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No: ***ICC-02/11-01/15***
Date: **9 March 2020**

THE APPEALS CHAMBER

Before: **Judge Chile Eboe-Osuji, Presiding**
Judge Howard Morrison
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa

SITUATION IN COTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR v. LAURENT GBAGBO AND CHARLES BLÉ GOUDÉ

Public

Public Redacted Version of "Defence Response to the 'Prosecution Document in Support of Appeal'", ICC-02/11-01/15-1315-Conf, 6 March 2020

Source: **Defence of Mr Charles Blé Goudé**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor Ms Fatou Bensouda Mr James Stewart Ms Helen Brady	**Counsel for the Defence of Mr Blé Goudé** Mr Geert-Jan Alexander Knoops Mr Claver N'Dry Ms Lauriane Vandeler Ms Antonina Dyk Ms Sara Pedroso **Counsel for the Defence of Mr Gbagbo** Mr Emmanuel Altit Ms Agathe Bahi Baroan
Legal Representatives of the Victims Ms Paolina Massidda	**Legal Representatives of the Applicants**
Unrepresented Victims	**Unrepresented Applicants (Participation/Reparation)**
The Office of Public Counsel for Victims	**The Office of Public Counsel for the Defence**
States' Representatives	**Amicus Curiae**

REGISTRY

Registrar Mr Peter Lewis	**Counsel Support Section**
Victims and Witnesses Unit	**Detention Section**
Victims Participation and Reparations Section	**Other**

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I. Introduction

1. Almost six years ago, on 27 March 2014, Charles Blé Goudé appeared for the first time in front of the International Criminal Court.[1] Standing alone in the back of the courtroom with only his strong sense of conviction as his source of comfort, Mr Blé Goudé uttered these prophetic words :

> *Madame la juge, contrairement à une certaine opinion qui estime, à tort ou à raison, qu'un voyage à la CPI est un voyage de non-retour, je pense qu'un citoyen qui est suspecté par la CPI peut venir ici, faire l'objet d'un procès, et s'il est innocent, peut repartir chez lui. Et je sais que je repartirai chez moi*.[2]

Five years later, tears streaming down his face, Mr Blé Goudé heard Trial Chamber I state what he knew all along, namely that the Prosecution had failed to produce sufficient evidence to sustain a conviction.[3] This verdict resulted in his full acquittal. Thus, the crucial issue that the Office of the Prosecutor ("Prosecution") should answer in its appeal is whether any reasonable trial chamber could find Mr Blé Goudé was guilty of any of the crimes charged. The Prosecution is silent on the matter despite having called 96 witnesses and submitted 4,610 items of documentary evidence,[4] thereby revealing that this mountain of "evidence" was just a simple hollow house of cards. Similarly, the Prosecution does not raise any alleged errors of fact, thereby conceding to the factual findings of the Trial Chamber regarding the absence of any link between Mr Blé Goudé and the crimes charged. The Prosecution is silent on the matter because there are no such errors, thereby revealing the futility of the Prosecution's appeal grounds, which do not affect the evidentiary outcome of the case.

2. The Prosecution's two grounds of appeal are founded on a single event, namely that the Trial Chamber decided in its discretion to render its oral decision to acquit Mr Blé Goudé before it had completed the full articulation of its reasons in writing. This event is anything but extraordinary as the Defence will demonstrate below. Indeed, the Prosecution's choice of appeal grounds shows that it believes there is an "endemic

[1] *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript of 27 March 2014, ICC-02/11-02-11-T-3-Red-FRA.
[2] *Ibid*, page 7, lines 25-28 to page 8, line 1.
[3] 15 January 2019 Oral Acquittal Decision, page 2, line 25 to page 3 lines 1-17.
[4] Judge Henderson's Reasons, paras. 32, 39.

right to a guilty verdict."[5] There is no such thing since "the endemic right lies in a just verdict".[6]In response to the first ground of appeal of the Prosecution, the Defence for Mr Charles Blé Goudé ("Defence") will demonstrate that it was not necessary for the 15 January 2019 Oral Acquittal Decision followed by the Written Reasons (together "Impugned Decision") to be entered under article 74 of the Statute in order to be lawful. Trial Chamber I (or "Trial Chamber") validly entered the Impugned Decision under article 66(2) of the Statute. Therefore, as a first direct consequence, the Impugned Decision is not a decision which triggers an automatic right of appeal under the Statute. As a result, the Prosecution's appeal should be rejected *in limine* as inadmissible, as it fails to fulfil the requirements of article 82(1)(d) of the Statute.

3. Another consequence of the Impugned Decision's valid legal basis being article 66(2) is that the Trial Chamber was not bound by the requirements of article 74(5) of the Statute in rendering the Impugned Decision. Nevertheless, the Trial Chamber complied with all of its criteria. On 9 January 2019, the Trial Chamber officially convened a hearing in order to formally and publicly deliver its decision in open court. At the hearing of 15 January 2019, held in public, the Trial Chamber rendered its oral verdict, along with a summary of its decision, while informing the parties, participants and the public that it would render its written reasons at a later stage.

4. The Written Reasons, which, based on Judge Henderson's Reasons, contained a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions, were published on 16 July 2019. As the Defence will develop, the Trial Chamber had made all its findings on the evidence and reached all conclusions when it rendered its oral verdict and summary on 15 January 2019. According to the Prosecution the factors showing that the Impugned Decision was not fully informed, such as alleged inconsistencies between the 15 January 2019 Oral Acquittal Decision and the Written Reasons, or the alleged shifting of the Trial Chamber judges' position, whether on the nature of the decision or the applicable standard of proof, are totally unfounded. In sum, the Impugned Decision was fully informed.

5. As a result, the Prosecution's argument that the Impugned Decision should be declared null and void for failing to comply with article 74(5) of the Statute does not

[5] *Bemba* Judge Eboe-Osuji Concurring Separate Opinion, page 1.
[6] *Ibid.*

find any basis. Also, the Prosecution's first ground of appeal should be dismissed *in limine* on the basis of its failure to substantiate to the requisite standard how the alleged errors materially affected the Impugned Decision. In particular, the Prosecution fails to convincingly demonstrate that in the absence of the alleged error, the judgment would have been "substantially different".

6. Similar to the first ground of appeal, the Prosecution's second ground of appeal must fail. The Prosecution's second ground of appeal, namely that the Trial Chamber acquitted Mr Blé Goudé without properly articulating and applying a clearly defined standard of proof and/or approach to assessing the sufficiency of evidence is premised on: (1) the procedural history of the case; (2) the Trial Chamber's approach to corroboration; and (3) certain factual examples. These alleged manifestations of error never materialized, as will be substantiated by the Defence in the present response ("Response"). Thus the Prosecution's arguments on alleged legal and procedural errors under the second ground are devoid of merit.

7. The Prosecution has also failed to show that the alleged errors under the second ground materially affected the decision to acquit Mr Blé Goudé. The Prosecution merely repeats its arguments regarding the legal and procedural errors instead of showing how those alleged errors show that the decision rendered would have substantially different had the errors not been made by the Trial Chamber.

8. Lastly, the Prosecution requested relief, namely a declaration of mistrial, finds no legal basis in the Statute, and thus should be rejected. Moreover, it would be unduly prejudicial to grant such a remedy in the present case since none of the circumstances warranting a mistrial are met. The Prosecution attempts to use this extraordinary relief as an opportunistic tool to avoid an acquittal, which is strictly forbidden, and thus should also be denied on this basis.

9. The Prosecution's glossary in Annex A to the Document in Support of Appeal is included herewith by reference.[7]

[7] ICC-02/11-01/15-1277-Conf-AnxA.

II. Page Limit and Classification

10. The Defence files the Response in accordance with the page limit set by the Appeals Chamber in its recent decision on Mr Gbagbo's request for an extension of page limit.[8] The Defence further files the Response confidentially pursuant to regulation 23*bis*(2) of the RoC, as it responds to a document that has been filed confidentially. The Defence will file a public redacted version of the Response shortly.

III. First ground of appeal: The Majority did not err as it was not bound by the requirements of article 74(5) of the Statute since the Impugned Decision was validly rendered under article 66(2), or in the alternative, the Majority fulfilled the requirements of article 74(5)

11. The legal basis for the Impugned Decision was clearly articulated in the 15 January 2019 Oral Acquittal Decision and in Judge Henderson's Reasons as being article 66(2). As will be shown below, the Prosecution's first ground of appeal is predicated on the wrongful assumption that the Impugned Decision should have been an article 74 decision,[9] despite the jurisprudence of this Court and the Trial Chamber's ruling to the contrary. From this assumption flows another flawed Prosecution argument, that in order to be lawful, the decision of acquittal must comply with the four requirements of article 74(5), namely that the decision must: (i) be made in writing; (ii) contain full and reasoned statements of findings; (iii) be delivered in open court, and; (iv) be one decision.[10]

12. According to the Prosecution, the Trial Chamber erred by failing to discharge its duty to fulfil these requirements, which in its view, renders the entire Impugned Decision "null and void".[11] Such a conclusion is wholly unsupported and should therefore be dismissed.

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[8] *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on Mr Laurent Gbagbo's request for an extension of page limit for his response to the Prosecutor's appeal brief, 2 March 2020, ICC-02/11-01/15-1313.
[9] Document in Support of Appeal, para. 34.
[10] Document in Support of Appeal, para. 24. The Prosecution refers to the article 74(5) requirements as "key features of justice", without, however, defining, explaining or providing any support for this apparent notion. This argument should therefore be rejected. *See* Document in Support of Appeal, Title III.C., paras 25, 88, 116; *See Prosecutor v. Callixte Mbarushimana*, Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled "Decision on the 'Defence Request for Interim Release'", 14 July 2011, ICC-01/04-01/10-283, para. 18; *Prosecutor v. Joseph Kony et al.*, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, 16 September 2009, ICC-02/04-01/05-408, para. 51.
[11] Document in Support of Appeal, para. 21.

13. On the contrary, the Defence will demonstrate that the Impugned Decision needed not be entered under article 74 of the Statute and in fact was not – as it was based on article 66(2) of the Statute. Therefore, as a preliminary matter, the Prosecution did not have an automatic right to appeal the Impugned Decision pursuant to article 81(1) and its appeal is thus inadmissible and should be rejected *in limine* for failure to seek leave to appeal under rule 155 of the Rules. Further, contrary to the Prosecution's submissions, the requirements of article 74(5) are not mandatory and do not bind the Trial Chamber. In the alternative, the Defence will show that the requirements of article 74(5) have nonetheless been fulfilled by the Trial Chamber, as (i) the Impugned Decision was made in writing, (ii) it provided a full and reasoned statement of the Trial Chamber's findings, (iii) a summary of this unique decision was delivered in open court and (iv) it was rendered as one decision.[12] It will further be shown that this decision was fully informed;[13] was internally consistent;[14] fully conforms to international human rights law;[15] was fully lawful;[16] and that the Trial Chamber did not abuse is discretion.[17] Lastly, the Defence will demonstrate that the Prosecution failed to show how the alleged errors "materially affected" the Impugned Decision, an essential requirement for any appeal before the Court.[18]

<u>III.A. The Prosecution's appeal under article 81 is inadmissible since the decision to acquit Mr Blé Goudé does not constitute a decision under article 74</u>

14. The statutory framework of the Court provides two distinct mechanisms for appealing a trial chamber's final decision. The first mechanism, which applies to decisions rendered pursuant to article 74 of the Statute, entails an automatic right of appeal and is governed by article 81(1) of the Statute.[19] The second mechanism, governed by

[12] *See infra* Response, paras 59-86.
[13] *See infra* Response, paras 87-106.
[14] *See infra* Response, paras 107-125.
[15] *See infra* Response, paras 126-136.
[16] *See infra* Response, paras 137-143.
[17] *See infra* Response, paras 144-157.
[18] *See infra* Response, paras 158-168.
[19] Article 81(1) provides: "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" (emphasis added).

article 82(1)(d) and rule 155 of the Rules, applies to "other decisions",[20] and requires prior leave or certification by the Trial Chamber.

15. The Prosecution's appeal, which was submitted directly to the present Appeals Chamber without seeking prior authorization from the Trial Chamber, was based on the erroneous assumption that any decision by a trial chamber to acquit must be rendered under article 74.[21] The specific reference made in article 81(1) to decisions "under article 74" excludes from its purview decisions rendered on the basis of other legal provisions of the Statute, including article 66(2). Given the nature of the Impugned Decision, rendered at the "halfway stage"[22] of the proceedings, and given that the Trial Chamber articulated the legal basis for its decision as article 66(2),[23] the Impugned Decision clearly falls in the category "other decisions" of article 82(1)(d), for which leave to appeal must be requested within five days of notification of the decision.[24] The Prosecution does not have an unqualified right to appeal the Impugned Decision, as it is not a decision which triggers an automatic right to appeal under the Statute.[25]

16. Thus, the Prosecution's appeal is inadmissible and should be rejected *in limine*.[26] This conclusion is supported by the following arguments: (i) the Trial Chamber clearly identified the legal basis for the Impugned Decision as article 66(2), which does not trigger an automatic right to appeal; (ii) decisions on NCTA motions, as distinct from decisions on acquittal resulting at the end of trial, are "other decisions" pursuant to article 82(1)(d) and do not trigger an automatic right to appeal; (iii) the principles of

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[20] Article 82(1)(d) provides: "Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: (…) (d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings".

[21] Document in Support of Appeal, para. 34.

[22] *Ruto and Sang* Decision No. 5, para. 23: "As an initial point, a distinction needs to be made between the determination made at the halfway stage of the trial, and the ultimate decision on the guilt of the accused to be made at the end of the case".

[23] Judge Henderson's Reasons, paras 15, 28.

[24] Rule 155(1) of the Rules. Request for leave to appeal shall specify the "legal and/or factual reasons in support thereof" as well as the "reasons warranting immediate resolution by the Appeals Chamber of the matter at issue". *See* regulation 65(1) and (2) of the RoC.

[25] Rule 155(1) of the Rules.

[26] "It is the Appeals Chamber that decides whether a particular judgment is appealable *per se*; but it is up to the Pre-Trial or Trial Chamber to decide whether the immediate resolution of an issue by the Appeals Chamber would advance the proceedings. Hence an appeal under Article 82(1)(d) will not be *admissible* unless leave to appeal has been granted by both the Pre-Trial or Trial Chamber and the Appeals Chamber." A. Cassese, P. Gaeta, J. R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court* (2002), page 1549.

fairness and equality of arms, as enshrined in articles 67(2) and 21(3) of the Statute require that parties have equal access to legal remedies.

17. With respect to the timing of the present admissibility challenge, the Defence submits that the moment to raise the challenge did not become ripe before the Prosecution submitted its "Prosecution Document in Support of Appeal"[27] ("Document in Support of Appeal"), which made concrete the Prosecution's appeal against the Impugned Decision.[28] Given that the Prosecution addressed the question of inadmissibility in its Document in Support of Appeal,[29] the Defence had no choice but to refrain from raising the issue separately from its Response, to avoid responding to the substance of the Prosecution's appeal prematurely and forfeiting its right to delve into this fundamental issue.

III.A.i. The Trial Chamber clearly identified the legal basis for the Impugned Decision as article 66(2) of the Statute and not article 74

18. First, the Trial Chamber clearly stated that the Impugned Decision was rendered on the basis of article 66(2) and not article 74 of the Statute:

> 12. Ordinarily, judgments on acquittals and convictions are rendered pursuant to article 74 and trigger the rights of the parties under article 81(1). However, *trial chambers have ordinarily used article 74 of the Statute as a legal basis for rendering judgments of first instance on the criminal responsibility of an accused and not decisions on "no case to answer" motions*.
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> 13. While the practical effect of a decision that there is no case to answer leads to an acquittal, it has not been settled in the Court's jurisprudence, whether or not such a decision ought to be rendered pursuant to article 74 of the Statute. Article 74 titled "requirements for the decision" does not expressly indicate whether "the decision" refers to one necessarily rendered only at the conclusion of the trial after having received all the evidence from the parties. Notwithstanding this, given the issue to be determined in this procedure, *article 74 does not appear to provide the appropriate basis to render such decisions on motions for 'no case to answer'*.
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> […]

[27] *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Prosecution Document in Support of Appeal, 15 October 2019, ICC-02/11-01/15-1277-Conf.
[28] *See* Document in Support of Appeal, paras 34-39.
[29] Document in Support of Appeal, paras 34-39.

> 15. *The 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. This burden never shifts.
>
> […]
>
> 17. Accordingly, 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.[30] [Emphasis added.]

19. The Trial Chamber's finding that the Impugned Decision had the legal *effect* of an article 74 decision, rather than being a "concession" on its part as to the legal basis for the Impugned Decision,[31] is an affirmation of the principle *ne bis in idem*.[32] The Trial Chamber's observation serves to dispel any doubt as to the finality of the Impugned Decision and to characterise the legal consequences of the decision on the rights of Messrs Blé Goudé and Gbagbo, namely, the termination of detention and trial proceedings against them as a result of their full acquittal.[33] Furthermore, a plain reading of the Trial Chamber's determination that the Impugned Decision has the equivalent legal effect of an article 74 decision further confirms that its legal basis is not article 74. The Prosecution itself recognized that the Impugned Decision "was not entered under article 74" and that the admissibility of its appeal is premised on the assumption that the Impugned Decision should be based on article 74.[34]

20. Contrary to the Prosecution's submission, there is no "clear contradiction" between the majority judges ("Majority Judges") as to the nature of the 15 January 2019 Oral

[30] Judge Henderson's Reasons, paras 12-13, 15, 17.
[31] Document in Support of Appeal, para. 37; Judge Henderson's Reasons, para. 17.
[32] In his Opinion, Judge Tarfusser fully concurred with Judge Henderson's conclusion, observing that the Impugned Decision "has an equivalent legal effect in that the accused are formally cleared of all charges and cannot be tried again for the same facts and circumstances", Judge Tarfusser's Opinion, para. 2; Judge Henderson's Reasons, para. 17. *See also* article 20 of the Statute, enshrining the principle *ne bis in idem*. According to this principle, a person should not be prosecuted more than once for the same criminal conduct, also known as "double jeopardy" or *res judicata*. *See* Schabas, W.A., *The International Criminal Court: A Commentary on the Rome Statute* (2016) ("Schabas 2016"), page 502.
[33] Judge Henderson's Reasons, paras 13, 17. *See also* Judge Tarfusser's Opinion, para. 2, where he concurred with Judge Henderson's approach. 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 31: "the immediate effect of an acquittal is the release of the accused".
[34] Document in Support of Appeal, paras 34, 117. The Prosecution observed that "the admissibility of the present appeal proceedings under article 81 depends on accepting the premise that the 15 January 2019 Oral Acquittal Decision should have been an article 74 one" as "direct appeals under article 81 are only permissible against "[a] decision under article 74". *Ibid.*

Acquittal Decision.[35] What the Prosecution conceives as "non-reconciled disagreement" in reality corresponds to nothing more than the expression of nuanced and robust judicial dialogue, which serves to contribute to the enrichment of the law.[36]

21. Given the clear articulation by the Trial Chamber, both in its 15 January 2019 Oral Acquittal Decision and in Judge Henderson's Reasons, that the legal basis for the Impugned Decision is article 66(2), the Prosecution's appeal should be rejected *in limine*.

III.A.ii. Decisions resulting from NCTA motions do not trigger an automatic right to appeal as they are distinct from decisions on acquittal issued at the end of trial

22. NCTA proceedings are of an interlocutory nature, occurring at the "halfway stage", which may result either in the continuation of trial or an acquittal.[37] The Court's jurisprudence places emphasis on the distinct nature of a NCTA decision as opposed to an "ultimate decision on the guilt of the accused to be made at the end of the case" under article 74.[38] This distinction is significant when considering whether the Impugned Decision triggers a direct or indirect (necessitating prior leave) right to appeal. The Prosecution is incorrect in stating that the effect or outcome of NCTA proceedings dictates whether the requirements of article 74 apply or not.[39]

23. *First*, the inadmissibility of the Prosecution's appeal finds support in the Court's jurisprudence, which places emphasis on the distinct nature of a decision on a NCTA motion. In the case of *Ruto and Sang*, in its unanimous decision allowing the NCTA procedure, Trial Chamber V(A) placed emphasis on the specificity of an acquittal

[35] Document in Support of Appeal, para. 77.
[36] Judge Tarfusser's observation that "trial proceedings can only end either in acquittal or conviction, as emerging from article 74, read together with article 81", consists of an incidental and concurring view to Judge's Henderson's Reasons and *obiter dictum*, *See* Schabas 2016, page 1133; Neuberger, cited by the Prosecution in its Document in Support of Appeal, who explains the valuable nature of concurring and dissenting judgments, and the negative impacts of compulsive unanimity, namely that they "can result in decisions which (i) are incomprehensible, (ii) have internally inconsistent reasoning, (iii) do not answer the issue that has been referred, or (iv) manage to enjoy all these three regrettable characteristics", paras 24-29; *See infra* Response, paras 108-125. *See also* Triffterer and Ambos, page 1973, Article 83(4): "It can be added that, as long as different views are not yet directly included in the main body of the judgments and decisions, thereby directly juxtaposing the available arguments, different views that judges hold should be expressed in separate or dissenting opinions in order to enrich the emerging jurisprudence of the Court and to contribute to the development of the law generally".
[37] *Ruto and Sang* Decision No. 5, para. 23.
[38] *Ruto and Sang* Decision No. 5, para. 23.
[39] Document in Support of Appeal, para. 35.

deriving from a NCTA procedure, made at the halfway stage of the trial, by contrast to an acquittal following the "ultimate decision on the guilt of the accused to be made at the end of the case".[40] In his Reasons, Judge Fremr held that the legal basis for his decision on the accused' NCTA motion were articles 64, 66, and 67 of the Statute, not article 74.[41] This emphasis on the distinct legal basis for a decision on a NCTA motion shows that the Trial Chamber was legally correct in basing its decision on article 66(2) of the Statute.[42]

24. *Second*, the fact that the 15 January 2019 Oral Acquittal Decision has the legal effect of an article 74 decision does not make it any less distinct, in nature, from an article 74 decision. Indeed, as held by the Appeals Chamber, the legal effect or outcome of a decision does not qualify or alter the character of the decision. Thus, the question whether a decision triggers a direct or indirect right to appeal does not depend on the

[40] *Ruto and Sang* Decision No. 5, para. 23.

[41] *Ruto and Sang* NCTA Decision (Reasons of Judge Fremr), para. 1. *See Ruto and Sang* Decision No. 5, paras 15-16, Judge Henderson's Reasons, para. 12.

[42] As stated by Judge Henderson, "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", while acknowledging that such a decision has an equivalent legal effect in that the accused is cleared of all charges, Judge Henderson's Reasons, para. 17; In his Opinion, Judge Tarfusser did not fully engage in this "debate", but rather acknowledged Judge Henderson's analysis and expressed his "agreement with and support for this equivalent outcome". Moreover, in his Opinion, Judge Tarfusser distinguished between an acquittal resulting at the end of a trial and an acquittal resulting from the NCTA stage, *see* Judge Tarfusser's Opinion, paras 2 and 14. The distinction between an acquittal stemming from NCTA proceedings and an acquittal resulting from ordinary trial proceedings has also been emphasized by the ICTY, which requires certification for appeals of NCTA motions under rule 98bis. In the case of *Kordić and Čerkez*, the Trial Chamber held: "Implicit in Rule 98 bis proceedings is the distinction between the determination made at the halfway stage of the trial, and the ultimate decision on the guilt of the accused to be made at the end of the case, on the basis of proof beyond a reasonable doubt", *Kordić and Čerkez* rule 98bis Decision, para. 11. *See also Prosecutor v. Šešelj*, Case No. ICTY-03-67, Transcript of Rule 98bis Judgment, 4 May 2011, page 16830, lines 13-22, where the Trial Chamber held: "It should be stressed that at the Rule 98 bis stage of the proceedings, according to the Rules, the Trial Chamber will first carry out a preliminary examination of the evidence adduced in the Prosecution case in order to ascertain whether the evidence is capable of sustaining a conviction. This is a preliminary examination which is different from the analysis carried out at the end of the trial proceedings". In *Krajišnik*, the Appeals Chamber held that it "would not entertain appeals of accused pursuant to Rule 98bis, unless those appeals have been certified by the Trial Chamber". It further held that "[t]he amendment to Rule 98bis was not intended to impinge upon the already established practice of the Tribunal that appeals against judgements denying acquittal require certification of a Trial Chamber. […] Under the Rules of the Tribunal the only time a party has a right of interlocutory appeal is under the specific grounds identified in Rule 72 or when another rule specifically so provides. All other interlocutory appeals have to go through the certification procedure set forth by Rule 73". *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-AR98bis.1., Decision on appeal of Rule 98 bis decision, 4 October 2005, paras 5-6.

outcome of a motion.[43] For instance, similarly to the case at hand, the Prosecution had argued, in *Mbarushimana*, that because the decision on the confirmation of charges was, in its legal effect, a "decision granting […] release" within the meaning of article 82(1)(b), it could appeal directly to the Appeals Chamber, without seeking prior leave, pursuant to rule 154 of the Rules.[44] The Appeals Chamber rejected this argument and concluded that the Prosecution was not entitled to an automatic right to appeal and that its appeal was therefore inadmissible. It held:

> 22. The jurisprudence of the Appeals Chamber addresses this question in the context of article 82 (1) (b) of the Statute by pointing out that the "implications" or "effects" of a decision do not change its "character" or "nature". And, more specifically with respect to the concrete question at issue, the Appeals Chamber ruled in the Decision in Lubanga OA 8 that "[t]he decision confirming the charges neither grants nor denies release. *The effect or implications of a decision confirming or denying the charges do not qualify or alter the character of the decision*". Accordingly, the Pre-Trial Chamber's order in the Confirmation Decision to release Mr Mbarushimana forms an integral part of the decision not to confirm the charges against him. *It has no impact on the nature of the Confirmation Decision, nor does it make it a decision granting release*.
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> 23. The Appeals Chamber concludes that the Confirmation Decision is not a "decision granting or denying release" and therefore cannot be appealed under article 82 (1) (b) of the Statute.[45] [Emphasis added.]

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[43] *Prosecutor v. Callixte Mbarushimana*, Reasons for Decision on the appeal of the Prosecutor of 19 December 2011 against the 'Decision on the confirmation of the charges' and, in the alternative, against the 'Decision on the Prosecution's Request for stay of order to release Callixte Mbarushimana' and on the victims' request for participation, 20 December 2011, ICC-01/04-01/10-483, paras 22-23; *Prosecutor v. Callixte Mbarushimana*, "Decision on the admissibility of the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 28 July 2011 entitled 'Decision on the "Second Defence request for interim release"', 21 September 2011, ICC-01/04-01/10-438 (OA 2), para. 17, relying on *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the admissibility of the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la confirmation des charges" of 29 January 2007", 13 June 2007, ICC-01/04-01/06-926 (OA 8), para. 15; *Situation in the Republic of Kenya*, Decision on the admissibility of the "Appeal of the government of Kenya against the 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence", 10 August 2011, ICC-01/09-78, para. 17, where the Appeals Chamber held similarly, that "[e]ven if the ultimate impact of a decision of a Pre-Trial or Trial Chamber were to affect the admissibility of cases, that fact would not, in and of itself, render the decision a 'decision with respect to […] admissibility' under article 82(1)(a)". *See also* the heading of Rule 154 of the Rules.

[44] *Prosecutor v. Callixte Mbarushimana*, Prosecution's Appeal against "Decision on the confirmation of charges" and Request for Suspensive Effect, In the alternative, Prosecution's Appeal against "Decision on the Prosecution′s Request for stay of order to release Callixte Mbarushimana", 19 December 2011, ICC-01/04-01/10-470, para. 7.

[45] *Ibid.*

25. Thus, in light of the above jurisprudence, the Prosecution's claim that the outcome and legal effect of the Impugned Decision would qualify the nature of the decision, must be rejected.[46]

26. *Third*, the Prosecution's reliance on an Appeals Chamber's decision in the *Ntaganda* case to argue that a decision to acquit in the context of NCTA proceedings must necessarily be entered under article 74 is inapposite, since it concerned the Trial Chamber's decision declining to entertain a defence NCTA motion. The decision is, moreover, silent as to the application of article 74.[47]

III.A.iii. The fundamental guarantees of a fair trial require the dismissal of the Prosecution's appeal in limine

27. The demands of fairness require the dismissal *in limine* of the Prosecution's appeal in accordance with article 67(1) of the Statute. The Prosecution effectively bypassed the legal requirement of seeking prior leave for appealing the Impugned Decision, amounting to a breach of fairness and equality of arms. Allowing the Prosecution to circumvent the requirement of seeking leave before the Trial Chamber would effectively give the Prosecution more automatic legal remedies than the Defence in the context of NCTA proceedings.[48]

28. The right to equality of arms "means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other

[46] *See* Document in Support of Appeal, paras 34-39.
[47] Document in Support of Appeal, para. 35. *Ntaganda* NCTA AD, para. 44, cited in the Document in Support of Appeal, footnote 84.
[48] For instance in England & Wales, where "prosecution's appellate rights have been noticeably expanded over the years", important safeguards have been put in place to limit those rights. With respect to appeals of no case to answer decisions, which may lead to an acquittal being overturned, constituting a "significant inroad into the double jeopardy principle", the most important constraints "concern the need for leave to appeal and the agreement of the prosecution that the defendant will be acquitted should leave to appeal be denied or should the appeal be abandoned before it is determined", D. Djukić, *The right to a fair appeal in international criminal law* (2017), Tilburg University, page 36, relying on Sections 57(4), 58(8)-(9) Criminal Justice Act 2003 (England & Wales).

unfairness to the defendant".[49] It is an "indivisible element of a fair trial".[50] Article 82, as with any other provision of the Statute, must be interpreted and applied in accordance with internationally recognized human rights, including the rights to equality of arms and to a fair trial, as provided for in article 21(3) of the Statute.[51] As held by the United Nations Human Rights Committee: "[t]here is no equality of arms if, for instance, only the prosecutor, but not the defendant, is allowed to appeal a certain decision".[52]

29. It is evident that, had the Trial Chamber rejected Mr Blé Goudé's NCTA Motion, the Defence would have been under the obligation to seek leave to appeal within five days, pursuant to rule 155. In other words, the Defence would not have been permitted to directly appeal the Impugned Decision. In the case at hand, therefore, the Prosecution should not be granted a right, which on the basis of the same decision,

[49] *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur', Separate opinion of Judge Georghios M. Pikis, 12 September 2006, ICC-01/04-01/06-424, para. 6: "Furthermore, equality of arms constitutes an indispensable requisite of an adversarial trial, an incident of a fair trial, designed to afford the same opportunities to the prosecution and the defence in confronting one another's case. The notion of a fair trial in all its manifestations is interwoven with that of equality of arms, warranting the assurance of equal opportunities to either side to present his/her case before the court. The opportunity afforded to either side must, no doubt, be adequate for the presentation of his/her case. Equality before the law and the administration of justice permeates the entire judicial process. It is a pillar of justice; a fundamental principle of the law, as acknowledged by the International Court of Justice" (footnotes omitted). *See also* Human Right Committee ("HRC"), General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, at 8. For instance, the exclusion of defendants from appellate hearings, whilst the prosecution is permitted to attend contravenes this principle, *See Dudko v. Australia*, Communication No. 1347/2005, HRC, 23 July 2007, at 7.3-7.4; Views, *Quliyev v. Azerbaijan*, Communication No. 1972/2010, HRC, 16 October 2014, at 9.3. Similar: Views, *Aliev v. Ukraine*, Communication No. 781/1997, HRC, 7 August 2003, at 7.3.

[50] *Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Defence Application for extension of page limit for the Defence's Response to the Prosecutor's Application for leave to appeal, 18 March 2010, ICC-02/05-02/09-254, page 4: "CONSIDERING that the principle of equality of arms between the parties demands that the Defence be entitled to file its response to the Prosecutor's Application for leave to appeal under the same conditions as the Prosecutor filed such Application"; *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur', Separate opinion of Judge Georghios M. Pikis, 12 September 2006, ICC-01/04-01/06-424-tFR, para. 6; *Situation in the Democratic Republic of the Congo*, Decision on the Prosecution's application for leave to appeal the Chamber's Decision of 17 January 2006 on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 31 March 2006, ICC-01/04-135-tEN, para. 36; *Prosecutor v. Thomas Lubanga Dyilo*, Decision on defence's request to obtain simultaneous French transcripts, 14 December 2007, ICC-01/04-01/06-1091, para. 18.

[51] *See e.g. DRC* Extraordinary Review Decision, para. 38.

