority with which I disagree

302. The Appeals Chamber's Majority held that, at the no case to answer stage, a 'trial chamber shall acquit the defendant or, as the case may be, dismiss one or more of the charges, where the evidence thus far presented is insufficient in law to sustain a conviction on one or more of the charges'.[424] According to the Appeals Chamber's Majority, a correct appreciation of the standard of proof applicable at the no case to answer stage 'necessarily entails assessment of credibility and reliability'.[425] In the view of the Appeals Chamber's Majority, if the prosecution's case 'upon its completion, is not strong enough to satisfy the standard of proof beyond reasonable doubt *at that stage*, a trial chamber may reasonably take the view that the evidence up to that point has been insufficient to support a conviction'.[426] Although I sustain that the no case to answer procedure is not permissible under the Rome Statute System, I observe that, contrary to the considerations of the Appeals Chamber's Majority,[427] its findings are not consistent with international and national jurisdictions. As elaborated below, the standard of proof at the no case to answer stage, in the jurisdictions that allow such a motion, is not as high as finding proof beyond reasonable doubt. As explained below, the applicable standard of proof at the no case to answer stage, in domestic jurisdictions and the *ad hoc* tribunals, requires that, under a *prima facie* assessment, a reasonable chamber could convict taking the Prosecution's evidence at its highest.

[424] Judgment of the Appeals Chamber's Majority, para. 301.
[425] *See* Judgment of the Appeals Chamber's Majority, para. 315.
[426] Judgment of the Appeals Chamber's Majority, para. 311 (emphasis in original).
[427] Judgment of the Appeals Chamber's Majority, para. 305.

303. Regarding the Prosecutor's arguments that Judges Henderson and Tarfusser failed to provide prior notice, set out, and agree on an evidentiary standard, the Appeals Chamber's Majority found that the two judges shared the views written in Judge Henderson's opinion that a chamber must engage in a full review of the evidence submitted, including making credibility and reliability assessments.[428] Further, '[t]o the extent that there is any doubt whether the Trial Chamber adopted the correct standard of proof, the [Appeals Chamber's Majority was] satisfied that the [impugned] decision was not materially affected',[429] considering that Judges Henderson and Tarfusser 'found that the Prosecutor's evidence did not meet any standard (including the one "whether the Prosecutor has submitted sufficient evidence in support of [a] charge such that a reasonable chamber could convict")'.[430] It further found that the Prosecutor's claim that the Trial Chamber gave no previous notice on the applicable evidentiary standards and approaches remained unsubstantiated,[431] and that the Prosecutor failed to explain what she would have done differently had she been given such a notice.[432]

304. I am unable to agree with these findings. The lack of agreement between Judges Henderson and Tarfusser is reflected by an objective reading of the views orally held by Judge Tarfusser, during the trial and after prematurely finishing it, as well as those written in the separate opinions of the two judges six months after entering the acquittals. The disagreements between the two judges materially affected the acquittals, considering that, had they reached an agreement on the applicable standard of proof before, they would have been able to properly make concurrent findings of fact and thus reached a substantially different decision.

305. As for the six examples that the Prosecutor raised under her second ground of appeal, the Appeals Chamber's Majority noted that, '[t]o the extent that the Prosecutor argues that the alleged errors in the six examples (together with the relevant procedural history) are manifestations of the failure to set out and agree upon the evidentiary standard and approaches, and therefore relevant to the showing of

[428] Judgment of the Appeals Chamber's Majority, paras 323-332.
[429] Judgment of the Appeals Chamber's Majority, para. 340.
[430] Judgment of the Appeals Chamber's Majority, para. 340, *referring to* Judge Henderson's Reasons, para. 2; *and* Judge Tarfusser's Opinion, para. 68.
[431] Judgment of the Appeals Chamber's Majority, para. 337.
[432] Judgment of the Appeals Chamber's Majority, paras 346-347.

material effect, the Appeals Chamber recalls that it has found that the Prosecutor has not demonstrated any "lack of clarity" or "failure to establish consensus" between Judge Henderson and Judge Tarfusser'.[433] It then went on to note that 'the question of material effect does not arise'.[434] Furthermore, 'with regard to the Prosecutor's submission that the errors that she alleges in respect of the six examples could be assessed as factual errors, the [Appeals Chamber's Majority recalled] that it would have been necessary for the Prosecutor to advance arguments showing that no reasonable trial chamber would have come to such a factual finding',[435] and considered it inappropriate to assess the six examples as factual errors.[436] It concluded that the Prosecutor failed to demonstrate that the Trial Chamber erred in law or procedure, thus rejecting the Prosecutor's second ground of appeal.

306. In brief, the Appeals Chamber's Majority decided not to address the examples. I am unable to agree with this approach. The wording of the Prosecutor's appeal is clear in saying that she is bringing those examples *in addition to* her argument that the Trial Chamber failed to set out a clear and commonly agreed standard of proof for the no case to answer stage.[437] With the examples, the Prosecutor is alleging the following errors:

i. The Trial Chamber erred in how it approached the question of corroboration of evidence;

ii. The Trial Chamber failed to consider the evidence in its totality;

iii. The Trial Chamber adopted an unreasonable and unrealistic view regarding the assessment of witness testimony;

iv. The Trial Chamber unfairly subjected evidence of crimes of sexual violence to a heightened level of scrutiny; and

[433] Judgment of the Appeals Chamber's Majority, para. 371, *citing* Prosecutor's Appeal Brief, paras 123-124, 131.
[434] Judgment of the Appeals Chamber's Majority, para. 371.
[435] Judgment of the Appeals Chamber's Majority, para. 372.
[436] Judgment of the Appeals Chamber's Majority, para. 373.
[437] *See* Prosecutor's Appeal Brief, paras 122-125, 166-252.

v. The Trial Chamber speculated on numbers and estimates outside the case record when seeking to set an empirical benchmark to assess patterns of criminality.[438]

307. I must note, in this regard, that I disagree with the position of the Appeals Chamber's Majority that these arguments were raised as part of the material effect. Unless the first part of the Prosecutor's argument is granted (as Judge Bossa and I would have done), not dealing with the examples is insufficient to meet the duty that the Appeals Chamber has to entertain and exhaust all arguments raised by the parties and participants, especially the appellant. To reject the second ground of appeal, the Appeals Chamber's Majority has not dealt with all arguments regarding the alleged errors of law and procedure. The Prosecutor presented the errors in examples to demonstrate errors of law and procedure, and the Appeals Chamber's Majority should have treated them as such instead of deciding not to entertain them. Below I will note the relevant parts of the examples that demonstrate Judge Henderson's incorrect application of the standard of proof applicable at the no case to answer stage, and other incorrect approaches to assess the evidence at the no case to answer stage or any stage of the proceedings, for that matter.

B. Arguments of the parties and participants

308. The Prosecutor submits that the Trial Chamber erred in law and procedure by '[f]ailing to define or articulate a clear and consistent standard of proof or approach to assess the sufficiency of evidence in the no case to answer proceedings in this case'.[439]According to the Prosecutor, the *error of law* is reflected in the Trial Chamber's failure 'to define *what* legal and evidentiary standards they considered applicable to the proceedings *before* they assessed the evidence and acquitted Mr Gbagbo and Mr Blé Goudé'.[440] In her submission, she argues that the Trial Chamber's 'lack of clarity and failure to establish consensus among the Judges—and to inform

[438] *See* Prosecutor's Appeal Brief, paras 162, 164.
[439] Prosecutor's Appeal Brief, para. 122.
[440] Prosecutor's Appeal Brief, para. 123 (emphasis in original).

the Parties—as to what the [no case to answer] process entailed and the applicable standards/approaches was itself a flaw.[441]

309. The Prosecutor adds that 'this flaw led the Majority to make several unreasonable and inconsistent factual findings and/or incorrect evidentiary assessments, many relating to significant findings' and that such findings are 'symptomatic' of Judges Henderson and Tarfusser's broader failure to 'take a consistent approach to assessing evidence—*unsuitable for the [no case to answer] stage or any other for that matter*'.[442]

310. The Prosecutor argues that the Trial Chamber failed to set out evidentiary standards applicable to the factual and evidentiary assessments, and that this was not remedied in Judge Henderson's Reasons six months later that set out this framework, as there was no consensus between the majority of the Trial Chamber, and the issues addressed were 'core issues' and 'not afterthoughts'.[443] These errors thus invalidated the Trial Chamber's factual determinations that lacked clarity, adopting an 'unreasonable and unrealistic' approach to assessing evidence.[444] The Prosecutor further argues that the Trial Chamber's procedural error was a result of the lack of consensus and failure to establish applicable standards/approaches that led to 'several unreasonable and inconsistent factual findings and/or incorrect evidentiary assessments, many relating to significant findings'.[445] She submits that the procedural background and six examples that she presents demonstrate Judges Henderson and Tarfusser's unclear and unreasonable factual and evidentiary assessments.[446]

311. The Prosecutor submits that 'written reasons which were issued six months later look like an after-the-fact justification of the verdict rather than an articulation of the

[441] Prosecutor's Appeal Brief, para. 124.
[442] Prosecutor's Appeal Brief, para. 124 (emphasis added).
[443] Prosecutor's Appeal Brief, para. 142.
[444] Prosecutor's Appeal Brief, para. 141. *See also* paras 143-151, *referring, inter alia, to* STL, Appeals Chamber, *The Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra*, Decision on Badreddine Defence Interlocutory Appeal of the "Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings", 11 July 2016, STL-11-01/T/AC/AR126.11F0019-ARI26.11/20160711/R000209-R000240/EN/af, paras 38-41.
[445] Prosecutor's Appeal Brief, para. 124.
[446] Prosecutor's Appeal Brief, para. 131.

reasoning that led to the verdict announced on 15 January'.[447] In her view, they 'did not demonstrate that the Majority Judges had that – or indeed *any* – standard in mind at the crucial time when deciding to acquit (before 15 January 2019)'.[448] She argues that '[o]ne cannot determine that there is no evidence at the close of the Prosecution's case without first clarifying what standard of proof would apply to examine if there was indeed no such evidence'.[449] The Prosecutor contends that the Trial Chamber's ambiguity on the no case to answer standard 'vitiated both the process of decision-making and thus the decision itself'.[450] This is because, in the Prosecutor's view, '[w]hen the process of adjudication is tainted, so is the decision to acquit; this decision can hardly be considered reliable or to have led to a valid legal outcome at all'.[451] In the Prosecutor's view, such lack of information at the moment of the oral acquittal in January 2019 invalidated the acquittal,[452] and, for her, this invalidation meets 'the impact test of "materially affecting the decision" at the ICC'.[453]

312. In this regard, the Prosecutor submits, by reference to the *Ayyash et al.* case before the Special Tribunal for Lebanon ('STL'), that the Trial Chamber's error 'is sufficient by itself to invalidate the decision'.[454] According to the Prosecutor, this means that the Trial Chamber's 'legal error (with impact) could lead to reversal on appeal on its own (without any further error)'.[455] The Prosecutor argues that the 'Majority's legal error "materially affected" the decision' because its ambiguity on the standard of proof 'vitiated both the process of decision-making and thus the decision itself'.[456]

313. The OPCV largely agrees with the Prosecutor's submissions,[457] arguing that the Trial Chamber's 'overall failure' to deal with the no case to answer litigation was caused by not agreeing on an applicable standard prior to the no case to answer

[447] Transcript of Hearing, 24 June 2020, ICC-02/11-01/15-T-240-ENG, p. 21, lines 22-24.
[448] Prosecutor's Response to the Appeals Chamber's Questions, para. 30 (emphasis in original).
[449] Transcript of hearing, 22 June 2020, ICC-02/11-01/15-T-238-Red-ENG, p. 71, lines 3-5.
[450] Prosecutor's Response to the Appeals Chamber's Questions, para. 35.
[451] Transcript of hearing, 22 June 2020, ICC-02/11-01/15-T-238-Red-ENG, p. 72, line 24 to page 73, line 2.
[452] Prosecutor's Appeal Brief, paras 142, 151.
[453] Prosecutor's Response to the Appeals Chamber's Questions, para. 35.
[454] Prosecutor's Appeal Brief, paras 142, 147-151, 254.
[455] Prosecutor's Response to the Appeals Chamber's Questions, para. 34.
[456] Prosecutor's Response to the Appeals Chamber's Questions, paras 35-36.
[457] OPCV's Observations, paras 110-174.

procedure, during said proceedings, and at the very moment of announcing its 15 January 2019 verdict and the opinions of Judges Henderson and Tarfusser dated 16 July 2019.[458] The OPCV submits that the Trial Chamber erred in law by failing to identify the requisite standard of proof before announcing its 15 January 2019 verdict, and erred in procedure by failing to articulate a clear approach in assessing the sufficiency of the evidence for the purposes of a no case to answer motion.[459]

314. According to the OPCV, the Trial Chamber's errors in law and procedure demonstrated that it reached its decision without knowledge of the applicable standard of proof.[460] Replying to the Appeals Chamber's questions, the OPCV submits that the lack of notice about the applicable standard is an error further impacting the proceedings' fairness and the outcome of the decision.[461]

315. Mr Gbagbo submits that the Trial Chamber's assessment of evidence used the appropriate standard of proof and evidentiary standards.[462] In his view, the Prosecutor's examples are unconvincing and irrelevant to the standard applied.[463] In response to the Appeals Chambers' questions, he argues that there is nothing in the case record indicating that Judges Henderson and Tarfusser had not adopted a specific standard of proof, or that they had not analysed the Prosecutor's evidence against that particular standard.[464]

316. Mr Blé Goudé argues that the Prosecutor's arguments are unsupported by the procedural history in this case.[465] He further argues that the Prosecutor's use of the six examples constitute mere disagreements.[466] In response to the Appeals Chamber's questions, Mr Blé Goudé submits that the alleged disagreement between Judges Henderson and Tarfusser regarding the standard of proof and the basis for the no case

[458] OPCV's Observations, para. 117.
[459] OPCV's Observations, para. 110.
[460] OPCV's Observations, para. 113.
[461] Legal Representative's submissions on the questions raised by the Appeals Chamber in its Decision ICC-02/11-01/15-1338, 22 May 2020, ICC-02/11-01/15-1351, para. 30; Transcript of hearing, 23 June 2020, ICC-02/11-01/15-T-239-ENG, p. 3, lines 12-14.
[462] Counsel for Mr Gbagbo's Response, paras 153-224.
[463] Counsel for Mr Gbagbo's Response, paras 225-404.
[464] Defence Submissions pursuant to the "Decision rescheduling, and directions on,the hearing before the Appeals Chamber" (ICC-02/11-01/15-1338), 22 May 2020, ICC-02/11-01/15-1350-tENG, para. 48; Transcript of hearing, 23 June 2020, ICC-02/11-01/15-T-239-ENG, p. 14, lines 7-20.
[465] Defence Response, para. 174.
[466] Defence Response, paras 174, 221-229.

to answer procedure had no material effect on the Trial Chamber's decision and its assessment of the evidence as both judges agreed on the assessment of the evidence.[467]

C. Issues under the second ground of appeal

317. In light of the findings of the Appeals Chamber's Majority and the arguments of the parties and participants, I consider that the issues under this ground of appeal are the following: (i) what is the correct standard of proof at the no case to answer stage and whether it was correctly applied in this case; (ii) whether Judges Henderson and Tarfusser had a clear, agreed and correct standard of proof in mind when entering the acquittals on 15 January 2019; (iii) whether there were other inconsistencies regarding Judge Henderson's approach to the evidence, and (iv) whether the acquittals were materially affected.

D. Analysis

1. *What is the correct standard of proof at the no case to answer stage and whether it was correctly applied in this case*

318. As I turn to explain, the standard that the Appeals Chamber's Majority considered was correctly applied in Judge Henderson's opinion does not correspond to the standard that representative common law jurisdictions and the *ad hoc* tribunals apply, at the no case to answer stage. The Appeals Chamber's Majority held that the applicable test at the no case to answer stage is the following: 'upon the conclusion of the evidence presented by the prosecution (and on behalf of the victims, as appropriate),[468] the trial chamber shall acquit the defendant or, as the case may be,

[467] Blé Goudé Defence Submissions answering the Appeals Chamber's questions in "Decision rescheduling, and directions on, the hearing before the Appeals Chamber" (ICC-02/11-01/15-1338), 22 May 2020, ICC-02/11-01/15-1348, paras 37-40.

[468] While victims and the witnesses they intended to call ultimately did not appear in court, earlier in the case, the victims noted the possibility and their intention to seek the Trial Chamber's authorisation to appear in court, to present their views and concern, and also to call witnesses to the stand. *See* Submission of information pursuant to the oral Order dated 28 August 2017, 2 October 2017, ICC-02/11-01/15-1039, para. 4 ('[t]he Legal Representative recalls her submissions filed on 14 April 2015, and in particular her observations at paragraphs 13-26 in relation to the possibility to seek the Chamber's authorisation to call witnesses and/or to request the appearance of some victims in person to present their views and concerns; as well as her submissions filed on 3 February 2017') (footnotes omitted), 5 ('[t]he Legal Representative informs the Chamber that she has the intention to request the appearance of a maximum of four victims to present their views and concerns'), 8 ('[t]he Legal Representative informs the Chamber that she intends to request authorisation to call four witnesses. If authorised, the Legal Representative estimates that she would use between 12 and 15 hours in total for the questioning of the witnesses'). As for documentary evidence, the OPCV was able to submit a 'list

dismiss one or more of the charges, where the evidence thus far presented is insufficient in law to sustain a conviction on one or more of the charges'.[469] The Appeals Chamber's Majority considered this test to be consistent with international and national jurisdictions.[470] It further held that 'a proper *appreciation* of the applicable test should make it wholly appropriate and correct to articulate the standard of proof at the level of proof beyond reasonable doubt and nothing less'.[471] In making these findings, it referred to rule 130(3) of the Kosovo Specialist Chambers Rules of Procedure and Evidence, the ICTY Appeals judgment in *The Prosecutor v. Jelisić*[472] and national jurisdictions.[473]

319. In the view of the Appeals Chamber's Majority, if the prosecution's case 'upon its completion, is not strong enough to satisfy the standard of proof beyond reasonable doubt *at that stage*, a trial chamber may reasonably take the view that the evidence up to that point has been insufficient to support a conviction'.[474] Paradoxically, the Appeals Chamber's Majority later held that the prosecution evidence should be considered in 'its best light', meaning that though the defence's evidence may be considered, the benefit of any doubt should be given to that presented by the prosecution.[475]

320. Despite my views that the no case to answer motion cannot be entertained at this Court,[476] I nevertheless find some inaccuracies in the abovementioned findings that would have in any event made me unable to agree with the Appeals Chamber's Majority. It relies on the supposition that the applicable standard of proof at the no

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of names of Nigerien nationals who were killed during the post-electoral crisis'. *See* Legal Representative's Application for the introduction of documentary evidence under paragraphs 43-44 of the Amended Directions on the conduct of the proceedings, 15 December 2017, ICC-02/11-01/15-1088, para. 2.

