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**International
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THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

Public

Public Redacted Version of "Victims' Observations on the issues on appeal affecting their personal interests", ICC-02/11-01/15-1326-Conf, 8 April 2020

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I. INTRODUCTION

1. The Common Legal Representative of the Victims admitted to participate in the proceedings (the “Legal Representative”)¹ submits that the Prosecution’s appeal (the “Appeal Brief”)² against the oral decision of the Majority of Trial Chamber I (the “Majority” and the “Chamber”) issued on 15 January 2019, and against the written “[r]easons for oral decision of 15 January 2019 on the *Requête de la Défense de Laurent Gbagbo afin qu’un jugement d’acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée*, and on the Blé Goudé Defence no case to answer motion” issued on 16 July 2019, should be granted.

2. The Legal Representative - while fully supporting and endorsing all Prosecution’s arguments showing that the Majority committed several errors of law and/or procedure - deems it necessary in the interests of the Victims she represents to elaborate on specific aspects of said errors and to provide observations on the arguments raised in the Defence Responses to the Appeal Brief.³

3. The Victims’ right to truth, justice and reparations is affected by the errors identified in the Appeal Brief. In particular, the errors of law and/or procedure regarding the violation of the requirements of article 74(5) of the Statute and the failure to articulate and apply a clear standard of proof deprive the Victims of a cogent inquiry into the crimes they suffered from and a remedy therefor.

¹ See the “Directions on the conduct of the proceedings” (Trial Chamber I), No. [ICC-02/11-01/15-205](#), 3 September 2015, p. 24.

² See the “Public redacted version of ‘Prosecution Document in Support of Appeal’, ICC-02/11-01/15-1277-Conf, 15 October 2019”, [No. ICC-02/11-01/15-1277-Red](#), 17 October 2019, (the “Appeal Brief”).

³ See the “Version publique expurgée de la « Réponse de la Défense de Laurent Gbagbo au « Mémoire d’appel de l’Accusation » (ICC-02/11-01/15-1277-Conf-tFRA) déposé le 15 octobre 2019 », [No. ICC-02/11-01/15-1314-Red](#), 13 March 2020 (the “Gbagbo Response”) and the “Public Redacted Version of ‘Defence Response to the ‘Prosecution Document in Support of Appeal’ ICC-02/11-01/15-1315-Conf, 6 March 2020”, [No. ICC-02/11-01/15-1315-Red](#), 9 March 2020, (the “Blé Goudé Response”) – (together the “Defence Responses”).

4. In this regard, the Legal Representative submits that - as illustrated *infra* - the Chamber discarded without valid grounds the account of the five charged incidents and thereby failed to shed light on the crimes suffered by the Victims. Moreover, by bringing the trial to an end after the closure of the presentation of evidence by the Prosecution, the Chamber rendered not actionable their right to reparations under the Statute.

5. The errors of law and procedure identified in the Appeal Brief are the result of extremely defective proceedings and are just the most illustrative of the Chamber's overall failure to conduct a fair trial, including *vis-à-vis* the Victims. In this sense, the Chamber also erred under article 83(2) of the Statute by failing in its duty to conduct a fair and expeditious trial and to an extent that it affects the reliability of the decision to acquit Mr Gbagbo and Mr Blé Goudé.

6. The errors identified in the Appeal Brief - together with the ones discussed *infra* - "*first, fall within the scope of article 64(2) of the Statute, governing the Trial Chamber's powers for the proper conduct of the proceedings and, secondly, affect its core judicial duty to establish the truth*".⁴ In this regard, the majority of the Appeals Chamber in the *Ngudjolo* case concluded that "[t]he principle that parties must be afforded an adequate opportunity to present their case has been adopted by Pre-Trial Chambers I and II and the *ad hoc* Tribunals".⁵ In reaching this conclusion, the majority noted the provisions of article 69(3) of the Statute, which entitle all parties and participants in the proceedings to submit evidence relevant to the case and

⁴ See the "Judgment on the Prosecutor's Appeal against the Decision of Trial Chamber II entitled 'Judgment Pursuant to Article 74 of the Statute' - Joint Dissenting Opinion of Judge Ekaterina Trendafilova and Judge Cuno Tarfusser", No. [ICC-01/04-02/12-271-AnxA A](#), 27 February 2015, para. 5.

⁵ See the "Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute'" (Appeals Chamber), No. [ICC-01/04-02/12-271-Corr A](#), 7 April 2015, para. 256, citing ICTY, *Haradinaj et al.*, Case No. IT-04-84-A, [Judgement](#) (Appeals Chamber), 19 July 2010, para. 49.

empowers the Chamber to request the submission of evidence necessary for the determination of the truth.⁶

7. In turn, Judge Tarfusser and Judge Trendafilova explicitly found in the same case that the right to a fair trial pursuant to article 64(2) of the Statute is enjoyed by all parties to the proceedings, including the Prosecutor.⁷ Judge Eboe-Osuji extended this right to the victims in the *Ruto* case, when he found that “[a] *trial must be fair to all the parties and participants in the case - the Defence and the Prosecution alike. And the victims, too*”.⁸ In this sense, the right to a fair trial corresponds with the Chamber’s ultimate duty of ensuring fairness and expeditiousness, a duty that cannot be delegated by or removed from it.⁹ The Chamber’s duty subsists regardless of the conduct of the parties and participants,¹⁰ who also must play a role in ensuring that these values are respected.¹¹

8. In over four years of trial, critical flaws affected the proceedings and led to their substantial unfairness. Despite the Defence’s submissions to the contrary and its attempts to conceal the procedural reality of this case,¹² several of those failings are

⁶ *Ibid.*

⁷ See the “Judgment on the Prosecutor’s Appeal against the Decision of Trial Chamber II entitled ‘Judgment Pursuant to Article 74 of the Statute’ - Joint Dissenting Opinion of Judge Ekaterina Trendafilova and Judge Cuno Tarfusser”, No. [ICC-01/04-02/12-271-AnxA A](#), 27 February 2015, paras. 6, 12.

⁸ See the “Public redacted version of Decision on Defence Applications for Judgments of Acquittal” (Trial Chamber V(a)), No. [ICC-01/09-01/11-2027-Red-Corr](#), 16 June 2016, Reasons of Judge Eboe-Osuji, para. 190.

⁹ See the “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled ‘Decision on the Prosecution’s Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU’” (Appeals Chamber), No. [ICC-01/04-01/06-2582 OA18](#), 8 October 2010, para. 47.

¹⁰ See the “Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled ‘Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings’” (Appeals Chamber), No. [ICC-01/04-01/07-2259 OA10](#), 12 July 2010, para. 53.

¹¹ See the “Decision on the Request for Disqualification of the Prosecutor” (Appeals Chamber), No. [ICC-01/11-01/11-175 OA3](#), 12 June 2012, para. 28.

¹² See the Blé Goudé Response, *supra* note 3, e.g., paras. 74-85; and the Gbagbo Response, *supra* note 3, e.g. paras. 201-211.

acknowledged by the Majority in Judge Tarfusser's Opinion and Judge Henderson's Reasons, and by Judge Herrera Carbuccion in her Dissenting Opinions of 15 January and 16 July 2019.

9. Judge Tarfusser explicitly refers to major conflicting approaches of such a gravity to have *"repeatedly fractured the Chamber"* on *"many crucial issues"*, and encompassing critical topics such as (i) the approach of the bench to evidence; (ii) the treatment of previous statements under rule 68 of the Rules of Procedure and Evidence (the "Rules"); (iii) *"whether the Accused would have been entitled to make an unsworn statement"*; (iv) *"whether requests for leave to appeal would or would not meet the requirements of article 82 of the Statute"*; and (v) *"to what extent and in what form the Chamber should address the Prosecution's concerns as regards public utterances by members of the Defence team"*.¹³ Judge Tarfusser identifies further procedural faults when referring to (vi) an excessively long and unfocused *"preparatory phase"* - which allegedly failed to streamline the trial and the impossibility to remedy it through the issuance of new directions on the conduct of proceedings;¹⁴ (vii) concerns with the procedure adopted to question expert witnesses;¹⁵ and (ix) the unavailability of a *"no case to answer"* ("NCTA") procedure in the Court's legal texts.¹⁶

10. In turn, Judge Henderson points, among others, to the lack of an admissibility determination of the evidence presented at trial, and the incompatibility thereof with a classic NCTA procedure.¹⁷ In so doing, Judge Henderson underlines an overall Chamber's malpractice on the methods of questioning, including allowing (i) *"highly leading questions and inviting opinions"*;¹⁸ (ii) confusion between refreshing the memory

¹³ See the "Opinion of Judge Cuno Tarfusser", [No. ICC-02/11-01/15-1263-AnxA](#), 16 July 2019 ("Judge Tarfusser's Opinion"), para. 6.

¹⁴ *Idem*, paras. 19-21.

¹⁵ *Idem*, paras. 26-37.

¹⁶ *Idem*, paras. 65-67.

¹⁷ See the "Reasons of Judge Geoffrey Henderson", [No. ICC-02/11-01/15-1263-AnxB-Red](#), 16 July 2019 ("Judge Henderson's Reasons"), para. 4.

¹⁸ *Idem*, para. 6.

of a witness and confrontation with a previous statement; and (iii) the admission of prior recorded statements under rule 68(2) of the Rules “*without making any appropriate effort to assess the reliability of the content of such statements*”.¹⁹ In relation to the latter point, Judge Henderson even states that the Chamber was “*denied*” the opportunity to observe the demeanour of witnesses concerned.²⁰ It is obvious that the Chamber was not “*denied*” said opportunity, but deliberately decided to proceed in that manner.

11. Similarly, in the interlocutory remarks, Judge Henderson indicates that the Prosecution would have failed in its “*overly ambitious*” attempt “*to bring within the scope of this single litigation several years of Ivorian history*” and that “*essential information*” in this regard would be still missing.²¹ However, Judge Henderson seems to ignore that the Chamber gave specific instructions to the Prosecution about the presentation of the temporal and factual scope of its case. In the course of the proceedings, the parties and participants were directed to focus the questioning exclusively on the strict temporal scope of the charges, were forbidden to ask questions on events preceding the year 2010 and interrupted when trying to elicit from the witnesses historical and contextual elements of the post-electoral crisis.²²

12. In addition, Judge Herrera Carbuccion explains at length the flaws (i) in conducting the “*no case to answer*” procedure; (ii) in issuing an oral and unreasoned judgment of acquittal; and (iii) how said flaws affect the overall fairness of the trial.²³

13. Moreover, the manifest lack of predictability and legal certainty in the course of the proceedings critically affected the Victims’ interests and the Chamber’s duty to

¹⁹ *Idem*, para. 7.

²⁰ *Idem*, para. 40.

²¹ *Idem*, para. 5.

²² See *e.g.*, T-56-Red2, pp.11-12; T-43-Red2, p. 65; T-158-Red2, p. 69; T-33, p. 21; T-31-Red2, p. 15; T-92-Red2, p. 42; T-104-Red2, p.1.

²³ See the “Dissenting Opinion to the Chamber’s Oral Decision of 15 January 2019” (Judge Herrera Carbuccion), [No. ICC-02/11-01/15-1234](#), 15 January 2019 (the “15 January 2019 Dissenting Opinion”), paras. 26, 32, 36, 43 and 46-47.

conduct a fair trial. More concretely, the Chamber: (i) issued no decisions on the qualification of expert witnesses, despite several attempts by the parties and participants to start a *voir dire* procedure;²⁴ and (ii) did not take clear decisions on the objections raised during the hearings by the Prosecution, the Defence and/or the Legal Representative.²⁵ More importantly, and as discussed *infra*, the Chamber (iii) failed to identify and indicate the applicable standard for the evaluation of evidence in a NCTA procedure, upon request by the Prosecution prior to the submissions by the parties and participants and in the 15 January 2019 Oral Decision;²⁶ (iv) failed to conduct an expeditious trial taking an exceptionally long time - almost two years - to decide on the NCTA motions;²⁷ (v) vacated the charges orally without providing reasons, only issuing those six full months thereafter,²⁸ and (vi) failed to agree on the very nature of and legal basis for issuing the impugned decision.²⁹

14. Finally yet importantly, the Legal Representative submits that the Chamber ended the proceedings and thereby affected the Victims' personal interests based on patent errors of fact that are a clear expression of the errors of law and procedure listed *supra* and likewise identified in the Appeal Brief.

15. Therefore, the Legal Representative concurs with the Prosecution that in the circumstances of the case to enter a declaration of "*mistrial*" is an effective remedy and the most appropriate one. The miscarriage of the trial process by the Trial Chamber cannot be addressed otherwise. In addition, a positive finding in this

²⁴ See T-217-Red, p.6: the Chamber did not rule formally on the expertise of P-0410. See also, T-189, pp. 4-5: the Chamber did not rule formally on the expert status of P-0585; T-185-Red2, pp. 6-7 : the Chamber had to rule on the expert status of P-0583 following the Gbagbo Defence "*Requête aux fins que le témoin P-0583 ne soit pas considéré comme témoin expert*", No. [ICC-02/11-01/15-1016](#), 31 August 2017; T-220-Red, pp. 86-87: the Chamber did not rule formally on the status of P-0564 as expert.

²⁵ See T-113-Red2, p. 38; T-112-Red2, pp. 22-23; T-46-Red2, [REDACTED] and p. 73; T-49-Red2, pp. 2-3.

²⁶ See *infra* paras. 110-122.

²⁷ See *infra* paras. 65, 108, 116, 117.

²⁸ See *infra* paras. 42-109.

²⁹ See *infra* paras. 123-174.

sense must entail that proceedings will restart against both Defendants. Indeed, for the Victims this is the only possible way of continuing their quest for Justice.

II. BACKGROUND

16. On 15 January 2019, the Majority of the Chamber issued a decision on the Defence motions for acquittal (the “15 January 2019 Oral Decision”),³⁰ Judge Herrera Carbuccion dissenting (the “15 January 2019 Dissenting Opinion”),³¹ whereby it orally (i) granted the Defence motions for acquittal from all charges against the Defendants, ordering their immediate release pursuant to article 81(3)(c) of the Statute; and (ii) indicated that the reasons for said acquittals would be provided as soon as possible .

17. On 16 January 2019, the Majority issued a decision on the Prosecution’s request to maintain Mr Gbagbo and Mr Blé Goudé in detention pending the appeal against the 15 January 2109 Oral Decision (the “16 January 2019 Release Decision”), Judge Herrera Carbuccion dissenting, rejecting the request and confirming the order for the release of the Defendants without conditions.³²

18. On 1 February 2019, upon an appeal by the Prosecution against the 16 January 2019 Release Decision, the Appeals Chamber found that there were compelling reasons to impose conditions on the release of Mr Gbagbo and Mr Blé Goudé.³³

³⁰ See [T-232](#), pp. 1–5 (the “15 January 2019 Oral Decision”).

³¹ See the 15 January 2019 Dissenting Opinion, *supra* note 23.

³² See [T-234](#), pp. 1-6 (the “16 January 2019 Release Decision”).

³³ See the “Judgment on the Prosecutor’s appeal against the oral decision of Trial Chamber I pursuant to article 81(3)(c)(i) of the Statute” (Appeals Chamber), [No. ICC-02/11-01/15-1251-Red2](#), 1 February 2019, paras. 59-60.

19. On 16 July 2019, the Chamber issued the written reasons for the 15 January 2019 Oral Decision (the “Written Reasons”),³⁴ with Annexes A and B containing respectively the concurring separate opinion of Judge Tarfusser (“Judge Tarfusser’s Opinion”)³⁵ and the Majority’s analysis of the evidence (“Judge Henderson’s Reasons”),³⁶ and Annex C containing Judge Herrera Carbuccia’s dissent (the “16 July 2019 Dissenting Opinion”).³⁷ The Written Reasons, Judge Tarfusser’s Opinion, Judge Henderson’s Reasons, and the 16 July 2019 Dissenting Opinion are referred to collectively in these observations as the “16 July 2019 Reasons”.

20. On 19 July 2019, the Appeals Chamber partially granted the Prosecution’s request for an extension of time to file its notice of appeal by 16 September 2019 and the appeal brief by 15 October 2019.³⁸

21. On 16 September 2019, the Prosecution filed its Notice of Appeal.³⁹ A corrigendum was filed on the next day.⁴⁰ On 15 October 2019, the Prosecution filed the Appeal Brief.⁴¹

22. On 26 November 2019, the Appeals Chambers issued its Decision on victim participation in the appeal.⁴²

³⁴ See the “Reasons for oral decision of 15 January 2019 on the *Requête de la Défense de Laurent Gbagbo afin qu’un jugement d’acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée*, and on the Blé Goudé Defence no case to answer motion” (Trial Chamber I), [No. ICC-02/11-01/15-1263](#), 16 July 2019 (the “Written Reasons”).

³⁵ See Judge Tarfusser’s Opinion, *supra* note 13.

³⁶ See Judge Henderson’s Reasons, *supra* note 17.

³⁷ See the “Dissenting Opinion Judge Herrera Carbuccia” (Judge Herrera Carbuccia), [No. ICC-02/11-01/15-1263-AnxC-Red](#), 16 July 2019 (the “16 July 2019 Dissenting Opinion”).

³⁸ See the “Decision on the Prosecutor’s request for time extension for the notice of appeal and the appeal brief” (Appeals Chamber), No. [ICC-02/11-01/15-1268 A](#), 19 July 2019.

³⁹ See the “Prosecution Notice of Appeal”, No. [ICC-02/11-01/15-1270](#), 16 September 2019.

⁴⁰ See the “Corrected version of ‘Prosecution Notice of Appeal’, 16 September 2019, ICC-02/11-01/15-1270”, No. [ICC-02/11-01/15-1270-Corr](#), 17 September 2019.

⁴¹ See the Appeal Brief, *supra* note 2.

⁴² See the “Decision on victim participation” (Appeals Chamber), No. [ICC-02/11-01/15-1290 A](#), 26 November 2019.

23. On 6 March 2020, the Defence filed their responses to the Appeal Brief.⁴³

III. CONFIDENTIALITY

24. Pursuant to regulation 23bis(2) of the Regulations of the Court, the present submission is filed confidential following the classification chosen by the Prosecution and because it refers to documents bearing the same classification. A public redacted version will be filed in due course.

IV. SUBMISSIONS

1. On the applicable standards of review on appeal

25. The Legal Representative agrees with the Prosecution that the correct legal basis for an appeal against the 15 January 2019 Oral Decision and the 16 July 2019 Reasons is article 81 of the Statute because an acquittal decision can only be entered under article 74 of the Statute.⁴⁴ The accuracy of this statement is unaffected by Judge Tarfusser's inconsistent views⁴⁵ and Judge Henderson's disagreement⁴⁶ as to article 74 of the Statute being the legal basis of the 15 January 2019 Oral Decision and the 16 July 2019 Reasons, respectively.

26. Similarly, it is not affected by the arguments raised in the Defence Responses on the alleged consensus within the Majority as to the legal basis of the impugned

⁴³ See the Defence Responses, *supra* note 3.

⁴⁴ See the Appeal Brief, *supra* note 2, paras. 34-35.

⁴⁵ Cf. the 16 January 2019 Release Decision, *supra* note 32, p. 4, lines 18-21 ("*[a] duty to consider the relevance, probative value and the potential prejudice of each item of evidence for the purpose of this decision [...] only arises in the context of admissibility rulings when giving the Chamber's decision pursuant to article 74*"); the Written Reasons, *supra* note 34, p. 3 ("*[h]aving regard to Articles 64, 66, 67, 69 and 74 [...] hereby issues the reasons for the Majority's oral decision and Judge Herrera Carbuccion's dissenting opinion dated 15 January 2019*"); and Judge Tarfusser's Opinion, *supra* note 13, para. 65 ("*Trial proceedings can only end either in acquittal or conviction, as emerging from article 74, read together with article 81*").

