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Date: **11 May 2020**

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

With two public annexes

Public redacted version of the “Defence Response to ‘Victims’ Observations on the issues on appeal affecting their personal interests’ Filed on 8 April 2020 (ICC-02/11-01/15-1326-Conf)”

Source: Defence team for Laurent Gbagbo

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

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As a preliminary matter, classification of this motion:

1. This motion is filed as confidential in accordance with regulation 23 *bis*(2) as it refers to confidential information.

I. Procedural history

2. On 15 January 2019, the Majority of Trial Chamber I granted the motion from the Defence for Laurent Gbagbo and acquitted him of all charges.¹

3. On 16 July 2019, Trial Chamber I notified the “Reasons for oral decision of 15 January 2019 on the *Requête de la Défense de Laurent Gbagbo afin qu’un jugement d’acquittal 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” to the Parties and participants.²

4. On 16 September 2019, the Prosecutor filed a notice of appeal against the decision of acquittal,³ followed on 17 September 2019 by a corrected version of the notice of appeal.⁴

5. On 15 October 2019, the Prosecutor filed her appeal brief.⁵

6. On 26 November 2019, the Chamber issued the “Decision on victim participation”, stating that the victims could file their observations within 30 days of the filing of the Defence’s response to the Prosecutor’s brief and that the Defence would then have 30 days in which to respond to the observations of the LRV:

2) The legal representative of victims may file consolidated observations, to the responses of both Mr Gbagbo and Mr Blé Goudé, within 30 days of notification of both responses to the Prosecutor’s appeal brief. These observations shall not exceed 60 pages.

¹ ICC-02/11-01/15-T-232-FRA CT WT.

² [ICC-02/11-01/15-1263](#).

³ [ICC-02/11-01/15-1270](#).

⁴ [ICC-02/11-01/15-1270-Corr](#).

⁵ [ICC-02/11-01/15-1277-Red](#).

3) Mr Gbagbo, Mr Blé Goudé and the Prosecutor may each file responses within 30 days of notification of the victims' observations in accordance with the preceding paragraph. The responses to the victims' observations shall not exceed 60 pages.⁶

7. On 2 March 2020, the Appeals Chamber decided to allow the Defence to respond to the Prosecutor's appeal brief in 130 pages and the LRV to set out her observations on the Defence's response in 68 pages.⁷

8. On 6 March 2020, the Defence filed its response to the Prosecutor's appeal brief.⁸

9. On 27 March 2020, the LRV requested a further seven pages to respond to the Defence.⁹

10. On 4 April 2020, the Appeals Chamber granted¹⁰ the LRV's request for extension of page limit. The LRV could, therefore, file submissions of 75 pages.

11. On 8 April 2020, the LRV filed her observations in English, consisting of 75 pages.¹¹

12. On 9 April 2020, the Defence also requested an extension of page limit in order to file a 75-page response to the observations of the LRV.¹²

13. On 20 April 2020, the Chamber granted the Defence's request.¹³

14. On 24 April 2020, the Defence received a draft French version of the observations of the LRV.¹⁴

⁶ [ICC-02/11-01/15-1290](#), p. 3.

⁷ [ICC-02/11-01/15-1313](#), p. 3.

⁸ ICC-02/11-01/15-1314-Conf.

⁹ [ICC-02/11-01/15-1320](#), para. 7.

¹⁰ [ICC-02/11-01/15-1323](#).

¹¹ ICC-02/11-01/15-1326-Conf.

¹² ICC-02/11-01/15-1327-Conf.

¹³ [ICC-02/11-01/15-1333-Corr](#), para. 21.

II. Discussion

15. On 26 November 2019, the Appeals Chamber issued a decision authorizing the Legal Representative of Victims to “file consolidated observations, to the responses of both Mr Gbagbo and Mr Blé Goudé”.

16. It was therefore evident that the Appeals Chamber considered that the LRV was to file observations on the responses filed by the Defence teams for Laurent Gbagbo and Charles Blé Goudé to the Prosecutor’s appeal brief. Nonetheless, it cannot escape notice that in her observations the LRV departs from the parameters set by the Appeals Chamber.

17. On examination, the LRV’s observations reveal that she only very seldom responds to the arguments raised by the Defence and, for the most part, merely echoes the Prosecutor’s arguments, sometimes elaborating on them, acting thereby as a second prosecutor.

18. The LRV frequently goes even further than the Prosecutor, by arguing procedural errors or errors of fact that the Prosecutor did not raise in her appeal brief. For instance, the LRV calls into question in general terms the conduct of the trial by the Chamber, maintains that the Chamber failed in its duty to reason the acquittal, and claims that the Chamber violated the Prosecutor’s right to appeal.

19. The Prosecutor did not found her appeal on those three points, and for good reason. Regarding the first point, the Trial Bench gave her the utmost latitude to present her case the way she wanted. Regarding the second point, there is no doubt that the 950-page Judgment is ample fulfilment of the duty to state reasons. Regarding the third point, the LRV’s submission makes little sense as the time limits for appealing against the decision of acquittal started to run only from the date of

¹⁴ Email from CSS to the Defence on 24 April 2020 at 13.31.

notification of the written reasons, 16 July 2019. Accordingly, the Prosecutor's right to appeal was never affected in any way.

20. Therefore, the LRV is not only acting as a second prosecutor, but also has exceeded the scope of the present appeal as delineated by the appellant – the Prosecution. By raising points of law and of fact not addressed by the Prosecutor, the LRV has in effect mounted an appeal of the decision, a covert appeal.

21. It is also apparent that, in addition to exceeding the scope of the appeal, the LRV, in her observations, has even exceeded the scope of the Judgment. For instance, the LRV sets forth a line of argument in defence of the authenticity of the video on the alleged incidents of 3 March 2011 even though in their written reasons the Judges agreed to reason on the assumption that the video is authentic.¹⁵ As this matter is not in dispute, such a line of argument is redundant and fails to illustrate any error whatsoever on the part of Chamber.

22. The LRV rehashes the Prosecutor's arguments (sections 2 and 3) and calls into question the Judges' conduct of the trial (section 1).

1. In her observations the LRV calls into question the Judges' conduct of the trial whereas she did not object to it during the proceedings

23. In both the introduction and the conclusion of her observations, the LRV levels accusations at the Judges and takes the view, going further than the Prosecutor, that their conduct of the trial raises doubts about the integrity of the proceedings as a whole.¹⁶ A number of remarks are in order in this regard.

¹⁵ ICC-02/11-01/15-1263-Conf-AnxB, footnote 3962.

¹⁶ ICC-02/11-01/15-1326-Conf, paras. 8-14, 177.

1.1. The LRV claims that procedural errors were committed by the Judges

1.1.1. The alleged errors that the LRV raises were endorsed by her throughout the proceedings

24. The Defence underscores that during the proceedings the LRV never complained about what she now refers to as “critical flaws” which purportedly “affected the proceedings and led to their substantial unfairness”.¹⁷ Upon analysis, the examples she gives reveal that, often, she even actively supported the Chamber’s position on those points.

25. For instance, she now criticizes the Judges for having denied themselves the means of testing the prior statements admitted under rule 68(2)(b) – that is, without live testimony – whereas not once during the trial did she express the slightest misgiving about the Chamber’s position; to the contrary she regarded such a practice as conducive to the expeditiousness of the proceedings: “Indeed, the Application meets the requirements under Rule 68 of the Rules and this course of events will contribute to the expeditiousness of the proceedings, allowing the prosecution to streamline its presentation of evidence”.¹⁸ The Defence notes, on the whole, that the LRV did not object to any of the Prosecutor’s requests for the admission of prior statements – whether they were made under rule 68(3) or rule 68(2)(b) – and even actively supported most such requests.¹⁹ To object now to a practice she supported throughout the trial does not amount to an argument worthy of consideration. As a matter of fact, by so objecting the LRV is taking issue with her own conduct at trial and, because it now suits her to do so, is back-tracking on her consistently held position at trial, which cannot constitute an argument.

¹⁷ ICC-02/11-01/15-1326-Conf, para. 8.

¹⁸ ICC-02/11-01/15-835-Conf, para. 2.

¹⁹ ICC-02/11-01/15-605-Conf; [ICC-02/11-01/15-491-Conf](#); ICC-02/11-01/15-835-Conf; [ICC-02/11-01/15-881-Conf](#).

26. Regarding the method of examining witnesses, the LRV claims that: “Judge Henderson underlines an overall Chamber’s malpractice on the methods of questioning, including allowing (i) “highly leading questions and inviting opinions”; (ii) confusion between refreshing the memory of a witness and confrontation with a previous statement”.²⁰ Upon analysis, it emerges that Judge Henderson did not once use the phrase “overall [...] malpractice” in his “Reasons”. Rather, he merely stated, in preliminary remarks explaining his approach, why the procedure that the Judges had opted for during the trial warranted a particularly thorough examination of all the Prosecutor’s evidence, including its credibility and probative value, in a “no case to answer” procedure. The thrust of Judge Henderson’s set of remarks is that whereas the credibility and probative value of evidence have to be examined as a matter of course, as, moreover, the Trial Chamber did in *Ruto*,²¹ such examination is warranted all the more by the procedure adopted in the case *sub judice*.

27. Furthermore, the Defence notes that the LRV was in agreement with the decisions adopted by the Majority of the Chamber on the conduct of the proceedings, including when the setting of the bounds for the practice of “leading” questions or the use of prior statements during examination was at issue,²² and she actually used a witness’s prior statement during examination of the witness.²³

²⁰ ICC-02/11-01/15-1326-Conf, para. 10.

²¹ [ICC-01/09-01/11-2027-Red-Corr](#), paras. 40-125.

²² ICC-02/11-01/15-T-13-CONF-FRA, p. 78, lines 19-20; ICC-02/11-01/15-T-14-FRA CT, pp. 17-19; [ICC-02/11-01/15-416](#); [ICC-02/11-01/15-545](#).

²³ ICC-02/11-01/15-T-153-CONF-FRA CT, p. 27, lines 8-25.

1.1.2. The LRV misrepresents the nature of the procedure adopted by the Judges during the trial

28. On the whole, the LRV is unable to establish that the “errors” and “practices” for which she blames the Judges adversely affected the proceedings and the Prosecutor’s ability to present her case. Instead, all the examples in the LRV’s observations indicate that the Judges allowed the Prosecutor the utmost room for manoeuvre and she was able to present her case as she wished. The Judges took a hands-off approach and gave the Prosecutor a great deal of latitude in the choice of evidence, the witnesses called and the way in which the witnesses were examined. For instance, the Judges deferred the assessment of the admissibility of the evidence to the end of the trial, adopted a practice of wholesale admission of the prior statements of witnesses, gave the Prosecution the opportunity to confront a witness with his or her prior statement and were accommodating to the Prosecutor’s “experts”. These measures afforded the Prosecutor very ample room for manoeuvre in order to present her case the way she wanted. This point is important as it demonstrates that in that procedural framework, which was optimal for her, the Prosecutor failed to establish the charges brought against the accused persons. To now take issue with the Judges for undermining the fairness of the proceedings by their adoption of practices that all in all turned out to be favourable to the Prosecution does not, therefore, amount to an argument worthy of consideration.

29. The LRV is unable to demonstrate how a different approach to all the points she raises would have led to a different outcome. To the contrary: the opinions of the Majority Judges suffice to show that they afforded the Prosecutor every opportunity and that, as they point out, had they proceeded differently, they would have had even more reason to dismiss the charges.

30. For instance, as Judge Henderson notes, had the admissibility of the Prosecutor’s evidence been considered at trial, much of it would have been excluded

earlier on, which would have further justified the rejection of the charges at the no case to answer stage:

More generally, although I did take into consideration the quality of the evidence. (i.e. whether the testimony was based on first-hand observation or (anonymous) hearsay), no evidence has been excluded or disregarded on the basis of the lack of trustworthiness of the witness *per se*. This is not out of a sense of impropriety – on the contrary, I believe that it is possible to assess credibility and reliability for the purpose of ‘no case to answer’ proceedings. However, there was no need for assessing trustworthiness of witnesses in order to reach the conclusion that the Prosecutor’s evidence cannot support a conviction. This implies that, had I systematically assessed the credibility and reliability of the Prosecutor’s testimonial evidence, there would be even less of a basis to continue the proceedings in this case.²⁴

31. In another example, concerning the experts, Judge Tarfusser states:

A glance at the subject matter of the various reports prepared by each of those experts, albeit cursory, at the time when they were included in the list of evidence would – and should – have allowed the bench to anticipate that, regardless of their content, no one of those reports would meaningfully assist the Chamber in discharging its responsibilities, whether as regards the determination of facts or the attribution of responsibility to either accused.²⁵

32. It is therefore evident from the Reasons of the Majority Judges and Judge Tarfusser’s individual opinion that the Judges wished to emphasize that they had allowed the Prosecutor the utmost room for manoeuvre throughout the trial. It follows that the LRV’s submission is not a true reflection of the record and the leeway actually afforded to the Prosecutor.

33. The LRV also attributes statements to the Majority Judges which they did not make. As said above, contrary to the LRV’s assertion, not once does Judge Henderson refer to “overall [...] malpractice”. Similarly, the LRV asserts that:

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; (vii) concerns with the procedure adopted to question expert witnesses.²⁶

²⁴ ICC-02/11-01/15-1326-Conf, para. 41.

²⁵ [ICC-02/11-01/15-1263-AnxA](#), para. 27.

²⁶ ICC-02/11-01/15-1326-Conf, para. 9.

However, Judge Tarfusser does not once refer to “procedural faults” in his dissenting opinion. He simply cites examples that he believes may illustrate the fact that, had a different procedure been adopted, the Chamber would have exercised stricter oversight over the quality of the Prosecutor’s case from the outset.

34. The LRV’s submissions are therefore baseless. However, they led her to adopt a stance that may have an impact on her clients’ understanding of the proceedings, since she states: “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.”²⁷ Did she at least explain to her clients that the procedure followed during the trial and during the “no case to answer” proceedings as well as in the judgment of acquittal always allowed the Prosecutor to present her case as she wanted, with minimal oversight by the Judges over the quality of her evidence, and that a different procedure would have provided all the more reason for the acquittal?

1.1.3. The LRV wrongly uses the diverging views expressed by the Judges on certain occasions to infer that the proceedings were unfair

35. It is an inherent part of procedure in the adversarial system that Judges be afforded the opportunity to express their opinions; at times separate or dissenting opinions might ensue. Legal and factual issues may thus be addressed from different perspectives. Such a practice is instructive for the Parties, the participants and the public and presents the proceedings in all their richness. To infer, as the LRV does, that such opinions are symptoms of poorly conducted proceedings is to labour under a misapprehension.