[468] *See* Reasons for 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 Blé Goudé Defence no case to answer motion, 16 July 2019, ICC-02/11-01/15-1263, p. 8 ('the [Trial] Chamber […] hereby […] DECIDES that the pending requests for provisional release have hereby become moot').

[469] Judgment of the Appeals Chamber's Majority, paras 297-298.

[470] Judgment of the Appeals Chamber's Majority, paras 297-298.

[471] Judgment of the Appeals Chamber's Majority, para. 304 (emphasis in original).

[472] Judgment of the Appeals Chamber's Majority, para. 306.

[473] Judgment of the Appeals Chamber's Majority, paras 307-308.

[474] Judgment of the Appeals Chamber's Majority, para. 311 (emphasis in original).

[475] Judgment of the Appeals Chamber's Majority, paras 311, 317.

[476] *See supra* section V(C).

case to answer stage is 'beyond reasonable doubt',[477] and that Judges Henderson and Tarfusser purportedly agreed on the standard to assess the evidence.[478] That is, the Appeals Chamber's Majority deems it correct at the no case to answer stage 'to articulate the standard of proof at the level of proof beyond reasonable doubt and nothing less'.[479] And yet, it considers that Judges Henderson and Tarfusser not only were in agreement as to the applicable standard, but that they applied the correct one.

321. Such findings, in my view, are (i) neither in line with the applicable law of common law jurisdictions that entertain no case to answer motions, (ii) nor in keeping with the standard of proof that Judge Henderson effectively applied in his opinion.

(a) What is the correct standard of proof in jurisdictions that provide for the no case to answer procedure?

322. The applicable standard of proof at the no case to answer stage, in domestic jurisdictions and the *ad hoc* tribunals, requires that, under a *prima facie* assessment, a reasonable chamber could convict taking the Prosecution's evidence at its highest. Although some jurisdictions differ as to whether the credibility of witnesses should be assessed at this stage, the evidentiary assessment at the no case to answer stage does not rely on a standard as high as that of beyond reasonable doubt. This is a very high standard that can only be applied when the proceedings have finished, after all parties and participants have made their arguments and submitted their evidence.

(i) No case to answer standard of proof at the international criminal tribunals

323. Although in my view, in *Ruto and Sang*, Trial Chamber V(A) applied the no case to answer procedure in contradiction with the statutory framework, it is noteworthy that Trial Chamber V(A) itself observed that the standard of proof is not as high as beyond reasonable doubt. Trial Chamber V(A) adopted the standard of sufficient evidence on which a reasonable trial chamber could convict the accused on the basis of a *prima facie* assessment of the evidence:

> the test to be applied for a no case to answer determination is whether or not, *on the basis of a prima facie assessment of the evidence*, there is a case, in the

[477] *See* Judgment of the Appeals Chamber's Majority, para. 304.
[478] *See* Judgment of the Appeals Chamber's Majority, paras 323-332.
[479] *See* Judgment of the Appeals Chamber's Majority, para. 304.

> sense of whether there is sufficient evidence introduced on which, if accepted, a reasonable Trial Chamber *could* convict the accused[480] [emphasis added].

324. It held that '[t]he effect of a successful "no case to answer" motion would be the rendering of a full or partial judgment of acquittal'.[481]

325. At the *ad hoc* tribunals, the key question for chambers lies in the capability or sufficiency to sustain a conviction. The language of the standard is 'no evidence capable of supporting a conviction', at the ICTY,[482] and 'the evidence is insufficient to sustain a conviction', at the ICTR.[483]

326. In July 1998, Rule 98 *bis*, the specific rule governing no case to answer motions at the *ad hoc* tribunals, was first introduced in the ICTY Rules of Procedure and Evidence.[484] It was subsequently amended twice, in November 1999,[485] and in December 2004,[486] and thereafter remained the same. The current version of rule 98 *bis* of the ICTY Rules of Procedure and Evidence reads:

> At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction.[487]

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[480] *Ruto and Sang* Decision No. 5, para. 23, *see also* para. 32.
[481] *Ruto and Sang* Decision No. 5, para. 22.
[482] Rule 98 *bis* of ICTY Rules of Procedure and Evidence (amended 8 July 2015).
[483] Rule 98 *bis* of ICTR Rules of Procedure and Evidence (as amended on 13 May 2015).
[484] Rule 98 *bis* of ICTY Rules of Procedure and Evidence (adopted 10 July 1998) ('If, after the close of the case for the prosecution, the Trial Chamber finds that *the evidence is insufficient to sustain a conviction* on one or more offences charged in the indictment, the Trial Chamber, on motion of an accused or *proprio motu*, shall order the entry of judgement of acquittal on that or those charges') (emphasis added).
[485] Rule 98 *bis* of ICTY Rules of Procedure and Evidence (amended 17 November 1999) ('(A) An accused may file a motion for the entry of judgement of acquittal on one or more offences charged in the indictment within seven days after the close of the Prosecutor's case and, in any event, prior to the presentation of evidence by the defence pursuant to Rule 85 (A)(ii). (B) The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or *proprio motu* if it finds that *the evidence is insufficient to sustain a conviction* on that or those charges') (emphasis added).
[486] Rule 98 *bis* of ICTY Rules of Procedure and Evidence (amended 8 December 2004) ('At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if *there is no evidence capable of supporting a conviction*') (emphasis added).
[487] Rule 98 *bis* of ICTY Rules of Procedure and Evidence (amended 8 July 2015).

327. Some scholars have argued that, compared with the wording in prior rules, this revised rule has lowered the evidentiary standard in favour of the Prosecution.[488]

328. Its counterpart, rule 98 *bis* of the ICTR Rules of Procedure and Evidence reflects the language of the original test in the former versions of rule 98 *bis* at the ICTY. The rule, at the ICTR, reads:

> If after the close of the case for the prosecution, the Trial Chamber finds that *the evidence is insufficient to sustain a conviction* on one or more counts charged in the indictment, the Trial Chamber, on motion of an accused filed within seven days after the close of the Prosecutor's case-in-chief, unless the Chamber orders otherwise, or *proprio motu*, shall order the entry of judgement of acquittal in respect of those counts.[489]

329. The ICTY and ICTR chambers generally agree that, when seized of no case to answer motions, courts should only review sufficiency of evidence as a matter of law and will not consider credibility and reliability of evidence. The ICTR held this, *inter alia*, in *The Prosecutor v. Laurent Semanza*.[490] Moreover, in the most recent decisions about the applicable standard of proof, the ICTY noted that the test under a no case to answer motion is to assess whether there is any possibility for the evidence to support a conviction, rather than to make a conviction or otherwise a finding beyond reasonable doubt. Notably, a case which summarises the ICTY jurisprudence on the applicable standard of proof, *Kordić & Čerkez* expressly notes that '[a]n analysis of the International Tribunal's jurisprudence shows a consistent pattern in determining motions for acquittal at the close of the Prosecution's case, *not on the basis of a Trial Chamber being satisfied beyond a reasonable doubt of the guilt of the accused on the basis of the Prosecution's case, but on a different and lower standard*'.[491] Importantly, it makes the following conclusion, after engaging not only with the ICTY jurisprudence, but also with that of common law jurisdictions:

> The Chamber concludes that *the true test to be applied on a motion for acquittal under Rule 98* bis *is not whether there is evidence which satisfies the Trial*

[488] *See* A. T. Cayley and A. Orenstein, 'Motion for Judgment of Acquittal in the Ad Hoc and Hybrid Tribunals' in *Journal of International Criminal Justice 8(2)* (2010), p. 581.
[489] Rule 98 *bis* of ICTR Rules of Procedure and Evidence (as amended on 13 May 2015).
[490] *See e.g.* ICTR, Trial Chamber III, *The Prosecutor v. Laurent Semanza*, Decision on the Defence Motion for a Judgement of Acquittal in Respect of Laurent Semanza After Quashing the Counts Contained in the Third Amended Indictment, 27 September 2001, ICTR-97-20-T, para. 17.
[491] *See* ICTY, *The Prosecutor v. Kordić & Čerkez*, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000, IT-95-14/2-T, para. 11 (emphasis added).

> *Chamber beyond a reasonable doubt of the guilt of the accused, but rather, whether there is evidence on which a reasonable Trial Chamber could convict*. This conclusion is supported by the distinction implicit in Rule 98 *bis*, and which is also plain to see in domestic jurisdictions with similar procedures. That distinction is between a determination made at the halfway stage in a trial after the close of the Prosecution's case, as to whether there is a case to answer, and a determination made at the close of the case as to guilt or innocence. It is not necessary to define what is meant by evidence on which a reasonable Trial Chamber could convict; it is sufficient to say that that standard is not met by any evidence; there must be some evidence which could properly lead to a conviction.[492]

330. While in *Jelisić* the ICTY Appeals Chamber said that 'the notion of proof of guilt beyond reasonable doubt must be retained in the operation of Rule 98bis(B)', it went on to explain that the way to apply this test is to focus on the *capability* to convict and not whether to actually convict beyond reasonable doubt; that is '*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'.[493]

> The next question is how should the test of guilt beyond reasonable doubt be applied in this situation. The Appeals Chamber considers that the reference in Rule 98*bis* to a situation in which "the evidence is insufficient to sustain a conviction" means a case in which, in the opinion of the Trial Chamber, the prosecution evidence, if believed, is insufficient for any reasonable trier of fact to find that guilt has been proved beyond reasonable doubt. In this respect, the Appeals Chamber follows its recent holding in the *Delalic* [*sic*] appeal judgement, where it said: "[t]he test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question". *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.[494]

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[492] ICTY, *The Prosecutor v. Kordić & Čerkez*, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000, IT-95-14/2-T, para. 26 (emphasis added).
[493] ICTY, *The Prosecutor v. Goran Jelisić*, Judgement, 5 July 2001, IT-95-10-A, para. 37 (footnotes omitted, emphasis added).
[494] ICTY, *The Prosecutor v. Goran Jelisić*, Judgement, 5 July 2001, IT-95-10-A, para. 37 (footnotes omitted, emphasis added).

331. In my view, this indicates that the beyond reasonable doubt standard cannot be applied at the no case to answer stage. This is because, at this stage, the trial chamber has not yet heard all of the evidence in the case, nor would it be possible for it to take into account the entire proceedings. The beyond reasonable doubt standard can only be applied at the end of a trial. In fact, in accordance with article 74(2) and (5) of the Statute, at the ICC, trial chambers assess the evidence and the entire proceedings when writing the final decision on the guilt or otherwise of the accused. It is only at this final stage, that a trial chamber can apply the beyond reasonable doubt standard to assess the evidence. Not before.

(ii) No case to answer standard of proof in domestic common law jurisdictions

332. At the outset, I note that, in this appeal, Judge Morrison noted *viva voce* during the hearing of 24 June 2020 before the Appeals Chamber:

> JUDGE MORRISON: [10:29:58] When I was sitting as a judge in the UK in jury trials on many occasions I had submissions of no case to answer at the halfway stage, i.e., at the close of the prosecution case. The procedure is that counsel rises and says I have a submission to make, doesn't say what it is because the jury is still in court, but then the jury is asked to retire, you hear the submission from counsel, and it's generally a very quick procedure. You hear from counsel for defence, who is making the application. You hear from counsel for the prosecution, who is no doubt resisting it, unless the case has proved to be completely hopeless and the prosecutor, as a minister of justice, will throw his or her hand in. That happens rarely. But the core is has the prosecution established a prima facie case on the charges which it's brought? And you are certainly not making a determination of guilt, you are simply allowing the trial to continue. There is no pressure upon the defence to give or call evidence. That's a decision they must make for themselves.[495]

333. Judge Morrison continued to observe: 'a prima facie case is simply evidence upon which a reasonable trier of fact could convict. It seems to me that that is a fairly simple way of approaching it'.[496]

334. In keeping with his statements, the domestic jurisdictions do not show a standard as high as beyond reasonable doubt. In Australia, 'a verdict of not guilty may be directed only if there is a defect in the evidence such that, *taken at its highest*, it will not sustain a verdict of guilty'. The judge is only concerned with the question of

[495] Transcript of hearing, 24 June 2020, ICC-02/11-01/15-T-240-ENG, p. 12 lines 13-25.
[496] Transcript of hearing, 24 June 2020, ICC-02/11-01/15-T-240-ENG, p. 13 lines 16-23.

whether there is evidence that can legally lead to a conviction, *not whether the evidence lacks weight such that a conviction based on it would be unsafe or unsatisfactory*. The exception is when 'the evidence is so *inherently incredible* that no reasonable person would accept its truth'.[497]

335. In Canada, 'a motion for a directed verdict is judged based on whether there is "evidence upon which the trier of fact, whether judge or *jury*, properly instructed, *could* convict the accused"'.[498] If the judge grants a motion for no case to answer, which is known as a motion for 'non-suit', the judge may withdraw the case from a *jury* and enter an acquittal himself or herself instead of directing the jury to acquit the accused.[499]

336. In South Africa, Section 174 of the Criminal Procedure Act of 1977 permits the court to acquit the accused: 'If at the close of the case for the prosecution at any trial, the court is of the opinion that *there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge*, it may return a verdict of not guilty'.[500] Although the statutory provision refers to 'no evidence', the court decisions have interpreted it as meaning 'evidence upon which a reasonable person *might* convict'.[501]

337. In the United Kingdom, under *Regina v. George Charles Galbraith*, the Court of Appeal held that a no case to answer submission requires either (i) no evidence that the alleged crime was committed by the defendant or (ii) some evidence of a tenuous character, but 'the prosecution evidence, *taken at its highest*, is such that a jury properly directed *could* not properly convict upon it'.[502] Conversely, where there is evidence upon which a jury could properly convict the accused, the submission of no case to answer will fail. Accordingly, a no case to answer motion provides a balance

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[497] *See* A. T. Cayley and A. Orenstein, 'Motion for Judgment of Acquittal in the Ad Hoc and Hybrid Tribunals' in *Journal of International Criminal Justice 8(2)* (2010), p. 577-578 (emphasis added).
[498] *See* A. T. Cayley and A. Orenstein, 'Motion for Judgment of Acquittal in the Ad Hoc and Hybrid Tribunals' in *Journal of International Criminal Justice 8(2)* (2010), p. 578 (emphasis added).
[499] Supreme Court of Canada, *R v. Louis Edouard Paul*, 22 April 1975, [1977] 1 SCR 181.
[500] South Africa, Section 174 of the Criminal Procedure Act 51 of 1977 (emphasis added).
[501] South Africa, Supreme Court of Appeal, *State v. Michael Lubaxa*, 25 September 2001, Case No: 372/2000, para. 10 (emphasis added).
[502] *See* United Kingdom, Court of Appeal, *R. v. George Charles Galbraith*, 19 May 1981, No. 5541/B/79, 1 W.L.R. 1039, pp. 1040-1042 (emphasis added).

between the 'possible *usurpation by the judge of the jury's functions and the danger of an unjust conviction by a capricious jury*'.[503]

(iii) Conclusion on the correct no case to answer standard of proof in jurisdictions providing for such a procedure

338. In light of the foregoing, although I do not agree that the no case to answer procedure could be applied at the ICC, even when Judges Henderson and Tarfusser applied it, they did so wrongly, and the Appeals Chamber's Majority has endorsed this approach. I find that the most common and appropriate way in which the *ad hoc* tribunals and representative common law jurisdictions have dealt with the no case to answer motions reflects a lower standard of proof than that required by the Appeals Chamber's Majority. It requires a determination on whether a reasonable trial chamber, taking the evidence at its highest, *could* convict, on the basis of a *prima facie* assessment, not under a standard as high as beyond reasonable doubt.

(b) Whether Judge Henderson's assessment was higher than a prima facie *assessment where, taking the evidence at its highest, a reasonable trial chamber could convict the accused*

(i) Findings that Judge Henderson noted could have been made by a reasonable trial chamber

339. As noted below, in some instances, Judge Henderson, having expressly noted that a reasonable trial chamber could have reached a conclusion sustaining the Prosecutor's narrative, found otherwise. Considering that the correct standard at the no case to answer stage requires no more than a *prima facie* assessment of the evidence in order to determine whether a reasonable trial chamber, taking the evidence at its highest, could convict, these instances show that Judge Henderson applied a higher standard of proof than that applied by other international criminal tribunals and representative common law jurisdictions at the no case to answer stage. This is illustrated in the examples presented by the Prosecutor under her second ground of appeal, as I turn to explain.

[503] *See* United Kingdom, Court of Appeal, *R. v. George Charles Galbraith*, 19 May 1981, No. 5541/B/79, 1 W.L.R. 1039, pp. 1040-1042 (emphasis added).

