SEPARATE FURTHER OPINION OF JUDGE EBOE-OSUJI

1. At paragraph 23 of the Chamber's decision, the following observation is made:

> As an initial point, a distinction needs to be made between the determination made at the halfway stage of the trial, and the ultimate decision on the guilt of the accused to be made at the end of the case. Whereas the latter test is whether there is evidence which satisfies the Chamber beyond a reasonable doubt of the guilt of the accused, the Chamber recalls that the objective of the 'no case to answer' assessment is to ascertain whether the Prosecution has lead sufficient evidence to necessitate a defence case, failing which the accused is to be acquitted on one or more of the counts before commencing that stage of the trial. It therefore considers that the test to be applied for a 'no case to answer' determination is whether or not, on the basis of a *prima facie* assessment of the evidence, there is a case, in the sense of whether there is sufficient evidence introduced on which, if accepted, a reasonable Trial Chamber *could* convict the accused. The emphasis is on the word 'could' and the exercise contemplated is thus not one which assesses the evidence to the standard for a conviction at the final stage of a trial. For the present purposes, the Chamber therefore need not elaborate on the standard of proof for conviction at the final stage.[1]

2. I fully agree with the essential point of that paragraph: to the effect that a motion of 'no case to answer' (made at the conclusion of the prosecution case) calls for 'a *prima facie* assessment of the evidence'; and, 'the exercise contemplated is thus not one which assesses the evidence to the standard for conviction at the final stage of the trial.' In this separate further opinion, I shall fully explain why, in my view, the approach is a most sensible one.

PART I
OVERVIEW OF THE CORRECT PROBATIVE STANDARD FOR 'NO CASE TO ANSWER' MOTIONS

3. We may recall now the classic formulation of the applicable test, which the Chamber has correctly reprised as follows: 'whether there is sufficient evidence introduced on which, if accepted, a reasonable Trial Chamber *could* convict the accused.' In explaining the test, the Chamber observed (again correctly) that '[t]he emphasis is on the word "could"'.

4. In the interpretation of the amplitude of the role of '*could* convict' in the test, it should be possible to make the following pronouncement categorically. In the assessment of the evidence on the record, for purposes of 'no case to answer' motions, the degree of cogency of the prosecution evidence need be no higher than the civil standard of proof—i.e. preponderance of proof of guilt on the balance of probabilities. That standard is distinctly higher than what justice reasonably requires in the interest of the accused (for purposes of

[1] *Decision No 5 on the Conduct of Trial Proceedings (Principles and Procedure on 'No Case to Answer' Motions)* dated 3 June 2014, [Trial Chamber V(A)], para 23 [internal footnotes omitted].

motions of 'no case to answer'), mindful also of what justice reasonably requires in the interests of victims and society at the same point in the proceedings.

5. To appreciate how high that standard truly is for the intended purposes (of 'no case to answer' motions), two things may be kept in mind. The first is that the civil standard is higher than mere evenness of the odds of the opposing conclusions. In other words, the civil standard is not discharged when the proponent of the affirmative proposition is able to prove the likelihood of the proposition only as high as at a par with the likelihood of the opposing conclusion. To succeed at the civil standard, the proponent must do better than that: she must, at a minimum, prove her own proposition to the degree of cogency of 'more likely than not'.

6. With the foregoing in mind, we come to the second thing to keep in mind, in order to appreciate the acuteness of the civil standard of proof for purposes of 'no case to answer'. It is this. The commonwealth legal colloquialism 'no case to answer' is aptly descriptive of the matter. The matter is whether the case for the Prosecution—at its closing—has been so deficient in the evidence as to make it virtually vexatious, inappropriate, inefficient and/or pointless to prolong the proceedings into the case for the Defence. The essence of the motion, then, is that the evidence tendered in the prosecution case has not raised any serious question of guilt that the Defence should be put to the trouble of answering. Hence, it is said, the case for the Prosecution has raised 'no case' for the Defence 'to answer'. In the result, the motion urges the Court to enter a directed judgment of acquittal, at the close of the case for the Prosecution, without the Defence being or feeling called upon to commence their case.