⁴⁶ See Judge Henderson's Reasons, *supra* note 17, paras. 13, 15 ("*[a]rticle 74 does not appear to provide the appropriate basis to render such decisions on motions for 'no case to answer' [...] The legal basis for the decision that the accused has no case to answer is thus article 66(2) of the Statute*").

decision, and on the nature of a ruling to acquit following a NCTA procedure. The attempts of the Defence for Mr Blé Goudé to first deny and then downplay the critical disagreement of the Majority are misleading and misrepresent the conclusions of the two Judges on the applicable legal basis, and as such they must be disregarded. Contrary to the Defence's submissions,⁴⁷ the Chamber did not "*clearly identify*" the legal basis as being article 66(2) of the Statute. The findings the Defence refers to belong exclusively to Judge Henderson,⁴⁸ only one of the two Judges constituting the so-called Majority. Judge Tarfusser took a completely different view, stating that the "[t]rial proceedings can only end either in acquittal or conviction, as emerging from article 74, read together with article 81".⁴⁹

27. Moreover, the Defence tries to minimise the impact of such a disagreement on the overall fairness of the proceedings. It seems to ignore that a decision to acquit grounded on two different legal bases is in breach of the principle of legality and raises at a minimum uncertainty as to the parties' and participants' legal situation.⁵⁰ It is thus inappropriate to dissimulate and characterise it as a mere "*expression of nuanced and robust judicial dialogue, which serves to contribute to the enrichment of the law*",⁵¹ especially so when at stake there is a decision on the faith of a trial involving the interests of hundreds of Victims. Similarly, advocating for the rejection *in limine* of the Appeal Brief on this basis⁵² is utterly unreasonable, as the lack of clarity and consensus within the Chamber on the applicable legal basis cannot go to the prejudice of the appellant raising the issue.

⁴⁷ See the Blé Goudé Response, *supra* note 3, paras. 18-21; and the Gbagbo Response, *supra* note 3, paras. 35-40.

⁴⁸ See the Blé Goudé Response, *supra* note 3, para. 18.

⁴⁹ See Judge Tarfusser's Opinion, *supra* note 13, para. 65.

⁵⁰ See ECtHR, *Petkov v. Bulgaria*, Appl. No. 2834/06, [Judgment](#) (Chamber), 19 February 2013, paras. 32-33. See also, ECtHR, *Légrand v. France*, Appl. No. 23228/08, [Judgment](#) (Chamber), 26 May 2011, para. 37; ECtHR, *Hoare v. United Kingdom*, Appl. No. 16261/08, [Decision](#) (Chamber), 12 April 2011, paras. 52, 54-56; ECtHR, *C.R. v. United Kingdom*, Appl. No. 20190/92, [Judgment](#) (Chamber), 22 November 1995, paras. 34, 41.

⁵¹ See the Blé Goudé Response, *supra* note 3, para. 20.

⁵² *Idem*, para. 21.

28. In addition, the Defence's arguments as to the impugned decision not triggering an automatic right to appeal⁵³ are unfounded and must also be rejected. First, the Defence's suggestion that a decision on whether to acquit following a NCTA procedure occurs at a "halfway stage" and is therefore interlocutory in nature⁵⁴ is inapposite as – depending on the outcome – such a decision has indeed the ability of ending the proceedings. Thus, the question whether a decision triggers a direct or indirect right to appeal **does** depend on the outcome of a NCTA motion.⁵⁵

29. This finding is also supported by the constant jurisprudence of the *ad hoc* Tribunals on NCTA procedure. As noted by the Trial Chamber in the *Blagojević* case, the "effect of granting, in whole or in part, a motion pursuant to Rule 98bis of the Rules is that a judgement of 'acquittal' is entered."⁵⁶ Indeed, granting a NCTA motion - and thereby entering a judgement of acquittal at "halfway stage" - has the same practical effect as entering a judgement of acquittal at the end of the trial from which there is an automatic right of appeal under article 81 of the Statute. In this sense, such a judgement cannot be considered as a decision requiring certification before an interlocutory appeal can proceed pursuant to article 82(1)(d).⁵⁷ Accordingly, it is under article 81 that an appeal against a judgement, including a judgement rendered pursuant to a NCTA procedure, must be brought. This is to be contrasted with a decision to dismiss a NCTA motion, which does not involve the Chamber rendering a judgement on the guilt or innocence of an accused, and remains a decision requiring certification for appeal.⁵⁸

⁵³ *Idem*, paras. 22-26.

⁵⁴ *Idem*, para. 22.

⁵⁵ Cf. the Blé Goudé Response, *supra* note 3, para. 24.

⁵⁶ See ICTY, *Blagojević and Jokić*, Case No. IT-02-60-T, [Decision on Request for Certification of Interlocutory Appeal of the Trial Chamber's Judgement on Motions for Acquittal Pursuant to Rule 98 bis](#) (Trial Chamber), 23 April 2004, paras. 11–13 (the "*Blagojević* Decision").

⁵⁷ See the *Blagojević* Decision, para. 10. See also, ICTY, *Karadžić*, [Decision On Prosecution Request for Certification to Appeal Judgement of Acquittal Under Rule 98Bis](#) (Trial Chamber), Case No. IT-95-5/18-T, 13 July 2012, para. 10.

⁵⁸ *Ibid.* Cf. the Gbagbo Response, *supra* note 3, paras. 53-59.

30. In relation to this distinction as to the applicable remedy based on the outcome, the Defence's arguments on an alleged breach of fairness and equality of arms shall also be dismissed.⁵⁹ It is the final nature of an acquittal decision that determines its direct appellate review. While following a refusal for leave to appeal an interlocutory decision, a party can usually raise the relevant issues before the Appeals Chamber at a later stage, as part of the final appeal against the verdict,⁶⁰ there would be no such opportunity in the present proceedings. In addition, the NCTA procedure responds to the need of avoiding lengthy proceedings based on evidence not capable of supporting a conviction and is intrinsically for the benefit of the accused, in accordance thus with internationally recognised human rights and with article 21(3) of the Statute.⁶¹

31. In the *Karadžić* case, the Appeals Chamber validated the Trial Chamber conclusions and recalled that *"an appeal against an acquittal entered at the Rule 98bis stage of a case is an appeal against a judgement. Thus, in an appeal of a Rule 98bis judgement of acquittal, the proceedings are governed by Article 25 of the Statute and by the standards of appellate review for alleged errors of law and alleged errors of fact"*.⁶²

32. In light of the above, the standards of review in relation to the errors identified in the Appeal Brief must be those established in the jurisprudence of the Court in relation to article 81(1) of the Statute.⁶³ In this regard, the Appeals Chamber found that the principles and rules established in its jurisprudence regarding the standard of review in relation to appeals arising under article 82(1) of the Statute *"are, in*

⁵⁹ See the Blé Goudé Response, *supra* note 3, paras. 27-31; and the Gbagbo Response, *supra* note 3, para. 59.

⁶⁰ See the "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" (Appeals Chamber), No. [ICC-02/04-01/05-408-OA3](#), 16 September 2009, paras. 46-47. See also, the "Judgment on the Prosecutor's appeal against the decision of Trial Chamber II entitled 'Judgment pursuant to article 74 of the Statute'" (Appeals Chamber), No. [ICC-01/04-02/12-271-Corr](#), 7 April 2015, paras. 3, 247.

⁶¹ Cf. the Blé Goudé Response, *supra* note 3, para. 28.

⁶² See IRMCT, *Karadžić*, Case No. IT-95-5/18-AR98bis.I, [Judgement](#) (Appeals Chamber), 11 July 2013, para. 9.

⁶³ See the Appeal Brief, *supra* note 2, paras. 36-37, 39.

*essence, also applicable in relation to legal, factual and procedural errors raised in appeals pursuant to article 81(1) of the Statute”.*⁶⁴

a) Standard of review for errors of law

33. The Legal Representative recalls that, pursuant to the consolidated jurisprudence of the Court regarding errors of law, “[the Appeals Chamber] *will not defer to the Trial Chamber’s interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision [...] [and a decision is] ‘materially affected by an error of law’ if the Trial Chamber ‘would have rendered a decision that is substantially different from the decision that was affected by the error, if it had not made the error’*”.⁶⁵

34. Consequently, when contending an error of law, an appellant “[m]ust identify the alleged error, present arguments in support of its claim, and explain how the error

⁶⁴ See the “Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction” (Appeals Chamber), No. [ICC-01/04-01/06-3121-Red A5](#), 1 December 2014, para. 17.

⁶⁵ See the “Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58’” (Appeals Chamber), No. [ICC-01/04-169 OA](#), 13 July 2006, para. 84. See also, the “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’” (Appeals Chamber), No. [ICC-02/05-03/09-295 OA2](#), 17 February 2012, para. 20; the “Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction” (Appeals Chamber), No. [ICC-01/04-01/06-3121-Red A5](#), 1 December 2014, paras. 18-19; the “Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/04-02/12-271-Corr A](#), 7 April 2015, paras. 20, 285; the “Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Judgment pursuant to Article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#), 8 March 2018, paras. 90, 283, 285, 299; and the “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgment pursuant to Article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/05-01/08-3636-Red A](#), 8 June 2018, para. 36.

invalidates the decision. An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground. However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may still conclude, for other reasons, that there is an error of law".⁶⁶

b) Standard of review for errors of fact

35. Regarding alleged errors of fact, the Appeals Chamber has ruled in previous decisions that “[i]t will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts, or failed to take into account relevant facts. As to the ‘misappreciation of facts’, the Appeals Chamber has also stated that it ‘will not disturb a Pre-Trial or Trial Chamber’s evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it’”.⁶⁷

⁶⁶ See ICTY, *Milošević*, Case No. IT-98-29/I-A, [Judgement](#) (Appeals Chamber), 12 November 2009, para.13. See also, ICTR, *Gatete*, Case No. ICTR-00-61-A, [Judgement](#) (Appeals Chamber), 9 October 2012, para. 8; SCSL, *Sesay et al.*, Case No. SCSL-04-15-A, [Judgment](#) (Appeals Chamber), 26 October 2009, para. 31; and STL, *Ayyash et al.*, STL-11-01/PT/AC/AR90.1 [Decision on the Defence Appeals Against the Trial Chamber’s ‘Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal](#) (Appeals Chamber), 24 October 2012, para. 10.

⁶⁷ See the “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgment pursuant to Article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/05-01/08-3636-Red A](#), 8 June 2018, para. 39. See also, the “Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/04-02/12-271-Corr A](#), 7 April 2015, para. 117; the “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’” (Appeals Chamber), No. [ICC-01/09-01/11-307 OA](#), 30 August 2011, para. 56; the “Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’” (Appeals Chamber), No. [ICC-01/09-02/11-274 OA](#), 30 August 2011, para. 55; and the “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’” (Appeals Chamber), No. [ICC-01/04-01/10-283 OA](#), 14 July 2011, paras. 1, 17.

36. In the particular case of reviewing errors of fact related to allegedly corroborative evidence, the Appeals Chamber has found that “[w]hile corroboration is ‘an element that a reasonable trier of fact may consider in assessing the evidence’, the question of whether or not to consider it forms part of the Trial Chamber’s discretion”.⁶⁸ Nevertheless, “[p]ursuant to rule 63(4) of the Rules there is no legal requirement of corroboration irrespective of the type of evidence or the fact to be established on its basis. This is not to say that corroboration will never have a role to play when assessing a witness’s credibility and the reliability of his or her testimony. [...] [H]owever, this does not mean that corroboration is required as a matter of law when evaluating the testimony of any witness”.⁶⁹

37. More recently, the Appeals Chamber has ruled that it may also interfere with the factual findings of the first-instance chamber “[w]henver the failure to interfere may occasion a miscarriage of justice, and not ‘only in the case where [the Appeals Chamber] cannot discern how the Chamber’s conclusion could have reasonably been reached from the evidence before it’”.⁷⁰ In particular, the Appeals Chamber has stated that “[i]t will determine whether a reasonable trial chamber properly directing itself could have been satisfied beyond reasonable doubt as to the finding in question, based on the evidence that was before it [...] when assessing the reasonableness of a factual finding, the Appeals Chamber will have regard not only to the evidence relied upon, but also to the trial chamber’s reasoning in analysing it [...]. Nevertheless, the emphasis of the Appeals Chamber’s assessment is on

⁶⁸ See the “Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/04-02/12-271-Corr A](#), 7 April 2015, para. 148.

⁶⁹ See the “Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Judgment pursuant to Article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#), 8 March 2018, para. 1084.

⁷⁰ See the “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgment pursuant to Article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/05-01/08-3636-Red A](#), 8 June 2018, para. 40.

*the substance: whether the evidence was such as to allow a reasonable trial chamber to reach the finding it did beyond reasonable doubt”.*⁷¹

c) Standard of review for procedural errors

38. The Appeals Chamber has held that “[a]rticle 81(1)(a)(i) of the Statute expressly provides that the Prosecutor may appeal a procedural error in relation to a ‘decision under article 74 [of the Statute]’. Furthermore, article 83(2) of the Statute presupposes that a decision pursuant to article 74 of the Statute may be ‘materially affected by [...] [a] procedural error’. [...] Accordingly, it must be possible to raise procedural errors on appeal pursuant to article 81(1)(a)(i) of the Statute in relation to decisions rendered during trial, and such errors may lead to the reversal of a decision under article 74 of the Statute, provided that it is materially affected by such errors”.⁷² In particular, “[g]iven the Trial Chamber’s duty to contribute to the establishment of the truth, the Appeals Chamber considers that the Prosecutor may raise errors alleging that her ability to present her case has been violated as procedural errors under article 81(1)(a)(i) of the Statute”.⁷³

39. Since procedural errors may be raised in relation to rulings issued in the proceedings leading up to the impugned decision,⁷⁴ the review of the Appeals Chamber should extend over the relevant proceedings as a whole.⁷⁵ Moreover,

⁷¹ *Idem*, paras. 42, 44.

⁷² See the “Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/04-02/12-271-Corr A](#), 7 April 2015, paras. 3, 247.

⁷³ *Idem*, para. 257.

⁷⁴ See the “Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled ‘Decision on the Admissibility and Abuse of Process Challenges’” (Appeals Chamber), No. [ICC-01/05-01/08-962-Corr OA3](#), 26 October 2010, para. 101. See also the “Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/04-02/12-271-Corr A](#), 7 April 2015, para. 247.

⁷⁵ See ECCC, *Nuon Chea and Khieu Samphan*, Case No. F36, [Appeal Judgement](#) (Supreme Court Chamber), 23 November 2016, para. 100.

procedural errors may arise from the procedural fairness of the impugned decision,⁷⁶ and from the exercise of the discretionary powers of Chambers.⁷⁷

40. Furthermore, “[a]s with errors of law, the Appeals Chamber will only reverse a decision of acquittal if it is materially affected by the procedural error. In that respect, the appellant needs to demonstrate that, in the absence of the procedural error, the judgment would have substantially differed from the one rendered”.⁷⁸ This may happen, for instance, “[w]hen evidence which is clearly relevant to the findings is not addressed by the Trial Chamber’s reasoning”.⁷⁹ Consequently, when alleging a procedural error, an appellant has not only to identify the error, but also to indicate, with sufficient precision, how said error would have materially affected the impugned decision.⁸⁰

⁷⁶ See the “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” (Appeals Chamber), No. [ICC-02/04-01/15-181 OA3](#), para. 46. See also, SCSL, *Sesay et al.*, Case No. SCSL-04-15-A, [Judgment](#) (Appeals Chamber), 26 October 2009, para. 34; and SCSL, *Fofana et al.*, Case No. SCSL-04-14-A, [Judgment](#) (Appeals Chamber), 28 May 2008, para. 35.

⁷⁷ See SCSL, *Norman et al.*, Case No. SCSL-2004-14-T, [Decision on Interlocutory Appeals against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone](#) (Appeals Chamber), 11 September 2006, para. 5.

⁷⁸ See the “Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/04-02/12-271-Corr A](#), 7 April 2015, paras. 21 and 285. See also, the “Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction” (Appeals Chamber), No. [ICC-01/04-01/06-3121-Red A5](#), 1 December 2014, para. 20; the “Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings” (Appeals Chamber), No. [ICC-02/11-01/11-321 OA2](#), 12 December 2012, para. 44; and the “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” (Appeals Chamber), No. [ICC-02/04-01/05-408 OA3](#), 16 September 2009, paras. 46-48.

⁷⁹ See the “Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII” (Appeals Chamber), No. [ICC-01/05-01/13-2275 Red A A2 A3 A4 A5](#), 8 March 2018, paras. 105, 1540.

⁸⁰ See the “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” (Appeals Chamber), No. [ICC-02/04-01/05-408 OA3](#), 16 September 2009, para. 48. See also, the “Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled ‘Decision on the Admissibility and Abuse of Process Challenges’” (Appeals Chamber), No. [ICC-01/05-01/08-962-Corr OA3](#), 26 October 2010, para. 103.

41. It is important to underline that, when determining whether there has been a breach of article 74(5) of the Statute, the Appeals Chamber will assess “[w]hether there was reasoning in support of a given factual finding. If particular items of evidence that are, on their face, relevant to the factual finding are not addressed in the reasoning, the Appeals Chamber will have to determine whether they were of such importance that they should have been addressed”.⁸¹ By contrast, “[w]hether the Trial Chamber’s reasoning was convincing or whether a reasonable Trial Chamber could have reached the factual finding in question is not relevant to the determination of whether there was a breach of article 74(5) of the Statute”.⁸²

2. On the grounds of appeal

a) First ground of appeal: The Majority erred by acquitting Mr Gbagbo and Mr Blé Goudé in violation of the mandatory requirements of article 74(5) of the Statute, or alternatively erred in the exercise of its discretion in doing so

42. The Legal Representative concurs with the Prosecution that the Majority erred in law and/or procedure, failing to comply with the requirements of article 74(5) of the Statute when it orally acquitted Mr Gbagbo and Mr Blé Goudé through an unreasoned and not fully informed oral decision, followed six months later by the written reasons therefor.⁸³

⁸¹ See the “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgment pursuant to Article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/05-01/08-3636-Red A](#), 8 June 2018, para. 54. See also, the “Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański” (Appeals Chamber), No. [ICC-01/05-01/08-3636-Anx1-Red A](#), 8 June 2018, para. 274; and the “Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Judgment pursuant to Article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#), 8 March 2018, para. 106.

⁸² *Ibid.*

⁸³ See the Appeal Brief, *supra* note 2, paras. 6-8.

(i) Article 74(5) of the Statute contains several requirements

43. The Legal Representative agrees with the Prosecution that article 74(5) of the Statute literally establishes four specific requirements for a decision to convict or to acquit, namely (i) a decision “*in writing*”; (ii) with “*a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions*”; (iii) delivered “*in open court*”; and (iv) comprising “*one decision*” with “*the views of the majority and the minority*”.⁸⁴

44. Moreover, the Legal Representative submits, firstly, that the requirements in article 74(5) - as any other provision of the Statute - must be applied and interpreted in a manner “[c]onsistent with internationally recognised human rights” pursuant to article 21(3) of the Statute,⁸⁵ and the rights of the accused to a fair trial, as detailed in article 67 of the Statute.⁸⁶

45. In this regard, the Human Rights Committee, the European Court of Human Rights and the Inter-American Court of Human Rights have clarified that the provision of a timely written and reasoned judgment in public is necessary to (i) protect an individual from arbitrariness,⁸⁷ (ii) maintain public confidence in the

⁸⁴ *Idem*, para. 24.

⁸⁵ See the “Judgment on the appeal of Mr Bosco Ntaganda against the ‘Decision on Defence request for leave to file a ‘no case to answer’ motion’” (Appeals Chamber), No. [ICC-01/04-02/06-2026 OA6](#), 5 September 2017, para. 46.

⁸⁶ See the “Judgment on the Appeal of Mr Germain Katanga Against the Decision of Trial Chamber II of 21 November 2012 Entitled ‘Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons’” (Appeals Chamber), No. [ICC-01/04-01/07-3363 OA13](#), 27 March 2013, para. 86.