[52] General Comment 32, para. 13, relying on Communication No. 1086/2002, *Weiss v. Austria*, para. 9.6. For another example of a violation of the principle of equality of arms, *see* Communication No. 223/1987, *Robinson v. Jamaica*, para. 10.4 (adjournment of hearing). The HCR further enunciated in its General Comment 32 on Article 14 of the International Covenant on Civil and Political Rights, para. 13, that: "[t]he right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant".

would not have been granted to the Defence, merely because the Trial Chamber decided to grant instead of reject the Defence's NCTA motion.[53]

30. In sum, a finding of admissibility of the Prosecution's appeal in the absence of prior authorization would amount to a circumvention of the Court's appellate framework to the detriment of the rights of the accused. Not only would it place the Defence in a fundamentally unfair position in contravention of article 67(1) of the Statute, but it would also constitute a breach of the appellate framework provided by the Statute.

31. In light of the distinct nature of a decision of acquittal stemming from NCTA proceedings, as opposed to a decision on acquittal deriving from the end of trial, and in view of the requirements of equality and fairness, the Trial Chamber clearly did not err by anchoring its decision on article 66(2) of the Statute and therefore the Prosecution's appeal should be rejected *in limine* for failure to seek leave to appeal in the required timeframe.

<u>III.B. There was no legal requirement to enter the Impugned Decision under article 74, thus the Trial Chamber was not bound by the requirements of article 74(5)</u>

32. There was no legal requirement for the Trial Chamber to render its decision on the basis of article 74; no such limitation is to be found in the statutory framework of the Court. The Prosecution's argument that the "Statute and the Rules contain no other provision under which a Trial Chamber may acquit an accused"[54] is unconvincing, especially given that the Prosecution itself cites at least one example disproving this observation, with respect to decisions on admissions of guilt under articles 64(8)(a) and 65 of the Statute, which are governed by the formal requirements of rule 139, and not article 74.[55] In such circumstances, as noted by the Prosecution, the delivery of the judgment has less formal requirements as decisions rendered on the basis of article 74 and merely requires that the Trial Chamber "give reasons" for the decision "which shall be placed on the record".[56]

[53] As submitted above, whether a party has an equal opportunity to appeal a decision, in this case, through seeking prior authorization, cannot be based on the result of the outcome of proceedings before the Court, *See supra* Response, paras 25-26.
[54] Document in Support of Appeal, para. 34.
[55] Document in Support of Appeal, para. 34, footnote 79.
[56] Document in Support of Appeal, para. 22, footnote 53. *See Prosecutor v. Ahmad Al Faqi Al Mahdi*, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15-171, page 4; rule 139(2) of the Rules.

33. The Prosecution cites another example confirming that the statutory framework and jurisprudence of the Court do not limit the legal basis for final judgments to article 74. As noted by the Prosecution, the Trial Chamber in *Ruto and Sang* did not base its NCTA Decision on article 74, nor did the Trial Chamber fulfill the requirements of article 74(5).[57] The Trial Chamber's partial non observance of the criteria of article 74(5) in that case did not, however, prevent the legal effects of that decision to be "lawfully triggered".[58] The Prosecution attempts to distinguish the *Ruto and Sang* precedent with the instant case by creating an artificial distinction between the end result in that case, namely, the "vacation" of the charges against the accused, based on the Prosecution's failure to satisfy the burden of proof "in relation to several core constitutive elements of the crimes as charged".[59] The decision on the NCTA motion in *Ruto and Sang* and the Impugned Decision offer, however, many more similarities than differences: they are both final decisions on NCTA motions launched by the defence at the "halfway stage".[60] In both cases, the trial chambers relied on their judicial discretion to rule on the motions.

34. Moreover, the Trial Chamber's reliance on article 81(3)(c) of the Statute in the 15 January 2019 Oral Acquittal Decision, in the context of Mr Blé Goudé's immediate release following acquittal, does not support the conclusion that the Impugned Decision should be based on article 74, nor does it pose challenge to the Defence's argument on the inadmissibility of the present appeal.[61] Unlike subsection 81(1) of the Statute, which specifically applies to "[a] decision under article 74" and subsection 81(2), which specifically applies to an appeal of a sentence (pursuant to article 76), article 81(3) addresses matters of detention and release resulting from a conviction or acquittal, generally. Unlike subsection 81(1), no reference is made to article 74 in subsection 81(3), whose application is not strictly limited to acquittals or convictions based on article 74. In light of the disjunctive nature of articles 81(1)(a) and 81(3)(c), the Prosecution's argument that the admissibility of its appeal challenging the Trial Chamber's decision on the immediate release of Mr Blé Goudé pursuant to article 81(3)(c)(ii) was "predicated on the assumption that the underlying decision should be

[57] Document in Support of Appeal, para. 35, footnote 83.
[58] Document in Support of Appeal, para. 22, footnote 53.
[59] 15 January 2019 Oral Acquittal Decision, page 3, lines 2-4.
[60] This analogy was made by the Trial Chamber in the Impugned Decision. *See* Judge Henderson's Reasons, footnote 14.
[61] Document in Support of Appeal, para. 34; *See supra* Response, paras 15-32.

an article 74 one", cannot be sustained.[62] Article 81(3)(c) is not limited to the release of a person following a judgment pursuant to article 74, when read in conjunction with the *chapeau* title of article 81, which applies to an "[a]ppeal against decision of acquittal or conviction or against a sentence", including, by extension, an acquittal on the basis of a no case to answer motion.

35. Similarly, the Prosecution's submission that the Trial Chamber failed to enter a formal decision based on its assumption that all decisions resulting in an acquittal must necessarily follow the requirements of article 74(5), regardless of the actual legal basis for that decision, is unsupported by the law and cogent argumentation .[63]

36. A plain language reading of the Statute further supports the argument that article 74(5) does not apply to every decision of conviction or acquittal. Although article 74 makes no specific reference to acquittals or conviction, the trial chambers' decisions referred to in article 74(2) are those that are "based on [their] evaluation of the evidence and the entire proceedings", implying that trial proceedings have not ended at the "halfway stage" by way of NCTA proceedings. As such, article 74, read plainly, further suggests that its requirements are limited to decisions rendered on the guilt or innocence of an accused resulting from the end of trial proceedings, as distinct from decisions following NCTA motions.

37. In light of the above, the Prosecution's claim that article 74(5) mandatorily applied to the Impugned Decision is unfounded. Nevertheless, as further detailed below, the Trial Chamber not only fulfilled the criteria of article 74(5), but also complied with rule 144 of the Rules[64] by officially convening a public hearing and by formally delivering its decision through an oral verdict and summary, as acknowledged by the Prosecution itself during the hearing, with full written reasons that followed.[65]

[62] Document in Support of Appeal, para. 34.
[63] Document in Support of Appeal, para. 38.
[64] 15 January 2019 Oral Acquittal Decision, page 3, lines 20-23 and page 4, lines. 3-9. *See* Rules 144(1) and 144(2)(b) of the Rules. The Trial Chamber (i) pronounced its decision in public, and (ii) provided "copies to the accused as soon as possible in a language that he or she fully understands or speaks". The Defence notes that rule 144, as with article 74, does not provide a time limit for the delivery of the full written reasons, only that this be done "as soon as possible", therefore leaving it the timing of the written reasons to the judges' discretion. Rule 144 of the Rules governing the criteria applicable to the delivery of all decisions on the criminal responsibility of the accused. *See infra* Response, paras 39-136.
[65] *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé,* Scheduling order for the decision on the Defence requests for acquittal and for provisional release of the accused, 9 January 2019, ICC-02/11-01/15-1233; 15

III.C. The Trial Chamber complied with the requirements of article 74(5) despite not being obligated to do so

III.C.1. The Majority provided a written decision

38. The Prosecution alleges that the Majority violated article 74(5) of the Statute by failing to provide a written decision of acquittal.[66]

39. The Defence does not contest the language of article 74(5) which requires a written article 74 decision. Two authors emphasize that "[t]he *complete* decision has to be handed down in writing" (emphasis added).[67] They further add, which many commentators agree with, that: "[w]ithout a written decision, the Prosecutor and the defence as well as the Appeals Chamber would be unable to discern whether the decision was materially affected by error of fact or law or procedural error […]."[68]

40. Although, as developed above, these comments do not apply to NCTA decisions, Trial Chamber I's acquittal decision *was* issued in writing. On 16 July 2019, the Trial Chamber published its decision in writing, including a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions, in line, assuming it would need to be, with article 74(5).

41. The Trial Chamber guaranteed the aforementioned right to appeal, which is at the root of the requirement to have a decision in writing, by having the time limit for the

January 2019 Oral Acquittal Decision, page 1, line 23 to page 5, line 12, page 5, lines 10-12. The Trial Chamber articulated the legal basis for its decision as article 66(2) of the Statute: 15 January 2019 Oral Acquittal Decision, page 4, lines 14-18, where the Trial Chamber decided: "that the Prosecutor has failed to satisfy the burden of proof to the requisite standard as foreseen in Article 66 of the Rome Statute. Grants the Defence motions for acquittal from all charges against Mr Laurent Gbagbo and Mr Charles Blé Goudé"; *See also* Judge Henderson' Reasons, paras 12-15. The legal basis of article 66(2) as underlying the Trial Chamber's decision was also confirmed in Judge Tarfusser's Opinion, para. 2 and is also reinforced by the 16 January 2019 Decision, page 4, lines 20-23, rejecting Judge Herrera Carbuccia's view that the Chamber "had the duty to consider the relevance, probative value and the potential prejudice of each item of evidence for the purpose of this decision" and that such a duty only arose "when giving the Chamber's decision pursuant to article 74".

[66] Document in Support of Appeal, para. 40.

[67] O. Triffterer, and A. Kiss, "Article 74: Requirements for the decision" in Triffterer and Ambos, page 1850, para. 69.

[68] O. Triffterer, and A. Kiss, "Article 74: Requirements for the decision" in Triffterer and Ambos, page 1850, para. 69. *See also* C. J. M., Safferling, L. Büngener, International Criminal Procedure, Oxford University Press, 2012, page 524: "the judgment must be in writing and reasoned because there must exist the possibility for appeal". *See also* Boas et al., page 378, stating that one of the objectives of the written decision is "that the parties and the Appeals Chamber may better follow the trial chamber's characterisation of the parties' arguments, evaluation of the evidence, reasoning, and legal conclusions, and better discern any error". *See* finally Klamberg, page 565, footnote 618.

appeal start running as from the delivery of this written decision.[69] Also, the safeguards of a verdict that is explained rather than merely stated or of the participation of a wider audience have been maintained.[70] Finally, the key bridge described by the Prosecution between the Court and the communities has been preserved.[71]

42. The Prosecution, while admitting that the Written Reasons equated to a written decision, implied that it was not a valid one under article 74(5), as the Written Reasons were not the trigger for the acquittals of Messrs Gbagbo and Blé Goudé, which had been in effect since 15 January 2019.[72]

43. Article 74(5) attributes trial chambers the choice of reading only a summary of the decision in open court. According to Sergey Vasiliev, while the summary "is an unofficial document that […] does not enable the parties to prepare a notice of appeal",[73] its pronouncement before the full text of the decision can be made public "*may be the way to give a notice of the verdict to the parties and remove the uncertainty about the outcome as early as possible (which is particularly important in case of an acquittal)*" (emphasis added).[74]

44. In the ICTR *Bagosora* case, where the summary of a decision had been issued before the end of the year 2008 while the related written reasons had followed in February of the following year, one of the defendants argued that one of the judges had failed to fulfil his judicial duties prior to the expiration of his mandate, which had ended on 31 December 2008. The Appeals Chamber rejected this argument finding that "[w]hile the oral summary of the Trial Chamber's findings was not authoritative, *the verdicts and sentences pronounced on 18 December 2008 were*" (emphasis added).[75]

45. Similarly, in the present case, the verdict pronounced on 15 January 2019 was authoritative and made the acquittal of Mr Blé Goudé effective as from that point on. Any other outcome would be against the right of the accused to a fair and expeditious

[69] 15 January 2019 Oral Acquittal Decision, page 5, lines 2-3. *See also* Triffterer, O. and Kiss, A., "Article 74: Requirements for the decision" in Triffterer and Ambos, page 1850, para. 65: "[t]he 'reasoned statement' is the basis for the parties' exercise of the right to appeal and for the Appeals Chambers' review."
[70] Document in Support of Appeal, paras 26, 28.
[71] Document in Support of Appeal, para. 28.
[72] Document in Support of Appeal, para. 41.
[73] Sergey Vasiliev, "Article 74, Requirements for the decision", in Klamberg, page 568, footnote 620.
[74] *Ibid.*
[75] *Bagosora et al. AJ,* para. 25.

trial, the whole objective of pronouncing the verdict orally before the publication of the written judgment being precisely to give effect to the acquittal and trigger the immediate release of Mr Blé Goudé.[76]

46. In the ICTR *Bagosora et al.* and *Nsengimana* cases, it was the oral summary, as opposed to the written reasons, which was the trigger for the acquittal.[77] Yet, in both cases, the right to appeal started running as from the date the written judgment was issued.[78] Thus, as these two ICTR judgments illustrate, the fact that acquittals are made effective before any written judgment is published is irrelevant to showing that the requirement that the decision shall be in writing was complied with. This is also compatible, as developed below, with article 74(5) of the Statute which does not require the oral summary and the related written judgment to be issued simultaneously.

47. Contrary to the Prosecution's submissions,[79] the Written Reasons can in no event be qualified as an attempt to "retroactively cure" the alleged Majority's violation of article 74(5) but *were* the actual authoritative written version of the decision.

48. In light of the above, the allegation that the Trial Chamber did not provide for a decision in writing in violation of article 74(5) should be rejected.

III.C.2. The Majority did provide a full and reasoned statement of the Chamber's finding on the evidence and conclusions and did deliver a summary of its decision in open court

[76] 15 January 2019 Oral Acquittal Decision, pages 3-4.
[77] *See The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Oral Summary, 18 December 2008, para. 48, where one of the accused, Gratien Kabiligi, was released immediately after the delivery of the oral summary of the judgment acquitting him. *See also* ICTR, *Prosecutor v. Hormisdas Nsengimana*, ICTR-01-69-T, Transcript of 17 November 2009, page 6, line 27 to page 7, line 1, where the trial chamber delivered the oral summary of its judgment on 17 November 2009, in which it acquitted Mr Nsengimana of all counts and ordered his immediate release. The written version of the judgment was filed later, on 18 January 2010, after the completion of the editorial process. *See* ICTR, *Prosecutor v. Hormisdas Nsengimana*, ICTR-01-69-T, Judgement, 17 November 2009, para. 866.
[78] ICTR, *Prosecutor v. Bagosora et al.*, ICTR-98-41C-A, Decision on Anatole Nsengiyumva's motion for extension of time for filing notice of appeal, 15 January 2009, page 2. ICTR, *Prosecutor v. Hormisdas Nsengimana*, ICTR-01-69-A, Decision on Prosecution's motion for extension of time to file a notice of appeal, 11 December 2009, page 3.
[79] Document in Support of Appeal, para. 41.

49. While the 15 January 2019 Oral Acquittal Decision might not have satisfied the requirement of article 74(5) of a full reasoned decision, the 16 July 2019 Reasons did. As announced by the Trial Chamber itself, "[t]he Chamber will provide its *fully reasoned decision* as soon as possible" (emphasis added).[80] A full reasoning was the very purpose of the 16 July 2019 Reasons and such a purpose was fully achieved. The question whether the Trial Chamber had the discretion to delay the reasons, which the Defence submits it did, will be specifically dealt with in the following section. However, as far as the requirement of a fully reasoned decision is concerned, the satisfaction of this requirement is not questionable in light of Judge Henderson's Reasons, on which the Impugned Decision is based. The Trial Chamber did explain with sufficient clarity "how it assessed the evidence and which facts it found relevant in coming to its conclusions".[81] It is noteworthy that the Prosecution completely ignored the 16 July 2019 Reasons in its argumentation that the Impugned Decision was not fully informed.

50. The right to a reasoned opinion is recognised in international human rights jurisprudence as a component of the right of the accused to have his or her conviction reviewed and, more generally, the right to a fair trial. In the case of *Hadjianastassiou v. Greece*, indirectly cited by the Prosecution,[82] the ECHR ruled that courts are required to "indicate with sufficient clarity the grounds on which they based their decision" and that "[i]t is this, inter alia, which makes it possible for the accused to exercise usefully the rights of appeal available to him".[83] This right has been fully guaranteed by Trial Chamber I in deciding that "[t]he deadline for appealing the present decision will start running at the moment the parties are notified of the full reasons for it".[84] So have been all the other alleged rights, as enumerated by the Prosecution, resulting from such a requirement.[85]

51. The Prosecution's assertion that a summary of the reasons must comply with the same principles, *i.e.* that it must include "the key steps of a chamber's reasoning on how

[80] 15 January 2019 Oral Acquittal Decision, page 3, line 18.
[81] Document in Support of Appeal, para. 43.
[82] Document in Support of Appeal, footnote 101, referring to *Lubanga* First Redactions AD, para. 20, referring to *Hadjianastassiou v. Greece*.
[83] *Hadjianastassiou v. Greece*, para. 33.
[84] 15 January 2019 Oral Acquittal Decision, page 4, lines 10-11.
[85] Document in Support of Appeal, para. 26.

and why it reached its conclusions", is totally unsubstantiated.[86] Article 74(5) of the Statute is completely silent as to the degree of detail a decision's summary must comply with. In the *Ntaganda* case, Judge Fremr read out a summary of the judgment, specifying that it served "to convey those findings made in the judgment to be considered most relevant to the accused and the public", thereby confirming the judges' discretion to consider what is most relevant.[87]

52. Furthermore, in the 15 January 2019 Oral Acquittal Decision, contrary to the Prosecution's submissions, the Trial Chamber did not merely limit itself to state the ultimate conclusion and the verdict[88] of its decision but did identify the core constitutive elements of the crimes as charged for which, in the Majority's view, the Prosecution had not satisfied the burden of proof.[89]

53. While it may not be considered as a fully reasoned statement, this qualifies as a summary of the decision. This is also the interpretation of Judge Herrera Carbuccia in her 15 January 2019 Dissenting Opinion wherein the dissenting judge found that "[t]wo fundamental issues arise[d] of the majority's choice to issue an oral acquittal *with a summary of their findings*, stating that reasons will follow as soon as possible [….]" (emphasis added).[90] The Prosecution itself qualifies the 15 January 2019 Oral Acquittal Decision as a summary.[91]

54. An analysis of the different summaries made by the *ad hoc* tribunals show that their number of pages was not proportionally higher than the Trial Chamber's summary, considering in particular the number of accused (sometimes higher than in the present

[86] Document in Support of Appeal, para. 43.
[87] *Prosecutor v. Bosco Ntaganda*, Transcript of 9 July 2019, ICC-01/04-02/06-T-265-ENG ET, page 3, lines 19-20.
[88] Document in Support of Appeal, para. 43.
[89] 15 January 2019 Oral Acquittal Decision, page 2, line 25 to page 3, line 17.
[90] 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, paras 12, 26, 47. *See also* 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 2: "[…] the Majority of the Chamber has chosen to give *their reasons* orally" (emphasis added).
[91] 15 January 2019 Oral Acquittal Decision, page 5, lines 10-12.

case) or the different legal and factual findings made for each of them.[92] In the present case, both accused were acquitted for the same reasons, thereby reducing even further the quantity of text needed to summarise the decision. As far as ICC cases are concerned, the summary of the decision of conviction in the *Lubanga* case was as short as twelve pages.[93] While other summaries might have been longer, this shows that the choice of publishing a summary, as well as the length and the content thereof, may vary upon the discretion of the trial chambers. The Prosecution's argument that Trial Chamber I would not have complied with any alleged requirements related to summaries is totally unfounded as there are none.[94]

55. Furthermore, the Prosecution fails to substantiate why the Trial Chamber incorrectly invoked rule 144 of the Rules.[95] There is not such an artificial distinction between the purely procedural aspects of rule 144 on the one hand and the substantive requirements for a decision as set out in article 74 on the other hand.[96] According to Dr. Iryna Marchuk and B. Aloka Wanigasuriya, rule 144(1) "has the effect of *extending* the Article 74 requirement […] to the sentencing and reparations stages *as well as adding an extra requirement* of pronouncing these decisions 'in public and whenever possible, in the presence of the accused'" (emphasis added).[97] By extension, this requirement can also be said to apply to all decisions on the criminal

[92] For instance, in the ICTR *Bagosora and al.* case, involving four accused, three of which were convicted to life sentence and one of which acquitted, the summary of the decision was ten pages long, with not more than a page dedicated to the acquitted person. *Bagosora et al.* 18 December 2008 Transcript, page 9, lines 1-36. In the ICTR *Muhimana* case, involving one accused sentenced to life, the summary was fourteen pages long. ICTR, *Prosecutor v. Muhimana*, ICTR-95-1B-T, Judgement, Redacted Transcript, 28 April 2005. In the ICTY *Boskoski and Tarculovski* case, involving two accused, one of which was acquitted, only 30 lines were dedicated to the acquitted person, among which six only to the acquittal itself. *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82, Judgment, Redacted Transcript, 10 July 2008, page 11226, lines 1-6.
[93] ICC, *Prosecutor v. Thomas Lubanga Diylo*, Trial Chamber I, Summary of the "Judgment pursuant to Article 74 of the Statute", 14 March 2012, ICC-01/04-01/06-2843.
[94] The Trial Chamber's alleged acknowledgement in its 16 January 2019 Decision of the novelty of its approach as regards to the rendering of its decision with reasons to follow is unsubstantiated. *See* Document in Support of Appeal, footnote 102, referring to 16 January 2019 Decision, page 5, lines 20-23, where the Chamber, addressing the question of the existence of exceptional circumstances for maintaining the acquitted in detention pending appeal found itself "unpersuaded that either the rendering of the decision with detailed reasons to follow or the novelty of the Majority's approach before this Court is per se an exceptional circumstance". The Defence submits, on the contrary, that the use of the conjunction "either/or" strongly suggests that the novelty the judges are referring to is not related to the decision to delay the reasons of the decision.
[95] Document in Support of Appeal, para. 44.
[96] Document in Support of Appeal, para. 44. Contrary to the Prosecution's submissions, the obligation for trial chambers to pronounce certain decisions "in public and, wherever possible, in the presence of the accused" under rule 144(1) qualifies as substantive requirements.
[97] I. Marchuk and A. Wanigasuriya, "Rule 144: Delivery of the decisions of the Trial Chamber", in M. Klamberg (ed.), *Commentary on the Law of the International Criminal Court: Rules of Procedure and Evidence*, Berlin/Brussels: Case Matrix Network [https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rules-of-procedure-and-evidence/commentary-rpe-ch-6/].

responsibility of the accused, including in the context of NCTA proceedings. Accordingly, the Prosecution's interpretation of the heading of rule 144, referring to the delivery of the decision, as meaning that it relates to pure procedural aspects, is erroneous. The Trial Chamber did fully comply with the *substantive* requirements of rule 144 in that on 15 January 2019, it pronounced its decision of acquittal in public,[98] in the presence of the accused, and delivered copies of this decision, as well as a full reasoned statement, as soon as possible after that decision was pronounced.

56. In light of the above, the Prosecution fails to substantiate why the Trial Chamber's interpretation of rule 144(2) contradicts the meaning and rationale of article 74(5).[99] First, as developed above, the Defence demonstrated that article 74 did not apply to the Impugned Decision. Second, assuming it did, the Trial Chamber's interpretation of rule 144(2) does not contradict the meaning of article 74(5), as rule 144 simply adds extra requirements.

57. Thus, the Prosecution's allegation that the Trial Chamber violated the requirements of article 74(5) to provide a full and reasoned statement and to deliver its decision or a summary thereof in open court should be rejected.

III.C.3. The Majority entered "one decision"

58. The Prosecution's theory that the Majority would have failed to enter one decision, first by separating the verdict from the reasons, and second, by failing to provide full

[98] While Judge Henderson's Reasons on which the Impugned Decision is based were not read out in public, the practice of trial chambers, when ruling on any of the issues as set out in rule 144(1) has always been to read out only a summary of the most relevant findings to the accused and the public, whether it is, for instance, a decision on criminal responsibility of the accused (*see Prosecutor v. Bosco Ntaganda*, Transcript of 8 July 2019, ICC-01/04-02/06-T-265-ENG ET WT, page 3), sentencing (*see Prosecutor v. Bosco Ntaganda*, Transcript of 7 November 2019, ICC-01/04-02/06-T-269-ENG ET WT, page 3; *Prosecutor v. Jean-Pierre Bemba Gombo*, Transcript of 21 June 2016, ICC-01/05-01/08-T-371-ENG ET WT, page 2) or reparation (*see Prosecutor v. Germain Katanga*, Transcript of 24 March 2017, ICC-01/04-01/07-T-348-ENG ET WT, page 5). Similarly, while article 83(4) of the Statute provides that "[t]he judgement of the Appeals Chamber […] shall be delivered in open court", with no mention of the possibility for the Appeals Chamber to issue a summary of it instead, it has been the practice of this Chamber to only read a summary of the judgement in open court. *See e.g. Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, Transcript of 8 June 2018, ICC-01/05-01/08-T-375-ENG ET WT, page 5; *Prosecutor v. Saif Al-Islam Gaddafi*, Appeals Chamber, Transcript of 20 May 2014, ICC-01/11-01/11-T-5-ENG ET WT, page 3. In any event, the obligation to pronounce judgments "in public" has been interpreted widely by the Appeals Chamber, which considered that this requirement could adequately be fulfilled by "publishing the Appeals Chamber's Judgment […] on the internet, by notifying the participants as usual in accordance with regulations 31 and 32 of the Regulations of the Court and by notifying the appellant in this appeal, Mr. Jean-Pierre Bemba Gombo, by way of personal service […]". *See Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, Order concerning notification by way of personal service, 16 December 2008, ICC-01/05-01/08-324, page 3.
[99] Document in Support of Appeal, para. 44.

and proper reasons for its decision must be considered unfounded for the reasons developed below, and therefore rejected.[100]

III.C.3.i. The Majority delivered its verdict and full reasons as "one decision"

59. The Prosecution argues that by separating the verdict from the reasons, the Majority violated the requirement that a trial chamber must issue one decision in that according to the Prosecution, for a decision to be legally valid, it must include in the same temporal space both the verdict and the full written reasons which led to it.[101]

60. The Prosecution does not cite a single case or article in support of its argument. It merely reasons by 'indications'.[102] The area of focus in Mistry's paper, which the Prosecution erroneously cites in support of its allegation,[103] was on the form of the *Ruto and Sang* decision, which consisted of a statement of the Chamber (i) outlining the Majority conclusion and (ii) relying on the respective separate opinions of *both* majority judges. Mistry concluded that since these two separate opinions offered different bases for their support of the Chamber's conclusion, "there [did] not appear to be a single decision of the Chamber in accordance with the requirements of the Statute".[104] First, this paper does not support the Prosecution's allegation that the 'one decision' requirement means that the reasons of a decision cannot follow the verdict. Second, assuming this paper would support the other Prosecution's 'one decision' argument that the Trial Chamber's decision did not contain the view of the Majority as required by article 74(5), the present case must be distinguished from *Ruto and Sang* in this regard. In the present case, the Majority's decision only includes and refers to the opinion of one of the judges, namely Judge Henderson, which, as will be developed in the following section, makes the decision of the Trial Chamber clearly unquestionably identifiable and singled out.

61. According to M. Klamberg, the issue as to the unity of the decision is linked to the accommodation of dissenting views. Therefore, the 'one decision' requirement cannot

[100] Document in Support of Appeal, paras 45 and seq.
[101] Document in Support of Appeal, paras 29, 45, 48.
[102] Document in Support of Appeal, paras 49-50.
[103] Document in Support of Appeal, para. 29, referring to Mistry, page 713.
[104] *See* Mistry, para. 714.

be interpreted as precluding the chambers from providing reasons to follow.[105] The 15 January 2019 Oral Acquittal Decision was not 'full" at the time it was issued, according to the judges, in that it included only the verdict and a summary of the decision, with the reasons in writing yet to follow. This does not suggest that the unity of the decision has been breached. There is one and only one decision, the full written version of which, as elaborated below, has been issued on 16 July 2019.

62. The Prosecution alleges that the unity of the Impugned Decision was also breached because of the temporal gap between the verdict and the reasons and the absence of reference to a time limit.[106] In *R. v. Teskey*, the Canadian Supreme Court found that the delay in rendering reasons, in and of itself, does not give rise to the apprehension that the "necessary link" does not exist between the verdict and the reasons.[107]

63. In assessing the reasonableness of the time passed, the length of the drafting phase of a judgment is relevant, not between the verdict and the reasons in the context of the question of the unity of the decision, but between the last submissions of the parties at the close of the evidence and the delivery of the judgment, in the context of the right of the accused to be tried without undue delay and his related right, in the interest of justice, to be informed of the outcome of his case as soon as practically possible.[108] In the ICTY *Bizimungu et al.* case, Judge Robinson, dissenting, found that taking two years and ten months as from the last submissions of the parties to draft a final judgment was an inordinately long time period and was "sufficient to constitute a

[105] *See* Klamberg, page 566, footnote 619: "When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. Turning to the issue of the number of decisions and the accommodation of dissenting views, Article 74(5) – which should be read jointly with paragraph 3 providing for the judicial duty to attempt to achieve unanimity – states that '[t]he Trial Chamber shall issue one decision' and '[w]hen there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority.'" And also: "Moreover, while Article 83(4) does not feature the requirement of 'one decision' in respect of the Appeals Chamber's judgment, Article 74(5) does envisage the issuance of a single decision containing the views of both the majority and the minority."
[106] Document in Support of Appeal, para. 47.
[107] *R. v. Teskey*, para. 19. This principle stands in contrast to Judge Herrera Carbuccia's reasoning, see 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 36.
[108] N. Jorgensen, A. Zahar, "Deliberation, Dissent, Judgment", in G., Sluiter, H., Friman, S., Linton, S., Vasiliev, S., Zappalà (eds), *International Criminal Procedure : Principles and Rules*, Oxford University Press, 2013, page 1197: "The formal rules of the various tribunals are all informed by the right of the accused to be tried without undue delay, a right which is not limited to the period between trial and verdict but covers the entire proceedings. Finding the right balance between expeditiousness and a thorough inquiry into the truth set out in written reasons is a challenge faced by all courts, domestic as well as international".

violation of the Accused's right to trial without undue delay".[109] The written decision in the present case has been rendered only eight (8) months after the last submissions of the parties and the acquitted persons have been – conditionally – released only two (2) months after the last submissions.[110] Therefore, the right of the accused and the interest of justice have been preserved.

64. The Prosecution fails to substantiate why the fact that the Trial Chamber did not provide any date by which it would render its reasons was an additional sign of a breach of the principle of unity of a decision.[111] Due to the complexity of the cases in international criminal law, the drafters of the Statute found appropriate to give the judges some flexibility and appreciate the time needed to issue their decision with regard to the particular circumstances of each case.[112] This is why article 74(5) and rule 142 do not impose a specific time limit for the judges to issue their judgment, only, with regards to rule 142, that is should be pronounced "within a reasonable period of time" after deliberations.[113]

65. Unlike rule 168(B) of the STL's Rules of Procedure and Evidence, article 74(5) does not specify whether the reasons should accompany the decision or could also follow it. Therefore, the choice of delaying the articulation in writing of the reasons of a judgment is not expressly banned and may be left to trial chambers' discretion. Therefore, the Prosecution's textual interpretation of article 74(5), by analogy with rule 168(B) of the STL Statute, is rather unconvincing.[114] In the same vein and by analogy, the ICC Statute, contrary to the ICTR, ICTY or STL ones, is silent as to whether separate opinions may be appended to the judgment. Yet, it has been the

[109] ICTR, *Prosecutor v. Augustin Bizimungu et al.*, Case No. ICTR-99-50-A, Partially Dissenting Opinion of Judge Patrick Robinson, 4 February 2013, paras 3, 8: "I note Mugiraneza's submission that the "length of the delay between *submissions* and judgment should be given great weight" (emphasis added), and concur with Judge Short's conclusion that the Majority in the Trial Chamber's judgement did not sufficiently consider the reasonableness of the time taken to deliver the Trial Judgement; more specifically he found that the period of three years between the close of evidence and the rendering of the Trial Judgement was "sufficient to constitute a violation of the Accused's right to trial without undue delay"; this failure to give due weight to a, relevant consideration amounts to an error by the Trial Chamber".
[110] The last oral submissions of the parties were on 22 November 2018. *See* NCTA Hearing Day 10.
[111] Document in Support of Appeal, para. 47.
[112] *See infra* Response, para. 148.
[113] *See* P. Lewis, "Trial Procedure", in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational publishers, Ardsley, NY, 2001, pages 551-552. 61. *See* rule 88 of the ICTR Rules, rule 98ter of the ICTY Rules and rule 168(B) of the STL Rules.
[114] Document in Support of Appeal, para. 49.

regular practice of the ICC trial judges to append such opinions to their Chamber's judgments.[115]

66. At the ICTR, where it was common practice to issue verdicts with reasons to follow, the judges usually abstained from announcing any time limit to deliver their written judgment.[116] Christoph Safferling, emphasising the risk of Arusha's delays, suggested that "six months after the public pronouncement of the verdict is an adequate period".[117] This is exactly the time gap between the verdict and the written version of the decision in the present case.