²⁷ ICC-02/11-01/15-1326-Conf, para. 177.

36. According to the LRV, there should be no separate or dissenting opinions, but absolute uniformity of thought by the Judges. The fact that Judges from diverse legal traditions and backgrounds – which enhance the ICC – discuss how to tackle various issues is quite normal in proceedings that are protracted (lasting several years in the case at bar) and complex (the Trial Chamber, like the Pre-Trial Chamber before it, having taken dozens of procedural decisions), is nothing unusual and cannot in itself be a cause of unfairness in the proceedings. It can even happen that Judges change their minds in the course of the same proceedings. It is worth recalling, for instance, that Judge Carbuccia, who with her colleagues adopted the first decision on the conduct of proceedings on 3 September 2015,²⁸ subsequently adopted another decision on the conduct of proceedings that was different in content.²⁹

1.1.4. The LRV does not at any time establish the unfairness of the proceedings in a concrete and specific manner and fails to show any prejudice suffered by her clients as a result of said unfairness

37. The purported procedural errors which the LRV did not regard as such during the trial, the misrepresentation of the Judges' understanding of the procedure they adopted and the misrepresentation of the Judges' freedom to express their opinions in adversarial proceedings are all ploys to conceal the true weakness of the LRV's line of argument, since at no point does she answer the only question that is worth asking, namely whether, irrespective of any disagreements among the Judges, the procedure that was ultimately adopted and applied during the trial caused unfairness.

38. The LRV does not at any point establish the unfairness of the procedure adopted, neither vis-à-vis the victims she represents nor vis-à-vis the Prosecutor. No

²⁸ [ICC-02/11-01/15-205](#).

²⁹ [ICC-02/11-01/15-498](#).

examples of unfairness are provided anywhere, let alone examples of any prejudice that she or the Prosecutor suffered as a result of the approach taken by the Judges.

39. In fact, the LRV, as the victims' legal representative, ought to have specifically shown that the procedure adopted had caused prejudice to her or adversely affected the interests of the persons she represents, but she did not.

1.1.5. The LRV in reality is acting like a second prosecutor

40. In failing to present in concrete terms how the interests of victims are affected and to establish any form of prejudice caused by the practice adopted by the Judges, the LRV appears in reality to be attempting to assist the Prosecutor. In so doing, the LRV oversteps by far her role as legal representative of victims by acting as a second prosecutor and, on many occasions, going further than the Prosecution by alleging "errors" that purportedly affected the Prosecutor's case even though the Prosecutor is silent about them and rightly so because, as seen above, the procedure adopted allowed the Prosecutor to present her case with as much latitude as she wanted.

41. The obvious consequence of having two prosecutors is that it disrupts the fairness of the proceedings: the fact that the LRV is now acting as a second prosecutor is in itself a disruption of the fairness of the proceedings to the detriment of the Defence.

42. By casting herself as a party, *viz.* as a second prosecutor, the LRV destroys the equality of arms to the detriment of the Defence, which thus finds itself forced to fight on two fronts. The fairness of the trial is thereby undermined.

43. Proceedings are fair only insofar as they strike a balance between Prosecution and Defence. It is this principle that allows a contest on equal terms to take place. Without equality of arms, there can be no fair trial. Prosecution and Defence must be placed strictly on a par for the tension between the two parties to produce its effects

and elicit the truth. Any extraneous intervention disrupts that balance to the detriment of one of the parties, in this case the Defence.

44. The Trial Chamber in *Bemba* emphasized the fact that under no circumstances could the limited rights of the victims in the proceedings turn them into a second prosecutor: “[...] victims are participants rather than parties to the trial and **shall not be considered as a support to the prosecution.**”³⁰

45. Likewise in the judgment on victim participation at the investigation stage in the situation in the Democratic Republic of the Congo:

Participation pursuant to article 68 (3) of the Statute is confined to proceedings before the Court, and aims to afford victims an opportunity to voice their views and concerns on matters affecting **their personal interests. This does not equate them, as the case law of the Appeals Chamber conclusively establishes, to parties to the proceedings before a Chamber**, restricting their participation to issues arising therein touching upon **their personal interests**, and then at stages **and in a manner not inconsistent with the rights of the accused and a fair and impartial trial.**³¹

1.1.6. Conclusion

46. In reality, it is apparent from her observations that the LRV is assailing, on principle, the proceedings in their entirety because of the Judges’ decision to acquit Laurent Gbagbo, without any real substantiation of her criticism.

47. Ultimately, the LRV’s current stance on a procedure that she accepted during the trial can be attributed to just one thing: the fact that the proceedings ended in an acquittal. Such an opportunistic volte-face cannot be accepted by the Appeals Chamber.

³⁰ [ICC-01/05-01/08-1023](#), para. 17 (emphasis added).

³¹ [ICC-01/04-556](#), para. 55.

- 1.2. The LRV wrongly claims that the Judges prevented the Prosecutor from sufficiently presenting the historical and political context of the case and that, as a result, their misapprehension of that context led them to take an erroneous decision – acquittal

48. The LRV states:

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. 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.³²

49. The LRV distorts what happened at trial to suggest that the Prosecutor’s case was sounder than it was. She attempts to blame the Judges for the failure of the Prosecutor, who claimed that there had been a common plan that was implemented for over 10 years, without ever supporting her claims with evidence, while admitting that there was no direct evidence of the common plan, since her entire case relied on circumstantial evidence:

As provided by the jurisprudence, the Common Plan does not need to be explicit. And in the present case, it is not so. There is no statement or document explicitly stating Mr Gbagbo’s will (or that of members of his Inner Circle) to stay in power – even if this required the use of violence against civilians.³³

50. As the Defence noted in its “no case to answer” submissions:

[TRANSLATION] It is important to fully grasp the significance of this: there is, according to it – the Prosecution – no direct evidence of a common plan allegedly implemented over the course of close to 10 years by the highest authorities of the State, under several successive governments (which, from 2003, comprised members of all political parties and included rebels) and by dozens, if not hundreds, of people, at all levels – civilian and military – of the State apparatus and across a large swath of Ivorian territory. This quite simply strains credibility, for it is not believable that the implementation of such a

³² ICC-02/11-01/15-1326-Conf, para. 11.

³³ ICC-02/11-01/15-1207-Conf-Anx1, para. 1109.

common plan, which would have involved so many actions and so many players, over such a stretch of time, did not yield the slightest piece of concrete evidence. At this stage, it is not so much a legal inference that the Prosecutor is asking of the Judges as a leap of faith.³⁴

51. What the Majority points out in the acquittal is that, during the trial, the Prosecutor systematically disregarded the real context prevailing in Côte d'Ivoire between 2002 and 2010, and in Abidjan during the crisis – in particular by remaining silent about the existence of a rebel army active in the heart of Abidjan, namely the *Commando Invisible*,³⁵ and the role played by the French military.³⁶

52. For instance, regarding the role played by the *Commando Invisible* during the crisis, Judge Tarfusser notes:

Among many, one example stands out: the choice to virtually ignore and substantially remain silent on the role of the *Commando invisible*: as defined in the Reasons, 'the main armed group operating in opposition to the FDS in Abobo'. Ever since the very early testimonies it became gradually apparent that throughout the crisis Abidjan saw the operation of heavily armed groups (including Dozo warriors in their thousands not only opposing, but actively attacking the FDS (including with tanks and other heavy weaponry), systematically resorting to techniques including mixing with the civilian population and disappearing immediately after the attack (a technique that one witness described as 'terroristic' and another as 'non-conventional': a first, in terms of challenges faced by the Ivorian army) or attacking FDS convoys not only in the context of specific operations aimed at neutralising their threat but on a regular basis, with different kinds of weapons (including *obus de mortiers*), also thanks to the presence of people infiltrating the FDS and passing on information, in particular in Abobo and starting as early as just after the second tour of the elections; all these elements were *per se* suitable to cast at least a doubt on the very narrative of the FDS engaged in an aggressive, as opposed to a defensive, campaign in Abidjan. Some also indicated that tanks of the French army also shot at the FDS. When stating that the presence of civilians, and the need to ensure their protection to the maximum extent, was the very reason why the FDS, who came under siege and progressively retreated into Camp Commando, failed in their mission to defeat the *Commando Invisible*, Witness P-0009 provided specific information as to the relevant context allowing to appropriately read and interpret all these elements; as stated by another military witness, '*on n'arrivait pas à pouvoir les vaincre, parce qu'ils utilisaient des méthodes... on n'avait pas la solution à ces... à ces... à ces méthodes-là*'.³⁷

³⁴ [ICC-02/11-01/15-1199-Conf-Anx5-Corr](#), para. 30.

³⁵ [ICC-02/11-01/15-1263-AnxA](#), para. 105.

³⁶ ICC-02/11-01/15-1263-AnxB-Conf, paras. 66-69.

³⁷ [ICC-02/11-01/15-1263-AnxA](#), para. 105.

53. To suggest, as the LRV does here, that the Prosecutor's failure is due to the fact that

[i]n 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 crisis³⁸

amounts to rewriting the history of the trial by straying from reality in order to absolve the Prosecutor of her shortcomings and enable her to shirk her responsibilities.

54. In an attempt to substantiate her assertions, the LRV cites various examples at footnote 22. On examination, none of the examples support her claims.

55. The first reference relates to P-0048's testimony. In the excerpt cited by the LRV, although the Presiding Judge directed the examining party not to dwell on certain "historical" issues, he did so once the witness had been examined at length (for 3 hours and 30 minutes) for the purpose of expatiating on the context in Côte d'Ivoire at the beginning of the twenty-first century. Moreover, it is surprising that the LRV cites P-0048 as an example whereas P-0048 was the main witness to be called by the Prosecutor to testify about context³⁹ and gave evidence for a total of 17 hours and 18 minutes.

56. The second reference relates to P-0431's testimony. In the excerpt, the Presiding Judge requests the examining party, the Prosecutor in that instance, to state the relevance of questions about a meeting held in 2006. The Prosecutor responded that the period when the meeting was held fell within the ambit of the charges,⁴⁰ and was authorized to proceed. It is therefore not correct to suggest, as the LRV does, that the Chamber prohibited the Parties from discussing the context with

³⁸ ICC-02/11-01/15-1326-Conf, para. 11.

³⁹ ICC-02/11-01/15-T-53-FRA CT WT, p. 67, lines 1-3.

⁴⁰ ICC-02/11-01/15-T-43-CONF-FRA CT, p. 69, lines 6-24.

the witness. It should be recalled that P-0431 is a documentary filmmaker who testified almost exclusively about the context in Côte d'Ivoire during his trip there in 2006 to film a documentary.⁴¹

57. The third reference concerns P-0440's testimony. In the excerpt, whereas the Presiding Judge directs the examining party not to ask further questions about certain incidents in 2004,⁴² he does so only once the witness has been questioned at length about that period.

58. The fourth reference appears to be even less relevant as it relates to an entirely routine courtroom exchange between the Parties, the participants and the Judges: at issue was whether they all agreed that the 265th meeting of the Peace and Security Council of the African Union on the situation in Côte d'Ivoire had taken place on 10 March 2011.⁴³ The reference is therefore of no relevance to the LRV's submission that the Parties were not afforded the right to put questions to the witnesses about the historical context.

59. The fifth reference concerns P-0625's testimony. In the excerpt, the Presiding Judge does not prohibit the Parties from putting questions about the context to the witness. Rather, the Judge merely directs them to be more specific in their questions.⁴⁴ Moreover, it should be noted here that that witness, like the other witnesses to whom the LRV refers, was, under examination, questioned at great length by all the Parties about the political and historical context in Côte d'Ivoire.

60. The sixth reference concerns P-0435's testimony. In this excerpt, the Presiding Judge does not prohibit the examining party from putting questions about the context, but simply directs the party, after hearing "hours" of questioning about the

⁴¹ ICC-02/11-01/15-T-43-CONF-FRA CT, p. 8, lines 10-13.

⁴² ICC-02/11-01/15-T-158-CONF-FRA CT, p. 74, line 21 to p. 75, line 1.

⁴³ ICC-02/11-01/15-T-33-FRA ET WT, p. 24, line 23, to p. 24, line 20.

⁴⁴ ICC-02/11-01/15-T-31-FRA ET, p. 16, lines 3-9.

events of November 2004, “[TRANSLATION] not to spend the whole day on 5 November, please”.⁴⁵ Once again, the LRV’s choice of witness is unusual because P-0435’s testimony, for much the greater part, covered the entire period from 2002 to 2010.

61. Lastly, the final reference concerns the case of the testimony of an alleged rape victim who was testifying in closed session. The Judge directed the Parties to question the victim only about the events that took place on the day of the incident.⁴⁶ That position was warranted in that exceptional case, since (1) it was important to restrict the examination-in-chief and cross-examination of a witness who was considered “vulnerable” and (2) the witness was not qualified to speak about the general context of Côte d’Ivoire.

62. Generally speaking, it is clear from the transcripts of the hearing that both the Prosecutor and the Defence were able to devote a large part of their examination-in-chief and cross-examination to questioning witnesses on the prevailing situation in Côte d’Ivoire between 2002 and 2010. This was the case, in particular, with the military witnesses (P-0009,⁴⁷ P-0010,⁴⁸ P-0011⁴⁹ and P-0047⁵⁰) who enabled the Chamber to fully understand the realities of the security situation in Côte d’Ivoire after the coup d’état of 2002, when year in and year out republican forces, particularly in the west of the country and in Abidjan, were attacked by the rebel forces. The witnesses made apparent that the 2002 coup d’état and the 2010 crisis form a continuum. For instance, P-0047 was unequivocal: “[TRANSLATION] Had it not

⁴⁵ ICC-02/11-01/15-T-92-FRA ET, p. 45, lines 8-21.

⁴⁶ ICC-02/11-01/15-T-104-CONF-FRA ET, p. 1, lines 17-23.

⁴⁷ ICC-02/11-01/15-T-198-FRA CT, p. 31, line 6, to p. 33, line 8.

⁴⁸ ICC-02/11-01/15-T-140-FRA CT, p. 64, line 5, to p. 76, line 17.

⁴⁹ ICC-02/11-01/15-T-132-FRA CT WT, p. 61, lines 5-7; ICC-02/11-01/15-T-135-CONF-FRA CT, p. 20, line 20, to p. 22, line 7, p. 34, line 14, to p. 35, line 17.