⁸⁷ See ECtHR, *Taxquet v. Belgium*, Appl. No. 926/05, [Judgment](#) (Grand Chamber), 16 November 2010, paras. 90-91. See also, I-ACtHR, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Series C No. 170, [Preliminary Objections, Merits, Reparations and Costs](#), 21 November 2007, para. 107; I-ACtHR, *Yatama v. Nicaragua*, Series C No. 127, [Preliminary Objections, Merits, Reparations and Costs](#), 23 June 2005, paras. 152-153; ECtHR, *Werner v. Austria*, Appl. No. 21835/93, [Judgment](#) (Chamber), 24 November 1997, para 54; ECtHR, *H. v Belgium*, Appl. No. 8950/80, [Judgment](#) (Plenary), 30 November 1987, para. 53; and ECtHR, *Pretto and Others v. Italy*, Appl. No. 7984/77, [Judgment](#) (Plenary), 8 December 1983, para. 27.

courts,⁸⁸ and (iii) ensure the right to an appeal,⁸⁹ in particular regarding the essential elements of the case heard by the court at hand.⁹⁰

46. These purposes determine the form of pronouncement to be given to the judgment, *i.e.* oral or written, which is also dependant on the special features of the proceedings at hand.⁹¹ In particular, the public pronouncement of the judgment is required to bring to the knowledge of the public why the suspicions against an individual have not been sufficiently supported.⁹²

47. Importantly, this obligation to render orally the reasons of a decision is only exceptionally limited by the nature of the proceedings or the sensitive issues

⁸⁸ See ECtHR, *Cerovšek and Božičnik v. Slovenia*, Appl. Nos. 68939/12 and 68949/12, Judgment (Chamber), 7 March 2017, para. 40. See also I-ACtHR, *J. v. Peru*, Series C No. 275, Preliminary Objections, Merits, Reparations and Costs, 27 November 2013, para. 217; ECtHR, *Fazliyski v. Bulgaria*, Appl. No. 40908/05, Judgment (Chamber), 16 April 2003, para. 64; ECtHR, *Szücs v. Austria*, Appl. No. 20602/92, Judgment (Chamber), 24 November 1997, para. 42; ECtHR, *Diennet v. France*, Appl. No. 18160/91, Judgment (Chamber), 26 September 1995, para. 33.

⁸⁹ See ECtHR, *Taxquet v. Belgium*, Appl. No. 926/05, Judgment (Grand Chamber), 16 November 2010, para. 91; I-ACtHR, *Apitz Barbera et al. v. Venezuela*, Series C No. 182, Preliminary Objections, Merits, Reparations and Costs, 5 August 2008, para. 78; ECtHR, *Hirvisaari v. Finland*, Appl. No. 49684/99, Judgment (Chamber), 27 September 2001, para. 30; ECtHR, *García Ruiz v. Spain*, Appl. No. 30544/96, Judgment (Grand Chamber), 21 January 1999, para. 26; HRC, *Hamilton v. Jamaica*, CCPR/C/50/D/333/1988, “Views”, Communication No. 333/1988, 25 March 1994; and ECtHR, *Hadjianastassiou v. Greece*, Appl. No. 12945/87, Judgment (Chamber), 16 December 1992, paras. 33-37.

⁹⁰ See ECtHR, *Carmel Saliba v. Malta*, Appl. No. 24221/13, Judgment (Chamber), 29 November 2016, para. 73; ECtHR, *Tatishvili v. Russia*, Appl. No. 1509/02, Judgment (Chamber), 22 February 2007, para. 58; ECtHR, *Kuznetsov and Others v. Russia*, Appl. No. 184/02, Judgment (Chamber), 11 January 2007, para. 83; and ECtHR, *Donadze v. Georgia*, Appl. No. 74644/01, Judgment (Chamber), 7 March 2006, para. 35.

⁹¹ See ECtHR, *Lamanna v. Austria*, Appl. No. 28923/95, Judgment (Chamber), 10 July 2001, paras. 31-32. See also, ECtHR, *B. and P. v. United Kingdom*, Appl. Nos. 36337/97 and 35974/97, Judgment (Chamber), 24 April 2001, paras. 45-49; ECtHR, *Szücs v. Austria*, Appl. No. 20602/92, Judgment (Chamber), 24 November 1997, paras. 43, 47; ECtHR, *Werner v. Austria*, Appl. No. 21835/93, Judgment (Chamber), 24 November 1997, paras. 54-55; ECtHR, *Sutter v. Switzerland*, Appl. No. 8209/78, Judgment (Plenary), 22 February 1984, paras. 32-33; and ECtHR, *Axen v. Germany*, Appl. No. 8273/78, Judgment (Plenary), 8 December 1983, paras. 30-31; ECtHR, *Pretto and Others v. Italy*, Appl. No. 7984/77, Judgment (Plenary), 8 December 1983, paras. 25-26.

⁹² See ECtHR, *Werner v. Austria*, Appl. No. 21835/93, Judgment (Chamber), 24 November 1997, paras. 59-60; ECtHR, *Szücs v. Austria*, Appl. No. 20602/92, Judgment (Chamber), 24 November 1997, paras. 47-48.

addressed in the case (*e.g.* the protection of privacy),⁹³ thereby preventing the courts from limiting the delivery of a judgement to the dispositive part of the chamber's findings. The aforementioned tribunals have also established that, although it is acceptable for a first instance court to pronounce reasons for a decision sometime after its adoption as long as this does not deny the applicant's right to effectively exercise his or her right to lodge an appeal,⁹⁴ the decision must give reply to the main arguments submitted by the parties.⁹⁵ The same approach to the provision of reasoned opinions on convictions or acquittals has been adopted at last instance by the International Criminal Tribunals for the former Yugoslavia and Rwanda, and by the Extraordinary Chambers in the Courts of Cambodia.⁹⁶

48. Secondly, the requirement to accompany the judgment by a reasoned opinion is also envisaged in other *fora*. For instance, the Rules of Procedure and Evidence of the Special Tribunal for Lebanon have been amended recently to limit the time available to the judges to issue the reasons of their judgments. In particular, whereas the original version of rule 168 of the Rules of the Special Tribunal for Lebanon provided the judges with a margin of time for issuing their reasons ("*as soon as*

⁹³ See ECtHR, *B. and P. v. United Kingdom*, Appl. Nos. 36337/97 and 35974/97, [Judgment](#) (Chamber), 24 April 2001, para. 46.

⁹⁴ See ECtHR, *Jodko v. Lithuania*, Appl. No. 39350/98, [Decision](#), 7 September 1999, para. 1. See also, HRC, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, [CCPR/C/GC/32](#), 23 August 2007, para. 49.

⁹⁵ See ECtHR, *Taxquet v. Belgium*, Appl. No. 926/05, [Judgment](#) (Grand Chamber), 16 November 2010, para. 91. See also ECtHR, *Boldea v. Romania*, Appl. No. 19997/02, [Judgment](#) (Chamber), 15 February 2007, paras. 28-30, and ECtHR, *Buzescu v. Romania*, Appl. No. 61302/00, [Judgment](#) (Chamber), 24 May 2005, para. 63.

⁹⁶ See ECCC, *Nuon Chea and Khieu Samphan*, Case No. F36, [Appeal Judgment](#) (Supreme Court Chamber), 23 November 2016, paras. 202-208. See also, ICTR, Case No. ICTR-00-56B-A, *Bizimungu*, [Judgment](#) (Appeals Chamber), 30 June 2014, para. 18; ICTR, *Karera*, Case No. ICTR-01-74-A, [Judgment](#) (Appeals Chamber), 2 February 2009, para. 20; ICTY, *Nikolić*, Case No. IT-02-60/1-A, [Judgment on Sentencing Appeal](#) (Appeals Chamber), 8 March 2006, para. 96; ICTY, *Milutinović et al.*, No. IT-05-87-AR65.1, [Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković's Provisional Release](#) (Appeals Chamber), 1 November 2005, para. 11; ICTY, *Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, [Judgment](#) (Appeals Chamber), 12 June 2002, para. 41; and ICTY, *Furundžija*, Case No. IT-95-17/1-A, [Judgment](#) (Appeals Chamber), 21 July 2000, para. 69.

possible”),⁹⁷ since April 2019 said provision does not include said possibility, and solely provides that “[t]he judgement [...] shall be accompanied by a reasoned opinion, in writing”.⁹⁸

49. Thirdly, as hinted by the Prosecution,⁹⁹ the “general principles of law derived by the Court from national laws of legal systems of the world” referred to in article 21(1)(c) of the Statute also support the same understanding of the requirements of a decision on conviction or acquittal pursuant to article 74(5) of the Statute. In some national jurisdictions like Côte d’Ivoire,¹⁰⁰ Democratic Republic of the Congo,¹⁰¹ Croatia,¹⁰² Venezuela¹⁰³ and Japan¹⁰⁴ - to quote only a few - judges have to provide reasons or a summary thereof at the time of issuing a decision on the merits.

50. The *rationale* for mandating the release of the reasons of a judgement when the latter is pronounced lies both with (i) ensuring that the decision-makers are perceived as basing their conclusion *solely* on the evidence and arguments heard during the trial; and (ii) providing the parties with the *immediate* possibility to challenge the decision acquitting or convicting the accused, in order not to prejudice their legitimate interests.

⁹⁷ See STL, [Rules of Procedure and Evidence, STL/BD/2009/01](#), 20 March 2009, rule 168(B).

⁹⁸ See STL, [Rules of Procedure and Evidence, STL-BD-2009-01-Rev.10](#), 10 April 2019, rule 168(B).

⁹⁹ See the Appeal Brief, *supra* note 2, para. 31.

¹⁰⁰ See the [Loi N. 2018-975 du 27 décembre 2018 portant Code de Procédure pénale](#), art. 509 : “Tout jugement doit contenir des motifs et un dispositif. [...] Le jugement est entièrement rédigé avant son prononcé. [...] Toutefois, pour les décisions rendues à l’audience même à laquelle ont eu lieu les débats, le jugement est rédigé et remis au greffier dans le délai de quinze jours à compter du prononcé”.

¹⁰¹ See the [Décret du 6 août 1959 portant le Code de procédure pénale](#), article 87 : “Les jugements [...] contiennent l’indication des faits mis à charge du prévenu, un exposé sommaire des actes de poursuite et de procédure à l’audience, les conclusions éventuelles des parties, les motifs et le dispositif”.

¹⁰² See the [Criminal Procedure Act](#), article 368(1): “The court shall found its judgement only on the facts and evidence presented at the trial. Criminal Procedure Act 129 (2) The court is bound to conscientiously assess each piece of evidence individually and in relation to other evidence and on the basis of such assessment to reach a conclusion on whether or not a particular fact has been proved”.

¹⁰³ See the [Organic Code of Criminal Procedure](#), decree N°9.042, 12 June 2012: [Translation] Article 346: “The sentence shall contain: [...] the statement of the facts and circumstances that have been the subject of the trial (3) The precise and circumstantial determination of the facts that the court deems relevant (4) The concise statement of its factual and legal basis”.

¹⁰⁴ See the [Code of Criminal Procedure](#), Act No. 131 of July 10, 1948, Article 44(1): “A decision shall be accompanied by the reason thereof”.

51. Fourthly, and more importantly, the jurisprudence of the Court on article 74(5) of the Statute goes along the lines described above. As discussed *infra*, different Chambers have already found that a decision under article 74(5) of the Statute must (i) be issued in writing; (ii) explain how and why the conclusions have been reached; (iii) be delivered in open court; and (iv) not have any other additions different from the opinion(s) of the minority.

a. Decision in writing

52. Trial Chamber V(a) found in the *Ruto* case that “[t]he effect of a successful ‘no case to answer’ motion would be the rendering of a full or partial judgment of acquittal”.¹⁰⁵ Consequently, as judgments of acquittal, successful decisions on “no case to answer” motions must be issued in writing pursuant to article 74(5) of the Statute.

53. In this regard, as noted by Judge Eboe-Osuji in the *Bemba et al.* case, “[t]here is a discernible difference in the texts of the ICTY Statute and that of the Rome Statute [...]. There is no indication - in either the ICTY Statute or the ICTY Rules - as to the extent that and in what respect the reasons must be in writing. In contrast, article 74(5) of the Rome Statute requires that the judgment of the Trial Chamber ‘shall be in writing and shall contain a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions’”.¹⁰⁶

54. Moreover, rule 144 of the Rules equally applies to decisions on “no case to answer” motions. In this regard, the Legal Representative fully agrees with the following reasoning of Judge Herrera Carbuccion in the present case:

“The judicial requirements and the mandatory language set out in Article 74(5) of the Statute apply to decisions on “no case to answer” motions that result in a full judgment of acquittal, as is the present case. Rule 144 of the Rules of Procedure and Evidence (“Rules”) further confirms that decisions such as a judgment of acquittal

¹⁰⁵ See the “Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedure on ‘No Case to Answer’ Motions)” (Trial Chamber V(a)), No. [ICC-01/09-01/11-1334](#), 3 June 2014, para. 22.

¹⁰⁶ See the “Concurring Separate Opinion of Judge Eboe-Osuji” (Appeals Chamber), No. [ICC-01/05-01/08-3636-Anx3 A](#), 14 June 2018, para. 39 (emphasis in the original).

*shall be in writing and that a copy of the decision shall be provided as soon as possible to all participants in the proceedings. This provision thus compels the Chamber to issue a written decision, which shall be notified as soon as possible to all participants and shall be pronounced in public”.*¹⁰⁷

b. Reasoned statement on the evidence and conclusions

55. In response to the Defence’s arguments,¹⁰⁸ the Legal Representative recalls that, as already underlined by the Appeals Chamber in the *Bemba* case, “[i]rrespective of the approach the Trial Chamber chooses [in the use of its discretion to defer consideration of the relevance or admissibility of evidence], it will have to consider the relevance, probative value and the potential prejudice of each item of evidence at some point in the proceedings – when evidence is submitted, during the trial, or at the end of the trial”.¹⁰⁹

56. Similarly, the Appeals Chamber has emphasized the importance of providing reasons when the judges use their discretion, especially – but not only – for evidentiary decisions.¹¹⁰ In particular, the Appeals Chamber has reiterated that explaining how and why a chamber reached its conclusions under article 74(5) of the Statute “[a]llow[s] the accused person to usefully exercise available rights of appeal [and] enables the Appeals Chamber to clearly understand the factual and legal basis upon which the Decision has been taken and thereby properly exercise its appellate functions [...] it must identify which facts it found to be relevant in coming to its conclusion [...]. It must be clear

¹⁰⁷ See the 15 January 2019 Dissenting Opinion, *supra* note 23, para. 21 (emphasis in the original).

¹⁰⁸ See the Blé Goudé Response, *supra* note 3, paras. 49-57.

¹⁰⁹ See the “Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’” (Appeals Chamber), No. [ICC-01/05-01/08-1386 OA5 OA6](#), 3 May 2011, para. 37.

¹¹⁰ See e.g., the “Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/04-02/12-271-Corr A](#), 7 April 2015, para. 226. See also, the “Concurring Separate Opinion of Judge Eboe-Osuji” (Appeals Chamber), No. [ICC-01/05-01/08-3636-Anx3 A](#), 14 June 2018, paras. 38-39; and the “Dissenting Opinion of Judge Anita Ušacka” (Appeals Chamber), No. [ICC-01/04-01/06-3121-Anx2 A5](#), 1 December 2014, para. 26.

from the Trial Chamber's decision which facts it found to have been established beyond reasonable doubt and how it assessed the evidence to reach these factual findings".¹¹¹

57. Although a Chamber is not required by article 74(5) of the Statute to individually set out each and every factor that was before it, it must "[i]ndicate with sufficient clarity the basis of the decision".¹¹² In this regard, the Appeals Chamber has recently found that "[i]t is to be presumed that the Trial Chamber evaluated all the evidence before it, 'as long as there is no indication that [it] completely disregarded any particular piece of evidence'. This presumption may be rebutted 'when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning' [...]. If particular items of evidence that are, on their face, relevant to the factual finding are not addressed in the reasoning, the Appeals Chamber will have to determine whether they were of such importance that they should have been addressed".¹¹³

¹¹¹ See the "Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute'" (Appeals Chamber), No. [ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#), 8 March 2018, paras. 102-104. See also, the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute'" (Appeals Chamber), No. [ICC-01/05-01/08-3636-Red A](#), 8 June 2018, paras. 50-52; the "Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański" (Appeals Chamber), No. [ICC-01/05-01/08-3636-Anx1-Red A](#), 8 June 2018, para. 274; the "Concurring Separate Opinion of Judge Eboe-Osuji" (Appeals Chamber), No. [ICC-01/05-01/08-3636-Anx3 A](#), 14 June 2018, paras. 296, 305-306, 315; the "Initial Directions on the Conduct of the Proceedings" (Trial Chamber IX), No. [ICC-02/04-01/15-497](#), 13 July 2016, para. 25; the "Dissenting Opinion of Judge Anita Ušacka" (Appeals Chamber), No. [ICC-01/04-01/06-3121-Anx2 A5](#), 1 December 2014, para. 26; and the "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'" (Appeals Chamber), No. [ICC-01/04-01/06-773 OA5](#), 14 December 2006, para. 20.

¹¹² See the "Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański" (Appeals Chamber), No. [ICC-01/05-01/08-3636-Anx1-Red A](#), 8 June 2018, para. 579. See also, the "Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute'" (Appeals Chamber), No. [ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#), 8 March 2018, para. 1049.

¹¹³ See the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's 'Judgment pursuant to Article 74 of the Statute'" (Appeals Chamber), No. [ICC-01/05-01/08-3636-Red A](#), 8 June 2018, para. 54. See also, and the "Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba,

58. The requirement to provide a reasoned statement relates to both factual and legal conclusions,¹¹⁴ and the use of inferences is the limited exception to a Chamber's duty to provide reasons. In this regard, as put by the Appeals Chamber, "[w]hen drawing an inference, a Trial Chamber is not required to articulate every step of its reasoning. The Appeals Chamber finds, however, that a trial chamber should always indicate the basis for its inference. When an inference is made to reach an essential finding, for example, in relation to the elements of charged crimes/offences and modes of liability, the trial chamber has to explain in more detail how it reached the factual conclusion in question".¹¹⁵

59. Contrary to the Defence's suggestions,¹¹⁶ failing to provide reasons is clearly illegitimate also when pronouncing an acquittal as it is in stark contrast with article 81(3)(c) of the Statute. Indeed, the time limit for filing an appeal against the decision of the chamber and requesting the maintenance in detention of the person concerned starts to run from the issuance of the decision. Therefore, the lack of reasoning therein prevents the parties to substantiate any appeal or related request, since the relevant criteria of article 81(3)(c)(i) cannot be properly addressed. In fact, this was the scenario faced when the Chamber issued the 15 January 2019 Oral Decision.¹¹⁷

Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute' (Appeals Chamber), No. [ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#), 8 March 2018, paras. 105-106, 1540.

¹¹⁴ See the "Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański" (Appeals Chamber), No. [ICC-01/05-01/08-3636-Anx1-Red A](#), 8 June 2018, para. 323. See also, ECCC, *Nuon Chea and Khieu Samphan*, Case No. F36, [Judgement](#) (Supreme Court Chamber), 23 November 2016, para. 207.

¹¹⁵ See the "Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute'" (Appeals Chamber), No. [ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#), 8 March 2018, para. 870.

¹¹⁶ See the Blé Goudé Response, *supra* note 3, paras. 49-51.

¹¹⁷ See the 15 January 2019 Oral Decision, *supra* note 30, pp. 5-6.

c. Delivered in open court

60. The Legal Representative notes that, regarding the delivery of decisions “in open court”, the Appeals Chamber has clarified that “[t]he purpose is, inter alia, to allow for publicity of proceedings”.¹¹⁸ As an exception to the delivery of judgments in open court, the Appeals Chamber has found that “[a]s the proceedings [...] are confidential, the Appeals Chamber delivers this judgment by way of notification to the parties (regulations 31 and 32 of the Regulations of the Court)”.¹¹⁹

61. Moreover, when “[t]he Court is in judicial recess, the Appeals Chamber considers that [the delivery of the judgment in open court] can adequately be fulfilled by publishing [its] judgments 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 accused] by way of personal service under regulation 31(3)[...] and (4) of the Regulations of the Court”.¹²⁰

d. One decision with the views of the majority and the minority

62. The Legal Representative notes that this is not the first case in the history of the Court where proceedings have been terminated with the release of the person(s) concerned. However, in all prior cases, the Pre-Trial or Trial Chamber pronounced its findings (or a summary thereof) on the lack of a sufficient basis to proceed to or continue with the trial at the same time of the issuance of its decision discontinuing

¹¹⁸ See also the “Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against Trial Chamber I’s decision on the submission of documentary evidence” (Appeals Chamber), No. [ICC-02/11-01/15-995 OA11 OA12](#), 24 July 2017, para. 67. See also, the “Order concerning notification by way of personal service” (Appeals Chamber), No. [ICC-01/05-01/08-324 OA](#), 16 December 2008, p. 3.

