



Original: **English**

No.: **ICC-02/11-01/15**

Date: **22 May 2020**

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

IN THE CASE OF

THE PROSECUTOR v. LAURENT GBAGBO and CHARLES BLÉ GOUDÉ

Public with Public Annex A

Prosecution's submissions in response to the Chamber's questions on the Appeal

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Ms Helen Brady

Counsel for Mr Laurent Gbagbo

Mr Emmanuel Altit
Ms Agathe Bahi Baroan

Counsel for Mr Charles Blé Goudé

Mr Geert-Jan Alexander Knoops
Mr Claver N'dry

Legal Representatives of Victims

Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Defence Support Section

Victims and Witnesses Unit

Detention Section

Mr Paddy Craig

Victims Participation and Reparations Section Other

I. Ground 1 of the Appeal

1. **Question 1:** A “no case to answer” (“NCTA”) motion is a discretionary *procedure*, which, according to the Appeals Chamber, a Trial Chamber may conduct “based on its power to rule on relevant matters pursuant to article 64(6)(f) of the Statute and rule 134(3) of the Rules.”¹ A Chamber’s discretion to conduct a NCTA procedure must be exercised on a case-by-case basis “[to ensure] that the trial proceedings are fair and expeditious pursuant to article 64(2) and 64(3)(a) of the Statute.”²
2. The legal basis for the *decision* that follows a NCTA procedure depends on the nature of the decision, namely whether a Chamber rejects the NCTA motion and orders the trial to continue, or whether it grants it and acquits the accused, thereby terminating the proceedings. These two decisions are governed by different legal provisions and trigger different consequences. A decision rejecting a NCTA motion is an interlocutory decision which is governed by the same provisions as the NCTA procedure itself, namely articles 64(2), 64(3)(a) and 64(6)(f) as well as rule 134(3). A decision finding that there is no case to answer, on the other hand, is a final decision dismissing the charges against the accused, thereby acquitting them. It is governed by article 74, and must comply with its provisions including under sub-paragraph (5). Only a decision that complies with these requirements can dismiss the charges, acquit the accused and lead to their release, thereby triggering *ne bis in idem*³ and appellate procedures under article 81.
3. **Question 2:** Interpreting the term “decision” in article 74 in the context of the Statute and the Rules necessarily leads to the conclusion that it refers to a “final judgment” by a Trial Chamber, meaning one that determines that an accused is convicted or acquitted of the charges. *First*, article 74 is at the end of Part 6 of the Statute on the trial, immediately before reparations to victims (article 75) and sentencing (article 76). *Second*, article 81 (“Appeal against decisions of acquittal or conviction or against sentence”) expressly regulates appeals against “[a] decision under article 74”.⁴ It also sets out procedures “[i]n case of an acquittal”,⁵ which have been applied in this appeal.⁶ *Third*, rule 40(1)(c) refers to “[a]ll decisions of a

¹ [Ntaganda NCTA AD](#), para. 44.

² [Ntaganda NCTA AD](#), para. 44.

³ See further paras. 59-62 below.

⁴ Article 81(1).

⁵ Article 81(3)(c).

⁶ See [Detention AD](#). The Appeals Chamber has also rendered decisions in this case indicating that the Prosecution’s appeal is an article 81 direct appeal and accordingly that the acquittal decision is an article 74 final decision: See e.g. [Time Extension Decision](#) (regarding the Prosecution’s request under rule 150(2), which addresses article 81 appeals against decisions of conviction or acquittal under article 74); [Hearing Scheduling Order](#) (relying on regulation 60, which relates to replies by an appellant in article 81 appeals against decisions of conviction or acquittal under article 74).

Trial Chamber on guilt or innocence, sentencing and reparations to victims pursuant to articles 74, 75 and 76” and rule 150(1) refers to appeals against “a decision of conviction or acquittal under article 74”.

4. **Question 3:** Nothing in article 74 necessarily precludes from its ambit a Trial Chamber’s decision following a NCTA motion, if that is the Chamber’s final decision of acquittal. Article 74 applies to *all* final decisions of the Trial Chamber—both those which convict the accused of the charges and those which acquit the accused of the charges—as explained in the following sub-sections.

5. **Question 4(a):** The phrase ‘entire proceedings’ in article 74(2) cannot reasonably be interpreted to restrict the provision’s application only to decisions taken after the Defence has presented its case. In relation to an acquittal after a NCTA motion, it must be read to mean “the entire proceedings” which have occurred up to the point when the Trial Chamber takes its final decision to dismiss the charges and thereby acquit the accused.

6. The requirement in article 74(2) that “[t]he Trial Chamber’s decision shall be based on its evaluation of the evidence and the entire proceedings” defines the scope of the basis of the decision.⁷ For a decision dismissing charges (and thereby acquitting the accused) upon a NCTA motion at the close of the Prosecution’s case, it means that the Trial Chamber must consider and assess (“evaluate”) *all* of the evidence which has been presented by the Prosecution according to the relevant standard applicable for that stage.⁸ In other words, the Trial Chamber must take into account all evidence submitted and discussed before it up to the NCTA motion before deciding to dismiss the charges against an accused and thereby acquit them.

7. **Question 4(b):** Article 74 applies to all decisions in which the guilt of the accused is finally resolved.⁹ It applies both to decisions convicting and those acquitting an accused. The process that may precede a decision to acquit—such as a NCTA procedure—does not affect the provision’s applicability. That a NCTA procedure does not carry an equal possibility of a conviction at that stage has no bearing on article 74’s applicability to a final decision which acquits an accused after a NCTA procedure. If a NCTA motion is rejected, then the proceedings will continue and the Trial Chamber will apply article 74 later when rendering its final judgment either convicting or acquitting the accused. Simply because a Trial Chamber

⁷ [Klamberg](#), p. 557-558, mn. 613; Triffterer/Kiss, p. 1836, mn. 25. Article 74(2) does not concern the manner in which the evidence must be assessed by the Trial Chamber to reach its decision.

⁸ See response to question 10 in paras. 24-25 below.

⁹ An exception to the principle that a decision of acquittal or conviction may be rendered only under article 74 is a decision based on an admission of guilt, pursuant to article 65 and rule 139 (see [PAB](#), fn. 53).

exercises its discretion to entertain a NCTA procedure at the close of the Prosecution's case does not enable it to circumvent the essential requirements of article 74 if it decides to acquit the accused.¹⁰

8. **Question 4(c):** The rationale of NCTA proceedings, as noted by the Appeals Chamber in *Ntaganda*, does not “necessarily remove the resulting decision from the regime of article 74”. A Chamber's exercise of discretion to entertain a NCTA motion to potentially shorten (and even terminate) the proceedings in the interests of fairness, and arguably to protect the rights of the accused, does not affect the applicability of article 74 and its requirements. As explained above, article 74's mandatory legal requirements must be followed whenever a Trial Chamber makes its final determination to acquit an accused, whether done after a successful NCTA motion or at the close of the defence case. If, on the other hand, the Trial Chamber rejects a NCTA motion and proceeds with the trial, its interlocutory decision dismissing the motion need not do so. Both outcomes of the NCTA procedure (and their respective requirements) meet the rationale of having NCTA proceedings in the first place.

9. **Question 5:** The victims' rights and interests are accommodated in the NCTA procedure. Victims' participation “does not in itself [inhibit] a [NCTA] motion.”¹¹ However, a decision *granting* a NCTA motion that fails to meet article 74(5) requirements—like in this case—negatively affects the rights of the Prosecution *and* the victims, as it calls into question the integrity of the acquittal decision and undermines trust in the outcome of the trial.¹²

10. **Question 6:** Contrary to Mr Blé Goudé submissions,¹³ ICTY jurisprudence *supports* the Prosecution's position that NCTA decisions which lead to acquittals are final decisions which must be treated in the same manner as those entered after a full trial and as such, may be directly appealed. It would be unfair to deny the Prosecution the right to *directly* appeal a final decision acquitting an accused, since the decision otherwise possibly imposes upon it the disability of *ne bis in idem*.¹⁴ That right should not be left to a Trial Chamber's discretion on granting certification. While ICTY decisions *rejecting* NCTA motions were routinely treated as *interlocutory* decisions that were appealable only with certification under ICTY Rule 73(B), decisions *granting* a NCTA motion were treated as final judgments of acquittal that could be directly appealed under ICTY Rule 108:

¹⁰ On the purpose of article 74(5)'s requirements, *see also* response to question 7 in para. 12 below.

¹¹ [Ruto & Sang Decision No. 5](#), para. 16. *See also* para. 18 (stating that a determination on whether the Prosecution has presented a case for the Defence to answer is “fully compatible with the rights of the accused under the Statute, while not derogating from the rights of the Prosecution and the victims”).

¹² *See* [PAB](#), paras. 24-31.

¹³ *See* [Blé Goudé Response](#), fn. 42.

¹⁴ *But see* paras. 59-62 below relating to the Prosecutor's right to appeal an acquittal and seek a retrial.

“Granting a motion under Rule 98bis and thereby entering a judgement of acquittal at the Rule 98bis 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 Rule 108. [It] cannot be considered a decision, which requires certification before an interlocutory appeal can proceed [...] This is to be contrasted with a decision to dismiss a Rule 98bis motion, which does not involve the Chamber rendering a judgement on the guilt of an accused, and remains a decision, from which certification is required [...] to appeal.”¹⁵

11. This accords with *Krajišnik* cited by Blé Goudé,¹⁶ which held that *denials* of Rule 98bis motions for acquittal had to be certified under ICTY Rule 73 as for any other interlocutory appeal. The other two cases he relies upon¹⁷ are immaterial to Q.6. They merely re-affirm that the lower standard of proof at the NCTA stage reflects “the distinction between *the determination* made at the halfway stage of the trial, and the ultimate decision on the guilt of the accused to be made at the end of the case, on the basis of proof beyond a reasonable doubt.”¹⁸ While distinguishing the two *applicable standards*, these cases do not distinguish between *acquittals* stemming from NCTA proceedings and acquittals after a full trial. Significantly, since in both cases the Defence’s NCTA motions were *dismissed* (and the correct appellate procedure required certification), they do not support the Defence’s argument that there is no direct right to appeal an acquittal rendered in a NCTA decision.