⁵⁰ ICC-02/11-01/15-T-203-FRA CT WT, p. 2, lines 17-24; ICC-02/11-01/15-T-205-CONF-FRA CT, p. 7, line 10, to p. 11, line 12; p. 13, lines 1-14.

been for the crisis starting in 2002, there would not have been this situation in ... in ... in December 2010, in November 2010. It was the direct consequence.”⁵¹

63. Ultimately, the LRV is trying to suggest that the Judges did not allow the Prosecutor to highlight the historical and political context of the post-election crisis in Côte d’Ivoire and hence failed to grasp the realities of the crisis, which is why they decided on an acquittal. Otherwise said, the acquittal, as the LRV sees it, rests on the Judges’ misapprehension of the history of Côte d’Ivoire. However, the truth of the trial is the antipode of the LRV’s claims: the Prosecutor was afforded the utmost latitude to present her case, including the historical and political context. One after another, the witnesses under direct examination and, more importantly, under cross-examination, afforded the Judges all the necessary contextual information – information which the Prosecutor had excluded from her narrative since it refutes it. As Judge Tarfusser noted in his separate opinion:

If one were to single out one shortcoming above all, however, one would have to select the Prosecutor’s choice, to this day a reason for the utmost concern, not to adjust and progressively amend her narrative, taking stock of things said or revealed in the courtroom. [...]. Throughout the trial and until her closing statements, the Prosecutor’s failure to meaningfully address facts and circumstances coming on the record through her own witnesses which were not consistent with her own ‘case-theory’ was striking.⁵²

1.3. The LRV wrongly claims that the Judges refused to hear the victims

64. The LRV claims that “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”.⁵³ Several remarks have to be made in this respect.

65. First, when the excerpts of the transcripts of the two testimonies cited by the LRV are analysed, it is readily apparent that in both cases the Chamber intervened

⁵¹ ICC-02/11-01/15-T-205-CONF-FRA CT, p. 7, line 10 to p. 11, line 12.

⁵² [ICC-02/11-01/15-1263-AnxA](#), para. 104.

⁵³ ICC-02/11-01/15-1326-Conf, para. 177.

solely to tell the LRV that her question was ill-framed, not to prohibit her from asking it. In other words, the Judges intervened out of fairness to the witness, so that the witness could express himself better.

66. As to [REDACTED], in concluding her examination of the witness (which was particularly brief – only 14 minutes), the LRV asked the following question:⁵⁴ “[TRANSLATION] What are your feelings today?” A question which is so open-ended may elicit all manner of answers. The question is obviously unconnected to any “prejudice and harms” that the witness might have suffered. Hence the Presiding Judge intervened, considering that such a question about the witness’s feelings did not have any place in *viva voce* evidence as to the facts. Instead of reframing her question and making it more specific and more factual, which she was at liberty to do, since this is how parties normally proceed in international criminal proceedings upon an intervention by the Chamber or an objection of a party, she did not see fit to pursue the matter.⁵⁵ Above all, what the LRV omits to tell the Appeals Chamber is that, beforehand, under direct examination by the Office of the Prosecutor,⁵⁶ and even at the beginning of examination by the LRV, P-0579 had been able to speak freely about the alleged harm done to him.⁵⁷

67. As to P-0433, the LRV asked the following question: “[TRANSLATION] what do you think can repair the harm suffered by the community, the Muslim community after the events?”⁵⁸ The witness did not comprehend the question: “[TRANSLATION] I do not quite understand. What do you mean?”⁵⁹ The Presiding Judge then intervened to explain to the LRV that such a question amounted to inviting the

⁵⁴ ICC-02/11-01/15-T-39-CONF-FRA CT, p. 40, line 28.

⁵⁵ ICC-02/11-01/15-T-39-CONF-FRA CT, p. 41, line 10.

⁵⁶ ICC-02/11-01/15-T-39-CONF-FRA CT, p. 25 *et seq.*

⁵⁷ ICC-02/11-01/15-T-39-CONF-FRA CT, p. 36, lines 13-19.

⁵⁸ ICC-02/11-01/15-T-147-CONF-FRA, p. 62, lines 17-19.

⁵⁹ ICC-02/11-01/15-T-147-CONF-FRA, p. 62, line 20.

witness to speculate and give an opinion⁶⁰ and thus fell outside the standard scope of a properly conducted examination. Once again, instead of reframing her question in order to eliminate the element of speculation, the LRV chose to move on to the next question. Furthermore, as in [REDACTED], a perusal of P-0433's testimony reveals that during examination by the Office of the Prosecutor⁶¹ and by the LRV⁶² the witness was able to speak freely about the harm alleged.

68. It is plain to see that in these two examples there was no desire whatsoever on the part of the Judges to prevent the witnesses from speaking of the harm done to them; quite simply the Judges were asking the LRV to reframe questions that were too vague or too speculative, in order to make them understandable to the witness and appropriate to examination. The Judges had a duty to intervene at that point, and to reproach them for that, as the LRV does here, is an unjustified attack on the Judges.

69. The Defence notes that the LRV's use of these two examples to claim that the Judges prevented the victims from expressing themselves suggests that this is what she told her clients, thereby misrepresenting the task of the Judges and the routine nature of such interventions in international criminal proceedings.

70. The impression that the LRV did not give her clients the full picture of what had happened in the course of the proceedings is, to anyone who reads the LRV's observations, reinforced by her general comments about her clients: the Victims

have expressed the view that from a certain point 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

⁶⁰ ICC-02/11-01/15-T-147-CONF-FRA, p. 60, lines 16-22.

⁶¹ ICC-02/11-01/15-T-147-CONF-FRA CT, p. 53, line 4 to p. 54, line. 19.

⁶² ICC-02/11-01/15-T-147-CONF-FRA CT, p. 56, line 20, to p. 58, line 17, p. 58, line 18, to p. 60, line 11, p. 62, line 8, to p. 63, line 6.

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.⁶³

71. This assertion constitutes a serious attack on the integrity of the three judges who make up the Trial Bench. It is unsubstantiated, as the LRV does not even take the trouble to give examples of the purportedly not impartial attitude.

72. Not only does the LRV's description suggest that she has not sufficiently educated her clients about the nature of international criminal proceedings, but also it is not open to her to rely on victims' "perception" of the proceedings, especially as that "perception" belongs to individuals who appear not to be fully informed.

73. The LRV cannot hide behind victims to level such serious accusations at the Judges. As a lawyer, she must establish bias, if any, in a substantiated and legal manner. Had the LRV considered at any point during the proceedings that the Judges were displaying bias, she should, at the appropriate juncture, have raised the issue before the Trial Chamber by filing a motion for disqualification.

74. Furthermore, she has a professional duty to explain to her clients, to the best of her ability, the nature of the proceedings before the Court and the fact that a decision which is unfavourable in some limited respects, taken on a matter canvassed by the parties, does not amount to bias.

75. Returning now to the allegation that some witnesses were unable to express themselves freely about the harm they claim to have suffered, it should be pointed out that all of the 38 alleged victims of the crisis – without exception – whom the Prosecutor called to testify before the Court were, in giving evidence, able to speak freely and in detail about the harm they had suffered (see Annex 2). Moreover, regarding the harm suffered by the three alleged victims whose prior statements were admitted under rule 68(2)(b), that harm was set out in their prior statements.

⁶³ ICC-02/11-01/15-1326-Conf, para. 177.

The suggestion that the Judges did not allow the alleged victims who gave evidence to express themselves is therefore profoundly inaccurate.

1.4. The LRV attempts to deflect attention from the strategic choices which she made at trial

76. The complaint levelled at the Chamber by the LRV that it did not have sufficient evidence to take an informed decision must be put into perspective given that the LRV waived the right to call witnesses⁶⁴ after the Prosecutor closed her case. Instead of entering a large amount of evidence into the record of the case – which is how she would have proceeded had she actually considered at the time that the Judges needed to be better informed – she entered just a single piece of evidence.⁶⁵ The logical conclusion from such behaviour is evident: clearly, the LRV considered that the Prosecutor had presented all the necessary evidence to the Chamber, had called all the witnesses who she believed could support the charges, had provided the Judges with all the relevant information on the political and historical background and had brought to their attention the harm suffered by the alleged victims.

77. As to the LRV's passiveness during the trial, it should be noted (see Annex 2), that of the 38 alleged victims of the crisis who came to testify in court, the LRV examined only 18 – fewer than half. She did not even examine all her clients, that is, the 17 dual-status witnesses among the 38 alleged victims. The LRV examined only 10 of them. Having deliberately chosen not to put questions or to put only a few questions when examining the witnesses, the LRV cannot lay the blame for her decisions on the Judges.

⁶⁴ [ICC-02/11-01/15-1088](#).

⁶⁵ [ICC-02/11-01/15-1088](#).

78. The point being made here is that, notwithstanding the fact that the Judges obtained all the relevant information, in particular concerning the historical and political context and the possible harm suffered by the alleged victims (see above), it must be underlined that the LRV is shifting responsibility for her own decisions to the Judges, even though they never prevented her from putting questions to the witnesses called by the Prosecutor, from calling her own witnesses or from entering evidence into the record. Had the LRV considered at any point in the trial that the Judges did not have all the relevant evidence, the question arises as to why she did not examine all the witnesses, present her own evidence or call her own witnesses. She cannot now complain about what happened during the trial whereas she did nothing then to change things.

2. The LRV's submissions on the Prosecutor's first ground of appeal

79. The LRV states:

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.⁶⁶

80. Regarding the Prosecutor's first ground of appeal, the Defence notes first that the LRV does not contribute anything new to the submissions that the Prosecutor made in her appeal brief of 15 October 2019. The LRV merely rehashes the Prosecutor's argumentation in broad strokes.

81. In addition to rehashing the Prosecutor's submissions, the LRV also ignores the Defence's response.⁶⁷ It is striking that the LRV refers to the response of the Defence for Laurent Gbagbo⁶⁸ only in three instances – in footnotes – whereas she devotes 27 pages to rehashing the Prosecutor's arguments. What is more, the three

⁶⁶ ICC-02/11-01/15-1326-Conf, para. 42.

⁶⁷ [ICC-02/11-01/15-1314-Conf](#), paras. 28-152.

⁶⁸ ICC-02/11-01/15-1326-Conf, footnotes 141, 152, 169.

references seem to have been made for the sake of form: whereas in the body of the text the LRV opens the paragraph with “In response to the Defence’s arguments”, all she does is rehash the Prosecutor’s arguments, with footnote references to entire passages of the Defence’s response but with no indication whatsoever as to which Defence arguments she is responding to and what her response is. This generic reference to the “Defence’s arguments” conceals a refusal to engage in debate with the Defence. Otherwise said, the LRV chooses thereby not to play by the procedural rules and not to discuss the Defence’s arguments, but merely to repeat those of the Prosecution.

82. However, as the Defence explained at length in its response of 6 March 2020 to the Prosecutor’s appeal brief,⁶⁹ the Prosecutor’s arguments are devoid of legal basis and do not call into question the decision of acquittal.

83. With regard to the LRV’s exposition, the Defence sees fit to make the following remarks:

2.1. Like the Prosecutor, the LRV constantly confuses the oral decision and the written decision of the Judges

84. The LRV, like the Prosecutor, invariably confuses the oral decision of January 2019 with the written decision of July 2019. For instance, like the Prosecutor, she devotes numerous and lengthy submissions to the issue of the supposed lack of reasoning in the oral decision of January 2019.⁷⁰ However, it is clear that the duty of judges to reason decisions taken pursuant to article 74(5) is applicable to written decisions and not the summaries of such decisions which are read out. Furthermore, it is worth noting that the authorities cited by the LRV in the footnotes pertain to the

⁶⁹ [ICC-02/11-01/15-1314-Conf](#), paras. 28-152.

issue of the reasoning of written judgments.⁷¹ All of those references are therefore irrelevant to the present appeal.

85. As emphasized by the Defence in its response to the Prosecutor's appeal brief,⁷² there is no doubt that the written reasons of the Majority Judges, which were notified on 16 July 2019 and in which a systematic and exhaustive analysis of the Prosecutor's evidence and allegations was carried out over 950 pages, do constitute sufficient reasoning of the judgment of acquittal – a point not, in any event, disputed by the Prosecutor in her appeal brief or by the LRV in her observations. It follows that the LRV's assertion that the Majority Judges did not reason their judgment of acquittal is completely unfounded.

86. Similarly, the LRV also confuses the issue of the written reasons for the decision and the oral delivery of the decision when she states that

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.⁷³

87. First, the references that the LRV lists in the footnote do not support her submission at all. The first judgment on appeal in *Lubanga* cited by the LRV is a classic case of an appeals bench pointing to a lack of sufficient reasoning on the part of a trial bench.⁷⁴ The delivery of an oral decision with the notification of written reasons at a later date was not at issue. The second judgment on appeal cited by the LRV was delivered in *Lubanga* on the same day as the first. It concerns the same

⁷⁰ ICC-02/11-01/15-1326-Conf, paras. 42, 55-59, 70.

⁷¹ ICC-02/11-01/15-1326-Conf, footnote 110.

⁷² [ICC-02/11-01/15-1314-Conf](#), paras. 19, 31, 71, 97.

⁷³ ICC-02/11-01/15-1326-Conf, para. 70.

⁷⁴ [ICC-01/04-01/06-773](#), para. 20.

issues: the passage cited by the LRV has been duplicated from the first decision.⁷⁵ Otherwise said, the LRV refers to the same thing twice.

88. Second, the LRV fails to explain how the issuance of written reasons after the delivery of an oral decision amounts to proof that the Judges failed in their duty to reason, given – once again – that the purpose was to reason the written decision. Once more, the question is whether, at the end of the “no case to answer” procedure, a written judgment setting out detailed and reasoned considerations for the acquittal was available to the Parties, the participants and the public. The answer is a resounding affirmative because to suggest that the Reasons of the Majority notified in July 2019 do not meet the requirements of reasoning and publicity does not reflect reality.

2.2. The issue of the alleged lack of agreement among the Majority Judges

89. The LRV argues:

However, as also argued by the Prosecution, 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 applicable and the scope of analysis required for the decision.⁷⁶

90. Therefore the LRV argues, like the Prosecutor, that the Majority Judges disagreed on (1) the factual and legal determinations, (2) the standard of proof and (3) the scope of analysis required of the decision.

91. First, the LRV seeks to gloss over the fact that the two Majority Judges agreed not only on the outcome of the proceedings (the acquittal of Laurent Gbagbo), but also on the standard of proof, the analysis of the evidence and the factual and legal determinations as set out in the Reasons of Judge Henderson. Here too, the LRV

⁷⁵ [ICC-01/04-01/06-774](#), para. 30.

⁷⁶ ICC-02/11-01/15-1326-Conf, para. 97.

simply rehashes the Prosecutor's arguments and does not make the slightest effort to address the Defence's submissions.