340. In relation to the Prosecutor's allegations under her third example, regarding Mr Gbagbo's involvement in the shelling in Abobo in late February 2011 and on 17 March 2011,[504] I observe that Judge Henderson's assessment was higher than the *prima facie* assessment required at the no case to answer stage. He stated that '[a]lthough a reasonable trial chamber might conclude, […] that Mr Gbagbo was indeed informed about the use of mortars during operations in Abobo in late February 2011, there is no reliable information about what exactly he was told'.[505] Judge Henderson stated this (i) after having found that it was unclear whether the testimony of witness P-0009 supported that Mr Gbagbo was informed about the use of shells during the second military operation in Abobo,[506] and (ii) after having considered that the Prosecutor, '[i]n an effort to make the witness repeat' what he had said outside the courtroom, read out in court previously recorded testimony in which the witness said that Mr Gbagbo had been informed that shells were used.[507] Judge Henderson further (iii) considered it 'entirely unclear whether Mr Gbagbo was apprised of the purpose behind the use of these weapons and/or the effect they had on the ground, particularly on the civilian population'.[508]

341. In my view, none of Judge Henderson's three concerns about the evidence should have been considered under the correct standard of proof at the no case to answer stage, namely to take the evidence at its highest. As for the first and third concerns, Judge Henderson was not called, at this stage, to question witness P-0009's testimony that Mr Gbagbo was informed about the use of shells. In fact, the testimony shows that 'with the assistance of a map', the witness 'reported back to the president of the republic with regard to the difficulties encountered during our progress'[509] and that Mr Gbagbo 'stood up and he approached the map',[510] where the witness 'showed him the position held by the enemy' and 'the position of the friendly troops'.[511] Not

[504] Prosecutor's Appeal Brief, paras 199-213.
[505] Judge Henderson's Reasons, para. 1359.
[506] Judge Henderson's Reasons, para. 1357.
[507] Judge Henderson's Reasons, para. 1358.
[508] Judge Henderson's Reasons, para. 1359.
[509] Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-ENG, p. 57, lines 12-15. *See also* Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-FRA, p. 59, lines 9-11.
[510] Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-ENG, p. 57, lines 16-17. *See also* Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-FRA, p. 59, lines 13-14.
[511] *See* Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-ENG, p. 57, lines 17-18. *See also* Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-FRA, p. 59, lines 14-15.

only did Mr Gbagbo ask questions as to the presence of civilians,[512] but when the witness confirmed such presence,[513] Mr Gbagbo told him, according to the witness: 'Make sure that not too many people die'.[514] The witness further testified that Mr Gbagbo asked other questions, received answers from different generals, and gave instructions to recover territory and roads he considered 'strategic'.[515]

342. Moreover, another witness, P-0010, testified that Mr Gbagbo 'always gave instructions as follows: "Hold on to Abobo. Reinforce your positions. Do whatever you can, but you must keep Abobo"'.[516] He further testified that Mr Gbagbo 'knew about weapons' and about 'the weight of weapons', '[b]ut he never delved into any details about the military operations'.[517]

343. It seems implausible that, taking this evidence at its highest, a reasonable trial chamber could not conclude that Mr Gbagbo could have been informed of the use of the weapons and their purpose and/or effect on the ground, especially with respect to civilians. Thus, I consider that Judge Henderson could not exclude, under the correct no case to answer standard, on a *prima facie* assessment, the possibility that Mr Gbagbo had such knowledge. Such a conclusion may only have been reached under a higher standard of proof such as beyond reasonable doubt, but as mentioned above, such a standard is not correct for the no case to answer stage.

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[512] *See* Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-ENG, p. 57, lines 18-19. *See also* Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-FRA, p. 59, lines 16-17.
[513] *See* Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-ENG, p. 57, line 20. *See also* Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-FRA, p. 59, lines 16-17.
[514] Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-ENG, p. 57, line 21. *See also* Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-FRA, p. 59, lines 17-18.
[515] *See* Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-ENG, p. 57, lines 22-25, p. 58, lines 1-14. *See also* Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-FRA, p. 59, lines 18-28, p. 60, lines 1-7.
[516] Transcript of hearing, 31 March 2017, ICC-02/11-01/15-T-141-Red2-ENG, p. 20, lines 5-17. *See also* Transcript of hearing, 31 March 2017, ICC-02/11-01/15-T-141-Red2-FRA, p. 21, lines 15-25 ('R.[10:40:49] En tout cas, pour les réunions… les deux réunions principales qui ont eu lieu au Plateau dont je me rappelle parfaitement, peut-être pas dans le détail près, mais je me rappelle assez bien le déroulé, le Président, il donnait des instructions, mais il rentrait jamais dans le détail des opérations militaires. Et pourtant, de tous les Présidents de Côte d'Ivoire que, moi, j'ai connus, c'est le seul qui ait fait l'armée et qui connaît l'armée. Mais jamais il n'est rentré dans le domaine…dans le détail des opérations militaires. Il donnait toujours des instructions en disant: «Tenez Abobo, renforcez vos…vos positions, faites ce que vous pouvez, mais il faut tenir Abobo.» Et je l'ai dit à M le Procureur l'autre jour: nous, on appelle ça une attitude défensive. Au mieux, ça ne pouvait être que des contre-attaques pour récupérer des me positions qu'on avait perdues.').
[517] Transcript of hearing, 31 March 2017, ICC-02/11-01/15-T-141-Red2-ENG, p. 20, lines 9-22. *See also* Transcript of hearing, 31 March 2017, ICC-02/11-01/15-T-141-Red2-FRA, p. 22, lines 1-3 ('il connaissait les armes, et il savait comment elles étaient lourdes, mais jamais il n'est rentré dans le détail de nos opérations militaires.').

344. As for the second concern raised by Judge Henderson, it appears that the judge considered that the fact that the previously recorded statement had been read out to the witness, who then confirmed the correctness of his previous answers, somehow diminished the value of the testimony to such an extent that it could not be believed. There is, however, nothing in the Statute preventing counsel from reading previously recorded testimony in the courtroom when formulating questions to the witness who provided that prior testimony. In my view, particularly halfway through the proceedings, at the no case to answer stage, where the testimony should be taken at its highest, there is no room for rejecting testimony that confirmed a prior statement of the witness.

345. In light of the abovementioned evidence of witness P-0009,[518] it is not clear how Judge Henderson reached his conclusion that there was no information as to what Mr Gbagbo was told. Also, I observe that while Judge Henderson referred to, and relied on, the testimony of witness P-0010 in other instances,[519] it appears that, when addressing Mr Gbagbo's implied authorisation to use mortars, Judge Henderson did not rely on this witness's testimony that Mr Gbagbo had given concrete instructions to hold on to Abobo, reinforce positions, and '[d]o whatever you can, but you must keep

[518] I note that witness P-0009 testified that 'with the assistance of a map', he 'reported back to the president of the republic with regard to the difficulties encountered during our progress' (Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-ENG, p. 57, lines 12-15. *See also* Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-FRA, p. 59, lines 9-11) and that Mr Gbagbo 'stood up and he approached the map' (Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-ENG, p. 57, lines 16-17. *See also* Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-FRA, p. 59, lines 13-14) where the witness 'showed him the position held by the enemy [and] the position of the friendly troops' (Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-ENG, p. 57, lines 17-18. *See also* Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-FRA, p. 59, lines 14-15). Not only did Mr Gbagbo ask questions as to the presence of civilians (Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-ENG, p. 57, lines 18-19. *See also* Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-FRA, p. 59, lines 16-17), but when the witness confirmed such presence (Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-ENG, p. 57, line 20. *See also* Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-FRA, p. 59, lines 16-17), Mr Gbagbo told him 'Make sure that not too many people die' (Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-ENG, p. 57, line 21. *See also* Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-FRA, p. 59, lines 17-18). The witness further testified that Mr Gbagbo asked other questions, received answers from different generals, and gave instructions to recover territory and roads he considered 'strategic' (Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-ENG, p. 57, lines 22-25, p. 58, lines 1-14. *See also* Transcript of hearing, 26 September 2017, ICC-02/11-01/15-T-194-FRA, p. 59, lines 18-28, p. 60, lines 1-7).

[519] *See e.g.* Judge Henderson's Reasons, paras 212, 268, 277, 292, 316-319, 321, 329-333, 360, 369, 430-433, 440, 453, 906, 926, 1091-1092, 1111.

Abobo'.[520] Having acknowledged, at the no case to answer stage, that 'a reasonable trial chamber might conclude, […] that Mr Gbagbo was indeed informed about the use of mortars during operations in Abobo in late February 2011',[521] Judge Henderson's analysis shows that the evidence in this regard met the necessary threshold. By not reaching this conclusion, he applied a standard higher than what is required at the no case to answer stage.

(ii) Inferences that could have been drawn at the no case to answer stage

346. As noted below, in some instances, Judge Henderson failed to draw reasonable inferences and rather followed alternatives that were not supported by evidence on the record. This was in violation of the applicable standard of proof. In this regard, the Prosecutor is right that a trial chamber could not reasonably reject at the no case to answer stage reasonable inferences that could possibly arise from the evidence. At the no case to answer stage, evidence (including circumstantial evidence) must be taken at its highest, to assess whether it could sustain a conviction.

347. In this regard, I observe that, under her first example, the Prosecutor argues that the majority of the Trial Chamber failed to conclude, from the evidence she presented, that an FDS convoy intentionally fired upon peaceful anti-Gbagbo demonstrators, killing seven women and injuring another six women.[522] I note that, in the following excerpts from his opinion, Judge Henderson found that the evidence established that the FDS fired, and he found it possible that the FDS bullets hit the women:

> Although there is evidence that other shots were fired from within the BTR 80 and possibly from other vehicles in the convoy, there is no evidence to link any of these shots to the deaths and injuries of the 13 victims. It is, of course,

[520] Transcript of hearing, 31 March 2017, ICC-02/11-01/15-T-141-Red2-ENG, p. 20, lines 5-17. *See also* Transcript of hearing, 31 March 2017, ICC-02/11-01/15-T-141-Red2-FRA, p. 21, lines 15-25 ('R.[10:40:49] En tout cas, pour les réunions… les deux réunions principales qui ont eu lieu au Plateau dont je me rappelle parfaitement, peut-être pas dans le détail près, mais je me rappelle assez bien le déroulé, le Président, il donnait des instructions, mais il rentrait jamais dans le détail des opérations militaires. Et pourtant, de tous les Présidents de Côte d'Ivoire que, moi, j'ai connus, c'est le seul qui ait fait l'armée et qui connaît l'armée. Mais jamais il n'est rentré dans le domaine…dans le détail des opérations militaires. Il donnait toujours des instructions en disant: «Tenez Abobo, renforcez vos…vos positions, faites ce que vous pouvez, mais il faut tenir Abobo.» Et je l'ai dit à M le Procureur l'autre jour: nous, on appelle ça une attitude défensive. Au mieux, ça ne pouvait être que des contre-attaques pour récupérer des me positions qu'on avait perdues.').
[521] Judge Henderson's Reasons, para. 1359.
[522] Prosecutor's Appeal Brief, paras 168-176.

> possible that at least some of the women were struck by some of the bullets that were fired from the convoy.[523]

348. In my view, this would have been sufficient to meet the evidentiary threshold at the no case to answer stage. However, Judge Henderson presented alternatives that, as the Prosecutor correctly argues, were not supported by the evidentiary record. Having established that the FDS fired and that such firing may have hit the women, Judge Henderson went on to consider the alternative scenario that the injuries may have resulted from ricocheting bullets and that, because the record supposedly had no information to discard this alternative, no reasonable trial chamber could conclude that the FDS killed or injured the women. Judge Henderson stated:

> However, even if this was the case, it would still have to be determined whether the injuries were caused by direct fire or whether they resulted from ricocheting bullets. Given that no information is available in this regard, no reasonable trial chamber could conclude that any of the women were killed or injured by direct shots fired by the FDS convoy.[524]

349. I find that this is incorrect for two reasons. First, having said that it was possible that the FDS shot at the women, such a possibility would have been sufficient to establish that as a fact for the purposes of the no case to answer stage. Second, it is unclear how, on the basis of the evidence on the record, Judge Henderson could consider the alternative scenario that ricocheting bullets injured the women. A reasonable trial chamber, taking the evidence at its highest, could not have sustained this alternative scenario, but could have rather found that it was possible that the FDS intentionally killed and injured the women.

350. Certainly, expert witness P-0585, who performed autopsies of three victims, testified that the location of the injuries are 'all remarkably similar'.[525] He reported that '[a]ll the injuries on all three bodies are at about the same level, the neck and the shoulder area',[526] and that '[t]hey all appear to be injuries with bullets coming from left to right'.[527] He thus concluded that 'there is a pattern within them'.[528] The

[523] Judge Henderson's Reasons, para. 1777.
[524] Judge Henderson's Reasons, para. 1777.
[525] Transcript of hearing, 11 September 2017, ICC-02/11-01/15-T-189-ENG, p. 29, line 23. *See also* p. 29, lines 20-22.
[526] Transcript of hearing, 11 September 2017, ICC-02/11-01/15-T-189-ENG, p. 29, lines 23-24.
[527] Transcript of hearing, 11 September 2017, ICC-02/11-01/15-T-189-ENG, p. 29, lines 24-25.

Prosecutor is correct in that this expert evidence showed a pattern that could not have been created by ricocheting bullets.

351. I consider that, having accepted the possibility that the victims were impacted by bullets fired from the vehicles of the FDS convoy, Judge Henderson's evidentiary analysis met the necessary threshold at the no case to answer stage. A reasonable trial chamber could have found that the victims' deaths and injuries could be attributed to the FDS convoy. Considering the standard of proof at the no case to answer stage, such a possibility was sufficient.

352. In this regard I further find merit in the Prosecutor's allegation that, in any event, the reference to the possibility of victims being hit by ricocheting bullets was 'entirely speculative'.[529] I consider that Judge Henderson's alternative hypothesis indeed does not appear supported by any evidence on the record. At any stage of the proceedings, trial chambers should refrain from considering potential alternative hypotheses if the evidence on the record does not support them. This is because trial chambers must carry out their factual analysis and reach their factual conclusions on the basis of the evidence that is before them, not on the basis of hypothetical alternative scenarios that have no grounding in the evidence. If it were otherwise, it would often be impossible to reach any factual conclusion as, most of the time, it will be possible to come up with hypothetical and purely theoretical alternative scenarios. In the case at hand, Judge Henderson presented an alternative scenario that was not supported by the record, and it was incorrect to rely on it.

353. Whether the victims had been impacted directly or as a result of ricocheting bullets is a question that may have implications with respect to Mr Gbagbo's and Mr Blé Goudé's liability. However, the Prosecutor presented expert testimony indicating that the injuries in the autopsied victims and other victims showed a pattern that would not have been present had the bullets bounced on any object before impacting the victims. In my view, Judge Henderson failed to assess the evidence in its totality

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[528] Transcript of hearing, 11 September 2017, ICC-02/11-01/15-T-189-ENG, p. 29, lines 24-25. He further testified that having 'seen photographs of the scene where the death is', he found 'other bodies there with clearly damage to the head'. He concluded: 'So again, again, all around about the same, same level'. *See* Transcript of hearing, 11 September 2017, ICC-02/11-01/15-T-189-ENG, p. 30, lines 3-5.
[529] Prosecutor's Appeal Brief, para. 176.

and as a whole. He concluded, solely on the basis of the ballistics report in the audio-visual evidence, that the BTR 80 had shot during the demonstration. Had he assessed all of the evidentiary items in their totality and as a whole, not only the ballistics report, but also the expert testimony and the autopsy reports, and had he taken all of these evidentiary items at their highest, he could not have raised such an alternative hypothesis about ricocheting bullets. Instead, he could have reasonably inferred that the FDS convoy had injured and killed the victims.

354. In my view, this would have sufficed to meet the *prima facie* standard. It would have been for the Defence teams to bring evidence to challenge the Prosecutor's case. Thus, the example clearly demonstrates that Judge Henderson failed to draw reasonable inferences at the no case to answer stage.

2. The changing mind and disagreements of Judge Tarfusser with Judge Henderson: whether Judges Henderson and Tarfusser had a clear, agreed and correct standard of proof in mind when entering the acquittals on 15 January 2019

355. Contrary to the findings of the Appeals Chamber's Majority, I consider that Judges Henderson and Tarfusser did not reach an agreement as to the applicable standard of proof before granting the defence no case to answer motions. I would have granted the Prosecutor's argument that Judges Henderson and Tarfusser failed to set out and agree on an evidentiary standard.

356. In contrast, having recalled that judges benefit from a presumption of judicial integrity,[530] and, taking that into account, the Appeals Chamber's Majority considered that Judge Henderson's opinion is the starting point for the assessment of the Prosecutor's argument.[531] In light of Judge Henderson's consideration that a chamber must engage in a full review of the evidence submitted and relied upon by the Prosecutor in order to determine whether such evidence is sufficient to support a conviction on the respective charges,[532] the Appeals Chamber's Majority found that Judge Tarfusser shared Judge Henderson's views, meaning that the two judges were

[530] I must note that this case is not about the integrity of Judges Henderson and Tarfusser. The Prosecutor is not challenging that. As I noted above, this case is about the working methods of the majority of the Trial Chamber and how those methods are in breach of the principles and guarantees of fairness in the proceedings at this Court. *See supra* section VI(D)(3).
[531] Judgment of the Appeals Chamber's Majority, para. 323.
[532] Judgment of the Appeals Chamber's Majority, paras 324-325.

in agreement on how to approach the evidence at this stage of the proceedings.[533] In my view, as explained below, this finding does not reflect the changing views evinced in Judge Tarfusser's contradictory statements, nor the contrasting observations that Judges Henderson and Tarfusser wrote regarding the standard of proof in each of their separate opinions.[534]

357. As for the Prosecutor's claim that the Trial Chamber's failure to provide notice of the applicable standard to the parties and participants is evidence of its failure to direct itself to a standard prior to assessing the evidence and acquitting the two accused, the Appeals Chamber's Majority considered that such a claim remained unsubstantiated.[535] The Appeals Chamber's Majority found that no lack of clarity existed in the Trial Chamber's approach to the evidence at this stage of the proceedings, and that the Trial Chamber correctly assumed that, at the no case to answer stage, it was 'not precluded from conducting an in-depth analysis of the evidence'.[536] Regarding the Prosecutor's arguments alleging the Trial Chamber had a duty to provide notice or guidance to the parties and the participants as to the evidentiary standards applied before rendering its decision to acquit,[537] the Appeals Chamber's Majority noted that it was not persuaded and that the Prosecutor failed to explain what she would have done differently had she been given such a notice.[538] I am unable to agree with these observation, as explained below.