12. **Question 7:** Even if, *arguendo*, article 74(5) does not apparently apply, the provision and its requirements should in any event be deemed to apply given that acquittals have resulted in substance (and thus raising the possibility of finality of proceedings and *ne bis in idem*). Decisions acquitting accused persons and finding them not guilty of the charges, and decisions convicting accused persons and finding them guilty, are the most important decisions a Trial Chamber will make. The former decisions engage the possibility of finality of the proceedings and the regime of *ne bis in idem*.¹⁹ As Judge Henderson observed, even if the legal basis for an acquittal at the NCTA stage was not a formal decision under article 74, that decision has “an equivalent legal effect [to an article 74 decision]”.²⁰ To lawfully trigger these equivalent effects, the acquittal decision must comply with article 74(5)’s

¹⁵ [Karadžić ALA Decision](#), para. 10, referring to [Blagojević & Jokić ALA Decision](#), paras. 10-11, 13 and [Krajišnik R98bis AD](#), para. 5. The ICTY Prosecution occasionally sought leave to appeal “simply to preserve its right to appeal the Judgment of Acquittal in case the Appeals Chamber [found] that certification by the Chamber [was] necessary” (see [Karadžić ALA Decision](#), para. 9). In one case, the ICTY Trial Chamber certified an appeal against a judgement of acquittal entered pursuant to Rule 98bis, but the Appeals Chamber did not specifically consider whether such certification was required ([Brđanin Interlocutory AD](#), para.1). See also [Jelisić AJ](#), para. 6.

¹⁶ See [Blé Goudé Response](#), fn. 42 referring to [Krajišnik R98bis AD](#), para. 5.

¹⁷ See [Blé Goudé Response](#), fn. 42 referring to [Kordić & Čerkez R98bis Decision](#), para. 11 and [Šešelj R98bis Decision](#), p. 16830.

¹⁸ See [Blé Goudé Response](#), fn. 42.

¹⁹ See also response to question 20 in paras. 59-62 below.

²⁰ See [J. Henderson Reasons](#), para. 17.

requirements.²¹ These requirements are mandatory and not mere formalities. They are essential components of international human rights law and key features of justice. They ensure that a Trial Chamber's final decision acquitting an accused is based on a solid legal, procedural, and factual foundation, thereby ensuring the integrity of the decision and enabling the parties, the victims and the public to fully trust in the outcome of the trial.²²

13. Q.7 correctly states that "there is no provision that specifically regulates differently judgments resulting from [NCTA] proceedings". This is not a *lacuna* in the Court's statutory regime because the Statute already has a clear legal framework governing acquittal decisions, namely article 74.²³ Accordingly, if a Trial Chamber dismisses the charges against an accused thereby acquitting them, it can only do so by fully complying with the requirements under article 74(5).²⁴

14. **Question 8:** A Trial Chamber should not issue an oral decision of acquittal or conviction with reasons to follow. Article 74(5) requires that the Trial Chamber's decision "shall be in writing and shall contain a full and reasoned statement of a Trial Chamber's findings on the evidence and conclusions".²⁵ An oral decision with reasons to follow would also contravene article 74(5)'s requirement that the Chamber issue "one decision".²⁶ A Trial Chamber's decision to convict or to acquit must be complete and cannot be delivered in stages or instalments.²⁷ In addition to providing a full written and reasoned decision, a

²¹ See [Afghanistan Victims' Standing Dis. Op.](#), paras. 8 ("no provision in the Statute allow[s] for a judgment to be made orally and without complete reasoning"), 3 ("Reasons have to be given in full for purposes of transparency and accountability, so that [Judges] are accountable before the parties and the international community for [their] decisions"). While Judge Ibáñez Carranza was commenting on article 83(4) and not article 74(5), parallels exist between these two provisions, even if they are not identical (see [PAB](#), para. 51). A group of State Parties recently submitted a communication to the ICC Independent Expert Review stating that "areas [...] of critical importance to the ongoing [Independent Expert Review] process" include "(6) ensuring that judgments and decisions fully comply with the Article 74.5 requirement that they contain a full and reasoned statement of the chamber's findings; (7) ensuring that judgments and decisions contain full reasoning at the time they are issued": [Nordic States IER Submission](#), p. 2.

²² See [PAB](#), paras. 21-32.

²³ See e.g. [DRC Extraordinary Review Decision](#), paras. 37-39, in which Appeals Chamber held that where the Statute clearly sets out certain procedures, there is no room left for recourse to alternative procedures. Although in that case the Appeals Chamber referred to appellate proceedings under article 82, the same principle applies to the legal basis and the applicable procedures for final decisions acquitting or convicting an accused, which are regulated by article 74

²⁴ See [PAB](#), paras. 98-102.

²⁵ See [PAB](#), paras. 26-30. Judge Eboe-Osuji noted that while the ICTY Statute and Rules do not indicate the extent and in what respect the reasons must be in writing, "[i]n contrast, article 74(5) of the Rome Statute requires that the [trial judgment] 'shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions'": [Bemba J. Eboe-Osuji Sep. Op.](#), para. 39.

²⁶ See [PAB](#), paras. 29-31, 46-51.

²⁷ See [PAB](#), paras. 46-50.

Chamber shall deliver the decision, or a *summary* of the decision, in open court. This renders the decision more accessible and explainable to the public.²⁸

15. To the extent that a Trial Chamber has any discretion to issue an oral decision with reasons to follow later, this would be subject to the following strict conditions: **(a)** The oral decision must consist of a substantive summary of the full decision which has been reached by the Chamber. It must set out the Chamber's main findings on the evidence and its conclusions and indicate clearly the evidence and facts which led to its conclusions.²⁹ The full oral decision shall be delivered in open court; **(b)** To prevent a Trial Chamber from engaging in "result-driven reasoning", the oral decision must clearly show that the full written reasoned decision was complete at the time it was delivered, that the Chamber has already made all its findings and what will follow is merely the completion of the editorial process;³⁰ **(c)** To comply with the "one decision" requirement, the Chamber's findings in the oral decision must be consistent with what follows in the full written decision.³¹ Where there is no unanimity, the oral decision (and the full written decision) must be based on a proper majority and contain the views of the majority and the minority;³² **(d)** When issuing the oral decision, the Chamber must establish, and follow, a precise and reasonably short deadline to issue its full written reasoned statement of its findings on the evidence and its conclusions.³³

16. **Question 9:** The Prosecution's submission that the violations of article 74(5) that occurred in this case were so fundamental as to render the decision *ultra vires* the Statute and thereby "null and void" does not mean that the test for establishing appealable error and its impact should be by-passed. To the contrary, such violations rendered the Majority's acquittals so fundamentally flawed that the impact of the errors on the decision is amply demonstrated. The Chamber's failure to comply with the mandatory requirements under article 74(5) materially affected not merely the form and substance of the decision but ultimately, the Majority's ability to deliver justice in the case.³⁴

²⁸ See [PAB](#), paras. 27-28, 40-43, 48-49.

²⁹ See [PAB](#), paras. 42-43, 111-112.

³⁰ See [PAB](#), paras. 62-64, 111-112; see also [Bagosora et al. AJ](#), paras. 23-25; [Case 002/02 TJ Summary](#); [Case 002/02 TJ](#); [Case 002/02 Case History](#); [R v. Teskey](#), per McLachlin CJ and Binnie, LeBel, Fish, Charron and Rothstein JJ; see also, [R v. Cunningham](#); see further, [15 January 2019 J. Carbuccia Dis. Op.](#), para. 33.

³¹ In Germany any inconsistency between the summary provided at the time of the verdict and the subsequent written reasons constitutes a ground of appeal, see [Kuhlmann](#), 15. Jahrgang.

³² See [PAB](#), paras. 52-59.

³³ See [PAB](#), paras. 62-64, 113.

³⁴ See [PAB](#), paras. 21-32, 100, 116, 120. A decision that fails to comply with the fundamental and mandatory requirements under article 74(5) cannot trigger the effects of an acquittal. It is null and void, irrespective of whether hypothetically the Chamber might have reached the same outcome, had it followed the correct procedure under article 74(5) (see also para. 21 below).

17. Under Article 83(2) if the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision, or that factual, legal or procedural errors have *materially affected* the decision, it may reverse or amend the decision and exercise its remedial powers.³⁵ Other international tribunals have likewise reviewed only errors of law which have the potential to invalidate the decision and errors of fact which have occasioned a miscarriage of justice.³⁶

18. The test applied by the Appeals Chamber for legal and procedural errors has been that in the absence of the error, “the judgement *would have substantially differed* from the one rendered.”³⁷ However, noting the prognostic difficulties arising from the test, Judge Eboe-Osui in his Separate Opinion in *Bemba* added some important qualifications, which are significant to the present case given the fundamental nature of the errors in this ground (and Ground 2) and their consequences for the Majority’s decision.

19. In Judge Eboe-Osui’s view, an error will qualify as material “if it reasonably compels the view of *likelihood* that the Trial Chamber *might have* rendered a substantially different judgement had the error not occurred; or if the appellate court *could not be sure* that the trial court would have rendered the same judgement had the error not occurred.”³⁸ Likewise, the Supreme Court of Canada has held that “to obtain a new trial [the Crown must] satisfy the appellate court that the error (or errors) of the trial judge might reasonably be thought [...] to have had a material bearing on the acquittal. *The Attorney General is not required, however, to persuade us that the verdict would necessarily have been different.*”³⁹ In a similar vein, Judges Trendafilova and Tarfusser observed in *Ngudjolo* that where the alleged error consists in a Trial Chamber’s failure to adopt a course of action, an appellant will by definition never be in a position to show how such an error would have materially affected the decision, and accordingly “[demonstrating] the erroneous nature of the inaction must be considered sufficient to substantiate the ground of appeal based on it. To hold otherwise [...] is tantamount to require something impossible from the appellant, [*i.e.*] a *probatio diabolica*”.⁴⁰

20. What this means for the present case is that to show the material impact of the errors in this ground (and in ground 2), the Prosecution need *not* show that absent the errors, the decision would *necessarily* have been to dismiss the NCTA motion and continue the trial. It is sufficient that the Prosecution show that it is *likely* that the Majority might have rendered a

³⁵ [Lubanga AJ](#), para.56; see also [Bemba AJ](#), paras. 60-62.