92. It should be noted that Judge Tarfusser made clear at the outset of his separate opinion:

I fully concur with the Majority outcome of this trial. I could not be more in agreement with my fellow Judge Geoffrey Henderson in believing that acquitting both accused is the only possible, and right, outcome for these proceedings. For the purposes of the Majority reasoning, I confirm that I subscribe to the factual and legal findings contained in the 'Reasons of Judge Henderson' ('Reasons').

He subsequently referred more than 80 times to the Reasons of Judge Henderson. It is also worth noting that Judge Tarfusser's approach is exactly the same as that taken in *Ruto* by Judge Eboe-Osuji who stated that he fully adopted the factual findings set out in Judge Fremr's individual opinion.⁷⁷

93. Second, regarding the standard of proof, it is worth recalling that, whereas Judge Tarfusser in his separate opinion expresses a preference in theory for the "beyond reasonable doubt" standard, he also explains that, owing to the "exceptional weakness" of the Prosecutor's evidence, he found that the Prosecutor's case also did not meet the lower threshold adopted by the Majority and set out in Judge Henderson's reasons.⁷⁸ The LRV, like the Prosecutor, has chosen to ignore this part of Judge Tarfusser's reasoning.

94. Third, regarding the "scope" of the Judgment, the LRV does not state what problem could arise from Judge Tarfusser's position. That Judge Tarfusser expressed his individual opinion on what the judgment of acquittal might have been had he written it in its entirety does nothing to change the fact that he clearly stated that he fully subscribed to the Majority's findings as set out in the Reasons of Judge Henderson.

⁷⁷ [ICC-01/09-01/11-2027-Red-Corr](#), Reasons of Judge Eboe-Osuji, para. 2.

⁷⁸ [ICC-02/11-01/15-1263-AnxA](#), paras. 65-67.

95. In this respect, the LRV oversimplifies Judge Tarfusser's position. The Judge considers, in keeping with the separate opinion he filed in *Abu Garda*, that once the Prosecutor has failed to satisfy his or her obligation to establish the essential elements relating to the responsibility of the accused, it should not be necessary for a Chamber to consider the other aspects of the allegations (for instance, the legal characterization of the facts, the contextual element of the alleged crimes, etc.). In *Abu Garda* the Chamber concluded that there was no evidence of any role played by the suspect, be it in the organization⁷⁹ or the implementation⁸⁰ of the alleged crimes. On that basis, Judge Tarfusser held that a finding that there was no nexus between the suspect and the alleged crimes sufficed alone for the dismissal of the charges⁸¹ and consequently the detailed analysis conducted by his colleagues on the characterization of the crimes was unnecessary.⁸²

96. That same position was expressed in Judge Tarfusser's separate opinion in the case *sub judice*. Referring to the issue of the volume and degree of detail required, in his view, of an international judgment, Justice Tarfusser stated:

It is not the first time that I address this matter. In the *Abu Garda* case, back in 2010, while fully subscribing to then Pre-Trial Chamber I's conclusion that the charges should not be confirmed, I dissociated myself from the Majority by stating my view that, in that case, 'the lacunae and shortcomings exposed by the mere factual assessment of the evidence [we]re so basic and fundamental that the Chamber need not conduct a detailed analysis of the legal issues pertaining to the merits of the case, in particular as to the existence of the material elements constituting any of the crimes charged'. I also stated, more specifically, that even at the pre-trial stage, the very nature and function of a criminal trial required first and foremost that a link be established between the historical events as charged and the alleged perpetrators as identified by the Prosecutor and that, 'whenever the evidence gathered by the Prosecutor does not allow such a link to be established, because it is flimsy, inconsistent or otherwise inadequate', it was the pre-trial judge's duty to decline to confirm the charges and to refrain from conducting a detailed analysis of the other facts. It is, or should be, beyond controversy that the same principles are at least as relevant, if not more critically so, at the trial stage.⁸³

⁷⁹ [ICC-02/05-02/09-243-Red](#), paras. 173, 178-179.

⁸⁰ [ICC-02/05-02/09-243-Red](#), paras. 216, 230.

⁸¹ [ICC-02/05-02/09-243-Red](#), para. 2.

⁸² [ICC-02/05-02/09-243-Red](#), paras. 3-5.

⁸³ [ICC-02/11-01/15-1263-AnxA](#), para. 10.

97. The statement of such a position does nothing to alter the fact that Judge Tarfusser made explicit his agreement with the manner in which the Prosecutor's evidence is analysed in Judge Henderson's reasons and, above all, it does not in any way imply that he disagrees with Judge Henderson's factual and legal determinations as a whole. The fact that Judge Tarfusser is of the opinion that the acquittal could have been pronounced on the basis of only part of the determinations made by the Majority, i.e., on the sole basis of the Prosecutor's failure to establish any nexus between Laurent Gbagbo and the alleged crimes (which makes sense, as the absence of one element of the mode of responsibility suffices for the charges to be considered not established) obviously does not entail that he disagrees with what Judge Henderson said.

98. In any event, in the Reasons, Judge Henderson explains that he strove to be exhaustive because that exercise is instructive, and that, because he had often given the Prosecution the benefit of the doubt, he had to see the analysis of the evidence through to completion in spite of its contradictions and lack of probative value. He points out that, had he not engaged in such an exercise, he would, in many instances, have arrived at his determination that there was no evidence much sooner.⁸⁴

99. To claim that the entirely legitimate question of the nature and scope of international judgments raised by Judge Tarfusser in his separate opinion has any bearing on the merits of the decision of acquittal shows, therefore, that the LRV misunderstood Judge Tarfusser's position and the fact that, in his separate opinion, aside his fundamental and complete agreement with Judge Henderson, the Judge was expressing a philosophical opinion.

⁸⁴ ICC-02/11-01/15-1263-AnxB-Conf, paras. 30-31, 38, 41, 1422-1423.

100. Ultimately, like the Prosecutor, the LRV is actually imputing motives to the Judges, relying not on concrete grounds but on a misrepresentation of the opinions expressed both by Judge Tarfusser and by Judge Henderson.

2.3. The LRV acts as if there had not been a trial

101. The LRV, like the Prosecutor, maintains that in January 2019 the Judges could not have analysed the Prosecutor's evidence. She claims:

In addition, the procedural history of this case further supports Judge Herrera Carbuccia's view 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 Defendants and sought the views from the parties and participants on the "appropriateness and modalities of interim release". 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. 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.⁸⁵

102. The LRV, like the Prosecutor in her appeal brief, acts in this respect as if the Judges, when they embarked on the no case to answer procedure, were unfamiliar with the case, as if two full years of trial had not previously taken place, two years in which the Judges heard 82 witnesses, ruled on the admission of the prior statements of 15 other witnesses (after a meticulous analysis of their evidence), accepted almost 3,000 items of documentary evidence submitted from the bar table and were present at hearings when the Parties canvassed the submission of over 1,000 items of documentary evidence through witnesses. Put otherwise, the Judges did not come across the Prosecutor's case on the day the Defence filed its "no case to answer" motion, 23 July 2018, and nor did they need to wait for the hearings to end in November 2018 to become acquainted with the substance of the Prosecutor's case and the Defence's position. By acting as if the Judges became acquainted with the

⁸⁵ ICC-02/11-01/15-1326-Conf, para. 108.

Prosecutor's evidence only during the "no case to answer" procedure, the LRV proceeds as if the trial had never taken place and the Judges had not performed their task during the proceedings.

103. The Defence notes that the LRV does not hesitate to assert, with nothing advanced in support, that the Majority Judges handed down the acquittal without having had the time to analyse all the Prosecutor's evidence.

104. It is therefore strange that, in her response, the LRV relies heavily on what Judge Carbuccia states in her dissenting opinion. Put differently, the LRV is implying that Judge Carbuccia did what the two Majority Judges failed to do: she acquainted herself with the record before reaching a decision. Such reasoning is flawed because, if the LRV considers that the two Majority Judges had no time to acquaint themselves with the record, the question then arises as to how Judge Carbuccia had the time. The Defence underscores that Judge Carbuccia had decided to follow exactly the same procedure as the other two Judges, in that, having announced on 15 January 2019 her intention to file her written reasons "in due course", she did no more that day than give the outcome of her thinking.⁸⁶ On 16 July 2019, Judge Carbuccia, in common with the other Judges, delivered the detail of her written reasons, which therefore constituted her dissenting opinion. In other words, from the standpoint that the Majority Judges did not have enough time to analyse the evidence before pronouncing the acquittal, it should necessarily follow that Judge Carbuccia also would not have had sufficient time to analyse all the evidence before opining that the trial should continue. Here, therefore, it is quite plain that fault is being found with the two Majority Judges for the content of their decision, that is, the acquittal, and not for how they proceeded.

⁸⁶ [ICC-02/11-01/15-1234](#), para. 48.

2.4. The LRV claims that issuance of the written reasons in July 2019 affected the Prosecutor's right to appeal

105. Somewhat inexplicably, the LRV claims on numerous occasions – at least eight – in her observations that by issuing a written decision in July 2019, the Majority Judges affected the Prosecutor's right to appeal.⁸⁷ However, what the LRV omits to state in her observations is the fact that, as early as 15 January 2019, the Majority Judges had taken care to state that the statutory time-limits for appeal would run only upon notification of the written reasons for acquittal.⁸⁸ In those circumstances, the Prosecutor was in a position to appeal the decision, since she could avail herself of the 950 pages of the Majority Judges' written reasons and, to that end, she enjoyed the time afforded by the Statute.

106. Since the Prosecutor's right to appeal was never affected in any way whatsoever and, on the contrary, the Judges took care to provide the Parties with the most specific and detailed set of reasons possible, it must be observed that the references made by the LRV in her submissions are irrelevant because they relate to cases in which a party had been unable to appeal under appropriate conditions because of the absence of written reasons.

107. For example, the LRV, like the Prosecutor in her appeal brief,⁸⁹ cites the reasoning in Judge Carbuccia's dissenting opinion that is founded on Canadian authorities, *Teskey* and *Cunningham*.⁹⁰ As stated in the Defence's response to the Prosecutor's appeal brief, these decisions are not relevant to the case *sub judice*.

108. In the *Teskey* case, the Accused had been convicted in an oral decision and was obliged to appeal that oral decision before a written judgment had been issued.

⁸⁷ ICC-02/11-01/15-1326-Conf, paras. 56, 59, 64, 71, 76, 81, 82, 106.

⁸⁸ ICC-02/11-01/15-T-232-FRA ET WT, p. 4, lines 9-10.

⁸⁹ [ICC-02/11-01/15-1277-Conf](#), para. 29, footnote 71, para. 60; footnote 134, para. 112, footnote 239.

⁹⁰ ICC-02/11-01/15-1326-Conf, para. 64, footnote 124.

Since that judgment was issued 11 months after the oral verdict,⁹¹ that is to say, after the person concerned had filed grounds of appeal, the question arose as to whether the written reasons had been composed with the aim of responding *ex post facto* to the grounds of appeal. In *Teskey* the fact that the written judgment came after the appeal may have occasioned prejudice to the convicted person. That case is therefore irrelevant here because the written decision was available to the Prosecutor at the time she lodged her appeal.

109. In *R v. Cunningham*⁹² the Canadian prosecutor had been put in the position of having to appeal against an acquittal where the trial court had not issued any written reasons whatsoever and only delivered its written judgment 25 months after the acquittal. In that case, the Court of Appeal for Ontario found that the written judgment had been composed with the sole purpose of responding after the fact to the ground of appeal submitted by the Canadian Prosecutor alleging that the reasons given orally were insufficient.⁹³ Here again, the circumstances are plainly not applicable to the case *sub judice*.

110. By way of further example, in *Bemba et al.*, which the LRV cites, the Appeals Chamber states:

Article 74 (5) of the Statute requires the Trial Chamber to provide “a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions”. If a decision under article 74 (5) of the Statute does not, or not completely, comply with this requirement, this amounts to a procedural error. In the view of the Appeals Chamber, this provision recognises the importance of reasoning in **allowing the accused person to usefully exercise available rights of appeal**.⁹⁴

Here again, the relevance of the reference is unclear, as the issue of a violation of the Prosecutor’s right to appeal does not arise here.

⁹¹, [Judgment of the Supreme Court of Canada, *R. v. Teskey*](#).

⁹² [Court of Appeal for Ontario, *R. v. Cunningham*](#), para. 50.

⁹³ [Court of Appeal for Ontario, *R. v. Cunningham*](#), para. 50.

⁹⁴ ICC-02/11-01/15-1326-Conf, para. 56, footnote 111, citing [ICC-01/05-01/13-2275-Red](#), para. 102 (emphasis added).

111. In addition, the LRV in her response seems to suggest that the Trial Chamber violated the victims' right to appeal:

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.⁹⁵

112. This assertion makes little sense since the LRV obviously lacks standing to appeal an acquittal. The Defence also notes the LRV's reference to a purported right of victims "to [...] reparations", which was supposedly violated by the Majority. At this juncture, an obvious procedural principle is worth recalling: victims participating in the proceedings do not enjoy an automatic right to receive reparations merely by virtue of their participation. The right to be awarded reparations is dependent on a conviction handed down in fairly conducted criminal proceedings. Therefore, by invoking in generic terms a right to reparations in this context, the LRV seems to suggest that, in her view, the mere fact of pronouncing an acquittal violates that right and that, ultimately, the victims have the right to obtain a conviction regardless of the course which the proceedings took. Evidently, such an approach must be rejected by the Appeals Chamber because it rests on a premise that is antithetical to the cornerstone of criminal proceedings in democracies: the presumption of innocence.

2.5. The LRV does not at any point show that the errors she alleges affected the impugned decision

113. Lastly, the Defence notes that the LRV does not, any more than the Prosecutor does, make the slightest effort to explain how the errors she ascribes to the Judges affect the impugned decision, whereas such explanation is a *sine qua non* for an

⁹⁵ ICC-02/11-01/15-1326-Conf, para. 71.

appeal to be entertained. Her failure to do so is all the more astonishing in that, in her observations, she underscores that it is a condition of appeal.⁹⁶

114. The LRV does nothing more than state:

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.⁹⁷

115. Nothing is put forward in support of that claim. Not once does she explain in which respect the acquittal decision of January 2019 is not underpinned by a comprehensive analysis of the Prosecutor's evidence, or which determinations of fact or law would have changed had the Majority Judges proceeded otherwise.