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[533] Judgment of the Appeals Chamber's Majority, paras 327-332.
[534] Speaking as a presiding judge of the Trial Chamber, Judge Tarfusser expressly said on 16 January 2019 that Judge Herrera Carbuccia was 'mistaken in stating that the majority has acquitted Mr Gbagbo and Mr Blé Goudé by applying the beyond a reasonable doubt standard' and that '[t]he majority limited itself to assessing the evidence submitted and whether the Prosecutor has met the onus of proof to the extent necessary for warranting the Defence to respond'. *See* Transcript of hearing, 16 January 2019, ICC-02/11-01/15-T-234-ENG, p. 4 lines 11-15. Despite of having said this, Judge Tarfusser six months later, on 16 July 2019, wrote in his opinion that the no case to answer proceedings 'have no place in the statutory framework of the Court and are unnecessary as a tool to preserve the interests and rights they are meant to serve', *and that the only applicable standard is 'beyond reasonable doubt*'. Judge Tarfusser's Opinion, para. 65. *See also*, Transcript of hearing, 1 October 2018, ICC-02/11-01/15-T-221-Red-ENG, p. 18 lines 4-11, during which, Judge Tarfusser had already expressed the view that the procedure for a no case to answer motion could not be found in the structure of the Rome Statute. In contrast, Judge Henderson observed in his opinion that 'the key question to be determined in these proceedings, with respect to each charge, is whether the Prosecutor has submitted sufficient evidence in support of that charge such that a reasonable chamber could convict'. *See* Judge Henderson's Reasons, para. 2.
[535] Judgment of the Appeals Chamber's Majority, para. 337.
[536] Judgment of the Appeals Chamber's Majority, para. 339.
[537] Judgment of the Appeals Chamber's Majority, paras 343-345.
[538] Judgment of the Appeals Chamber's Majority, paras 346-347.

358. For the reasons that follow, I disagree with the finding of the Appeals Chamber's Majority that Judge Tarfusser shared Judge Henderson's views as to the applicable standard of proof. First, the procedural history shows, *inter alia*, that speaking as a presiding judge of the Trial Chamber, Judge Tarfusser expressly said on 16 January 2019 that Judge Herrera Carbuccia was 'mistaken in stating that the majority has acquitted Mr Gbagbo and Mr Blé Goudé by applying the beyond a reasonable doubt standard' and that '[t]he majority limited itself to assessing the evidence submitted and whether the Prosecutor has met the onus of proof to the extent necessary for warranting the Defence to respond'.[539] Thus, in saying that the correct standard at the no case to answer stage is the 'beyond reasonable doubt' standard, the Appeals Chamber's Majority's seems to be ignoring that Judge Tarfusser said, in open court, that neither himself nor Judge Henderson applied the beyond reasonable doubt standard. Moreover, ignoring such an unequivocal statement by Judge Tarfusser, who was speaking as a presiding judge of the Trial Chamber, contradicts the finding of the Appeals Chamber's Majority that the word of judges benefits from the presumption of integrity.

359. At the outset, I observe that all parties and participants concede that judges must have clarity as to the applicable standard of proof prior to determining no case to answer requests.[540] The question here is whether such clarity existed in the standard that was applicable as per the agreement, if any, of the Trial Chamber on such a standard. I will first recall the relevant procedural history as to the applicable standard of proof, noting the inconsistent and incongruent statements between Judges Henderson and Tarfusser, and will then show how such statements show no clarity nor agreement whatsoever and, thus, amount to errors of law and procedure.

(a) Procedural history

360. Earlier in the proceedings, on 8 June 2018, the Prosecutor requested the Trial Chamber to clarify what the applicable standard of proof was,[541] but Judge Tarfusser,

[539] Transcript of hearing, 16 January 2019, ICC-02/11-01/15-T-234-ENG, p. 4 lines 11-15.
[540] Prosecutor's Appeal Brief, para. 122; Prosecutor's Response to the Appeals Chamber's Questions, para. 29; Legal Representative's submissions on the questions raised by the Appeals Chamber in its Decision ICC-02/11-01/15-1338, 22 May 2020, ICC-02/11-01/15-1351, para. 29; Defence Response, para. 193. While it is not explicitly stated, counsel for Mr Gbagbo does not dispute this point.
[541] Urgent Prosecution's motion seeking clarification on the standard of a "no case to answer" motion, 8 June 2018, ICC-02/11-01/15-1179, para. 1.

acting as a single judge, refused to provide an answer.[542] According to the Prosecutor, 'given the diverging positions of the Parties', there was a need for 'the Trial Chamber to provide guidance on the applicable standard of a "no case to answer" motion so the Parties could make focused submissions and to avoid unnecessary analyses on matters inappropriate for a half-time submission'.[543] The Prosecutor sought clarification as to whether and to what extent 'the range of principles elaborated in the *Ruto* case applies'.[544]

361. Judge Tarfusser, acting as a single Judge, noted that '[t]he Prosecutor's Request is premised on the assumption that […] this Chamber has decided to follow the steps taken by Trial Chamber V(a) in the *Ruto and Sang* case' and that '[t]his assumption amounts to a mischaracterisation of the procedural steps devised by this Chamber, which have been tailored to the specific circumstances of these proceedings'.[545] Judge Tarfusser thus considered it unnecessary to take a position as to the applicable standard:

> In light of the above, the Single Judge takes the view that it is not necessary to take a position either as to the standards adopted by Trial Chamber V(a) or to the application of those principles in the final decision in that case. The Single Judge only notes that, the *Ruto* and *Sang* case being the only precedent in the jurisprudence of this Court to this day, the Prosecutor's statement to the effect that the standards enunciated in it are representative of the jurisprudence at the Court sounds far-fetched.[546]

362. On 15 January 2019, the trial finished because the no case to answer motions were granted. Judge Tarfusser, on behalf of the Trial Chamber, stated that the Prosecutor 'has failed to satisfy the burden of proof to the requisite standard as foreseen in Article 66 of the Rome Statute'.[547] He further stated that 'the Chamber, by majority, Judge Herrera Carbuccia dissenting, hereby […] GRANTS the defence

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[542] *See* Decision on "Urgent Prosecution's motion seeking clarification on the standard of a 'no case to answer' motion", 13 June 2018, ICC-02/11-01/15-1182.
[543] Urgent Prosecution's motion seeking clarification on the standard of a "no case to answer" motion, 8 June 2018, ICC-02/11-01/15-1179, paras 1, 3.
[544] Urgent Prosecution's motion seeking clarification on the standard of a "no case to answer" motion, 8 June 2018, ICC-02/11-01/15-1179, para. 6.
[545] Decision on "Urgent Prosecution's motion seeking clarification on the standard of a 'no case to answer' motion", 13 June 2018, ICC-02/11-01/15-1182, para. 11.
[546] Decision on "Urgent Prosecution's motion seeking clarification on the standard of a 'no case to answer' motion", 13 June 2018, ICC-02/11-01/15-1182, para. 13.
[547] Oral Verdict, p. 4, lines 15-16.

motions for acquittal from all charges against Mr Laurent Gbagbo and Mr Charles Blé Goudé'.[548]

363. The following day, Judge Tarfusser, acting in his capacity as presiding judge, found that the Prosecutor's evidence was 'exceptionally weak'[549] and further observed that:

> [T]he dissenting judge is mistaken in stating that the majority has acquitted Mr Gbagbo and Mr Blé Goudé by applying the beyond a reasonable doubt standard. The majority limited itself to assessing the evidence submitted and whether the Prosecutor has met the onus of proof to the extent necessary for warranting the Defence to respond. Adopting this standard, it is not appropriate for these proceedings to continue.[550]

364. Despite having said this, Judge Tarfusser six months later, on 16 July 2019, wrote in his opinion that the no case to answer proceedings 'have no place in the statutory framework of the Court and are unnecessary as a tool to preserve the interests and rights they are meant to serve', *and that the only applicable standard is* '*beyond reasonable doubt*':[551]

> My views on the no case to answer proceedings are well-known at this stage: they have no place in the statutory framework of the Court and are unnecessary as a tool to preserve the interests and rights they are meant to serve. There is only one evidentiary standard and there is only one way to terminate trial proceedings. The evidentiary standard is set forth in article 66, paragraph 3: '[i]n order to convict the accused, the Court must be convinced of the guilt of the accused *beyond reasonable doubt*' (emphasis added). Trial proceedings can only end either in acquittal or conviction, as emerging from article 74, read together with article 81.[552]

365. In contrast, Judge Henderson observed in his opinion that 'the key question to be determined in these proceedings, with respect to each charge, is whether the Prosecutor has submitted sufficient evidence in support of that charge such that a reasonable chamber could convict'.[553] Regarding the *Ruto and Sang* standard, Judge

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[548] Oral Verdict, p. 1, line 15 to p. 5, line 7.
[549] Transcript of hearing, 16 January 2019, ICC-02/11-01/15-T-234-ENG, p. 4, line 5.
[550] Transcript of hearing, 16 January 2019, ICC-02/11-01/15-T-234-ENG, p. 4, lines 11-15.
[551] Judge Tarfusser's Opinion, para. 65. *See also*, Transcript of hearing, 1 October 2018, ICC-02/11-01/15-T-221-Red-ENG, p. 18 lines 4-11, during which, Judge Tarfusser had already expressed the view that the procedure for a no case to answer motion could not be found in the structure of the Rome Statute).
[552] Judge Tarfusser's Opinion, para. 65.
[553] Judge Henderson's Reasons, para. 2.

Henderson noted that such a standard provided that a trial chamber 'should not assess reliability and credibility but should consider the Prosecutor's evidence at its highest'.[554] Judge Henderson agreed with the standard ultimately applied by Judges Eboe-Osuji and Fremr in *Ruto and Sang*,[555] provided that, in its application, the Trial Chamber can (i) assess the quality and credibility of the evidence, and (ii) considering that the Trial Chamber did not rule on its admissibility during the trial proceedings, make a 'full review' of the submitted evidence on which the Prosecutor relied.[556]

366. Thus, on the one hand, Judge Tarfusser first claimed that the 'beyond reasonable doubt' standard was not applicable and later said otherwise, while, on the other hand, Judge Henderson applied a modified version of the *Ruto and Sang* standard, adding, of his own accord, the possibility to make credibility and reliability assessments with respect to the evidence on which the Prosecutor relied in her mid-trial brief. In brief, Judge Tarfusser contradicted his own views (i) before the oral acquittal, (ii) the day of the acquittal, (iii) one day after the acquittal, (iv) six months after the acquittal; and (v) he also showed contrasting views with Judge Henderson.

(b) The disagreements between Judges Henderson and Tarfusser as to the applicable standard of proof amount to appealable errors of law and procedure

367. As it was argued by the Prosecutor,[557] the Trial Chamber was never clear as to what legal standards and approaches it would apply regarding the evidence. I note that the plurality of oral statements and written opinions emerging from the Trial Chamber, specifically Judges Henderson and Tarfusser, who supposedly formed a majority, show a lack of agreement on the standard of proof to be applied at the no case to answer stage. In my view, this inconsistency had consequences on two aspects of the procedure. Firstly, the parties did not have a proper reference and were thus acting under legal uncertainty, while predictability of the law is one of the main features of justice and it should have been present in this case, as in any other case. Secondly, the outcome is incoherent as the judges who reached that outcome would

[554] Judge Henderson's Reasons, para. 3, *referring to* *Ruto and Sang* Decision No. 5, para. 24.
[555] Judge Henderson's Reasons, para. 3, *referring to* Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, ICC-01/09-01/11-2027, Reasons of Judge Fremr, para. 144; Reasons of Judge Eboe-Osuji, paras 105-125.
[556] Judge Henderson's Reasons, paras 3-8.
[557] Prosecutor's Appeal Brief, para. 132.

have assessed the evidence under different standards; even if Judge Tarfusser said he joined Judge Henderson's assessment, he continued to disagree on the basis for the no case to answer motion at the ICC and, accordingly, with a special standard of proof for such an stage of the proceedings, which makes it logically impossible for him to join Judge Henderson's assessment. As indicated above, Judge Tarfusser disagreed with the applicability of the no case to answer procedure and the applicable standard of proof .[558]

368. In my view, as the Prosecutor correctly indicates, the written reasons are mere 'afterthoughts' developed after the oral acquittals,[559] and did not demonstrate that the judges had agreed on any standard when they orally acquitted.[560] In fact, they demonstrate that the judges had contradictory views in this regard. This, as the Prosecutor submits,[561] invalidated the outcome of the case.

369. In the *Ayyash et al* case, the STL Trial Chamber issued an 'interim' oral decision, finding that there was not 'sufficient evidence' meeting the requisite standard to convince the Trial Chamber that Mr Badreddine had deceased and, consequently, that the proceedings against him should be terminated.[562] However, in its oral decision, the STL Trial Chamber failed to specify the standard of proof used to reach such a conclusion. Between the date of the oral decision and the issuance of its written reasons (six days apart), the Trial Chamber asked the parties to submit their views on the applicable standard of proof. The Trial Chamber then issued its written reasons.[563] The defence of Mr Badreddine filed an appeal arguing that there was an

[558] He said that the no case to answer proceedings 'have no place in the statutory framework of the Court', that '[t]here is only one evidentiary standard', referring to the 'beyond reasonable doubt' one, and that 'there is only one way to terminate trial proceedings'. *See* Judge Tarfusser's Opinion, para. 65.
[559] Prosecutor's Appeal Brief, para. 142.
[560] Prosecutor's Response to the Appeals Chamber's Questions, para. 30.
[561] Transcript of hearing, 22 June 2020, ICC-02/11-01/15-T-238-Red-ENG, p. 72, line 24 to page 73, line 2.
[562] STL, Appeals Chamber, *The Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra*, Decision on Badreddine Defence Interlocutory Appeal of the "Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings", 11 July 2016, STL-11-01/T/AC/AR126.11F0019-ARI26.11/20160711/R000209-R000240/EN/af, para. 4.
[563] STL, Appeals Chamber, *The Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra*, Decision on Badreddine Defence Interlocutory Appeal of the "Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings", 11 July 2016, STL-11-01/T/AC/AR126.11F0019-ARI26.11/20160711/R000209-R000240/EN/af, para. 40.

error of law 'by only identifying the requisite standard of proof *ex post facto* and by failing to precisely articulate the requisite standard applicable'.[564] The Appeals Chamber found merit 'in the Badreddine Defence's contention that the Trial Chamber reached its decision on whether or not it was satisfied that the fact of Mr Badreddine's death had yet been sufficiently proven without knowing which standard of proof it was to apply'.[565] The Appeals Chamber thus invalidated the Trial Chamber's factual determination and, consequently, the decision.[566]

370. In the appeal before us, we also have a case where the judges entered acquittals without having agreed on the standard of proof for assessing the evidence. While Judge Tarfusser thought that the applicable standard was that evidence should sustain a conviction beyond reasonable doubt, Judge Henderson considered that the standard was whether a reasonable trial chamber could convict the accused, looking at the evidence at its highest, and yet conducting credibility and reliability assessments.

371. This evinces, as indicated above, that Judges Henderson and Tarfusser had no agreement on the applicable standard of proof when they announced the verdict of the acquittals. It further shows that there was no agreement regarding the level of scrutiny that the judges had to apply when assessing the evidence; they had not agreed as to what exactly they were looking for in such an assessment. This reflects the legal uncertainty that the judges had as to the standard of proof when they announced the verdict of acquittal. It is impossible to know whether, had judge Tarfusser had a lower standard in mind, he would have continued with the trial and thus rejected the no case to answer motions.

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[564] STL, Appeals Chamber, *The Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra*, Decision on Badreddine Defence Interlocutory Appeal of the "Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings", 11 July 2016, STL-11-01/T/AC/AR126.11F0019-ARI26.11/20160711/R000209-R000240/EN/af, para. 32.
[565] STL, Appeals Chamber, *The Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra*, Decision on Badreddine Defence Interlocutory Appeal of the "Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings", 11 July 2016, STL-11-01/T/AC/AR126.11F0019-ARI26.11/20160711/R000209-R000240/EN/af, para. 38.
[566] STL, Appeals Chamber, *The Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, and Assad Hassan Sabra*, Decision on Badreddine Defence Interlocutory Appeal of the "Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings", 11 July 2016, STL-11-01/T/AC/AR126.11F0019-ARI26.11/20160711/R000209-R000240/EN/af, para. 41.

372. Worse yet, the judges never agreed on the standard of proof, not even in their written opinions. The 'Opinion of Judge Cuno Tarfusser'[567] and the 'Reasons of Judge Geoffrey Henderson'[568] show contradictory views as to the applicable standard of proof. And yet, inconsistently, Judge Tarfusser said he joined Judge Henderson's assessment of the evidence.

373. These disagreements cannot be taken lightly. It is especially important to recall that Judge Tarfusser was speaking as a presiding Judge when he uttered those contradictory views (i) before the oral acquittal, (ii) the day of the acquittal, and (iii) one day after the acquittal. It is equally important that Judge Henderson was supposedly writing for the majority when he expressed views that are diametrically opposed to those that Judge Tarfusser wrote in his own opinion. The lack of clarity as to the applicable standard of proof in the proceedings and the lack of agreement between the two judges on the standard are obvious.