³⁶ [Karadžić R98bis AD](#), para.11, [Šešelj AJ](#), para. 12; [Case 002/01 AJ](#), paras. 99-100, [Sesay et al. AJ](#), para. 31.

³⁷ [Lubanga AJ](#), para. 18-20; [Ngudjolo AJ](#), paras. 20-21; [Bemba et al. AJ](#), paras. 90, 99.

³⁸ [Bemba J. Eboe-Osui Sep. Op.](#), para. 81. See also paras. 82-83.

³⁹ [R v. Graveline](#), para. 14 (emphasis added).

⁴⁰ [Ngudjolo Dis. Op.](#), para. 30.

substantially different decision on the motions had the error(s) not occurred. The Prosecution submits that in light of the fundamental nature of the violations⁴¹ (and considered together with the errors in the second ground), this Appeals Chamber could not be sure that the Majority would have rendered the *same* decision had such errors not occurred.

21. Finally, the article 74(5) violations that occurred in this case do not preclude all consideration that “justice was nevertheless served in substance” (**Q. 9, last sentence**). To the contrary, justice requires that a decision as important as one to acquit an accused is based on a process that follows the essential article 74(5) requirements. This is what ensures the integrity of a Trial Chamber’s findings and guarantees that justice may be achieved in substance. If the question instead asks whether the Majority—had they followed the statutory requirements—would nevertheless have reached the *same* outcome, this is a hypothetical question and impossible to answer definitively. What can be said is that in light of the fundamental nature of the errors in this ground (and in Ground 2), the Appeals Chamber cannot be sure that the Majority would have. Finally, if the question asks whether the Majority reached the *correct* outcome in dismissing the charges, in the Prosecution’s view, the answer is no, just as one judge in the case found, when stating that she would have found that there was a case for Mr Gbagbo and Mr Blé Goudé to answer, even if on a narrower set of incidents and modes of liability.

II. Ground 2 of the Appeal

22. The Prosecution does not challenge how Judge Henderson ultimately stated the NCTA standard of proof in his 16 July 2019 reasons.⁴² Rather the thrust of this appeal ground is that—*because* the Majority erred legally (by failing to direct itself to the applicable standard of proof) and erred procedurally (by failing to set out a clear approach on how it would assess the evidence *before* it did so), this led the Majority to err in several ways when it assessed the evidence.⁴³ The Majority’s errors, individually and cumulatively, materially affected the decision. The legal error invalidated the decision. The procedural error affected the reliability of the adjudicative process, thereby affecting the decision.⁴⁴

23. While many aspects of the Majority’s approach to assessing evidence would have been incorrect at *any* stage of the proceedings (not only at the half-time stage), the Prosecution recognises that conceptually, the NCTA standard of proof and broader evidentiary approach applicable at this stage are necessarily linked and addresses **question 10** accordingly.

⁴¹ The Prosecution relies on its arguments in [PAB](#), paras. 34-85.

⁴² [Questions-II.10](#); [PAB](#), para. 126; [J. Henderson Reasons](#), paras. 1-3 (relying on [Ruto & Sang Decision No. 5](#)).

⁴³ [PAB](#), paras. 142-151 (legal error), 152-252 (procedural error), 162-252 (examples).

⁴⁴ [PAB](#), paras. 253-263.

24. *Ruto & Sang* Decision No. 5 encapsulates the essence of the NCTA standard of proof.⁴⁵ As has been correctly recalled, the test—“whether there is sufficient evidence introduced on which, if accepted, a reasonable trial chamber *could* (reasonably) convict the accused”—is low.⁴⁶ Mindful of relevant judicial views that the approach in Decision No. 5 must be viewed in the Court’s context (where professional judges are also the triers of fact),⁴⁷ the Prosecution considers that, interpreted within this context,⁴⁸ Decision No. 5 continues to reflect the key principles that should govern NCTA proceedings at this Court.

25. The appropriate NCTA standard of proof for this Court must reflect the following:

(i) “could (reasonably) convict: As the *Ruto & Sang* Trial Chamber correctly observed “[t]he emphasis is on the word ‘could’”.⁴⁹ A chamber at the NCTA stage must not consider if it *would* convict at half-time. Nor is the standard of proof for conviction (proof beyond reasonable doubt) engaged at half-time.⁵⁰ Following from the “could convict” test, the Prosecution must present sufficient evidence to support a realistic hypothesis of the accused’s guilt, even if at par with a different hypothesis of innocence.⁵¹ Put simply, the NCTA motion

⁴⁵ [Ruto & Sang Decision No. 5](#), paras. 23 (“[...] whether or not, on the basis of a *prima facie* assessment of evidence, there is a case, in the sense of whether there is sufficient evidence introduced on which, if accepted, a reasonable Trial Chamber *could* convict the accused”); 24 (“[...] does not entail an evaluation of the strength of the evidence presented, especially as regards exhaustive questions of credibility or reliability.”); 32 (“[no] questions of reliability or credibility[...], save where the evidence in question is incapable of belief [...]”).

⁴⁶ [Ruto & Sang J. Eboe-Osuji Sep. Op.](#), paras. 105-106 (same approach for confirmation of indictment and NCTA proceedings, *i.e.*, a standard lower than proof beyond reasonable doubt); 107 (“[...] the classic formulation of ‘no case to answer’ test—in the manner of considering whether there is evidence upon which a trier of fact *could* reasonably *convict*—does not inevitably invite that higher standard of proof [...]”).

⁴⁷ [Ruto & Sang J. Carbuccia Dis Op.](#), para. 15 (“[an NCTA motion] must be derived from the Court’s statutory framework [and what] purpose such a motion would be intended to fulfil in the distinctive institutional and legal context of the Court.”); [Kordić and Čerkez R98bis Decision](#), para. 9 (“[the rule 98bis regime is based on] the Statute and the Rules [it] may be influenced by features of [domestic jurisdictions], but will not be controlled by it; and therefore a proper construction of the Rule may [modify some of those features].”); [Bemba et al. AJ](#), paras. 434 (discouraging the “import” of domestic principles), 574 (noting that domestic systems are influenced by their own underlying legal culture and differ greatly from the international procedural model); [Ruto & Sang J. Eboe-Osuji Reasons](#), para. 136, fn. 341 (“[...] Such narrow interpretation is not truly borne out by Decision No. 5 itself, when read in the fuller context of the case law [*hinged as it were in the separation of functions between judge and jury*] that inspired what it expresses in the outline.”); [Ruto & Sang J. Fremr Reasons](#), paras. 17-19 (“[...] the test as set out in Decision No. 5 envisages a situation, whereby *different reasonable triers of fact* at the ‘no case to answer’ stage could come to different conclusions concerning the guilt or innocence of the accused concerned. However, this does not mean that the Trial Chamber actually conducting the ‘no case to answer’ assessment cannot reach its own [...] conclusions”). Emphasis added.

⁴⁸ *E.g.*, [Ruto & Sang J. Eboe-Osuji Reasons](#), paras. 14 (“The *raison d’être* of this Court [...] is to ensure [accountability for crimes] ”); 96 (“The central consideration [...] is that judges [...] are also the triers of facts in the case [...]”); 121-123 (noting additional ICC statutory features, including a Pre-Trial Chamber’s statutory authority to confirm charges and article 64(2) to ensure that a trial should be fair and expeditious).

⁴⁹ [Jelisić AJ](#), para. 37; [Ruto & Sang Decision No. 5](#), para. 23; [Ruto & Sang J. Eboe-Osuji Sep. Op.](#), para. 3.

⁵⁰ [Ruto & Sang J. Eboe-Osuji Sep. Op.](#), paras. 4 (“[...] the degree of cogency of the prosecution evidence need be no higher than the civil standard of proof.”); 27-56 (the required standard [...] is not the standard of proof beyond reasonable doubt); 112 (“[...] a balanced view of justice should not require the case at half-time to show proof beyond reasonable doubt, [...] to avoid summary judicial termination [...]”).

⁵¹ [Ruto & Sang J. Eboe-Osuji Sep. Op.](#), para. 112; [Ruto & Sang J. Eboe-Osuji Reasons](#), paras. 74, 86 (“In circumstantial cases, [...] ‘the inference of guilt must be compelling’”, and not merely hypothetical.).

must fail if, at that stage, the evidence indicates, at a minimum, that both likelihoods of guilt or innocence are possible.⁵²

(ii) *“taking the Prosecution’s case at its highest”*: At the NCTA stage, the Prosecution’s case must be taken at its highest.⁵³ A Trial Chamber cannot “pick and choose among parts of [...] evidence” in reaching its conclusion.⁵⁴ Therefore, to decide a NCTA motion, the Trial Chamber must take the prosecution evidence ‘as a whole’, and not only focus on the strengths or weaknesses of the evidence in isolation.⁵⁵ In this sense, the Prosecution’s case is entitled to credence unless incapable of belief on any reasonable view.⁵⁶ At this stage, evidence of one charged incident supporting a count (along with its legal and factual components) and of one mode of liability is sufficient to dismiss the NCTA motion and for the case to proceed.⁵⁷

(iii) *A “prima facie” exercise*:⁵⁸ Within the Court’s context, the approach to NCTA proceedings is similar to confirmation proceedings. Both serve to establish if evidence is sufficient to continue the case, and to filter out cases when it is not.⁵⁹ Moreover, to avoid prejudging the Prosecution case at the half-time stage, the Trial Chamber—having only heard the Prosecution’s case—must not evaluate the evidence in any manner that “settles the question of proof of *guilt* beyond reasonable doubt”.⁶⁰ Accordingly, the Chamber does not usually address issues pertaining to the strength of the case at the half-time stage and does not consider “exhaustive questions of credibility or reliability”.⁶¹ Yet, as Decision No. 5 itself stipulates, the Chamber might, in exceptional circumstances, consider the strength of the case (and questions of credibility and reliability) when the evidence is *incapable of belief* by any reasonable chamber.⁶² These circumstances include when the Prosecution’s case has

⁵² [Ruto & Sang J. Eboe-Osuji Sep. Op.](#), paras. 8-10, 112.