116. Had the Judges proceeded as, in the view of the LRV and the Prosecutor, was required of them, *viz.* by ruling all at once and in writing, they would necessarily have done so in July 2019, as that is the time it took to compose the written reasons. The outcome would have been identical and the Prosecutor would have entered an appeal within the same time frame. The question arises as to what would have changed: not the outcome of the no case to answer procedure, not the rationale followed by the Majority Judges, not the details of the Reasons and not the time for entering an appeal. The only change would have been that unconditional release would not have been ordered on 15 January 2019, as the acquittal would not have been entered by then. Otherwise put, Laurent Gbagbo would have spent a further six months in prison for nothing, which would have been another violation of his rights. To put a finer point on it, not once does the LRV or the Prosecutor consider the issue of the concrete consequences of the position they adopt, whereas the rights of the person who stands charged are the be-all and end-all of criminal proceedings.

⁹⁶ ICC-02/11-01/15-1326-Conf, paras. 34, 35, 40.

⁹⁷ ICC-02/11-01/15-1326-Conf, para. 105.

117. The LRV and the Prosecutor therefore find fault with the Judges for not keeping a person who they knew must be acquitted in prison for six months. The position of the LRV and the Prosecutor finds no support in law or from the perspective of fundamental human rights and, in relation to the present appeal, that position cannot have any bearing on the legality of the acquittal.

3. The LRV's submissions on the Prosecutor's second ground of appeal

3.1. The LRV argues, no evidence in support, that the Judges had not adopted a standard of proof at the time of entering the acquittal in January 2019

118. The situation as to the standard of proof, as set out by the Defence in its response to the Prosecutor's appeal brief,⁹⁸ is straightforward: there is nothing to suggest that the Judges – be they the Majority Judges or the dissenting Judge – upon handing down their decision on 15 January 2019 (1) had not adopted a standard of proof and (2) had not examined the evidence against that standard. The six months which elapsed between the decision of acquittal and the written notification of the reasons are immaterial in this respect, since that time could not be compressed as it was needed to write the decision.

119. Neither the LRV nor the Prosecutor explains how the form of delivery – oral and subsequently written – of the decision of acquittal would in any way be connected to the type of standard adopted by the Judges. The question arises as to how the delivery of an oral decision in January 2019 followed by a written decision in July 2019 reveals that the Judges did not base their reasoning on a standard in January. Neither the LRV nor the Prosecutor provides any explanation. The mere fact that the Judges did not specify in their decision of January 2019 the standard they had adopted does not mean that they did not adopt one at all. What is more,

⁹⁸ [ICC-02/11-01/15-1314-Conf](#), paras. 157-173.

as the LRV herself notes, “it is a common and uncontroversial practice for a [Trial] Chamber not to set out expressly the standard of proof it applies, especially when delivering an oral decision”.⁹⁹

120. Nor does the LRV explain, any more than the Prosecutor does, how the way in which the Chamber proceeded during the no case to answer proceedings, specifically as regards the choice of standard of proof, deviated from the norm: the Parties and the participants gave their views freely on the standard of proof and had the right to reply; thereafter, on the basis of the Parties’ submissions, the Chamber disposed of the matter in a decision. Everything therefore proceeded with the utmost normality and took an ordinary procedural course. As the LRV herself acknowledges, the Parties and the participants were able to present at length their views on the applicable standard.¹⁰⁰

121. The LRV does not explain, any more than the Prosecutor does, what would have changed had the Judges specified their chosen standard of proof in advance of the no case to answer proceedings: the proceedings would have been identical, all the more so since the Prosecutor was able to adduce the totality of her evidence during the two years of trial, applying to it the highest standard, which is that required at trial – “beyond reasonable doubt”. That being so, irrespective of whether the Judges did or did not explicitly inform the Parties once the Prosecutor had closed her case but before the no case to answer proceedings that a specific standard would apply to those proceedings – and by definition a standard lower than that required at trial – nothing would have changed.

122. The LRV does not explain, any more than the Prosecutor does, how uncertainty ensued from the fact that the Judges did not spell out beforehand the

⁹⁹ ICC-02/11-01/15-1326-Conf, para. 124.

¹⁰⁰ ICC-02/11-01/15-1326-Conf, para. 120.

standard they would apply to the no case to answer procedure, whereas, as said, the Prosecutor had, for two years, been able to adduce all of her evidence vis-à-vis the higher standard.

123. The Defence notes that, despite arguing during the no case to answer procedure for a standard of proof which does not give consideration to the authenticity, reliability or probative value of her evidence,¹⁰¹ at the same time the Prosecutor set out in detail and over more than 1,000 pages why, as she saw it, her evidence was credible, reliable, authentic and so on. In practice, the Prosecutor therefore presented her entire case, during the no case to answer procedure, in as much detail as possible, and thus applied the standard which the Judges went on to adopt formally. She therefore suffered no unfairness or prejudice.

124. The LRV appears to suggest that the fact that parties to proceedings may hold a divergent opinion on a matter of law, for instance on the standard of proof, entails *ipso facto* “uncertainty”. Discussion *inter partes* is par for the course. Even so, such discussion will not entail uncertainty since its *raison d’être* is to be disposed of by the judges.

125. Furthermore, a discussion as to the law always takes place within set parameters. As regards the matter at hand, the parameters were delineated by the precedent in *Ruto*, in which the two Majority judges had made plain their decision to apply to the no case to answer procedure a standard which allows the strength of the Prosecutor’s evidence to be appraised vis-à-vis various points, such as authenticity of the evidence or witness credibility. The *Ruto* precedent is what the Majority Judges in the case *sub judice* ultimately followed. It also should be noted that the positions taken by the Parties in canvassing the evaluation of the standard of proof (in relation to the no case to answer procedure) were clear-cut: the Prosecutor sought

¹⁰¹ ICC-02/11-01/15-1207-Conf-Anx1, para. 34.

rejection of the *Ruto* precedent, whereas the Defence argued for it to be followed. The fact that the Prosecutor sought a departure from *Ruto* does not however entail uncertainty as to the existence of a standard, since the *Ruto* precedent predated that discussion.

126. The LRV does not call into question, any more than the Prosecutor does, the determination made by the Chamber as to the individual responsibility of Laurent Gbagbo. She does nothing more than argue:

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 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.¹⁰²

127. Yet the LRV does not explain how the decision would have differed absent the alleged errors, nor does she specify the general standard that the Majority should have adopted that would have produced a different outcome. All she does in her analysis of the Prosecutor's second ground of appeal is to express sporadic disagreement (and for which no support is provided, as discussed below) with certain findings of fact made by the Majority.

128. Lastly, the LRV is reduced to well and truly imputing motives to the Judges, to the point of casting aspersions on their professional integrity, when, for example, she appears to suggest that the Majority Judges had "already decided the fate of the trial"¹⁰³ in December 2018, implying that they "decided the fate of the trial" before they had analysed all of the Prosecutor's evidence ("since the oral pleadings on the NCTA motions had only concluded on 22 November 2018").¹⁰⁴ The LRV cites in

¹⁰² ICC-02/11-01/15-1326-Conf, para. 127.

¹⁰³ ICC-02/11-01/15-1326-Conf, para. 121.

¹⁰⁴ ICC-02/11-01/15-1326-Conf, para. 121.

support the Code of Judicial Ethics and the provisions of the Statute on the duty of impartiality of the Judges and the disqualification of Judges.¹⁰⁵

129. That is a serious accusation for the LRV to level at the Judges (and one which, as aforementioned, necessarily extends to Judge Carbuccia, since she too had made it known in January 2019 that she had analysed all of the Prosecutor's evidence).¹⁰⁶

130. That accusation which the LRV levels at the Judges is necessarily unfounded, as it disregards what happened at trial and the role of the judge at trial. Setting aside, for the time being and for the sake of argument, the issue of the no case to answer procedure and the standard applicable thereto, and turning to the trial itself, it should be noted that the Prosecutor was able to present the entirety of her case against the Accused freely before the Chamber for two years. Logically, since the burden of proof rests with the Prosecution, it had to be open to the Judges, in theory, to rule on whether the Prosecutor had proven the charges beyond reasonable doubt at the time the Prosecutor closed her case, in spring of 2018 – solely on the basis of that case against the Accused. That being so, does it not follow as a matter of course that a judge who had been present at the presentation of all of the Prosecutor's evidence for two years was able to form a clear picture of whether of the Prosecutor's case was sound or weak, irrespective of whether or not the Defence filed a no case to answer motion?

131. Yet again, the weakness of the LRV's line of argument reveals the true complaint which she has with the Majority Judges: the fact of having entered an acquittal.

¹⁰⁵ ICC-02/11-01/15-1326-Conf, para. 122.

¹⁰⁶ [ICC-02/11-01/15-1234](#), para. 38.

3.2. The “Majority’s errors” set forth by the LRV are unsupported and unproven

132. The LRV proceeds in the same fashion as the Prosecutor in the part she titles “Relevant examples of the Majority’s errors”: she selects a number of factual points on which she disagrees with the Majority and claims them to be examples “of errors” with the explicit aim of bolstering the line of argument advanced by the Prosecutor. And yet (1) not once does she explain how each such example illustrates the error – legal or procedural – argued by the Prosecutor in her Appeal Brief and (2) nor does she situate them within their context, wilfully disregarding the holistic analysis of the evidence undertaken by the Majority Judges to which the examples belong.

133. The Defence sees that, whereas the LRV finds fault with the Majority Judges for not taking a holistic approach to the Prosecutor’s evidence,¹⁰⁷ she engages in a piecemeal analysis of the Reasons of the Majority Judges, isolating particular points of disagreement without ever returning them to the context of the holistic analysis of the Prosecutor’s case undertaken by the Majority.

134. The Defence also sees that, in her observations, the LRV puts forward new examples in addition to elaborating upon some of the examples given by the Prosecutor in her Appeal Brief. That course of action raises significant procedural issues, since the LRV thereby exceeds the ambit of the appeal as delineated by the Prosecutor. The fact that the Prosecutor, in her second ground of appeal, selected examples which, in her view, reflect an error of law or an error of procedure does not give the LRV free rein to raise every example that comes to her mind: to do so would extend the ambit of the appeal. This point takes on all the more significance in that, by adding her own examples and her own arguments to what the Prosecutor has said, the LRV mounts a covert appeal under the cloak of “observations”.

¹⁰⁷ ICC-02/11-01/15-1326-Conf, para. 129.

135. Lastly, the Defence sees that the LRV does not show, any more than the Prosecutor does, how the examples of alleged errors which she uses would have affected the decision of acquittal. Quite the contrary: as said, the LRV does not at any point call into question the overall findings made by the Majority Judges, but simply states – no argument advanced in support – that the decision would have been different had they not made the errors which she holds against them. A statement is no substitute for substantiation.

136. As regards the Prosecutor's examples on which the LRV elaborates, the Defence refers to its response to the Prosecutor's appeal brief. Regarding the LRV's new arguments on the incidents underpinning the charges, the Defence makes the following submissions:

3.2.1. The first incident: the march on the RTI of 16 December 2010

137. The LRV states:

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. However, the Prosecution presented evidence showing that Mr Gbagbo was informed of civilian deaths on the same day of the march, and that he met with the CEMA and his ministers in the course of the day on 16 December 2010.¹⁰⁸

138. First, it must be remarked that the reference given by the LRV at footnote 236 does not support her assertion. Giving evidence from the stand, P-0009 claimed to have been in contact with Laurent Gbagbo only twice on the day of the march: (1) a brief telephone call on the day which did not concern the march itself but only the fact that there had been clashes between the FDS and the armed rebels around the Golf Hotel that morning and (2) a brief report given by P-0009 after the march.¹⁰⁹

¹⁰⁸ ICC-02/11-01/15-1326-Conf, para. 133.

¹⁰⁹ ICC-02/11-01/15-T-196-CONF-FRA CT, p. 24, line 4 to p. 30, line 10.

Those two brief exchanges cannot be regarded as “real-time” information and so do not cast doubt on Judge Henderson’s conclusion.

139. The LRV appears to be suggesting that, in the Judgment, Judge Henderson deliberately disregarded P-0009’s evidence. That is not so. Quite the contrary: Judge Henderson analysed at length P-0009’s evidence on the subject¹¹⁰ and concluded that “[a]ccording to the evidence, General Mangou spoke to Mr Gbagbo **during the operation** once and this was in relation to the clashes at the Golf Hotel **rather than the RTI march as such**” and that

General Mangou testified that he did not report on civilian deaths among the demonstrators at that time, since he had not yet received information on the issue. **It was only when the operation had finished that General Mangou reported to Mr Gbagbo that there had been civilian casualties. Therefore, the Prosecutor’s allegation that General Mangou had been reporting on FDS and civilian casualties to Mr Gbagbo throughout the day is unsupported.**¹¹¹

140. Second, an analysis of the references provided by the LRV to lend support to the idea that there had been a meeting between Laurent Gbagbo and “the CEMA and his ministers in the course of the day on 16 December 2010”¹¹² shows that the idea is unfounded.

141. By way of example, in the excerpt to which the LRV adverts, P-0009 explains that after the clash on the morning of 16 December 2010 between the FDS and the armed rebels based at the Golf Hotel, the French General Palasset, commander of Force Licorne,¹¹³ had threatened him that any military action by government troops against the rebels would be seen as an attack on France: “[TRANSLATION] If you ever touch the Golf, consider yourself at war with France”.¹¹⁴ P-0009 called Laurent

¹¹⁰ ICC-02/11-01/15-1263-Conf-AnxB, paras. 1144-1147, 1185-1188.

¹¹¹ ICC-02/11-01/15-1263-Conf-AnxB, para. 1186 (emphasis added).

¹¹² ICC-02/11-01/15-1326-Conf, para. 133.

¹¹³ ICC-02/11-01/15-T-196-CONF-FRA CT, p. 37, lines 12-13.

¹¹⁴ ICC-02/11-01/15-T-196-CONF-FRA CT, p. 21, lines 8-9.

Gbagbo to report the conversation to him.¹¹⁵ There is nothing incriminating about that: it is normal for the Chief of Staff of a national army to call the President of the Republic after receiving threats from the commander of a foreign force which is on its territory, particularly when the threat is one of war. Moreover, the call had nothing to do with the march on the RTI, let alone a meeting between President Gbagbo, the CEMA and ministers that day.

142. Witness P-0010 for his part refers to only one meeting between generals held at army headquarters and does not any point mention the presence of Laurent Gbagbo.¹¹⁶

143. P-0011 also spoke of a meeting held at army headquarters on 16 December, as the day came to a close, attended by the following persons: “[REDACTED]”.¹¹⁷ Here too no mention is made of Laurent Gbagbo’s presence.