374. In light of the foregoing, it is difficult to say that there was any clarity as to the applicable standard of proof among the two judges who acquitted Mr Gbagbo and Mr Blé Goudé. If the no case to answer motions had not been granted, Mr Gbagbo and Mr Blé Goudé likely would have asked for leave to appeal precisely on the same ground that there was no clarity as to the standard of proof.

3. Whether there were other inconsistencies regarding Judge Henderson's approach to the evidence

(a) Incorrect approach to corroboration

375. The Appeals Chamber's Majority considered that the approach to corroboration applied by Judge Henderson was clear.[569] In its view, trial chambers enjoy discretion in deciding whether corroboration is necessary.[570] It thus found no error in the Trial Chamber's view on corroboration[571] and considered it unnecessary to review the

[567] Judge Tarfusser's Opinion.
[568] Judge Henderson's Reasons.
[569] Judgment of the Appeals Chamber's Majority, paras 350-360.
[570] Judgment of the Appeals Chamber's Majority, para. 357.
[571] Judgment of the Appeals Chamber's Majority, para. 360.

Prosecutor's arguments as to how Judge Henderson applied corroboration when assessing the evidence.[572]

376. I am unable to agree with the Appeals Chamber's Majority's assertions of endorsement regarding Judge Henderson's approach to corroboration. Judge Henderson noted that '[w]hen exhibits relate to similar but different facts; for example, a number of killings that took place at different times and locations, even at close proximity, such evidence does not nessarily [*sic*] provide corroboration'.[573] He further noted that '[i]t is equally not possible to argue in such a scenario that there is necessarily corroboration for a pattern of events, because the patterns do not exist independently from the individual instances that constitute it'.[574] Additionally, as shown below with the second and fourth examples presented by the Prosecutor, Judge Henderson did not rely on the testimony of witnesses whose accounts were not identical or were slightly dissimilar to others' accounts, thereby requiring, in practice, that witnesses' accounts of the facts they experienced be identical, absent of any inconsistency, however minor it may be.[575]

377. For one, nothing in the Statute or the Rules prevents that a testimony about one event corroborate another testimony regarding a broader pattern or series of facts including that event. Moreover, by not relying on the testimony of witnesses whose account was slightly dissimilar, and thus requiring that two pieces of evidence be identical or absolutely consistent, Judge Henderson extrapolated corroboration to a level that may not always be attainable, nor even required at the ICC in cases where a chamber may decide to consider the corroborative nature of testimony.

378. I note that rule 63(4) provides that 'a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court'. In *Bemba et al.* (A-A5), the Appeals Chamber noted that '[p]ursuant to rule 63 (4) of the Rules there is no legal requirement of corroboration irrespective of the type of evidence or the fact to be established on its basis'.[576] While trial chambers 'may find, in the specific circumstances of the case, that corroboration of a particular witness's testimony – or part thereof – is needed for it to be convinced

[572] Judgment of the Appeals Chamber's Majority, para. 362.
[573] Judge Henderson's Reasons, para. 47.
[574] Judge Henderson's Reasons, para. 47.
[575] *See infra* section VII(D)(3).
[576] *Bemba et al.* Appeal Judgment, para. 1084.

of its reliability and credibility', the Appeals Chamber in *Bemba et al* (A-A5) also determined that 'this does not mean that corroboration is required as a matter of law when evaluating the testimony of any witness'.[577]

379. Moreover, under rule 68(2)(i) of the Rules regarding prior recorded testimony of a witness who is not present before the trial chamber, 'the Chamber shall consider, *inter alia*, whether the prior recorded testimony in question […] is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts' among other considerations. That is, to analyse the corroborative nature of a testimony, an important factor is the testimony given by other witnesses on *similar* facts, as opposed to the *same* fact.

380. Furthermore, I note that all witnesses may not necessarily be able to reproduce facts in the same manner, be it because different witnesses experience facts from different perspectives or because, considering the time elapsed after they experience such facts or the trauma that some witnesses may have suffered, some witnesses may not be able to recall facts with the same precision as others. That witnesses testify differently as to one event does not negatively affect the credibility of their testimony on different facts.

381. In this regard, I recall that the ICTR Appeals Chamber has noted that different testimonies do not need to 'be identical in all aspects or describe the same fact in the same way', and that '[e]very witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others'.[578] Furthermore, it has observed that 'the presence of inconsistencies within or amongst witnesses' testimonies does not per se require a reasonable Trial Chamber to reject the evidence as being unreasonable', and it has endorsed that 'in situations where witnesses are called to testify on events which took place over a decade ago, discrepancies relating to the time and date of the event may occur'.[579]

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[577] *Bemba et al.* Appeal Judgment, para. 1084.
[578] ICTR, Appeals Chamber, *The Prosecutor v. Ferdinand Nahimana*, Judgement, 28 November 2007, ICTR-96-11, para. 428.
[579] ICTR, Appeals Chamber, *The Prosecutor v. Mikaeli Muhimana*, Judgement, ICTR-95-1B-0230/1, 21 May 2007, paras 58, 90.

382. As Judge Herrera Carbuccia mentioned, the *ad hoc* tribunals have also noted that

> [t]he passage of time, the difference in questions put to the witnesses at different stages of the investigation and in court, and the traumatic situations in which the witnesses found themselves during the events about which they testified were all taken into account by the Chamber in evaluating the significance of such inconsistencies. Minor inconsistencies between prior statements and in-court testimony did not lead the Chamber to automatically reject the evidence as unreliable. Witnesses testifying under such circumstances cannot be expected to recall events in precise sequence or detail, and discrepancies between different witnesses' evidence also did not necessarily lead to a finding of a lack of reliability.[580]

383. I further recall that, in the framework of the investigation and documentation of the atrocious crimes adjudicated at this Court, it is not uncommon that witnesses' memories may be impaired. The United Nations Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the 'Istanbul Protocol') notes that survivors 'may have difficulty recounting the specific details of the torture for several important reasons, including: […] (d) The psychological impact of torture and trauma, such as high emotional arousal and impaired memory, secondary to trauma-related mental illnesses, such as depression and post-traumatic stress disorder (PTSD)'.[581] This applies not only to victims of torture and other inhumane acts, but also to witnesses thereof.[582]

384. Thus, if two witnesses testifying on the same fact apparently produce different testimony, it does not mean that their evidence is uncorroborated. It may simply mean that the witnesses recall the events with different levels of precision. In my view, this argument of the Prosecutor should have been accepted.

385. In this regard, I find that the second and fourth examples of the Prosecutor are instructive. As for the second example, the Prosecutor submits that the evidence of witnesses P-0239, P-0330, P-0164, P-0226, P-0238 and P-0411 'generally

[580] ICTY, *The Prosecutor v. Sainovic et al.*, Judgement, 26 February 2009, IT-05-87, paras. 49-50.
[581] UNHCHR, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 August 1999, HR/P/PT/8/Rev.1 (hereinafter: 'Istanbul Protocol'), para. 142.
[582] Istanbul Protocol, para. 145(u).

corroborated each other as to the delivery, installation and launch of 120mm mortars from Camp Commando on 17 March 2011'.[583]

386. In my view, a reasonable trial chamber, at the no case to answer stage, could indeed have found that that these testimonies were '*prima facie* compatible'.[584] I note that while there was evidence on the record indicating that 120mm mortars were available at Camp Commando around the time of the incident and that *Bataillon d'Artillerie Sol-Air* ('BASA') members fired shells on 17 March 2011, Judge Henderson focused on contradictions, omissions and credibility issues concerning some witnesses to conclude that it was 'impossible' for a reasonable trial chamber to determine with 'sufficient confidence' who caused the explosions that took place on 17 March 2011 and by what means.[585] Such an approach to the evidence, particularly at the no case to answer stage of the proceedings, was unreasonable. This supports the Prosecutor's allegation that the majority of the Trial Chamber failed to draw reasonable interferences from the evidence on the record.

387. In my view, Judge Henderson failed to acknowledge that the evidence on the record demonstrated that 120mm mortars were present in Camp Commando on 17 March 2011. While, as Judge Henderson noted, there were some discrepancies between the witnesses' testimonies regarding, *inter alia*, the precise time and location of the presence of 120mm mortars before 17 March 2011, their testimonies were generally consistent as regards the factual allegations that 120mm mortars were delivered to Camp Commando prior to 17 March 2011 and were present there around the time of the incident. I observe that, given the consistencies between the witnesses' testimonies, the discrepancies in their accounts were not sufficient to detract from the reliability of their testimony.

388. Furthermore, I recall that Judge Henderson, in reaching his conclusion, noted that 'none of the evidence regarding the presence of 120mm mortars at Camp

[583] Prosecutor's Appeal Brief, para. 194. To support her argument, the Prosecutor compares the testimonies of witnesses P-0226 and P-0239 regarding the bringing in of the mortars and their location at Camp Commando around early March 2011, and then the testimonies of witnesses P-0164 and P-0226 regarding the presence of 120mm mortars on, and some days prior to, 3 March 2011. *See* Prosecutor's Appeal Brief, paras 195-196.
[584] Prosecutor's Appeal Brief, paras 195-196.
[585] Judge Henderson's Reasons, para. 1820.

Commando specifically and unequivocally concerns the date of the incident in question, that is 17 March 2011 – *with the exception of P-0047, who seems to deny their presence on the relevant date*'.[586] However, I note that, as Judge Henderson mentioned in a footnote,[587] witness P-0047 testified that during the interview he 'had omitted to tell [the interviewer] that the 120[mm] guns had been withdrawn' from Camp Commando, although he admitted that he had indicated in his prior recorded statement that BASA did have 120mm mortars at the relevant time.[588] In my view, Judge Henderson should have been cautious in analysing this testimony, given that witness P-0047, 'the commander of the ground forces and highest operational FDS officer in Abidjan',[589] was an insider or accomplice witness and may have had an interest in giving false testimony due to the concern for his possible criminal responsibility. I recall that in *Bemba et al.* (A-A5), the Appeals Chamber noted that 'the condition of a witness as an "accomplice" is a circumstance that needs to be *carefully considered* when assessing the reliability of his or her evidence'.[590] Although the Appeals Chamber said this in the context of a case where the entire proceedings had been conducted, and the beyond reasonable standard was applicable, as opposed to this case, which ended at the no case to answer stage, I consider that Judge Henderson placed more weight on this evidence than on the evidence of the witnesses whose testimony he unreasonably found to be incompatible. Such an approach to the evidence was unreasonable, particularly at the no case to answer stage. This supports the Prosecutor's allegation that Judge Henderson failed to appreciate that the evidence was consistent and corroborated.

389. As for the fourth example, I note that the Prosecutor first challenges the inconsistencies found by Judge Henderson in the testimonies of witnesses P-0109, P-0436 and P-0433.[591] Judge Henderson found that witness P-0109's testimony that the shooting calmed down at around 14h00 is 'difficult to reconcile with P-0436's narrative according to which lethal weapons were used in the clashes on the

[586] Judge Henderson's Reasons, para. 1811 (emphasis added).
[587] Judge Henderson's Reasons, para. 1811, fn. 4050.
[588] Transcript of hearing, 13 December 2018, ICC-02/11-01/15-T-204-Red2-ENG, p. 17, lines 7-10.
[589] Judge Henderson's Reasons, para. 1810.
[590] *See* *Bemba et al.* Appeal Judgment, para. 1531 (emphasis added).
[591] Prosecutor's Appeal Brief, paras 216-222.

Boulevard Principal only from around 16h00'.[592] He further observed that witness P-0433 testified that the youth from Yao Séhi and Doukouré threw stones at each other until about 10h00, in contrast with the testimony of witness P-0441 that the militia were throwing stones around 12h00.[593]

390. Having observed Judge Henderson's assessment of this testimonial evidence, it appears that, as the Prosecutor points out,[594] Judge Henderson did not fully accommodate witness P-0109's testimony in his analysis. Witness P-0436's reference to the time of the events[595] is not inconsistent with witness P-0109's testimony.[596] While witness P-0109 said that he waited until the shooting calmed down and the noise and gunshots abated,[597] the reference he made to the time was to say that he arrived at the neighbourhood around 14h00.[598] This does not necessarily indicate that the use of grenades and gunfire did not resume after the shooting calmed down. As the Prosecutor indicates,[599] the witness said that he witnessed people shouting and running around 17h00, which indicates that clashes may have already resumed by that time.[600] In my view, since the testimony of witness P-0109 indicates that clashes may have continued around 17h00, this appears to be consistent with witness the narrative of witness P-0436 that a third grenade was lobbed but failed to explode after around 16h00. Judge Henderson, however, cursorily noted this part of witness P-0109's testimony in a footnote,[601] but failed to take it into account when addressing the consistencies between the testimonies of witnesses P-0109 and P-0436.

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[592] Judge Henderson's Reasons, para. 1637.
[593] Judge Henderson's Reasons, para. 1638.
[594] The Prosecutor argues that the majority of the Trial Chamber 'disregarded, or at least minimised, the ample consistencies' between the testimonies of witnesses P-0109 and P-0436. *See* Prosecutor's Appeal Brief, para. 225.
[595] Witness P-0436's reference to the time was to say that he left the main road around 16h00, and that, before he left, a grenade that had been lobbed did not explode. *See* Transcript of hearing, 1 May 2017, ICC-02/11-01/15-T-148-ENG, p. 25, lines 17-19.
[596] Witness P-0109 testified that the stone clashes lasted for two hours since 9h00 or 10h00, and that the militias came afterwards lobbing grenades. *See* Transcript of hearing, 9 May 2017, ICC-02/11-01/15-T-154-Red2-ENG, p. 29, lines 9-12, p. 36, lines 14-17, p. 30, lines 7-9, p. 36, line 3, p. 37, lines 7-8.
[597] Transcript of hearing, 9 May 2017, ICC-02/11-01/15-T-154-Red2-ENG, p. 42, lines 3-4, 7-8.
[598] Transcript of hearing, 9 May 2017, ICC-02/11-01/15-T-154-Red2-ENG, p. 42, lines 7-9.
[599] Prosecutor's Appeal Brief, para. 225.
[600] Transcript of hearing, 10 May 2017, ICC-02/11-01/15-T-155-Red2-ENG, p. 14, lines 22-24.
[601] Judge Henderson's Reasons, para. 1637, fn. 3701 (stating, '*Note* that P-0109 thought that at around 17h00 it started again – P-0109 was at a football field right next to the Mosque when he and others fled into Doukouré again after they heard people shouting "they're coming"').

391. I also consider that, while not identical, the testimony of witness P-0433 is overall consistent with the other witnesses' testimonies (including witness P-0441), in that the clashes started around noon at the latest and escalated during the day. I recall that different testimonies do not need to 'be identical in all aspects or describe the same fact in the same way', and that '[e]very witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others'.[602] In light of the above, I find that Judge Henderson's focus on establishing 'with certainty' the 'clear timeline of the events', such as 'starting time and duration of the clashes' was not reasonable, particularly at the no case to answer stage of the proceedings. This supports the Prosecutor's allegation that Judge Henderson unreasonably required witnesses to provide identical accounts for him to consider them as 'true'.

392. In light of the foregoing, I consider that the approach to corroboration applied by Judge Henderson was unclear and erroneous. This was demonstrated, *inter alia*, by the second and fourth examples presented by the Prosecutor. Requiring that testimonies be identical in all aspects is not appropriate, as explained above. Judge Henderson unreasonably did so, while at the no case to answer stage he should have taken the evidence at its highest, and could have found that the testimonial evidence referred to in the second and fourth examples was '*prima facie* compatible'.[603]

(b) Incorrect assessment of sexual violence

393. The Prosecutor argues that the majority of the Trial Chamber erred in assessing the evidence in relation to the rapes.[604] She raises three lines of argument in this regard: first, she submits that although '[c]rimes of rape and other forms of sexual violence must not be subjected to heightened evidentiary requirements', the majority of the Trial Chamber set too high a threshold for considering the allegations of rape as evidence of the policy or the common plan to commit the attack.[605] Second, she submits that the Trial Chamber made speculative and inconsistent findings in respect

[602] ICTR, Appeals Chamber, *The Prosecutor v. Ferdinand Nahimana*, Judgement, 28 November 2007, ICTR-96-11, para. 428.
[603] Prosecutor's Appeal Brief, paras 195-196.
[604] Prosecutor's Appeal Brief, paras 234-247.
[605] Prosecutor's Appeal Brief, para. 236.

of the rapes that had occurred.[606] Third, the Prosecutor argues that the evidentiary approach that the Trial Chamber used to assess the evidence on rapes was inconsistent with its own stated approach.[607] Below, I shall address the first two lines of argument as they disclose a troublesome approach specifically with respect to the crime of rape, which cannot be left unaddressed.

394. In relation to the first set of arguments, the Prosecutor refers to a passage in Judge Henderson's Reasons, where he noted that there was inconsistent evidence to conclude 'that there was an instruction, agreement and/or policy to rape female pro-Ouattara demonstrators'.[608] The Prosecutor is correct in noting that the Trial Chamber was not asked to find that there was a policy to rape pro-Ouattara demonstrators, but instead, whether, in the context of crimes against humanity, there was a policy to commit an attack directed against the civilian population – a difference that Judge Henderson failed to appreciate.

395. The Prosecutor notes further that, with regard to rape, the Trial Chamber considered whether the identification of the victim as a pro-Ouattara supporter was the reason for the commission of the crime, or whether this might simply have been a 'pretext'.[609] The approach of the Trial Chamber is worrisome because it seems to have established a higher threshold for crimes of rape to be considered indicative of the existence of a policy to attack a civilian population than for other crimes. There is no legal basis for such an approach.