67. As developed below,[118] reasons for judgment are *presumed* to reflect the reasoning that led the trial judge(s) to a decision. In the present case, the Prosecution failed to adduce sufficient and cogent evidence that the reasons were crafted after the announcement of the verdict.[119]

68. The risk of "result-driven reasoning" exists irrespective of whether the reasons will follow or accompany the verdict. As explained by Cohen, requiring judges to give reasons in general may be counterproductive in that it may encourage them to "think about their reasons for the decision in a strategic way before deciding the outcome" or "to fabricate post hoc constructions intended to justify their intuitions".[120] M. Cohen concludes that "[i]mposing strict reason-giving requirements on judges may yield insincerity and artificiality in judicial discourse, rather than promoting accountability and transparency".[121]

69. It is utterly clear from the Impugned Decision that the Majority Judges did not find themselves in the situation where they had come to a definite conclusion yet found

[115] *See* rule 88 of the ICTR Rules, rule 98ter of the ICTY Rules and rule 168(B) of the STL Rules.
[116] *See Bagosora et al.* 18 December 2008 Transcript, page 2, lines 35-36: "[t]he full text of the judgement will be available in the coming days after the conclusion of the editorial process", ICTR, *Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Transcript of Judgement, 17 November 2011, page 1, line 37, to page 2, line 1: "Only the written judgement is authoritative and will soon be available", ICTR, *Prosecutor v. Hormidas Nsengimana*, Case No. ICTR-01-69-T, Transcript of Judgment, 17 November 2009, page 2, lines 9-10: "Only the written judgement is authoritative. It will be available soon after the conclusion of the editorial process."
[117] Safferling, page 524. *See also* Chamber Practice Manual, November 2019, Deadlines Regarding Decisions of the Trial Chamber, page 25, para. 87: "[t]he written decision under Article 74 of the Statute shall be delivered within 10 months from the date the closing statements end".
[118] *See infra* Response, para. 152.
[119] Document in Support of Appeal, paras 29-30.
[120] Cohen, page 522.
[121] *Ibid.*

that the conclusion was indefensible when they wrote their opinions explaining it.[122] There are numerous statements in either Judge Henderson's Reasons or Judge Tarfusser's Opinion leaving no doubt to the reader that the outcome of this trial was based on an obvious and sustainable conclusion, which has not changed to the slightest since 15 January 2019.[123]

70. Also, if one were to follow the Prosecution's flawed artificial logic, any ICC Appeals Chamber,[124] ICTR, or ICTY judgment issued with reasons to follow, while expressly permitted by the respective court or tribunal's statutory framework, could not be considered as one decision. The fact that the 'one decision' requirement is not expressly imposed on the ICC Appeals Chamber and *ad hoc* trial chambers would not make their decision's alleged lack of unity less of an issue.

71. The Defence agrees that a decision pursuant to article 74(5) is not complete until a "full and reasoned" statement is provided and that if "the decision merely consisted of the verdict", a summary of the decision would not be needed.[125] However, first, the Trial Chamber *did* provide for a full reasoned written statement,[126] which summarised form *was* given in open court. On 15 January 2019 indeed, the Trial Chamber did not merely announce the verdict, which as stated by the Prosecution, is "a short formula stating whether the accused is convicted or acquitted".[127] It gave a summary of its decision, including of its reasons, in its seven-page oral statement.[128] Secondly, and more importantly, where the Defence disagrees with the Prosecution is on the idea that the need for a summary would be an indication that reasons cannot *follow* a

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[122] Document in Support of Appeal, para. 30 and footnote 75. *See also* Document in Support of Appeal, footnote 58, referring to Bingham (1998), page 143.
[123] *See e.g.* Judge Henderson's Reasons, para. 2: "the majority acquitted Mr Gbagbo and Mr Blé Goudé because the way in which the Prosecutor depicted their actions and omissions from a legal point of view could not be sustained by the evidence" or para. 5: "although the available evidence is voluminous, a lot of essential information is still missing" or para. 36: "probably fair to say that a majority of documentary exhibits […] would not pass even the most rudimentary admissibility test in many domestic systems". *See also* Judge Tarfusser's Opinion, para. 4 stating that none of the documents "could confirm [the case] in the slightest, whether taken individually or as a whole" or para. 12: "[a]s the analysis of the evidence in the Reasons makes it abundantly clear, this is certainly (yet) another case where the evidence is 'flimsy, inconsistent or otherwise inadequate' to say the least, such as to never possibly envisage sending the case to trial, let alone sustaining a conviction".
[124] Document in Support of Appeal, para. 51 with footnote 111.
[125] Document in Support of Appeal, para. 50.
[126] Written Reasons.
[127] Document in Support of Appeal, para. 50 and footnote 110.
[128] 15 January 2019 Oral Acquittal Decision.

verdict under article 74(5).[129] Indeed, nothing prevents the full reasons to be published after their summary.

72. In fact, should the requirement of a summary be the indication of anything, it is in the Defence's view an indication that the ICC trial chambers *may* delay the issuance of their reasons. It is strangely enough also the Prosecution's argument, at paragraph 31 of its Document in Support of Appeal, referring to the German criminal procedure, which allows judges to separate the reasons from the verdict while ensuring that, at the time of the verdict, a summary of the essential reasons be read out. It has also often been the practice of the ICTR trial chambers. As already mentioned, "[t]his may [for these chambers] be the way to give a notice of the verdict to the parties and remove the uncertainty about the outcome as early as possible (which is particularly important in case of an acquittal)".[130]

73. In conclusion, the Prosecution's legal basis to support its argument that the Trial Chamber was not permitted to separate the reasons from the verdict, namely the use of the article 74(5) "one decision" requirement, is clearly misplaced. No requirement from the ICC Statute or jurisprudence prevents the trial chambers from doing so. To the contrary, it is even common in national jurisdictions that once a chamber arrives at an acquittal, the decision is immediately pronounced without undue delay with the full reasons being delivered at a later stage.[131] It is an exponent of a fair trial. Trial Chamber I used the flexibility of the statutory framework at hand to preserve the right of the accused to be tried without undue delay the best possible way, *i.e.* by ordering their immediate release. It could indeed not "justify maintaining the accused in detention during the period necessary to fully articulate its reasoning in writing".[132]

[129] Document in Support of Appeal, para. 50.
[130] S. Vasiliev, "Article 74, Requirements for the decision", in Klamberg, page 568, footnote 620. *See also* Bassirou Ningan, « Article 74 », in Fernandez J., Pacreau X., Badinter R., Kirsch P., *Statut de Rome de la Cour Pénale Internationale : Commentaire Article Par Article*, Pedone, 2012, page 1649: "*[d]ans l'intérêt des parties également, du point de vue d'une rapidité recherchée et le souci de lever le suspens à l'égard des parties, il pourrait paraitre judicieux que la lecture du résumé de la décision soit donnée en audience publique en attendant sa rédaction complète qui pourrait intervenir dans un délai plus long.*" ECtHR, *Stögmüller v. Austria*, App. no. 1602/62, Judgment, 10 November 1969, Section "As to the Law", para. 5, in G. Sluiter, H. Friman, S. Linton, S. Vasiliev, S. Zappala, *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, page 1184: "The right to a speedy trial, and more specifically a speedy judgment, 'is designed to avoid that a person charged should remain too long in a state of uncertainty about his fate'".
[131] Reference is made to the Canadian Supreme Court judgment of *R. v. Teskey*, that is discussed at length at para. 152 *infra* and the Ontario Court of Appeal decision of *R. v. Cunningham*, at para. 153 *infra*.
[132] 15 January 2019 Oral Acquittal Decision, page 4, lines 5-9.

Therefore, the allegation that the Trial Chamber would have violated article 74(5) in this respect should be rejected.

III.C.3.ii. The Majority provided full and proper reasons for the Impugned Decision

74. The Prosecution avers that the "views of the majority" referred to under article 74(5) of the Statute would in reality be the reasons of Judge Henderson alone, which Judge Tarfusser would have then ascribed to, but without having personally participated in the analysis and in reaching the conclusions found therein. The Prosecution therefore concludes that the Majority "failed to comply with the requirement that a Trial Chamber issue "one decision"" also in that respect.[133]

75. As pointed out by the Prosecution, the Written Reasons expressly emphasize that "[t]he majority's analysis of the evidence is contained in Judge Henderson's reasons".[134] Further, Judge Tarfusser specifies that "the Majority's view is soundly and strongly rooted in an in-depth analysis of the evidence (and of its exceptional weakness)" on which he and Judge Henderson "could not be more in agreement".[135] Judge Tarfusser not only concurs "with the Majority outcome of this trial" but he also confirms that "[f]or the purposes of *the Majority reasoning*", he "subscribe[s] to the factual and legal findings contained in the 'Reasons of Judge Henderson […]'" (emphasis added).[136]

76. The occasional use of the first-person pronoun is only logical in trial chamber decisions where one of the judges' reasons represent the view of the majority.[137] For instance, in *Ruto and Sang*, the NCTA decision contained and was issued on the basis of two separate reasons of the majority judges, namely Judges Fremr and Eboe-Osuji.

[133] Document in Support of Appeal, paras 52-54.
[134] Document in Support of Appeal, para. 53 referring to the Written Reasons, para. 29.
[135] Judge Tarfusser's Opinion, para. 67.
[136] Judge Tarfusser's Opinion, para. 1. Both judges also agreed on the fact that there was no need to agree on the legal threshold to reach those conclusions since to both of them, the charges were not sustained by the evidence. Judge Tarfusser's Opinion, para. 4. Judge Tarfusser then goes on to regularly cite Judge Henderson's Reasons on this question of the assessment of the evidence, including on the level of disconnect between the Prosecution's narrative and the facts. Judge Tarfusser's Opinion, para. 12. *See also* para. 68 stating that evidence in this case did not require discussing "the theoretical foundation or the practical application" of the NCTA procedure or 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". *See also* Judge Henderson's Reasons, paras 5, 2 or 36.
[137] According to Lynch, page 478, "[t]he process of assigning a judge the responsibility to write for his or her colleagues fosters consensus rather than individualism and actively seeks to build a majority".

However, the evidential review was set out in Judge Fremr's reasons alone.[138] Yet, the many references to "I" or "in my view" appear in Judge Fremr's reasons as early as the section of the decision on preliminary remarks.[139] The Prosecution's argument that the present case should be distinguished from the *Ruto and Sang* case because the latter was not entered pursuant to article 74(5) and Trial Chamber V(A) vacated the charges, rather than acquitting the accused, is totally artificial and flawed.[140] First, it would be fundamentally unfair if the legal basis of the decision were to vary depending on the outcome of the NCTA proceedings.[141] Second, the Defence refers to its former developments on the legal basis of the Impugned Decision which, similarly to the *Ruto and Sang* case, was not article 74.[142] Third, assuming article 74(5) would strictly apply, the Trial Chamber would not have violated it since the Impugned Decision contains a Majority view as encompassed in Judge Henderson's Reasons and a minority view as encompassed in Judge Herrera Carbuccia's Dissenting Opinion.[143]

77. The Prosecution has not adduced any evidence whatsoever to rebut the presumption that the judges acted in accordance with the solemn undertaking made under article 45 of the Statute and rule 5(1)(a) of the Rules before taking up their duties. The general comment that nothing in Judge Henderson's Reasons and Judge Tarfusser's Opinion "allows the reader to conclude that the Majority Judges deliberated to reach any joint

[138] *Ruto and Sang* NCTA Decision, page 1. *See also Ruto and Sang* NCTA Decision (Reasons of Judge Eboe-Osuji), para. 1: "To keep the length of my own reasons more manageable, I need conduct no further evidential review. I fully adopt the evidential review set out in Judge Fremr's reasons. It is, in my view, fully borne out by the legal principles that should guide decisions on no case to answer motions in this Court".
[139] *See e.g. Ruto and Sang* NCTA Decision, paras 1, 2, 24, 148.
[140] Document in Support of Appeal, footnote 126.
[141] Whether the Chamber considers (i) acquitting or (ii) vacating the charges / continuing the trial should not motivate different legal bases.
[142] *See supra* Response, Section III.A.
[143] Regarding separate concurring opinions, while not expressly authorized by article 74(5) of the Statute, most of the ICC trial judgments issued thus far were accompanied by individual opinions that did not qualify as 'minority opinions' within the meaning of article 74(5). *Prosecutor v. Thomas Lubanga Dyilo*, Separate opinion of Judge Adrian Fulford and Separate and Dissenting Opinion of Judge Odio Benito, Judgment pursuant to Article 74 of the Statute, 14 March 2014, ICC-01/04-01/06-2842; *Prosecutor v. Mathieu Ngudjolo Chui*, Concurring Opinion of Judge Christine Van den Wyngaert, Judgment pursuant to Article 74 of the Statute, 18 December 2012, ICC-01/04-02/12-4; *Prosecutor v. Germain Katanga*, Concurring opinion of Judges Fatoumata Diarra and Bruno Cotte, Judgment pursuant to Article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3464-AnxII. "On these instances, the conclusions on the question of guilt or innocence of the accused were reached unanimously or by majority, but the verdicts were still accompanied by individual opinions on discrete issues". Klamberg, page 567, footnote 619.

findings and conclusions"[144] is not sufficient to show "improprieties in the deliberative process".[145]

78. As will be developed at length below, Judge Tarfusser, while having developed his own judicial view about the necessity of NCTA proceedings in the context of the ICC statutory framework, decided, as part of a judicial compromise, to authorize and initiate those proceedings. He agreed to such a procedure as early as the First Conduct of Proceedings Order, where Trial Chamber I unanimously requested Defence submissions on the possibility of an NCTA motion.[146] As a result, and in all logic, Judge Tarfusser then adhered to and applied the standard of proof as set out in Judge Henderson's Reasons, which "was never meant to replicate the so-called "'Ruto and Sang model'",[147] as also explained by Judge Henderson in his Reasons.[148] The same conclusion may be made in relation to the nature of the decision. In a scenario where NCTA proceedings would have not taken place, the legal basis for the acquittal of Mr Blé Goudé would have been article 74. However, Judge Tarfusser chose to finally adopt the NCTA proceedings for the purpose of this decision and as a result accepted the fact that, for the purpose of this decision, the legal basis was not article 74. He expressly states it in the 16 January 2019 Decision.[149] Therefore, for the purpose of the Impugned Decision, Judge Tarfusser did agree with Judge Henderson's reasoning and the Prosecution's unsubstantiated claim that such alleged differences would have "affected the coherence of the Majority's view" should be rejected.[150] On the contrary, the Impugned Decision is an example of judicial decision making at its best. Despite their vastly different backgrounds, the Majority Judges were able to come to a consensus so as to avoid protracting litigation needlessly and guarantee the fairness and expeditiousness of the trial proceedings.

[144] Document in Support of Appeal, para. 54.
[145] ICTY, Appeals Chamber, *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Judgement, 17 March 2009 ("*Krajišnik* AJ"), para. 134. In addition, in the Written Reasons, page 3, it is expressly stated that the Trial Chamber, in issuing these reasons, has had regard to rule 142 of the Rules, requiring the decision to be pronounced within a reasonable period of time after the deliberations, which strongly suggests that deliberations did take place as they should have.
[146] First Conduct of Proceedings, para. 14; *see* Judge Tarfusser's Opinion, para. 67.
[147] Judge Tarfusser's Opinion, para. 67.
[148] Judge Henderson's Reasons, para. 4.
[149] 16 January 2019 Decision, page 4, lines 20-23. *See also* Judge Tarfusser's Opinion, para. 2 where, as noted by the Prosecution in footnote 118, Judge Tarfusser confirms being in full agreement with Judge Henderson's view that a decision that there is no case to answer has a legal effect that is equivalent to a formal judgment of acquittal thereby suggesting an agreement with the view that the decision was not a formal judgment of acquittal to begin with.
[150] Document in Support of Appeal, paras 56-57.

79. Judge Tarfusser makes it very clear in his paragraph 3 that the reason for his separate opinion is to take a stand, not on the *assessment of the evidence* for which he already made clear he was in agreement, but on *"other features of this case as a whole*, including developments preceding the opening of the trial and the overall conduct of the Office of the Prosecutor and of the Defence throughout the proceedings" (emphasis added).[151] The paragraph ends with: "[i]t is on these features that I wish to take a stand here".[152]

80. In his section entitled '[t]he differences in approach with my fellow Judges and well-established ICC practices",[153] Judge Tarfusser makes general criticisms in relation to the ICC practices based on his ten year experience as an ICC judge[154] and, as far as the differences in approach within the bench are concerned, contests *inter alia* the length and the degree of details Judge Henderson went into or the length of the pre-trial phase.[155] The "fracture" referred to here has therefore nothing to do with the reasoning applied for the assessment of the evidence.

81. Judge Tarfusser's Opinion was a separate opinion issued *in addition* to the joint majority reasons.[156] This is clearly expressed by Judge Tarfusser in his introduction. Contrary to the Prosecution's claim, the situation is not that of a "[m]ere coincidence of verdicts" and Judge Tarfusser's "possible compromises" referred to by the Prosecution not only cover the outcome of the trial but the "reasons controlling the majority decision".[157]

82. The Prosecution's claim that the Impugned Decision could be considered as a plurality decision is a mischaracterization of the nature of this decision. Plurality decisions, also called no-clear-majority decisions, have been defined by, *inter alia*, Linda Novak as "those in which a majority of the Court agrees upon the judgment but not upon a *single* rationale to support the result. Thus, there is no "opinion of the

[151] Judge Tarfusser's Opinion, para. 3.
[152] Judge Tarfusser's Opinion, para. 3.
[153] Judge Tarfusser's Opinion, paras 6-38.
[154] Judge Tarfusser's Opinion, para. 6.
[155] Judge Tarfusser's Opinion, paras 8-14, 19.
[156] Document in Support of Appeal, para. 58.
[157] Document in Support of Appeal, para. 59. *See also* Judge Tarfusser's Opinion, para. 1.

Court" in the ordinary sense" (emphasis added).[158] Contrary to plurality decisions issued mainly in the United States or Canada by up to a nine judge final appellate court, with each opinion carrying equal weight, where the highest common factor binding on lower court would have to be identified sometimes through as many as five individual judgments, the Impugned Decision enables anybody reading it to know exactly what the Court has decided, "without having to study the opinions of half a dozen gentlemen in order to find some point on which possibly they agreed, while they differed in a good many others".[159] In such instances, identifying the orders favoured by a fixed majority of the Court, also called "the highest common factor" is impossible.[160] On the contrary in the instant case, the ratio of the case is absolutely not speculative.[161] There is one opinion that prevails, and that represents the opinion of the Trial Chamber, namely Judge Henderson's Reasons. While the two judges might not have agreed on everything, it was not a case where the split of opinion was so great that no common ground could be found. The common ground rationale is clear and identifiable without question because it has been expressly stated.[162]

83. Plurality decisions "exhibit the tendency of some Justices to cling dogmatically to their initial views on an issue, and the concomitant inability of the Court to settle that

[158] Novak, page 756, footnote 1. *See also* L'Heureux-Dubé, C., as cited in Lynch, page 478, footnote 17, explaining the concept of a 'plurality' decision as "the opinion supported by the greatest number of judges which although not a clear majority of the court, nevertheless holds more sway in the result reached than any other opinion given voice".

[159] L'Heureux-Dubé (1990), page 584. *See also* page 586: "Now, as decision-makers, we are primarily concerned with expressing our deeply felt opinions about a case. Judges in Canada have always been fiercely independent. Even Chief Justice Anglin recognized this, and in formulating the Court policy of one written opinion per judgment, he did not want to be understood as depriving in any way the members of the Court from the freedom of expressing their personal views. He said: Then in regard to the opinions of the concurring majority, I further suggested that any member of the Court who felt that the conclusions of the majority could be better put, or better sustained, on some other ground than that which had been taken by the judge writing for them, would be at perfect liberty to add to the judgment his view, confining it, of course, to the matter necessary to make clear the ground on which he might think the judgment could be better supported."

[160] *See* for instance U.S. Supreme Court, Wolman v. Walter 433 U.S. 229 (1977), where nine Justices combined in six different voting patterns.

[161] *See also* Document in Support of Appeal, footnote 131 referring to Bingham (2006), page 8: "the judges should recognize a duty, not always observed, to try to ensure that there is a clear majority ratio". First, this is the case here, there was a clear majority ratio as expressly stated in the Impugned Decision. Second, Bingham's comment was a caveat made to the initial agreement of the author with Lord Reid that "the quality of single Privy Council judgments has on the whole been inferior from the point of view of developing the law to the more diverse opinions of the House. A single lapidary judgment buttressed by four brief concurrences can give rise to continuing problems of interpretation which would have been at least reduced if the other members had summarised, however briefly, their reasons for agreeing".

[162] In addition, the Trial Chamber's Impugned Decision can serve as precedent and formal overruling by an appellate chamber, as the present proceedings show, is necessary to turn the case upside down.

issue with any degree of finality".[163] As explained, the compromise made by Judge Tarfusser demonstrates the opposite situation.[164]

84. The Prosecution's reference to Blom-Cooper and Drewry's comment that an overt division of opinion among the judges should be avoided was made in the context of English criminal *appeals*, as opposed to trial judgments,[165] and out of fear that "*favourable* but impotent *dissenting* judgment[s]" (emphasis added) would aggravate the discomfiture of an unsuccessful appellant.[166] This comment is irrelevant in the present context.

85. In light of the above, the Defence submits that the Prosecution's conclusion that the Trial Chamber's Impugned Decision would not have contained the views of the Majority in breach of article 74(5) of the Statute should be rejected.

III.D. The 15 January 2019 Oral Acquittal Decision was fully informed

86. The Prosecution argues that when the Majority issued the 15 January 2019 Oral Acquittal Decision, it *apparently* "had not yet completed its fully informed reasoning" and that therefore that decision was not fully informed.[167] According to the Prosecution, this conclusion is demonstrated by four (4) main factors each of them is addressed below.

87. The Defence will elaborate below as to why the Prosecution's submissions are unsubstantiated and should be rejected and will show on the contrary that there are objective elements to conclude that the 15 January 2019 Oral Acquittal Decision was fully informed.

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[163] Harvard Law Review, page 1130.
[164] *See* by analogy Lord Reid's statement in GE Trade Mark: "I have read the speech of my noble and learned friend, Lord Diplock. I am in general agreement with it apart from one matter. I agree with the view of Eve J in *Wooedward v Boulton Macro Ltd* that section 11 of the Act has only a limited application. If that is right then I would reach the same conclusion that this appeal should be allowed but by a shorter and simpler route. As I believe that I am alone in taking this view I do not think that it would serve any useful purpose either to set out my reasons for agreeing with Eve J or to set out the subsequent steps by which I reach my conclusion", as cited in Blom-Cooper, Dickson, and Drewry, "The Judicial House of Lords 1876-2009", 2009, page 155. The authors found this assent to a lengthy judgment of Lord Diplock to be "rare, but commendable, judicial approach to multiple judgements." Blom-Cooper, Dickson, and Drewry, "The Judicial House of Lords 1876-2009", 2009, page 154.
[165] Blom-Cooper and Drewry, page 80: "[t]hese reflections apply to the final appellate court more than to any intermediate court of appeal where a division of opinion may become submerged more or less quickly in a ruling of the higher court."
[166] Document in Support of Appeal, footnote 129 referring to Blom-Cooper and Drewry, page 81.
[167] Document in Support of Appeal, para. 60.

III.D.1. The Majority did not err by issuing the 15 January 2019 Oral Acquittal Decision without providing a precise timeline for issuing the reasons

88. First, the Prosecution claims that one factor showing that the Impugned Decision was not fully informed is that the Majority would not have delivered a summary of this decision in open court in accordance with article 74(5).[168]

89. As developed above, the Trial Chamber did provide a summary of the decision in open court on 15 January 2019. The Majority rendered its decision and explained why it had reached the conclusion to acquit.[169] Secondly, the brief nature of this summary does not necessarily mean, as the Prosecution erroneously concludes, that the Majority had not completed the process of drawing all factual and legal conclusions by 15 January 2019. The Trial Chamber expressly stated on 15 January 2019 "having thoroughly analysed the evidence and taken into consideration all legal and factual arguments submitted orally and in writing by the parties and participants". Therefore, unless the Appeals Chamber is contemplating to question the reliability of the Trial Chamber's express statements, the submissions of the Prosecution should be rejected.

90. Judge Henderson's remarks about the complexity of the case and the large volume of evidence do not suggest that the evidence had not been analysed by 15 January 2019.[170] Judge Henderson made this statement in a totally different context.[171] Also, his expressed regrets relating to his inability to make admissibility rulings are irrelevant for the purpose of these discussions. What matters is that he did, *a contrario*, have the necessary resources to evaluate the evidence in the manner in which he evaluated it.[172]

91. The process of analysing the evidence and reaching all necessary conclusions must be distinguished from the drafting process and the articulation of the judgment which, in

[168] Document in Support of Appeal, para. 62.
[169] 15 January 2019 Oral Acquittal Decision, pages 2-3.
[170] Document in Support of Appeal, para. 63.
[171] Judge Henderson's Reasons, para. 5. His point was that the Prosecution had been overly ambitious in bringing "within the scope of this single litigation several years of Ivorian history" and that "although the available evidence [was] voluminous, a lot of essential information [was] still missing". He questioned the Prosecution's choices and strategy "in framing the factual scope of the charges so broadly", not in any way suggesting that this voluminous, often irrelevant, evidence would have had an impact on its timely assessment of the evidence before the 15 January 2019 Oral Acquittal Decision was rendered.
[172] Judge Henderson's Reasons, para. 29.

the instant case, took time, for the reasons explained by Judge Henderson.[173] The lack of specification of any time limit to issue the Impugned Decision's reasons was fully justified in this context of completing an extensive drafting process, which could have been much shorter, had Judge Henderson made a different drafting choice. In light of the above, the conclusion that the lack of announced time limit may have meant that the process of analyzing the evidence and reaching all necessary conclusions had not been completed by 15 January 2019 is a clear misinterpretation of the Majority's approach.

III.D.2. The Prosecution fails to substantiate that the Majority had not completed its assessment of the evidence or reached all conclusions by 15 January 2019

92. The Prosecution further argues that a second factor showing that the Impugned Decision was not fully informed is that by 15 January 2019, the Majority would not have completed its assessment of the evidence or reached all conclusions.[174]

93. *First*, the Prosecution argues that the Trial Chamber had a duty to make a detailed assessment of the relevance, probative value and potential prejudice of each item of evidence before deciding to acquit[175] and that Judge Tarfusser, in the 16 January 2019 Decision, had confirmed that the Majority had not made such an assessment.[176]

94. The Prosecution misrepresents Judge Tarfusser's statement. Judge Tarfusser did confirm that the Majority had considered all evidence submitted,[177] and that therefore, the question as to whether the Chamber had a *duty* to consider the relevance, probative value and potential prejudice of each item of evidence for the purpose of this decision was irrelevant.

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[173] Rather than giving a few illustrative examples to explain the 15 January 2019 Oral Acquittal Decision, which "may be appropriate in other contexts", Judge Henderson has chosen, "[s]eeing that the Chamber was not unanimous", to explain his decision "with some precision", in order to "maintain and promote certain minimum standards of rationality and transparency". Judge Henderson's Reasons, paras 3-4. This came at a cost in terms of length, which Judge Tarfusser even criticized as being "unnecessary as a matter of law". Judge Tarfusser's Opinion, para. 9.
[174] Document in Support of Appeal, paras 65-75.
[175] Document in Support of Appeal, para. 67 citing *Bemba* Evidence Admission Decision, para. 37.
[176] Document in Support of Appeal, para. 66 referring to 16 January 2019 Decision, page 4, lines 17-23.
[177] "[…] for the purpose of this procedure, all evidence submitted is to be considered". *See also* First Conduct of Proceedings Order, para. 10, where the Trial Chamber invited the Prosecution to provide a "detailed narrative of her case in light of the testimonies heard and the documentary evidence *submitted at trial*" (emphasis added) and Second Conduct of Proceedings Order, para. 10, in which the Trial Chamber invited the Defence to make "concise and focused submissions on the specific factual issue for which, in their view, *the evidence presented* is insufficient to sustain a conviction" (emphasis added).

95. This approach as to the assessment of the evidence has been confirmed by Judge Henderson who explained that because the Trial Chamber decided not to make admissibility rulings, it was then necessary to "evaluate the evidence considered "submitted" before the Trial Chamber, regardless of how [he] would have actually proceeded with respect to admissibility".[178] The fact that (i) the consideration of the relevance, probative value and prejudice of each item of evidence has not been made pursuant to an admissibility ruling, and (ii) all the evidence considered submitted has been presumed to be "not inadmissible" and therefore not excludable, does not suggest that the Trial Chamber did not make an item by item consideration of the evidence.

96. As rightly pointed out by Judge Tarfusser in the 16 January 2019 Decision, since the purpose of the present proceedings was not to decide on the guilt or innocence of the accused pursuant to article 74 but whether the evidence submitted by the Prosecution was sufficient to sustain a conviction, the *Bemba* jurisprudence and the duty contained therein does not apply in the context of the present procedure.[179] However, the Trial Chamber did consider each item of evidence, "as part of the holistic assessment of all evidence submitted"[180] and as necessary to come to its determination using the NCTA standard as detailed by Judge Henderson, who pointed out that, had he "systematically assessed the credibility and reliability of the Prosecution's testimonial evidence, there would be even less of a basis to continue the proceedings in this case".[181] This is emphasized by the Majority in the 15 January 2019 Oral Acquittal Decision and reiterated in Judge Henderson's Reasons and Judge Tarfusser's Opinion.[182]

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[178] Judge Henderson's Reasons, para. 29. He even mentioned that had he, for instance, been able to simply exclude all anonymous hearsay, his opinion would have been much shorter.

[179] *See* 16 January 2019 Decision, page 4, lines 17-23: "[t]his [the duty to consider the relevance, probative value and potential prejudice of each item of evidence] only arises in the context of admissibility rulings when giving the Chamber's decision pursuant to Article 74". *See also* Judge Henderson's Reasons, para. 22: "[…] there is no obligation […] for a chamber to rule on a particular item of evidence to be "not irrelevant" and/or "not inadmissible" *until a judgment pursuant to article 74 of the Statute*" (emphasis added). *See finally* 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 47, confirming that this analysis was required "in order to reach a determination beyond reasonable doubt".

[180] *Bemba et al.* AJ, para. 598. *See also* Judge Henderson's Reasons, para. 22, footnote 25.

[181] *See also* Judge Henderson's Reasons, para. 36: "a majority of documentary exhibits that were submitted by the Prosecutor in this case would not pass even the most rudimentary admissibility test in many domestic systems".

[182] *See*, for instance, Judge Tarfusser's opinion, para. 67: "the Majority's view is soundly and strongly rooted in an in-depth analysis of the evidence (and of its exceptional weakness)". *See also* 15 January 2019 Oral Acquittal Decision, page 2, line 25 to page 3 line 1. *See*, for instance, Judge Henderson's Reasons, paras 8, 29-30, 31, 38, etc.

97. In any event, according to Judge Tarfusser, there was simply no evidence allowing "a Chamber to establish a link between the accused and any of the charged facts."[183] Judge Henderson confirmed this conclusion in his Reasons.[184] As pointed out by the Prosecution itself, the admissibility test is not relevant or necessary in that case.[185]

98. The arguments of the Prosecution at paragraph 68 of the Document in Support of Appeal are simply unsustainable. It would indeed be fundamentally unfair to have a different NCTA test applied depending on the outcome of the NCTA Motions, *i.e.* whether the Trial Chamber considers granting the NCTA motion and acquitting or on the contrary rejecting it. It would mean that midway through the Trial Chamber's considerations as it was considering acquitting, it would have had to change course and start assessing the relevance, probative value and potential prejudice of each item of evidence pursuant to article 74. This would actually equate to the illegal outcome that the Prosecution is now alleging in this appeal, namely that the Trial Chamber would not have one standard way of approaching and assessing the evidence when coming to its NCTA determination. A similar response can be given to the Prosecution's related argument as to the legal basis for the decision, in paragraph 70 of the Document in Support of Appeal, as developed right above.[186]

99. Thus, the Defence submits that the Oral Decision was fully informed with respect to the above.

100. *Second*, the Prosecution alleges that Judge Tarfusser reached his final conclusion before he received the Blé Goudé's and Gbagbo's NCTA Motions as well as the Prosecution's NCTA Response. Therefore, this demonstrates that Judge Tarfusser would not have yet completed his assessment by the time he orally acquitted Mr Gbagbo and Mr Blé Goudé on 15 January 2019.[187]

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[183] Judge Tarfusser's Opinion, paras 74, 70, 52.
[184] Judge Henderson's Reasons, paras 5, 2, 80.
[185] Document in Support of Appeal, para. 68: "[…] if the Chamber finds that there is simply *no* evidence supporting a given charge at the NCTA stage, then that Chamber is obviously relieved from making any further assessment".
[186] *See also* Document in Support of Appeal, para. 68: "[t]his does not mean that a Trial Chamber must always assess the relevance, probative value and potential prejudice of each item of evidence when deciding a NCTA motion. It can – and should – reject a NCTA motion without making ultimate and detailed findings on the evidence". *See also* Document in Support of Appeal, footnote 126 for a similar argument in respect of the vacation of the charges.
[187] Document in Support of Appeal, para. 71.