144. Third and most importantly, by placing the focus on the idea that the President was informed of the events in real time on 16 December 2010 (which she is unable to substantiate – see above), the LRV seeks to divert attention from the Majority Judges’ exhaustive analysis of the evidence on the RTI march (encompassing close to 300 paragraphs of the Reasons)¹¹⁸ from which they concluded that the Prosecutor’s allegations had not been proven.

145. Judge Henderson discusses the march on the RTI in the part which addresses the “Implementation and adaptation of the alleged common plan/policy in light of the evolving situation”.¹¹⁹ He devotes 97 paragraphs to an analysis of the evidence with a view to ascertaining whether a nexus can be established between instructions

¹¹⁵ ICC-02/11-01/15-T-196-CONF-FRA CT, p. 21, lines 1-10.

¹¹⁶ ICC-02/11-01/15-T-139-CONF-FRA CT, p. 38, line 26 to p. 39, line 5.

¹¹⁷ ICC-02/11-01/15-T-134-CONF-FRA ET, p. 33, line 27 to p. 34, line 10.

¹¹⁸ ICC-02/11-01/15-1263-Conf-AnxB, paras. 1122-1218, 1418-1613.

¹¹⁹ ICC-02/11-01/15-1263-Conf-AnxB, section V.

allegedly issued by the authorities and the crimes allegedly committed on 16 December 2010.¹²⁰

146. Having regard to the fact that “the demonstrators numbered in their thousands and there were expectations – which turned out to be at least partially justified – that there would be armed individuals amongst the marchers”¹²¹ and that clashes had taken place that very morning between armed rebels and FDS personnel, with some FDS fatalities and injuries, Judge Henderson concludes that it does not appear that “the decision to deploy the armed forces was exaggerated”.¹²² Judge Henderson further concludes that

[t]here is also no evidence suggesting that Mr Gbagbo would have been briefed in real-time about the developments during the day and the use of violence by FDS and others against civilians. It is thus difficult to see what he could have done to avoid the escalation in general and the use of violence in particular.¹²³

Lastly, Judge Henderson takes the view that “in relation to a number of the crimes that were committed there is no obvious connection with the operation to repress the RTI march”.¹²⁴ He concludes:

In sum, the available evidence does not allow a reasonable trial chamber to conclude that the measures that were put in place to enforce the prohibition of the RTI march were deliberately or obliquely intended to cause violent crimes to be committed against civilian supporters of Mr Ouattara.¹²⁵

147. Judge Henderson discusses the march on the RTI in the part of the Reasons which examines the “Existence of a pattern of crimes committed against civilians by persons acting on behalf of or loyal to the accused”.¹²⁶ Judge Henderson devotes

¹²⁰ ICC-02/11-01/15-1263-Conf-AnxB, paras. 1122-1218; see also [ICC-02/11-01/15-1314-Conf](#), para. 359.

¹²¹ ICC-02/11-01/15-1263-Conf-AnxB, para. 1213.

¹²² ICC-02/11-01/15-1263-Conf-AnxB, para. 1213.

¹²³ ICC-02/11-01/15-1263-Conf-AnxB, para. 1216.

¹²⁴ ICC-02/11-01/15-1263-Conf-AnxB, para. 1217.

¹²⁵ ICC-02/11-01/15-1263-Conf-AnxB, para. 1218 (emphasis added).

¹²⁶ ICC-02/11-01/15-1263-Conf-AnxB, section VI.

196 paragraphs to an analysis of the march, which there is understood as a series of events which occurred between 16 and 19 December 2010.¹²⁷

148. Therein Judge Henderson underscores the challenge of analysing the facts due to “the events [being] spread widely in time and space” in a city spanning 400 km² and “the scene of thousands of individuals moving from different locations towards the RTI headquarters in Cocody in the centre of town”.¹²⁸

149. Furthermore, given the scant information from the Prosecutor on the deployment of the FDS and other forces throughout the city, Judge Henderson underlines that “it has proved impossible to reconstruct the context in which the individual incidents alleged by the Prosecutor took place”.¹²⁹ Even for the facts for which the Prosecutor has provided some evidence, Judge Henderson draws attention to the limited and incomplete nature of that information, and makes the point that “evaluating the Prosecutor’s evidence for the RTI march is a lot like trying to reconstruct the shape of a vase that has broken into thousands of pieces on the basis of only a handful of random shards”.¹³⁰

150. Judge Henderson concludes that the course of the events, as it appears from the evidence presented by the Prosecutor, is “difficult to reconcile with the Prosecutor’s claim that the violence that occurred on 16-19 December 2010 was pursuant to or in furtherance of a policy to attack the pro-Ouattara civilian population”¹³¹ and that “[t]here is thus no scope for any argument that the intent to

¹²⁷ ICC-02/11-01/15-1263-Conf-AnxB, paras. 1418-1613.

¹²⁸ ICC-02/11-01/15-1263-Conf-AnxB, para. 1420.

¹²⁹ ICC-02/11-01/15-1263-Conf-AnxB, para. 1420.

¹³⁰ ICC-02/11-01/15-1263-Conf-AnxB, para. 1421.

¹³¹ ICC-02/11-01/15-1263-Conf-AnxB, para. 1610.

attack the civilian demonstrators can be inferred from what happened on the ground”.¹³²

151. Judge Henderson is further of the view that it is impossible “on the basis of the available evidence, to determine who caused their [the victims’] death/injuries in 63 out of 76 instances”¹³³ and that even if those victims could be attributed to the FDS or irregular forces, “this would still be only anecdotal evidence when seen in light of the scale of the RTI march and the hundreds of confrontations between marchers and law enforcement elements”.¹³⁴

152. Judge Henderson discusses the march on the RTI in the part of the Reasons which examines the responsibility of Laurent Gbagbo and Charles Blé Goudé under the head of article 25(3)(a) of the Statute. Judge Henderson notes that “for none of these instances has the Prosecutor provided sufficient evidence that would allow a [...] trial chamber to conclude that one of the ‘inner circle’ members instructed the units/groups in question to engage in the commission of the charged crimes”,¹³⁵ and that “there simply is insufficient evidence to suggest that a reasonable trial chamber could conclude that, when Mr Gbagbo allegedly ordered the prohibition of the march, it was clear to him that this would result in excessive violence”.¹³⁶

153. It is entirely plain to see that the Majority Judges were thorough in their examination of the issue of the march on the RTI, and that their resulting conclusions were detailed and supported by argument. To seek to gloss over this fact, by isolating and misrepresenting an excerpt of a witness’s evidence, does not amount to an argument worthy of consideration.

¹³² ICC-02/11-01/15-1263-Conf-AnxB, para. 1613.

¹³³ ICC-02/11-01/15-1263-Conf-AnxB, para. 1613.

¹³⁴ ICC-02/11-01/15-1263-Conf-AnxB, para. 1613.

¹³⁵ ICC-02/11-01/15-1263-Conf-AnxB, para. 1929.

¹³⁶ ICC-02/11-01/15-1263-Conf-AnxB, para. 1932.

3.2.2. The second incident: the clashes of 25 February 2011

154. The Defence sees that the LRV, like the Prosecutor, oversimplifies the Majority's careful and detailed analysis of the evidence given by the witnesses; that analysis allowed the Judges to pinpoint irreconcilable contradictions between the witnesses and led them to conclude that the Prosecutor had not established that the events which occurred on the Boulevard Principal on 25 February 2011 took the course which she claimed they had.

155. For instance, the LRV accuses the Majority of "speculating":

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'. Any alternative inference must be supported by the evidence in the record of the case.¹³⁷

156. The LRV's accusation is untenable: in that passage Judge Henderson did not "speculate"; rather he set out a determination. Judge Henderson's sentence, which the LRV isolates, forms the continuation of his train of analysis of the part of P-0442's evidence which addresses the conduct of the police. Having looked at the evidence of P-0442, according to whom the police positioned themselves between the "Doukouré people" and the "Yao Séhi people", Judge Henderson found that that position exposed the police officers to the danger of having stones thrown at them. Accordingly, he draws the **conclusion** that "[t]he 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". In this respect, the word "thus" is operative.¹³⁸ It is quite apparent here that, contrary to the LRV's assertion, Judge Henderson did base his conclusion on reasoning at which he arrived from an analysis of P-0442's evidence.

¹³⁷ ICC-02/11-01/15-1326-Conf, para. 142.

¹³⁸ ICC-02/11-01/15-1263-Conf-AnxB, para. 1668.

157. It is worthy of note that Judge Henderson himself regards this entire section of the Reasons as superfluous. Shortly before, he had concluded that the contradictions amongst witnesses in the evidence led by the Prosecutor precluded a reasonable chamber from reaching the slightest conclusion about the participation of the police on 25 February 2011. That notwithstanding and, affording in a sense the benefit of the doubt to the Prosecution, Judge Henderson nonetheless embarks on an additional exercise which was not strictly necessary: he inquires into the question whether the police may have acted “with discriminatory intent”, while disregarding for the purpose of the exercise the contradictions amongst witnesses:

The 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. This effectively renders moot any discussion about the Prosecutor’s contention that the Police acted with discriminatory intent against the inhabitants of Doukouré. However, in light of the importance that the Prosecutor attaches to the role of the Police in this context, the discussion below disregards the contradictions revealed in the holistic analysis of the evidence abovemade, to determine whether or not there would have been evidence that the Police acted with discriminatory intent if solely the testimony of P-0442 or P-0436 were to be considered and P-0109’s evidence completely disregarded.¹³⁹

158. Having concluded that the witnesses’ evidence taken as a whole did not allow a reasonable trial chamber to draw conclusions about the participation of the police, Judge Henderson stated that he would attempt “to determine whether or not there would have been evidence that the Police acted with discriminatory intent **if solely the testimony of P-0442 or P-0436 were to be considered**”.¹⁴⁰ And so Judge Henderson proceeds in that section.

159. In the same vein at paragraph 144, the LRV states: “Furthermore, Judge Henderson erred by speculating that ‘it seems that the pro-Gbagbo looters would

¹³⁹ ICC-02/11-01/15-1263-Conf-AnxB, para. 1667.

¹⁴⁰ ICC-02/11-01/15-1263-Conf-AnxB, para. 1667 (emphasis added).

have been exposed to the gunfire as the Doukouré inhabitants'. Again, no reasonable trial chamber would have reached such a conclusion based on a mere guess [...]"¹⁴¹

160. Upon analysis, it would appear that Judge Henderson, far from relying on a "mere guess", engaged in a careful analysis of the witnesses' evidence, taking it further by analysing each witness's evidence despite the contradictions identified by the Judges. Only upon completing that exercise, and in particular the analysis of P-0436's evidence (paragraph 1669 of the Reasons), does Judge Henderson reach the conclusion that the conduct of the police was not discriminatory (paragraph 1670 of the Reasons).

161. The Judge points out that "the inhabitants of Doukouré and the pro-Gbagbo youth were physically mixed amid a situation of chaos during the events described".¹⁴² He thus concludes: "In this scenario, the teargas and defensive grenades which P-0436 said the Police threw upon leaving the station could not have been specifically directed at individuals of one group and not the other"¹⁴³ – this is a world away from a "mere guess".

162. Furthermore, in an attempt to cast doubt on the approach taken by Judge Henderson, specifically when he did not consider himself in a position to determine that the facts were made out, in particular due to contradictions amongst witnesses, the LRV asserts that

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'. 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.¹⁴⁴

¹⁴¹ ICC-02/11-01/15-1326-Conf, para. 144.

¹⁴² ICC-02/11-01/15-1263-Conf-AnxB, para. 1669.

¹⁴³ ICC-02/11-01/15-1263-Conf-AnxB, para. 1669.

¹⁴⁴ ICC-02/11-01/15-1326-Conf, paras. 137-138.

163. The LRV appears to think that a judge faced with contradictory evidence from multiple witnesses *necessarily* has to select the evidence of one witness, even absent any other material on record that may lend credence to a given account of the course which an event took.

164. It is beyond the realm of doubt that the task of a judge is to assess carefully the evidence given by witnesses and the other evidence put before him or her so as to determine whether the Prosecutor has proven his or her allegations. That exercise may in theory lead the judge to determine that, in a given respect, one witness's evidence is more credible than that of another witness, for example because it finds support in another piece of evidence. This is a trite point not open to dispute.

165. The LRV's contention is questionable in that she appears to suggest that a Judge must perforce, out of principle, choose between two contradictory accounts. The LRV is confusing two aspects: (1) the standpoint of each person and the perspective from which he or she may recount an event witnessed at first hand; and (2) the event itself, which, from a judicial standpoint, is treated as having happened only if witnesses give the same account of it. Yet it is abundantly clear that contradictory evidence given by witnesses does not *per se* allow a determination to be made as to whether an event took place. For the evidence of a witness to be afforded precedence over contradictory evidence given by another witness, it must find support elsewhere. Only then does a judge have a factual basis from which to reconstruct the sequence of an event.

166. The Defence sees that the LRV does not explain, regarding the matter at hand, what other material on record could have allowed the Majority Judges to determine which of the contradictory witness accounts is the most "credible". Absent any evidence on record to allow a ruling on the issue on which the witnesses contradict each other, what other avenue is open to the Judge than to conclude that the facts are not made out?

167. Likewise, the LRV states:

As already mentioned, it is the chamber's duty to analyse contradictions amongst testimonies, and to assess the credibility of the relevant 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.¹⁴⁵

168. This statement surprises in that the LRV is, in effect, calling into question the concept of "reasonable doubt". It is because the burden of proof rests with the Prosecutor that a judge discharges the duty to ascertain that an alleged event occurred by examining and appraising the evidence which the Prosecutor places before him or her. If those pieces of evidence are contradictory and the accounts incompatible, then the judge has discharged the judicial duty by finding that the facts are not made out. Any other way of dispelling the doubt would rely on presupposing the truth of what the Prosecutor alleges and would reduce the presumption of innocence to nought.

169. It is also worth remembering that which the Prosecutor in her Appeal Brief and the LRV in her observations seek to gloss over: that the problem lies not in the Judgment, but in the flimsiness of the Prosecutor's evidence. The reason why the Majority Judges were forced to expound at length on the contradictions between witnesses is precisely that the contradictions preclude any finding whatsoever that the events took the course which the Prosecutor alleges they did on 25 February 2011. It was the Prosecutor who placed contradictory evidence before the Chamber and it was she who failed to provide any further evidence to allow the contradictions to be resolved. To now find fault with the Judges, as the LRV does, for drawing the logical conclusions from the contradictions between witnesses is unfair. The argument is now revealed for what it is: an attempt to hold the Judges responsible for the weakness of the Prosecutor's case. All that the Judges did in their

¹⁴⁵ ICC-02/11-01/15-1326-Conf, para. 140.

reasons was to expose the weakness of the Prosecutor's case: to assail the judges is in effect to shoot the messenger.