⁵³ [Ruto & Sang J. Carbuccia Dis. Op.](#), para. 18; [Ruto & Sang J. Eboe-Osuji Reasons](#), paras. 47-53 (citing [R. v. Galbraith](#); [R v. Shippey & Jedynak](#)).

⁵⁴ [Karadžić R98bis AD](#), para. 21 ; [R v. Shippey & Jedynak](#), (“[taking] the prosecution’s case at its highest did not mean picking out the plums and leaving the duff behind”); [Hadžihasanović et al. AJ](#), para. 55 (the failure to consider evidence favourable to the accused at the NCTA stage was an error of law).

⁵⁵ [Ruto & Sang J. Eboe-Osuji Reasons](#), paras. 48-53 (“The evidence in the case must be looked at as a whole in order to appreciate what the trier of fact could *properly* do as to conviction”); [Ruto & Sang J. Carbuccia Dis. Op.](#), para. 22 (“[...] the analysis of evidence [...] must not be done in relation to every single individual piece of evidence, without considering it as a whole.”).

⁵⁶ [Ruto & Sang Decision No. 5](#), para. 24.

⁵⁷ [Ruto & Sang Decision No. 5](#), paras. 26-32.

⁵⁸ [Ruto & Sang Decision No. 5](#), para. 23; [Ruto & Sang J. Eboe-Osuji Sep. Op.](#), paras. 2, 24; [Ruto & Sang J. Carbuccia Dis. Op.](#), paras. 16-17.

⁵⁹ [Ruto & Sang J. Eboe-Osuji Reasons](#), paras. 121-122. See [Mbarushimana Confirmation AD](#), paras. 47-48; [Ntaganda NCTA AD](#), paras. 46, 53-54.

⁶⁰ E.g., [Ruto & Sang J. Eboe-Osuji Reasons](#), para. 110.

⁶¹ [Ruto & Sang J. Carbuccia Dis. Op.](#), para. 18.

⁶² [Ruto & Sang Decision No. 5](#), para. 32 (“[...] The Chamber will not consider questions of reliability or credibility [...], save where the evidence in question is incapable of belief by any reasonable Trial Chamber.”); [Ruto & Sang J. Carbuccia Dis. Op.](#), para. 18.

completely broken down, either on its own presentation, or as a result of such fundamental questions being raised through examination as to witness reliability and credibility that the Prosecution is left without a case.⁶³ In this scenario, even if a Chamber were to *provisionally* review credibility or reliability *to determine if a case is weak*, once it determines that there is a case to be answered, it must refrain from pronouncing on those issues.⁶⁴ Otherwise, if the NCTA motion is dismissed and the case continues, the Chamber would have prematurely pronounced on the strength of the Prosecution case, without hearing the Defence case. Although, in principle, this concern does not arise if the NCTA motion succeeds,⁶⁵ a NCTA decision which acquits the accused may still be overturned on appeal. If the Trial Chamber has already pronounced extensively on the strength (or weakness) of the Prosecution case, it could be prevented from continuing to hear the case for reasons of pre-judgment.⁶⁶

26. In assessing the evidence at the NCTA stage, the Chamber must consider the entire record and apply evidentiary principles conforming to the Court's legal framework and international practice.⁶⁷

27. Ultimately, because the Chamber must ensure the *legal* sufficiency of the evidence (*i.e.*, is the evidence capable of leading to a conviction?), its assessment remains primarily a legal one.⁶⁸ Although the question of sufficiency of evidence is engaged (and the evidence assessed and factual findings made accordingly), this does not transform the exercise into a factual (or merits-based) assessment overall which engages the factual standard of review (**Q. 10, 3rd sub-Q**). Rather, whether errors of fact are raised on appeal depends on the precise nature of the challenge to the Trial Chamber's assessment of legal sufficiency.⁶⁹ That said, given the low standard of proof at the NCTA stage—which does not involve making factual findings of guilt beyond reasonable doubt—it is unlikely that a Trial Chamber's assessment of legal sufficiency will engage questions/errors of fact in the same manner as in a final appeal against an acquittal decision rendered after a full trial.

28. **Questions 11-13:** The Majority's failure to set out a clearly defined standard of proof and other evidentiary standards is primarily a procedural error (**Q. 11**). This is because it

⁶³ [Ruto & Sang J. Carbuccia Dis. Op.](#), para. 20.

⁶⁴ [Ruto & Sang J. Eboe-Osuji Reasons](#), paras. 113, 115.

⁶⁵ [Ruto & Sang J. Eboe-Osuji Reasons](#), para. 112.

⁶⁶ See below para. 51.

⁶⁷ [Ruto & Sang J. Carbuccia Dis. Op.](#), paras. 22-26; [Ruto & Sang J. Eboe-Osuji Reasons](#), para. 115; [J. Carbuccia Dis. Op.](#), paras. 26-34.

⁶⁸ [Ruto & Sang J. Eboe-Osuji Reasons](#), para. 55. See [Questions-II.10](#), third prong. See also [Čelebići AJ](#), para. 434; [Hadžihasanović et al. AJ](#), para. 51.

⁶⁹ See e.g. [Jelisić AJ](#), paras. 30-39 (legal error in applying an incorrect standard of proof); [Karadžić R98bis AD](#), paras. 37-38, 47-50 (factual error in appreciating the evidence), 44-45 (legal error in lack of reasoning).

relates to the Majority's erroneous conduct of the proceedings leading up to its adjudication and decision to acquit.⁷⁰ However, since the Majority's procedural error also includes its failure to determine the applicable legal standard in adjudicating the NCTA motions, this aspect also amounts to legal error. Failure to apply a legal standard is as much a legal error as misapplying one.⁷¹ Moreover, although the Majority's failure to direct itself to the appropriate NCTA standard of proof is in itself a distinct and reversible error of law,⁷² it is related to the procedural error that followed. (*i.e.*, the failure to set out its approach). If the Majority had set out its approach clearly, this may have shown that it had, at least, directed itself to the relevant standard first. Likewise, if the Majority had properly directed itself to the NCTA standard, it was more likely that it would have given guidance on the procedure. Therefore, the legal and procedural errors alleged, though distinct, are linked.

29. Clarity on core issues—such as the NCTA standard of proof in a NCTA proceeding—is essential not just to inform and guide the Prosecution in the conduct of its case or the parties in their submissions—but more crucially—to ensure that the trial judges direct *themselves* correctly when deciding matters of such importance,⁷³ namely, whether to dismiss the motions and proceed with the case, or to grant the motions and acquit the accused. Accordingly, the Majority's failure *to direct itself* as to the relevant standard does *not* “amount to the same thing” as its failure to give parties advance notice of the standard. (**Q. 12**). Clarity in the judges' minds, and clarity given to parties, are different matters and serve different purposes.

30. *First*, clarity on the standard of proof would have guided the Majority “*as to the required degree or level of conviction in [its] mind* as to the truthfulness of the assertions made”, and would have ensured that the adjudicative process was transparent, predictable, and not arbitrary.⁷⁴ Such judicial clarity should have been present *before* the matter was decided and not after.⁷⁵ Accordingly, notwithstanding that Judge Henderson articulated the standard correctly in his July 2019 reasons, the Majority's failure to direct itself initially to

⁷⁰ [Bemba et al. AJ](#), paras. 99-100; [Lubanga AJ](#), para. 20; Staker/Eckelman, “Article 81”, pp. 1929-1930, mns. 34-35; Djukić, “The Right to Appeal in International Criminal Law”, pp. 190-192; [PAB](#), paras. 152-252.

⁷¹ [Zigiranyirazo AJ](#), para. 43.

⁷² [PAB](#), paras. 142-151. The STL has addressed this as an error of law ([Ayyash et al. AD](#), paras. 37-41) and does not allow for procedural errors (Article 26, [STL Statute](#)).

⁷³ *E.g.*, [Ayyash et al. AD](#), paras. 37-41 (“[...] 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”); [Ayyash J. Nsereko Dis. Op.](#), paras. 1, 4, 7; [Ayyash J. Baragwanath Dis. Op.](#), paras. 27-28 (“[when the] standard of proof is of such importance to the present decision, [...] it may not be supplied simply by inference, but must be stated expressly”); [Blé Goudé Response](#), para. 193 (agreeing that a chamber must know and apply the appropriate standard in coming to its determinations).

⁷⁴ *E.g.*, [Ayyash et al. AD](#), paras. 37-41; [Ayyash J. Nsereko Dis. Op.](#), para. 4.