¹¹⁹ See the “Judgment on the Appeal of the Prosecutor against the ‘Decision on Request 1200 of the Prosecutor for Prohibition and Restrictive Measures Against Mathieu Ngudjolo with Respect to Contacts Both Outside and Inside the Detention Centre’” (Appeals Chamber), No. [ICC-01/04-01/07-1718 OA9](#), 9 December 2009, p. 18, footnote 71.

¹²⁰ See also the “Order concerning notification by way of personal service” (Appeals Chamber), No. [ICC-01/05-01/08-324 OA](#), 16 December 2008, p. 3. See also, the “Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against Trial Chamber I’s decision on the submission of documentary evidence” (Appeals Chamber), No. [ICC-02/11-01/15-995 OA11 OA12](#), 24 July 2017, para. 67.

the proceedings against the person(s) concerned (and if applicable, releasing the defendant(s) from custody).¹²¹

63. In particular, in the only NCTA procedure held before the Court prior to the one giving rise to this appeal, Trial Chamber V(a) decided on the merits of the Defence motions and provided reasons therefor in the same decision,¹²² with the views of the minority appended to it.¹²³

64. As noted by Judge Herrera Carbuccion,¹²⁴ the importance of providing the reasons at the same time as deciding on the outcome of the proceedings cannot be overemphasized for the consequences attached to it, namely the time limit for filing an appeal and an eventual request to maintain the person(s) concerned in detention.

¹²¹ For decisions on “no case to answer” motions in the *Ruto* and *Sang* cases, see the “Public redacted version of Decision on Defence Applications for Judgments of Acquittal” (Trial Chamber V(a)), No. [ICC-01/09-01/11-2027-Red-Corr](#), 16 June 2016, Reasons of Judge Fremr, paras. 147-150 and Reasons of Judge Eboe-Osuji, paras. 182-183. For decisions authorising the withdrawal of charges against *Muthaura* and *Kenyatta*, see the “Decision on the withdrawal of charges against Mr Kenyatta” (Trial Chamber V(b)), No. [ICC-01/09-02/11-1005](#), 13 March 2015; and the “Decision on the withdrawal of charges against Mr Muthaura” (Trial Chamber V), No. [ICC-01/09-02/11-696](#), 18 March 2013. For the decision on acquittal in the *Ngudjolo* case, see the “Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect” (Appeals Chamber), No. [ICC-01/04-02/12-12 OA](#), 20 December 2012. For decisions not confirming the charges brought against *Ali*, *Kosgey*, *Mbarushimana*, and *Abu Garda*, see the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” (Pre-Trial Chamber II), No. [ICC-01/09-02/11-382-Red](#), 26 January 2012; the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” (Pre-Trial Chamber II), No. [ICC-01/09-01/11-373](#), 23 January 2012; the “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’ of 20 December 2011” (Appeals Chamber), No. [ICC-01/04-01/10-483 OA3](#), 24 January 2012; and the “Decision on the Confirmation of Charges” (Pre-Trial Chamber I), No. [ICC-02/05-02/09-243-Red](#), 8 February 2010.

¹²² See the “Public redacted version of Decision on Defence Applications for Judgments of Acquittal” (Trial Chamber V(a)), No. [ICC-01/09-01/11-2027-Red-Corr](#), 16 June 2016, Reasons of Judge Fremr, para. 8-15.

¹²³ See the “Dissenting Opinion of Judge Herrera Carbuccion”, No. [ICC-01/09-01/11-2027-AnxI](#), 5 April 2016.

¹²⁴ See the 15 January 2019 Dissenting Opinion, *supra* note 23, paras. 32-33, 35.

65. Moreover, as also pointed out by Judge Herrera Carbuccia,¹²⁵ a decision with reasons to follow suggests that the judges have not analysed all the facts and evidence prior to issuing their ruling, and the subsequent delivery of the reasons for the decision may in turn lead to a violation of the right of the accused to an expeditious trial.

(ii) The requirements of article 74(5) of the Statute are mandatory

66. The Legal Representative agrees with the Prosecution that the requirements in article 74(5) of the Statute are not discretionary, but mandatory.¹²⁶ The literal wording of the provision indicates that the Chamber must deliver in open court one decision in writing containing a full and reasoned statement of its findings.

67. Having regard to the drafting history of article 74(5), it is worth recalling that in 1996, the Report on the Second Session of the Preparatory Committee proposed that the contents of the judgement should be *“as complete as possible, including the questions of the competence and admissibility, as well as reasons for the judgement”*.¹²⁷ This emphasis on the completeness strongly suggests that a chamber must include its thorough assessment on the evidence when delivering its decision.¹²⁸

68. This interpretation is further confirmed and echoed by what the Fifth Session of the Preparatory Committee added regarding the trial chamber’s judgement which

¹²⁵ *Idem*, paras. 32, 35.

¹²⁶ See the Appeal Brief, *supra* note 2, para. 24.

¹²⁷ See the *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, (Proceedings of the Preparatory Committee during March-April and August 1996)*, General Assembly, Fifty-first Session, Supplement N° 22, [UN Doc. A/51/22](#), Article 45, page 61, para. 291.

¹²⁸ It is worth noting that in 1987, the Bassiouni Draft Statute already mentioned that “[t]he decisions of the Chambers shall be publicly announced orally, in summary or entirely, **accompanied by written findings of fact and conclusions of law**” and the setting of a deadline of “30 days from the date of pronouncement of the oral decision” [emphasis added], TRIFFTERER (O.) (dir.), *Commentary on the Rome Statute of the International Criminal Court – Observer’s Notes, Article by Article*, C.H. Beck, Hart, Nomos Verlagsgesellschaft, München, Oxford, Baden-Baden, 3rd ed, 2016, p. 1828 quoting BASSIOUNI (C.), “Draft International Criminal Code and Draft Statute for an International Criminal Tribunal”, 1987, Annex, 231, and for the Commentary 231 and 232.

“shall be based on its evaluation of the evidence and the entire proceedings”.¹²⁹ The drafters’ choice of the term “shall” in article 74(5) of the Statute cannot be understood as coincidental. The wording of the provision leaves no discretion to a chamber as to how to issue its decision. Therefore, contrary to the Chamber’s reasoning,¹³⁰ the unequivocal meaning of article 74(5) cannot be changed by referring to unidentified internationally recognised human rights on the basis of article 21(3) of the Statute.

69. As the Prosecution convincingly argues,¹³¹ the Majority’s resort to article 21(3) of the Statute is unjustified and appears to respond, *inter alia*, to the openly stated judicial disagreement as to the applicable standard of proof. In this regard, Judge Herrera Carbuccion and Judge Tarfusser respectively refer in their opinions to “[t]he absence of clarity as to the applicable standard”,¹³² and to “[d]ifferences in approach within the bench, some of which [are] so deep as to have repeatedly fractured the Chamber”.¹³³

70. In fact, the Majority’s choice of rendering its disposition of the case in public session on 15 January 2019 but providing the reasons thereof only six months thereafter is inconsistent with the internationally recognised human right to a reasoned decision stated by the Appeals Chamber.¹³⁴ The Legal Representative agrees with the Prosecution that the Majority’s apparent concern about the right to liberty of the Defendants¹³⁵ should have been catered by conditionally releasing them, while

¹²⁹ See *Preparatory Committee on the Establishment of an International Criminal Court* (1 - 12 December 1997), U.N. [Doc.A/AC.249/1997/L.9/Rev.1](#), Decision taken by the Preparatory Committee as its Session Held from 1 to 12 December 1997, article 45, pp. 34-35.

¹³⁰ See the 15 January 2019 Oral Decision, *supra* note 30, pp. 3-4.

¹³¹ See the Appeal Brief, *supra* note 2, paras. 91-92.

¹³² See the 15 January 2019 Dissenting Opinion, *supra* note 23, para. 43.

¹³³ See Judge Tarfusser’s Opinion, *supra* note 13, para. 6.

¹³⁴ See the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” (Appeals Chamber), No. [ICC-01/04-01/06-773 OA5](#), 14 December 2006, para. 20. See also, the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled Second Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 82” (Appeals Chamber), No. [ICC-01/04-01/06-774 OA6](#), 14 December 2006, para. 30.

¹³⁵ See the 15 January 2019 Oral Decision, *supra* note 30, p. 4, lines 7-9.

finalising the written reasons and, thereafter, pronouncing in a public hearing the acquittal *and* the reasons therefor.¹³⁶

71. Moreover, the Legal Representative submits that the right to a fair trial is not the only internationally recognised human right protected by article 74(5) of the Statute. As pointed out by Judge Herrera Carbuccion,¹³⁷ the Majority should have ensured that the 15 January 2019 Oral Decision did not thwart the Victims' right to justice, and ultimately reparations, which is in turn dependant on the right to know the reasons of the judgment and the right to appeal.

72. Assuming *arguendo* that the requirements in article 74(5) of the Statute are not mandatory, the Legal Representative agrees with the alternative argument put forward by the Prosecution that the Chamber abused its discretion.¹³⁸

(iii) The Chamber failed to comply with the requirements of article 74(5) of the Statute by issuing the 15 January 2019 Oral Decision

73. The Legal Representative concurs with the Prosecution¹³⁹ and with Judge Herrera Carbuccion¹⁴⁰ that the Majority violated its legal obligation to deliver one fully reasoned judgment in writing by rendering instead an oral decision acquitting Mr Gbagbo and Mr Blé Goudé on 15 January 2019. The Legal Representative further submits that the Defence related arguments raised in the respective Responses¹⁴¹ should be dismissed for the following reasons.

¹³⁶ See the Appeal Brief, *supra* note 2, paras. 95-96. Cf. the Blé Goudé Response, *supra* note 3, para. 73.

¹³⁷ See the 15 January 2019 Dissenting Opinion, *supra* note 23, para. 35.

¹³⁸ See the Appeal Brief, *supra* note 2, paras. 103-114.

¹³⁹ *Idem*, para. 39.

¹⁴⁰ See the 15 January 2019 Dissenting Opinion, *supra* note 23, para. 26.

¹⁴¹ See the Gbagbo Response, *supra* note 3, paras. 68-95, 199-104; and the Blé Goudé Response, *supra* note 3, paras. 38-85.

a. The Majority issued its decision orally

74. Not rendering in writing the 15 January 2019 Oral Decision was in violation of article 74(5) of the Statute.¹⁴² The literal tenor of this provision requires that the decision be in writing. In this regard, the written transcript of the 15 January 2019 Oral Decision cannot be considered a “written decision” for the purpose of article 74(5) of the Statute, since court transcripts record every oral hearing, regardless of whether a decision is issued during the hearing or not.

75. In response to the Defence’s arguments,¹⁴³ and as also argued by the Prosecution,¹⁴⁴ the Written Reasons issued on 16 July 2019 cannot be read as a remedy to the violation of article 74(5) of the Statute committed with the issuance of the oral decision on 15 January 2019. The acquittal of Mr Gbagbo and Mr Blé Goudé took place with the rendering of the 15 January 2019 Oral Decision, whereas said acquittal required a decision in writing. The fact that the Written Reasons, issued six months later, quoted the dispositive part of the 15 January 2019 transcript¹⁴⁵ is inconsequential for this purpose.

76. Moreover, the rendering of the 15 January 2019 Oral Decision is inconsistent with the consolidated jurisprudence of the Court, which requires that decisions on NCTA motions be issued in writing.¹⁴⁶ This requirement otherwise stems from the interpretation and application of article 74(5) of the Statute consistently with “internationally recognised human rights”, in accordance with article 21(3) of the Statute. In this regard, the Human Rights Committee, the European Court of Human Rights and the Inter-American Court of Human Rights require the provision of a timely written judgment to protect from arbitrariness and to ensure the right to an

¹⁴² See the Appeal Brief, *supra* note 2, para. 40.

¹⁴³ See the Blé Goudé Response, *supra* note 3, paras. 38-48.

¹⁴⁴ See the Appeal Brief, *supra* note 2, para. 41.

¹⁴⁵ See the Written Reasons, *supra* note 34, para. 28.

¹⁴⁶ See *supra* paras. 52-54.

appeal, in particular regarding the essential elements of the case heard by the court at hand.¹⁴⁷

77. The Legal Representative notes that the European Court of Human Rights has validated the oral pronouncement of some judgments, but has consistently explained that the form of pronouncement to be given to the judgment, *i.e.* oral or written, must be consistent with the purposes indicated *supra* and depends on the special features of the proceedings at hand.¹⁴⁸

78. In this regard, the Legal Representative submits that the fact that anyone may at present consult or obtain a copy of the full text of the 16 July 2019 Reasons does not validate the oral issuance of the disposition six months before said date.¹⁴⁹ There was no other decision previously issued on the facts and merits of the NCTA motions,¹⁵⁰ and it was therefore necessary for the public, and also for the participating Victims, to know the reasons why Mr Gbagbo and Mr Blé Goudé were acquitted.

b. The Majority provided an insufficient explanation of how it reached its findings

79. The Legal Representative agrees with the Prosecution that the content of the 15 January 2019 Oral Decision does not comply with the requirements of article 74(5) of the Statute.¹⁵¹ In response to the Defence's arguments,¹⁵² the Legal Representative recalls that this provision literally requires that the decision contain "[a] *full and*

¹⁴⁷ See *supra* para. 45.

¹⁴⁸ See note 91.

¹⁴⁹ Cf. ECtHR, *Sutter v. Switzerland*, Appl. No. 8209/78, [Judgment](#) (Plenary), 22 February 1984, para. 34.

¹⁵⁰ See ECtHR, *Szücs v. Austria*, Appl. No. 20602/92, [Judgment](#) (Chamber), 24 November 1997, paras. 43, 48; ECtHR, *Axen v. Germany*, Appl. No. 8273/78, [Judgment](#) (Plenary), 8 December 1983, para. 32; ECtHR, *Pretto and Others v. Italy*, Appl. No. 7984/77, [Judgment](#) (Plenary), 8 December 1983, para. 27.

¹⁵¹ See the Appeal Brief, *supra* note 2, para. 42.

¹⁵² See the Blé Goudé Response, *supra* note 3, paras. 49-57; and the Gbagbo Response, *supra* note 3, paras. 132-146.

reasoned statement of the Trial Chamber's findings on the evidence and conclusions". Contrary to the Defence's submissions,¹⁵³ the reading of the conclusions and the verdict contained in the 15 January 2019 Oral Decision cannot be considered "[a] *full and reasoned statement*" of the findings, since the Chamber did not even provide a summary of the manner in which it reached its conclusions.

80. As argued by the Prosecution,¹⁵⁴ it was not enough for the Chamber to identify the allegations for which the burden of proof was not met. In addition, the Chamber should have explained, even in summary form, how it assessed the evidence and which facts it found to be relevant in coming to its conclusions. It is obvious, however, that in order to provide a summary of the Majority written decision at a minimum a draft thereof was to be in existence at the time of the hearing on 15 January 2019.

81. Instead, the content of the 15 January 2019 Oral Decision is inconsistent with the consolidated jurisprudence of the Court, which requires the Chamber to indicate with sufficient clarity the basis of its decision under article 74(5) of the Statute, in order to allow the useful exercise of the right to appeal and to enable the Appeals Chamber to properly exercise its function.¹⁵⁵

82. The lack of a full explanation in the 15 January 2019 Oral Decision prevented the parties from exercising their right to appeal in an effective manner. In the absence of a reasoned statement, the parties and participants were unable, for instance, to find out whether the Chamber had actually evaluated all the evidence before it or had instead disregarded important pieces of evidence that should have been addressed.¹⁵⁶ Similarly, the lack of concrete factual references in the 15 January 2019 Oral Decision made it impossible to test the inferences possibly drawn by the

¹⁵³ See the Blé Goudé Response, *supra* note 3, paras. 86 *et seq.*

¹⁵⁴ See the Appeal Brief, *supra* note 2, para. 43.

¹⁵⁵ See *supra* paras. 56-57.

¹⁵⁶ See *supra* para. 57.

Chamber in relation to the elements of the crimes and the modes of liability alleged against Mr Gbagbo and Mr Blé Goudé.¹⁵⁷

c. The Majority failed to deliver in open court the reasons of its decision

83. The Legal Representative agrees with the Prosecution that not rendering orally the 16 July 2019 Reasons, at least in summary form, was in violation of article 74(5) of the Statute.¹⁵⁸ The literal tenor of this provision requires that the decision or a summary thereof – with the views of the majority and the minority – be delivered in open court. In this regard, the Chamber erred in law by relying on rule 144 of the Rules to issue *exclusively* in writing the reasons for the 15 January 2019 Oral Decision.¹⁵⁹

84. As argued by the Prosecution,¹⁶⁰ rule 144(2) only refers to providing all participants in the proceedings with “copies” of the decision of the trial chamber on the criminal responsibility of the accused. The wording of the provision does not exempt the trial chamber from issuing said reasons also *orally*, pursuant to the literal tenor of article 74(2) of the Statute, whereby “[t]he decision or a summary thereof shall be delivered in open court”.

85. The Chamber wrongly relied on rule 144(2) to not provide orally the reasons of its decision on 15 January 2019 and to do so in writing only on 16 July 2019. Rule 144(2) is a procedural provision that allows the Registry to delay the delivery of the full version of the decision *in writing*. In fact, the title of this rule is “*Delivery of the decisions of the Trial Chamber*” and expressly provides in its first sub-rule that “[d]ecisions of the Trial Chamber concerning [...] criminal responsibility of the accused [...] shall be pronounced in public”. However, nothing in rule 144 contradicts the wording of

¹⁵⁷ *Ibid.*

¹⁵⁸ See the Appeal Brief, *supra* note 2, para. 42.

¹⁵⁹ See the 15 January 2019 Oral Decision, *supra* note 30, pp. 3-4; and the Written Reasons, *supra* note 34, p. 3

¹⁶⁰ See the Appeal Brief, *supra* note 2, para. 41.

article 74(5) of the Statute. Article 74, titled “*Requirements for the decision*”, obliges the trial chamber to prepare a decision “*in writing*” to be “*delivered in open court*”. Said decision is to be pronounced in public pursuant to rule 144(1), and is to be distributed to the accused and all the participants in the proceedings pursuant to rule 144(2).

86. Assuming *arguendo* that there is a contradiction between the provisions mentioned *supra*, rule 144 must always be interpreted and applied consistently with article 74(5) of the Statute, as required by article 51(4) and (5) of the Statute. As argued by the Prosecution,¹⁶¹ the Chamber erred in law by following the opposite approach and adopting an interpretation of rule 144 in the 15 January 2019 Oral Decision that is inconsistent with the obligation established by article 74 of the Statute to deliver the decision in open court.

87. In this regard, the Appeals Chamber has interpreted the same wording contained in article 83(4) of the Statute (“*The judgment of the Appeals Chamber [...] shall be delivered in open court*”) as having the purpose of allowing for the publicity of the proceedings.¹⁶² The judicial recess and the confidentiality of the proceedings are the only circumstances found by the Appeals Chamber to justify not reading the judgment in open court. None of these circumstances were present in the current instance, where the Chamber disposed of the case in public on 15 January 2019¹⁶³ and orally discontinued its proceedings on 16 January 2019.¹⁶⁴

88. Moreover, the fact of not rendering orally the 16 July 2019 Reasons or summary thereof is inconsistent with the obligation under article 21(3) of the Statute to apply and interpret article 74(5) and rule 144 in a manner consistent with internally recognized human rights.

¹⁶¹ *Idem*, para. 44.

¹⁶² See *supra* para. 60.

¹⁶³ See the 15 January 2019 Oral Decision, *supra* note 30, pp. 4-5.

¹⁶⁴ See the 16 January 2019 Release Decision, *supra* note 32, p. 6.