170. Lastly, the LRV contends that

[t]he 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', in stark contrast with the standard of proof he indicated to be appropriate at this stage of the proceedings.¹⁴⁶

Upon analysis, it appears that the excerpts from the Reasons to which the LRV adverts do not allow her to sustain such a contention.

171. The first paragraph to which the LRV adverts is paragraph 1661 of the Reasons, where Judge Henderson states:

Having regard to the totality of the evidence above discussed, it is possible to infer that all three witnesses were in the same area on 25 February 2011. That being the case, had the Police intervened in the clashes in the way in which either P-0442 or P-0436 described, it would have been highly unlikely for P-0109 not to have noticed their presence.

172. It is apparent here that the use of the conditional "would have been" in that paragraph can be readily explained by the fact that Judge Henderson is in the process of analysing contradictions between the witnesses, as he said he would at paragraph 1639 of the Reasons ("Below, the account of the three witnesses who testified having been present during the clashes will be described in more detail. These are witnesses P-0436, P-0442 and P-0109. **This will be followed by a discussion of the contradictions in their testimonies.** Thereafter, the analysis will address the question of whether there is sufficient evidence that the Police attacked pro-Ouattara supporters if all contradictions in the evidence were to be ignored by the Chamber");¹⁴⁷ he does so without predetermining the veracity of any of the

¹⁴⁶ ICC-02/11-01/15-1326-Conf, para. 135.

¹⁴⁷ ICC-02/11-01/15-1263-Conf-AnxB, para. 1639 (emphasis added).

accounts. What he says is straightforward: **if** a witness X saw a given thing, a witness Y, present in the same place, **should** have seen the same thing.

173. The LRV adverts also to paragraph 1666 of the Reasons, where Judge Henderson concludes:

Therefore, 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.

There too the conditional tense is a logical requirement because Judge Henderson is entering the realm of the hypothetical where he is not predetermining the veracity of the three witnesses' evidence.

174. The LRV then adverts to paragraph 1670 of the Reasons, where Judge Henderson concludes:

In relation to P-0436's testimony that the Police were shooting at people running in the sidestreets of Doukouré, it seems that the pro-Gbagbo looters would have been as exposed to the gunfire as the Doukouré inhabitants. Moreover, even if the pro-Gbagbo youth were not present inside Doukouré neighbourhood at that specific moment, it would not be possible to infer that the Police targeted individuals perceived to be Ouattara supporters. Indeed, there is evidence to the effect that people who would normally be perceived as pro-Gbagbo also resided in Doukouré.

175. It must be remembered that use of the conditional tense throughout that passage is warranted by the fact that, shortly before, at paragraph 1667, Judge Henderson concluded:

The 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. This effectively renders moot any discussion about the Prosecutor's contention that the Police acted with discriminatory intent against the inhabitants of Doukouré. However, in light of the importance that the Prosecutor attaches to the role of the Police in this context, the discussion below disregards the contradictions revealed in the holistic analysis of the evidence abovementioned, to determine whether or not there would have been evidence that the Police acted with discriminatory intent if solely the

testimony of P-0442 or P-0436 were to be considered and P-0109's evidence completely disregarded.¹⁴⁸

176. It is therefore clear that Judge Henderson uses the conditional tense in that passage because he is affording the Prosecutor the benefit of the doubt, by examining the evidence of each of the witnesses, contradictions notwithstanding. Hence Judge Henderson's determination is in the conditional tense: at no point is there anything to allow him to accept any of the witnesses' claims.

177. Lastly, the LRV adverts to paragraph 1674 of the Reasons, where Judge Henderson concludes:

In light of so much uncertainty, no reasonable trial chamber could conclude that the Police targeted the inhabitants of Doukouré on 25 February 2011; nor would it be possible to infer that Mr Blé Goudé went to the 16th arrondissement Police station and instigated the Police officers to attack civilians.

178. The same reasoning applies here: paragraph 1674 concludes an entire section in which Judge Henderson analysed various contradictory pieces of information and attempted to draw conclusions, which necessarily are in the conditional tense.

179. Upon analysis it appears astonishing, therefore, that the LRV accuses Judge Henderson of having misapplied the standard of proof (read: to the detriment of the Prosecutor) whereas all the examples she cites show that Judge Henderson gave the Prosecutor the benefit of the doubt and considered every possible eventuality in spite of the contradictions amongst witnesses; hence his use of the conditional tense, which she holds against him.

3.2.3. The third incident: the alleged march of 3 March 2011

180. Regarding 3 March 2011, the LRV states: "The Legal Representative concurs with the Prosecution's analysis and submits that Judge Henderson erred in assessing

¹⁴⁸ ICC-02/11-01/15-1263-Conf-AnxB, para. 1667.

the evidence as to the attribution of gunfire to the FDS convoy for the 3 March 2011 incident”.¹⁴⁹

181. The Defence sees that none of the arguments made by the LRV in that section cast doubt on the central conclusion at which the Judges arrived, *viz.* that there was nothing in the record to allow the alleged death of the female protesters to be attributed to a military convoy.

182. For instance, the LRV, as the Prosecutor did before in her appeal brief, places reliance on purported “eye-witnesses”¹⁵⁰ to suggest that the Judges did not look at all the evidence. But, as the Defence recalled in its response to the Prosecutor’s appeal brief, Judge Henderson was meticulous in his analysis of all of the witnesses’ evidence, including that of purported “eye-witnesses”, and thus concluded that none of them really witnessed the firing at first hand. Judge Henderson draws the necessary conclusion that the source of the firing cannot be determined from the evidence of those witnesses.¹⁵¹

183. Likewise, the LRV claims that video CIV-OTP-0077-0411 is a valuable piece of evidence as it is an authentic video, it was shot on 3 March, and witnesses recognised from the video the sites where the march had taken place.¹⁵² However those points are irrelevant since Judge Henderson made plain in his Reasons that: “However, for the purposes of this decision, it was decided to give the Prosecutor the advantage of the doubt and to analyse the video as if it were authentic and recorded on 3 March 2011. This position does not prejudice any future conclusions regarding the authenticity/date of this exhibit”;¹⁵³ the Judge specified that: “It is acknowledged that the Defence for Mr Gbagbo challenges the authenticity of this

¹⁴⁹ ICC-02/11-01/15-1326-Conf, para. 146.

¹⁵⁰ ICC-02/11-01/15-1326-Conf, paras. 151-152.

¹⁵¹ [ICC-02/11-01/15-1314-Conf](#), paras. 248-256.

¹⁵² ICC-02/11-01/15-1326-Conf, para. 154.

¹⁵³ ICC-02/11-01/15-1263-Conf-AnxB, footnote 3962.

video. One of the arguments raised, in this regard, is that the date of the video file does not correspond with the date of the alleged incident”¹⁵⁴ and that “It is not necessary, for the purposes of this decision, to determine whether there is any merit in Mr Gbagbo’s claim that the evidence for this incident is unreliable and that, in particular, the video footage has been doctored”.¹⁵⁵

184. The criticism which the LRV is levelling at the Judges is not, therefore, specified in her submissions and it cannot be concluded from that passage that the Majority Judges erred in any way whatsoever.

185. Even so, the Defence notes that the LRV misrepresents the Prosecutor’s evidence. For instance, regarding the date of the video, she states that: “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”.¹⁵⁶ What the LRV says is true, but she omits to point out to the Appeals Chamber that P-0606 concluded from his analysis that it was impossible to state with any certainty the date when the footage was shot.¹⁵⁷

186. The crux, which the LRV does not address, is that, as the Judges rightly underlined, it is not possible to determine who killed the women from the video.¹⁵⁸ An analysis of the video even suggests that the women were killed after the convoy’s passage.¹⁵⁹

¹⁵⁴ ICC-02/11-01/15-1263-Conf-AnxB, footnote 3962.

¹⁵⁵ ICC-02/11-01/15-1263-Conf-AnxB, para. 1774.

¹⁵⁶ ICC-02/11-01/15-1326-Conf, para. 154.

¹⁵⁷ ICC-02/11-01/15-T-163-FRA CT WT, p. 52, line 23 to p. 53, line 13.

¹⁵⁸ ICC-02/11-01/15-1263-Conf-AnxB, paras. 1773-1787.

¹⁵⁹ ICC-02/11-01/15-1263-Conf-AnxB, para. 1785; see also [ICC-02/11-01/15-1314-Conf](#), paras. 259-260.

187. Lastly, the LRV contends: “There is no trace of the presence of armed rebels at the march or of any damage to the personnel or equipment that the FDS convoy might have suffered from an alleged attack”.¹⁶⁰

188. First, it is worth recalling that [REDACTED].¹⁶¹

189. Second, the context in Abobo at the time must also be borne in mind: the area was entirely under the control of rebels from the *Commando Invisible*, a heavily armed rebel group.¹⁶² The only place under the control of government forces was Camp Commando, which the rebels besieged. The camp was supplied by army convoys which came under frequent attack. P-0321 stated: “[REDACTED]”.¹⁶³

190. Furthermore, P-0414, a UNOCI staff member, giving evidence from the stand, explained that in the course of her assignments she had noticed a *Commando Invisible* presence in Abobo. Specifically, the witness explained that on 10 March 2010, while she was investigating what had happened during the march of 3 March, she saw armed rebels on the Abobo road and at the roundabouts,¹⁶⁴ thus confirming her prior statement in which she said that on the road from Sebroko to Abobo there were armed people¹⁶⁵ and that they were “[TRANSLATION] members of the *Commando Invisible*”;¹⁶⁶ she went on to say that “[TRANSLATION] there were a fair number of them at the intersection where we parked”.¹⁶⁷ In other words, P-0414 describes a considerable rebel presence all along the route taken by the march of 3 March 2011.

¹⁶⁰ ICC-02/11-01/15-1326-Conf, para. 149.

¹⁶¹ ICC-02/11-01/15-T-170-CONF-FRA CT, p. 19, line 28 to p. 20, line 1.

¹⁶² [ICC-02/11-01/15-1263-AnxA](#), para. 105.

¹⁶³ ICC-02/11-01/15-T-62-CONF-FRA CT, p. 35, lines 23-28; see also ICC-02/11-01/15-T-171-CONF-FRA ET, p. 75, line 27 to p. 76, line 3.

¹⁶⁴ ICC-02/11-01/15-T-75-CONF-FRA CT, p. 88, lines 11-23; ICC-02/11-01/15-T-76-CONF-FRA CT, p. 54, line 23 to p. 55, line 6, p. 56, lines 12-20.

¹⁶⁵ CIV-OTP-0054-0582, para. 129.

¹⁶⁶ CIV-OTP-0054-0582, para. 143.

¹⁶⁷ CIV-OTP-0054-0582, para. 144.

191. A further contextual factor of significance which the LRV fails to mention is that the march of 3 March 2011 had been directly organized by the rebel leadership based at the Golf Hotel,¹⁶⁸ which included Aya Virgine Touré, national President of the women's chapter of the RDR,¹⁶⁹ and Adama Toungara, the then Mayor of Abobo.¹⁷⁰ The latter issued instructions to one of her deputies at the time, Maïmouna Touré, President of the Abobo women's chapter of the RDR, who was on the ground.¹⁷¹ She had a number of other contact persons on the ground, including Sirah Dramé, a *commissaire politique* in the RDR. As a *commissaire politique*, Sirah Dramé reported to the local RDR Departmental Secretary who, at the time of the crisis, was the Mayor of Abobo, Adama Toungara.¹⁷² Sirah Dramé, in her capacity as Departmental Secretary of the Abobo women's chapter of the RDR, organized the march of 3 March 2011¹⁷³ with Maïmouna Touré.¹⁷⁴

192. That being the case, it is striking that the LRV seeks to divert attention from the fact that the march was held in an area controlled by the rebel forces and organized by the rebel leadership based at the Golf Hotel.

3.2.4. The fourth incident: the alleged shelling of 17 March 2011

193. Regarding 17 March 2011, the LRV states that “[t]he 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

¹⁶⁸ [ICC-02/11-01/15-1199-Conf-Anx3-Corr](#), paras. 373-382.

¹⁶⁹ ICC-02/11-01/15-T-215-CONF-FRA ET, p. 58, lines 13-14, p. 59, lines 15-17.

¹⁷⁰ ICC-02/11-01/15-T-174-CONF-FRA ET, p. 25, lines 10-13; ICC-02/11-01/15-T-215-CONF-FRA ET, p. 58, line 16 to p. 53, lines 10-11, p. 59, line 7.

¹⁷¹ ICC-02/11-01/15-T-174-CONF-FRA ET, p. 25, lines 10 to 13; ICC-02/11-01/15-T-215-CONF-FRA ET, p. 58, line 16 to p. 53, lines 10-11, p. 59, line 7.

¹⁷² ICC-02/11-01/15-T-215-CONF-FRA ET, p. 57, lines 17-25.

¹⁷³ ICC-02/11-01/15-T-215-CONF-FRA ET, p. 13, line 27 to p. 14, line 6, p. 70, lines 9-14.

¹⁷⁴ ICC-02/11-01/15-T-215-CONF-FRA ET, p. 95, lines 4-10.

of specificity or certainty' at the NCTA stage".¹⁷⁵ She dwells on paragraph 1839 of the Reasons to find fault with the Judge for not engaging in a consistent and reasonable examination of the evidence.

194. However, by insinuating that paragraph 1839 of the Reasons encapsulates the Judge's approach, the LRV glosses over the fact that that paragraph, which concludes a section of the Reasons which runs to 19 pages or 37 paragraphs, is where Judge Henderson undertook a painstaking and comprehensive analysis of the Prosecutor's evidence, concluding that it could not, on that evidence, be determined that (1) there were mortars at Camp Commando on 17 March 2011;¹⁷⁶ (2) mortar fire came from Camp Commando that day;¹⁷⁷ (3) even had there been mortar fire that day, there was nothing to suggest that the Prosecutor's account was correct, and specifically that six shots were fired that day;¹⁷⁸ (4) even had there been mortar fire that day, there was nothing to suggest that it was aimed at the civilian population;¹⁷⁹ and (5) even had there been mortar fire that day, there was nothing to suggest that the firing was carried out at the say-so of anyone at all, let alone at the say-so of President Gbagbo.¹⁸⁰

195. It is apparent that at every stage of its reasoning the Majority has, in a sense, afforded the Prosecutor the benefit of the doubt, even absent any cogent evidence concerning crucial points such as the date of the firing or the presence of mortars at Camp Commando, the Judges considered every eventuality and addressed all of the Prosecutor's allegations, in depth and exhaustively. For example, the Majority considered the possibility that explosions could have taken place in Abobo that day, but had to remark:

¹⁷⁵ ICC-02/11-01/15-1326-Conf, para. 161.