⁷⁵ [PAB](#), paras. 122-125, 131-161.

the correct standard—and most critically, before it acquitted them in January 2019—was a “continuing appealable error”. (Q. 13). Judge Henderson’s July 2019 belated articulation of the standard—*six months* after the Majority had acquitted Mr Gbagbo and Mr Blé Goudé, and *one year* after the Presiding Judge rejected the *Ruto & Sang* principles⁷⁶—did not “cure” the Majority’s initial error. It did not demonstrate that the Majority Judges had that—or indeed *any*—standard in mind at the critical time when deciding to acquit (before 15 January 2019). Nor was this belated expression of the standard available to guide the parties/participants when they made their NCTA submissions.⁷⁷

31. *Second*, in the circumstances of this case, once the Majority had directed itself to the appropriate standard, it should have informed the parties and participants. They could not assume the *Ruto & Sang* standard would apply, as the Presiding Judge had stated that he did not intend to follow it, but gave no further guidance.⁷⁸

32. Although the Defence now claim that they had the needed clarity⁷⁹ (albeit that they altered their views on fundamental NCTA elements during the proceedings),⁸⁰ all parties—Prosecution and victims included—needed such clarity to discharge their functions. Knowing *merely* that the Prosecution must prove the accused’s guilt beyond reasonable doubt or that its evidence must be “sufficient” to sustain a conviction is inadequate.⁸¹ Neither of these obvious propositions reflects the complex and nuanced aspects of any NCTA standard of proof (on which there are multiple, often competing views and approaches).⁸²

33. Likewise, while it may not be necessary in every case for a Chamber to set out its approach to general evidentiary principles in advance, the circumstances of *this case* obliged the Majority to do so. The NCTA standard of proof shapes the evidentiary approach

⁷⁶ [NCTA Clarification Decision](#), para. 13 (“[...] the Prosecutor’s statement [that the *Ruto & Sang* standards] are representative of the jurisprudence of the Court sounds far-fetched.”).

⁷⁷ [PAB](#), para. 136.

⁷⁸ [PAB](#), paras. 132-141, 152-252; See [NCTA Clarification Decision](#), para. 11 (“[The assumption that the Chamber had decided to follow the *Ruto & Sang* case] amounts to a mischaracterisation of the procedural steps devised by this Chamber [...]”); 12-13 (“[...] it is not necessary to take a position either as to the standards adopted by Trial Chamber V(a) [...]”); [J. Tarfusser Op.](#), para. 65 (NCTA proceedings “have no place in the statutory framework of the Court and are unnecessary as a tool to preserve the interests and rights they are meant to serve”).

⁷⁹ [Blé Goudé Response](#), para. 184.

⁸⁰ Compare [Blé Goudé’s Pre-Trial Observations](#), para. 3 (not objecting to the Prosecution’s proposal to follow the same principles as outlined in [Ruto & Sang Decision No. 5](#)) with [Blé Goudé Conduct of Proceedings Observations](#), paras. 18-19 (asking the Chamber to examine the quality of the evidence); [Gbagbo Conduct of Proceedings Observations](#), paras. 18-33 (mentioning the *Ruto & Sang* approach, but arguing that the Chamber should not be limited in its approach).

⁸¹ *Contra* [Blé Goudé Response](#), paras. 177, 186; [Gbagbo Response](#), paras. 158-159.

⁸² *E.g.*, [Ruto & Sang J. Eboe-Osuji Sep. Op.](#), paras. 1-115 and [Ruto & Sang J. Eboe-Osuji Reasons](#), paras. 1-137 (discussing a range of issues/views on the NCTA standard, *i.e.*, *prima facie* approach, whether proof beyond reasonable doubt was appropriate, NCTA in jury and judge-only trials, the ICC’s unique features, a judge’s duty in borderline cases and to what extent the strength of the case should be assessed at half-time and how).

adopted,⁸³ and consequently, will determine whether evidence may be considered sufficient at this stage or not. For instance, evidence may be considered sufficient when a Chamber considers corroboration in an appropriately flexible way. However, that same evidence may not be considered sufficient applying Judge Henderson’s overly rigid approach to corroboration.⁸⁴ Without indication that the judges intended to adopt a different approach, the Prosecution must be guided by approaches previously broadly endorsed by the Appeals Chamber, as it was.⁸⁵

34. **Questions 14-16:** The Prosecution did not argue that the errors in this ground did not “materially affect” the decision, or that an appellant need not demonstrate the impact of errors alleged. (Q. 14). Rather, as stated above,⁸⁶ although an appellant must establish that the errors materially affected the decision as required in article 83(2), this “impact” may be demonstrated in different ways, depending on both the error and the decision being challenged.⁸⁷ In stating that the legal error was “sufficient by itself to invalidate the decision”,⁸⁸ the Prosecution intended that the legal error (with impact) could lead to reversal on appeal on its own (without any further error)—not that the error was sufficient *without* showing its impact.

35. The Majority’s legal error “materially affected” the decision.⁸⁹ While the Prosecution—consistently with *Ayyash et al. AD*—used the phrase “invalidated the decision” to describe the impact of the error, this phrase is interchangeable with the impact test of “materially affecting the decision” at the ICC. The *ad hoc* and hybrid tribunals likewise require “impact” of error (though described differently).⁹⁰ In this case (like *Ayyash et al.*), the Majority’s ambiguity on the standard of proof—a fundamental tool in any judicial adjudicative process—vitiated both the process of decision-making and thus the decision itself.⁹¹ Without this essential clarity, any attempt to assess the evidence and ultimately to acquit Mr Gbagbo and Mr Blé Goudé at this stage must necessarily be flawed—just as any attempt to convict them

⁸³ [Ruto & Sang J. Carbuccia Dis. Op.](#), paras. 22-26; [Ruto & Sang J. Eboe-Osuji Reasons](#), para. 115; [J. Carbuccia Dis. Op.](#), paras. 26-34.

⁸⁴ [PAB](#), paras. 155-159.

⁸⁵ See [Bemba et al. AJ](#), para. 1018.

⁸⁶ See above paras. 16-21.

⁸⁷ [Bemba et al. AJ](#), para. 110 (substantiation of error/impact “will depend on the specific argument raised, including the type of error alleged.”); [PAB](#), paras. 253-263.

⁸⁸ [PAB](#), para. 254.

⁸⁹ [PAB](#), paras. 142-151.

⁹⁰ See Article 26, [STL Statute](#); [Ayyash et al. AD](#), para. 26; [Ayyash et al. CDR AD](#), para. 21; [Halilović AJ](#), paras. 26, 131; [Rutaganda AJ](#), paras. 20, 283.

⁹¹ [Ayyash et al. AD](#), paras. 38-41.

at the end of the case, without the appropriate clarity on the standard/burden of proof (guilt beyond reasonable doubt), would have been.

36. The Majority's procedural error "materially affected" the decision.⁹² Since the error consists of the Majority's *failure* to adopt a course of action (rather than any specific actions it undertook *per se*), a lower level of prognostic assessment is appropriate.⁹³ Rather than showing that the decision *would* have substantially differed from the one rendered in these circumstances (an impossibility, or *probatio diabolica*), the Prosecution need only show that the Majority's errors "reasonably compel[] the view of *likelihood*" that the Majority *might* have rendered a substantially different decision.⁹⁴ However, even if the Prosecution must show the decision *would* have substantially differed, the Majority's ambiguous approach led to an improperly informed analysis and serious methodological flaws concerning all five charged incidents. In turn, each of these incidents composed key building blocks of the case. An acquittal rendered in these circumstances must necessarily be unreliable.⁹⁵ Finally, the Prosecution need not demonstrate that Mr Gbagbo's and Mr Blé Goudé's guilt was established beyond reasonable doubt on appeal.⁹⁶ This would be unsuited to an NCTA appeal, when no first instance chamber has considered the allegations beyond reasonable doubt.

37. Although the parties made submissions on the NCTA standard of proof, the Appeals Chamber must still consider if the Majority's *own* lack of clarity on how to adjudicate the NCTA motion affected the reliability of the proceedings and outcome (**Q. 15**). As Judge Herrera Carbuca observed when the decision to acquit was rendered, the lack of judicial clarity affected the proceedings and the parties' rights.⁹⁷ In particular, the Majority Judges disagreed on whether the "*Ruto & Sang* model" applied to the case, and even on the applicable legal provision for the proceedings. While Judge Henderson applied the *Ruto* standard, Judge Tarfusser continued to assert (six months after the acquittal) that he did not "replicate the so-called *Ruto & Sang* model" in his evidentiary exercise.⁹⁸ This casts doubt on their joint evidentiary assessment as a whole. (**Q. 16**).

38. **Questions 17-19:** In the circumstances of this case, by failing to set out a clear approach to the NCTA standard of proof and how it would assess the evidence *before* doing

⁹² [PAB](#), paras. 255-262.

⁹³ [Nqudjolo Dis. Op.](#), para. 30.

⁹⁴ See [Bemba J. Eboe-Osuji Sep. Op.](#), paras. 81-83.

⁹⁵ [PAB](#), paras. 258-260.

⁹⁶ *Contra* [Blé Goudé Response](#), para. 223.

⁹⁷ [15 January 2019 J. Carbuca Dis. Op.](#), para. 40.

⁹⁸ Compare [J. Tarfusser Op.](#), paras. 65, 67 with [J. Henderson Reasons](#), paras. 1-3. See also [PAB](#), paras. 132-141.

so, the Majority erred in procedure.⁹⁹ This overall procedural error—which related to the proceedings and the decision-making process leading up to the 15 January 2019 oral acquittal decision—is shown by *three factors* (i) the procedural chronology of this case, revealing a flawed process; (ii) the overly rigid approach to corroboration applied by Judge Henderson, at odds with the otherwise accepted approach; and (iii) the Majority’s incorrect and inconsistent assessment of several factual matters, reflected in the six examples.¹⁰⁰ Accordingly, the six examples are one factor, among others, that the Prosecution relies on to illustrate the Majority’s flawed and unclear approach, and thus the procedural error.¹⁰¹ The six examples also demonstrate the impact of this procedural error: they show that the Majority’s erroneous procedure led to an unreliable adjudicative process and accordingly, an unreliable outcome (*i.e.*, the acquittals), and thus materially affected the decision.¹⁰²

39. Accordingly, the Appeals Chamber is asked to review the six examples under the standard of review for procedural errors (**Q. 17(a)**).¹⁰³ As the Appeals Chamber has found, this review may occur in the following two ways:

40. *First*, since the six examples demonstrate the Majority’s flawed and unclear approach, and are linked to its failure to reason properly, the Appeals Chamber may determine if the underlying factual assessments therein, *on their face*, were properly addressed in the Majority’s reasoning.¹⁰⁴ In so doing, the Appeals Chamber must determine whether the Majority indicated the basis of its decision to acquit with sufficient clarity—an obligation that binds all chambers whether the decision falls under article 74 or not.¹⁰⁵ However, the Appeals Chamber need not consider if the Majority’s reasoning was convincing or if a reasonable Trial Chamber could have reached those conclusions.¹⁰⁶ Rather, the Appeals Chamber should assess whether the Majority’s reasoning (as reflected in the six examples) reveals its flawed and unclear approach in this case.