396. In this context, I note that relevant jurisprudence of the ICTY indicates that even acts committed for 'purely personal motives' may amount to crimes against humanity.[610] And the ICTY was not the first court to say this. It confirmed a precedent that emerged nearly half a century before, in several judgments of 1948 and

[606] Prosecutor's Appeal Brief, paras 238 *et seq*.
[607] Prosecutor's Appeal Brief, paras 246-247.
[608] Prosecutor's Appeal Brief, para. 237, *referring to* Judge Henderson's Reasons, para. 1883.
[609] Prosecutor's Appeal Brief, para. 237, *quoting* Judge Henderson's Reasons, para. 1882.
[610] *See*, *e.g.*, ICTY, Appeals Chamber, *The Prosecutor v. Duško Tadić*, Judgement, 15 July 1999, IT-94-1-A (hereinafter: '*Tadić* Appeal Judgment'), para. 270; *The Prosecutor v. Kvočka et al.*, Judgement, 28 February 2005, IT-98-30/1-A, para. 463. *See also* ICTY, Appeals Chamber, *The Prosecutor v. Goran Jelisić*, Judgement, 5 July 2001, IT-95-10-A, para. 49; ICTY, Appeals Chamber, *The Prosecutor v. Milorad Krnojelac*, Judgement, 17 September 2003, IT-97-25-A, para. 102; ICTY, Appeals Chamber, *The Prosecutor v. Milan Martić*, Judgement, 8 October 2008, IT-95-11-A, para. 154.

1949, regarding crimes against humanity during WWII in Nazi Germany[611] (in the cases of K. and P.,[612] P. and others,[613] Sch.,[614] G.,[615] H.,[616] B.,[617] and V.[618]).

[611] *See* *Tadić* Appeal Judgment, paras 255-270.
[612] In the case of K. and P., the trial court convicted two individuals accused of crimes against humanity for reporting the Jewish wife of one of the defendants to the Gestapo, despite their mutual motive to 'rid themselves of' her because she 'would not agree to a divorce'. She was arrested and detained in Auschwitz until she died of malnutrition. The Supreme Court for the British Zone confirmed the convictions, noting that the conduct of the accused met the requisite *actus reus* and *mens rea* of crimes against humanity. It noted that 'in cases of crimes against humanity taking the form of political denunciations, only the perpetrator's consciousness and intent to deliver his victim through denunciation to the forces of arbitrariness or terror are required'. *See* *Tadić* Appeal Judgment, para. 257, fn. 318, *referring to* Decision of the Supreme Court for the British Zone dated 9 November 1948, S. StS 78/48, in *Justiz und NS-Verbrechen* (Vol. II), p. 499.
[613] In the case of P. and others, the Supreme Court for the British Zone reversed an acquittal and ordered the retrial of medical doctors and a jurist who executed a directive to transfer mentally disturbed patients from their hospital to other institutions where the patients were killed in gas chambers. At first, the trial court acquitted the accused for lack of proof of the requisite *mens rea* to kill the patients. The Supreme Court noted that the trial court failed to consider whether the behaviour of the accused could amount to crimes against humanity. It ordered a retrial, having observed that a 'perpetrator [of a crime against humanity] is indeed also anyone who contributes to the realisation of the elements of the offence, without at the same time wishing to promote National Socialist rule, […] but who acts perhaps out of fear, indifference, hatred for the victim or to receive some gain. [This is] because even when one acts from these motives ("*Beweggründe*"), the action remains linked to this violent and oppressive system'. *See* *Tadić* Appeal Judgment, fn. 320, *referring to* Decision of the Supreme Court for the British Zone dated 5 March 1949, S. StS 19/49, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone* (Vol. I), p. 341 (emphasis added).
[614] In the case of Sch., the trial court convicted the defendant who reported her landlord to the Gestapo 'out of revenge and for the purpose of rendering him harmless'. Pursuant to the denunciation of the accused, the Gestapo executed the landlord (*See* *Tadić* Appeal Judgment, para. 260, *referring to* Decision of Flensburg District Court dated 30 March 1948 in *Justiz und NS-Verbrechen* (Vol. II), pp. 397- 402). On appeal, the defendant argued that 'crimes against humanity were limited to participation in mass crimes and […] did not include all those cases in which someone took action against a single person for personal reasons' (*See* *Tadić* Appeal Judgment, para. 260, *referring to* Decision of the Supreme Court for the British Zone dated 26 October 1948, S. StS 57/48, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen* (Vol. I), pp. 122-126 at p. 124 (unofficial translation)). The Supreme Court rejected the appeal holding that '[i]f an individual's attack against an individual victim for personal reasons is connected to the National Socialist rule of violence and tyranny and if the attack harms the victim in the aforementioned way, it, too, becomes one link in the chain of the measures which under the National Socialist rule were intended to persecute large groups among the population. There is no apparent reason to exonerate the accused only because he acted against an individual victim for personal reasons'. *See* *Tadić* Appeal Judgment, para. 260, *referring to* Decision of the Supreme Court for the British Zone dated 26 October 1948, S. StS 57/48, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen* (Vol. I), p. 124 (unofficial translation).
[615] In the case of G., the trial court convicted the defendant of a crime against humanity after he mistreated his political opponent because of rancour between their families. On appeal, the Supreme Court rejected the defendant's claim of personal motives, instead holding that the defendant's motives were immaterial and that an attack for personal reasons against a single victim can amount to a crime against humanity if it is linked to the Nazi rule of violence and tyranny. *See* *Tadić* Appeal Judgment, fn. 322, *referring to* Decision of the Supreme Court for the British Zone dated 8 January 1949, S. StS 109/48, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen* (Vol. I), p. 247.
[616] In the case of H., the trial court convicted the defendant of a crime against humanity after he denounced his father-in-law. The defendant's motives to denounce him were that he listened to a foreign radio station, constantly mocked the defendant for his low class and tyrannised the family.

397. Besides her argument that the majority of the Trial Chamber incorrectly adopted a heightened standard in assessing the evidence of rape, the Prosecutor contends that, 'by considering whether rapes had occurred for any reason other than the victims being identified as pro-Ouattara supporters, [it] went beyond the record of this case in search of an alternative and speculative inference'.[619] According to the Prosecutor, the evidence showed that the victims were raped because they had been identified as pro-Ouattara supporters, and '[e]ven if any additional personal/sexual motive had existed, this would not detract from this reason'.[620] The Prosecutor asserts that the majority of

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Having been imprisoned by the Nazi authorities, the father-in-law died in prison. The trial court convicted the defendant, and noted that 'it can be left open as to whether […] [the accused] was motivated by political, personal or other reasons', and held that 'the motives ("*Beweggründe*") prompting a denunciation are not decisive'. *See* *Tadić* Appeal Judgment, para. 261, *referring to* Decision of the Braunschweig District Court dated 22 June 1950, in *Justiz und NS-Verbrechen* (Vol. VI), pp. 631-644, at p. 639, *referring to* the Decision of the Supreme Court for the British Zone dated 17 August 1948, S. StS 43/48, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen* (Vol. I), pp. 60-62 *and* Decision dated 13 November 1948, S. StS 68/48, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen* (Vol. I), pp. 186-190. *See also* Decision of the Supreme Court for the British Zone dated 20 April 1949, S. StS 120/49, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen* (Vol. I), p. 388.

[617] In the case of B., the Supreme Court for the British Zone reversed an acquittal where a trial court incorrectly found that it was unable to determine whether the defendant's denunciation of his colleague had been motivated by political or religious reasons. The defendant reported his colleague, who expressed his doubts and disapproval of Nazi political views, persecution of Jews, official propaganda, cultural policies and anti-clerical attitude. After receiving the information, the Gestapo imprisoned the colleague. The Supreme Court for the British Zone reversed the acquittal, noting that 'it was erroneous and in contradiction to the consistent jurisprudence of the [Supreme] Court' to give relevance to the motives of the accused. *See* *Tadić* Appeal Judgment, fn. 324, *referring to* Decision of the Supreme Court for the British Zone dated 30 November 1948, S. StS 68/48 in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen* (Vol. I), p. 189.

[618] In the case of V., the Supreme Court explained that the trial court convicted Nu despite the personal motives which led her to commit the crime. To regain her adoptive son from his natural mother, the defendant denounced her based on the natural mother's negative remarks about Hitler, the Nazis and the SS. During imprisonment, the natural mother suffered serious bodily harm and lost sight in one eye before being released by the allied forces. The trial court held that the denunciation amounted to a crime against humanity even though the accused was fuelled by personal motives. *See* *Tadić* Appeal Judgment, para. 262, *referring to* Decision of the Supreme Court for the British Zone dated 22 June 1948, S. StS 5/48, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen* (Vol. I), pp. 19-25.

[619] Prosecutor's Appeal Brief, para. 238.

[620] Prosecutor's Appeal Brief, para. 238.

the Trial Chamber 'failed to resolve its findings made in different sections of its analysis and to draw reasonable, even inevitable, conclusions'.[621]

398. I observe that there are indeed several inconsistencies in Judge Henderson's Reasons, as noted by the Prosecutor. The thrust of the Prosecutor's arguments is that the majority of the Trial Chamber failed to draw, based on the witness testimonies, the inferences that 'the victims were raped for the reason that they had been identified as pro-Ouattara supporters'.[622] To support these contentions, the Prosecutor refers to the testimonies of (i) witnesses [redacted] regarding rapes during the RTI march,[623] and (ii) witness [redacted] regarding rapes during the 12 April 2011 incident.[624]

399. As for the rapes during the RTI march, I observe that witness [redacted] testified that a perpetrator told her: '[redacted]'.[625] Judge Henderson noted the evidence provided by witness [redacted].[626] Her evidence further shows that, [redacted].[627] Regarding the women raped during the 12 April 2011 incident, Judge Henderson's Reasons noted testimonies of witnesses who said they were raped because of being of an ethnicity associated with Mr Ouattara.[628] It noted, *inter alia*, witness [redacted] testimony that, [redacted].[629] In this regard, the

[621] Prosecutor's Appeal Brief, para. 238.
[622] Prosecutor's Appeal Brief, para. 238.
[623] Prosecutor's Appeal Brief, para. 239-242.
[624] Prosecutor's Appeal Brief, para. 243-245.
[625] [redacted].
[626] Judge Henderson's Reasons, paras 1528-1529, referring to [redacted].
[627] Judge Henderson's Reasons, paras 1528-1529, referring to [redacted].
[628] Judge Henderson's Reasons, para. 1851.
[629] [redacted].

Trial Chamber observed that '[redacted]'.[630]

400. However, despite these testimonies, which, taken at their highest, could support the reasonable conclusion that the women were raped for being suspected to support Mr Ouattara, Judge Henderson found otherwise. As for the rapes during the RTI march, Judge Henderson noted that the rapes had 'no obvious connection with the operation to repress the RTI march'[631] and that the identification may have 'served merely as a pretext'.[632] He further noted that the women were raped after being suspected of being pro-Ouattara supporters.[633]

401. As to the rapes during the 12 April 2011 incident, Judge Henderson observed that 'one cannot exclude the possibility that in the midst of the violent commotion created by pro-Gbagbo elements on that day, some of the victims were harmed for reasons other than having been perceived Ouattara supporters'.[634] Judge Henderson pointed out, referring to the testimonies of witnesses [redacted], that 'in two cases the perpetrators were already leaving the house of the victims when they changed their minds and decided to rape or kill'.[635] He stated that '[t]his indicates that their primary objective was not to harm Ouattara supporters', and it was 'conceivable that some of the crimes committed in Yopougon on 12 April 2011 were opportunistic in nature, in the sense that the perpetrators took advantage of the general state of lawlessness and defencelessness of the victims'.[636]

[630] Judge Henderson's Reasons, para. 1855, *referring to* [redacted].
[631] Judge Henderson's Reasons, para. 1217.
[632] Judge Henderson's Reasons, para. 1882.
[633] Judge Henderson's Reasons, para. 1496.
[634] Judge Henderson's Reasons, para. 1859.
[635] Judge Henderson's Reasons, para. 1859, *referring to* [redacted].
[636] Judge Henderson's Reasons, para. 1859.

402. I note that, while Judge Henderson found that 'direct testimonial evidence confirmed that pro-Gbagbo individuals killed, raped or injured the victims because their ethnicity was associated with the pro-Ouattara camp',[637] he did not explain why witness [redacted] testimony stating that the perpetrators came back and raped her, after extorting valuables and when they were about to leave her place, detracts from such a finding.[638] I find speculative Judge Henderson's conclusion that 'some of the victims were harmed for reasons other than having been actual or perceived Ouattara supporters', let alone that some of the crimes committed on 12 April 2011 'were opportunistic in nature'.[639]

403. In saying this, Judge Henderson, on no basis other than his own speculation, failed to believe the witnesses who testified on their experiences as victims of sexual crimes. This was not only unnecessary and inappropriate, but it contradicted the approach of the statutory framework of affording special treatment to victims of sexual crimes. As the Prosecutor correctly argues, this 'approach contrasts with the careful and reasonable approach to such crimes set out in the Court's legal framework and that taken by other Chambers at this Court and elsewhere to assessing evidence of sexual violence'.[640] Particularly, she refers to rule 63(4) of the Rules, which provides that 'a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence'. This is further consistent with international standards with respect to questioning victims of sexual violence.[641] Judge Henderson's failure to make reasonable inferences based on the testimony of victims of sexual crimes was completely at odds with the careful and sensitive approach embraced in the Court's statutory framework.

404. Contrary to Judge Henderson's observations, in my view, the evidence on the record could have supported that the inference that the women were raped for being

[637] Judge Henderson's Reasons, para. 1851.
[638] Although Judge Henderson notes in paragraph 1859 that '[t]his indicates that their primary objective was not to harm Ouattara supporters', this does not detract from the inference that witness [redacted] was raped because of her ethnicity associated with the pro-Ouattara camp. Judge Henderson's Reasons, para. 1859.
[639] Judge Henderson's Reasons, para. 1859.
[640] Prosecutor's Appeal Brief, para. 243-245.
[641] Istanbul Protocol, para. 215.

Ouattara sympathizers was the most reasonable one. However, contrary to the evidence on the record, Judge Henderson concluded that the motivation of the perpetrators was different and that their having identified the women as pro-Ouattara supporters potentially was just a pretext. In so doing, and for the reasons set out above, I consider that Judge Henderson erred in law.

4. Whether the acquittals were materially affected

405. In the view of the Appeals Chamber's Majority, '[t]o the extent that there is any doubt whether the Trial Chamber adopted the correct standard of proof, the [Appeals Chamber's Majority was] satisfied that the [impugned] decision was not materially affected'.[642] In its view, by adopting the correct approach as to how to assess the sufficiency of the evidence, as required at this stage of the proceedings, and after a detailed analysis of the evidence, Judges Henderson and Tarfusser 'found that the Prosecutor's evidence did not meet any standard (including the one "whether the Prosecutor has sufficient evidence in support of [a] charge such that a reasonable chamber could convict")'.[643]

406. In my view, even if, *arguendo*, the 'beyond reasonable doubt' standard were applicable at the no case to answer stage (as found by the Appeals Chamber's Majority) and Judges Henderson and Tarfusser had ultimately applied the same standard (*i.e.* 'beyond reasonable doubt' in Judge Henderson's opinion of 16 July 2019), they would have reached acquittals through an erroneous standard at the no case to answer stage considering that the correct standard at that stage is lower (*see ad hoc* tribunals' jurisprudence). It is to be recalled that the Appeals Chamber in *Al Bashir* (OA) has found that the application of an erroneous standard of proof by a chamber in its evaluation of evidence is an error of law which may have a material effect upon its decision.[644] The issue in that appeal concerned the standard of proof that a pre-trial chamber should apply in applications for arrest warrants. Pre-Trial Chamber I had held that the 'reasonable grounds to believe' standard would be met where the Prosecutor '"show[s] that the only reasonable conclusion to be drawn

[642] Judgment of the Appeals Chamber's Majority, para. 340.
[643] Judgment of the Appeals Chamber's Majority, para. 340, *referring to* Judge Henderson's Reasons, para. 2, *and* Judge Tarfusser's Opinion, para. 68.
[644] *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 3 February 2010, ICC-02/05-01/09-73 (hereinafter: '*Al Bashir* Appeal Judgment'), para. 41.

therefrom is the existence of reasonable grounds to believe in the existence" of the requisite specific genocidal intent'.[645] The Appeals Chamber viewed this standard of proof as going beyond the applicable standard and amounting to that of 'beyond a reasonable doubt'.[646] The Appeals Chamber thus found that 'although the Pre-Trial Chamber appreciated the appropriate standard to be "reasonable grounds to believe", it applied this standard erroneously', and that '[t]he standard it developed and applied in relation to "proof by inference" was higher and more demanding than what is required'.[647] In the Appeals Chamber's view, '[t]his amounted to an error of law'.[648] It found that Pre-Trial Chamber I's decision 'was materially affected by an error of law' and reversed the decision.[649]

407. The fact that Judge Henderson may *arguendo* have applied on 16 July 2019 the standard that Judge Tarfusser had in mind, (*i.e.*, 'beyond reasonable doubt') does not show that there was no material effect. Even assuming that there was an overlap or implied agreement in the standards that the judges in the majority had in mind, such a high standard would have been erroneous at the 'no case to answer' stage, and this would have materially affected the acquittals.

408. Furthermore, even if it were likely that the two judges would in any event acquit, that decision would have been different and therefore the impugned decision would have been affected by the error. As previously indicated by the Appeals Chamber in the *Situation of the Democratic Republic of Congo* (OA),[650] even where the result of a decision remains unchanged, if the outcome of the decision is to be reached based upon the application of a different legal assessment than originally applied, then it may be considered a substantially different decision, thereby amounting to a material error.[651] In that case, Pre-Trial Chamber I had rejected the Prosecutor's application as it found the case inadmissible; however, upon review of this decision, the Appeals Chamber noted that had Pre-Trial Chamber I not considered admissibility criteria, it would have based its decision upon article 85(1) of the

[645] *Al Bashir* Appeal Judgment, para. 32 (footnotes omitted).
[646] *Al Bashir* Appeal Judgment, para. 33.
[647] *Al Bashir* Appeal Judgment, para. 39.
[648] *Al Bashir* Appeal Judgment, para. 39.
[649] *Al Bashir* Appeal Judgment, para. 41.
[650] DRC Appeal Judgment.
[651] DRC Appeal Judgment, para. 84.