89. As consistently found by the Appeals Chamber, internationally recognized human rights cannot alter the content of legal texts of the Court, but are of assistance in applying and interpreting the latter.¹⁶⁵ In the case at hand, an interpretation of article 74(5) of the Statute and rule 144 of the Rules consistent with internationally recognized human rights required the delivery in open court of the 16 July 2019 Reasons. The pronouncement in open court of the reasons was mandatory to bring to the knowledge of the public why the suspicions concerning Mr Gbagbo and Mr Blé Goudé had not been sufficiently supported by the Prosecution, justifying the sense of the 15 January 2019 Oral Decision.¹⁶⁶

90. Finally, the obligation on the Chamber to render orally the reasons of its decision was not limited by the nature of the proceedings or the sensitive issues addressed in this case.¹⁶⁷ Therefore, the Chamber committed an error of law and/or procedure by not delivering in open court the 16 July 2019 Reasons – or a summary thereof – together with the dispositive part of the Chamber’s findings.

¹⁶⁵ See the “Judgment on the appeal of Mr Aimé Kilolo Musamba against the decision of Pre-Trial Chamber II of 14 March 2014 entitled ‘Decision on the ‘Demande de mise en liberté provisoire de Maître Aimé Kilolo Musamba’” (Appeals Chamber), No. [ICC-01/05-01/13-558 OA2](#), 11 July 2014, para. 67. See also, the “Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Judgment pursuant to Article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#), 8 March 2018, paras. 319, 372; and the “Judgment on the appeal of Mr Bosco Ntaganda against the ‘Decision on Defence request for leave to file a ‘no case to answer’ motion’” (Appeals Chamber), No. [ICC-01/04-02/06-2026 OA6](#), 5 September 2017, paras. 2, 46, 48-52, 56.

¹⁶⁶ See *supra* para. 46. Cf. ECtHR, *Werner v. Austria*, Appl. No. 21835/93, [Judgment](#) (Chamber), 24 November 1997, paras. 59-60; and ECtHR, *Szücs v. Austria*, Appl. No. 20602/92, [Judgment](#) (Chamber), 24 November 1997, paras. 47-48.

¹⁶⁷ See *supra* para. 47. Cf. ECtHR, *B. and P. v. United Kingdom*, Appl. Nos. 36337/97 and 35974/97, [Judgment](#) (Chamber), 24 April 2001, para. 46.

d. The Majority failed to provide simultaneously the verdict and the reasons therefor

91. The Legal Representative agrees with the Prosecution¹⁶⁸ that the 15 January 2019 Oral Decision failed to provide a reasoned statement on the evidence and conclusions, contrary to the requirements of article 74(5) of the Statute. In response to the Defence relevant arguments,¹⁶⁹ the Legal Representative notes that a literal interpretation of this provision suffices to conclude that the Chamber was obliged to issue *at the same time* the verdict and the reasons therefor.

92. Article 74(5) expressly provides that “[t]he decision [...] shall contain a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions” (emphasis added). The same article further provides that “[t]he decision or a summary thereof shall be provided in open court” (emphasis added). The literal tenor of the provision leaves no room for doubt as to the obligation imposed on the Chamber to issue the “conclusions” of its decision together with the “findings” supporting said conclusions.

93. The possibility to read a “summary” of the decision does not relieve the Chamber from its obligation to refer to *both* the findings and the conclusions derived from said findings. The equally authentic French version of article 75(4) of the Statute is even clearer in this regard: “Elle [la décision] *contient l’exposé complet et motivé des constatations de la Chambre de première instance sur les preuves et les conclusions* [...] *Il est donné lecture de la décision ou de son résumé en audience publique*”.

94. By contrast, the Chamber in this case orally announced its *conclusions* on 15 January 2019 without reading any summary of the supporting *findings*, and provided the full reasons for said conclusions in writing on 16 July 2019.

¹⁶⁸ See the Appeal Brief, *supra* note 2, para. 45.

¹⁶⁹ See the Blé Goudé Response, *supra* note 3, paras. 58-73, 174-191; and the Gbagbo Response, *supra* note 3, paras. 111-131.

This apparent disregard for the difference between “*findings*” and “*conclusions*” is also evidenced in the content of the separate documents issued on 16 July 2019 by Judge Henderson and by Judge Tarfusser.

95. Judge Henderson identifies the reasoning as his own and only refers to the Majority in the introductory paragraphs of his document: “*What follows are my written reasons for joining Judge Tarfusser in deciding to end the case [...] 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*”.¹⁷⁰

96. Conversely, Judge Tarfusser states his agreement with Judge Henderson as to the *conclusions* read in open court on 15 January 2019 (“*I fully concur with the Majority outcome of this trial [...] the Majority acquitted Mr Gbagbo and Mr Blé Goudé from all charges because they are not sustained by the evidence*”),¹⁷¹ and makes a generic statement that “[f]or the purposes of the Majority reasoning, I confirm that I subscribe to the factual and legal findings contained in the ‘Reasons of Judge Henderson’”.¹⁷²

97. However, as also argued by the Prosecution,¹⁷³ the content of the abovementioned documents testifies as to the critical disagreement between Judge Henderson and Judge Tarfusser on the reasons for sharing the same conclusion. Although trying to minimise its significance, both Judges openly differ regarding critical *reasons*, such as the standard of proof applicable¹⁷⁴ and the scope of analysis required for the decision.¹⁷⁵

¹⁷⁰ See Judge Henderson’s Reasons, *supra* note 17, para 1 (emphasis added).

¹⁷¹ See Judge Tarfusser’s Opinion, *supra* note 13, paras. 1-2.

¹⁷² *Idem*, para. 1.

¹⁷³ See the Appeal Brief, *supra* note 2, para. 53, 138-141.

¹⁷⁴ Cf. Judge Henderson’s Reasons, *supra* note 17, paras. 2, 8, 13-15, 17, with Judge Tarfusser’s Opinion, *supra* note 13, para. 65, 67-68.

¹⁷⁵ Cf. Judge Henderson’s Reasons, *supra* note 17, para. 8, with Judge Tarfusser’s Opinion, *supra* note 13, paras. 8-9.

98. In fact, the pronouncement of the reasons of the decision was anticipated by previous rulings of the Chamber. For instance, in 2016 the Chamber indicated that “[t]he Chamber’s obligation, as set forth in Article 74 of the Statute, to determine the guilt or the innocence of the accused in light of all of the evidence presented during the trial would make it always imperative for the Chamber to determine, at the end of the trial, whether the determination made at an earlier stage on a particular piece of evidence still stands”.¹⁷⁶

99. By contrast, the 15 January 2019 Oral Decision did not include the slightest reference to the admissibility of particular pieces of evidence, not even of those most relevant to the Majority’s conclusions. Therefore, by not delivering at the same time the dispositive part of its findings and the full or summarised version of the 16 July 2019 Reasons, the Chamber committed an error of law and/or procedure.

(iv) The 16 July 2019 Reasons do not cure the Chamber’s failure to comply with the requirements of article 74(5) of the Statute

100. The Legal Representative agrees with the Prosecution that the 16 July 2019 Reasons cannot validate the Majority’s approach or Mr Gbagbo and Mr Blé Goudé acquittals in this case.¹⁷⁷

101. Firstly, the Written Reasons merely re-state the 15 January 2019 Oral Decision. In fact, the Written Reasons quote the oral decision.¹⁷⁸ As such, the former cannot retroactively cure the latter.

102. Secondly, the 16 July 2019 Reasons were issued in violation of the Statute and the Rules. Said Reasons were only notified in writing, but they should have also been delivered orally, pursuant to article 74(5) of the Statute rule 144(1) of the Rules. The

¹⁷⁶ See the “Decision on the submission and admission of evidence” (Trial Chamber I), No. [ICC-02/11-01/15-405](#), 29 January 2016, para. 14 (emphasis added).

¹⁷⁷ See the Appeal Brief, *supra* note 2, para. 101-102.

¹⁷⁸ See the Written Reasons, *supra* note 34, para. 28.

latter provision literally mandates that “[d]ecisions of the Trial Chamber concerning [...] criminal responsibility of the accused [...] shall be pronounced in public”, and, as found by Judge Pikis, is related to article 74(5) of the Statute, which “[l]ikewise provides that the decisions of the Trial Chamber on the guilt or innocence of the accused should be pronounced in public”.¹⁷⁹

103. The object of making the judgments public, namely to ensure scrutiny of the judiciary by the public,¹⁸⁰ would have been properly served by reading the 16 July 2019 Reasons or a summary thereof. The public significance of these particular reasons, expressly acknowledged as a source of law by article 21 of the Statute,¹⁸¹ was especially relevant taking into account the disagreements within the bench.

104. Lastly, as argued *supra*,¹⁸² the 16 July 2019 Reasons do not provide a full and reasoned statement of the joint *findings* and *conclusions* of the Majority, but only a common agreement of Judge Henderson and Judge Tarfusser on their conclusion to end the proceedings.

105. The Legal Representative submits that had the Chamber not erred in acquitting Mr Gbagbo and Mr Blé Goudé in violation of the requirements of article 74(5) of the Statute, the decision would have been totally different. In the circumstances of this case, there is a high likelihood that the Chamber, had it not committed the alleged procedural and legal errors, would not have issued the sparse 15 January 2019 Oral Decision and would have carefully considered all the evidence before discontinuing the case.

¹⁷⁹ See the “Decision of the Appeals Chamber on the Unsealing of Documents – Separate Opinion of Judge Georghios M. Pikis” (Appeals Chamber), No. [ICC-02/04-01/15-106 OA](#), 4 February 2008, pp. 8-9, para. 6.

¹⁸⁰ See note 91.

¹⁸¹ See the “Decision of the Appeals Chamber on the Unsealing of Documents – Separate Opinion of Judge Georghios M. Pikis” (Appeals Chamber), No. [ICC-02/04-01/15-106 OA](#), 4 February 2008, p. 10, para. 9.

¹⁸² See *supra* paras. 95-97.

106. In turn, as noted in the 15 January 2019 Dissenting Opinion,¹⁸³ providing the written reasons in compliance with article 74(5) of the Statute would have allowed the parties an immediate opportunity to mount their appeals, if any, and the Appeals Chamber would have exercised its review in relation to the findings in question in a more timely fashion.¹⁸⁴ In this regard, the Appeals Chamber has already found that “[s]uch an error has a material effect in terms of article 83(2) of the Statute because it inhibits the parties from properly mounting an appeal in relation to the factual finding in question and the Appeals Chamber from exercising its appellate review of it”.¹⁸⁵

107. The material effect of the identified errors of law and/or procedure would have existed as well had the same failure by the Chamber to comply with the requirements of article 74(5) led to the continuation of the trial, instead of to the acquittal of the Defendants. In the former scenario, the failure to abide by the requirements of article 74(5) of the Statute would have materially affected the Defence, since it would have prevented it to mount immediately an appeal against the Chamber’s decision to continue with the trial. Moreover, the impossibility to immediately file an appeal against the oral delivery of the dispositive part of the decision would have led to the Defendants remaining in detention until at least the issuance of the reasons of the judgement, six months thereafter.

¹⁸³ See the 15 January 2019 Dissenting Opinion, *supra* note 23, para. 23.

¹⁸⁴ See the “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgment pursuant to Article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/05-01/08-3636-Red A](#), 8 June 2018, para. 55. See also, the “Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Judgment pursuant to Article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#), 8 March 2018, para. 107. See also, HRC, *Hamilton v. Jamaica*, CCPR/C/50/D/333/1988, [Communication No. 333/1988](#), 25 March 1994, para. 9.1.

¹⁸⁵ See the “Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s ‘Judgment pursuant to Article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/05-01/08-3636-Red A](#), 8 June 2018, para. 55. See also, the “Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled ‘Judgment pursuant to Article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#), 8 March 2018, para. 107.

108. In addition, the procedural history of this case further supports Judge Herrera Carbuccia's view¹⁸⁶ that the decision with reasons to follow suggests that the Majority had not analysed all the facts and evidence prior to issuing its judgement, in violation of the duty to conduct a fair and expeditious trial. In this regard, it is worth recalling that on 10 December 2018 the Majority *proprio motu* scheduled a hearing (held on 13 December 2018) on the continued detention of the Defendants¹⁸⁷ and sought the views from the parties and participants on the "appropriateness and modalities of interim release".¹⁸⁸ At that time, deliberations were still to be concluded as the oral pleadings on the NCTA motions had only taken place less than three weeks earlier.¹⁸⁹ Between the 13 December 2018 hearing and the 15 January 2019 Oral Decision, less than one month passed by, which counted the judicial recess and festive period. It is indeed hard to conceive how the Chamber had the time to even start discussing the totality of the parties' and participants' submissions.

109. Lastly, changes in the jurisprudence, while not in themselves contrary to the proper administration of justice, must be well-known or at least reasonably foreseeable - so that the principle of legality is not breached and there is no uncertainty as to the parties' and participants' legal situation.¹⁹⁰

¹⁸⁶ See the 15 January 2019 Dissenting Opinion, *supra* note 23, paras. 32, 35.

¹⁸⁷ See the "Order convening a hearing on the continued detention of the accused" (Trial Chamber I), No. [ICC-02/11-01/15-1229](#), 10 December 2018. See also, the "Dissenting Opinion of Judge Herrera Carbuccia" (Judge Herrera Carbuccia), No. [ICC-02/11-01/15-1229-Anx](#), 10 December 2018.

¹⁸⁸ See the "Order convening a hearing on the continued detention of the accused", *supra* note 187, para. 11.

¹⁸⁹ See [T-230-ENG](#), page 23.

¹⁹⁰ ECtHR, *Petkov v. Bulgaria*, Appl. No. 2834/06, [Judgment](#) (Chamber), 19 February 2013, paras. 32-33; ECtHR, *Legrand v. France*, Appl. No. 23228/08, [Judgment](#) (Chamber), 26 May 2011, para. 37; ECtHR, *Hoare v. United Kingdom*, Appl. No. 16261/08, [Decision](#) (Chamber), 12 April 2011, paras. 52, 54-56; ECtHR, *C.R. v. United Kingdom*, Appl. No. 20190/92, [Judgment](#) (Chamber), 22 November 1995, paras. 34, 41.

b) Second ground of appeal: The Majority erred by acquitting Mr Gbagbo and Mr Blé Goudé without properly articulating and consistently applying a clearly defined standard of proof and/or approach to assessing the sufficiency of the evidence

110. The Legal Representative concurs with the Prosecution that the Majority failed to identify the requisite standard of proof before issuing its 15 January 2019 Oral Decision. In so doing, the Majority erred in law and failed to articulate a clear approach in assessing the sufficiency of the evidence for the purposes of a no case to answer motion. Further, as discussed *supra*,¹⁹¹ Judge Tarfusser's Opinion and Judge Henderson's Reasons provide *ex post facto* two separate and conflicting reasoning - including a separate and conflicting standard of review - for vacating the charges against Mr Gbagbo and Mr Blé Goudé.¹⁹² Therefore, and contrary to the Defence's submissions,¹⁹³ the Majority did commit a procedural error which in turn precluded the proper assessment of the evidence before it.

111. As highlighted by Judge Tarfusser,¹⁹⁴ neither the Statute nor the Rules specify the standard of proof to which a chamber must be satisfied that there is "no case to answer" for the Defence. Regardless, it is indisputable that a chamber cannot properly determine whether a fact or state of affairs exists without applying the relevant standard of proof to that determination.

112. Contrary to the Defence's submissions in this regard,¹⁹⁵ in the absence of a clear provision, it is the chamber's duty to duly inform the parties and participants on how the relevant proceedings will unfold. In the *Katanga* case, the Appeals Chamber found that "*in order to achieve certainty, a Chamber, when faced with an issue that is not regulated by a relevant legal provision, should compensate for the lack of such a provision that would otherwise provide certainty. In doing so, the Chamber provides*

¹⁹¹ See *supra* paras. 95-99.

¹⁹² Cf. the Gbagbo Response, *supra* note 3, paras. 201-206.

¹⁹³ See the Blé Goudé Response, *supra* note 3, paras. 168-192.

¹⁹⁴ See Judge Tarfusser's Opinion, *supra* note 13, para. 66. See also, T-221-Red, p. 6 to p. 18.

¹⁹⁵ See the Gbagbo Response, *supra* note 3, para. 172.

*the necessary certainty and predictability to the parties and it ensures that the proceedings are properly organised. This in turn guarantees due respect for the rights of the parties. In this respect, Chambers should have in place a clear policy which will indicate to the parties how it expects the proceedings to unfold and in particular, as far as the issue at stake is concerned, that parties are expected to file motions, not otherwise regulated by law, whenever they are in a position to effectively exercise their right. This is an assessment that depends primarily on the facts of each particular case".*¹⁹⁶

113. In the case at hand, and contrary to the Defence's arguments,¹⁹⁷ having carefully reviewed the relevant rulings of the Chamber - *inter alia*, the Decision on the Prosecution's motion for clarification on the standard to be applied,¹⁹⁸ the 15 January 2019 Oral Decision¹⁹⁹ and the Written Reasons²⁰⁰ - it is evident that the Majority reached its decision on whether or not the Prosecution presented sufficient evidence to continue with the trial without knowing which standard of proof it was to apply.

114. If such a standard was ever clarified in the respective mind of the two Judges forming the Majority, this was only *after* the 15 January 2019 Oral Decision had been issued and at which point the determination vacating the charges against the two Defendants had already been made. The individual effort made by Judge Tarfusser and Judge Henderson to define the applicable standard of proof in the 16 July 2019 Reasons cannot remedy the failure to apply a standard at the time the Majority took its decision putting an end to the trial.

¹⁹⁶ See the "Dissenting Opinion of Judge Erkki Kourula and Judge Ekaterina Trendafilova in the Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled 'Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings'" (Appeals Chamber), No. [ICC-01/04-01/07-2297_OA10](#), 29 July 2010, para. 60.

¹⁹⁷ See the Blé Goudé Response, *supra* note 3, paras. 175-191; and the Gbagbo Response, *supra* note 3, paras. 164-167.

¹⁹⁸ See the "Decision on 'Urgent Prosecution's motion seeking clarification on the standard of a 'no case to answer' motion'" (Trial Chamber I), No. [ICC-02/11-01/15-1182](#), 13 June 2016.

¹⁹⁹ See the 15 January 2019 Oral Decision, *supra* note 30.

²⁰⁰ See the Written Reasons, *supra* note 34.

115. In the *Ayyash et al.* case before the Special Tribunal for Lebanon, the Appeals Chamber found that the Trial Chamber's failure to apply a standard of proof when making its factual determination constituted an error of law which invalidated its factual determination and thereby the overall impugned decision - to the point of rendering moot all the remaining grounds raised on appeal.²⁰¹ Contrary to the Defence's submissions,²⁰² the *Ayyash* case mirrors the circumstances of the case at hand, as: (i) there is no provision in the Court's legal texts providing for a standard of review of a NCTA motion; (ii) reference to the *Ruto* case - the only previous example before the Court in which a NCTA procedure took place - was found to be inapposite by Judge Tarfusser, acting as Single Judge;²⁰³ and, (iii) in any case, none of the Judges in the Majority applied the standard as it was done in the *Ruto* case and following the *ad hoc*'s jurisprudence.

116. A decision on whether or not to conduct a NCTA procedure is discretionary in nature, yet it must be exercised on a case-by-case basis "*in a manner that ensures that the trial proceedings are fair and expeditious pursuant to article 64(2) and 64(3)(a) of the Statute*".²⁰⁴ In the present case, the Majority failed to do so. The so called NCTA procedure was neither intrinsically fair nor contributed to the overall fairness of the trial. It was also extremely long in nature and, as such, also ran radically against a chamber's duty of ensuring the expeditiousness of the trial.

117. The reason for the Chamber's overall failure in dealing with the NCTA litigation in a fair and expeditious manner is mainly rooted on its inability to agree

²⁰¹ See STL, *Ayyash et al.*, Case No. STL-11-01/T/AC/AR126.11, [Decision on Badreddine Defence Interlocutory Appeal of the 'Interim Decision on the Death of Mr Mustafa Amine Badreddine and Possible Termination of Proceedings'](#) (Appeals Chamber), 11 July 2016, para. 41.

²⁰² See the Gbagbo Response, *supra* note 3, paras. 168-170; and the Blé Goudé Response, *supra* note 3, paras. 194, 203-206.

²⁰³ See the "Decision on 'Urgent Prosecution's motion seeking clarification on the standard of a 'no case to answer' motion'", *supra* note 198, para. 11.