⁹⁹ [PAB](#), para. 152.

¹⁰⁰ [PAB](#), paras. 132-141, 153; 155-159; 160-252.

¹⁰¹ [PAB](#), paras. 162-165 (noting *inter alia* that while the Majority stated that it had taken the evidence as a whole, it did not always do so; while it made positive findings in some sections, it failed to reflect them in others).

¹⁰² [PAB](#), paras. 131, 165, 253-262.

¹⁰³ [Bemba et al. AJ](#), para. 99.

¹⁰⁴ [Bemba et al. AJ](#), paras. 102-108 (“[...] 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 [...]).

¹⁰⁵ [Bemba et al. AJ](#), paras. 102 (“[Chambers are required to] ‘indicate with sufficient clarity the grounds on which they based their decision’. [Reasons allow] the Appeals Chamber to clearly understand the factual and legal basis upon which the decision has been taken [...]”); 104 (“[...] these considerations apply, in principle, also to decisions on the guilt or innocence of the accused [...] It must be clear from [the decision] how it assessed the evidence to reach those factual findings”); [Lubanga First Redactions AD](#), para. 20.

¹⁰⁶ [Bemba et al. AJ](#), para. 106.

41. *Second (and alternatively)*, since the six examples illustrate procedural errors which led to the acquittal decision, they relate to the Majority's exercise of discretion (also a procedural error).¹⁰⁷ The Appeals Chamber may interfere with a Trial Chamber's exercise of discretion if based on an error of law, fact or procedure. The six examples demonstrate that the Majority's approach was based on erroneous interpretations of law and patently incorrect conclusions of fact, and raise individual errors of law and fact respectively (**Q. 17(b)**).¹⁰⁸ Whether aspects of the six examples are considered errors of law (failure to apply evidentiary principles properly) or errors of fact (making unreasonable findings), they materially affected the decision,¹⁰⁹ as they affected the reliability of the process and thus the ultimate outcome. Again, the Appeals Chamber may rely on the Majority's reasoning on its face to determine if the findings are reasonable. However, if the Appeals Chamber finds that some aspects of the decision lack proper reasoning (and prevent the conclusions from being understood), to perform its appellate review role, the Appeals Chamber may review the evidence itself.¹¹⁰

42. Therefore, whichever the approach, the Appeals Chamber must review the Majority's reasoning on the six examples to assess error. For instance, in not attributing gunfire to the FDS for the 3 March 2011 women's march, was the Majority's reliance on P-0607's evidence *over all other evidence* (eyewitness, video, autopsy reports, and expert evidence) properly reasoned and reasonable?¹¹¹ Or, in finding that victims of sexual violence were not necessarily raped because they were pro-Ouattara supporters (but that this served as a "pretext" for their rape), did the Majority fairly evaluate the evidence of victims of sexual violence and appropriately reconcile its various findings and properly reason its decision?¹¹² The answer to both questions, as indeed in all six examples, must be in the negative and shows that the Majority erred.

43. While the six examples may themselves amount to "mini" errors of fact (under the alternative approach), the Prosecution's appeal is not *overall* a factual one. It remains a legal/procedural appeal, and indeed, legal/procedural appeals challenging a Trial Chamber's assessment of evidence can lead to alleging individual errors of fact *within* their overall context.¹¹³ Factually flawed conclusions can result from a Chamber's defective legal or procedural approach—and accordingly, can also demonstrate the errors and their impact.

¹⁰⁷ [Bemba et al. AJ](#), para. 100 ("procedural errors often relate to alleged errors in a Trial Chamber's exercise of discretion"); Staker and Eckelmans, "Article 81", p. 1933, mns. 40-41.

¹⁰⁸ [Bemba et al. AJ](#), paras. 100-101.

¹⁰⁹ [Bemba et al. AJ](#), para. 110.

¹¹⁰ [Bemba et al. AJ](#), paras. 107-108; Staker and Eckelmans, "Article 81", pp. 1938-1939, mns. 53-55.

¹¹¹ [PAB](#), paras. 166-182.

¹¹² [PAB](#), paras. 236-247.

¹¹³ Staker and Eckelmans, "Article 81", p. 1933, mns. 40-41, p. 1934-1935, mn. 43.

Tailoring the standard of review to the primary errors alleged (in this case, legal/procedural error) reflects a common sense approach to appellate review that the Appeals Chamber has previously taken.¹¹⁴

44. In relation to appellate deference (**Q. 18**), in general, when factual errors are alleged, the Appeals Chamber may disturb a first instance factual finding only where it cannot discern how that conclusion could have reasonably been reached from the evidence before it.¹¹⁵ It otherwise does not completely assess the evidence *de novo* to determine if it would have reached those same factual conclusions, and applies a margin of deference—whether as a legal standard or a matter of judicial policy¹¹⁶—to the Trial Chamber’s factual findings. At the conclusion of the defence case (**Q. 18(i)**), the Trial Chamber’s factual findings deserve this deference. The Trial Chamber has received all the evidence in the case, observed the unfolding of the evidence contemporaneously and as a whole throughout the trial; developed the deep knowledge of the case required to assess evidence separately and holistically and to resolve inconsistencies in the evidence; and made its evaluations on the beyond reasonable doubt standard accordingly. It is therefore “much better positioned” to assess evidence and make factual conclusions than the Appeals Chamber.¹¹⁷

45. A Trial Chamber’s decision-making in a NCTA procedure is, however, different. It applies a “legal sufficiency” test and does not make comprehensive credibility/reliability determinations at this stage (unless, exceptionally, it finds that evidence is “incapable of belief”). Any advantage that it would otherwise enjoy *because it was better placed to assess witness credibility* does not apply, and accordingly, its factual findings may not deserve deference *to the same extent* as at the end of the Defence case (**Q. 18(ii)**). In relatively confined cases (such as in domestic criminal cases)—and especially when the record is based on a limited number of witnesses or only documentary evidence—the Appeals Chamber is likely to be in the same position to assess the evidence against the NCTA standard of proof as the Trial Chamber. However, in complex cases (as before this Court), assessing the evidence

¹¹⁴ [Bemba et al. AJ](#), paras. 100-101 (an error of discretion can be based on errors of law, procedure, or fact); [Kenyatta Article 87\(7\) AD](#), paras. 23-24; see also [Bemba AJ](#), para. 44; [Ngudjolo AJ](#), paras. 44, 129 (wholesale factual errors, resulting from misapplying the standard of proof and other evidentiary standards, are viewed under the factual standard of review); [Bemba et al. AJ](#), para. 107 (lack of reasoning is a procedural error, since it prevents appellate review); [Haradinaj AJ](#), paras. 128-129, 134 (failing to address inconsistencies in a principal witness’s evidence in its reasoning is a legal error), 226.

¹¹⁵ [Lubanga AJ](#), paras. 17-27; [Bemba et al. AJ](#), paras. 89-108; [Ngudjolo AJ](#), paras. 18-27. See also [Bemba AJ](#), paras. 38, 40, 42-43, 45 (with some qualification, endorsing the *reasonableness* standard and rejecting the assessment of evidence *de novo*) and [Bemba J. Eboe-Osui Sep. Op.](#), para. 9 (the Appeals Chamber should not lightly overturn factual findings).

¹¹⁶ See [Ntaganda Response](#), paras. 4-18; [Bemba J. Eboe-Osui Sep. Op.](#), para. 46.

¹¹⁷ [Lubanga AJ](#), para. 57; see also [Bemba et al. Second SAJ](#), para. 21.

(even against the NCTA standard) is often related to how it unfolded at trial: to this extent the Trial Chamber may still enjoy certain advantages. Thus, although appellate deference may be of less significance at the NCTA stage, it may still play a role, depending on the nature of the trial record being reviewed.

46. *In this case*, if the Appeals Chamber considers that it must review the six examples under the factual standard of review (notwithstanding the Prosecution’s overall legal/procedural appeal),¹¹⁸ whether it applies “less” appellate deference than it would in reviewing a decision at the conclusion of the defence case, or the same level,¹¹⁹ the Majority’s factual findings (shown in the six examples) are unreasonable and thus do not deserve appellate deference (**Q. 19**). As the Prosecution has shown, the Majority’s reasoning demonstrates their unreasonableness, as does a review of the underlying evidence.¹²⁰

III. Remedy

47. **Question 20** asks **(a)** whether the Prosecutor “is seeking a remedy that simply declares a mistrial, as requested at paragraphs 264-267 of her appeal brief”, or if she is **(b)** “in fact seeking a new trial before a new Trial Chamber, which appeared to be her position at the hearing on 6 February 2020.” As framed, it implies that the Prosecutor has changed her position on remedy in this appeal,¹²¹ although she has not. And that the Prosecutor’s request for a mistrial declaration, and her expressed intention to retry Mr Gbagbo and Mr Blé Goudé if her appeal succeeds, are mutually exclusive, when they are not.

48. The requested remedy has *not* altered since first articulated in the Prosecutor’s appeal brief,¹²² and later discussed at the February 2020 hearing.¹²³ In both, she asked the Appeals Chamber to reverse the acquittal decision and declare a mistrial, thereby leaving it in the Prosecutor’s hands to decide on the future course of the case. At the February hearing, the Prosecutor elaborated upon her present intention to conduct a retrial if her appeal succeeds.

49. To restate the requested remedy: *first*, based on the errors in grounds 1 and 2, the Prosecutor respectfully requests the Appeals Chamber to exercise its article 83(2)(a) powers and *reverse* the Trial Chamber Majority’s decision.¹²⁴ This will quash or nullify the acquittals. *Second*, given the fundamental nature of the Majority’s errors, the Prosecutor also

¹¹⁸ See above paras. 38-43.