101. The Defence submits that, indeed, it is likely that, based on hearing all the testimonies, the *review* of all documentary evidence, and the analysis of both the Pre-Trial Brief and the Trial Brief,[188] Judge Tarfusser had formed a strong judicial impression, at the close of the Prosecution's case, as to the insufficiency of the evidence presented. Judge Tarfusser confirms that for almost two years, he "assisted to the Prosecutor's case unravelling before [his] eyes" and that none of the documentary evidence "purportedly supporting that case […] could confirm it in the slightest, whether taken individually or as a whole".[189] Every reasonable judge, put in the same position as Judge Tarfusser, would have had the same impression.

102. The Defence submits however that such a necessary progression of the mind is not illegal and does not make the 15 January 2019 Oral Acquittal Decision any less informed; neither does the fact that while he had not heard the Defence's submissions at the time, he might have already formed a preliminary opinion on Mr Blé Goudé's innocence. By 15 January 2019, when the Impugned Decision was issued, the Majority, of which Judge Tarfusser was part, had analysed all the evidence and "taken into consideration all legal and factual arguments *submitted orally and in writing by the parties and participants*" (emphasis added).[190]

103. The Appeals Chamber in the *Ntaganda* case confirmed that this formed opinion – which is the professional task of a judge - was a pre-condition of the entertainment of NCTA motions.[191] The fact that in the *Ruto and Sang* case, "it was already known at the time of the parties' submissions on whether there was a case to answer for the accused that the presentation of evidence by the Prosecution had been severely affected by the special circumstances of that case" was indeed seen by the Chamber in

[188] Second Conduct of Proceedings Order, para. 6: "The Chamber has considered the Trial Brief. It has noted that, notwithstanding some minor changes in respect of a limited number of allegations, the overall narrative has remained essentially the same as the one mirrored in the Pre-Trial Brief".
[189] Judge Tarfusser's Opinion, para. 4.
[190] 15 January 2019 Oral Acquittal Decision, page 2, line 25 to page 3, line 2.
[191] *Ntaganda* NCTA Decision, paras 26-27, where it considered that "a motion arguing that there is no case to answer, in whole or in part, ought to be entertained only if it appears sufficiently likely to the Chamber that doing so would further the fair and expeditious conduct of the proceedings". It further states that "[s]hould it appear to the Chamber that the expeditiousness and/or fairness of the trial so warrants, it may *proprio motu*, having regard to the evidence presented, invite and *consider submissions* on, and issue, a (partial) judgment of acquittal" (emphasis added).

the *Ntaganda* case as a condition which would have warranted the Chamber to authorise the NCTA proceedings.[192]

104. As developed above, the Trial Chamber saw the case break down in terms of evidence. Yet, it invited the Prosecution to submit a Trial Brief[193] and, as a matter of fairness, the Defence to respond to it.[194] With the First Conduct of Proceedings Order, the Prosecution was given the opportunity to revise its narrative and to fill in the 'overall disconnect' between its narrative and the facts having emerged from the evidence.[195] In fact, this shows the Trial Chamber's indulgence towards the Prosecution. The Trial Chamber could have exercised its statutory power to terminate the case, on the basis of article 64(2) of the Statute, immediately after the close of the Prosecution's case, and without inviting the parties to make any further submissions.[196] It finally decided, referring to "its responsibility to ensure the efficiency and fairness of these proceedings" that "the most appropriate and efficient way to proceed in light of its statutory duties"[197] was to authorise NCTA proceedings and, after having heard the submissions of all parties in this respect, it issued its decision to acquit. Therefore, assuming Judge Tarfusser had already formed an opinion about the case by June 2018, it is only after the Defence's submissions were filed and reviewed by the Trial Chamber, as confirmed by it, that the 15 January 2019 Oral Acquittal Decision was rendered. The judges referred to the responses of the Defence teams and the Prosecution in their written opinions but in no event does this suggest that they had not reviewed and assessed these responses by 15 January.[198]

105. In light of the above, the Defence submits that the Prosecution's argument that the 15 January 2019 Oral Acquittal Decision was not fully informed because Judge Tarfusser would have reached certain conclusions by June 2018 must therefore be rejected.

III.D.3. There are no substantive inconsistencies between the 15 January 2019 Oral Acquittal Decision and the 16 July 2019 Reasons demonstrating that the acquittal was not fully informed

[192] *Ntaganda* NCTA Decision, para. 28.
[193] First Conduct of Proceedings Order.
[194] Second Conduct of Proceedings Order.
[195] It appears that Judge Tarfusser had hoped the Prosecution would change its narrative in the Trial Brief. Judge Tarfusser's Opinion, paras 104, 112-114, 71.
[196] *Ruto and Sang* NCTA Decision (Reasons of Judge Eboe-Osuji), para. 123.
[197] Second Conduct of Proceedings Order, paras 9-10.
[198] Document in Support of Appeal, para. 75.

106. The Prosecution identifies what it claims to be inconsistencies between the 15 January 2019 Oral Acquittal Decision and the 16 July 2019 Reasons and relies on them to argue that the Majority Judges developed their conclusions on certain matters, such as the nature of the decision or the standard of proof, only after deciding to acquit Mr Blé Goudé and that therefore the decision of acquittal was not fully informed.[199]

III.D.3.i. There are no inconsistencies about the nature of the decision

107. An assumption showing in the Prosecution's view that the decision of acquittal was supposedly not fully informed is that by 15 January 2019, the Majority had allegedly not fully completed its reasoning and reached shared conclusions on the legal basis of the decision.[200]

108. This point has been developed at length above. There are no inconsistencies between the 15 January 2019 Oral Acquittal Decision, as clarified in the Majority's 16 January 2019 Decision and the Majority's reasons as encompassed in Judge Henderson's Reasons dated 16 July 2019. The Majority's view has therefore always been consistent. In his Opinion, Judge Tarfusser confirms subscribing "to the factual and legal findings contained in the 'Reasons of Judge Henderson'".[201] While not considering necessary to engage in any debate as to the nature of the decision, he fully agreed with Judge Henderson's determination that a decision that there is no case to answer has a legal effect equivalent to a formal judgment of acquittal.[202]

109. Even assuming that Judge Tarfusser would have a different view on the nature of the decision, it does not make the 15 January 2019 Oral Acquittal Decision any less informed. First, as emphasized by Judge Tarfusser, a debate as to the nature of the decision is "theoretical" and not "necessary, or wise" as long as the decision that there is no case to answer is based on an in-depth analysis of the evidence and both judges agree on the practical effect of the decision.[203] Second, and more importantly, Judge Tarfusser chose to authorize NCTA proceedings and to ascribe to Judge Henderson's reasoning for the purpose of the Impugned Decision, as first expressed in the January

[199] Document in Support of Appeal, para. 76.
[200] Document in Support of Appeal, paras 77-78.
[201] Judge Tarfusser's Opinion, para. 1.
[202] Judge Tarfusser's Opinion, para. 2.
[203] Judge Tarfusser's Opinion, paras 67, 2.

2019 oral decision and as reiterated in his separate concurring opinion.[204] Therefore, that choice was made, consciously, prior to issuing the 15 January 2019 Oral Acquittal Decision. In consideration thereof, the Prosecution's argument that the decision was not fully informed based on Judge Tarfusser's apparent change of mind as to the nature of the decision after 15 January 2019, is thus unsubstantiated and should be rejected.

III.D.3.ii. There are no inconsistencies on the applicable standard of proof

110. One other factor allegedly showing in the Prosecution's view that the decision was not fully informed is that by 15 January 2019, the Majority had allegedly not yet decided on the applicable standard of proof.[205]

111. *First*, the Prosecution claims that there is a contradiction between (i) the 15 January 2019 Oral Acquittal Decision, referring to the standard of proof of article 66 of the Statute, and thus, presumably, to the proof beyond reasonable doubt under article 66(3) and (ii) the 16 January 2019 Decision, in which Judge Tarfusser, in the name of the Majority contested that the latter did in fact apply the beyond a reasonable doubt standard.[206]

112. The burden of proof that the Majority is referring to in the 15 January 2019 Oral Acquittal Decision is, as explained the following day in the 16 January 2019 Decision, the standard required to meet "the onus of proof to the extent necessary for warranting the Defence to respond".[207] Therefore, the "standard as foreseen in Article 66 of the Rome Statute" was not the beyond a reasonable doubt standard contained in article 66(3) but the no case to answer standard related to the onus of proof of article 66(6). This interpretation is consistent with the 16 January Decision but also with another excerpt of the 15 January 2019 Oral Acquittal Decision stating that "there is no need for the Defence to submit further evidence as the Prosecutor has not satisfied

[204] 16 January 2019 Decision, page 4, lines 17-23, 15 January 2019 Oral Acquittal Decision, page 4, lines 15-16; Judge Tarfusser's Opinion, paras 1-2.
[205] Document in Support of Appeal, para. 76.
[206] Document in Support of Appeal, para. 80.
[207] 16 January 2019 Decision, page 4, lines 14-15.

the burden of proof in relation to several core constitutive elements of the crimes charged".[208]

113. The "beyond reasonable doubt standard"' of article 66(3) that Judge Herrera Carbuccia refers to[209] and that Judge Tarfusser clarified was not the standard the Majority applied involves the Trial Chamber making its own determinations on the facts of the case and determining whether the accused is guilty beyond reasonable doubt. The beyond reasonable doubt standard is not a sufficiency determination, it is a factual determination that the trial chamber, seized with a case, makes.

114. However, the Majority did not look at the evidence so as to determine for itself whether Mr Blé Goudé was *indeed* guilty beyond a reasonable doubt. The standard the Majority applied, and that Judge Henderson emphasized was "the key question to be determined in *these proceedings*" (emphasis added) was "whether the Prosecutor has submitted sufficient evidence in support of that charge such that a reasonable chamber could convict".[210]

115. In light of the above, there were not any contradictions between the 15 January 2019 Oral Decision and the 16 January 2019 Decision as to the standard applied.

116. *Second*, the Prosecution argues that even assuming both judges were in agreement on the standard in January, by 16 July 2019, "the two Majority Judges disagreed with each other".[211] Judge Henderson allegedly adopted the *Ruto and Sang* no case to answer standard while Judge Tarfusser supposedly found that the only evidentiary standard was that of beyond a reasonable doubt pursuant to article 66(3) of the Statute.[212] The Prosecution claims that Judge Tarfusser's apparent switch of opinion shows that the 15 January 2019 Oral Acquittal Decision was not fully informed.[213]

117. This is a total misrepresentation of Judge Tarfusser's position. Judge Tarfusser never hid his view that the NCTA proceedings were "unnecessary as a tool to preserve the interests and rights they are meant to serve".[214] On the basis of his own words, it has

[208] 15 January 2019 Oral Acquittal Decision, page 3, lines 2-4.
[209] 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, paras 41-47.
[210] Judge Henderson's Reasons, paras 2, 14.
[211] Document in Support of Appeal, para. 81.
[212] Judge Tarfusser's Opinion, para. 65.
[213] Document in Support of Appeal, paras 81-82.
[214] Judge Tarfusser's Opinion, para. 65.

always been his view.[215] However, the fact is that the Chamber, *unanimously*, authorized NCTA proceedings.[216] It means that at least by June 2018 (but probably earlier), Judge Tarfusser decided, as a judicial compromise, to fully ascribe to the other two judges' position that a NCTA procedure was the most efficient approach, for the purpose and in the context of these specific proceedings.

118. Judge Tarfusser's statement in his paragraph 65 was made in *obiter dictum*.[217] What matters is that he expressly agreed to the NCTA proceedings for the purpose of this decision and consequently agreed to the evidentiary standard as mentioned in the First and Second Conduct of Proceedings Orders and as reiterated in the 15 January 2019 Oral Acquittal Decision, the 16 January 2019 Decision and Judge Henderson's Reasons.[218] In his Opinion, Judge Tarfusser quoted Judge Henderson's Reasons affirming that "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" to confirm his full agreement with the equivalent legal effect of a NCTA decision.[219]

119. Judge Tarfusser further emphasized that "the exercise entertained by the Chamber […] was never meant to replicate the so-called 'Ruto and Sang model'".[220] He then quoted Judge Henderson's Reasons in which Judge Henderson explained that the Trial Chamber departed from the initial NCTA model by pointing out, *inter alia*, that while it took the evidence at its highest,[221] completely preventing trial judges from assessing the quality of the evidence at the NCTA stage "sits uncomfortably in the ICC's procedural framework".[222] This shows that Judge Tarfusser embraced the standard of proof of the NCTA model adopted by the Trial Chamber.

120. In light of the above, the Prosecution's claim that Judge Tarfusser's *obiter dictum* demonstrates that he allegedly had shifted his position after the issuance of the 15

[215] Judge Tarfusser's Opinion, para. 2.
[216] Second Conduct of Proceedings Order, para. 10.
[217] Judge Tarfusser's Opinion, para. 65.
[218] First Conduct of Proceedings Order, para. 10; Second Conduct of Proceedings Order, para. 10, 15 January 2019 Oral Acquittal Decision, page 4, lines 15-16, 16 January 2019 Decision, page 4, lines 11-16, Judge Henderson's Reasons, paras 14-15.
[219] Judge Tarfusser's Opinion, para. 2 referring to Judge Henderson's Reasons, para. 17.
[220] Judge Tarfusser's Opinion, para. 67.
[221] Judge Tarfusser confirms having "looked at the evidence in its entirety, taking it all 'at its highest' and 'holistically'". Judge Tarfusser's Opinion, para. 73.
[222] Judge Tarfusser's Opinion, para. 68 referring to Judge Henderson's Reasons, para. 3.

January 2015 Oral Acquittal Decision should be considered unsupported and therefore rejected.

III.D.4. There are no inconsistencies in assessing the sufficiency of evidence at the NCTA stage within Judge Henderson's Reasons

121. The Prosecution's conclusion that Judge Henderson had not yet clearly defined the relevant standard of proof when he drafted parts of his Reasons, since he would allegedly have inconsistently applied his approach to assessing the sufficiency of the evidence, is totally unsubstantiated and a misrepresentation of the Majority's reasoning.[223]

122. First, the Prosecution fails to identify which factual findings and conclusions Judge Henderson reached in the Reasons before allegedly having set out the applicable standard. A broad reference to the Document in Support of Appeal's paragraphs 122 to 263 is not sufficiently specific to allow the parties and this Chamber to identify any issue in this respect. Second, even assuming any inconsistency in Judge Henderson's approach to the evidence, which the Prosecution also failed to demonstrate, it would not mean that Judge Henderson had not yet clearly defined the relevant standard of proof to assessing the sufficiency of the evidence when drafting the alleged inconsistent portions of the Reasons and that the decision was therefore not fully informed in that regard. The Prosecution strangely presumes that Judge Henderson would not have been able to amend his initial findings to adapt them to his alleged newly defined approach. There is absolutely no nexus between any potential inconsistency in Judge Henderson's approach to the evidence and the question of the informed nature of the Impugned Decision.

123. Therefore, the Prosecution's argument that the Impugned Decision was allegedly not fully informed on this basis should be rejected.

124. In conclusion, the Prosecution failed to demonstrate that the Majority did not complete the process of making all its findings on the evidence and reaching all its conclusions when it decided to acquit Mr Blé Goudé on 15 January 2019. Similarly, it failed to demonstrate that delaying the reasons to a later stage had any consequences

[223] Document in Support of Appeal, para. 83.

on the informed nature of the 15 January 2019 Oral Acquittal Decision. Therefore, the Defence submits that the Prosecution's claim that the Impugned Decision was not fully informed and thus unlawful should be rejected.

III.E. The Trial Chamber did not "deviate" from the Statute or apply an "expansive approach to article 74(5) by evoking the rights of the accused in the Impugned Decision

125. The Prosecution argues that the Trial Chamber erred by applying an "expansive approach" to article 74(5) that justified "departing" from this provision on the basis of international human rights law.[224] This premise is fundamentally misguided.

126. *First*, contrary to the Prosecution's suggestion, nowhere in the Impugned Decision does the Trial Chamber purport to "depart" or "deviate" from article 74(5) nor is such a "departure" inferable from it.[225] The Prosecution also has failed to demonstrate that the Trial Chamber "invoke[d] internationally recognised human rights to justify its inability to provide a decision expeditiously".[226] In the 15 January 2019 Oral Acquittal Decision, the Trial Chamber referred to rule 144(2) which requires that "copies" of the decision be provided to the participants and accused persons "as soon as possible", while observing that a strict reading of that provision would mean that the oral and written reasons would ideally have been rendered simultaneously.[227] However, the Trial Chamber noted that such a strict reading of the rule would not, in the circumstances, be appropriate.[228] As such, the Trial Chamber exercised its judicial discretion to render its written reasons as soon as possible, in order for the legal effect of the Impugned Decision to be triggered immediately, as to avoid further delays and the unnecessary detention of Mr Blé Goudé, and to promote legal certainty.[229] This approach is compatible with the Trial Chamber's obligations under the Statute,

[224] Document in Support of Appeal, paras 86-87.
[225] Document in Support of Appeal, para. 87. *See* 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 34.
[226] Document in Support of Appeal, para. 25, footnote 55 and para. 91.
[227] 15 January 2019 Oral Acquittal Decision, page 3, line 18 to page 4, line 9, cited in the Document in Support of Appeal, para. 87. *See* 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 21.
[228] 15 January 2019 Oral Acquittal Decision, page 4, lines 1-3.
[229] 15 January 2019 Oral Acquittal Decision, page 4, lines 5-9. As held by the Single Judge, "(…) legal certainty and finality in judicial decisions serve important purposes in achieving the orderly administration of justice", and "[l]egal certainty and finality in judicial decisions are also principles consistent with internationally recognized human rights, as required by article 21(3) of the Statute", *Prosecutor v. Callixte Mbarushimana*, Decision on "Second Defence request for interim release", 28 July 2011, ICC-01/04-01/10-319, page 6 and footnote 24.

including its duty to ensure fairness and expeditiousness.[230] Rather than constituting a "deviation" from the Statute, the Trial Chamber's approach has merely been to inform the parties of its reasons not to postpone the delivery of the verdict until the full articulation of its reasoning in writing. In doing so, it recalled its duty to interpret and apply the Statute in a way that is consistent international human rights, in light of the final decision of acquittal that had been reached following deliberations.[231]

127. *Second*, the Prosecution's reliance on the guiding principles of international human rights, including the right to a fair trial, in order to challenge the Impugned Decision is misplaced, as it relies on these principles to the detriment of the accused. The international human rights instruments and jurisprudence relied on by the Prosecution focus on the rights of accused persons to a fair trial.[232] More specifically, they underline the fundamental role played by courts and tribunals in protecting the rights of accused persons, deprived of their liberty and facing trial and recognize the inherent position of vulnerability and disadvantage of defendants, whether in domestic or international criminal trials.[233]

128. The jurisprudence cited by the Prosecution, rather than undermining the Trial Chamber's decision, only further reinforces the lawful nature of the Impugned Decision, as consistent with international human rights law. As noted by this Court, the rights of the accused are at the heart of NCTA proceedings, which serve to promote judicial economy and efficiency, and the proper administration of justice.[234] The NCTA procedure "saves the accused from the hardship of standing trial where

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[230] Article 64(2) of the Statute.

[231] 15 January 2019 Oral Acquittal Decision, page 3, line 24 to page 4, line 5.

[232] *See* Document in Support of Appeal, footnote 197.

[233] For instance, article 10 of the UDHR provides that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him"; article 14(1) of the ICCPR provides for the equality of accused persons before the courts, a fair and public hearing by competent, independent and impartial tribunal established by law, as well as a public judgment; article 8(5) of the ACHR provides that criminal proceedings shall be made public; article 6(1) of the ECHR enshrines the right of an accused person to a fair trial, encompassing a fair and public hearing within a reasonable time by an independent and impartial tribunal, as well as the delivery of a public judgment, as quoted in the Document in Support of Appeal, para. 25, footnote 55 and para. 94. *See* Y. McDermott, Fairness in International Criminal Trials (2016), page 116.

[234] *Ruto and Sang* Decision No. 5, para. 16; *Ntaganda* NCTA Decision, para. 26, noting however that such a motion may also entail a lengthy process requiring parties and participants submissions and evaluation of the evidence by the Chamber.

there is no evidence capable of supporting a conviction".[235] As noted by the Appeals Chamber, "[h]uman rights underpin the Statute"[236] and judges have a duty to "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".[237] In the cited Judgment of *Bemba*, in interpreting article 74(5), the Appeals Chamber placed emphasis on the need to protect the rights of the accused. It held that in "interpreting article 74 (5) of the Statute, it is appropriate to have regard to the jurisprudence of the ECtHR, which has underlined the importance of reasoning in allowing the *accused* person to usefully exercise available rights of appeal. It requires that courts "indicate with sufficient clarity the grounds on which they based their decision" (emphasis added).[238] Similarly, in the cited case of *Hadjianastassiou v. Greece*, the ECtHR concluded that "the *rights of the defence* were subject to such restrictions that the applicant did not have the benefit of a fair trial" (emphasis added).[239] The cited cases of *Van de Hurk v. Netherlands*,[240] *García Ruiz v. Spain*,[241] *Perez v. France*,[242] *Gorou v. Greece*,[243] *Hirvisaari v. Finland*,[244] *Suominen v. Finland*[245] also dealt with the

[235] S. Vasiliev, "Structure of Contested Trial", in G., Sluiter, H., Friman, S., Linton, S., Vasiliev, S., Zappalà (eds), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, page 639. *See also* S. Vasiliev, International criminal trials: A normative theory (2014), pages 702-703. This is further evidenced by the enactment of rule 98bis in 2004 at the ICTY, with the aim of increasing fairness and securing the rights of the accused, by turning the no case to answer procedure into an oral procedure, serving to streamline and simplify the procedure and render it a process more similar to the summary process at common law. This had been a reaction to the "prevailing tendency for Rule 98bis motions to involve much delay, lengthy submissions, and therefore an extensive analysis of evidentiary issues in decisions", as had been noted by several chambers of the ICTY. *See Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98 bis, 21 June 2004, para. 13; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, 16 June 2004, para. 11.

[236] *Lubanga* Jurisdiction AD, para. 37.

[237] Article 64(2) of the Statute.

[238] *Bemba* AJ, para. 50, cited in the Document in Support of Appeal, para. 93, footnote 189.

[239] *Hadjianastassiou v. Greece*, para. 37, cited by the Prosecution at para. 93, footnote 189.

[240] The ECtHR held that "Article 6 para. 1 (art. 6-1) obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument. Nor is the European Court called upon to examine whether arguments are adequately met […]", *Van de Hurk v. Netherlands*, para. 61.

[241] The ECtHR held that "[t]he extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in light of the circumstances of the case" and "[a]lthough Article 6 §1 obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument", *García Ruiz v. Spain*, para. 26.

[242] The ECtHR observed that "[w]hile Article 6 § 1 does oblige the courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument", *Perez v. France*, para. 81.

[243] "The Court reiterates that Article 6 § 1 of the Convention obliges courts to give reasons for their decisions, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty applies may vary according to the nature of the decision. It is moreover necessary to take into account, *inter alia*, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfil the obligation to state

accused persons' right to a fair trial through the provision of sufficient reasons for the court's decision.[246] This jurisprudence serves to illustrate that the Impugned Decision was rendered in a way that protected the rights of Mr Blé Goudé, as is required by the Statute and internationally recognized human rights.[247]

129. Moreover, the Prosecution impermissibly relies on the rights of accused persons to argue to their detriment.[248] These rights are not meant to protect the position of the Prosecution. In support of its argument that the Trial Chamber's approach was inconsistent with the right to a reasoned opinion, the Prosecution relies on two Appeals Chamber decisions in the *Lubanga* case.[249] Both concern the fair trial rights of the *accused* person – and not the Prosecution – to a reasoned decision and in both cases, it was the defendant who had appealed.[250]

130. *Third*, the Prosecution evokes the principle of equality to argue that fair trial rights do not only belong to accused persons, but also belong to victims and the Prosecution.[251] However, the jurisprudence cited by the Prosecution explicitly emphasises that the "principle of equality does not affect the fundamental protections given by the general

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reasons, deriving from Article 6 § 1, can only be determined in the light of the circumstances of the case", *Gorou v. Greece*, para. 37.

[244] The ECtHR held 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", *Hirvisaari v. Finland*, para. 30.

[245] The ECtHR held that "an authority is obliged to justify its activities by giving reasons for its decisions" And emphasized that "a further function of a reasoned decision is to demonstrate to the parties that they have been heard", *Suominen v. Finland*, paras 36-37.

[246] Document in Support of Appeal, para. 93, footnote 189.

[247] Articles 21(3) and 64(2) of the Statute.

[248] For instance, the Prosecution cites the *Lubanga* Interim Release AD, Separate opinion of Judge Georghios M. Pikis, para. 16, which emphasizes the right of Mr Lubanga to have his detention considered, the *Katanga* Legal Characterisation AD, para. 86, where the Appeals Chamber "has had specific regard to, and emphasises the importance of, the rights of the accused to a fair trial, as detailed in article 67 of the Statute", in the context of the accused's right to have adequate time and facilities to prepare the defence in accordance with article 67(1)(b) and (e) of the Statute, *See* Document in Support of Appeal, footnote 176, as well as the *Gbagbo* Judge Ušacka Dissenting Opinion, in which Judge Ušacka recalled the rights of a detained person which are "woven into the fabric of the Statute via article 21 (3)", paras 11-14.

[249] Document in Support of Appeal, para. 93.

[250] In the cited *Lubanga* First Redactions AD, Mr Lubanga had argued, as a first ground of appeal, that the factual reasoning given in the impugned decision to rule that the identities of the witnesses should not be disclosed to the defence was insufficient. The Appeals Chamber held that "[a] decision authorising the non-disclosure of the identities of witnesses of the Prosecutor to the defence has to state sufficiently the reasons upon which the Pre-Trial Chamber based its decision". *Lubanga* First Redactions AD, paras 1, 10, 20. In the *Lubanga* Second Redactions AD, also cited in the Document in Support of Appeal, para. 93, footnote 188, Mr Lubanga appealed the Pre-Trial Chamber decision on the ground of insufficient reasoning in relation to authorisation for non-disclosure based on rule 81(2) of the Rules, *Lubanga* Second Redactions AD, para. 11, s*ee also* Separate Opinion by Judge Georghios M. Pikis, para. 5.

[251] Document in Support of Appeal, para. 93. *See* 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 35.

law or Statute to the accused, and the trial proceeds against the background of those fundamental protections".[252] This jurisprudence also establishes that "it is usually understood that the right to a fair trial applies first and foremost to a defendant or to the Defence" but that the "general component of fairness" applies to the benefit of all participants and to the Prosecution. This principally means that each party shall "be granted the genuine opportunity to present [its] case and to be apprised of and comment on the observations and evidence submitted to the Court that might influence its decision", including the right to disclosure from the Defence.[253] Judge Van den Wyngaert has endorsed the view that the right to a fair trial applies "first and foremost" to the defendant, in particular where a defendant's liberty is at stake:

> 311. This raises the question by which standard fairness and justice should be evaluated. My view is that the trial must be first and foremost fair towards the accused. Considerations about procedural fairness for the Prosecutor and the victims and their Legal Representatives, *while certainly relevant, cannot trump the rights of the accused. After all, when all is said and done, it is the accused - and only the accused - who stands trial and risks losing his freedom and property*. In order for a court of law to have the legal and moral authority to pass legal and moral judgment on someone, especially when it relates to such serious allegations as international crimes, it is essential, in my view, to scrupulously observe the fairness of the proceedings and to apply the standard of proof consistently and rigorously. It is not good enough that most of the trial has been fair. *All of it must be fair*. [Emphasis added.][254]

131. As noted by Judge Van den Wyngaert, it is not enough that most of the trial has been fair; all of it must be fair, including, in the Defence's view, the manner in which the final decision on a NCTA is rendered. In the instant case, the Trial Chamber issued its

[252] *Aleksovsk*i Evidence Admissibility Decision, para. 25, cited in the Document in Support of Appeal at para. 93, footnote 194.
[253] *Situation in Uganda*, Decision on Prosecutor's application for leave to appeal dated 15th day of March 2006 and to suspend or stay consideration of leave to appeal dated the 11th day of May 2006, ICC-02/04-01/05-90-US-Exp (reclassified by ICC-02/04-01/05-135), 10 July 2006, para. 24; *See* ICTY *Prosecutor v. Orić*, Interlocutory Decision on length of Defence case, 20 July 2005, Case No. IT-03-68-AR73.2, para. 7: "[t]he Prosecution has the burden of telling an entire story, of putting together a coherent narrative and proving every necessary element of the crimes charged beyond reasonable doubt." Rules 79 (1) (a) and 79 (3) of the Rules. *See also* 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 35.
[254] *Katanga* TJ, Minority Opinion of Judge Christine Van den Wyngaert, para. 311; *See also* Situation in Uganda, Decision on Prosecutor's application for leave to appeal dated 15th day of March 2006 and to suspend or stay consideration of leave to appeal dated the 11th day of May 2006, ICC-02/04-01/05-90-US-Exp (reclassified by ICC-02/04-01/05-135), 10 July 2006, para. 24. The International Bar Association also indicated in its August 2011 Report on Fairness at the International Criminal Court: "The IBA agrees with the assessment of PTC II: while there is undoubtedly a need in the context of international criminal proceedings to ensure the fairness of the proceedings for all participants, the fair trial rights of the defendant must never be subordinated to those of the victims or the prosecution", IBA, Fairness at the International Criminal Court: An International Bar Association's Human Rights Institute Report, August 2011, p. 20.

verdict publically while providing a summary of its decision, which was followed by full written reasons, thereby complying with its duty not only to uphold the fair trial rights of the accused, but also its duty to protect the interests of victims and witnesses, pursuant to article 64(2).[255] The alleged victims and the witnesses too benefitted from receiving the verdict and summary of the decision prior to the full articulation of its reasoning in writing, as it allowed them to be appraised of the outcome of the Trial Chamber's deliberations. Therefore, the Prosecution's arguments that the Trial Chamber "shielded" its decision and did not "make it properly accessible to the public" must be rejected.[256]

132. *Fourth*, the Prosecution argues that the Trial Chamber knowingly departed from the requirements of article 74(5) for no legal or practical reason, arguing that the Trial Chamber could have conditionally released Mr Gbagbo and Mr Blé Goudé as part of its review of detention.[257] The Prosecution relies *inter alia* on the case of *Werner v. Austria*, where the applicant was not afforded a public hearing in relation to his compensation claim for his detention.[258] The case lacks pertinence and is clearly distinguishable, as the Trial Chamber held a public hearing for the purpose of delivering its verdict and summary of decision, with reasons to follow.

133. Moreover, the Prosecution's argument that the Trial Chamber could have addressed any concerns about Mr Blé Goudé's human rights by conditionally releasing them while finalising the full written reasons is equally unconvincing.[259] Not only is this argument speculative, but it also ignores the fundamental difference between interim release of an accused person pending trial and release resulting from an acquittal, which may at the utmost be accompanied by conditions.[260] After an acquittal,

[255] *See Situation in the Democratic Republic of Congo*, Decision on the Prosecutor's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Application for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS5 and VPRS6, ICC-01/04-135-tEN, 31 March 2006, para. 38.
[256] Document in Support of Appeal, para. 94.
[257] Document in Support of Appeal, para. 95.
[258] Document in Support of Appeal, para. 94. In *Werner v. Austria*, para. 46. The Defendant had not been afforded a hearing, neither before the Vienna Regional Court, nor before the Vienna Court of Appeal.
[259] Document in Support of Appeal, para. 92. See article 81(3)(c)(i) of the Statute, which provides: "In case of an acquittal, the accused shall be released immediately, subject to the following: (i) Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal (…)".
[260] Article 58(1) of the Statute establishes the legal basis for arrest and detention, whereas article 60(2) of the Statute provides for the possibility of a person subject to a warrant of arrest to be released in the interim pending trial. Article 60(3) of the Statute provides for periodical review of rulings on the release or detention of the

principles of international criminal law do not allow for interim release.[261] Moreover, the Prosecution ignores that the Trial Chamber first and foremost rendered its oral decision with written reasons to follow because it had arrived at a Majority verdict following judicial deliberations, which it sought to communicate as soon as possible. Rather than contravening it, this approach is entirely compatible with the Court's Code of Judicial Ethics, namely article 7(4), providing that judges "shall deliver their decisions and any other rulings without undue delay", aiming to remove uncertainty about the outcome of the trial as early as possible.[262] As held by Judge Herrera Carbuccia, "[w]hat is reasonable will depend on the nature and complexity of each case".[263] In the instant case, it was entirely reasonable and compatible with both the statutory framework of the Court and internationally recognized human rights for the Trial Chamber to proceed as it did.