²⁰⁴ See the "Judgment on the appeal of Mr Bosco Ntaganda against the 'Decision on Defence request for leave to file a 'no case to answer' motion'" (Appeals Chamber), No. [ICC-01/04-02/06-2026 OA6](#), 5 September 2017, para. 44.

on an applicable standard – and to properly articulate it – prior to the NCTA procedure, during said proceedings, and at the very moment of issuing the Majority 15 January 2019 Oral Decision and belated reasoning thereof on 16 July 2019.

118. The Majority's failure to agree on any standard when making its respective factual determination is demonstrated in a number of ways. The overall defective nature of the proceedings leading to the 15 January 2019 Oral Decision – coupled with the several instances of misguided and inconsistent evidentiary assessment which riddle the 16 July 2019 Reasons – reveal indeed the lack of a defined standard and the continued substantial disagreement on how to approach evidence in general and at the NCTA stage particularly.

119. Firstly, as regards the fairness of the NCTA procedure in this case, on 13 June 2018, Judge Tarfusser as the Single Judge rejected the Prosecution's request seeking clarification on the standard of a NCTA motion.²⁰⁵ The Single Judge explicitly refused to state his position on the standard to be applied.²⁰⁶ He also declined to provide any additional guidance on the basis that the Prosecution's reference to the "no case to answer" in the *Ruto* case amounted to "*a mischaracterisation of the procedural steps devised by th[e] Chamber*"²⁰⁷ – i.e. for Judge Tarfusser, the parties and participants were not dealing with a NCTA motion.

120. Thus, the Defence,²⁰⁸ the Prosecution²⁰⁹ and the Legal Representative²¹⁰ presented their submissions merely guessing what they were required to address

²⁰⁵ See the "Decision on 'Urgent Prosecution's motion seeking clarification on the standard of a 'no case to answer' motion'", *supra* note 198.

²⁰⁶ *Idem*, para. 13.

²⁰⁷ *Idem*, para. 11.

²⁰⁸ See the "Corrigendum to the 'Blé Goudé Defence No Case to Answer Motion' (ICC-02/11-01/15-1198-Conf), 23 July 2018", 3 August 2018, No. [ICC-02/11-01/15-1198-Conf-Corr](#); and the "Version corrigée de la « Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquiescement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée »", No. [ICC-02/11-01/15-1199-Corr](#), 25 September 2018.

²⁰⁹ See the "Annex 1 - Prosecution's Consolidated Response to the Defence No Case to Answer", No. [ICC-02/11-01/15-1207-Conf-Anx1](#), 10 September 2018.

before the Chamber and up to which standard the evidence was going to be considered by the bench. The Prosecution²¹¹ and the Victims²¹² included in their submissions lengthy observations on the applicable standard and/or approach to evidence at the middle stage of the proceedings.

121. The Chamber nonetheless, never addressed these observations. Moreover, the confusion increased when, on 10 December 2018, the Majority *proprio motu* scheduled a hearing on the continued detention of the Defendants²¹³ and sought the views from the parties and participants on the “*appropriateness and modalities of interim release*”.²¹⁴ At that time, as confirmed by Judge Herrera Carbuccia²¹⁵ deliberations were on-going - since the oral pleadings on the NCTA motions had only concluded on 22 November 2019.²¹⁶ Although the debates were not yet resolved, the Majority – at least apparently – had already decided the fate of the trial. As feared by Judge Herrera Carbuccia,²¹⁷ the Majority’s approach did predetermine - or at least appeared to predetermine - major issues related to the pending NCTA motions.

122. In this regard, the Legal Representative recalls that judicial impartiality is the *sine qua non* condition of a fair trial pursuant to article 67(1) of the Statute. In fact, article 41(2) of the Statute provides that “[a] judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground”, and article 4(1) of the Code of Judicial Ethics emphasises the importance of such appearances and

²¹⁰ See the “Response to Defence Submissions on the specific factual issues for which the evidence presented could be insufficient to reasonably support a conviction (ICC-02/11-01/15-1198-Conf and ICC-02/11-01/15-1199)”, No. [ICC-02/11-01/15-1206-Red](#), 10 September 2018 (the “CLR V Response”).

²¹¹ See the “Annex 1 - Prosecution’s Response to Defence No Case to Answer”, *supra* note 209, paras. 27-180.

²¹² See the CLR V Response, *supra* note 210, paras. 38-103.

²¹³ See the “Order convening a hearing on the continued detention of the accused”, *supra* note 187. See also, the “Dissenting Opinion of Judge Herrera Carbuccia”(Judge Herrera Carbuccia), No. [ICC-02/11-01/15-1229-Anx](#), 10 December 2018.

²¹⁴ See the “Order convening a hearing on the continued detention of the accused”, *supra* note 187, para. 11.

²¹⁵ See the “Dissenting Opinion of Judge Herrera Carbuccia”, *supra* note 213, para. 4.

²¹⁶ See [T-230](#), page 23.

²¹⁷ See the “Dissenting Opinion of Judge Herrera Carbuccia”, *supra* note 213, para. 4.

perceptions. Moreover, the Plenary of the Court has consistently established that “[i]t is not necessary for an applicant seeking to disqualify a judge to show actual bias on behalf of the judge; rather, the appearance of grounds to doubt his or her impartiality will be sufficient [...] the relevant standard of assessment is whether the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias in the judge”.²¹⁸

123. However, this is only a secondary matter when compared to the Majority’s inability to dispel uncertainty about the applied standard of proof and their approach to evidence – also at the time of pronouncing its decision acquitting the two Defendants.²¹⁹ Indeed, on 15 January 2019, the Majority’s oral ruling lasted slightly more than ten minutes – during which no mention of the bench’s approach to evidence was made.

124. However, Judge Tarfusser did make a vague reference to it during the hearing held the following day,²²⁰ when addressing Judge Herrera Carbuccion’s concerns on this matter.²²¹ He cryptically stated that the Majority had assessed the Prosecution’s evidence just “[t]o the extent necessary for warranting the Defence to respond” and did not employ the beyond reasonable doubt standard.²²² While it is a common and uncontroversial practice for a Chamber not to set out expressly the standard of proof it applies, especially when delivering an oral decision, the Majority’s subsequent conduct evinces that such a standard was lacking in the “mind” of the two Judges when they made their determination.

²¹⁸ See the “Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the disqualification of Judge Christine Van den Wyngaert from the case of The Prosecutor v Germain Katanga” (Plenary), No. [ICC-01/04-01/07-3504-Anx](#), 22 July 2014, paras. 38-39. See also, ECCC, *Nuon Chea and Khieu Samphan*, Case No. E314/12/1, [Reasons for Decision on Applications for Disqualification](#) (Trial Chamber), 30 January 2015, para. 36.

²¹⁹ See the 15 January 2019 Oral Decision, *supra* note 30.

²²⁰ See the 16 January 2019 Release Decision, *supra* note 32, pp. 4-5.

²²¹ See the 15 January 2019 Dissenting Opinion, *supra* note 23.

²²² See the 16 January 2019 Release Decision, *supra* note 32, p. 4, lines 11-15.

125. Indeed, the extremely puzzling situation did not improve with the issuance of the written reasons six months later, on 16 July 2019.²²³ As discussed *supra*, the three annexes supposed to form the basis for the 15 January 2019 Oral Decision do not provide an applicable common agreed standard. As also noted *supra*, Judge Tarfusser even changed his own mind since his statement of 16 January 2019 and indicated in his Opinion that the only possible standard was indeed the “beyond reasonable doubt” of article 74 of Statute.²²⁴ There could not have been agreement within the Majority at the time of the 15 January 2019 Oral Decision because the standard was not even clear in the mind of each Judge forming the Majority.

126. In addition, in the written reasons that followed, the three Judges made no secret that they looked at the evidence against three different thresholds. While such fractured views are obviously acceptable between the Majority and the dissenting Judge, a disagreement of this magnitude within the Majority itself is inadmissible. The Majority cannot simply agree on the outcome of the proceedings (*i.e.* acquittal in this case), without agreeing on the reasons why the two Defendants are to be acquitted and how to reach such a conclusion. In the absence of consensus thereon, the Majority should have refrained from issuing any such decision, the Defence motions should have been dismissed and the trial should have continued.²²⁵

127. Lastly, all the procedural and legal errors identified in the Appeal Brief and analysed *supra* had an impact on the evaluation by the Majority of the facts of the case as the limited number of examples examined *infra* will show. The Legal Representative submits that had the Chamber not erred in dealing with the NCTA procedure, the decision would have been substantially different. In the circumstances

²²³ See Judge Tarfusser’s Opinion, *supra* note 13, para. 124; Judge Henderson’s Reasons, *supra* note 17, para. 2041; and the 16 July 2019 Dissenting Opinion, *supra* note 37, para. 2.

²²⁴ See the 16 January 2019 Release Decision, *supra* note 32, p. 4. Cf. the Judge Tarfusser’s Opinion, *supra* note 13, para. 65.

²²⁵ See STL, *Ayyash et al.*, Case No. STL-18-10-MISC.2/AC F0006, [Decision on Appeal against Decision of President convening Trial Chamber II](#) (Appeals Chamber), 13 December 2019, paras. 16-24.

of this case, there is a high likelihood that the Chamber, had it not committed the alleged procedural and legal errors, would not have acquitted Mr Gbagbo and Mr Blé Goudé.

(i) *Relevant examples of the Majority's errors*

128. The Majority's inconsistent, unclear and unreasonable factual and evidentiary assessments in relation to the identified examples reveal the Chamber's errors of law and procedure in failing to agree on a clear and consistent standard of proof for making its factual determinations.

129. The Legal Representative submits that there is no reasoning supporting several of the crucial factual findings of the Chamber or said reasoning is flawed in several aspects. In fact, the reasoning shows a general lack of proper consideration of items of evidence that were relevant on their face and, as such, should have been addressed. The Majority also failed to adopt a holistic approach to evidence. In particular, it failed to assess individual items of evidence and/or specific facts in light of the elements in the entire record of the case and in the context of other key corroborating evidence (including circumstantial and hearsay evidence) and/or other key facts. These errors of fact are elucidated *infra* through some examples focusing on the most relevant issues to the interests of the participating Victims, while addressing some of the related Defence's arguments.²²⁶

130. In order to illustrate the nature and impact of said errors, the Legal Representative only refers to the most significant findings in Judge Henderson's Reasons and Judge Tarfusser's Opinion which would have been substantially different from the ones rendered and which, it is submitted, make the Majority's acquittal unreliable and invalidate the impugned decision.

²²⁶ See the Gbagbo Response, *supra* note 3, Section IV, paras. 225-404; and the Blé Goudé Response, *supra* note 3, paras. 221-229.

a. Errors committed in relation to the 16-19 December 2010 rapes in connection with the RTI march (1st charged incident)

131. First, Judge Henderson found that [REDACTED] and [REDACTED], who were taking part in the march to the RTI on 18 December 2010, were raped [REDACTED].²²⁷ Nonetheless, he concluded, without providing any explanation, that the rapes had no *“obvious connection with the operation to repress the RTI march”*.²²⁸ Judge Henderson acknowledged that *“[m]ost cases of rape do appear to conform with the claimed pattern, in that victims were violated after being identified as supporters of Mr Ouattara or as belonging to a particular ethnic, national or religious group”*²²⁹ but without further ado concluded that the identification of those women may have *“served merely as a pretext”* to justify their rape.²³⁰

132. Second, Judge Henderson concluded that the evidence provided by [REDACTED] could not be a reasonable basis to conclude that there was a policy to rape female pro-Ouattara demonstrators because it was anonymous hearsay – [REDACTED].²³¹ However, direct evidence of formal adoption of a policy is not required; a policy need not to be formalised and can be inferred from the manner in which the acts occur.²³² Moreover, Judge Henderson’s conclusion is inconsistent with the approach adopted by the Chamber during the trial *vis-à-vis* anonymous hearsay,²³³ and with the one taken by the Appeals Chamber in the *Ngudjolo* case, namely that

²²⁷ See Judge Henderson’s Reasons, *supra* note 17, paras. [REDACTED].

²²⁸ *Idem*, paras. 1217, 1608-1609.

²²⁹ *Idem*, para. 1882.

²³⁰ *Ibid.*

²³¹ [REDACTED].

²³² See, *inter alia*, the “Judgment pursuant to article 74 of the Statute” (Trial Chamber II), No. [ICC-01/04-01/07-3436-tENG](#), 2 April 2015, paras. 1109-110. See also, the “Decision on the confirmation of charges against Laurent Gbagbo” (Pre-Trial Chamber I), No. [ICC-02/11-01/11-656-Red](#), 12 June 2014, para. 215; and the “Decision on the confirmation of charges” (Pre-Trial Chamber I), No. [ICC-01/04-01/10-465](#), 16 December 2011, para. 263.

²³³ See the “Decision on requests for leave to appeal the ‘Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and (68(3))’” (Trial Chamber I), No. [ICC-02/11-01/15-612](#), 8 July 2016, para. 17.

*“[t]he fact that evidence is hearsay does not necessarily deprive it of probative value, but does indicate that the weight or probative value afforded to it may be less, ‘although even this will depend upon the infinitely variable circumstances which surround hearsay evidence’”.*²³⁴

133. Lastly, Judge Henderson concluded that there was no evidence suggesting that Mr Gbagbo would have been briefed in real-time about the developments during the day of the RTI march and the use of violence by FDS.²³⁵ However, the Prosecution presented evidence showing that Mr Gbagbo was informed of civilian deaths on the same day of the march,²³⁶ and that he met with the CEMA and his ministers in the course of the day on 16 December 2010.²³⁷

b. Errors committed in relation to the 25 February 2011 clashes on the Boulevard Principal (2nd charged incident)

134. The Majority committed several errors of fact in relation to the clashes on the *Boulevard Principal* that occurred on 25 February 2011. These errors are demonstrative of the Majority’s erroneous approach in assessing the sufficiency of the evidence at the NCTA stage and are the clear result of its failure to articulate and consistently apply a clearly defined standard of proof and/or approach to evidence.

135. The language used in Judge Henderson’s Reasons reveals that a standard of proof other than the one announced was applied in the assessment of the evidence related to this incident. In reaching several of his conclusions, Judge Henderson uses the verb “*would*”,²³⁸ in stark contrast with the standard of proof he indicated to be appropriate at this stage of the proceedings.²³⁹

²³⁴ See the “Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled ‘Judgment pursuant to article 74 of the Statute’” (Appeals Chamber), No. [ICC-01/04-02/12-271-Corr A1](#), 7 April 2015, para. 226.

²³⁵ See Judge Henderson’s Reasons, *supra* note 17, para. 1216.

²³⁶ See P-0009, [T-196-Red2](#), pp. 24-31.

²³⁷ See P-0009, [T-196-Red2](#), pp. 21-22; P-0010, [T-139-Red2](#), pp. 39-41; and P-0011, [REDACTED].

²³⁸ See Judge Henderson’s Reasons, *supra* note 17, paras. 1661, 1666, 1670, 1674.

²³⁹ *Idem*, introductory paras. 1 *et seq.*

136. It also appears that the Majority erred by failing to analyse the evidence in its entirety, applying instead a fragmentary approach and discarding evidence following an overly strict standard of proof. For example, Judge Henderson expected all witnesses to be entirely concordant as to the exact timing of the events leading to the clashes on the *Boulevard Principal*.²⁴⁰ As such, minor discrepancies among witnesses' accounts as to the timing and other marginal aspects led Judge Henderson to reject all testimonies.²⁴¹ He concluded that *"while the accounts of P-0436, P-0442 and P-0109 are plausible when seen in isolation, they are incompatible in relation to a number of significant aspects of the narratives they provide. Since their respective accounts cannot all be entirely true at the same time, this raises serious questions about their truthfulness altogether. Considering that only one of the three testimonies can be truthful in its entirety and there is no possibility to determine which one this is, it would be difficult for a reasonable trial chamber to reach any conclusion based on this evidence"*.²⁴²

137. This statement is highly problematic. Contrary to the Defence's submissions in this regard,²⁴³ it is the chamber's duty to analyse the different testimonies and to decide which one is more reliable and for which parts. In the *Nyiramasuhuko et al.* case, the Appeals Chamber of the ICTR found that *"[w]hen faced with competing versions of the same event, it is the prerogative of the Trial Chamber to decide which version is more credible"*.²⁴⁴

138. The Majority cannot refuse to analyse the evidence before it and *a fortiori*, cannot reject the totality of the evidence on a fact because of existing contradictions among different accounts. It is settled jurisprudence that a witness is not necessarily

²⁴⁰ *Idem*, paras. 1636-1639, 1657-1661.

²⁴¹ *Idem*, para. 1666.

²⁴² *Ibid.*

²⁴³ See the Gbagbo Response, *supra* note 3, paras. 328-349.

²⁴⁴ See ICTR, *Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, [Judgement](#) (Appeals Chamber), 14 December 2015, para. 3210.

untruthful if contradicted by other credible evidence.²⁴⁵ As recently recalled in the *Ntaganda* case: “[i]nconsistencies, contradictions, and inaccuracies do not automatically render a witness’s account unreliable in its entirety, as witnesses, depending on their personal circumstances, may experience, and therefore remember, past events in different ways”.²⁴⁶ The duty of the trial chamber as first trier of facts is further reflected in the respect accorded by the Appeals Chamber to its conclusions as “[d]eference to the Trial Chamber on matters of fact and witness credibility is based essentially on the fact that the Trial Chamber has the advantage of observing witnesses in person and so are better placed to choose between divergent accounts of the same event”.²⁴⁷

139. Judge Henderson further erred in discarding the Prosecution’s submissions for having “ignored most of these differences”.²⁴⁸ At that stage of the proceedings, the Prosecution was not to address all the discrepancies in the relevant testimonies, but rather to show that the relevant evidence could support the charges.

140. In the same vein, Judge Henderson committed several errors of fact in assessing the “evidence concerning the Police”.²⁴⁹ In particular, he erred in finding that “[t]he contradictions amongst the witnesses hamper the ability of any reasonable trial chamber to reach conclusions with regard to the participation of the Police in the clashes of 25 February 2011”²⁵⁰ and therefore “[t]his renders moot any discussion about the Prosecutor’s contention that the Police acted with discriminatory intent against the inhabitants of Doukouré”.²⁵¹ As already mentioned, it is the chamber’s duty to analyse contradictions amongst testimonies, and to assess the credibility of the relevant

²⁴⁵ See the “Judgment pursuant to Article 74 of the Statute” (Trial Chamber VII), No. [ICC-01/05-01/13-1989-Red](#), 19 October 2016, para. 204. See also, ICTY, *Popović et al.*, Case No. IT-05-88-A, [Judgement](#) (Appeals Chamber), 30 January 2015, para. 137.

²⁴⁶ See the “Judgement” (Trial Chamber VI), No. [ICC-01/04-02/06-2359](#), 8 July 2019, para. 80.

²⁴⁷ See ICTR, *Rutaganda*, Case No. ICTR-96-3-A, [Judgement](#) (Appeals Chamber), 26 May 2003, para. 21 (emphasis added).

²⁴⁸ See Judge Henderson’s Reasons *supra* note 17, para. 1654.

²⁴⁹ *Idem*, paras. 1667-1674.

²⁵⁰ *Idem*, paras. 1667.

²⁵¹ *Ibid.*

witnesses. The Chamber cannot absolve itself from this duty by simply noting that it is impossible - on the sole basis of the existence of such contradictions - to reach a conclusion as to the participation of the Police. Moreover, a Chamber can rely on uncorroborated evidence,²⁵² and therefore decide to rely on a single witness to prove a fact - even more so at the NCTA stage.

141. It is also established jurisprudence that different testimonies do not need to *“be identical in all aspects or describe the same fact in the same way. Every witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others”*.²⁵³

142. Judge Henderson further erred by speculating on the reasons for which the Police shot on civilians, mentioning that the *“Police shooting was thus possibly aimed at averting a situation which endangered their own physical integrity rather than at attacking the civilians in front of them”*.²⁵⁴ Any alternative inference must be supported by the evidence in the record of the case.²⁵⁵ However, the available evidence does not allow

²⁵² See ICTR, *Hategekimana*, Case No. ICTR-00-55B-A, [Judgement](#) (Appeals Chamber), 8 May 2012, para. 18.