¹¹⁹ See [Tadić AJ](#), para. 64; [Jelisić AJ](#), para. 57; [Čelebići AJ](#), paras. 433-435; [Hadžihasanović et al. AJ](#), paras. 51-52; [Karadžić R98bis AD](#), paras. 10,14 (applying the same standard of review as final appeals to NCTA appeals).

¹²⁰ [PAB](#), paras. 162-252.

¹²¹ See also [Blé Goudé Response](#), paras. 244-246; [Gbagbo Response](#), para. 420.

¹²² [PAB](#), paras. 264-267. See also [Prosecution Notice of Appeal](#), para. 13.

¹²³ 6 February 2020 Hearing. 46:16-23, 47:21-24, 48:8-12, 94:18-95:8.

¹²⁴ [PAB](#), paras. 266-267; [Prosecution Notice of Appeal](#), para. 13.

requests the Chamber to declare a mistrial, without prejudice.¹²⁵ This will vacate the charges, and effectively leave the case with the Prosecutor to exercise her discretion in relation to it.¹²⁶

50. Significantly, in her appeal brief, the Prosecutor did *not* expressly ask the Appeals Chamber to order a retrial/new trial for Mr Gbagbo and Mr Blé Goudé, but rather noted it as a possible remedy.¹²⁷ Since the February 2020 hearing concerned their continued conditional release, the Prosecutor expressed her position (through counsel), that if her appeal succeeds, she intends to retry them.¹²⁸ However, as she underscored, the exact scope and parameters of any such retrial would depend on several factors, which may only be properly assessed when the Appeals Judgment is rendered. This would include any Appeals Chamber orders about its scope; the Prosecutor's decision on whether to narrow the charges (especially considering the Majority's and Judge Herrera Carbuca's views); and operational factors such as the availability of witnesses and other evidence; whether a retrial could utilise parts of the existing record; and cooperation with the relevant authorities.¹²⁹ As stated, the Prosecutor commits to deciding as expeditiously as possible once the judgement is rendered.

51. The Prosecution did not ask the Appeals Chamber to simply reverse the decision and remand it back to the (original) Trial Chamber for a new decision or to resume the trial.¹³⁰ Given the fundamental nature of the Majority's legal and procedural errors *and* their detailed remarks on the sufficiency of evidence (including at times their comments on its quality), this would likely raise insurmountable pre-judgment issues.¹³¹ Moreover, the Trial Chamber, as previously composed, no longer exists since Judge Tarfusser's mandate has ended.

52. A mistrial is "an erroneous, invalid, or nugatory trial; a trial of an action which cannot stand in law because of want of jurisdiction, or a wrong drawing of jurors, or disregard of some other fundamental requisite."¹³² Most critically, a mistrial nullifies or renders nugatory the trial, allowing a new trial to commence (**Q. 20(a)(i)**).

¹²⁵ [PAB](#), paras. 266-267; 6 February 2020 Hearing, 50:21-51:10.

¹²⁶ [PAB](#), paras. 266-267; 6 February 2020 Hearing 51:11-13.

¹²⁷ [PAB](#), para. 266.

¹²⁸ 6 February 2020 Hearing, 44:10-11.

¹²⁹ 6 February 2020 Hearing, 51:24-52:19.

¹³⁰ [PAB](#), paras. 266-267. See 6 February 2020 Hearing, 49:6-20.

¹³¹ See [Uganda v. Godfrey](#), p. 27 (The accused was acquitted at the half-time stage. The Court of Appeal finding that the judge, who had extensively assessed the evidence, had applied a wrong legal standard, ordered a retrial before another judge since the original judge would not be able to be impartial in any retrial, and out of fairness to the parties and the trial judge. Also, the circumstances in this case differ from [Bashir Arrest Warrant AD](#), para. 42 (reversing the PTC's decision to deny a warrant of arrest for genocide based on an incorrect standard of proof, and remanding the case back to the Chamber for a new decision, using the correct standard of proof)).

¹³² *Black's Law Dictionary*, 2nd ed., "[mistrial](#)". Another definition is "(1) A trial that the judge brings to an end without a determination on the merits because of a procedural error or serious misconduct occurring during the proceedings. (2) A trial that ends inconclusively because the jury cannot agree on a verdict": *Black's Law Dictionary*, 11th ed.

53. The Prosecution adopts Judge Eboe-Osuji's approach to mistrials in *Ruto & Sang*, inspired by domestic cases.¹³³ The US Supreme Court in *U.S. v. Perez* observed that "the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever ... there is a *manifest necessity* for the act, or the ends of public justice would otherwise be defeated."¹³⁴ In *Illinois v. Somerville* it underscored that it is left to the trial judge's broad discretion, when "substantial justice cannot be attained without discontinuing the trial."¹³⁵ It clarified in *Arizona v. Washington* that the 'manifest necessity' standard "cannot be interpreted literally" and that a mistrial is appropriate when there is a "high degree" of necessity.¹³⁶

54. The power to declare a mistrial should be used cautiously. But as Judge Eboe-Osuji noted, the category of circumstances that may result in a mistrial is not closed.¹³⁷ Nor need it be premised on the accused's fault. In *Ruto & Sang*, after a trial riddled with deliberate witness interference, Judge Eboe-Osuji found a manifest necessity to declare a mistrial because to acquit would "make a perfect mockery of any sense of the idea that justice has been seen to be done".¹³⁸ For him, a mistrial could be declared "when there is a serious procedural error or misconduct that would result in an unfair trial and the judge adjourns the case without a decision on the merits and decides that a new trial may be held."¹³⁹ Further, as he noted, judicial mistakes in the conduct of trials have resulted in a previous trial being nullified and a new one ordered, citing *R v. SH* where the UK Court of Appeal reversed a judge's decision that an accused had no case to answer on one count, and the jury's subsequent acquittal on a second count, due to the judge's errors in applying the standard and his remarks to the jury. Instead of ordering the trial to resume, it ordered a retrial.¹⁴⁰

55. Domestically, a mistrial request is usually dismissed if not made before a verdict is rendered; the applicant usually cannot request it for the first time on appeal and will be

¹³³ [Ruto & Sang J. Eboe-Osuji Reasons](#), paras. 183-185, 157.

¹³⁴ *U.S. v. Perez*, p. 580.

¹³⁵ *Illinois v. Somerville*, p. 462; *Gori v. U.S.*, p. 368.

¹³⁶ *Arizona v. Washington*, p. 506; *Renico v. Lett*, p. 774.

¹³⁷ [Ruto & Sang J. Eboe-Osuji Reasons](#), paras. 184-186 and cases cited therein.

¹³⁸ [Ruto & Sang J. Eboe-Osuji Reasons](#), para. 183 and fn. 278: "Impurities in the trial process may make it unjust to acquit, without making it just to convict. Hence the remedy of a mistrial." See [Ruto & Sang NCTA Decision](#), p.1 and [Ruto & Sang J. Fremr Reasons](#), paras. 1, 147-148 (not referring expressly to mistrial, but nevertheless agreeing that the charges should be vacated and the accused discharged without prejudice to their prosecution afresh in the future; noting the witness interference in the case, and leaving open the opportunity to re-prosecute the accused, if new evidence unavailable to the Prosecution at the time of the trial warrants such a course of action).

¹³⁹ [Ruto & Sang J. Eboe-Osuji Reasons](#), paras. 185 and 157-158.

¹⁴⁰ See *R v. SH*, p. 202.

deemed to have waived it if not raised at trial.¹⁴¹ Nevertheless, the Prosecution submits that in the unique circumstances of this case, the Appeals Chamber may declare a mistrial even at this stage, as part of the appropriate remedy, and thereby fashion a remedy which best fits the case and the errors.¹⁴² *Firstly*, the Prosecution could not have sought a mistrial for these fundamental errors during trial, since they only manifested (and became apparent) in the rendering of the acquittal decision itself (and as confirmed in the Written Reasons six months later). Accordingly any domestic waiver principle does not bar the Prosecution from asking for it as part of its remedy in the appeal. *Secondly*, the stage of the case is important. The acquittals were rendered by the Majority at the close of the Prosecution's case. If the Appeals Chamber reverses (*i.e.* quashes) the decision based on the errors, the charges would still be extant and the case could (theoretically) be sent back to and resumed before the Trial Chamber. Since that option is no longer possible,¹⁴³ it is instead open for the Appeals Chamber to declare that the trial was a mistrial and to vacate the charges without prejudice, such that Mr Gbagbo and Mr Blé Goudé could be retried in the future.¹⁴⁴

56. As for the legal basis for the remedy at this stage (**Q. 20(a)(ii)**), no explicit provision in the Statute or Rules governs mistrials. But it is necessarily implied from article 64(2), which requires the Chamber to ensure a fair (and expeditious) trial—a notion which applies to the Defence, the Prosecution and the victims alike.¹⁴⁵ This provision applies *mutatis mutandis* to the Appeals Chamber through article 83(1) and rule 149.¹⁴⁶

57. A mistrial finding would nullify the trial and vacate the charges without prejudice, thereby leaving the case with the Prosecutor to determine whether to bring charges and a new trial afresh. (**Q. 20(a)(iii) 1st bullet**).¹⁴⁷ To do so she would need to bring new charges for confirmation before the Pre-Trial Chamber.

¹⁴¹ See *e.g.*, *Gori v. U.S.*; *Downum v. U.S.*; *U.S. v. Alvarez-Moreno*; *U.S. v. Nelson*; *Collins v. State*.

¹⁴² See 6 February 2020 Hearing, 48:3-12.

¹⁴³ See para. 51 above.

¹⁴⁴ See [Stanišić Mistrial Decision](#), para. 33 (*Stanišić* is distinguishable since the appellant brought a *separate* interlocutory motion asking for a mistrial seven months after the completion of trial and while appellate proceedings were on foot. By contrast, here the Prosecution seeks the mistrial declaration *as part of its remedy* in its appeal. Furthermore, *Stanišić's* trial had been fully completed and a Trial Judgement issued, as opposed to here where the acquittal was after a NCTA motion during trial).