134. *Sixth*, the Prosecution suggests that the test for "departing" from the requirements of article 74(5) is that of "good cause", without however, providing any substantiation for this argument.[264] It should therefore be rejected summarily, as it finds no legal or factual basis.[265]

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person, which may be done upon request of a party. S*ee* for instance *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mengenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision regarding interim release, ICC-01/05-01/13-1151, 17 August 2015. By contrast, article 81(3)(c) provides specifically for the rule that an acquitted person be immediately release, while carving out an exception to that rule in article 81(3)(c)(i), where the Trial Chamber may maintain the detention of he person pending appeal in "exceptional circumstances". As held by the Appeals Chamber, article 81(3)(c)(i) of the Statute must be interpreted restrictively and continued detention must be limited to situations which are truly exceptional, and "compelling reasons" must exist for imposing conditions on a released person. Moreover, "[a]ny such conditions must be carefully balanced with the rights of the acquitted person and must be proportionately tailored to mitigate the risks identified". Detention AD, paras 1, 49-54; 16 January 2019 Decision, page 2, lines 1-2.

[261] There is no provision in the Statute for conditional release. The Appeals Chamber in its 1 February 2019 Decision relied on rule 149 of the Rules read together with articles 57(3)(a), 60(2) and 64(6)(f) of the Statute and rule 119 of the Rules to justify its power to impose conditions on the acquitted person pending an appeal, and not on the legal framework on interim release, Detention AD, para. 53.

[262] *See supra* Response, paras 44, 73; Document in Support of Appeal, para. 92; Judge Herrera Carbuccia's Dissenting Opinion, footnote 30; Code of Judicial Ethics, article 7(4).

[263] Judge Herrera Carbuccia's Dissenting Opinion, paras 29, 31.

[264] Document in Support of Appeal, para. 92.

[265] *Prosecutor v. Laurent Gbagbo*, Decision on the Defence request for leave to appeal the "Decision on the Confirmation of Charges against Laurent Gbagbo", 11 September 2014, ICC-02/11-01/11-680, para. 47; ICTY *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-A, Judgment, 22 April 2008, para. 46; the ICTY Appeals Chamber held in *Galić* that "[a]rguments of a party which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits", ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgment, ("*Galić* AJ") 30 November 2006, para. 10.

135. In sum, the Prosecution's argument that the Trial Chamber erred by applying an "expansive" approach to article 74(5) on the basis of international human rights law is unfounded and is based on a mischaracterization of the Impugned Decision. The Trial Chamber's exercise of its judicial discretion in a way that would mitigate the impacts of a lengthy procedure on the rights of the accused was entirely lawful and consistent with international human rights.[266]

III.F. Non-observance of the criteria pursuant to article 74(5) does not lead to the nullity of the Impugned Decision

136. The Prosecution failed to provide cogent arguments to support its claim that the Majority's alleged failure to fulfil the requirements of article 74(5) of the Statute renders the judgment of acquittal "null and void" and without any legal effect.[267] It based its argument on the flawed premise that the Trial Chamber relied on its "inherent powers" to fill a "non-existent gap".[268] The Trial Chamber did not invoke its inherent powers nor did it purport to fill in a lacuna which could warrant the application of article 21(1)(c) of the Statute.

137. *First*, as argued above, the Trial Chamber did not err in misapplying article 74(5) as it was not bound by its requirements.[269] Nevertheless, the Trial Chamber entered a formal judgment of acquittal pursuant to rule 144, and applied the criteria found in article 74(5).[270] As such, the Prosecution's argument that the Impugned Decision should be declared null and void for failing to comply with article 74(5) finds no basis.[271]

138. Even if the alleged deficiencies identified by the Prosecution were to be detected in the Impugned Decision – which the Defence strongly contests – those deficiencies would not lead to its nullity. Not only would those deficiencies not materially affect the outcome of proceedings, as further elaborated below,[272] but the Prosecution has

[266] 15 January 2019 Oral Acquittal Decision, page 3, line 18- page 4, line 9.
[267] Document in Support of Appeal, paras 21, and Section III.G., paras 98-102.
[268] Document in Support of Appeal, para. 98, relying on *Bemba et al.* SAJ, para. 76. *See* Judge Herrera Carbuccia's Dissenting Opinion, para. 15.
[269] *See supra* Response, paras 33-38.
[270] *See supra* Response, paras 39-125.
[271] Document in Support of Appeal, para. 117.
[272] *See infra* Response, paras 158-168.

failed to show how the *ultra vires* nature of the Impugned Decision would be the necessary outcome of the alleged procedural deficiencies.

139. *Second*, the Prosecution's reliance on the Appeals Chamber findings in the case of *Bemba et al.* lacks pertinence, as the legal issues raised in that case differed significantly from those in the instance case. In *Bemba et al.*, the Appeals Chamber quashed the Trial Chamber's finding that it had the inherent power to impose a suspended sentence. The cases are clearly distinguishable, given that contrary to the decision in *Bemba et al.*, where the Trial Chamber explicitly relied on the inherent powers doctrine and invoked the existence of a lacuna within the Court's legal framework to impose a suspended sentence, Trial Chamber I did not appeal to its inherent powers or incidental jurisdiction, nor did it rely on subsidiary sources of law pursuant to article 21(1) of the Statute or purport to fill a non-existent gap.[273] In the instant case, the Trial Chamber merely invoked article 21(3), which applies at all times, regardless of the existence of a lacuna.[274] Contrary to article 21(1)(c), internationally recognized human rights as enshrined in article 21(3) is not a subsidiary source of law. Rather, it is a principle which must guide the Court in its interpretation of the Statute, the Rules and the Elements of Crime.[275]

140. The Prosecution also relies on the *Bemba et al*. Appeals Judgment to argue that non-compliance with article 74(5) amounts to a procedural error.[276] In that same Judgment, the Appeals Chamber noted that "a trial chamber thus has a degree of discretion as to what to address and what not to address in its reasoning" and that "[n]ot every actual or perceived shortcoming in the reasoning will amount to a breach of article 74 (5) of the Statute".[277] Therefore, the fact that the Trial Chamber did not

[273] *Bemba et al.* SAJ, paras 76-80.
[274] By contrast, inherent powers are "judicial powers which, while not explicitly conferred in the relevant constitutive instruments, are to be considered necessarily encompassed within ("inherent to") other powers specifically provided for, in that they are essential to the judicial body's ability to perform the judicial functions assigned to it by such constitutive instruments", *See Prosecutor v. Banda and Jerbo*, Stay of Proceedings Decision, 26 October 2012, ICC-02/05-03/09-410, para. 77; *Bemba et al.* SAJ, para. 76.
[275] Article 21(3) is the only provision of the Statute which governs the application and interpretation of all other Statute provisions and is seen as many scholars as a provision analogous to constitutional provisions in national law contexts, *See* Schabas 2016, page 530; G. Hafner and C. Binder, 'The Interpretation of Article 21(3) ICC Statute, Opinion Reviewed' (2004) 9 Austrian Rev Int'l & European L 163, at 163; G. Bitti, 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC', in C. Stahn and G. Sluiter, The Emerging Practice of the International Criminal Court, Martinus Nijhoff Publishers, 2009, page 304.
[276] Document in Support of Appeal, para. 99.
[277] *Bemba* AJ, para. 106.

expressly rely on article 74(5), but nonetheless applied the criteria contained therein, does not mean that it committed a procedural error.

141. *Fourth*, the various US domestic law cases cited by the Prosecution to support its argument are irrelevant.[278] For instance, the case of *People v. Ahmed* concerned the absence of the trial judge and the delegation of some of his duties to his law secretary during jury deliberations, depriving the defendant of his right to a trial by jury.[279] Similarly, *People v. Lumpkin* addressed the absence of a judge from the courtroom during the reading of testimony.[280] Neither of these cases relates to the issues in the present appeal and should therefore be rejected.

142. In conclusion, the Prosecution's arguments as to the *ultra vires* nature of the Impugned Decision are unconvincing and unsupported by the law.

III.G. The Majority did not abuse its discretion in rendering the Impugned Decision pursuant to article 66(2)

143. The Prosecution fails to provide cogent arguments which could lead to a conclusion that the Trial Chamber abused its discretion by failing to comply with the requirements of article 74(5) of the Statute.[281] Rather, it focuses on reiterating its previous arguments and relying on examples from domestic law which do not apply.

144. The Appeals Chamber has consistently held that it may only interfere with the exercise of a trial chamber's discretion under limited conditions, namely, when the exercise of discretion is based on (i) "an erroneous interpretation of the law"; (ii) "a patently incorrect conclusion of fact"; or (iii) "where the decision *is so unfair and unreasonable as to constitute an abuse of discretion*" (emphasis added).[282] To fall under the latter, the Prosecution must show that the cumulative criteria of unfairness *and* unreasonableness are met, and that the Impugned Decision would "force the

[278] Document in Support of Appeal, para. 100, footnote 216.
[279] *People v. Ahmed*, page 310, cited in Document in Support of Appeal, para. 100, footnote 216.
[280] *People v. Lumpkin*, page 740, cited in Document in Support of Appeal, para. 100, footnote 216. The cited cases of *People v. Bayes* and *People v. Parker* are equally inapposite, as they concern the principle that a question of law may exist even absent timely objection by the defendant. The Court of Appeals of the State of New York decided in *People v. Patterson* that a defendant cannot consent to an error of law, *People v. Patterson*, page 295.
[281] *See* Document in Support of Appeal, paras 103-106.
[282] *Kony et al.* Admissibility AD, paras 79-80; *Kenyatta* Non-Compliance AD, para. 22; *Bemba et al.* AJ, para. 101; *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, para. 20.

conclusion that the Chamber failed to exercise its discretion judiciously".[283] The Prosecution, however, has failed to do so.

145. *First*, as shown above, the Trial Chamber was not bound by article 74(5) in rendering the Impugned Decision, given that the legal basis for the decision is article 66(2) and therefore did not exercise its discretion based on an erroneous interpretation of the law.[284] Nevertheless, it complied with the criteria of article 74(5).[285]

146. *Second*, the manner in which the Impugned Decision was delivered falls short of meeting the test of being "so unfair and unreasonable as to constitute an abuse of discretion". Trial chambers enjoy broad latitude to direct the conduct of proceedings, pursuant to articles 64(3)(a), 64(2) 64(6)(f) and rule 134, including the manner in which they formally render decisions, as long as they are compatible with the basic requirements of publicity and fairness.[286] The Trial Chamber's broad discretion is supported, among others, by the fact that no specific deadline for rendering a final decision was ultimately included in the Statute, as acknowledged by Judge Herrera Carbuccia in her dissenting opinion.[287] The Dissenting Judge's reference by analogy to the time limit for rendering a decision on the confirmation of charges as provided in the Statute is inapposite. As observed by Judge Herrera Carbuccia, this is the "sole provision imposing a time limit upon a Chamber",[288] attesting to the fundamentally distinctive nature of confirmation of charges proceedings, as a limited "filtering" stage which should not delay the commencement of trial, rather than constituting a benchmark for the delay between an oral decision and its written reasons.[289]

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[283] *Kenyatta* Non-Compliance AD, para. 25, relying on *Prosecutor v. Dragomir Milošević*, Case No IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chambers Decision on the Assignment of Defense Counsel, 1 November 2004, para. 10; *Bemba et al.* AJ, para. 101; *see* Document in Support of Appeal, para. 105.
[284] *See supra* Response, paras 15-38.
[285] *See supra* Response, paras 39-125.
[286] *See Ruto and Sang* Decision No 5, paras 15-16; Rule 144 of the Rules.
[287] 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 28.
[288] *Ibid.*
[289] As held by the Appeals Chamber: "[…] the confirmation of charges hearing is not an end in itself but rather serves the purpose of filtering out those cases and charges for which the evidence is insufficient to justify a trial. This limited purpose of the confirmation of charges proceedings is reflected in the fact that the Prosecutor must only produce sufficient evidence to establish substantial grounds to believe the person committed the crimes charged. The Pre-Trial Chamber need not be convinced beyond a reasonable doubt, and the Prosecutor need not submit more evidence than is necessary to meet the threshold of substantial grounds to believe. This limited purpose is also reflected in the fact that the Prosecutor may rely on documentary and summary evidence and need not call the witnesses who will testify at trial.", *Prosecutor v. Callixte Mbarushimana*, Judgment on the

147. The intentional absence of a clear time limit between the delivery of the oral decision and the written reasons in the Statute and Rules is a further indication that this has been left to the discretion of the chambers of the Court. This is evidenced, among others, by an earlier draft for an international criminal court prepared by scholar Cherif Bassiouni, which provided that "written findings of fact and conclusions of law" shall be rendered within "30 days from the date of pronouncement of the oral decision".[290] The draft specifically anticipated for a delay between the oral verdict and the written judgment, foreseeing that such a delay would be required.

148. *Second*, the Prosecution's argument that the Trial Chamber's approach does not accord with several domestic legal practices around the world is not only irrelevant to the Appeals Chamber's assessment of whether the Trial Chamber abused its discretion, but also, fails to support the Prosecution's argument.[291]

149. The Prosecution's reasoning is contradictory and inconsistent. On the one hand, the Prosecution relies on domestic jurisprudence and legislation as a subsidiary source of law pursuant to article 21(1)(c), arguing that "the practice of international courts and tribunals […] illustrates the limits of any judicial discretion and […] that the Majority exceeded those limits in this case".[292] On the other hand, the Prosecution argues that "recourse to general principles of law under article 21(1)(c) is unnecessary",[293] given the "clear wording of article 74(5)" and that there is no lacuna in the law, as held by Judge Herrera Carbuccia.[294] Despite the lack of pertinence of domestic law in the present appeal, and the internal contradiction in the Prosecution's reasoning, the Defence will nevertheless engage with some of the examples of domestic and international practice to show that even if considered by the Appeals Chamber, they do not support the Prosecution's arguments.

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appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", 30 May 2012, ICC-01/04-01/10-514, para. 47.

[290] The text of Article XX ('Adjudication') subparagraph 5 reads as follows: "The decisions of the Chambers shall be publicly announced orally, in summary or entirely, accompanied by written findings of fact and conclusions of law, or entered 30 days from date of pronouncement of the oral decision, and any judge of that Chamber may write a separate dissenting or concurring opinion", C. Bassiouni (ed.), A Draft International Code and Draft Statute for an International Criminal Court, Martinus Nijhoff Publishers (1987), page 231.

[291] Document in Support of Appeal, paras 108-114.

[292] Document in Support of Appeal, paras 108-109.

[293] Document in Support of Appeal, para. 108.

[294] 15 January 2019 Judge Herrera Carbuccia's Dissenting Opinion, para. 14: "Thus, the use of such external sources of law and is limited and strictly auxiliary to the primary sources of law and internationally human rights". Document in Support of Appeal, para. 108.

150. *Firstly*, the Prosecution argues that in the Ivorian legal system "a court is simply not allowed to separate the verdict from the reasons".[295] In practice, however, written reasons are rarely published on the same day or even shortly after the delivery of the oral verdict; rather, written reasons are often delivered weeks or months later. A recent example is Mr Blé Goudé's oral conviction by the Tribunal of Abidjan, for which the written reasons were issued after the oral verdict.[296]

151. *Secondly*, the Canadian Supreme Court judgment of *R v Teskey*, cited by the Prosecution to support the proposition that "deferrals of the full reasons is acceptable only for a limited period of time when it is clear that the reasons had been crafted before the verdict was announced,"[297] is not only clearly distinguishable factually and legally from the case at hand but actually reinforces the Defence's argument. At issue was whether the trial judge's observation made to the defendant after he had delivered his oral verdict – namely, that he would take into account the defendant's views in his written reasons, which would follow – raised a reasonable apprehension of bias capable of displacing the presumption of integrity and impartiality of the trial judge.[298] The Supreme Court held that the fact that the written reasons had been delivered 11 months after the oral verdict did not, in and of itself, give rise to an apprehension of bias; judges are not precluded from announcing a verdict with "reasons to follow" and this is an acceptable practice in the Canadian legal system.[299] The central issue was whether the presumption of impartiality had been displaced by the absence of a "necessary link" between the oral verdict and the written reasons.[300] The Court emphasised that reasons for a judgment are *presumed* to reflect the

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[295] Document in Support of Appeal, para. 110.
[296] Procès-Verbal de l'audience du Tribunal d'Abidjan Plateau, 30 December 2019, CIV-OTP-0108-0530; Written Decision of the 30 December 2019 Conviction, 9 January 2020, CIV-OTP-0108-0535.
[297] Document in Support of Appeal, para. 111.
[298] *R v. Teskey*, para. 34.
[299] *R v. Teskey*, para. 36.
[300] As held by the Supreme Court (Charron J.) : "I am not suggesting that the necessary link between the verdict and the reasons that led to it will be broken whenever there is a delay in rendering reasons after the announcement of the verdict. Trial judges benefit from a presumption of integrity, which in turn encompasses the notion of impartiality. […] Hence, the reasons proffered by the trial judge in support of his decision are presumed to reflect the reasoning that led him to his decision.", *R v. Teskey*, para. 19.

reasoning that led the trial judge(s) to a decision.[301] This principle is based on the presumption of impartiality of the judges, which cannot easily be rebutted.[302]

152. The Prosecution also relies on the Ontario Court of Appeal decision of *R v. Cunningham*, which again, does not support the Prosecution's position.[303] In that case, the trial judge had announced that she would issue written reasons later on the same day as the oral ruling. However, the judge issued the written reasons 25 months later, without offering any valid explanation for the delay.[304] The Ontario Court of Appeal considered this lack of explanation, combined with the two-year passage of time and several other factors, and concluded that the "requisite link between the decision and the reasons" was not present.[305] It held that there was a presumption of integrity of judges, including a presumption that reasons provided by judges truly reflect the reasoning process leading to the decision.[306] The Supreme Court further held that "[t]he presumption of integrity can only be displaced by "cogent" evidence that would lead a reasonable person to apprehend that the written reasons are not the road map to the decision, but are instead an after-the-fact justification for the decision".[307] No such circumstances are to be found in the case at hand. The Trial Chamber did not make any remark which could give rise to a reasonable apprehension of bias, and a clear "link" is to be found, as developed above, between the Trial Chamber's oral verdict and written reasons.

153. The Prosecution's argument that the Trial Chamber had not arrived at a verdict when it delivered the 15 January 2019 Oral Acquittal Decision amounts to a veiled attempt to challenge the integrity of the Trial Chamber judges, without, however, providing

[301] *See* for instance *R v. Teskey* and *R v. Cunningham*, cited in Document in Support of Appeal, para. 112, footnote 239.
[302] At the ICC, the plenary of judges has previously found that: "there is a strong presumption of impartiality that is not easily rebutted" and that "the disqualification of a judge [is] not a step to be undertaken lightly, [and] a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office", Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, 20 June 2014, ICC-01/05-01/13-511-Anx, para. 18.
[303] Document in Support of Appeal, para. 111, footnote 239.
[304] *R. v . Cunningham*, para. 26.
[305] *R v. Cunningham*, para. 37.
[306] The Ontario Court of Appeal in *R v. Cunningham* emphasized that the "presumption rests on the long and strong tradition of judicial independence and impartiality in Canada" relying on *R v. Teskey*, at paras 2-19, 20, and Judge Abella's dissenting opinion in R v. Teskey, para. 33, *R. v. Cunningham*, para. 33.
[307] *R v. Cunningham*, para. 34.

the appropriate legal foundation for this claim.[308] For such an argument to succeed, the Prosecution must follow the formal procedure of requesting the disqualification of a judge or judges, pursuant to article 41 of the Statute and rule 34 of the Rules. Such a challenge may not be disguised as a sub-ground on appeal and must be thoroughly substantiated. Even indirectly, the Prosecution has failed to provide cogent evidence capable of displacing the presumption of impartiality of the Trial Chamber.[309]

154. *Thirdly,* the Prosecution's reliance on the previously mentioned ICTR case of *Bagosora et al.* to support its argument that the Trial Chamber abused its discretion, must fail, as it emerges from this Appellate Decision that what was relevant at the time of the rendering of the oral summary is that the judges had come to a verdict.[310]

155. Moreover, whether the Trial Chamber allegedly abused its discretion cannot be considered in isolation; such an examination by the Appeals Chamber must take into account all relevant circumstances of the case.[311] In the instant case, the Trial Chamber exercised its discretion in a way that balanced its formal duties pursuant to

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[308] *See* Document in Support of Appeal, para. 39. In *R v. Teskey*, para. 47, the Supreme Court of Canada held: "The presumption of integrity exists to protect the judicial role from undue perceptual assault. Suggesting that the judge's reasons are "after-the-fact justifications" or "result-oriented" *involves the very second-guessing of a judge's thought processes that the presumption was designed to avoid.* Where the delay is inordinate, the judge may be the recipient of critical comment by a reviewing court. But refusing even to consider the merits of the reasons — to assess their compliance with the record, the arguments and the law — does a greater disservice to the public perception of the integrity of the system, not to mention the perception of the litigants who are forced to undergo a new trial, than does the fact of undesirable delay" (emphasis added).

[309] Article 41(2)(a) of the Statute sets out the standard of the Court with respect to judicial impartiality: "[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground." At the ICC, the plenary of judges has previously found that: "there is a strong presumption of impartiality that is not easily rebutted" and that "the disqualification of a judge [is] not a step to be undertaken lightly, [and] a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office", Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, 20 June 2014, ICC-01/05-01/13-511-Anx, para. 18; Decision of the plenary of judges on the Defence Application of 20 February 2-13 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*, 11 June 2013, ICC-01/04-01/06-3040-Anx, paras 10. *See also Prosecutor v. Al Hassan*, Public redacted version of Urgent Request for the Disqualification of Pre-Trial Chamber I, 11 July 2019, ICC-01/12-01/18-406-Red.

[310] *See supra* Response, paras 45-47. The Appeals Chamber rejected the argument brought by the Defendant, concluding that "[w]hile the oral summary of the Trial Chamber's findings was not authoritative, the verdicts and sentences pronounced on 18 December 2008 were", *Bagosora et. al.* AJ, para. 25.

[311] The Appeals Chamber held that "[…] the manner in which the discretion to manage trials is exercised by a trial chamber should be determined in accordance with the case before it; what is reasonable in one trial is not automatically reasonable in another". *See Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Judgment, 14 December 2015, para. 179; *Prosecutor v. Haradinaj et al.*, IT-04-84-A, Judgment, 19 July 2010, para. 39.

rule 144 and its duties of fairness towards the accused persons, after having come to a decision following deliberations.[312]

156. In sum, the Prosecution's argument that the Trial Chamber exercised its discretion which was so unfair as to constitute an abuse of discretion is unpersuasive and finds no legal basis.[313] Even if the Prosecution were to establish that the Trial Chamber's discretion was erroneously exercised, the Prosecution has failed to show that the improper exercise of discretion "materially affected" the Impugned Decision.

III.H. The 15 January 2019 Oral Acquittal Decision, read together with the 16 July 2019 Reasons was not materially affected by errors under first ground of appeal

157. For the purposes of appeals pursuant to articles 82 and 81, the appellant bears the burden of proving, first, that the first-instance chamber erred in fact, or committed a legal or procedural error, and second, that the purported errors "materially affected the Impugned Decision".[314] The two-fold nature of the legal test, which applies to all appeals before the Court, ensures that the circumstances of an appeal are not only strictly circumscribed, but that they meet a sufficient legal threshold; mere formal errors, which do not affect the operative part of a decision will not be admitted.[315]

158. In the particular context of an appeal of an acquittal, the Appeals Chamber held:

> In the view of the Appeals Chamber, this requirement is explained by the fact that a Trial Chamber's decision, at the end of what will often have been a lengthy trial, should not be disturbed lightly. In particular in the case of an acquittal, *it is not justifiable to put the person*

[312] 15 January 2019 Oral Acquittal Decision, page 3, line 18 to page 4, line 9.
[313] Document in Support of Appeal, para. 107.
[314] Article 83(2) of the Statute; *Ngudjolo* AJ, para. 284; *Situation in the DRC*, ICC-01/04-169, para. 84; *Kenyatta* Non-Compliance AD, para. 22; *Ruto and Sang* Admissibility AD, para. 87, cited in *Bemba et al.* AJ, paras 99-101; *Kony et al.* Admissibility AD, para. 48; *Prosecutor v. Banda and Jerbo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation", 17 February 2012, ICC-02/05-03/09-295 OA 2 ("*Banda and Jerbo* AD"), para. 20; *Prosecutor v. Germain Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497 ("*Katanga* Admissibility AD"), para. 37; *Prosecutor v. Gaddafi and Al-Senussi*, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", 24 July 2014, ICC-01/11-01/11-565, para. 109.
[315] The Appeals Chamber noted that "[a]ccording to article 83 (2) of the Statute, the Appeals Chamber may intervene only if it "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". The Appeals Chamber has previously held that its jurisprudence regarding the standard of review in appeals arising under article 82 (1) of the Statute is "in essence, also applicable in relation to legal, factual and procedural errors raised in appeals pursuant to article 81 (1) of the Statute" *Bemba et al.* AJ, para. 89.

through the ordeal of a new trial or even to reverse the acquittal and enter a conviction, unless it is shown that the error indeed materially affected the decision under review. [Emphasis added.][316]

159. Even if the Appeals Chamber were to deem the Prosecution's appeal admissible and if it were to conclude that the Trial Chamber committed legal or procedural errors – which is challenged by the Defence – the Prosecution has failed to show how the alleged errors "materially affected" the Impugned Decision. As a result, the alleged errors do not warrant the Appeals Chamber's intervention.[317]

160. Therefore, the Prosecution's appeal should be dismissed *in limine* on the basis of its failure to substantiate the applicable legal criteria under article 82(1)(d) of the Statute in addition to Article 83(2). The Prosecution's argumentation with respect to whether the errors alleged "materially affected" the decision falls considerably short of the required threshold which could "trigger" the Appeals Chamber's intervention.[318] In order to show the "material effect" of an alleged error on a decision, an appellant is

[316] *Ngudjolo* AJ, para. 284.
[317] *Banda and Jerbo* AD, para. 20; *Katanga* Admissibility AD, para. 37. The Prosecution was also required to convincingly show that the Impugned Decision "involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings", pursuant to article 82(1)(d) of the Statute, rule 155(1) of the Rules and regulation 65 of the RoC. The Prosecution failed to address how the alleged "issues" raised on appeal are subjects "the resolution of which is essential for the determination of matters arising in the judicial cause under examination" and are not questions "over which there is a disagreement or conflicting opinion". *DRC* Extraordinary Review Decision, para. 9. An "issue" must emanate from the relevant decision itself and cannot represent a hypothetical concern or abstract legal question. Pre-Trial Chamber I, *Prosecutor v. Laurent Gbagbo*, Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges, 31 July 2013, ICC-02/11-01/11-464, para. 8; Pre-Trial Chamber II, *Prosecutor v. Bosco Ntaganda*, Decision on the "Requête de la Défence sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014", 4 July 2014, ICC-01/04-02/06-322. As held by the Single Judge: "Should the first requirement, for instance the determination that the issue significantly affects the fair and expeditious conduct of proceedings, not be met, then the examination of the second requirement, namely that an immediate resolution by the Appeals Chamber may materially advance the proceedings, becomes irrelevant" and that "[a] determination that the issue significantly affects the fair and expeditious conduct of proceedings or the outcome of the trial does not automatically qualify it as a subject to appeal. (…) The party requesting leave to appeal needs to demonstrate the existence of this requirement" *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, 25 August 2008, ICC-01/05-01/08-75, paras 6-7, 19-20. Issues required an "immediate resolution" by the Appeals Chamber in order to materially advance the proceedings: *Situation in the Democratic Republic of Congo*, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 14.
[318] *Kony et al.* Admissibility AD, para. 83.

required to demonstrate that in the absence of the error, the decision would have been "substantially different".[319]

161. The Appeals Chamber held that the threshold to meet this test was high:

> The Appeals Chamber notes that this standard is high – it must be demonstrated that, had the Trial Chamber not erred in procedure, the decision under article 74 of the Statute would (as opposed to "could" or "might") have been substantially different. In the circumstances of this case, *it has to be established that there is a high likelihood that the Trial Chamber, had it not committed the procedural errors, would not have acquitted Mr Ngudjolo*. [Emphasis added.][320]

162. Based on the Appeals Chamber's findings, the Prosecution was required to establish that there is a high likelihood that the Trial Chamber, had it not committed the alleged errors, would not have acquitted Mr Blé Goudé. The fact that the procedural posture of this case is that Mr Blé Goudé was acquitted at the halfway stage is of no significance. The same test on appeal applies for acquittals that result at the end of trial or by way of NCTA motion.[321] The Prosecution failed to provide any fact that could meet this high standard.

163. The appellant must show how an alleged error "materially affected" the impugned decision with *sufficient precision*,[322] failing which the appeal ground may be rejected *in limine*. As stated by the Appeals Chamber of this Court, "[i]f an appellant fails to do so, the Appeals Chamber may dismiss the argument without analysing it in substance".[323] The Appeals Chamber has summarily rejected appellate grounds on the basis that the "materially affected" criterion was insufficiently substantiated or too vague.[324]

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[319] *Situation in the Democratic Republic of the Congo* OA, ICC-01/04-169, paras 84-85; *Katanga* Admissibility AD, para. 37; *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red ("*Lubanga* AJ"), para. 19, citing *Situation in Democratic Republic of Congo,* Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor'sApplication for Warrants of Arrest, Article 58", 13 July 2006, ICC-01/04-169, para. 84; *Lubanga* AJ, paras 29-32, *Kony et al.* Admissibility AD, para. 48.
[320] *Ngudjolo* AJ, para. 285.
[321] *Ruto and Sang* NCTA Decision (Reasons of Judge Eboe-Osuji), paras 64-65.
[322] *Kony et al.* Admissibility AD, para. 48; *Lubanga* AJ, paras 29-32. *See* regulations 65(1) and (2) of the RoC.
[323] *Bemba* AJ, para. 64; *Lubanga* AJ, paras 29-32. *See* Triffterer and Ambos, page 1955: "Appellants are obliged to substantiate in their filings on appeal not only the alleged error of law, fact, or procedure, but also how the alleged error materially affected the impugned decision; failure to do so may lead to a summary rejection of the ground of appeal or indeed the appeal as a whole".
[324] *Kony et al.* Admissibility AD, para. 51; *Prosecutor v. Laurent Gbagbo*, Decision on the Defence request for leave to appeal the "Decision on the Confirmation of Charges against Laurent Gbagbo", 11 September 2014, ICC-02/11-01/11-680, para. 47.

164. In its Document in Support of Appeal, the Prosecution's arguments relating to the material impact of the alleged errors identified in its first ground of appeal are scarce and unconvincing, falling short of the requirements of the regulations of the Court.[325] *First,* the Prosecution dedicates *a mere seven* paragraphs to the material impact of the alleged errors argument, which, on its face, is not commensurate to its obligation to prove that the Impugned Decision would have been "substantially different" had it not been for the alleged errors.[326] A closer reading of the Prosecution's arguments on this point reveals that the Prosecution mainly merely reiterates the alleged errors identified in its first ground of appeal, instead of arguing how the alleged errors materially affected the Impugned Decision.[327] To provide but one example of the Prosecution's circularity of reasoning, the Prosecution argues that "the errors in the first ground materially affected the [Impugned Decision], *because the Majority's decision to acquit was not fully informed*" (emphasis added),[328] which is in itself one of the alleged errors identified by the Prosecution in its first ground of appeal.[329] Such circular reasoning simply cannot be sustained in any court of law.