Statute. The Appeals Chamber went on to state that even assuming, *arguendo*, that Pre-Trial Chamber I concluded there were insufficient reasons to believe that the suspect committed a crime within the Court's jurisdiction or that the suspect's arrest was unnecessary for the reasons enumerated in article 58(1)(b) of the Statute, and for those reasons had refused to issue the warrant, 'such refusal would have been substantially different from the refusal on the ground that the case against the suspect is inadmissible'.[652]

409. That Judge Henderson and Judge Tarfusser would have in any event agreed and acquitted Mr Gbagbo and Mr Blé Goudé, regardless of the standard at a later stage in trial where they could enter acquittals 'beyond reasonable doubt', misses the point. It would require a substantially different decision rendering the standard material to each different decision. It is not sufficient to say, as does the Appeals Chamber's Majority, that Judges Henderson and Tarfusser 'found that the Prosecutor's evidence did not meet any standard (including the one "whether the Prosecutor has sufficient evidence in support of [a] charge such that a reasonable chamber could convict")'.[653] This would, therefore, mean that the lack of agreement as to the standard of proof amounted to errors of law and procedure that materially affected the impugned acquittals.

410. In light of the foregoing, I would have granted the second ground of the Prosecutor's appeal.

E. Conclusions on the second ground of appeal

411. Due to the nature of the no case to answer procedure, which is entertained halfway through trial, the correct standard of proof, as applied by the *ad hoc* tribunals and representative common law jurisdictions, though not uniform, is not as high as beyond reasonable doubt. The correct standard of proof is whether, under a *prima facie* assessment, taking the evidence at its highest, a reasonable trial chamber *could* convict the accused.

[652] DRC Appeal Judgment, para. 84.
[653] Judgment of the Appeals Chamber's Majority, para. 340, *referring to* Judge Henderson's Reasons, para. 2, *and* Judge Tarfusser's Opinion, para. 68.

412. Judge Henderson, in his separate opinion, erroneously applied a higher standard of proof. His opinion evinces that, had he made a *prima facie* assessment of the evidence, taking the evidence at its highest, he could have found that the standard at the no case to answer stage had been met.

413. Judges Henderson and Tarfusser never informed the parties and participants as to which standard of proof would apply at the no case to answer stage. In fact, the judges never reached an agreement with regard to the applicable standard, neither *before* the accused filed the no case to answer motions, nor *before* the Prosecutor and the victims had the opportunity to respond to such motions. The judges did not reach an agreement on the applicable standard *during* the no case to answer procedure, either. Importantly, the judges had not reached an agreement *at the moment of entering the acquittals*. Notably, they did not even reach an agreement *after entering the acquittals*, when they wrote their separate opinions, six months later. Given that both the no case to answer procedure and its applicable standard is not provided in the Statute, the judges' failure to agree on this matter, and to inform the parties of such an agreement, amounted to errors of law and procedure.

414. Judge Henderson's opinion additionally shows that his assessment of the evidence was premised on erroneous evidentiary approaches to assessing circumstantial evidence, corroboration, and evidence of sexual violence. These amounted to errors of law.

415. The examples presented by the Prosecutor illustrate the abovementioned errors. They show that, failing to looked at the evidence in its totality, Judge Henderson not only speculated by raising alternative scenarios not supported by the evidentiary record, but also failed to make the most reasonable inferences, taking the evidence at its highest, under a *prima facie* assessment. He further failed to rely on testimonies that, in his view, did not appear identical, thereby requiring a high standard for corroboration that is not supported by the statutory framework.

416. Additionally, in contradiction with the statutory framework and longstanding jurisprudence amounting to customary international law, Judge Henderson required that, for incidents of rape to be considered part of the widespread or systematic attack against the civilian population, the Prosecutor had to show that the motivation of the

perpetrators of such sexual crimes was in keeping with a policy to rape pro-Ouattara supporters, rather than other personal motives which, in his erroneous view, rendered such terrible crimes merely opportunistic. Moreover, Judge Henderson's failure to make reasonable inferences based on the testimony of victims of sexual crimes, to rather make speculations that were not supported by the record, contradicted the careful and sensitive assessment of the evidence of sexual crimes, as required within the statutory framework and in line with international standards on questioning victims of sexual violence.

417. Accordingly, (i) the errors of law and procedure of failing to inform the parties and participants clearly as to the applicable standard of proof for the no case to answer proceedings, (ii) the error of failing to apply the correct standard of proof, (iii) the error in assessing circumstantial evidence, (iv) the error in assessing corroboration of evidence, and (v) the error in assessing sexual violence and evidence of rapes, taken all together or each on its own, materially affected the acquittals and the outcome of the trial.

418. In light of the foregoing, I would have granted the second ground of appeal.

VIII. APPROPRIATE RELIEF

419. The remedy of 'mistrial' requested by the Prosecutor is not provided for in the Statute. Granting such a remedy would be against the wording of the Statute. According to article 83(2) of the Statute, once the Appeals Chamber finds that there was an error of law, fact or procedure that materially affected the impugned decision, it must reverse or amend the decision or, on the other hand, order that a new trial chamber retry the case. Considering that, in the case at hand, the trial was incomplete, as the evidence of neither the victims nor the defence was heard, the Appeals Chamber would not have been able to reverse or amend the impugned decision. I would have thus considered appropriate that the case be retried.

420. Moreover, having made a final opinion on the guilt of the accused, the judges of the Trial Chamber have already made up their minds (some of them possibly beyond reasonable doubt) as to the guilt or innocence of Mr Gbagbo and Mr Blé Goudé. Furthermore, all of the judges in the Trial Chamber have by now ended their mandate

at the Court. Therefore, I would have found it appropriate that retrial be conducted by a new composition of judges who can look the case afresh.

421. Contrary to what the majority of the Appeals Chamber indicates, a new trial would not be prejudicial to the defendants. It would instead give the defendants, as well as all parties and participants, an opportunity to have a fair trial. Moreover, I recall that, under rule 134*ter* of the Rules, trial chambers may excuse an accused from being present during trial. In the case at hand, it is a relevant consideration that both Mr Gbagbo and Mr Blé Goudé were in detention during the trial that ended with an erroneous outcome and have undertaken written assurances that 'they will abide by all instructions and orders from the Court, including to be present at the Court when ordered'.[654]

422. Moreover, while it is necessary to order a new trial, some of the evidence already collected, especially testimonial evidence, may be introduced as previously recorded testimony. For example, rule 68(1) of the Rules provides that a trial chamber may, under certain conditions 'allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that this would not be prejudicial to or inconsistent with the rights of the accused'. In particular, rule 68(2) of the Rules states that '[i]f the witness who gave the previously recorded testimony is not present before the Trial Chamber', the chamber has the discretion to allow the introduction of the recorded testimony if '[b]oth the Prosecutor and the defence had the opportunity to examine the witness during the recording' or (b) if it 'goes to proof of a matter other than the acts and conduct of the accused'. This could be a solution ensuring the expediency of the retrial.

IX. FINAL CONCLUSIONS

423. Regarding the no case to answer procedure, in light of the foregoing, I hold the following views:

[654] Judgment on the Prosecutor's appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute, 21 February 2019, ICC-02/11-01/15-1251-Red2 (original confidential version filed 1 February 2019), para. 60.

i. The no case to answer procedure, as an avenue to terminate a trial, is not stated nor enshrined in the Statute nor anywhere in the Court's legal framework. It has no regulation under the Rules and Regulations. Its illegal introduction and application is in contradiction with the principle of legality in the criminal proceedings of the ICC under the Statute. It would require an amendment by the States Parties and that is not a power that judges have.

ii. There is no place for the no case to answer motion at the ICC because the proceedings under the Rome Statute System require the determination of the truth. Under article 69(3), Judges shall have the authority to request the submission of all necessary evidence for the determination of the truth. The abrupt termination of a case halfway through the trial, not only fails to meet such a duty of the judges, but it also breaches the rights of the parties and participants, and fails to meet the expectation of the international community. It further breaches article 74, thereby affecting the due process of law and the fairness of the proceedings, which entail rights and guarantees for all the parties and participant in the proceedings at the ICC.

iii. In addition, there is no place for the no case to answer motion at the ICC because the drafters of the Rules, having been seized of a proposal to include it, did not incorporate and thus implicitly rejected it.

iv. The no case to answer procedure cannot be based on the trial chambers' powers under article 64(6)(f) of the Statute. This provision only gives trial chambers the authority to regulate purely procedural matters, but not to resolve substantive matters on the guilt of the accused person. Thus, it cannot be a basis to enter acquittals halfway through a trial. This would also violate the rights under the Statute of the parties and participants, especially, victims.

v. Articles 74 and 65 of the Statute leave no lacuna in the Rome Statute System regarding the legal avenues to terminate proceedings. And even assuming that there were a lacuna in the Statute, no treaty,

principle, rule or custom under international law, and no general principle of law, provides for mandatory application of the no case to answer procedure. There is no consistent practice on this institution across domestic jurisdictions, not even in common law jurisdictions. Moreover, Ivoirian law does not provide for it. Thus, it is not possible to derive any international custom or general principle from domestic jurisdictions to apply the no case to answer procedure at the ICC.

vi. In my view, it is erroneous to invoke the right to liberty as a pretext

- (a) for not following the requirements of article 74(5) of the Statute,
- (b) for applying a procedure not foreseen in the Statute, and,
- (c) on that basis, prematurely acquitting the accused.

vii. In the case at hand the accused persons were under lawful detention and the Trial Chamber had been seized of requests for provisional release. However, they did not apply the procedural avenues foreseen in the Statute for these requests. It rather decided, by majority, not to entertain such requests and, against the statutory framework of the ICC, it used a procedure alien to the Statute, such as that of the no case to answer, to release and acquit the accused of all charges.

424. Regarding the first ground of appeal, I hold the following views:

i. The legal guarantees and requirements of article 74(2) and (5), besides being enshrined in a treaty, contain the guarantees of justice for the decision-making process, due process of law, and fairness in proceedings. Hence they are provisions of a mandatory nature. Complying with them is not discretionary for the judges. The Trial Chamber did not comply with them.

ii. The Trial Chamber's failure to comply with these legal requirements and guarantees of fairness, due process of law and effective judicial protection created a situation of unfairness for the Prosecutor and the

rights of the victims and that made the acquittal unreliable. They further amount to appealable errors of law and procedure.

iii. As for article 74(5), the guarantees were not followed because there was not a single written decision, and the two opinions Judges Henderson and Tarfusser issued six months afterwards do not amount to one decision. This breach is of such gravity that it invalidated the decision.

iv. The guarantees of article 74(2) require the assessment of evidence and the entire proceedings, that is, the complete trial in its totality. This provision has only one exception in article 65 when the accused makes an admission of guilt. Otherwise, proceedings must be conducted in their entirety. Not having complied with this, Judges Henderson and Tarfusser erred in law and procedure.

v. There clearly are three breaches of article 74(5) of the Statute: (i) the decision was not in writing, (ii) there was not 'one decision' with the Trial Chamber's findings on the evidence and conclusions, nor the findings and conclusions of a majority, (iii) what was delivered in open court was the verdict only, not the decision, and (iv) no summary of its reasons was delivered, as the reasons had not been fully agreed yet, nor were they fully agreed six months later.

vi. There is an additional breach of article 74(2) of the Statute, which provides for a correct decision-making process for final decisions. This entails the assessment of the totality of the evidence and the entire trial. This did not happen in the case at hand because the trial finished prematurely.

vii. Moreover, having finished the case halfway through the trial to enter acquittals, without considering the views and concerns of victims, especially at the closing stage, the Trial Chamber further erred in law and procedure.

viii. Judges Henderson and Tarfusser committed errors of law and procedure in failing to comply with the requirements of article 74 of the Statute and such errors are material *per se*, because they amount to breaches of guarantees of due process of law including the right to a fair trial and the principle of legality, and additionally they materially affected the impugned decision.

ix. The material effect arises because the lack of a written judgment reflects that the judges had not finished the internal decision-making process to reach an acquittal; they prematurely announced the verdict of their decision and this announcement prevented the judges from finding otherwise when they actually wrote the decision. The material effect is that Judges Henderson and Tarfusser rushed to provide the result removing any possibility to later, while drafting the reasons, change their views. In this regard, rendering the oral opinion materially affected the possibility for these judges to change their minds while assessing the evidence and drafting the decision, especially if at the moment when the judges rendered their oral decision they had not agreed on how to assess the evidence.

x. The lack of fairness in the proceedings and the Trial Chamber's errors in violation of article 74 of the Statute amounted to errors of law and procedure that materially affected the decision; as such, the Prosecutor's first ground of appeal should be granted.

425. Regarding the second ground of appeal, I hold the following views:

i. Judges Henderson and Tarfusser failed because they never were in agreement with the applicable standard of proof at the no case to answer stage. They did not reach an agreement about this before nor during the no case to answer proceedings, nor at the moment of entering the verdict, nor six months later in their separate opinions.

ii. Judges Henderson and Tarfusser erred in law and procedure by failing to inform the parties and participants clearly as to the applicable

standard of proof for the no case to answer proceedings. This affected the due process of law and the reliability of the proceedings. Consequently, this affected the reliability of the final acquittals.

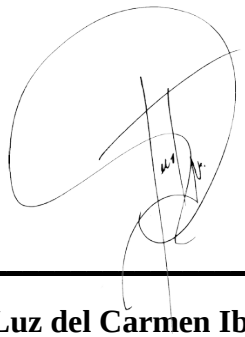
iii. While the correct standard was whether, under a *prima facie* assessment, taking the evidence at its highest, a reasonable trial chamber *could* convict the accused, Judge Henderson, in his separate opinion, erroneously applied a higher standard of proof. Judge Henderson's opinion shows that, had he made a *prima facie* assessment, taking the evidence at its highest, he could have found that the applicable standard at the no case to answer stage had been met.

iv. Judge Henderson's opinion additionally shows that his assessment of the evidence was premised on erroneous evidentiary approaches to assessing circumstantial evidence, corroboration, and evidence of sexual violence. These approaches amounted to errors of law.

v. Accordingly, these errors, taken all together or each on its own, materially affected the acquittals and the outcome of the trial.

426. As for the appropriate relief, the remedy I would have granted for these errors would have been a retrial with a new composition of judges.

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



Judge Luz del Carmen Ibáñez Carranza

Dated this 31st day of March 2021

At The Hague, The Netherlands

X. SUMMARIES

A. Summary of the 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, who said that he was writing for the majority of the Trial Chamber, 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

B. Résumé de l'Opinion Dissidente de Madame la Juge Luz del Carmen Ibáñez Carranza relative à l'Arrêt relatif à l'appel du Procureur contre la décision de la Chambre de première instance 1 rendue oralement le 15 janvier 2019 et les conclusions écrites rendues le 16 Juillet 2019 en l'affair de le Procureur v. Laurent Gbagbo and Charles Blé Goudé

1. La Juge Ibáñez Carranza conteste l'issue finale et les conclusions de la majorité des juges de la Chambre d'appel relatifs aux deux moyens d'appel du Procureur. Selon la Juge Ibáñez Carranza, chacun de ces moyens auraient dû être accordés. En ce qui concerne le premier moyen d'appel, la juge est d'avis que les juges Henderson et Tarfusser ne sont pas arrivés à « une seule décision », fondée sur « [leur] appréciation des preuves et sur l'ensemble des procédures », et contenant « l'exposé complet et motivé de [leur] constatations », tel qu'exigé par l'article 74-2 et 5 du Statut. La Juge Ibáñez Carranza considère qu'il existe des erreurs de droit et de procédure qui ont substantiellement affecté et vicié la décision attaquée. En ce qui concerne le second moyen d'appel, la juge estime que l'absence d'un accord entre les juges Henderson et Tarfusser concernant le standard de preuve applicable a affecté la validité de leurs « constatations sur les preuves et les conclusions ». Ici aussi, la Juge Ibáñez Carranza considère qu'il existe des erreurs de droit et de procédure de nature à vicier au point de porter atteinte à la décision attaquée.

2. Selon la Juge Ibáñez Carranza, les défauts dans cette affaire sont présents depuis le 4 juin 2018, lorsque, malgré les divergences entre la majorité des juges de première instance quant à la base légale des requêtes en insuffisance des moyens à charge à la CPI et le standard de preuve applicable à l'appréciation de la preuve lorsque ces requêtes sont accueillies, la Chambre de première instance, de sa propre initiative, a invité l'accusé à déposer de telles requêtes. Le 15 janvier 2019, les juges Henderson et Tarfusser ont rendu une décision orale à la majorité, accueillant les requêtes de M. Gbagbo et M. Blé Goudé soumettant l'insuffisance des moyens à charge, les acquittant de toutes les charges, et informant qu'ils rendraient une décision dûment motivée dans les plus brefs délais. Bien que les deux juges aient rendu leur décision d'acquittement oralement seulement, la juge Herrera Carbuccia a rendu une opinion dissidente à temps et par écrit le même jour, dans laquelle sa position est dûment

motivée. Les juges Henderson et Tarfusser ont rendu leurs opinions écrites séparées six mois plus tard.