²⁵³ See ICTR, *Nahimana et al.*, Case No. ICTR-99-52-A, [Judgement](#) (Appeals Chamber), 28 November 2007, para. 428. See also, ICTR, *Bikindi*, Case No. ICTR-01-72-A, [Judgement](#) (Appeals Chamber), 18 March 2010, para. 81; ICTR, *Ntawukulilyayo*, Case No. ICTR-05-82-A, [Judgement](#) (Appeals Chamber), 14 December 2011, para. 24; ICTR, *Kanyarukiga*, Case No. ICTR-02-78-A, [Judgement](#) (Appeals Chamber), 8 May 2012, para. 177; ICTR, *Gatete*, Case No. ICTR-00-61-A, [Judgement](#) (Appeals Chamber), 9 October 2012, para. 205; ICTR, *Bizimungu*, Case No. ICTR-00-56B-A, [Judgement](#) (Appeals Chamber), 30 June 2014, para. 241.

²⁵⁴ See Judge Henderson’s Reasons, *supra* note 17, para. 1668.

²⁵⁵ See, ICTY, *Delalić et al.*, Case No. IT-96-21-T, [Judgment](#) (Trial Chamber), 16 November 1998, para. 601: *“proof beyond reasonable doubt should be understood as follows: it need not reach certainty but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence, ‘of course it is possible, but not in the least probable’, the case is proved beyond reasonable doubt, but nothing short of that will suffice”* (emphasis added). See also, ICTY, *Tadić*, Case No. IT-94-1-A, [Judgment](#) (Appeals Chamber), 15 July 1999, paras. 178-183; ICTY, *Mrkšić and Šljivančanin*, Case No. IT-95-13/1-A, [Judgment](#) (Appeals Chamber), 5 May 2009, para. 220; ICTY, *Martić*, Case No. IT-95-11-A, [Judgment](#) (Appeals Chamber), 8 October 2008, para. 61; ICTY, *Delalić et al.*, Case No. IT-96-21-A, [Judgment](#) (Appeals Chamber), 20 February 2001, para. 458;

for such a conclusion – even more so at the NCTA stage in which a less stringent standard was to be applied.

143. Judge Henderson also manifestly erred in concluding that “*it would not be possible to infer that the Police targeted individuals perceived to be Ouattara supporters*”²⁵⁶ because “*there is evidence to the effect that people who would normally be perceived as pro-Gbagbo also resided in Doukouré*”.²⁵⁷ This over simplistic conclusion cannot justify putting aside direct evidence that clearly points to such a targeting.²⁵⁸ It is also worth noting that this finding is based on the testimony of P-0436 referring to two individuals of Bété ethnicity setting up roadblocks.²⁵⁹ No reasonable trial chamber would have relied only on this discrete portion of P-0436’s evidence to reach such a conclusion, while ignoring that the same witness testified that the civilians were targeted on that very day based on their ethnicity and religion.²⁶⁰

144. Furthermore, Judge Henderson erred by speculating that “*it seems that the pro-Gbagbo looters would have been exposed to the gunfire as the Doukouré inhabitants*”.²⁶¹ Again, no reasonable trial chamber would have reached such a conclusion based on a mere guess and not on the available evidence. Similarly, Judge Henderson erred by elaborating discrete assumptions and speculating as to the reasons behind the clashes between the pro-Gbagbo and pro-Ouattara residents in Yopougon.²⁶² He concluded that it has to be assumed that the population of Yopougon was aware that the security situation was precarious and therefore Blé Goudé’s speeches did not instil

and ICTR, *Bagosora*, Case No. ICTR-98-41-A, [Judgment](#) (Appeals Chamber) 14 December 2011, paras. 551, 560-562.

²⁵⁶ See Judge Henderson’s Reasons, *supra* note 17, para. 1670.

²⁵⁷ *Idem*, para. 1670.

²⁵⁸ See P-0436, [T-148](#), pp. 48-49 and 50-51; and P-0433, [T-147-Red2](#), pp. 31, [REDACTED], and [REDACTED]. See also, on the targeting of Dioula in Doukouré, P-0440, [T-157-Red2](#), pp. 19, 72-73; P-0459, [T-153-Red2](#), pp. 2, 25-26, 42-43, 77-78; P-0438, [T-150-Red2](#), p. 6; P-0442 [REDACTED].

²⁵⁹ See Judge Henderson’s Reasons, *supra* note 17, para. 1670, footnote 3755.

²⁶⁰ See P-0442, [T-19-Red2](#), p. 76, 77, 79.

²⁶¹ See Judge Henderson’s Reasons, *supra* note 17, para. 1670 (emphasis added).

²⁶² *Idem*, paras. 1764-1771.

fear amongst the local population,²⁶³ nor they exacerbated the hostility between the two groups of residents. No reasonable trial chamber would have “*assumed*” such a fact, while discarding direct evidence on the impact of Blé Goudé’s speech on the pro-Gbagbo supporters generally and on this specific occasion.²⁶⁴

145. Judge Henderson also erroneously concluded that the violence on 25 February 2011 started before Blé Goudé’s speech at *Le Baron Bar* on that day and that, therefore, “[t]he immediate cause for this violence appears to have been an attack by suspected RHDP sympathisers, who set fire to a bus that apparently transported pro-Gbagbo students”.²⁶⁵ In this regard, he accorded too much weight on the Police commissioner’s report and too little on evidence about Blé Goudé’s own actions on 24 February 2011, and direct evidence about the clashes starting immediately after his speech.²⁶⁶

c. Errors committed in relation to the 3 March 2011 attack on the women’s demonstration (3rd charged incident)

146. The Legal Representative concurs with the Prosecution’s analysis and submits that Judge Henderson erred in assessing the evidence as to the attribution of gunfire to the FDS convoy for the 3 March 2011 incident.²⁶⁷

147. As far as the facts are concerned, Judge Henderson’s analysis provides a set of alternative hypotheses on how the relevant events occurred. Instead of proceeding to a rigorous assessment of the evidence at the basis of the Prosecution’s narrative, the analysis at hand offers a different scenario in which there might have been armed

²⁶³ *Idem*, para. 1764.

²⁶⁴ See P-0459, T-153-Red2, pp. 15-16, 48-49. See also, P-0440, T-157-Red2, pp. 30-31, 33-35, 41-44, 50-51; P-0442, T-20-Red2, pp. 19-21; P-0438, T-150-Red2, pp. 39-41; P-0438, T-151-Red2, p. 61; and P-0109, T-154-Red2, pp. 22, 44-46.

²⁶⁵ See Judge Henderson’s Reasons, *supra* note 17, para. 1765. See also, the Blé Goudé Response, *supra* note 3, paras. 226-227.

²⁶⁶ See note 264.

²⁶⁷ See the Appeal Brief, *supra* note 2, paras. 166-182.

individuals among the women's march²⁶⁸ and/or victims could have been injured by ricocheting bullets.²⁶⁹

148. In response to the relevant Defence's arguments,²⁷⁰ the Legal Representative recalls her submissions on the standard and approach to evidence,²⁷¹ and submits that Judge Henderson provided an inconsistent and unreasonable assessment of the evidence. On the contrary, the evidence presented by the Prosecution was sufficient to support its narrative of the events and well-structured in so far as it included insiders, experts and crime-based witnesses.

149. As regards the testimony of insider witnesses with a military background – [REDACTED], P-0156 and P-0321 - the Legal Representative notes that there is not a single piece of evidence in the record of the case pointing to the presence of any armed person who could have fired against the crowd. Such a scenario remains fully unsupported and contradicted by the evidence in the record.²⁷² There is no trace of the presence of armed rebels at the march or of any damage to the personnel or equipment²⁷³ that the FDS convoy might have suffered from an alleged attack. Similarly, the rules of engagement that were *generally* applicable to the FDS supply convoys and mentioned by both P-0156²⁷⁴ and P-0321,²⁷⁵ are not evidence of a particular conduct at the specific time of the events.

²⁶⁸ See Judge Henderson's Reasons, *supra* note 17, paras. 1783-1784.

²⁶⁹ *Idem*, para. 1777.

²⁷⁰ See the Gbagbo Response, *supra* note 3, paras. 238-272.

²⁷¹ See the "Response to Defence Submissions on the specific factual issues for which the evidence presented could be insufficient to reasonably support a conviction (ICC-02/11-01/15-1198-Conf and ICC-02/11-01/15-1199)", No. [ICC-02/11-01/15-1206-Conf](#), 10 September 2018, paras. 38-103.

²⁷² See P-0364 saw a very few men and a large group of women and she did not see any Mògôbas or armed men, [T-190](#), p. 25; [REDACTED] and P-0190 saw only women at the march, [T-22-Red2](#), pp. 15-16.

²⁷³ See *e.g.*, [REDACTED].

²⁷⁴ See P-0156, [T-172-Red2](#), p. 30.

²⁷⁵ See P-0321, [T-62-Red3](#), pp. 6-7.

150. Instead, the evidence clearly shows that the BTR-80 fired first,²⁷⁶ without any provocation;²⁷⁷ that two of the soldiers in the BTR-80 opened fired against the demonstrators,²⁷⁸ and that at least seven women died as a result. Therefore, if anything was to be discussed on a purported FDS legitimate self-defence, it was to be done through the presentation of the Defence case and not at the NCTA stage.

151. Moreover, Judge Henderson's analysis entirely disregards all eye-witness testimony on these events and further shows the Majority's erroneous approach and conclusions. In response to the Defence's arguments,²⁷⁹ by way of example, the evidence provided by dual status P-0172 and P-0237 is indeed far from being a mere hearsay. Around 9:45, 10 am on the day of the women's march, P-0172 heard heavy gunfire and shooting.²⁸⁰ Once at the Banco roundabout, he saw six bodies including the one of his sister in law, Fatoumata Coulibaly²⁸¹ – who, as P-0172 knew, was taking part in the march.²⁸² Similarly, in the morning of 3 March 2011, P-0237 saw the body of her daughter Nachamy Bamba,²⁸³ and was able to identify it in the video of the march.²⁸⁴ [REDACTED].²⁸⁵

152. P-0114, P-0184 and P-0190 were all in the exact place where the incident occurred. [REDACTED].²⁸⁶ [REDACTED].²⁸⁷ P-0184 was directly involved in the organisation of the march.²⁸⁸ She saw a tank approaching²⁸⁹ and heard shooting and

²⁷⁶ [REDACTED].

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

²⁷⁹ See the Gbagbo Response, *supra* note 3, paras. 250-256.

²⁸⁰ See P-0172, T-174-Red2, p. 6.

²⁸¹ *Idem*, p. 7.

²⁸² *Idem*, p. 41.

²⁸³ See P-0237, T-175-Red2, p. 6.

²⁸⁴ See P-0237, CIV-OTP-0081-0380-R02 at 0388-0390, paras. 42-48. See also, CIV-OTP-0077-0411, at 00:05:47:07.

²⁸⁵ [REDACTED].

²⁸⁶ [REDACTED].

²⁸⁷ [REDACTED].

²⁸⁸ See P-0184, T-215-Red, pp. 26-28.

²⁸⁹ *Idem*, p. 32.

shell being fired.²⁹⁰ She saw young people transporting the body of six women,²⁹¹ including the one of Bamba Nachamy.²⁹² P-0190 confirmed the presence at the place of the incident of dual status P-0172's sister in law, Fatoumata Coulibaly, as they went together to the march.²⁹³ She saw the tank firing²⁹⁴ and heard a shell falling, the ground shacking and fell to the ground together with the other women.²⁹⁵ Just before the shell landed, Fatoumata Coulibaly was standing in front of P-0190.²⁹⁶ P-0190 was covered in blood,²⁹⁷ but she was not wounded; it was the blood of the people on the ground that was sprayed all over her.²⁹⁸ It is obvious that, all these eye-witnesses provided direct evidence on the events of 3 March 2011.

153. In the same vein, the alleged contradictions between the testimony of crime-based and insider witnesses²⁹⁹ are inapposite and do not take into account the different roles that those two sets of witnesses play in a trial. Indeed, the three [REDACTED] insider witnesses - P-0156, P-0321 and [REDACTED] - are the only kind of witnesses expected to have knowledge of the composition of the FDS supply convoy – including the precise description of the number and type of military vehicles – as well as on the kind of weapons and ammunitions that were fired, also relying on the type of noise heard during the shooting.³⁰⁰ Demanding the same exercise to crime-based witnesses who directly suffered from the events is simply unreasonable as it is to disregard their testimony based on alleged inaccuracies on those aspects of their accounts.

²⁹⁰ *Ibid.*

²⁹¹ *Idem*, p. 34.

²⁹² *Ibid.*

²⁹³ See P-0190, T-21-Red3, p. 54.

²⁹⁴ *Idem*, p. 57.

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ *Idem*, p. 58.

²⁹⁸ *Ibid.*

²⁹⁹ See Judge Henderson's Reasons, *supra* note 17, paras. 1781-1783.

³⁰⁰ [REDACTED].

154. Turning briefly to Judge Henderson's limited assessment of video evidence CIV-OTP-0077-0411³⁰¹ and related Defence's arguments,³⁰² the Legal Representative notes the following: (i) the relevant images have been showed to eye-witnesses of the 3 March 2011 incident and all of them have recognised the place,³⁰³ the march³⁰⁴ and the victims;³⁰⁵ (ii) the video has been found by expert P-0606³⁰⁶ to be free of any manipulation and to be authentic;³⁰⁷ (iii) expert P-0606 also clarified that whether the metadata related to video CIV-OTP-0077-0411 indicate a different date is not relevant, being an information given by the file structure of the support (*i.e.* the camera) and not of the video itself;³⁰⁸ and (iv) the woman that the Defence bluntly accused twice to be acting her own death in the video³⁰⁹ was identified by several witnesses as being Moyamou Koné,³¹⁰ one of three women for which it was possible to identify the body and to establish the kinship with dual status P-0582, through a DNA test.³¹¹

155. Concerning the victims of the events, the three victims for which it was possible to find the body – and for which the kinship with [REDACTED] P-0579,

³⁰¹ See Judge Henderson's Reasons, *supra* note 17, paras. 264-362.

³⁰² See the Gbagbo Response, *supra* note 3, paras. 257-262.

³⁰³ See [REDACTED]; P-0184, T-215-Red, pp. 29-30; P-0190, T-21-Red3, p. 69; and [REDACTED].

³⁰⁴ See [REDACTED]; P-0184, T-215-Red, pp. 29-30; P-0190, T-21-Red3, p. 69; and [REDACTED].

³⁰⁵ See [REDACTED]; and P-0581, T-188-Red2, pp. 11-13.

³⁰⁶ See P-0606, T-163, p. 43 ("*The result in this case is that there was no trace of any kind of manipulation*"). See also P-0583, specifically in relation to the audio assessment, T-186-Red, pp. 45 and 48.

³⁰⁷ See P-0606, T-163, p. 43 ("*[T]he result of this analysis is that the hypothesis more probable is the hypothesis that the video file is authentic*").

³⁰⁸ See P-0606, T-163, pp. 44-45.

³⁰⁹ See the "Version corrigée de la 'Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquiescement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée'", No. [ICC-02/11-01/15-1199-Corr](#), 25 September 2018, [Annex 3](#), paras. 304, 349.

³¹⁰ See P-0172, T-174-Red2, p. 8; P-0237, CIV-OTP-0081-0380 at 0389, para. 43; and P-0582, CIV-OTP-0081-0468-R02 at 0081-0481, para. 64.

³¹¹ See P-0601, T-162, p. 28. See also the relevant report, CIV-OTP-0084-3930 at 3936.

P-0580 and P-0582 has been proved through a DNA test³¹² – were all found to have *remarkably similar* injuries about the same level, the neck and the shoulder area.³¹³

156. The Legal Representative recalls her submissions *supra* in relation to the death of Moyamou Koné,³¹⁴ daughter of [REDACTED] P-0582. With specific regard to the autopsy of her body,³¹⁵ expert P-0585 felt confident that, particularly on the shoulder blade, the fractures observed were gunshot injuries.³¹⁶ The clothing also showed an exit hole at the back of the right shoulder, which was remarkably similar to the hole expert P-0585 had seen during the examination of Sylla Malon's body.³¹⁷

157. Similarly, expert P-0585 found that Gnon Rokia Ouattara, daughter of [REDACTED], died of a minimum of two gunshots.³¹⁸ P-0585 suspected there may have been more than two because of the observable extent of damage.³¹⁹ She had at least a clear shot to her neck and one lower down. In this case, expert P-0585 could actually see a hole in the skin on the left shoulder that was clearly the entrance of the projectile.³²⁰ Likewise, the cause of death of Sylla Malon, sister of dual status P-0580, was found to be a gunshot injury of her neck and left shoulder.³²¹ Moreover, "*the nature of the damage was suggestive of the use of high velocity ammunition*".³²²

158. In conclusion, the wounds observed on these three victims all appear to be injuries by bullets coming from left to right – showing, as explained by expert P-0585, a clear pattern within them.³²³ Similar injuries to the head, neck and shoulders can be

³¹² *Ibid.*

³¹³ See P-0585, T-189, p. 29.

³¹⁴ See *supra* para. 154.

³¹⁵ See CIV-OTP-0081-0528, autopsy report for victim DZF1C11.

³¹⁶ See P-0585, T-189, p. 28.

³¹⁷ *Ibid.*

³¹⁸ See P-0585, T-189, p. 25. See also, CIV-OTP-0081-0523, the report for victim DZF1C6.

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

³²¹ See P-0585, T-189, p. 17. See also, CIV-OTP-0081-0518, the report for victim DZF1C5.

³²² See P-0585, T-189, p. 23. See also, CIV-OTP-0081-0518, the report for victim DZF1C5.

³²³ See P-0585, T-189, p. 29.

seen on the other women whose bodies were not recovered, but yet were identified by relatives in the video evidence and/or pictures provided.³²⁴ As such, they are incompatible with Judge Henderson's theory on ricocheting bullets.³²⁵

159. As regards the death of Nachamy Bamba, daughter of dual status P-0237, the wounds that P-0106 saw on one of the women killed at the march are compatible with the ones suffered by Nachamy Bamba, based on the photographic³²⁶ and video evidence.³²⁷ In relation to the death of Fatoumata Coulibaly, sister in law of dual status P-0172, the Legal Representative recalls her submissions above in relation to both the testimony of P-0190³²⁸ and the findings of expert P-0606 and P-0583.³²⁹

160. Lastly, in relation to the death of Amy Coulibaly and Adjara Touré, sister of dual status P-0581, the Legal Representative recalls her submissions on the direct nature of the evidence presented by crime-based witnesses P-0106, P-0172, P-0184 and P-0237,³³⁰ and on the examination of video evidence CIV-OTP-0077-0411 by expert P-0606 and P-0583.³³¹ Dual status P-0581 recognised her sister Adjara Touré in the video evidence and in the pictures of the women's demonstration of 3 March 2011.³³²

³²⁴ See P-0237, CIV-OTP-0081-0380 at 0389, para. 44; P-0106, CIV-OTP-0019-0211-R04 at 0220; pictures CIV-OTP-0037-0114, CIV-OTP-0037-0116, CIV-OTP-0037-0117 and CIV-OTP-0037-0118; video CIV-OTP-0077-0411 at 00:05:47:07; P-0579, T-39-Red2, p. 39; and P-0581, T-188-Red2, pp. 13-18.

³²⁵ See Judge Henderson's Reasons, *supra* note 17, para. 1777.

³²⁶ See P-0106, CIV-OTP-0019-0211-R04 at 0220; and pictures CIV-OTP-0037-0114, CIV-OTP-0037-0116, CIV-OTP-0037-0117 and CIV-OTP-0037-0118.

³²⁷ See CIV-OTP-0077-0411 at 00:05:47:07. See also P-0237, CIV-OTP-0081-0380 at 0389, para. 44; and P-0172, T-174-Red2, p. 52.

³²⁸ See *supra* para. 152.

³²⁹ See *supra* paras. 153-154 with footnotes.

³³⁰ See *supra* paras. 151-152.

³³¹ See *supra* paras. 153-154 with footnotes.