165. *Second*, the Prosecution's arguments lack precision and are patently unconvincing. For example, the Prosecution argues that "the errors materially affected the 15 January 2019 Oral Acquittal Decision, *because a partially informed decision to acquit is substantially different from a fully informed decision to acquit*" (emphasis added).[330] Such argumentation falls considerably short of the required threshold to identify with "sufficient precision" how, in the absence of the error, the Impugned Decision would have been "substantially different".[331]

166. *Third*, although the Prosecution alleges that the first ground of appeal has "materially affected" the Impugned Decision because it impacted its "validity" and "legal

[325] Regulations 65(1) and (2). The same requirement exists for Appeals under Article 81 *See* regulation 64(2) of the RoC.
[326] Document in Support of Appeal, paras 115-121.
[327] *See* Document in Support of Appeal, footnotes 248-251, 253-254.
[328] Document in Support of Appeal, para. 120.
[329] Document in Support of Appeal, Section III.E. "The 15 January 2019 Oral Acquittal Decision was not fully informed".
[330] Document in Support of Appeal, para. 120.
[331] *Kony et al.* Admissibility AD, para. 48; *Lubanga* AJ, paras 29-32 *See* regulations 65(1) and (2) of the RoC; *Situation in the Democratic Republic of the Congo* OA, ICC-01/04-169, paras 84-85; *Katanga* Admissibility AD, para. 3.

effect",[332] it fails to provide concrete "but for" arguments and to convincingly demonstrate that in the absence of the alleged error, the judgment would have been "substantially different". Despite the fact that the onus is on the Prosecution to advance such arguments, the Defence submits that had the Trial Chamber rendered its oral summary and its written reasons – which together constitute the Impugned Decision – on the same day, the outcome of the decision would not have been any different, given that the deliberations process had come to an end and the judges had reached their verdict.[333] Had the Trial Chamber, for instance, waited to render its verdict and summary orally at the end of the drafting and editing of the Impugned Decision, it would not have led to a "significantly different" outcome, as the Trial Chamber had clearly "arrived at its decision upon the assessment of the evidence".[334] Also, the right of appeal of the Prosecution would have in this case started running exactly at the same time. To provide another example, had the Trial Chamber provided a timeline for the issuance of its written reasons,[335] which, in the Prosecution's view, would have been required, this would also not have had any impact on the decision, even not when such decision would have been rendered within the same timeframe. The Prosecution has not demonstrated, for instance, how this alleged error "materially affected" the Impugned Decision.

167. In conclusion, the Prosecution's first ground of appeal must necessarily be rejected not only on the basis that it failed to identify an error of law or procedure, but also because it failed to demonstrate how the alleged errors "materially affected" the Impugned Decision.

[332] Document in Support of Appeal, para. 118.
[333] 15 January 2019 Oral Acquittal Decision, page 2, line 25 to page 3, line 5, where the Trial Chamber: "[…] having thoroughly analysed the evidence and taken into account, into consideration all legal and factual arguments submitted both orally and in writing by the parties and participants finds, by majority, that there is no need for the Defence to submit further evidence as the Prosecutor has not satisfied the burden of proof in relation to several core constitutive elements of the crimes as charged.".
[334] 15 January 2019 Oral Acquittal Decision, page 4, lines 5-9.
[335] Document in Support of Appeal, paras 62-64.

IV. Second ground of appeal: The Majority properly articulated and consistently applied a standard of proof and approach to assessing the sufficiency of evidence and therefore Mr Blé Goudé's acquittal was lawful

IV.A. Overview

168. Mr Blé Goudé was acquitted of all charges after the Trial Chamber whose judges, hailing from diverse backgrounds, came together unanimously and agreed to allow the Defence to submit a NCTA motion.[336] In the order authorising the Defence to make NCTA submissions, the Trial Chamber requested the Defence "to make concise and focused submissions on the specific factual issues for which, in their view, the evidence presented is insufficient to sustain a conviction […]."[337] This standard articulated by the Trial Chamber for the first time on 4 June 2018 was unequivocally clear and was the same standard the Trial Chamber articulated both in its 15 January 2019 Oral Acquittal Decision,[338] and Judge Henderson's Reasons.[339] Therefore, the Defence opposes the Prosecution's second ground of appeal in whole.

169. In the overview section of its second ground of appeal, the Prosecution attempts to distinguish the present case from the *Ngudjolo AJ* where the Appeals Chamber found that errors challenging the assessment of evidence should be considered as factual errors.[340]

170. The Prosecution's submissions mischaracterize the arguments made in the *Ngudjolo* appeal, and ignore the dispositive findings of the Appeals Chamber in that case. In its Document in Support of Appeal, the Prosecution submits that in *Ngudjolo* it had alleged that the Trial Chamber had misapplied the standard of proof, and that the grounds of appeal were evidentiary in nature.[341] A review of the *Ngudjolo* AJ shows this is simply not the case. In *Ngudjolo*, the Prosecution argued that the Trial Chamber committed a legal error by employing an incorrect standard, namely the standard of beyond *any* doubt.[342] The Prosecution submitted that it could demonstrate this legal error through showing that for certain findings the Trial Chamber required proof of

[336] Second Conduct of Proceedings Order.
[337] *Ibid.*, para. 10.
[338] 15 January 2019 Oral Acquittal Decision, page 3 lines 1-5, page 4, lines 15-16.
[339] Judge Henderson's Reasons, para. 2.
[340] Document in Support of Appeal, para. 128 *citing Ngudjolo AJ*, para. 44.
[341] Document in Support of Appeal, para. 128.
[342] *Ngudjolo* AJ, paras 43-44.

facts to absolute certainty.[343] The Appeals Chamber rejected the argument, and found that since the arguments were based on alleged errors of fact, they must be assessed against the standard of review of factual errors.[344] The reason for applying the standard of review for factual errors stemmed from the necessity of the Appeals Chamber to review the Trial Chamber's factual findings in order to dispose of the matter under appeal.[345]

171. Here, like in *Ngudjolo,* the Prosecution is again trying to demonstrate an alleged legal error through the use of alleged erroneous factual findings. Instead of alleging an incorrect standard like it did in *Ngudjolo*, the Prosecution here alleges that there was a lack of a standard. This distinction, however, is not dispositive since the Chamber will have to review the Trial Chamber's factual findings in order to assess the Prosecution's arguments with respect to its factual examples. Therefore, the standard of review for factual errors as set out in *Ngudjolo* applies to the instant case.

172. Given the factual nature of the errors the Prosecution alleges in the sections of the Document in Support of Appeal dedicated to the alleged erroneous factual findings,[346] it was incumbent on the Prosecution to advance arguments showing how no reasonable trial chamber would have come to such factual findings.[347] Further, since in the instant case the Prosecution is alleging factual errors with respect to an acquittal, it was also necessary that the Prosecution demonstrate that the factual errors committed by the Trial Chamber occasioned a miscarriage of justice.[348] In *Ngudjolo*, the Appeals Chamber, citing the jurisprudence from the *ad hoc* tribunals, determined that establishing a miscarriage of justice with respect to the Prosecution is different than for the accused because the onus is on the Prosecution to prove the guilt of the accused beyond a reasonable doubt.[349] Therefore, the Prosecution must demonstrate that all reasonable doubt as to the accused's guilt has been eliminated once the factual errors by the Trial Chamber have been taken into account.[350]

[343] *Ibid.*, para. 43.
[344] *Ibid.*, para. 44.
[345] *Ibid.*
[346] *See* Document in Support of Appeal, *Section IV.B.4*; *Ibid.,* paras 155-159.
[347] *Ngudjolo* AJ, paras 24-25.
[348] *Ibid.*, paras 24-27.
[349] *Ibid.*
[350] *Ibid.*, para. 25

173. Here, the Prosecution never made such arguments. It even stressed that it would not be making them, and simply stated that it was within the power of the Appeals Chamber to characterize the errors as factual, and engage in such a review.[351] This argument does not pass muster. The Prosecution cannot delegate its responsibility to substantiate the alleged errors made by the Trial Chamber. Its failure to substantiate how the six examples of alleged erroneous factual findings make it such that all reasonable doubt as to Mr Blé Goudé's guilt has been eliminated warrants dismissal *in limine*.

IV.B. The Majority did not err in law and procedure

174. The Prosecution's argument that the Trial Chamber erred in law and/or procedure by failing to articulate and consistently apply a standard of proof and/or approach to assessing the evidence must fail for the following reasons. First, the Prosecution premises its argument on a procedural narrative that is unsupported by the procedural history of the instant case. The use of the term "narrative" by the Prosecution is most appropriate,[352] since the Prosecution's account of the procedural history in this case consists of a partial story based on speculation, innuendo, and hyperbole. Second, a review of the Prosecution's arguments regarding a lack of a clear standard that manifested itself through the six examples developed in the Document in Support of Appeal reveals that its submissions are mere disagreements with the Trial Chamber's factual findings that do not show any error committed by the Trial Chamber. Third, the Prosecution submissions with respect to ruptured proceedings fall flat since it bases its arguments on the Judges writing separate opinions, which is a deeply rooted and uncontested practice at the ICC.[353] Lastly, the Prosecution is unable to show any prejudice since it is a standard feature of adversarial proceedings that parties present their position as to the correct interpretation of the law and its application, and the Trial Chamber only provides its conclusions in the final decision on the matter.

IV.B.1. Relevant Procedural History: The Majority was clear and consistent when it articulated and applied its approach to assessing evidence

[351] Document in Support of Appeal, paras 129-130.
[352] *Ibid.*, para. 131.
[353] *See supra* Response, paras 76, 180.

175. On 9 February 2018, after hearing the last Prosecution witness, the Trial Chamber determined, unanimously and in accordance with its obligation to ensure a fair and expeditious trial under article 64(2) of the Statute, to invite the Prosecution to file a Trial Brief "[…] in which way [it] thinks the evidence supports each of the elements of the different crimes and the forms of responsibility charged."[354] Consistent with its duty under article 64(3) to confer with the parties in adopting procedures to facilitate a fair and expeditious trial, the Trial Chamber ordered the Defence to indicate whether it wished to present a NCTA motion.[355]

176. On 24 April 2018, pursuant to this First Conduct of Proceedings Order, the Defence informed the Trial Chamber that it did wish to present such a motion, and it made extensive submissions as to the standard of review that should apply.[356] The Prosecution did not respond to the Defence's submissions although it could have availed itself of the opportunity to do so.

177. On 4 June 2018, the Trial Chamber unanimously agreed to allow the Defence to present a NCTA motion. It specifically instructed the Defence "to explain why there is insufficient evidence which could reasonably support a conviction."[357] For the Defence, who as the moving party, had the onus to establish that there was no case for Mr Blé Goudé to answer, the order was crystal clear. Never, did the Defence request clarification as to the applicable standard.[358] The reason was simple. The Prosecution's burden to prove its case beyond a reasonable doubt lies at the heart of an accused's rights enshrined in the Statute.[359] In the instant case, the Trial Chamber based its decision to acquit Mr Blé Goudé on Article 66 because the onus is always on the Prosecution to prove the guilt of the accused beyond a reasonable doubt.[360] This

[354] First Conduct of Proceedings Order, para. 10.
[355] *Ibid.*, para.14.
[356] Blé Goudé Conduct of Proceedings Observations.
[357] Second Conduct of Proceedings Order, para. 10.
[358] The Procedural history of this case reveals that only the Prosecution made a motion seeking clarification of the standard to be applied. *See* Prosecution NCTA Clarification Request. The Defence responded requesting that the Trial Chamber reject the request *in limine*. *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Demande de rejet *in limine* de la « Urgent Prosecution's motion seeking clarification on the standard of a "no case to answer" motion» (ICC-02/11-01/15-1179), 8 June 2018, ICC-02/11-01/15-1180 ('Mr Gbagbo Request'). The Defence joined the Mr Gbagbo Request *via* email. *See* NCTA Clarification Decision, paras 6-7.
[359] Articles 66, 67(1)(g)(i) of the Statute.
[360] Judge Henderson's Reasons, para. 15.

burden never shifts. It forms the bedrock of the right to be presumed innocent.[361] Therefore, the Prosecution could not ignore that by the close of its case, it should have produced evidence capable of showing that Mr Blé Goudé was guilty beyond a reasonable doubt. Further, the Trial Chamber indicated consistently and expressly at all stages of the NCTA procedure that it would, and that it did assess the sufficiency of the Prosecution's evidence to sustain a conviction.[362] Thus, the Prosecution was aware that the test was not one where Trial Chamber I would evaluate for itself whether it was convinced that the Prosecution had proved guilt beyond a reasonable doubt since the evaluation of the sufficiency of evidence indicates an objective evaluation "in terms of adequacy of proof."[363] While the interpretation and application of the relevant NCTA standard were live issues in the case,[364] the parties were well aware that the Defence needed to establish that there was insufficient evidence upon which a trial chamber could find that the charged crimes were committed beyond a reasonable doubt.[365]

178. When the Trial Chamber rendered its decision to acquit Mr Blé Goudé on 15 January 2019, it again stressed the sufficiency of the Prosecution's evidence. The Trial Chamber found that there was no need for the Defence to present evidence because the Prosecution had "not satisfied the burden of proof under Article 66 of the Rome Statute in relation to several core constitutive elements of the crimes as charged."[366] Moreover, on the next day, the Trial Chamber, in its 16 January 2019 Decision, expressly noted that "the 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."[367] The Trial Chamber clarified that the standard it applied was one of

[361] *See* Article 66, Presumption of innocence which is guaranteed through the onus being on the Prosecution to prove guilt beyond a reasonable doubt.
[362] Second Conduct of Proceedings Order, para. 10; NCTA Clarification Decision, para.14; 15 January 2019 Oral Acquittal Decision, page 3 lines 1-5, page 4, lines 15-16; NCTA Clarification Decision, para. 14; 16 January 2019 Decision, page 4 lines 11-16; Judge Henderson's Reasons, para. 2
[363] *Ruto and Sang* NCTA Decision (Reasons of Judge Eboe-Osuji), paras 55, 70
[364] *See* Blé Goudé Conduct of Proceedings Observations, paras 18-19; Prosecution's NCTA Clarification Request, para. 6; NCTA Hearing Day 1, pages 4-18; NCTA Hearing Day 6, pages 39-53.
[365] Blé Goudé's NCTA Motion, para. 6 (arguing that the Prosecution has failed to adduce sufficient evidence upon which a reasonable trial chamber could convict Mr Blé Goudé); Prosecution's NCTA Response, paras 30, 128 (advancing that a reasonable trial chamber could convict on the basis of the totality of the evidence on record).
[366] 15 January 2019 Oral Acquittal Decision, page 3 lines 1-5, page 4, lines 15-16.
[367] 16 January 2019 Decision, page 4, lines 11-13.

evaluating whether the Prosecution had produced sufficient evidence to merit a response from the Defence.[368]

179. Six months later, on 16 July 2019, the Trial Chamber, fully consistent with its 15 January Oral Acquittal Decision, in which it announced that it would provide its fully reasoned decision as soon as possible, rendered its Written Reasons. In Judge Henderson's Reasons, the Trial Chamber merely informed the parties of its interpretation and application of the standard of review used when coming to the decision to acquit Mr Blé Goudé.[369] Such an approach is anything but extraordinary, let alone erroneous. The Appeals Chamber of this Court has found that disagreement among the parties on the interpretation of the law is a common feature of judicial proceedings, and that it is most often in its written decision that a trial chamber is required to give its interpretation, and then apply it to the facts at hand.[370]

180. Separate opinions are also not an uncommon feature of this Court, which have been consistently made since the Court's inception.[371] Judge Tarfusser appending a separate opinion to the Written Reasons does not in any way demonstrate "ruptured" proceedings. Indeed, Judge Tarfusser left no room for doubt in this regard when he stated in the opening lines of his separate opinion "I confirm that I subscribe to the factual and legal findings contained in the Reasons of Judge Henderson".[372] Therefore, Judge Tarfusser subscribed to the interpretation and application of the NCTA standard as fully articulated in Judge Henderson's Reasons. Despite their differences in legal background and approach, the Majority was able to work through

[368] 16 January 2019 Decision, page 4, lines 14-16.
[369] Judge Henderson's Reasons, paras 1-30.
[370] *Gaddafi* Admissibility AD, para. 203.
[371] Regarding separate concurring opinions, while not expressly authorized by article 74(5) of the Statute, most of the ICC trial judgments issued thus far were accompanied by individual opinions that did not qualify as 'minority opinions' within the meaning of article 74(5). *Prosecutor v. Thomas Lubanga Dyilo*, Separate opinion of Judge Adrian Fulford and Separate and Dissenting Opinion of Judge Odio Benito, Judgment pursuant to Article 74 of the Statute, 14 March 2014, ICC-01/04-01/06-2842; *Prosecutor v. Mathieu Ngudjolo Chui*, Concurring Opinion of Judge Christine Van den Wyngaert, Judgment pursuant to Article 74 of the Statute, 18 December 2012, ICC-01/04-02/12-4; *Prosecutor v. Germain Katanga*, Concurring opinion of Judges Fatoumata Diarra and Bruno Cotte, Judgment pursuant to Article 74 of the Statute, 7 March 2014, ICC-01/04-01/07-3464-AnxII. "On these instances, the conclusions on the question of guilt or innocence of the accused were reached unanimously or by majority, but the verdicts were still accompanied by individual opinions on discrete issues". Klamberg, page 567, footnote 619.
[372] Judge Tarfusser's Opinion, para. 1.

them and agree to have and apply a NCTA procedure in circumstances that both judges in the Majority disagreed with.[373]

181. Ultimately, the procedural history of the NCTA proceedings in the instant case is emblematic of the *sui generis* system of international criminal justice that the drafters of the Statute intended.[374] The Trial Chamber was able to conduct a NCTA procedure, which is only found in common law systems[375] and adapt it such that it would be suitable in a case in which no admissibility findings were made, and in which the examination of witnesses was done with far less limitations, commonly seen in civil law jurisdictions.[376]

182. The Prosecution's narrative of an undefined standard applying in the instant case clearly tells a one-sided story that can be categorized into the following three sets of arguments: (1) previously rejected arguments regarding the need to clarify the NCTA standard; (2) arguments reflecting disagreements with the Trial Chamber's assessment of the evidence, and (3) arguments attempting to undermine the Trial Chamber's judicial integrity.

183. The first set of arguments relating to the Trial Chamber adopting an unclear and inconsistent approach are a mere repetition of arguments that the Prosecution presented at the trial stage, but lack a showing of the error that was made at first instance. The Prosecution alleges that the Trial Chamber resisted opportunities to articulate the relevant standard,[377] and that as Single Judge, Judge Tarfusser, declined to enunciate a standard.[378] The Prosecution gives two arguments with respect to the

[373] Judge Henderson's Reasons, paras 23, 26-28 (expressing in *obiter dictum* that there should have been admissibility rulings since allowing a no case to answer motion to proceed without such rulings could have resulted in unfair prejudice to the Defence); Judge Tarfusser's Opinion, para. 65 (expressing in *obiter dictum* that no case to answer proceedings have no place in the statutory framework of the Court and are unnecessary as a tool to preserve justice).
[374] *Bemba et al.* AJ, para. 574 ("the procedural regime envisaged in the legal framework of the Court is comprehensive and unique, and, as a whole, it has been designed by the Court's legislator as a distinctive workable balance of different procedural models"); *See also Bemba et al.,* Judge Geoffrey Henderson Separate Opinion, paras 38, 40, 52, footnote 69; K. Ambos, *Treatise on International Criminal Law – Volume iii: International Criminal Procedure* (Oxford University Press, Oxford, 2016), page 660 ("the ICC [is] the first universal criminal court with a rather mixed and flexible procedural framework").
[375]*Ruto and Sang* Decision No. 5 Judge Eboe-Osuji's Separate Opinion, para. 12 ("The notion of no case to answer owes its provenance to the common law criminal process.").
[376] *See Prosecutor v. Laurent Gbagbo and Charles Blé Goudé,* Transcript of 4 February 2016, ICC-02/11-01/15-T-14-ENG, pages 1-3; Judge Henderson's Reasons, para. 10.
[377] Document in Support of Appeal, para. 132.
[378] Document in Support of Appeal, para. 136.

Trial Chamber resisting opportunities to articulate a standard: first, Judge Tarfusser's decision as Single Judge to reject the Prosecution's NCTA Clarification Request, and second, the Trial Chamber's decision to not articulate the relevant standard to be applied or its approach to the evidence despite differing views expressed by the parties.[379]

184. With respect to its first argument, the Prosecution does not engage with the operative part of the NCTA Clarification Decision. The Single Judge expressly noted that both the Defence for Mr Blé Goudé and Mr Gbagbo stated that the order authorising the Defence to make a NCTA motion was clear.[380] Given the standard of review was clear to the Defence, the Single Judge found that the concerns raised by the Prosecution were unwarranted.[381] The Prosecution does not make any submissions with respect to this finding; even though it was one of the primary reasons the Single Judge rejected the Prosecution's NCTA Clarification Request. Instead, the Prosecution falsely asserts that the Trial Chamber clarifying the evidentiary standards and approaches ahead of time would have assisted the parties in making submissions. As previously submitted, both the Defence and the Defence for Laurent Gbagbo expressed that the standard to be applied was clear, and requested that the Prosecution's NCTA Clarification Request be rejected.[382] The Prosecution has not shown how it was erroneous of the Single Judge to reject the Prosecution's Clarification Request in the context of the standard being clear to both the Defence and the Defence for Laurent Gbagbo, who had the onus to prove that the NCTA standard was met in the present case. For the aforementioned reasons, the Prosecution's argument in this regard must be dismissed.

185. With respect to its second argument, it is not sufficient to show that the Trial Chamber should have clarified its approach for the simple reason that the parties had different interpretations regarding the standard of review to be applied.[383] Differing views between parties is a common feature of adversarial proceedings. In *Ruto & Sang*, the case the Prosecution champions as an example of a trial chamber conducting a careful

[379] Document in Support of Appeal, para. 136.
[380] NCTA Clarification Decision, para. 15.
[381] *Ibid.*
[382] Mr Gbagbo Request. The Defence joined the Mr Gbagbo Request *via* email. *See* NCTA Clarification Decision, paras 6-7.
[383] Document in Support of Appeal, para. 136.

NCTA procedure with clear instructions to the parties,[384] Trial Chamber V(a) did not provide such clarification to the parties before its final disposition of the case.[385] Indeed, the Prosecution in *Ruto & Sang* submitted that Trial Chamber V(a) was limited to conducting a quantitative assessment of the evidence, under *Ruto and Sang* Decision No. 5.[386] The Defence for Messrs Ruto and Sang disagreed and submitted that *Ruto and Sang* Decision No. 5 lent itself to qualitative assessments of the evidence.[387] It was not until the *Ruto and Sang* NCTA Decision that the Trial Chamber provided the parties with its interpretation of *Ruto and Sang* Decision No. 5.[388] Trial Chamber V(a) found not only that qualitative assessments are permissible, but also that the Trial Chamber was not constrained by the procedure it had adopted in Decision No. 5, and could have terminated the case if it found that it would not be able to convict the accused.[389] Judge Fremr reasoned that a continuation of the proceedings in these circumstances "would be contrary to the rights of the accused, whose trial should not continue beyond the moment that it has become evident that not finding of guilt beyond all reasonable doubt can follow".[390]

186. Here, like in *Ruto and Sang,* and in any case before the Court, the Prosecution was and is at all times aware that its evidence must be capable of convincing a trial chamber that the accused is guilty beyond a reasonable doubt.[391] The Prosecution should never be allowed to rely on the mere hope that the Defence will ultimately muddle its case by introducing incriminating evidence at the Defence presentation of its case.[392] Thus, like in *Ruto and Sang*, there was no justification in the instant case for the Trial Chamber to inform the Prosecution of its interpretation and application of the NCTA standard. Moreover, here, the Prosecution had the benefit of taking into account Trial Chamber V(a)'s interpretation and application of the NCTA standard of review. Thus, the Prosecution was on notice that it was possible that the Trial

[384] Document in Support of Appeal, para. 154.
[385] *Ruto and Sang*, NCTA Decision (Reasons of Judge Eboe-Osuji), paras 42-50.
[386] *Ibid.*, para. 42.
[387] *Ibid.*
[388] *Ruto and Sang*, NCTA Decision (Reasons of Judge Eboe-Osuji), paras 42-125; (Reasons of Judge Fremr) paras 18-19,144-146.
[389] *Ruto and Sang*, NCTA Decision (Reasons of Judge Eboe-Osuji), paras 126-130; (Reasons of Judge Fremr) paras 18-19,146.
[390] *Ruto and Sang*, NCTA Decision (Reasons of Judge Fremr), para. 19.
[391] Article 66 of the Statute.
[392] *Ruto and Sang*, NCTA Decision (Reasons of Judge Eboe-Osuji), paras 105-109.

Chamber would not agree with the Prosecution's quantitative interpretation of "taking the evidence at its highest".[393]

187. For the aforementioned reasons, the Prosecution's first set of arguments based upon the Single Judge's refusal to grant the Prosecution's NCTA Clarification Request and the Trial Chamber's decision to elucidate its standard in the final decision should be dismissed.

188. The Prosecution's second set of arguments reflect mere disagreements with the Trial Chamber's evaluation of the evidence and should also be rejected.[394] These submissions are wholly unrelated to the Prosecution's main submission in this section, namely that the procedural history of the case reveals that the Trial Chamber was unclear and inconsistent when it articulated and applied its approach to Blé Goudé's NCTA Motion. The Prosecution does not challenge the Trial Chamber's stated approach for the NCTA standard as expressed in Judge Henderson's Reasons.[395] Rather, the Prosecution erroneously submits that: (1) Judge Henderson departed significantly from existing international criminal law with respect to corroboration, which ultimately resulted in an unlawful approach;[396] (2) Judge Henderson inconsistently applied evidentiary principles regarding hearsay;[397] and (3) Judge Henderson had unexpectedly unreasonable and unrealistic views on significant issues.[398] All three of these arguments concern the application of the Trial Chamber's standard of review, and not the lack of one. Departing from existing jurisprudence in other tribunals and having an inflexible or unreasonable view is not at all indicative of a trial chamber not having a clear standard of review in mind when disposing of a case. Rather, it is a mere disagreement with how the Trial Chamber applies that standard. For such arguments to be successful on appeal, the Prosecution must show that due to these errors of fact, all reasonable doubt as to Mr Blé Goudé's guilt have been eliminated.[399] The Document in Support of Appeal does not make such a showing and therefore, these arguments must fail. While the argument of

[393] *See* Ruto and Sang, NCTA Decision (Reasons of Judge Eboe-Osuji), para. 124.
[394] Document in Support of Appeal, paras 133-134, 141.
[395] Document in Support of Appeal, para. 133.
[396] Document in Support of Appeal, para. 134.
[397] Document in Support of Appeal, paras 134, 141.
[398] Document in Support of Appeal, para. 141.
[399] *Ngudjolo AJ*, paras 24-25. *See also Ruto and Sang* NCTA Decision (Reasons of Judge Eboe-Osuji), paras 63-64.

inconsistency could reasonably be related to the lack of a standard, the Prosecution does not indicate to the Chamber how this inconsistency argument is related to the lack of a standard being in the Trial Chamber's mind when it acquitted Mr Blé Goudé. The Prosecution merely repeats that the Trial Chamber made inconsistent findings, without indicating how the inconsistency shows that the Trial Chamber's findings were made on an arbitrary basis, and not in accordance with the standard articulated in Judge Henderson's Reasons. Therefore, these arguments also do not show how the lack of a clear and consistent standard was manifested in the procedural history of the present case.

189. Lastly, the Prosecution's third set of arguments centers on Judge Tarfusser's Opinion and consists of a hidden attack on the judge's integrity that has not been substantiated in the slightest. The Prosecution submits that Judge Tarfusser never accepted that the proceedings constituted NCTA proceedings, and that he applied his own more exacting standard to the evidence.[400] Accepting the Prosecution's argument would mean that the Majority Judges were not truthful both in the 15 January 2019 Oral Acquittal Decision and the 16 July 2019 Reasons. In his opinion, Judge Tarfusser stated that he fully subscribed to the legal and factual findings contained in Judge Henderson's Reasons.[401] Similarly, in the 15 January 2019 Oral Acquittal Decision, Judge Tarfusser rendered the Trial Chamber's decision, and found that the Trial Chamber by Majority had found that the Prosecution had not satisfied the burden of proof in relation to several core constitute elements of the crimes charged.[402] He further expressed that the Majority had thoroughly analysed the evidence, and taken into account the submissions of the parties.[403] A day after the acquittal, Judge Tarfusser rendered the 16 January 2019 Decision. There too, Judge Tarfusser stated that the Majority did not employ the beyond a reasonable doubt standard.[404]

190. For the Prosecution's argument to be true, it would mean that Judge Tarfusser was not truthful when he wrote that he fully subscribed to the legal and factual findings contained in Judge Henderson's Reasons. Additionally, the aforementioned oral

[400] Document in Support of Appeal, paras 134, 136, 138-140.
[401] Judge Tarfusser's Opinion, para. 1.
[402] 15 January 2019 Oral Acquittal Decision, page 2, line 25 to page 3, lines 1-17.
[403] *Ibid.*, page 2, lines 22-25, page 3 lines 1-5
[404] 16 January 2019 Decision, page 4, lines 11-15.

decisions, which employed the term "the Majority", thereby indicating a unified decision making entity would also be untruthful. The Prosecution does not present a single convincing argument that could raise doubts as to the Majority Judges' judicial integrity. Never, did Judge Tarfusser state that he shifted his position. The Prosecution's arguments on this point consist of: (1) the *obiter dicta* expressed in Judge Tarfusser's Opinion,[405] (2) certain statements taken from the Single Judge's NCTA Clarification Decision,[406] and (3) a question Judge Tarfusser asked during the NCTA hearings.[407] The procedural history of this case shows that the Judges unanimously agreed to allow for a NCTA procedure to be applied in the instant case.[408] While Judge Tarfusser in *obiter dicta* expressed his disagreements with applying a NCTA procedure,[409] his decision to set aside his views and allow such a procedure to apply in this case constitutes judicial compromise. Such compromise is laudable in an international criminal court, which is neither a common law or civil law jurisdiction, but a hybrid one.[410] The Prosecution's reliance on a separate opinion is insufficient to blemish the Judge's integrity and to question whether Judge Henderson's Reasons really do reflect the Majority's views as expressly stated by Judge Tarfusser.

191. Similarly, the Prosecution reliance on selected sentences from the Single Judge's NCTA Clarification Decision and the question he posed during the NCTA hearings is also insufficient to undermine Judge Tarfusser's integrity. The Prosecution references the portion of the decision where the Judge clarified that the Prosecution mistakenly assumed that the Trial Chamber in the instant case would follow the NCTA procedure that was applied in the *Ruto and Sang* case. The Single Judge further clarified that the Trial Chamber intended to provide the Defence, as it did to the Prosecution with its Trial Brief, a flexible opportunity to illustrate its view that there was no evidence at

[405] Document in Support of Appeal, paras 134, 138-140.
[406] *Ibid.*, paras 136-137.
[407] *Ibid*., para. 136.
[408] Second Conduct of Proceedings Order.
[409] The portions of Judge Tarfusser's Opinion the Prosecution cites are always qualified by the terms "in my view" or "my views". Judge Tarfusser's Opinion, paras 65-67.
[410] *Bemba et al.* AJ, para. 574 ("the procedural regime envisaged in the legal framework of the Court is comprehensive and unique, and, as a whole, it has been designed by the Court's legislator as a distinctive workable balance of different procedural models"); *See also Bemba et al.*, Judge Geoffrey Henderson Separate Opinion, paras 38, 40, 52, footnote 69; K. Ambos, *Treatise on International Criminal Law – Volume iii: International Criminal Procedure*, Oxford University Press, 2016, page 660 ("the ICC [is] the first universal criminal court with a rather mixed and flexible procedural framework").

the close of the Prosecution's case to sustain a conviction.[411] Neither of these statements made by the Single Judge corresponds to an abdication of Judge Tarfusser's position to apply NCTA proceedings. To accept the Prosecution's argument would be paramount to limiting NCTA proceedings to the procedure as articulated in the *Ruto and Sang* case. The Prosecution provides no argument as to why the core texts of the Court impose such a limit, and why the articulation of the standard as set out by Judge Henderson, who distinguished the standard applied in the instant case from the *Ruto and Sang* case was erroneous.[412] Therefore, these arguments merit dismissal. Similarly, the question presented by Judge Tarfusser, in which he asked the Prosecution, albeit rhetorically, where in the structure of the Statute is the NCTA procedure to be found, was asked in order to suggest that the Prosecution's limited interpretation was unsupported by the Statute.[413] For the aforementioned reasons, the Prosecution's arguments undermining the integrity of the Majority Judges are incapable of rebutting the presumption of their integrity.[414]

IV.B.2. The Majority did not err in law

192. The Prosecution argues that the Trial Chamber erred in law on the basis of the inconsistency of Judge Henderson's framework with that of Judge Tarfusser's[415] and the assertion that issues such as standards of proof and "other legal standards applying to evidence" are core issues and not afterthoughts.[416] With respect to the Prosecution's first argument, the Defence refers the Chamber to the section on the relevant procedural history in the present Response, which clearly demonstrates that the Judges in the Majority subscribed to the same clearly defined legal standard that would, and was correctly applied to the evaluation of the Blé Goudé's NCTA Motion.[417]

[411] NCTA Clarification Decision, paras 12-13.
[412] Judge Henderson's Reasons, paras 2-9.
[413] NCTA Hearing Day 1, page 18, lines 7-9. The Prosecution does not reference in its Document in Support of Appeal the clearer articulation of this question, which Judge Tarfusser repeated in his reasons, where it is evident that the Judge was not asking where the NCTA motion, as such, was to be found in the Statute, but the procedure for such a motion. Judge Tarfusser's Opinion, para. 66.
[414] *See supra* Response, para. 147.
[415] Document in Support of the Appeal, para. 142.
[416] Document in Support of the Appeal, para. 142.
[417] *See supra* Response, paras 175-192.