¹⁴⁵ [Ruto & Sang J. Eboe-Osuji Reasons](#), para. 190. See also paras. 191-192 finding the doctrine of incidental or implied powers, article 4(1) and article 21 could be sources for the remedy.

¹⁴⁶ By analogy, see [Detention AD](#), para. 53 (recognising that the power to impose conditions on an acquitted person pending appeal results from reading rule 149 with articles relating to release on conditions at trial, and the Appeals Chamber's incidental powers to protect the integrity of its process).

¹⁴⁷ The Prosecution notes that the Appeals Chamber would be empowered to declare a mistrial “with prejudice” to the Prosecutor's right to bring a fresh prosecution, if it considered the interests of justice would not be served by holding a new trial. See also 6 February 2020 Hearing, Blé Goudé's Submissions, 82:11 -22.

58. Article 61(9) does not impede the suggested course (**Q. 20(iii) 2nd bullet**). It prevents the Prosecutor from withdrawing charges after a trial has commenced without the Trial Chamber's permission. However, if the Appeals Chamber declares a mistrial, thereby vacating the charges, the charges would no longer exist before the Trial Chamber, so they need not be withdrawn.

59. A declaration of mistrial could be entered at this stage consistently with the fundamental rights of the accused, including *ne bis in idem* (article 20) and the right to present a defence case before the Trial Chamber (article 67(1)(e)) (**Q. 20(a)(iv)**). *First*, a declaration of mistrial and order to vacate the charges and discharge without prejudice would not *itself* automatically engage the double jeopardy principle. It would be for a future Trial Chamber, if and when there is a new trial on the same charges, to decide that issue.

60. *Second*, even in domestic systems where the double jeopardy principle precludes Prosecution appeals against acquittals, Courts have endorsed the use of mistrials when warranted on the facts, acknowledging that the accused's "valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence before an impartial jury."¹⁴⁸ In other words, a defendant's right to have his trial completed by a particular tribunal must be balanced against the public interest in favour of retrying a person if the circumstances are such that a mistrial is declared because there has been a fundamental inability to have justice done in the case.¹⁴⁹

61. *Third*, this reasoning is even more apposite at the Court, since the *ne bis in idem* principle in article 20 will only bar a second trial at the Court (for the same criminal conduct) when an acquittal is final in the sense of *res judicata*.¹⁵⁰ As such, article 20(1) does *not* preclude holding a retrial following a successful Prosecution appeal against an acquittal. Article 20 recognises this in its opening words, "[e]xcept as provided in this Statute," and article 83(2)(b) provides that the Appeals Chamber, upon finding appealable error, has the power to order a new trial before a new Trial Chamber. This latter provision applies both when an accused appeals a conviction (which is overturned on appeal) *and* when the Prosecution appeals an acquittal (which is overturned on appeal).

¹⁴⁸ *Arizona v. Washington*, p. 505; *Renico v. Lett*, pp. 773-776.

¹⁴⁹ *Illinois v. Somerville*, pp. 470-471.

¹⁵⁰ Applying to article 20(1) the same interpretation to article 20(3) in [Gaddafi Admissibility AD](#), paras. 55-63.

62. Many domestic systems (civil and common law) allow the Prosecution to appeal an acquittal and if successful, retry the accused.¹⁵¹ Likewise at the *ad hoc* tribunals, retrials have been ordered after successful Prosecution appeals.¹⁵² Since *ne bis in idem* in article 20(1) would not bar a retrial at this Court, the only exception would be if there was any abuse of discretion or bad faith in the Prosecutor's request or in the declaration,¹⁵³ and no grounds exist for any such claim here. Alternatively, if the Chamber considers that it would be inherently unfair in the circumstances to leave open the possibility for retrial, it could order a mistrial with prejudice.¹⁵⁴

63. Finally, in relation to **question 20(b)**, while the Appeals Chamber has the power to order a new trial under article 83(2)(b), the Prosecutor is in fact seeking a reversal and mistrial (and vacation of charges), leaving it for her to decide on any retrial and its scope. The Prosecutor's present intention—if her appeal succeeds—is to do so, subject to the above factors to consider in making her final decision about the retrial and its scope.¹⁵⁵

64. The question of a retrial - especially after an acquittal - involves a complex balancing exercise.¹⁵⁶ The Prosecution recognises, on the one hand, that the case was terminated at the close of the Prosecution's case (and before the Defence case); the length of time since proceedings began; issues regarding putting the two men through trial again; and the potential impact of the passage of time on the evidence (**Q. 20(b)**). But these matters must be balanced against the interests of justice, which also demand that the Prosecution and the victims are entitled to have charges as serious as these adjudicated by a Trial Chamber applying proper

¹⁵¹ See [Ruto & Sang J. Fremr Reasons](#), para. 148 (noting the “overly strict wording of article 20 of the Statute, which is no longer in line with the contemporary criminal laws of numerous national jurisdictions.” Relying on Article 4(2) to Optional Protocol 7 to the ECHR and domestic laws, he thought it appropriate to vacate the charges and “leave open the opportunity to re-prosecute the accused, should any new evidence that was not available to the Prosecution at the time of the present case, warrant such course of action.”). See [Ruto & Sang J. Eboe-Osuji Reasons](#), para. 157 (referring to UK case law by which a trial may be required to start afresh when the jury fails to return a verdict). See also [Bemba J. Eboe-Osuji Sep. Op.](#), paras. 5, 22, 263 (stating that he would have preferred to set aside the Trial Judgement and order a new trial in light of the many errors by the Trial Chamber, but ultimately decided to form part of the majority for acquittal).

¹⁵² For example, in [Stanišić & Simatović AJ](#), [Haradinaj et al. AJ](#), and [Muvunyi First AJ](#).

¹⁵³ See *Arizona v. Washington*, p. 508, cited in [Gbagbo Response](#), para. 421; [Blé Goudé Response](#), para. 247.

¹⁵⁴ See fn. 147 above.

¹⁵⁵ See para. 50 above.

¹⁵⁶ [Muvunyi First AJ](#), para. 148 (noting a “retrial is an exceptional measure to which resort must necessarily be limited.” Although the defendant had already spent 8 years in custody, the Appeals Chamber granted a retrial); [Stanišić & Simatović AJ](#), para. 127 (ordering a retrial as the most appropriate remedy to serve the interests of justice, given the gravity of the crimes, and notwithstanding the defendants had already spent over 5 years in detention); [Jelisić AJ](#), paras. 74-77 (declining to order a retrial and considering the accused's guilty plea to other charges based on the same conduct, the time elapsed between the crimes and the commencement of any retrial, the accused's lack of responsibility for the Trial Chamber's error and the ICTY's limited resources). See also factors in [Gilham v. R](#) on whether a re-trial should be ordered (after a conviction had been overturned on appeal).

and fair evidentiary standards and processes, conforming to mandatory statutory requirements.¹⁵⁷

65. Balancing all these interests, the Prosecution considers that a retrial could now be carried out in an expeditious and fair manner. As stressed above, if successful in her appeal, the Prosecutor will expeditiously assess the feasibility and exact scope of any retrial based on the factors mentioned, including the length of the proceedings and fairness to the accused.

66. The Prosecution also notes that much will depend on the future Trial Chamber to decide how fairness and expedition can best be achieved in any retrial, drawing on, *inter alia*, *Stanišić and Simatović*, *Haradinaj* and *Muvunyi*. The Appeals Chamber may also direct or guide the modalities of any retrial, to ensure it effectively balances all competing values.¹⁵⁸

67. Several procedures could ensure the fairness and expedition of a retrial such as (a) the Prosecutor bringing a narrower set of charges,¹⁵⁹ (b) the parties relying on the first trial's record to the extent permitted under the Statute (e.g. rule 68(2) and (3) on prior recorded testimony; article 69(6) on judicial notice; article 69(3), and rule 69 on agreements between the parties); and (c) while not preventing the parties from bringing new evidence, the new Trial Chamber could impose some restrictions.¹⁶⁰ While not an exhaustive list, it shows that modalities exist for ensuring that any retrial is conducted fairly and expeditiously while at the same time ensuring that justice may properly be done in this case.



Fatou Bensouda, Prosecutor

Dated this 22nd day of May 2020, at The Hague, The Netherlands

¹⁵⁷ See also 6 February 2020 Hearing, 51:17-19 (“[T]he Prosecutor has always been of the view that justice has not been done in this case and that continuing proceedings was required in the interests of justice.”).

¹⁵⁸ [Haradinaj Retrial AD](#), para. 26 (stating that, “[a]ny potential for undue prejudice to a defendant in a retrial following an acquittal should be addressed through both the Appeals Chamber’s careful delineation of a retrial’s parameters and the Trial Chamber’s continuing duty to apply fair trial principles”. The Appeals Chamber directed the Trial Chamber to consider any prejudice arising from the admission of new evidence in the retrial to the accused’s fair trial rights).

¹⁵⁹ See [Haradinaj Retrial AD](#), paras. 32, 39 (confining the retrial to certain counts only).

¹⁶⁰ [Haradinaj Retrial AD](#), para. 26. [Stanišić Stay Decision](#), para. 23 (“[T]he Trial Chamber considers it appropriate to exercise its discretion to limit the Prosecution’s evidence primarily to that presented during the original trial [...] Notwithstanding, the Trial Chamber is aware that there may be limited instances where new evidence may be necessary due to circumstances outside of the Prosecution’s control where the evidence presented during the original trial has become subsequently unavailable. In such instances, the Prosecution may be allowed to present new evidence. [It] may be necessary, in exceptional circumstances, to allow the Prosecution to present new evidence [...] unavailable during the original trial and appeal proceedings, could not have been discovered through the exercise of due diligence, and is in the interest of justice.”); see also paras 20-22; [Muvunyi Retrial AD](#), para. 13.