3. La Juge Ibáñez Carranza considère qu'un enjeu préliminaire et essentiel à la compréhension des importants défauts de cette affaire est que la procédure concernant les requêtes en insuffisance des moyens à charge n'est pas prévu dans le cadre juridique du système du Statut de Rome. La juge estime que, bien que la procédure concernant les requêtes en insuffisance de moyens à charge est un recours de *common law* par excellence, le cadre juridique du Statut de Rome n'étant pas de *common law* mais plutôt d'un ensemble des divers systèmes juridiques du monde. Elle relève que les travaux préparatoires montrent que les requêtes en insuffisance des moyens à charge ont été proposées mais pas inclues, et donc exclues, du texte du Règlement de procédure et de preuve. De plus, la juge considère que le pouvoir discrétionnaire accordé aux chambres à l'article 64-6-f du Statut s'applique aux questions discrétionnaires purement procédurales, et ne peut être utilisé pour décider de questions de fond telles que la culpabilité de l'accusé, et encore moins pour ignorer les exigences impératives prévues à l'article 74 du Statut lorsque les décisions relatives à la culpabilité de l'accusé sont rendues. Selon la Juge Ibáñez Carranza, importer la procédure relative aux requêtes en insuffisance des moyens à charge des juridictions de *common law*, sans aucun amendement préalable du Statut, implique une violation des principes de légalité et de *pacta sunt servanda*, ainsi que des droits des victimes prévus par le Statut et le Règlement et le droit international relatif aux droits de l'Homme.

4. La Juge Ibáñez Carranza note que, bien que les tribunaux *ad hoc* ont régulièrement fait usage de la procédure relative aux requêtes en insuffisance des moyens à charge, les cadres procéduraux de ces tribunaux prévoient de façon explicite cette procédure dans leur Statut, alors que, comme il a été mentionné, le Statut ne la prévoit pas. De plus, la juge relève que les divergences au sein des différentes juridictions montrent qu'il n'est pas possible de se fonder sur quelconque règle internationale ou coutume concernant les requêtes en insuffisance des moyens à charge, ou de tirer un principe général de droit des juridictions nationales qui justifierait cette procédure ou qui serait en mesure de clarifier le standard de preuve approprié. La Juge Ibáñez Carranza observe que, similairement, le droit applicable de

la Côte d'Ivoire ne prévoit pas la possibilité de soumettre une requête en insuffisance des moyens à charge, et que, au contraire, ceci contredit le droit ivoirien. Notamment, elle considère que le standard de preuve applicable à la procédure relative aux requêtes en insuffisance des moyens à charge à ce stade n'est pas uniformément appliqué au sein des différentes juridictions nationales de *common law*.

5. La Juge Ibáñez Carranza aurait accueilli le premier moyen d'appel car elle conclut qu'il y a eu violation des exigences légales et des garanties d'équité et de procès équitable prévues à l'article 74-2 et 5 du Statut dans cette affaire. La juge observe que les violations susmentionnées constituent à la fois des erreurs de droit et de procédure. La juge considère que les juges Henderson et Tarfusser ont commis les violations suivantes de l'article 74-5 : (i) la décision d'acquitter les accusés n'a pas été rendue par écrit ; (ii) les juges ne sont pas arrivés à « une seule décision » quant aux « constatations de la Chambre […] sur les preuves et les conclusions » ou, au demeurant, quant aux constatations et conclusions d'une majorité ; et (iii) seule l'acquittement a été prononcé en séance publique, bien que ni les constatations et conclusions de la Chambre de première instance, ni un résumé de celles-ci n'aient été rendus à ce moment-là. Ils ont uniquement annoncé leur verdict.

6. La Juge Ibáñez Carranza observe que, à mi-chemin du procès du Procureur contre M. Gbagbo et M. Blé Goudé, deux des juges de la Chambre de première instance, les juges Henderson et Tarfusser, ont accueilli les requêtes en insuffisance des moyens à charge, malgré l'absence de tout base juridique au sein du Statut, comme le juge Tarfusser l'a lui-même observé. La juge estime que les deux juges ne sont pas parvenus à s'entendre afin de former une majorité, en particulier sur la question de savoir sur quel base ils pouvaient accueillir ces requêtes en insuffisance des moyens à charge, mais aussi sur d'autres questions essentielles à une décision prise à la majorité dans cette affaire : l'applicabilité de l'article 74 du Statut dans cette décision, le standard de preuve applicable, et le cadre relatif à la recevabilité des preuves.

7. En ce qui concerne le second moyen d'appel, la Juge Ibáñez Carranza conteste l'approche et le résultat de la majorité de la Chambre d'appel. Bien que qu'il n'y ait, à son sens, aucun fondement dans le Statut justifiant d'accueillir les requêtes en insuffisance des moyens à charge formées devant cette Cour, elle conclut néanmoins

que le standard de preuve approprié, tel qu'appliqué par les tribunaux *ad hoc* et les juridictions représentatives de *common law*, bien que son application ne soit pas uniforme, n'est pas aussi élevé que ce qui est exigé pour une condamnation « au-delà de tout doute raisonnable ». La Juge Ibáñez Carranza estime qu'une analyse *prima facie* est nécessaire lorsqu'une chambre de première instance raisonnable et accordant le plus de considération possible aux preuves, pourrait condamner l'accusé. La juge considère que le juge Henderson, dans son opinion séparée, a incorrectement appliqué un standard de preuve plus élevé.

8. La Juge Ibáñez Carranza considère aussi que les juges Henderson et Tarfusser ont commis une erreur de droit et de procédure en ne parvenant pas à un accord concernant le standard de preuve applicable. De plus, ils ont omis de clairement informer les parties et les participants quant au standard de preuve applicable à la procédure relative aux requêtes en insuffisance des moyens à charge.

9. Alors qu'il aurait été, à son avis, suffisant d'accueillir le second moyen d'appel du Procureur, la Juge Ibáñez Carranza examine d'autres arguments soulevés par le Procureur. À cet égard, elle aborde aussi l'approche erronée du juge Henderson relative à la corroboration des éléments de preuves et l'appréciation des éléments de preuves de violence sexuelle, qui constitue, à son avis, une erreur de droit. En examinant les arguments avancés par le Procureur à l'appui de son second moyen d'appel, la juge procède à l'analyse, le cas échéant, des parties pertinentes des exemples présentés par le Procureur afin d'illustrer les erreurs relatives à ce moyen d'appel.

10. En ce qui concerne les mesures appropriées aux termes de l'article 83-2 du Statut, la Juge Ibáñez Carranza considère que les violations de l'article 74, commises par les juges Henderson et Tarfusser, constituent des erreurs de droit et de procédure de nature à substantiellement affecter la décision acquittant les accusés. De même, la juge estime que les erreurs relatives au second moyen d'appel, concernant le standard de preuve applicable au stade des requêtes en insuffisance des moyens à charge, l'absence d'accord entre les juges Henderson et Tarfusser sur le standard applicable, et l'approche erronée du juge Henderson relative à l'appréciation des preuves, ont affecté la procédure et a vicié au point de porter atteinte au verdict prononcé. Parmi ces erreurs, il y a, entre autres, l'analyse erronée du juge de la preuve circonstancielle,

le fait qu'il n'ait pas considéré les preuves dans leur totalité, son approche du concept de corroboration, et, notamment, son analyse erronée et inappropriée de la violence sexuelle. Pour cette raison, la Juge Ibáñez Carranza aurait également accueilli le second moyen d'appel. Ayant accueilli chacun des moyens d'appel, la Juge Ibáñez Carranza aurait considéré approprié d'ordonner un nouveau procès devant une autre chambre de première instance.

Fait le 31 mars 2021

À La Haye, Pays-Bas

C. Resumen de la Opinión Disidente de la Jueza Luz del Carmen Ibáñez Carranza con relación a la Sentencia de la mayoría de la Sala de Apelaciones sobre el recurso de apelación de la Fiscalía contra la decisión oral de la Sala de Primera Instancia I de fecha 15 de enero de 2019 cuyos motivos escritos fueron emitidos el 16 de julio de 2019 en el caso de la fiscalía contra Laurent Gbagbo y Charles Blé Goudé

1. La Jueza Ibáñez se encuentra en desacuerdo con la decisión final como así también con las conclusiones hechas por la mayoría de la Sala de Apelaciones en relación con los dos cargos de apelación interpuestos por la Fiscalía. En su opinión, ella habría concedido ambos cargos de apelación interpuestos por la Fiscalía. Con respecto al primer cargo de apelación, la Jueza Ibáñez considera que los Jueces Henderson y Tarfusser no llegaron a 'un fallo', basado en su evaluación de todas 'las pruebas y de la totalidad del juicio', que cuente con 'una exposición fundada y completa de la evaluación de las pruebas y las conclusiones', como exige el artículo 74, incisos 2 y 5, del Estatuto de Roma. En su opinión, se trata de errores de derecho y de procedimiento que afectaron materialmente y viciaron la decisión impugnada. En cuanto al segundo cargo de apelación, la Jueza Ibáñez considera que la falta de acuerdo entre los Jueces Henderson y Tarfusser sobre el estándar probatorio les impidió arribar a un válido análisis y evaluación de las pruebas, y formulación correcta de hallazgos y conclusiones. Una vez más, en su opinión, se trata de errores de derecho y de procedimiento que afectaron materialmente a la decisión impugnada.

2. A juicio de la Jueza Ibáñez, las falencias en este caso se iniciaron el 4 de junio de 2018 cuando, a pesar de las discrepancias entre la mayoría de los jueces de primera instancia sobre la base jurídica de las mociones de absolución perentoria (*no case to answer motions*) y al estándar probatorio aplicable para evaluar el plexo probatorio en tales casos, la Sala de Primera Instancia, por iniciativa propia, invitó al acusado a presentar dicha moción. El 15 de enero de 2019, los jueces Henderson y Tarfusser dictaron un veredicto oral, por mayoría, en el que se hizo lugar a las mociones de absolución perentoria presentadas por los Sres. Gbagbo y Blé Goudé, absolviéndolos de todos los cargos y señalando que las razones de tal decisorio se harían conocer 'lo antes posible'. Mientras que los dos Jueces que conformaron la mayoría absolvieron a los acusados sin emitir razones escritas, la Jueza Herrera Carbuccia emitió su Opinión

Disidente debidamente razonada y por escrito oportunamente, en efecto lo hizo el mismo día. Los motivos del veredicto de los Jueces Henderson y Tarfusser se emitieron en sus opiniones separadas por escrito seis meses después.

3. Según la Jueza Ibáñez, una cuestión preliminar y crucial para entender las grandes falencias y defectos legales en este caso, es que el procedimiento concerniente a 'mociones de absolución perentoria' (*no case to answer motions*) no está establecido ni tiene lugar dentro del marco legal del sistema del Estatuto de Roma. En su opinión, si bien esta es una institución de derecho anglosajón por excelencia, el sistema del Estatuto de Roma no es un sistema de derecho anglosajón, sino una combinación de todos los sistemas jurídicos del mundo. Observa la Jueza en este sentido que los trabajos preparatorios demuestran que la posibilidad de incluir 'mociones de absolución perentoria' (*no case to answer motions*) fue contemplada pero no se incluyó en el texto de las Reglas de Procedimiento y Prueba, por lo que resultó rechazada. Además, considera que el margen de discreción que debe concederse a las salas de primera instancia con arreglo al artículo 64, apartado 6, letra f), del Estatuto de Roma es para asuntos discretos y puramente procesales, y no puede utilizarse para pronunciarse sobre cuestiones sustantivas como la culpabilidad del acusado, y mucho menos para ignorar los requisitos obligatorios previstos en el artículo 74 del Estatuto al dictar sentencia sobre la culpabilidad del acusado. Asimismo, a su juicio, el trasplante del procedimiento aplicable a mociones de absolución perentoria desde las jurisdicciones de derecho anglosajón sin modificaciones previas al Estatuto de Roma implica una vulneración de los principios de legalidad y *pacta sunt servanda*, y de los derechos de las víctimas contemplados en el Estatuto de Roma, las Reglas de Procedimiento y Prueba y en el derecho internacional de los derechos humanos.

4. La Jueza Ibáñez señala que, si bien los tribunales *ad hoc* aplicaron un procedimiento concerniente a 'mociones de absolución perentoria' (*no case to answer motions*) de forma regular, esto fue porque tal procedimiento estaba expresamente previsto en el marco legal de dichos tribunales; en tanto que, como se ha mencionado, el Estatuto de Roma no lo prevé dentro de su marco legal. Por otra parte, señala la Jueza Ibáñez que las discrepancias entre diversas jurisdicciones demuestran que no se puede establecer ninguna norma o costumbre internacional sobre el procedimiento de

mociones de absolución perentoria (*no case to answer motions*), y que ningún principio general de derecho puede derivarse de las jurisdicciones nacionales que sustente la aplicación de este procedimiento o sirva para esclarecer el estándar probatorio correspondiente. En su opinión, resulta notable que las jurisdicciones de derecho anglosajón, donde se encuentra regulado el procedimiento de 'mociones de absolución perentoria' (*no case to answer motions)*, no muestran ninguna práctica uniforme sobre tal procedimiento, en particular con respecto al estándar probatorio aplicable en esta etapa. Observa que, del mismo modo, el marco jurídico de Côte d'Ivoire no prevé el procedimiento de 'mociones de absolución' perentoria (*no case to answer motions)*, y que, de hecho, tal procedimiento contradice la legislación marfileña.

5. La Jueza Ibáñez habría concedido el primer recurso de casación, ya que se han constatado en el presente caso incumplimientos de los requisitos legales y garantías de justicia y debido proceso legal establecidas en el artículo 74, apartados 2 y 5, del Estatuto de Roma. La Jueza Ibáñez señala que los incumplimientos antes mencionados equivalen, al mismo tiempo, a errores de derecho y de procedimiento. La Jueza Ibáñez considera que los Jueces Henderson y Tarfusser cometieron los siguientes errores violatorios del artículo 74, 5: (i) el veredicto de absolución no fue por escrito; (ii) no hubo 'un solo fallo' que contenga una 'exposición fundada y completa de la evaluación de las pruebas y las conclusiones', ni siquiera una decisión con la evaluación y conclusiones de la mayoría; y (iii) sólo la lectura de la absolución fue en sesión pública, en tanto que ni el razonamiento, ni los hallazgos ni las conclusiones de la Sala de Primera Instancia sobre las pruebas se hicieron públicas en ese momento, conforme lo manda el artículo 74, 5. La mayoría tampoco hizo público un resumen de estas, simplemente anunciaron el veredicto.

6. La Jueza Ibáñez señala que dos Jueces de la Sala de Primera Instancia, los magistrados Henderson y Tarfusser, a mitad del juicio de la Fiscal contra el Sr. Gbagbo y el Sr. Blé Goudé, hicieron lugar a las 'mociones de absolución perentoria' (*no case to answer motions*), a pesar de la falta de base legal en el Estatuto para proceder de este modo, tal como señaló el propio Juez Tarfusser a lo largo de todo el procedimiento. En opinión de la Jueza Ibáñez, los dos magistrados no llegaron a un acuerdo para formar una mayoría específicamente con relación a la cuestión de la

base jurídica para la aplicación en esta Corte del procedimiento de 'mociones de absolución perentoria' (*no case to answer motions*), y adicionalmente en relación con otras cuestiones esenciales para arribar a una decisión por mayoría, a saber: la aplicabilidad del artículo 74 del Estatuto a la decisión, el estándar probatorio y el sistema de admisibilidad de las pruebas.

7. En cuanto al segundo cargo de apelación, la Jueza Ibáñez disiente del planteamiento y decisión de la mayoría de la Sala de Apelaciones. Aunque la Jueza Ibáñez considera que el procedimiento de mociones de absolución perentoria (*no case to answer motions*) no encuentra fundamento jurídico en el Estatuto de Roma, no obstante, opina que el correcto estándar probatorio, aplicado por los tribunales ad *hoc* y las jurisdicciones representativas del derecho anglosajón, aunque no uniforme, no es tan alto como 'más allá de toda duda razonable'. En su opinión, se requiere sólo de una evaluación *prima facie,* en la que una sala de juicio actuando de modo razonable y tomando las pruebas en su máximo valor probatorio, *podría* condenar al acusado. Ella considera que el Juez Henderson aplicó erróneamente un estándar de prueba más elevado, que no corresponde a este tipo de procedimiento perentorio.

8. Además, considera que los Jueces Henderson y Tarfusser incurrieron en errores de derecho y de procedimiento al no ponerse de acuerdo sobre el estándar de prueba aplicable. Asimismo, no informaron claramente a las partes y participantes sobre cuál era el estándar probatorio aplicable para mociones de absolución perentorias (*no case to answer motions*).

9. Si bien, a juicio de la Jueza Ibáñez, esto habría sido suficiente para conceder el segundo cargo de apelación de la Fiscalía, ella elabora respecto de otros argumentos presentados por la Fiscalía. En este sentido, la Jueza Ibáñez aborda además el enfoque erróneo del Juez Henderson sobre el análisis y la valoración de la prueba, principalmente en materia de corroboración, prueba inferencial y evaluación de pruebas de crímenes sexuales, en el contexto de crímenes de lesa la humanidad, falencias que, a su juicio, equivalen a serios errores de derecho. Al abordar los argumentos del segundo cargo de apelación de la Fiscalía, la Jueza Ibáñez se refiere, donde resulta pertinente, a los ejemplos presentados por la Fiscalía para ilustrar los varios errores de derecho motivo de este cargo de apelación.

10. En cuanto a la determinación adecuada, en los términos del artículo 83, apartado 2, del Estatuto de Roma, la Jueza Ibáñez considera que las violaciones del artículo 74 por parte de los Jueces Henderson y Tarfusser equivalen a errores de derecho y procedimiento que afectaron materialmente a la decisión absolutoria. Asimismo, considera que los errores del segundo cargo de apelación relativos al estándar probatorio aplicable a mociones de absolución perentoria (*no case to answer motions*), al hecho de que los Jueces Henderson y Tarfusser no llegaran a un acuerdo sobre el estándar aplicable, y a los enfoques probatorios erróneos del Juez Henderson resultaron en un procedimiento y la decisión poco fiables, y afectaron materialmente al resultado del caso. Por tales motivos, la Jueza Ibáñez también habría concedido el segundo cargo de apelación.

11. Habiendo concedido uno o ambos cargos de apelación, la Jueza Ibáñez habría considerado apropiado ordenar un nuevo juicio ante una nueva sala de primera instancia, con todas las garantías de ley para todas las partes.

Fechado el 31 de marzo de 2021

En La Haya, Países Bajos