193. The Prosecution's second argument centers on the importance of the Trial Chamber articulating and applying a standard of proof in coming to its factual determinations. This is not in dispute. The Defence avers that during the fact finding process, a Trial Chamber must know and apply the appropriate standard in coming to its determinations.[418] As the procedural history of this case reveals, the Trial Chamber had a clearly defined standard in mind when it acquitted Mr Blé Goudé.

194. The Defence submits that the Prosecution's submissions with respect to a legal error in this case must be dismissed for the following three reasons. First, the Prosecution's reliance on cases in which the matter to be assessed was novel and which caused a significant degree of disagreement between the parties is inapposite. Second, the jurisprudence relied on by the Prosecution to show that the standard to be applied must be articulated correctly reveals that such an error is insufficient to reverse a decision and also runs counter to the Prosecution's argument that the factual standard of review should not apply to the present appeal. Third, the Prosecution's extensive reliance on the *Ayyash* case is unconvincing because the relevant procedural history of that case is clearly distinguishable from the present case.

195. *First*, the Prosecution argues that trial chambers generally give guidance when new and novel issues are at stake.[419] Further, the Prosecution asserts that the Appeals Chamber of this Court has held that parties must be on notice as to the legal standards to be applied, and that ambiguity as to what is expected can lead to reversible error.[420] The cases the Prosecution cites do not support its arguments. For example, in one of the cases cited, namely the *Lubanga* Second Reparations AD, the Appeals Chamber noted that the parties were aware that the standard to be applied was "a balance of the probabilities".[421] The Appeals Chamber found the Trial Chamber had erred in not ensuring equal conditions for all victims since the eligibility requirements expressed by the TFV, the Trial Chamber and the Appeals Chamber, may have led to ambiguity as to what was required of potential victims submitting their requests.[422] The Appeals Chamber further found that victims applying for reparations after the impugned

[418] Document in Support of the Appeal, paras 143-144.
[419] Document in Support of Appeal, para. 144.
[420] Document in Support of Appeal, para. 145.
[421] *Lubanga* Second Reparations AD, paras 33, 197
[422] *Ibid.*,, paras 162-169.

decision was issued were able to take advantage of the guidance provided by the Trial Chamber therein.[423] This Appeals Judgment is therefore incapable of supporting the Prosecution's arguments in this case, since the standard of proof applied by the Trial Chamber was not litigated in that appeal.

196. *Additionally*, the Prosecution mischaracterizes the *Lubanga* Second Reparations AD when it advances that varying views expressed by chambers and parties/participants can lead to reversible error.[424] This is not a finding by the Appeals Chamber. Rather, the Appeals Chamber found that the varying views expressed by the TVF, the Appeals Chamber, and the Trial Chamber can lead to reversible error.[425] Such a finding is tied to all three entities being adjudicatory bodies with respect to victims' applications.[426] Therefore, their varying views did create ambiguity as to what was expected from victims. This Appeals Judgment is silent as to the varying views expressed by parties or participants, and thus does not support the parallel the Prosecution attempts to make between this case where parties had differing views and the *Lubanga* Second Reparations AD.

197. The Prosecution equally refers to the *Gaddafi* Admissibility AD, *Ruto and Sang* Decision No. 5, as well as case-law from the ECCC to support the proposition that trial chambers tend to guide parties and participants when novel issues are at stake.[427] It attempts to draws a parallel between these cases and the instant case when it submits that the circumstances of this case demanded clarity on the law and procedure, and that the Trial Chamber provided none.[428] The Defence refers the Chamber to its submissions on the relevant procedural history in which it substantiates that the standard that was applied to this case was clear from the beginning.[429] The Defence equally refers to its submissions on the *Ruto and Sang* case where the parties disputed the interpretation of *Ruto and Sang* Decision No. 5 and whether it constituted a quantitative or qualitative test.[430] Trial Chamber V(a) did not provide such guidance, and only provided its interpretation in its final decision

[423] *Ibid.*
[424] Document in Support of Appeal, para. 145.
[425] *Lubanga* Reparations AD, para. 167-169.
[426] *Ibid.*
[427] Document in Support of Appeal, para. 145.
[428] Document in Support of Appeal, para. 149.
[429] *See supra* Response, paras, 175-192.
[430] *See supra* Response, para. 185.

disposing of the NCTA motions.[431] Further, while both Judges Fremr and Eboe-Osuji did apply the *Ruto and Sang* Decision No. 5 test, both judges stated in *obiter dicta* that nothing in the Statute constrained from going outside the parameters of *Ruto and Sang* Decision No. 5 such that the Trial Chamber would have been prevented from assessing the credibility and the reliability of the evidence.[432] This reasoning is consistent with the Defence submissions that the Prosecution was always on notice that it must prove its case beyond a reasonable doubt.[433] Therefore, while NCTA procedures may be novel at the Court, the Prosecution's burden of proof at trial is not. Therefore, the Prosecution's reliance on the *Gaddafi* Admissibility AD, the ECCC case law, and the *Ayyash et al.* AD is inapposite.

198. In the context of a NCTA procedure, it is the accused who has to put forward arguments that the Prosecution has not presented sufficient evidence to sustain a conviction. In the *Gaddafi* Admissibility AD, it was the Libyan government who had the burden of proof to establish that the case against Saif Al-Islam Gaddafi was inadmissible. The Appeals Chamber determined that the principles of due process did not require for the Pre-Trial Chamber to provide clarification as to its interpretation of the precise standard of proof.[434] It noted that the Pre-Trial Chamber had demonstrated that it was attentive to the moving party's difficulties, in this case, the Libyan government, and that in response, the government had stated that it was acutely aware of its responsibilities to meeting the standard as set out by the Pre-Trial Chamber.[435] Here, like in *Gaddafi*, the Defence, as the moving party, also insisted that it was aware of the standard that it was required to meet in showing that there was no evidence capable of sustaining a conviction against Mr Blé Goudé. Thus, like the Pre-Trial Chamber in *Gaddafi*, the Trial Chamber in the instant case was not required to provide its interpretation of the NCTA standard for the simple reason that the parties disagreed over the interpretation and application of the standard.

199. Moreover, similar to *Gaddafi*, the Trial Chamber acted with procedural fairness towards the parties, by giving the parties every opportunity to present arguments as to

[431] *Ruto and Sang* NCTA Decision (Reasons of Judge Eboe-Osuji), paras 42-50.
[432] *Ruto and Sang*, NCTA Decision (Reasons of Judge Eboe-Osuji), paras 126-130; *Ruto and Sang* NCTA Decision (Reasons of Judge Fremr) paras 18-19,146.
[433] *See Ruto and Sang* NCTA Decision (Reasons of Judge Eboe-Osuji), para. 129.
[434] *Gaddafi* Admissibility AD, para. 203.
[435] *Ibid*., paras 203-204.

the standard to be applied and its interpretation. The Defence made submissions as to its interpretation of the relevant standard to be applied in: its submissions made pursuant to the First Conduct of Proceedings Order,[436] and (2) during the NCTA Hearing Day 6.[437] The Prosecution did not avail itself of the opportunity to respond to the Blé Goudé Conduct of Proceedings Observations. The Prosecution first announced its interpretation of the standard to be applied in the Prosecution's NCTA Clarification Request.[438] Despite the Prosecution not providing any legal basis for this request as required by regulation 23(1)(d) of the RoC, the Single Judge decided it would consider it in order to dispel any uncertainty,[439] and rendered a decision in which he detailed his reasons for rejecting the request. Further, the Trial Chamber did not limit at all in terms of length, structure, or arguments the Prosecution's response to the Blé Goudé's NCTA Motion.[440] Indeed, the Prosecution responded with 1055 pages of submissions.[441] Lastly, the Prosecution was afforded an opportunity to present its arguments on the relevant standard during the NCTA hearings. The Prosecution made such arguments, and never did the Trial Chamber limit the Prosecution with respect to them.[442] Therefore, the Prosecution's submission that the Trial Chamber did not meaningfully engage with the parties is clearly refuted by the aforementioned reasons.

200. Similarly, the ECCC case law does not support the Prosecution's arguments with respect to an alleged legal error. First, in *Case 001* AJ, the Supreme Court Chamber found that despite the legal framework being obscure, the Trial Chamber did not err in law.[443] Therefore, on the basis of this decision, the Prosecution's arguments regarding the Trial Chamber not providing a clear standard to the parties are insufficient to show that Trial Chamber's legal error. The Prosecution also refers to *Case 002 JCE Notice Order*, in which the Co-Investigating Judges determined they would provide notice as to the mode of liability to be applied in the context of the accused making such a

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436 Blé Goudé Conduct of Proceedings Observations, paras 20-27.
437 NCTA Hearing Day 6, pages 39-53
438 NCTA Clarification Decision, para. 9.
439 *Ibid.*
440 *See* Second Conduct of the Proceedings Order.
441 Prosecution's NCTA Response.
442 NCTA Hearing Day 1, pages 6-18.
443 *Case 001* AJ, paras 486, 493, 501.

request in order to be able to mount a proper defence.[444] Here, the Defence did not make any requests for clarification, and it was always aware of the standard to be applied. Moreover, the Prosecution as stated before was always aware that its evidence had to be capable of meeting the beyond a reasonable doubt standard.

201. The aforementioned analysis of the Prosecution's references demonstrates that the Prosecution has not substantiated that the Trial Chamber in the instant case should have provided guidance to the parties given that the matter to be assessed was novel and one which caused a significant degree of disagreement between the parties.

202. Second, the Prosecution submits that trial chambers are required to articulate the standard of proof correctly. However, all the cases the Prosecution relies on demonstrate that while the standard must be articulated correctly, the decision will not be reversed on appeal unless the appellant can show that the Trial Chamber applied the standard incorrectly in its factual findings.[445] In the case of factual errors, the appellant must also show that there was a miscarriage of justice, which the Prosecution failed to do.[446] Therefore, the authorities the Prosecution cites run counter to its argument that a decision can be reversed on the ground that the standard was not articulated correctly. Moreover, these cases also demonstrate that the Prosecution's approach to this appeal, namely canvassing a few factual examples is not sufficient to

[444] *Case 002* JCE Notice Order, para. 10.
[445] The Prosecution cites in footnotes 296 to 299 the following cases: *D. Milošević*, para. 22, finding that despite the Trial Chamber using misleading language "the Trial Chamber in fact meant to state that all reasonable doubt was eliminated on the basis of the evidence cited in all such instances."; *Musema AJ*, para. 209-211, finding that an in-depth analysis of the findings of Trial Chamber was needed in order to see whether the Trial Chamber did in fact misapply the standard of proof; *Zigiranyirazo AJ*, para. 20: "[i]n assessing whether a Trial Chamber, when using this type of language, has in fact shifted the burden of proof, the Appeals Chamber carries out an in-depth analysis of the specific findings related to a given incident. The Appeals Chamber has generally found that such language, while inappropriate, *is not fatal* when viewed in the broader context of a Trial Chamber's findings" (emphasis added); *Ngudjolo AJ*, para. 44, finding that though the Prosecution alleged an error of law under its first ground of appeal the Appeals Chamber would apply the standard of review for errors of fact; *Martić AJ*, para. 60,"[w]hile the wording used in the footnote mentioned is unfortunate, in light of the overall discussion by the Trial Chamber and its application of the standard to the evidence, the Appeals Chamber finds that Martić has failed to show that the Trial Chamber actually erred in its application of the standard of proof".
[446] *D. Milošević*, para. 12 ("On appeal, parties must limit their arguments […] to factual errors that result in a miscarriage of justice"); *Musema AJ*, para. 17 ("It is not every error that will lead the Appeals Chamber to overturn a decision of the Trial Chamber. The appealing party must demonstrate that the error was such that it led to a miscarriage of justice."); *Zigiranyirazo AJ*, para. 8 ("On appeal, the parties must limit their arguments to legal errors that invalidate the decision of the Trial Chamber and to factual errors that result in a miscarriage of justice."); *Ngudjolo AJ*, paras 24-26 (finding that factual standards of review require that the appellant show "'an unreasonable assessment of the facts' carried out by the Trial Chamber 'may have occasioned a miscarriage of justice'"; *Martić AJ*, para. 11 ("Only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber.").

reverse the Trial Chamber's decision to acquit Mr Blé Goudé. Therefore, the Prosecution's own authorities undermine its own argument.

203. Lastly, the Prosecution argues extensively on the basis of the *Ayyash et al.* AD that a legal error was committed in the instant case. However, the relevant procedural history of that case stands in stark contrast with the present case. Indeed, the *Ayyash et al.* AD demonstrates to what extent the Prosecution's arguments with respect to the Trial Chamber not having a standard "in mind" in the instant case lack any foundation. In *Ayyash*, the Appeals Chamber found three indicators showed that the Trial Chamber did not have a standard in mind when they determined the death of the accused: (1) the Trial Chamber called for a hearing on the relevant standard to be applied in determining the death of the accused, *after* it had rendered its oral decision on the accused's death,[447] (2) during the hearing, the judges asked questions to the parties indicating that they were not sure of the standard to be applied to determine an accused's death even though their decision had already been made on the issue,[448] (3) the written decision cited the parties' oral submissions, which also indicated that the oral decision was taken without the judges having applied a standard.[449]

204. Here, the Prosecution is unable to cite any such indicators. The only potential similarity between the two decisions is that an oral decision was rendered, and the reasons followed. The similarity stops there. First, unlike in *Ayyash*, the Trial Chamber after concluding its oral decision, did not convene a single hearing or ask for any submissions as to the appropriate standard to be applied in evaluating the Blé Goudé's NCTA Motion. Rather, the Trial Chamber found it necessary to issue an oral decision before the written decision for the sole purpose of not maintaining Mr Blé Goudé in detention "during the period necessary to fully articulate its reasoning in writing."[450] Moreover, the Trial Chamber also stated that it had "thoroughly analysed the evidence and taken into account, into consideration all legal and factual arguments

[447] *Ayyash et al.* AD, para. 39.
[448] *Ibid.*
[449] *Ibid.*, para. 40. *See also Ayyash et al.*, Judge Nsereko's Dissenting Opinion, para. 7. ("I furthermore agree with the majority's conclusions regarding the significance of the Trial Chamber referring, in its Written Reasons, to the submissions regarding the applicable standard of proof which were made after the Oral Decision had been delivered.")
[450] 15 January 2019 Oral Acquittal Decision, page 4, lines 7-9.

submitted both orally and in writing by the parties and participants."[451] The plain meaning of these words is that the Trial Chamber had completed its legal and factual assessment of the parties' submissions and had come to a decision to acquit Mr Blé Goudé. The only task it had before it after its decision was to provide written reasons of an already completed assessment. Therefore, on 16 January 2019, after determining that Mr Blé Goudé should not be maintained in detention pending appeal, the Trial Chamber "conclude[d] the trial as far as this Chamber is concerned."[452] Consistent with this conclusion, the Trial Chamber did not issue any document until the Written Reasons were issued on 16 July 2019.

205. *Second*, unlike in *Ayyash*, Judge Tarfusser's question as to the procedure to be applied in NCTA proceedings was posed before the Judges came to their decision on the Blé Goudé's NCTA Motion.[453] In *Ayyash*, the questions for guidance noted by the Appeals Chamber were asked after the judges had made their decision regarding the accused's death. Moreover, as previously stated by the Defence, the Prosecution's submission that the question revealed that Judge Tarfusser disagreed with the NCTA procedure is a mischaracterization of the Judge's question.[454]

206. Lastly, unlike in *Ayyash*, the Prosecution is not able to point to a single excerpt in the Written Reasons, which indicates that the Trial Chamber did not have a standard in mind when it decided to acquit Mr Blé Goudé. Judge Tarfusser's Opinion indicating that NCTA proceedings have no place in the Statute constitutes *obiter dicta*, and any other reading would imply that the Majority Judges were not truthful.[455] The Prosecution has not made any showing that would rebut the presumed integrity of the Judges. Given the dissimilarities between the instant case and *Ayyash*, the Prosecution has failed to substantiate its arguments that the Trial Chamber did not have a standard in mind when it acquitted Mr Blé Goudé.

[451] 15 January 2019 Oral Acquittal Decision, page 2, line 25 to page 3, lines 1-2.
[452] 16 January 2019 Decision, page 6, line 20.
[453] Judge Tarfusser posed this question during the NCTC hearings on 1 October 2018, and the decision acquitting Mr Blé Goudé was rendered on 15 January 2019. NCTA Hearing Day 1, page 18, lines 7-9; 15 January 2019 Oral Acquittal Decision.
[454] NCTA Hearing Day 1, page 18, lines 7-9. The Prosecution does not reference in its Document in Support of Appeal the clearer articulation of this question, which Judge Tarfusser repeated in his reasons, where it is evident that the Judge was not asking where the NCTA motion, as such, was to be found in the Statute, but the procedure for such a motion. Judge Tarfusser's Opinion, para. 66.
[455] *See supra*, Response, para. 152.

IV.B.3. The Majority did not err in procedure

207. The Prosecution submits that the Trial Chamber erred in procedure by failing to articulate and apply its evidentiary approach. The Prosecution erroneously attempts to substantiate such procedural error through: (1) the procedural chronology of the case, (2) Judge Henderson's articulation and application of an overly rigid approach to corroboration, and (3) the Majority's incorrect and inconsistent assessment of several factual matters.[456]

208. The Defence notes that under the second ground of appeal the Prosecution's arguments with respect to alleged legal errors are almost identical to its arguments regarding alleged procedural errors.[457] However, these are distinct errors under the Statute, which the Prosecution erroneously does not differentiate.[458] In *Ngudjolo*, the Appeals Chamber noted that procedural errors often relate to alleged errors in a trial chamber's exercise of its discretion.[459] Further, the Appeals Chamber should only interfere with the the trial chamber's discretion if certain conditions are met.[460] In *Ntaganda*, the Appeals Chamber determined that the decision to entertain NCTA procedures forms part of a trial chamber's discretion.[461] Further, the Appeals Chamber found devoid of merit Mr Ntaganda's reliance on Trial Chamber V(a)'s approach in *Ruto and Sang* to substantiate that Trial Chamber VI erred in its discretion by adopting a different approach.[462] The Appeals Chamber reasoned that "[…] a Trial Chamber is expected to exercise its discretion bearing in mind the specific circumstances of the case before it." The Appeals Chamber found that the Trial Chamber bore in mind those circumstances when it referred to the "present circumstances" and the "proceedings against Mr Ntaganda".[463]

209. Given the decision to conduct a NCTA procedure is a discretionary one, to assert a procedural error the Prosecution in the instant case needs to show that the Trial Chamber erred in the exercise of its discretion when it adopted its NCTA procedure.

[456] Document in Support of Appeal, para. 153.
[457] *See* Document in Support of Appeal, para. 131.
[458] Article 81(1)(a)(i), (iii) of the Statute.
[459] *Ngudjolo* AJ, para. 21.
[460] *See supra* Response, para. 144.
[461] *Ntaganda* NCTA AD, para. 53.
[462] *Ibid*., para. 54.
[463] *Ibid*.

The Prosecution makes no submissions in this regard. Rather, the Prosecution's arguments rely on the approach in Trial Chamber V (a) to substantiate that the different approach adopted by the Trial Chamber was erroneous.[464]

210. Like in *Ntaganda*, the Chamber should find these arguments to be devoid of merit since the Trial Chamber in the instant case clearly took into account the specific circumstances of Mr Blé Goudé's case when adopting its NCTA procedure. In light of the evidence presented at trial, the Trial Chamber unanimously invited the Prosecution to submit a Trial Brief in which it would detail how the evidence presented at trial supported the charges.[465] The Trial Chamber then requested the Defence to indicate whether it wished to present a NCTA motion,[466] to which it responded in the affirmative, and outlined its interpretation of the standard that should apply.[467] The Prosecution chose to not respond to the Defence's submissions. Therefore, the Prosecution tacitly approved of this procedure.

211. After having received the Defence's submissions, the Trial Chamber authorised the Defence to make its Blé Goudé's NCTA Motion. It is only upon receipt of the Second Conduct of Proceedings Order that the Prosecution raised for the first time in its Prosecution's NCTA Clarification Request, its arguments with respect to the legal standard that should apply. Despite the Prosecution not raising these arguments when the Defence made its submissions on its wish to file a NCTA motion, the Single Judge nevertheless considered the Prosecution's request.[468] Rather than rejecting the Prosecution's request for its untimeliness, the Single Judge considered it "[…] in the interest of dispelling uncertainty and of the overall efficiency of the proceedings".[469] The Single Judge rejected the request and noted that the Trial Chamber determined not to follow the procedural steps in *Ruto and Sang* since the procedure was "[…] tailored to the specific circumstances of these proceedings".[470] The judge then reasoned that as the Prosecution had flexibility to demonstrate how the evidence

[464] Document in Support of Appeal, para. 154.
[465] First Conduct of Proceedings Order, paras 9-10.
[466] *Ibid.*, para. 14.
[467] Blé Goudé Conduct of Proceedings Observations, paras 17-27.
[468] NCTA Clarification Decision, para. 9.
[469] *Ibid*.
[470] *Ibid*., para. 11.

presented supports the charges in the Prosecution Mid-Trial Brief, the Defence, too, should have equal flexibility in presenting why such evidence is insufficient.[471]

212. Therefore, like in *Ntaganda,* the Trial Chamber assessed the specific circumstances of the present proceedings, in arriving at its decision on whether and how to conduct a NCTA procedure. While in *Ntaganda* the ultimate decision was not to conduct such proceedings, in the present case, the Trial Chamber determined to allow such proceedings pursuant to its powers and responsibilities under article 64(2) of the Statute. It did not give its interpretation of the relevant standard with a view to offer the Defence the same flexibility in drafting its NCTA Motion as the Prosecution enjoyed in drafting its Prosecution Mid-Trial Brief. The Prosecution has failed to show how this approach was an error in the exercise of the Trial Chamber's discretion. Therefore, the Prosecution's assertion that the procedural history of the present case would show a procedural error is devoid of merit.

213. The Prosecution also asserts that the Trial Chamber's unclear approach led it to adopt an inflexible and legally unsupported approach to corroboration.[472] Thus, in its submission, the Trial Chamber committed both a procedural and legal error.[473] The Defence submits that this argument should be dismissed *in limine* for it is contrary to common sense. The ICTY Appeals Chamber has defined a list of categories for which dismissal *in limine* is warranted; among them have figured arguments, which are contrary to common sense.[474]

214. The Prosecution in the instant case asserts that the Trial Chamber did not have a defined standard in mind when it assessed the evidence. Corroboration is one element that trial chambers have broad discretion to use in the assessment of the credibility or the reliability of evidence.[475] If it is true that the Trial Chamber did not have a legal

[471] *Ibid*., para. 12. Compare First Conduct of Proceedings Order, paras 10-11 with Second Conduct of Proceedings Order, para. 11.
[472] Document in Support of Appeal, para. 155.
[473] *See ibid.*
[474] *D. Milošević* AJ, para. 17, citing *Krajišnik* AJ, paras 17-27; *Martić* AJ, paras 14-21; *Prosecutor v. Pavle Strugar,* Case No. IT-01-42-A, Judgment, 17 July 2008, paras 18-24; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgment, 3 April 2007, paras 17-31; *Galić* AJ", paras 256-313.
[475] *Sesay et al,* Case No. SCSL-04-14-A, Judgment, 26 October 2009, ("*Sesay et al* AJ"), para. 221 ("The Appeals Chamber holds that a Trial Chamber enjoys discretion to use uncorroborated evidence, to decide whether corroboration is necessary in the circumstances, and to rely on uncorroborated, but otherwise credible, witness testimony."); *see also Karemera et al.* AJ, paras 467-468 ; *Nzabonimana* AJ, para. 319; *Đorđević* AJ,

standard in mind when it assessed the evidence, then it would be logical that its approach to the tools at its disposal to assess evidence would be equally unclear and opaque. Here, the Prosecution makes the opposite argument. It argues that the tool used to assess evidence, namely corroboration, was too strictly construed, and thus shows that the Trial Chamber had an opaque evidentiary approach. Such an argument is contrary to common sense for a rigid approach, regardless of whether it is correct, is usually clearly defined, and leaves no room for nuance. The Trial Chamber's approach to corroboration illustrates this point. The Trial Chamber determined that "corroboration only occurs when two pieces of evidence independently confirm the same fact."[476] This approach to corroboration is unequivocal and clear. Therefore, it is illogical for the Prosecution to argue that such an approach would be indicative of an undefined standard. Therefore, the Chamber should dismiss *in limine* the Prosecution's arguments regarding corroboration for they lack common sense.

215. *Assuming arguendo* that the Chamber were to consider the Prosecution's submissions with respect to corroboration, the Defence submits that the Prosecution fails to demonstrate any procedural or legal error. The Prosecution's arguments are premised on (1) the rule 63(4) prohibition, as a matter of law, to require that evidence be corroborated,[477] (2) other international criminal tribunals providing for a flexible approach to corroboration,[478] and (3) the Trial Chamber's rejection of the Prosecution's arguments regarding corroboration occurring when evidence relates to not only the same facts but similar facts.[479] The Prosecution fails to show that the Trial Chamber committed a procedural or legal error with respect to corroboration.

216. *First*, rule 63(4) prohibiting corroboration to be imposed as a legal requirement to prove a crime is not in dispute. The Prosecution in its submissions is not able to provide a single example where the Trial Chamber required, as a matter of law, that the evidence presented by the Prosecution be corroborated. Moreover, in his written reasons, Judge Henderson stated that corroboration was not required.[480] Thus, the

para. 395; *Hategekimana* AJ, paras 82, 190; *Munyakazi* AJ, paras 51, 71, 103; *Bagilishema* AJ, para. 78; *Taylor* AJ paras 75-78; *Kupreškić et al.*AJ, para. 220; *Case 002/01* AJ, paras 314, 423.

476 Judge Henderson's Reasons, para. 47.

477 Document in Support of Appeal, para. 156.

478 *Ibid.*

479 *Ibid.*, paras 157-159.

480 Judge Henderson's Reasons, para. 46.

Trial Chamber did not require that all evidence of the Prosecution be corroborated. The Prosecution suggests that since corroboration is not a requirement, then it means that corroboration must be broadly construed.[481] However, such a conclusion is wholly unsupported by the legal authorities cited by the Prosecution. Indeed, the cases cited by the Prosecution stand for the proposition that corroboration is an element that a reasonable trial chamber may consider when assessing the evidence, and the decision to consider it is discretionary.[482] The Prosecution makes no submissions with respect to how the Trial Chamber erred in the exercise of its discretion by employing this approach to corroboration when it assessed the evidence. Therefore, its arguments regarding the need for a flexible approach should be dismissed.

217. *Second*, the Prosecution argues at great length that the Trial Chamber's approach to corroboration is allegedly not supported by the flexible fact specific approach adopted by other international criminal tribunals, especially the ICTR.[483] First, the Defence submits that even when assuming the truth of this argument, it does not show any error on the part of the Trial Chamber. Article 21 of the Statute defines the Court's sources of law. The jurisprudence of other international criminal tribunals, while persuasive authority, is not binding upon this Court. Thus, the Prosecution fails to substantiate this argument.

218. Moreover, the Prosecution mischaracterizes the jurisprudence of the international criminal tribunals. Not a single case cited by the Prosecution indicates that the trial chambers in international criminal tribunals adopt a flexible approach to corroboration because of "the fact-sensitive nature of the assessment that must accommodate various factors in determining its need and what it constitutes".[484] The cases the Prosecution cites can be grouped into the following propositions: (1) trial chambers have broad discretion in evaluating inconsistencies within the evidence, and thus appeals chambers have accorded deference to trial chambers in this regard[485] (2)

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[481] *See* Document in Support of Appeal, para. 156.
[482] *See* Document in Support of Appeal, para. 156, footnote 333, in particular *Taylor* AJ, paras 75-78; *Case 002/02* TJ, para. 53; *Case 002/01* AJ, paras 268, 302, 314, 424, 428.
[483] Document in Support of Appeal, paras 156-158.
[484] *Ibid*., para. 156.
[485] *Popović et al.* AJ, para. 137; *Karemera et al.* AJ, paras 179, 467-468; *Nizeyimana* AJ, para. 174; *Nzabonimana* AJ, para. 319; *Đordevic* AJ, paras 395, 422, 797; *Ndahimana* AJ, para. 93; *Lukic et al.* AJ, paras 135, 234; *Hategekimana* AJ, para. 190; *Munyakazi* AJ, paras 51, 103; *Setako* AJ, para. 31; *Renzaho* AJ, paras 269, 355; *Kalimanzira* AJ, para. 105; *Rukundo* AJ, paras 86, 207; *Haradinaj et al.* AJ, para. 129; *Muvunyi* AJ,

appeals chambers will only find an error in the trial chambers' resolution of inconsistencies within the evidence if they determine that no reasonable trier of fact could have made such a finding,[486] (3) corroboration can exist even when there are differences between two testimonies as long as two credible witnesses' accounts of the facts are compatible with one another.[487] Rather than supporting the Prosecution's arguments that international courts adopt a flexible approach to corroboration, the jurisprudence cited by the Prosecution shows that trial chambers have great flexibility in reviewing inconsistencies within the evidence presented and in deciding whether corroboration is necessary. Therefore, the Prosecution should have shown that the Trial Chamber went beyond the limits of its discretion by adopting such an approach to corroboration. Since it failed to make a *prima facia* showing of error, the Prosecution's arguments should be dismissed.

219. *Third*, the Prosecution's submissions relating to similar facts being corroborative of one another should be dismissed since they are for the most part entirely repetitive of arguments at trial, which were correctly rejected by the Trial Chamber.[488] The Prosecution's remaining arguments are equally deficient, albeit for a different reason, namely their basis in circular reasoning. The starkest example is the Prosecution's argument that the Trial Chamber adopted an illogical approach since "it appeared to insist that facts should be identical or "mirror images, to be considered as corroborative of one another".[489] Indeed, such an approach appears illogical since it assumes the very conclusion the Prosecution wishes to prove, namely that different facts may be corroborative of one another. The Trial Chamber found that corroboration only occurs when different pieces of evidence refer to the same fact. Therefore, never did the Trial chamber disregard "similar" facts because they were "different," as asserted by the Prosecution.[490] Rather, the Trial Chamber in

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para. 44; *Seromba* AJ, para. 116; *Simba* AJ, para. 103; *Muhimana* AJ, paras 58, 135; *Kajelijeli* AJ, para. 96; *Rutaganda* AJ, para. 443; *Bagilishema* AJ, para. 78; *Musema* AJ, para. 89; *Kupreškic et al.* AJ, para. 156; *Taylor* AJ, paras 75-78; *Case 002/01* AJ, para. 302.

[486] *Popovic et al.* AJ, para. 1228; *Nizeyimana* AJ, para. 174; *Setako* AJ, para. 31; *Renzaho* AJ, para. 355; *Musema* AJ, para. 89; *Case 002/01* AJ, para. 302.

[487] *Karemera et al.* AJ, paras 467-468; *Nzabonimana* AJ, para. 319; *Hategekimana* AJ, para. 82; *Munyakazi* AJ, paras 71, 103; *Setako* AJ, para. 31.

[488] Compare Document in Support of Appeal, paras 156-158 with Prosecution's NCTA Response, paras 122, 198. *See* NCTA Hearing Day 7, pages 2-7 (arguing *inter alia* that the Prosecution's interpretation of "sequence of linked facts" was too broad).

[489] Document in Support of Appeal, para. 159.

[490] *Ibid.*

determining whether a piece of evidence was corroborated may have disregarded evidence which pertained to a different fact. The Prosecution's arguments do not show how such an approach was erroneous. Similarly, the Prosecution's submissions on the holistic assessment of evidence and it not triggering any consideration of corroboration also assume that corroboration occurs when similar facts are at issue.[491] This is the very proposition the Prosecution must substantiate, and thus this argument is devoid of merit.