³³² See P-0581, T-188-Red2, pp. 13 and 15. See also CIV-OTP-0078-0515.

d. Errors committed in relation to the 17 March 2011 shelling of the Abobo market (4th charged incident)

161. The approach of Judge Henderson to the evidence on the explosions that occurred in Abobo on 17 March 2011 is inconsistent and appears to be unreasonable in requesting a “sufficient level of specificity or certainty” at the NCTA stage.³³³ Instead, the evidence in the record of the case supports the Prosecution’s narrative of the events and establishes that: (i) the BASA had 120mm mortars and its personnel knew how to use them;³³⁴ (ii) elements of the BASA were deployed at Camp Commando before and at the time of the market shelling of 17 March 2011;³³⁵ (iii) 120mm mortars were at Camp Commando on 17 March 2017,³³⁶ and (iv) BASA troops based at Camp Commando fired 120mm mortars in Abobo on 17 March 2011 striking several locations, including the Siaka Koné Market.³³⁷

162. Judge Henderson’s analysis³³⁸ in relation to the availability of 120mm mortars, rests solely on the contradictory testimony of P-0047 – [REDACTED].³³⁹ P-0009 did not testify about the availability of 120mm mortars at Camp Commando on the specific day of the incident.³⁴⁰ The same goes for P-0156, who could only testify about the absence of that kind of mortars between 28 February and 4 March 2011 – two weeks before the shelling.³⁴¹

163. To the contrary and in response to the Defence’s arguments,³⁴² P-0226, P-0239 and P-0164 consistently affirmed that those mortars were indeed available at

³³³ See Judge Henderson’s reasons, *supra* note 17, para. 1839.

³³⁴ See P-0164, T-164-Red2, p. 23.

³³⁵ *Idem*, pp. 50-52 and 77; and P-0239, T-167, pp. 45-48 and 87-91.

³³⁶ See Judge Henderson’s reasons, *supra* note 17, para. 485.

³³⁷ *Idem*, para. 484-495.

³³⁸ See Judge Henderson’s reasons, *supra* note 17, paras. 1805-1811.

³³⁹ [REDACTED].

³⁴⁰ See P-0009, T-196-Red2, p. 41.

³⁴¹ See P-0156, T-172-Red2, p. 33.

³⁴² See the Gbagbo Response, *supra* note 3, paras. 284-288.

Camp Commando and that BASA members fired shells on 17 March 2011.³⁴³ In this regard, the Legal Representative recalls her submissions on the applicable standard at the NCTA stage,³⁴⁴ and notes that Judge Henderson's findings on the credibility of those insider witnesses are inapposite and, in any case, based on mere speculations.³⁴⁵

164. Regarding the timing of the shelling of Abobo and the number of mortar shells that were fired on 17 March 2011, the Legal Representative submits that, in order to establish the occurrence of a shelling of several close locations in a defined area in the course of one day, it is not necessary – but rather irrelevant – to indicate the exact number of shells that were fired and ended up striking those locations. The act itself of shelling is indeed a concerted and persistent use of heavy fire of artillery to hit a specific target.

165. Turning briefly to the video evidence on the incident of 17 March 2011, the Legal Representative notes the following: on video CIV-OTP-0046-1283, two eye-witnesses of the shelling recognised the marketplace just after the incident and identified some of the victims;³⁴⁶ it is not disputed that video CIV-OTP-0042-0593 contains the images of the dead body of P-0536's son, killed by the shelling of 17 March 2011;³⁴⁷ and as regards video evidence CIV-OTP-0043-0268 and CIV-OTP-0051-2092, it is not explained how the images contained in the two videos do not corroborate the oral evidence supporting the Prosecution's narrative of events that took place in Abobo on 17 March 2011.

³⁴³ *Idem*, paras. 490 and 493.

³⁴⁴ See the "Response to Defence Submissions on the specific factual issues for which the evidence presented could be insufficient to reasonably support a conviction (ICC-02/11-01/15-1198-Conf and ICC-02/11-01/15-1199)", No. [ICC-02/11-01/15-1206-Red](#), 10 September 2018, paras. 38-103.

³⁴⁵ See the Judge Henderson's Reasons, *supra* note 17, paras. 1836-1838.

³⁴⁶ See P-0105, [T-213-Red](#), pp. 39-41; and P-0362, [T-206-Red](#), pp. 99-100.

³⁴⁷ See P-0536, [T-23-Red2](#), pp. 11-14.

166. Lastly, the Legal Representative notes Judge Henderson's conclusions on report CIV-OTP-0049-0048 on the shelling sites of Abobo and its author, expert P-0411.³⁴⁸ Judge Henderson indicates that each element needs to be considered in light of the whole set of submitted evidence.³⁴⁹ However, he failed to do so.

167. Contrary to the Defence's submissions,³⁵⁰ expert P-0411 looked at all the available evidence while conducting the investigation and not with the cognitive bias that it was categorically a 120mm mortar attack. He considered the physical evidence on the ground and the references quoted in the letter of mission when he looked at many different possible courses of events.³⁵¹ When asked about the probable shelling using the 120mm mortar weapon system, the evidence led him to the conclusions stated in his report³⁵² – *e.g.* the size and shape of fragmented ammunitions recovered were found to be consistent with a detonation of a 120mm Russian or Soviet mortar shell.³⁵³ Similarly, expert P-0411 could conclude that – given the minimum and maximum range of 120mm mortar shell fired from a Russian or Soviet mortar firing system³⁵⁴ – the area of SOS village and Siaka Koné market were undoubtedly within reach from Camp Commando,³⁵⁵ and there were no high rise buildings or any obstacles in the probable direction of fire that would have limited the use of 120mm mortar ammunition.³⁵⁶

168. Concerning the victims of the event, Judge Henderson's analysis completely disregards all eye-witness testimony and further shows the Majority's erroneous approach. In particular, on 17 March 2011: (i) P-0105 was at the Siaka Koné market

³⁴⁸ See Judge Henderson's Reasons, *supra* note 17, paras. 484-520.

³⁴⁹ *Idem*, para. 1807.

³⁵⁰ See the Gbagbo Response, *supra* note 3, paras. 289-302.

³⁵¹ See P-0411, T-169-Red2, p. 42.

³⁵² *Idem*, pp. 42-43 and 95-96.

³⁵³ *Idem*, pp. 4-5.

³⁵⁴ *Idem*, p. 16.

³⁵⁵ *Idem*, pp. 17-20.

³⁵⁶ *Idem*, p. 80.

when the shelling occurred;³⁵⁷ she was injured³⁵⁸ and saw people being hit by the shell;³⁵⁹ (ii) P-0106 [REDACTED], when he heard the shell hitting the Siaka Koné market;³⁶⁰ on the next day [REDACTED];³⁶¹ (iii) P-0107 could hear the shelling on the Siaka Koné market as [REDACTED];³⁶² (iv) P-0117 [REDACTED]³⁶³ and [REDACTED];³⁶⁴ (v) P-0184 could hear the shelling of the Siaka Koné market even from the distance;³⁶⁵ (vi) P-0294 [REDACTED];³⁶⁶ (vii) Makaridia Doumbia was struck by a bomb on her way home from the Siaka Koné market;³⁶⁷ and her brother, dual status P-0297, provided evidence on the identification of her body at the morgue of Anyama;³⁶⁸ (viii) P-0360 [REDACTED]³⁶⁹ (ix) P-0362 [REDACTED];³⁷⁰ [REDACTED];³⁷¹ [REDACTED];³⁷² (x) P-0363 [REDACTED];³⁷³ (xi) P-0364 was herself hit by the shelling and witnessed several people, including some of her relatives, being struck on the same occasion;³⁷⁴ (xii) P-0489 [REDACTED]³⁷⁵ and, [REDACTED];³⁷⁶ (xiii) P-0536 and her son were struck by a shell next to the Siaka Koné market; she was wounded and her son, [REDACTED], lost his life;³⁷⁷ and (xiv) dual status P-0580 heard the noise of loud shelling³⁷⁸ on the Siaka Koné market;³⁷⁹

³⁵⁷ See P-0105, T-213-Red, pp. 34-35.

³⁵⁸ *Idem*, pp. 36-37.

³⁵⁹ *Idem*, pp. 37-38.

³⁶⁰ See [REDACTED].

³⁶¹ *Ibid.*

³⁶² *Idem*, paras. 156-159.

³⁶³ See [REDACTED].

³⁶⁴ See [REDACTED].

³⁶⁵ See P-0184, T-215-Red, p. 41.

³⁶⁶ See [REDACTED].

³⁶⁷ See P-0297, T-192-Red2, p. 46.

³⁶⁸ See P-0297, CIT-OTP-0041-0412-R02 at 0417-0418, paras. 31-32.

³⁶⁹ See [REDACTED].

³⁷⁰ See [REDACTED].

³⁷¹ [REDACTED].

³⁷² [REDACTED].

³⁷³ See [REDACTED].

³⁷⁴ See P-0364, T-190, pp. 40-46.

³⁷⁵ See [REDACTED].

³⁷⁶ [REDACTED].

³⁷⁷ See P-0536, T-23-Red2, pp. 10-12.

³⁷⁸ See P-0580, T-186-Red, p. 57.

³⁷⁹ *Idem*, p. 58.

and once he got there, he saw people lying dead on the ground with their heads and limbs crushed.³⁸⁰

169. In sum, the Legal Representative submits that being inside the house while the house itself is being shelled or being hit and losing consciousness during the bombing, or even arriving on the place of the incident a few minutes after a shelling took place, does not turn any of the evidence provided by those witnesses into hearsay evidence. All those crime-based witnesses personally heard, saw or suffered from the shelling in Abobo on 17 March 2011.

170. Accordingly, P-0360, P-0362, P-0363 and P-0364 provide also direct evidence: on the death of [REDACTED] being wounded;³⁸¹ on the death of Bamba Lassina,³⁸² Bamba Daouda,³⁸³ Adama, [REDACTED];³⁸⁴ and on Diomandé Amara, Solo, [REDACTED] and Ballo Seydou being wounded;³⁸⁵ [REDACTED] having been struck by a shell;³⁸⁶ and on Issa Bokoum, [REDACTED], Papiss and Isamel being struck during the shelling.³⁸⁷

171. Lastly, on the death of Yaya Diakité, the available evidence is clearly sufficient to establish that he lost his life because of the 17 March 2011 shelling of the Siaka Koné market. The two eye-witnesses, P-0105 and P-0362, saw Yaya Diakité respectively at the moment he was struck by a shell³⁸⁸ and then, when he was wounded lying on the ground at the market, with both legs broken.³⁸⁹ The two witnesses are also consistent in affirming that Yaya Diakité did not die on the spot,

³⁸⁰ *Ibid.*

³⁸¹ See [REDACTED].

³⁸² See P-0362, T-206-Red, pp. 93-100.

³⁸³ *Ibid.*

³⁸⁴ *Ibid.*

³⁸⁵ *Idem.*, pp. 93-100.

³⁸⁶ See [REDACTED].

³⁸⁷ See P-0364, T-190, pp. 40-46.

³⁸⁸ See P-0105, T-213-Red, pp. 34-38.

³⁸⁹ See P-0362, T-206-Red, pp. 99-100.

but, as they were told, was brought to the hospital and died because of his injuries.³⁹⁰ Their testimony is corroborated by video evidence CIV-OTP-0046-1283,³⁹¹ where both P-0105 and P-0362 were able to identify Yaya Diakité,³⁹² seated on the ground with his limbs crushed. The video shows the victim wounded but still alive and confirms the information on Yaya Diakité's death at the hospital, which both P-0105 and P-0362 were given by Yaya Diakité's relatives.³⁹³ In this regard, the elements of the crime of murder may be satisfied independently of whether the victim's body has been identified and the fact of a victim's death can be inferred circumstantially from all of the evidence presented to the Trial Chamber.³⁹⁴

e. Errors committed in relation to the 12 April 2011 rapes in Yopougon (5th charged incident)

172. The Majority also committed several errors of fact when assessing the evidence on the rapes committed in connection with the 12 April 2011 incident. Despite finding that the crimes committed displayed a pattern of criminality motivated by ethnic animosity,³⁹⁵ Judge Henderson concluded that "*it is not possible to make a precise determination as to how many of the victims were killed because they were Dioula*".³⁹⁶ However, a determination of the exact number of victims is not necessary, and even more so at the NCTA stage. Moreover, the Majority could reasonably infer from the totality of the evidence³⁹⁷ that all the crimes committed against the Dioula that day were committed on ethnic grounds. As discussed *supra*³⁹⁸ and contrary to the

³⁹⁰ See P-0105, T-213-Red, pp. 37-38; and P-0362, T-206-Red, pp. 99-100.

³⁹¹ See CIV-OTP-0046-1283 at 02.01.10 minutes.

³⁹² See P-0105, T-213-Red, pp. 39-41; and P-0362, T-206-Red, pp. 66-68.

³⁹³ See note 390.

³⁹⁴ See *e.g.*, ICTY, *Kvočka et al.*, Case No. IT-98-30/1-A, Judgment (Appeals Chamber), 28 February 2005, paras. 260-261; and ICTY, *Krnjelac*, Case No. IT-97-25-T, Judgment (Trial Chamber), 15 March 2002, para. 326.

³⁹⁵ See Judge Henderson's Reasons, *supra* note 17, para. 1862.

³⁹⁶ *Idem*, para. 1860.

³⁹⁷ *Idem*, paras. 1855-1858.

³⁹⁸ See *supra* para. 132.

Defence's arguments,³⁹⁹ a policy need not be formalised, or expressly declared, and can be inferred from the circumstances of the attack.

173. Judge Henderson also erred in concluding that the crimes committed by some perpetrators were opportunistic in nature and were not aimed at harming Ouattara's supporters. In reaching said conclusion, Judge Henderson merely relied on two instances alleging a sudden changing in the perpetrators' mind that instead of leaving the victims' house, decided to stay and to rape and kill.⁴⁰⁰ This deduction is purely speculative. No reasonable trial chamber would have come to such a conclusion if the totality of the evidence had been correctly analysed - including the indication of mass graves containing numerous bodies of individuals of Dioula ethnicity,⁴⁰¹ the fact that individuals of Guéré ethnicity showed to the attackers the Dioula houses,⁴⁰² and the threats made to all Dioulas on the day preceding the attack.⁴⁰³

174. The errors addressed above not only demonstrate that the Majority's decision is unsafe, but also show a total lack of consideration for and acknowledgement of the extent of the persecution suffered by the Victims in this case, particularly in the parts of the impugned decision addressing the accounts provided by dual status individuals.

3. On the relief sought by the Prosecution

175. The Legal Representative concurs with the Prosecution that in the circumstances of the case to enter a declaration of "*mistrial*" is an effective remedy. Whereas at the trial phase a motion for mistrial may be "*indispensable to the grant of*

³⁹⁹ See the Gbagbo Response, *supra* note 3, paras. 355-358.

⁴⁰⁰ See Judge Henderson's Reasons, *supra* note 17, para. 1859.

⁴⁰¹ *Idem*, para. 1858.

⁴⁰² *Idem*, para. 1857.

⁴⁰³ *Idem*, para. 1859.

fair and appropriate relief”,⁴⁰⁴ in appeal proceedings an allegation of a violation of the right to a fair trial is to be considered.⁴⁰⁵ In this regard, while the Prosecution has clearly shown the extent of the violation of said right, the Legal Representative recalls that the Appeals Chamber has also the discretionary power to conclude that an impugned decision is vitiated for reasons different from the specific ones raised by the appellant.⁴⁰⁶

176. However, the Legal Representative – having consulted extensively with the Victims she represents on the issues on appeal and on the relief sought by the Prosecution – is under an obligation to convey to the Appeals Chamber their views and concerns particularly on the consequences of a declaration of a mistrial.

177. The vast majority of the Victims have indicated that they support the Prosecution’s reasoning that the trial should be rendered invalid because of the numerous errors of law and/or procedure that critically affected the fairness of the proceedings. In particular, Victims have expressed the view that from a certain point

⁴⁰⁴ See ICTY, *Delalić et al.*, Case No. IT-96-21-A, [Judgement](#) (Appeals Chamber), 20 February 2001, paras. 643-645.

⁴⁰⁵ See ICTY, *Martić*, Case No. IT-95-11-A, [Judgement](#) (Appeals Chamber), 8 October 2008, paras. 30, 39-46. See also, ICTY, *Hadžihasanović and Kubura*, Case No. IT-01-47-A, [Judgement](#) (Appeals Chamber), 22 April 2008, paras. 43, 77-107; ICTY, *Galić*, Case No. IT-98-29-A, [Judgement](#) (Appeals Chamber), 30 November 2006, paras. 27-45; ICTY, *Delalić et al.*, Case No. IT-96-21-A, [Judgement](#) (Appeals Chamber), 20 February 2001, paras. 651-709; ICTY, *Furundžija*, Case No. IT-95-17/1-A, [Judgement](#) (Appeals Chamber), 21 July 2000, paras. 164-215; ICTR, *Hategekimana*, Case No. ICTR-00-55B-A, [Judgement](#) (Appeals Chamber), 8 May 2012, paras. 12-21; ICTR *Renzaho*, Case No. ICTR-97-31-A, [Judgement](#) (Appeals Chamber), 1 April 2011, paras. 13-50; ICTR, *Karera*, Case No. ICTR-01-74-A, [Judgement](#) (Appeals Chamber), 2 February 2009, paras. 371-379; ICTR, *Nahimana et al.*, Case No. ICTR-99-52-A, [Judgement](#) (Appeals Chamber), 28 November 2007, paras. 18, 47-90; ICTR, *Semanza*, Case No. ICTR-97-20-A, [Judgement](#) (Appeals Chamber), 20 May 2005, paras. 12-58; ICTR, *Niyitegeka*, Case No. ICTR-96-14-A, [Judgement](#) (Appeals Chamber), 9 July 2004, paras. 43-46; ICTR, *Rutaganda*, Case No. ICTR-96-3-A, [Judgement](#) (Appeals Chamber), 26 May 2003, paras. 36-125; and ICTR, *Akayesu*, Case No. ICTR-96-4, [Judgement](#) (Appeals Chamber), 1 June 2001, paras. 85, 194-207.

⁴⁰⁶ See ICTY, *Gotovina & Markač*, [Judgement](#) (Appeals Chamber), Case No. IT-06-90-A, 16 November 2012, para. 11. See also, ICTY, *Haradinaj et al.*, Case No. IT-04-84-A, [Judgement](#) (Appeals Chamber), 19 July 2010, para. 10; ICTY, *Boškoski and Tarčulovski*, Case No. IT-04-82-A, [Judgement](#) (Appeals Chamber), 19 May 2010, para. 10; and ICTR, *Bagosora and Nsengiyumva*, Case No. 98-41A-A, [Judgement](#) (Appeals Chamber), 8 May 2012, para. 16.

in time during the trial, they perceived that the attitude of the bench but especially of the Presiding Judge was more favourable to the Defence. In this regard, they noted that arguments presented by the Prosecution and the Legal Representative were on several occasions summarily dismissed; and even that the Presiding Judge showed often some impatience towards the Prosecution. This attitude was perceived by the Victims as not impartial and prejudicial to their interests. Victims also expressed their serious concerns for the Majority's lack of understanding of the historical and political background of the post-electoral crisis in relation to the open targeting of the Dioula and of the extent of their victimisation. Finally, two dual status individuals indicated that they feel that the Chamber did not allow them to fully express the extent of their victimisation by curtailing their accounts when convening their prejudice and harms.⁴⁰⁷

178. Therefore, while supporting the Prosecution's requested remedy, Victims also consider that a positive finding by the Appeals Chamber cannot simply result in a declaration of mistrial and leave as uncertain the possibility of holding future proceedings against Mr Gbagbo and Mr Blé Goudé.

179. In fact, Victims expect as a consequence of a declaration of mistrial the re-opening of proceedings against Mr Gbagbo and Mr Blé Goudé, after a careful examination of the evidence available and eventual limited further investigation. Indeed, the alleged offences are of the utmost gravity and the consequences on Victims devastating that, in the circumstances of this case, the interests of Justice and of the Victims would not be served if new proceedings will not be started, should the Appeals Chamber enter a declaration of mistrial.

⁴⁰⁷ See [REDACTED]; and P-0433, [T-147-Red2](#), p.60.

V. CONCLUSION

180. For the foregoing reasons, the Legal Representative respectfully requests the Appeals Chamber to grant the Prosecution's appeal against the 15 January 2019 Oral Decision and the 16 July 2019 Reasons.

A handwritten signature in black ink, appearing to read 'Fokine M. Hossain', with a horizontal line drawn underneath the name.

Dated this 22nd day of April 2020

At The Hague, The Netherlands