¹⁷⁶ ICC-02/11-01/15-1263-Conf-AnxB, para. 1811.

¹⁷⁷ ICC-02/11-01/15-1263-Conf-AnxB, para. 1820.

¹⁷⁸ ICC-02/11-01/15-1263-Conf-AnxB, para. 1814.

¹⁷⁹ ICC-02/11-01/15-1263-Conf-AnxB, para. 1831.

¹⁸⁰ ICC-02/11-01/15-1263-Conf-AnxB, paras. 1838-1839.

It is, however, difficult to fully understand what exactly happened with regard to the location, timing and number of explosions that took place on that date. Many of the witnesses have no clear recollection [...] as to where or when the explosions that they are speaking of took place, or how many of them there were.¹⁸¹

196. From this thorough analysis, it must be noted that there is nothing in the LRV's contention to call into question the conclusions which the Judges reached.

197. For example, she asserts:

Judge Henderson's analysis in relation to the availability of 120mm mortars, rests solely on the contradictory testimony of P-0047 – who, despite having previously indicated in his statement the presence at Camp Commando of 120mm mortars, recanted his declarations during his oral testimony.¹⁸²

198. The paragraphs to which the LRV refers (paragraphs 1805-1811 of the Reasons) suffice to show that Judge Henderson analysed in depth the evidence given by many witnesses (P-0226, P-0330, P-0239, P-0164, P-0156 and P-0047) and thus concluded:

On the basis of the above evidence, it is difficult to make any determination about whether and, if so, when 120mm mortars arrived in Camp Commando. Although one trustworthy witness may suffice, in this case there are so many different accounts about the circumstances under which 120mm mortars were allegedly deployed at Camp Commando that it is impossible to decide which one is accurate. It is also possible that several of the testimonies are true. But in that case it would seem that mortars were brought back and forth to and from Camp Commando quite frequently, or at least that they were put in and out of battery by different persons on several occasions. Whatever the case may be, the main factor from the above analysis is that none of the evidence regarding the presence of 120mm mortars at Camp Commando specifically and unequivocally concerns the date of the incident in question, that is 17 March 2011 – with the exception of P-0047, who seems to deny their presence on the relevant date. It follows that on the basis of the abovementioned evidence, no reasonable trial chamber could affirm that 120mm mortars were present in Camp Commando on 17 March 2011. This does not establish that there were in fact no mortars in Camp Commando on that day. It only means that the evidence concerning the firing of 120mm mortar shells from Camp Commando on 17 March 2011, which will be discussed next, is not independently supported by any of the other evidence.¹⁸³

¹⁸¹ ICC-02/11-01/15-1263-Conf-AnxB, para. 1803.

¹⁸² ICC-02/11-01/15-1326-Conf, para. 162.

¹⁸³ ICC-02/11-01/15-1263-Conf-AnxB, para. 1811.

199. It is therefore incorrect to say, as the LRV does here, that “Judge Henderson’s analysis in relation to the availability of 120mm mortars rests solely on the contradictory testimony of P-0047”.¹⁸⁴

200. In the same vein, and equally unpersuasive, is the LRV’s claim that “[t]o the contrary and in response to the Defence’s arguments, P-0226, P-0239 and P-0164 consistently affirmed that those mortars were indeed available at Camp Commando and that BASA members fired shells on 17 March 2011”.¹⁸⁵

201. The Defence notes that, at footnotes 343 and 344, the LRV refers only to some paragraphs from the response of the Defence for Laurent Gbagbo, whereas it would have been expected that she discuss what the Defence had said, and to have done so with reference to the substance of P-0226, P-0239 and P-0264’s evidence, and specifically that she identify the passages therein where they “consistently affirmed that those mortars were indeed available at Camp Commando and that BASA members fired shells on 17 March 2011”.¹⁸⁶ The fact is that she is unable to refer to those witnesses’ evidence because, upon analysis, as Judge Henderson underscored in the Reasons (at paragraph 1808 – see above) and as the Defence recalled in its response to the Prosecutor’s brief,¹⁸⁷ it is clear that their evidence is not capable of sustaining the Prosecutor’s allegation.

202. Regarding the report by ballistics expert P-0411, the LRV takes issue with Judge Henderson for having not “considered [it] in light of the whole set of submitted evidence”.¹⁸⁸ Quite the contrary, as the Defence pointed out in its response to the Prosecutor’s appeal brief:¹⁸⁹ that was precisely what the Judge did, since in his

¹⁸⁴ ICC-02/11-01/15-1326-Conf, para. 162.

¹⁸⁵ ICC-02/11-01/15-1326-Conf, para. 163.

¹⁸⁶ ICC-02/11-01/15-1326-Conf, para. 163.

¹⁸⁷ [ICC-02/11-01/15-1314-Conf](#), para. 278.

¹⁸⁸ ICC-02/11-01/15-1326-Conf, para. 166.

¹⁸⁹ ICC-02/11-01/15-1326-Conf, para. 166.

Reasons he states: “However, the expert’s evidence must not be seen in isolation. Indeed, the conclusions may complement and/or converge with other information that is on the record.”¹⁹⁰ Judge Henderson does compare the expert’s evidence and other witnesses’ evidence to inquire into the truth of the Prosecutor’s allegation.¹⁹¹ His analysis complete, Judge Henderson concludes: “It follows that on the basis of the abovementioned evidence, no reasonable trial chamber could affirm that 120mm mortars were present in Camp Commando on 17 March 2011.”¹⁹²

203. Moreover, the LRV does not enter into how the Judges erred in assessing the report and in deciding to attach limited weight thereto. The Defence recalls that whereas the witness in the report – which was produced under dubious scientific conditions (see the Reasons of Judge Henderson¹⁹³ and the separate opinion of Judge Tarfusser¹⁹⁴) – was of the opinion that mortar fire could, in theory, have come from Camp Commando on 17 March 2011, he also acknowledged under cross-examination that, on the same standard of analysis, the alleged fire could have come from anywhere within a six-kilometre radius of the alleged sites where the shells supposedly fell.¹⁹⁵

204. Lastly, it is hard to comprehend the relevance of the LRV’s expatiations regarding the sites where the shells allegedly fell and the alleged victims, since, as aforementioned, Judge Henderson did not address those points in the Judgment; he accepted, for the sake of argument, that shells fell in several places in Abobo that day, and did not at any point dispute the alleged victims’ accounts. Here too, therefore, it is difficult to fathom exactly what error the LRV is imputing to the

¹⁹⁰ ICC-02/11-01/15-1263-Conf-AnxB, para. 1807.

¹⁹¹ ICC-02/11-01/15-1263-Conf-AnxB, para. 1807.

¹⁹² ICC-02/11-01/15-1263-Conf-AnxB, para. 1811.

¹⁹³ ICC-02/11-01/15-1263-Conf-AnxB, para. 1806.

¹⁹⁴ [ICC-02/11-01/15-1263-AnxA](#), para. 29.

¹⁹⁵ ICC-02/11-01/15-T-169-CONF-FRA CT, p. 82, lines 10-15; see also [ICC-02/11-01/15-1199-Conf-Anx3-Corr](#), paras. 502-505.

Majority Judges when she raises issues which fall outside the ambit of the Judgment and outside the ambit of the present appeal.

205. In a bid to discredit the Judges' reasoning, the LRV cites several examples of persons who were purportedly witnesses to the alleged shelling of 17 March 2011 in Abobo. And yet those witnesses contribute nothing to the debate inasmuch as none of them is able to testify to the source of the firing, which is, however, the crux of Judge Henderson's analysis.

206. The Defence underscores in this respect that the summary of the testimonies provided by the LRV of the testimonies to which she refers at paragraph 168 of her observations is inaccurate. The first of the LRV's examples suffices as illustration: “: (i) P-0105 was at the Siaka Koné market when the shelling occurred; she was injured and saw people being hit by the shell”.¹⁹⁶ It is apparent from the evidence of the witness that: (1) she makes no mention of any “shell” but says only that she heard a “[TRANSLATION] noise”¹⁹⁷ and (2) did not “s[ee] people being hit by the shell” since only the following day did other people tell her what had happened at the market, specifically that people were killed and wounded.¹⁹⁸ It is quite plain in this instance that the LRV, like the Prosecutor, is trying to put words into the witnesses' mouths. That practice, which was not acceptable when the Prosecutor engaged in it at trial, is no more acceptable on the part of the LRV.

¹⁹⁶ ICC-02/11-01/15-1326-Conf, para. 168.

¹⁹⁷ ICC-02/11-01/15-T-213-CONF-FRA CT, p. 38, lines 8-20, p. 39, lines 10-15.

¹⁹⁸ ICC-02/11-01/15-T-213-CONF-FRA CT, p. 39, line 22 to p. 40, line 13.

3.2.5. The fifth incident: 12 April 2011

207. The LRV states regarding the incident that: “[t]he Majority also committed several errors of fact when assessing the evidence on the rapes committed in connection with the 12 April 2011 incident”.¹⁹⁹

208. Like the Prosecutor, the LRV picks disparate instances from the reasoning of the Majority Judges to assail their findings while casting a veil over the entire analysis undertaken by the Judges. This is particularly true of the alleged incident of 12 April 2011. The Judges dovetail their analysis of the incident with a wider analysis concerning the alleged existence of a common plan or of a policy aimed at attacking a civilian population, and conclude, after undertaking an assessment of the Prosecutor’s evidence over hundreds of pages, that the Prosecutor had not adduced evidence of a common plan or of a policy aimed at attacking the civilian population. The Defence elaborated on the subject in its response to the Prosecutor’s appeal brief.²⁰⁰

209. The exhaustive and closely argued conclusions of the Majority, and the thorough and detailed expositions of the Defence in its response to the Prosecutor’s appeal brief, attract only the following argument from the LRV in response: “a policy need not be formalised, or expressly declared, and can be inferred from the circumstances of the attack”.²⁰¹

210. It is frivolous to think that one sentence could countervail 950 pages of detailed reasoning and would constitute an argument capable of calling the acquittal into question.

¹⁹⁹ ICC-02/11-01/15-1326-Conf, para. 172.

²⁰⁰ [ICC-02/11-01/15-1314-Conf](#), paras. 353-379.

²⁰¹ ICC-02/11-01/15-1326-Conf, para. 172.

211. Furthermore, the argument that the policy may be inferred from the circumstances of the attack appears in fact to be a way for the LRV to absolve the Prosecutor of her duty to substantiate her allegations in a thoroughgoing manner and with argument.

212. As the Majority underscores in the Reasons:

Another serious shortcoming in the Prosecutor's evidentiary approach has been the cat and mouse game with the content (and putative criminality) of the alleged Common Plan/policy. Upon the pretext that the Common Plan/policy must not be exclusively directed at a criminal activity and that the motive for the attack against a civilian population is irrelevant, the Prosecutor has presented a lot of evidence which seems only capable of proving non-criminal aspects of Mr Gbagbo's alleged plan to stay in power, but has offered nothing that specifically proves the criminal aspect of that policy. Instead, the Prosecutor argues that the criminality of the common plan/policy must be inferred from the totality of the evidence on record. The difficulty with the Prosecutor's approach is that none of the individual factual elements she relies upon clearly point to the existence of a plan or policy to attack civilians. The Prosecutor acknowledges this but argues that when all the different strands of her argument are considered together, it becomes clear that the Common Plan and the policy were criminal in nature. While it is true that the (criminal) content of the Common Plan can, in principle, be inferred from a combination of circumstantial evidence, this theoretical possibility does not relieve the Prosecutor from formulating a cogent argument in this regard. Ultimately, the Prosecutor bears the burden of demonstrating, for each factual allegation she makes, which evidence purportedly proves it. If it is a combination of evidence that allegedly proves a fact, then the Prosecutor must clearly identify all the pieces of the puzzle and, crucially, explain how they fit together. Simply listing a large number of individual factual claims and corresponding evidence and arguing that everything must be assessed holistically is not sufficient. A holistic assessment of evidence should not become an evidentiary black box and Chambers should not have to guess about the particulars of the Prosecutor's evidentiary arguments. This approach raises a number of serious concerns. First, since the Prosecutor does not articulate a clear evidentiary argument (beyond arguing that everything should be assessed together), it is not possible to assess it properly. In particular, on the crucial question of why the combined effect of all her evidence is greater than the sum of the individual (non-incriminating) parts, the Prosecutor remains largely silent. In principle, this in itself would be a sufficient ground to dismiss her case.²⁰²

213. Lastly, it must be noted that the LRV's argument rests on the false premise that, for the Judges to have determined the policy was proven, they would have required that it be "formalised" or "expressly declared".

²⁰² ICC-02/11-01/15-1263-AnxB-Conf, paras. 85-88.

214. Clearly that is not how they proceeded. Had they in fact taken the approach which the LRV suggests, they would have seen that the Prosecutor herself had acknowledged that there was no direct evidence of the existence of a common plan or of a policy aimed at attacking the civilian population²⁰³ and hence they would have rejected her line of argument outright and considered that the charges were not proven, as Judge Henderson suggests in the above passage: “[i]n principle, this in itself would be a sufficient ground to dismiss her case”.²⁰⁴ That is not how they proceeded: they wrote a 950-page judgment. The Judges took their task seriously; they scrutinized the Prosecutor’s evidence in the round. And, at the end of an extensive and in-depth analysis, no policy aimed at attacking the civilian population could even “be inferred from the circumstances of the attack”.

4. Conclusion

215. The baseless arguments, the injudicious citation of authorities, the questionable interpretation of the judgment of acquittal, the misapprehension of the Judges’ train of reasoning, the gross simplification of the painstaking analysis of the Prosecutor’s evidence undertaken by the Judges in the judgment of acquittal, and the fact that not once does the LRV go to the trouble of showing how the errors she alleges might have affected the impugned decision – those factors all go to show that the LRV is in fact taking issue with the Trial Bench for having entered an acquittal.

216. That rigid stance appears to have led her, in her observations, to portray the state of affairs as if there had been neither a trial nor a no case to answer procedure, as if the Judges had not been able to form a clear picture of the value of the Prosecutor’s evidence and as if they had not handed down a reasoned judgment, set out in particular detail and closely argued and running to 950 pages. Ultimately,

²⁰³ ICC-02/11-01/15-1207-Conf-Anx1, para. 1109.

²⁰⁴ ICC-02/11-01/15-1263-AnxB-Conf, para. 88.

the LRV well and truly imputes motives to the Trial Chamber, to the point of casting aspersions on the Judges' professional integrity.

[signed]

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Dated this 11 May 2020

At The Hague, Netherlands