220. The Defence submits that the Trial Chamber's approach to corroboration was reasonable, and well within the ambit of the broad discretion that trial chambers enjoy in their evaluation of it. In the *Taylor* AJ, a case the Prosecution cites, the Appeals Chamber found that the Trial Chamber correctly relied on the plain meaning of the term corroboration, and thus found no error in the Trial Chamber's approach. Here, like in *Taylor* AJ, the Trial Chamber adopted the plain meaning definition of the term. Black's Law dictionary defines corroborating evidence as "additional evidence of a different character to the same point."[492] This definition mirrors the definition employed by the Trial Chamber, namely corroboration occurs "when two pieces of evidence independently confirm the same fact". [493] In both instances, the term "same" limits corroboration to an identical element.[494] Thus, by adopting and applying the plain meaning of the term "corroboration", the Trial Chamber acted within the bounds of the broad discretion it had to evaluate and assess the evidence, and thus made no procedural error.

IV.B.4. The Prosecution's submissions on the examples should be dismissed in limine since they constitute mere disagreements with the Trial Chamber's findings

221. The Prosecution submits that the alleged opaque standard of proof the Trial Chamber applied is supposedly manifested in the six examples set forth in the Document in

[491] *Ibid.*
[492] Henry Cambell Black, *Black's Law Dictionary*, (Free Online Dictionary 2nd ed., 1910), *at*. Thelawdictionary.org/corroborating-evidence/.
[493] Judge Henderson's Reasons, para. 47.
[494] The 2019 edition of Black's Laws dictionary defines corroborating evidence as "[e]vidence that differs from but strengths or confirms what other evidence shows". In this definition, the term "what" is the direct object for both "the evidence" and "other evidence" also showing that corroboration occurs when evidence confirms a single element. B. G. Gardner (ed.). *Black's Law Dictionary*, (11th ed., Thomson Reuters, 2019), page 699.

Support of Appeal.[495] For this reason, the Prosecution argues that the Chamber should not apply the standard for review relating to errors of fact. However, the Prosecution's submissions regarding the examples engage only with the Trial Chamber's clear and defined assessment of the evidence,[496] which belies the Prosecution's claim that the Trial Chamber applied an undefined standard to the evidence.

222. Moreover, the Document in Support of Appeal relied on evidence pertaining to incidents for which the Prosecution itself asked for the charges against Mr Blé Goudé concerning Abobo, namely the 3 March 2011 incident and the 17 March 2011 incident to be dismissed.[497] Therefore, examples relating to these incidents[498] are not relevant for the appeal in the case of Mr Blé Goudé. Therefore, only three examples remain in the Document in Support of Appeal, which is utterly insufficient to sustain the second appeal ground.

223. The six examples the Prosecution expounds upon constitute a disagreement with the Trial Chamber's factual findings. The Chamber will not disturb the factual findings made at first instance if the appellant merely advances a different interpretation of the evidence.[499] Further, the Prosecution relies on several instances in which the Dissenting Judge found that a reasonable trier of fact would have come to the factual findings advanced by the Prosecution.[500] Such an argument is insufficient to show an error since a NCTA procedure takes into account that "reasonable persons can come to different views that may still be reasonable in their variance or diversity."[501] In order to show error, the Prosecution needed to substantiate that (1) no reasonable trial chamber would have made such findings,[502] and (2) that all reasonable doubt as to Mr Blé Goudé's guilt has been eliminated.[503] The Prosecution does not make any submissions in this regard, and thus its submissions on the six examples warrant dismissal *in limine*.

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[495] Document in Support of Appeal, para. 162.
[496] *See e.g.* [REDACTED]; [REDACTED], [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED].
[497] Prosecution's NCTA Response, para. 1864.
[498] Document in Support of Appeal, Example 1, Example 2, and in part Example 3.
[499] *Bemba et. al.* AJ, para. 111, footnote 157 citing *Lubanga AJ*, para. 33; *Ngudjolo AJ*, para. 205.
[500] Document in Support of Appeal, paras 166, 183, 199, 260.
[501] *Ruto and Sang* NCTA Decision (Reasons of Judge Eboe-Osuji), para. 71.
[502] The Prosecution limits its submissions in this regard to asserting that a reasonable trial chamber would have reached the conclusions put forward by the Prosecution. Document in Support of Appeal, paras 170, 172, 183-185, 195, 199-200, 202, 222, 236-238.
[503] *Ngudjolo* AJ, paras 24-25; *See Ruto and Sang* NCTA Decision (Reasons of Judge Eboe-Osuji), paras 64-65.

224. It is extraordinary that in the Document in Support of Appeal the Prosecution chose to not include any examples of alleged erroneous findings with respect to the alleged criminal responsibility of Mr Blé Goudé. The Prosecution constructs an artificial argument by merely canvassing six examples of erroneous factual findings in order to avoid its inability to substantiate that Mr Blé Goudé's conduct had any contribution to the commission of the charged crimes. Thus, even were the Chamber to assume the Trial Chamber did err, it would have no bearing on the findings of the Trial Chamber regarding the complete absence of any linkage between Mr Blé Goudé and the crimes charged. The Prosecution does not contest it because in its own admission it is too difficult.[504] The only inference to be drawn from this situation is that the Trial Chamber's findings regarding the lack of Mr Blé Goudé's criminal responsibility are iron clad both with respect to the law and fact.

225. The Trial Chamber specifically found that for each of the charged incidents the Prosecution relied on alleged contributions that were general in nature and not linked to the specific instances of criminal conduct.[505] For example, the Trial Chamber found that even if it were to accept Mr Blé Goudé's 11 generic contributions, none of them were linked to keep Laurent Gbagbo in power *by all means*.[506] Thus, while the evidence showed that Mr Blé Goudé did participate in meetings, the Prosecution utterly failed to present evidence which showed that during the meetings matters that were related to the commission of crimes were discussed.[507] The Prosecution does not contest this finding.

226. A canvassing of three incidents shows that the Prosecution is unable to find an error in the Trial Chamber's findings regarding the lack of evidence with respect to Mr Blé Goudé's conduct and the instances of crime. For Mr Blé Goudé's speeches, the Trial Chamber found and the Prosecution stipulated that there were no explicit calls for violence.[508] Moreover, for each of these incidents, the Trial Chamber determined that the Prosecution submitted no evidence that the perpetrators of the crimes heard or were influenced by any utterances made by Mr Blé Goudé.[509]

[504] Document in Support of Appeal, para. 260.
[505] Judge Henderson's Reasons, paras 1956, 1963, 2018-2019.
[506] *Ibid.*, para. 1963.
[507] *Ibid.*, para. 1964-1965.
[508] *Ibid.*, paras 1984-1985,1988.
[509] *Ibid.*, paras 1935,1942,2023.

227. With respect to the incidents in Yopougon, specifically the incident of 25-28 February 2011, the Trial Chamber found that there was clear evidence of Mr Blé Goudé calling for the population to not fall into the trap of a civil war. Moreover, the Trial Chamber held – also not contested by the Prosecution – that there was no unambiguous evidence showing: (1) the exact sequence of events between Mr Blé Goudé's Baron Bar speech and the start of the violence, (2) the presence of Mr Blé Goudé at the 16th arrondissement Commissariat, (3) and the alleged links with local militia and Mr Blé Goudé so as to understand how Mr Blé Goudé may have influenced them.[510]

228. The second incident in Youpogon, namely the 12 April 2011 incident suffered from similar evidentiary lacunas. The Trial Chamber reasoned that even if it assumed the alleged conclusions the Prosecution wished for the Trial Chamber to draw regarding the control of the inner circle over the groups, it could not assume that such control existed in April of 2011.[511] To the contrary, the evidence on the record showed that the situation was chaotic and there was no evidence showing any level of coordination and communication between the alleged "inner circle" and the groups that committed the crimes.[512]

229. The aforementioned findings show a clear reasoning of the Trial Chamber applying the standard of review regarding sufficiency of evidence. The Prosecution does not engage at all with the finding that its allegations were not supported with any evidence regarding Mr Blé Goudé and the crimes charged. Therefore, even when assuming the Trial Chamber did err with respect to the first and second grounds of appeal, it would not change the outcome since the Prosecution's case was patently weak. There simply was no evidence to support that Mr Charles Blé Goudé contributed to the crimes, and thus an acquittal must ensue.[513]

IV.C. The 15 January 2019 Oral Acquittal Decision, read together with the 16 July 2019 Reasons was not materially affected by errors under the second ground of appeal

230. The Prosecution fails to show how the alleged procedural and legal errors under its second ground of appeal had a material impact on the Impugned Decision, contrary to

[510] *Ibid.*, paras 1999-2000.
[511] *Ibid.*, para. 1942.
[512] *Ibid.*
[513] Judge Tarfusser's Reasons, para 14.

the requirements of successful appeals both under article 81 and under article 82.[514] The Prosecution asserts that when the error lies in the failure to take a particular course of action, it is sufficient for the appellant to show the erroneous nature of such inaction, and the material impact need not be demonstrated. The Prosecution bases this argument on a single dissenting opinion rendered at the ICC.[515] However, the plain language of article 83(2) is clear; the Appeals Chamber may intervene, for example by reversing the decision or ordering a new trial if the appellant can demonstrate that either (1) the alleged errors materially affected the decision or (2) that the proceedings were so unfair as to affect the reliability of the decision. Indeed, in *Ngudjolo*, the Appeals Chamber confirmed the acquittal decision, despite finding that the Trial Chamber did err in not allowing the Prosecution to use certain information to cross examine Mr Ngudjolo because this error had no material impact on the decision to acquit Mr Ngudjolo.[516] The Appeals Chamber determined that in order to show that the decision would have been substantially different as is required under article 83(2), it needed to be established that there was "a high likelihood that the Trial Chamber, had it not committed the procedural errors, would not have acquitted Mr Ngudjolo".[517] The Prosecution has failed to demonstrate this in the instant case.

231. The Defence avers that under article 21(2) of the Statute, the Appeals Chamber is not bound by its precedent through *stare decisis*. However, the Appeals Chamber has found that "absent convincing reasons" it will not depart from previous jurisprudence.[518] The Prosecution does not provide any such reasons. It merely cites the *Ngudjolo* AJ Dissenting Opinion without showing how the judges in the Majority

[514] Article 83(2) of the Statute; *Ngudjolo* AJ, para. 284. *Situation in the DRC*, ICC-01/04-169, para. 84; *Kenyatta* Non-Compliance AD, para. 22; *Ruto and Sang* Admissibility AD, para. 87, cited in *Bemba et al.* AJ, paras 99-101; *Kony et al.* Admissibility AD, para. 48; *Banda and Jerbo* AD, para. 20; *Prosecutor v. Germain Katanga*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497 ("*Katanga* Admissibility AD"), para. 37; *Prosecutor v. Gaddafi and Al-Senussi*, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", 24 July 2014, ICC-01/11-01/11-565, para. 109.
[515] *See* Document in Support of Appeal, para. 256, footnote 548.
[516] *Ngudjolo* AJ, para. 287.
[517] *Ngudjolo* AJ, para. 285.
[518] *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, 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, para. 14.

were incorrect in their interpretation, or that current practice demonstrates that the interpretation must be changed.

232. Given the clear language of article 83(2) and the precedent of the Appeals Chamber that the Prosecution has been unable to effectively challenge, the Prosecution in the present case is required to demonstrate how the alleged procedural and legal errors materially affected the Impugned Decision. The Prosecution's submissions in this regard lack merit. The Prosecution submits that the Impugned Decision would have been substantially different for the following four reasons: (1) the Trial Chamber did not draw reasonable inferences as is allegedly demonstrated in the six examples developed in the Document in Support of Appeal;[519] (2) the Majority approach suffered methodological flaws, which affected the reliability of the decision; (3) the Trial Chamber failed to guide the parties, which resulted in ambiguity;[520] and (4) the alleged incorrect and inconsistent analysis affected every one of the five charged incidents that were the key building blocks to the Prosecution's case.[521] Similar to its submissions under the first ground of appeal, the Prosecution merely reiterates the alleged errors identified under the second ground of appeal for reasons (1)-(3),[522] instead of arguing how the alleged errors materially affected the Impugned Decision. Such arguments are patently deficient and must fail.

233. The Prosecution's fourth aforementioned argument, namely that it need only demonstrate through a few allegedly erroneous factual findings that there was a substantial impact is without any legal basis. Indeed, in *Ngudjolo*, the Appeals Chamber found that particularly in the case of an acquittal, it is unjustifiable to put a person through the ordeal of a new trial, or even enter a conviction, unless the error materially affected the decision under review. In the circumstances of Mr Ngudjolo, the Prosecution had to show "a high likelihood that the Trial Chamber, had it not committed the procedural errors, would not have acquitted Mr Ngudjolo".[523] Thus,

[519] Document in Support of Appeal, para. 258.
[520] Document in Support of Appeal, paras 261-262.
[521] Document in Support of Appeal, para. 259.
[522] The Trial Chamber's failure to draw reasonable inferences is an error the Prosecution alleges in paras 162, 170, 172, 184-193, 200, 202, 222, and 238 of the Document in Support of Appeal. The Trial Chamber's alleged flawed methodological approach is found in paras 164, 234-235, 248-252 of the Document in Support of Appeal. The Chamber's alleged failure to provide guidance is found in para. 145.
[523] *Ngudjolo* AJ, para. 285.

contrary to the Prosecution's submissions,[524] it is expected that the Prosecution demonstrate that the disposition of the instant case would have been different, and that Mr Blé Goudé would not have been acquitted but for the errors.[525]

234. The complexity of the case, and the length of the Impugned Decision, which is a result of the Trial Chamber's scrupulous consideration of the parties' submissions, which included the Prosecution's 1057 page response to the Blé Goudé's and Gbagbo's NCTA Motions does not absolve the Prosecution from substantiating its arguments on appeal. It also shows that the Prosecution's arguments are without merit. Moreover, the Prosecution must make such demonstration since in the instant case, like in *Ngudjolo*, the Prosecution is requesting the Appeals Chamber to put Mr Blé Goudé through the ordeal of being put in jeopardy again for the same crimes at an unspecified date in the future.

235. The Prosecution's submissions, if accepted, do not show that the Trial Chamber would not have acquitted Mr Blé Goudé had it not made the errors. The Prosecution's submissions on the examples are wholly unrelated to the acts and conduct of Mr Blé Goudé. Therefore, this Prosecution argument is incapable of showing that without having committed such alleged errors, the Trial Chamber would not have acquitted him.

236. The Defence submits that had the Trial Chamber informed the parties of the standard it would apply in advance of the Defence submitting its motion for a NCTA, the decision would not be substantially different. To the contrary, the Trial Chamber authorized the Defence to file its NCTA submissions at the close of the Prosecution's case. Thus, the Prosecution's ability to introduce evidence that would be capable of meeting the standard was no longer a possibility. Therefore, had the Trial Chamber notified the parties of the standard contained in Judge Henderson's Reasons, the evidence would still have been found insufficient by the Trial Chamber since it would have remained unchanged. Therefore, the Chamber should not consider the merits of

[524] Document in Support of Appeal, para. 260.
[525] *See supra*, Response, para. 160.

the Prosecution's second ground of appeal since the alleged errors to do not materially impact the Impugned Decision.[526]

V. There are no substantive grounds to reverse the 15 January 2019 Oral Acquittal Decision and to declare a mistrial

237. Pursuant to article 83(2) (a), the Prosecution requests the Chamber to reverse the Trial Chamber's decision to acquit Mr Blé Goudé. Moreover, it requests additional relief for which there is no basis in article 83 of the Statute, namely the declaration of a mistrial such that the Prosecution may at some indeterminate time, potentially spanning the rest of his life, (re)prosecute Mr Blé Goudé.[527] The Prosecution contends that the circumstances in which the acquittals were rendered necessitate such an extraordinary remedy.[528] The Defence opposes the Prosecution's relief sought, in whole, because: (1) a declaration of mistrial is not a remedy that is available at this stage of the proceedings, (2) in the alternative, if the Chamber determines such a remedy is available, the Prosecution has been unable to show urgent circumstances warranting it. The Prosecution submissions in support of a declaration of a mistrial are merely a repetition of its arguments on appeal, and thus do not constitute extraordinary circumstances.

238. The Prosecution bases this request on a single decision, namely *Ruto and Sang* NCTA Decision (Reasons of Judge Eboe-Osuji).[529] The Prosecution's reliance on it is inapposite since a mistrial can only be declared at the trial stage of the proceedings. In *Ruto and Sang*, under its obligation to ensure that trials are fair under article 64(2), the Trial Chamber declared a mistrial because it was impossible to determine whether the Prosecution's case was weak due to there being no better evidence left to be obtained or whether it was due to the interference with witnesses and political intimidation.[530] Since Judge Eboe-Osuji could not make such a determination, he reasoned that a

[526] *Bemba* AJ, para. 64; *Lubanga* AJ, paras 29-32. *See* Triffterer and Ambos, page 1955: "Appellants are obliged to substantiate in their filings on appeal not only the alleged error of law, fact, or procedure, but also how the alleged error materially affected the impugned decision; failure to do so may lead to a summary rejection of the ground of appeal or indeed the appeal as a whole".
[527] Document in Support of Appeal, para. 266 (requesting a declaration of a mistrial such that the Prosecution can decide at any given time the future course of the case and how to best serve justice).
[528] *Ibid.*, para. 265.
[529] *Ibid.*
[530] *Ruto and Sang* NCTA Decision (Reasons of Judge Eboe-Osuji), paras 2, 190.

declaration of mistrial was the best suited remedy to terminate the proceedings.[531] Thus, there was no final disposition of the case at the trial stage. In his reasons, Judge Eboe-Osuji found that the exercise of such a remedy forms part of the broad discretion of the trial judge, thereby indicating that the remedy is only available to trial chambers.[532]

239. Similarly, in the *Prosecutor v. Stanišić et al.,* the ICTY Appeals Chamber's defined a mistrial as "a trial that has been terminated prior to its conclusion".[533] Thus, the Appeals Chamber found that such a motion must be filed during the trial. It rejected Mr Stanišić's arguments regarding the applicability of rule 107 of the ICTY Rules of Procedure and Evidence. Rule 107 states that "the rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply mutatis mutandis to proceedings in the Appeals Chamber".[534] The Appeals Chamber recalled that rule 107 does not mean that all the rules applicable at the trial stage will automatically apply at the appellate stage.[535] The rule is only meant to enable the Appeals Chamber to import rules from "trial proceedings to fill a *lacuna* in appellate proceedings..."[536] Since any alleged violation of rights could be adequately addressed in the appeal judgment, the Appeals Chamber determined that a declaration of mistrial "is not available or necessary in the appeals phase of the case".[537]

240. Here, unlike in *Ruto and Sang*, the Trial Chamber was able to come to a final disposition of the case. It acquitted Mr Blé Goudé after a thorough evaluation of the Prosecution's evidence, after which it determined that the Prosecution case was so weak as to make a defence case unwarranted. The outcome is the ordinary result that occurs when a trial chamber finds that the Prosecution's case is weak at the NCTA

[531] *Ibid.*
[532] *Ibid*, paras 186, 190.
[533] *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-A, Decision on Mićo Stanišić's Motion Requesting a Declaration of mistrial, and Stojan Župljanin Motion to Vacate Trial Judgment, 2 April 2014 ("Decision on Stanišić Motion") para. 33 *citing* , Black's Law Dictionary (St. Paul, Minn.: West, 2009, 9th ed.), page 1093 *("mistrial [...] 1. A trial that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings.")(emphasis added).*
[534] *Ibid*, citing Rule 107 of the ICTY Rules of Procedure and Evidence.
[535] *Ibid*, para. 33.
[536] *Ibid*, para, 33 citing *Prosecutor v. Tihomir Blaškic*, Case No. IT-95-14-A, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 32 (Rule 107 enables "the Appeals Chamber to import rules for trial proceedings to fill a lacuna in appellate proceedings, subject to appropriate modifications").
[537] ("Decision on Stanišić Motion"), para. 33

stage.[538] The judgment of acquittal constitutes the end of the trial proceedings. Like in *Stanišić et al*, the end of the trial proceedings should preclude this requested relief at the appellate stage in the present case.

241. Moreover, the Prosecution's reliance on rule 149 of the Rules is undeveloped and unconvincing. Rule 149 at the Court mirrors the language employed in Rule 107 of the Rules of Procedure and Evidence at the ICTY.[539] Therefore, the Appeals Chamber's determinations in *Stanišić et al* are instructive with respect to the applicability of this rule. Like in *Stanišić et al*, rule 149 should not be interpreted to mean that all rules governing trial proceedings apply to the appellate stage. Indeed, rule 149 should be read in light of article 83(1) of the Statute, which states in relevant part "for the purposes of the proceedings under Article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber". Thus, the Appeals Chamber's application of the powers of the Trial Chamber must be done with the purpose of ensuring that a determination can be made on appeal. Here, article 83(2) expressly provides a remedy for errors that materially affect the decision or that result in unfairness affecting the reliability of the decision - reversal of the decision or an order for a new trial before a different trial chamber. Seeing as these two remedies are available to the Prosecution, as stipulated by it,[540] then there is no lacuna that needs to be filled in the appellate proceedings, thereby making the application of rule 149 unwarranted. In light of the above, a declaration of mistrial is not an available remedy in these appellate proceedings.

242. In the alternative, were the Appeals Chamber to find that such a remedy is available at this stage of the proceedings, it is clear that the circumstances of this case do not warrant a declaration of a mistrial. In *Ruto and Sang,* Judge Eboe-Osuji determined to terminate the case by declaring a mistrial because "the basic forensic premise that no-case submissions assume" was not valid for the *Ruto and Sang* case.[541] This basic premise assumes that the Prosecution was able to conduct its case freely, both with

[538] *Ruto and Sang* NCTA Decision (Reasons of Judge Eboe–Osuji), para. 139.
[539] *Compare* the text of Rule 149 namely, "Parts 5 and 6 and rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber" *with* the text of Rule 107, namely "the rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber."
[540] Document in Support of Appeal, para. 266 (requesting the Appeals Chamber to reverse the decision and averring that requesting a new trial would be a possible remedy).
[541] *Ruto and Sang* NCTA Decision (Reasons of Judge Eboe–Osuji), para. 139.

respect to its investigation and presentation.[542] Thus, the Prosecution case is to be free from any interference and intimidation, which was certainly the case here. The judge reasoned that if such assumptions are valid, and the Prosecution case remains weak, then "the case must be terminated with a judgment of acquittal".[543]

243. Here, in the case of Mr Blé Goudé this basic forensic premise was respected. The Trial Chamber even noted the importance of this basic premise when it found that the legal effect of granting a NCTA motion is that the accused is acquitted unless the Prosecution has been unable to present its case.[544] Indeed, the Prosecution does not allege any external interference with its investigation and presentation of the case in its Document in Support of Appeal. Unlike in *Ruto and Sang* where the government of the situation country was particularly hostile to the prosecution of the two accused, here, the government was particularly cooperative. The situation in Côte d'Ivoire opened as a result of a state referral made by a government which was headed by Mr Blé Goudé's political opponents.[545] Unsurprisingly, much of the evidence in this case, as Judge Henderson noted, was provided by the current Ouattara led government.[546] Never did the Prosecution allege during the presentation of its case that it was unable to fully present its case because of witness interference or intimidation. Rather, it was the Defence who submitted that it was subject to intimidation and interference during its investigations.[547] Given that the basic forensic premise of a NCTA procedure was respected, there are no urgent circumstances justifying the remedy of declaring a mistrial. The Prosecution's submissions on these circumstances consist of its arguments of error, material impact and unfairness addressed under the two grounds of appeal.[548] Therefore, the Appeals Chamber, as stipulated by the Prosecution,[549] is

[542] *Ibid.*
[543] *Ibid.*
[544] Judge Henderson's Reasons, para. 17.
[545] *Situation in the Republic of Côte d'Ivoire*, Decision Assigning the Situation in the Republic of Côte d'Ivoire to Pre-Trial Chamber II, 20 May 2011, ICC-02/11-1.
[546] Judge Henderson's Reasons, para. 36.
[547] *See Prosecutor v. Laurent Gbagbo and Charles Blé Goudé,* Public redacted version of "Defence Notification on Security Incidents, 11 September 2015, ICC-02/11-01/15-216-Conf, 15 September 2015, ICC-02/11-01/15-216-Red; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé,* Demande à la Chambre de mesures de protection de façon à permettre le travail d'enquête des équipes de Défense, 16 September 2015, ICC-02/11-01/15-223.
[548] Document in Support of Appeal, para. 264 (arguing that the Majority acquitted Mr Blé Goudé without having an entered a proper and fully informed decision, and without directing itself to a standard); Document in Support of Appeal, para. 265 (the Majority's approach prejudiced the proceedings).
[549] Document in Support of Appeal, para. 130 (arguing that the Appeals Chamber is vested with the power to reverse the decision on the basis of an error of fact).

able to determine whether the Prosecution led sufficient evidence to sustain a conviction. In such circumstances, a declaration of mistrial at the appellate stage is neither necessary nor appropriate.

244. The unusual circumstance in this case is that the Prosecution is not in a position to affirmatively state whether it wishes to retry Mr Blé Goudé if the acquittal is reversed on appeal.[550] The Prosecution's request implies that it is either unable or unwilling to prosecute Mr Blé Goudé at this time, despite having been able to conduct its investigations unhindered against Mr Blé Goudé for the past 9 years.[551] As recently as 6 February 2020, the Prosecution asked a different remedy than the one originally requested in its Document in Support of Appeal.[552] In the Document in Support of Appeal, the Prosecution unequivocally and very clearly submitted that instead of "asking the Appeals Chamber to order a new trial (which would be a possible remedy) the Prosecution requests the Appeals Chamber to declare a mistrial. This will leave the case in the hands of the Prosecutor to decide on its future course, and how justice may be best served in this case".[553] The Prosecution limited its remedy to a mistrial not so it could retry Mr Blé Goudé at a later stage, but so that it could determine "the future course" of the case and "how justice may best be served".

245. On 6 February 2020, in a sudden turn of events,[554] the Prosecution for the first time affirmatively stated that it wished to retry Mr Blé Goudé in front of a different trial chamber.[555] The Prosecution argued that the reason for this drastic change of requested remedy was that it was not in a position in February 2019 to state whether it wished to retry Mr Blé Goudé because the 16 July 2019 Reasons had yet to be rendered.[556] This argument does not pass muster, since the Prosecution submitted its Document in Support of Appeal three months after the 16 July 2019 Reasons were rendered. The deadline the Appeals Chamber gave took into account the Prosecution's

[550] Document in Support of Appeal, paras 266; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript of 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG-CT, pages 51-52.
[551] Judge Tarfusser's Opinion, para. 116.
[552] *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript of 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG-CT, pages 37, 44, 46.
[553] Document in Support of Appeal, para. 266.
[554] *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript of 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG-CT, pages46-53
[555] *Ibid*, page 44, lines 10-11.
[556] *Ibid*, page 47.

request for an extension of time,[557] and thus the Prosecution should have been able to affirmatively state in its Document in Support of Appeal that it wished to retry Mr Blé Goudé.

246. Moreover, during the hearing, the Prosecution also should have been able to inform the Chamber and the parties when it would be in position to know whether it could retry Mr Blé Goudé. While the Prosecution initially responded that it wished to retry Mr Blé Goudé, it then again reversed course during the hearing. The Prosecution submitted that it would only be in a position to determine whether it would retry Mr Blé Goudé once the Appeals Chamber has delivered its judgment on the Prosecution's appeal.[558] In a case where the Prosecution's case was never interfered with, such a position is confounding. Either the Prosecution after nine years has in its possession evidence to convict Mr Blé Goudé or it does not.

247. The only conclusion to draw in such circumstances is that the Prosecution is requesting this remedy to avoid an acquittal. The Prosecution is simply not in possession of evidence to convict Mr Blé Goudé. Article 20 of the Statute precludes the Prosecution from obtaining the requested relief. In the United States, the Supreme Court has determined that the double jeopardy clause protects defendants from prosecutors who try to use mistrials as an opportunistic tool to avoid an acquittal.[559] This holding also applies here with respect to a mistrial.

248. In the instant case, the Prosecution's arguments of a "manifest necessity" to declare a mistrial are contradicted by its stipulation that it could have requested a retrial in the instant case.[560] Thus, contrary to its submissions, the present request for a mistrial results from its own attempt to provoke such a declaration, and not from the circumstances in which the acquittal was rendered. Granting such a request would render null and void the *ne bis in idem* principle enshrined under article 20 of the Statute. If granted, Mr Blé Goudé would be precluded from asserting that he had

[557] Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Prosecution's urgent request for extension of time limits under rule 150(1) and regulation 58(1), 16 July 2019, ICC-02/11-01/15-1264.
[558] *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript of 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG-CT, pages 51-52.
[559] Arizona v. Washington, 434. U.S.497, 508 (1978).
[560] Document in Support of Appeal para. 266 (requesting a mistrial while stipulating that a retrial ordered by the Appeals Chamber would be a possible remedy).

already been tried and acquitted of the crimes under article 20 if in a future point in time the Prosecution esteems that it has "perfected" its evidence or if another jurisdiction determines to prosecute Mr Blé Goudé on the same material facts, as has recently been the case in Côte d'Ivoire.[561] Such a result runs counter to the purpose of such remedies, which are not to be used as tools for the state to harass the acquitted person, but used when no determination can be made on the merits of the case. Therefore, the Chamber should deny the Prosecution's requested relief on this basis.

249. Another basis for rejecting the Prosecution's request for a mistrial is that such a remedy would violate Mr Blé Goudé's fundamental right to a fair trial. As noted by Judge Eboe-Osuji, the relief requested by the Prosecution is one that simply conveniences the Prosecution.[562] The procedural posture of this case is that Mr Blé Goudé was acquitted of all charges at the half-way stage of the proceedings, which means the case came to an end before the Defence presented its case. Under article 67 (1)(e) of the Statute, Mr Blé Goudé has the fundamental right to: (1) present evidence from witnesses in the same conditions as the witnesses who were presented against him, (2) to present any admissible evidence, and (3) raise defences. International and regional human rights instruments also recognize this basic right for an accused to present evidence and raise defences.[563]

250. If a mistrial were declared and the Prosecution would have the opportunity to start its case over, it would translate to Mr Blé Goudé being stripped of his right under article 67(1)(e) to present a defence case at the close of the Prosecution case. Mr Blé Goudé spent five years in detention, including more than one year in detention at the hands of Ivorian authorities where he was held in incommunicado detention and tortured.[564] He also underwent a gruelling trial where the Prosecution was able to present with no obstruction the testimony of 96 witnesses and submit 4,610 items of documentary evidence. If the Prosecution's relief is granted, Blé Goudé would be put in a worse position than he was in before submitting the NCTA motion. First, as previously stated, Mr Blé Goudé would not have benefited from his right to present a defence

[561] *See* [REDACTED]; [REDACTED].
[562] *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript of 6 February 2020, ICC-02/11-01/15-T-237-CONF-ENG-CT, page 48, lines 14-24.
[563] ICCPR Article 14(3); European Convention on Human Rights, Article 6(3)(d); American Convention on Human Rights, Article 8(2)(f); *see* African (Banjul) Charter on Human and People's Rights, Article 7(1)(c).
[564] [REDACTED]

case. Second, he also would have to face, at an indeterminate time, a future trial, in which the Prosecution would present for a second time its witnesses and documentary evidence, which would carry with it the prospect of Mr Blé Goudé being detained again and facing another lengthy trial that could span several years.

251. Moreover, the Prosecution has given no visibility as to when it would try Mr Blé Goudé. Whereas the Prosecution had the benefit of already getting its witnesses on record between 2016-2018, the Defence would not be able to preserve potential defence evidence. First, it is unclear whether Mr Blé Goudé would benefit from the Court's legal aid policy once the judgment on appeal is rendered so he would not have the means to preserve such evidence. Second, evidence is corrupted with time. Even if Mr Blé Goudé were to obtain exculpatory evidence from witnesses, these witnesses would not testify for the next several years to come. It has already been nine years since the alleged events took place, if another trial were to be held another five to ten years may pass, and memories will fade. Thus, Mr Blé Goudé would not benefit from the same conditions as the Prosecutor in presenting his evidence through no fault of his own. Such a result would violate his fundamental right under article 67(1)(e).

252. For all the above reasons, the Defence respectfully requests the Appeals Chamber to dismiss the Prosecution's appeal *in limine*, or in the alternative, reject the Prosecution's appeal and confirm the decision to acquit Mr Blé Goudé.

Respectfully submitted,

Mr Knoops, Lead Counsel and Mr N'Dry, Co-Counsel

Dated this

9 March 2020,

At The Hague, the Netherlands