7. How, then, is it that the civil standard is to be seen as more than ample a standard of proof for the motion of 'no case to answer'? In any criminal case in which guilt and innocence enjoy a parity of likelihoods, in the light of the evidence on the record, the presumption of innocence will have been far from rebutted. For, the parity of likelihoods of guilt and innocence does not establish guilt on any legally recognised standard of proof—not even at the lower civil standard of proof.

8. It is, however, evidently incorrect to assert, in those circumstances (when the opposing conclusions are equal as to guilt), that the case for the Prosecution has been so deficient in the evidence as to require the acquittal of the accused *at half-time*; because the evidence tendered in the prosecution case does not raise any serious question of criminal responsibility of the accused that the Defence *should* answer, at the instance of victims and society. My own view of the incorrectness of such an assertion, finds support in a proper understanding of the following often-cited pronouncement of an American judge (which he had made in the context of 'no case to answer' motions): 'If [the judge] concludes that *either of the two results*, a reasonable doubt or no reasonable doubt, is *fairly possible*, he must let the jury

decide the matter.'[2] That, in my view, is the essence of '*could* convict' in the much repeated test of 'no case to answer' motions. Its true point is this. The motion of 'no case to answer' must fail; if at the point of its making, the record of the trial indicates, at a minimum, a parity of likelihoods of guilt and innocence. Consequently, the accused will be put to his defence (where the motion was made at the close of the prosecution case) or the case will be sent to the jury (if the motion was made at the close of the defence case).

9. It thus affords a stronger reason to say that a 'no case to answer' motion must necessarily fail, when the case for the Prosecution is found to have established the prospect of guilt at the civil standard of proof. For, that is a level higher than the parity of likelihoods of guilt and innocence—since the prospect of guilt (at that level) appears to be 'more likely than not.'

10. It may be noted, of course, that the standard of proof that has established guilt at only the level of 'more likely than not' will be inadequate for a criminal conviction. In order to convict an accused of a crime, the tribunal of fact needs to be satisfied beyond reasonable doubt as to the guilt of the accused. But, strictly speaking, that is an irrelevant consideration for purposes of motions of 'no case to answer'. This is because the question of *conviction* of the accused is not engaged immediately upon the close of the case for the Prosecution (when the motion of 'no case to answer' is made), before the conclusion of the case for the Defence. It is therefore correct to observe, as the Chamber has done, that 'the exercise contemplated is thus not one which assesses the evidence to the standard for a conviction at the final stage of a trial.'

11. At the close of the case for the Prosecution—if the 'no case to answer' motion has failed for the reasons indicated above—it is for the Defence counsel in a criminal case to (competently) take stock of the case thus far presented. Having done so, it is for them to bring astute professional acumen to bear, and decide whether they really need to call any evidence or whether it is in the interest of their client to bring their case to a close immediately—and thus subject the assessment of the evidence to the standard of proof of guilt beyond reasonable doubt. Such a resolute manoeuvre (especially on the part of Defence counsel who lack true acumen or solid criminal trial experience) comes with its own risks, of course. But, so, too, does calling evidence in the case for the Defence: noting that counsel on either side are generally entitled to use to their own advantage any evidence called or tendered by the opposing side. In particular, any evidence tendered by the Defence may be used against them,

[2] *Curley v United States*, 160 F 2d 229 (1947) [US Court of Appeals, DC Circuit] at p 233, per Judge Prettyman [emphasis added]. As is discussed later, Judge Prettyman's dictum is often relied upon (wrongly in my view) by those who insist that the standard of proof for the assessment of 'no case to answer' is the standard of proof beyond reasonable doubt.

much in the same way that the evidence called by the Prosecution may be used to undermine their case. Such is the nature of a criminal trial: it is not a seminar.

PART II
THE DISCUSSION

An Overview of the Different Stages of a Trial by Judge and Jury

12. The notion of 'no case' to answer owes its provenance to the common law criminal process. It holds great potential in every trial—whether judge-alone trial or trial by judge and jury. But it serves a more critical purpose in trials by judge and jury. In *Curley v United States*, Judge Prettyman explained that purpose in the following way:

> The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration.[3]

13. As noted in the Chamber's decision, the motion invoking the notion of 'no case' to answer is also known as motion for 'directed verdict of acquittal', motion for 'judgment of acquittal', motion for 'nonsuit', motion for 'half-time judgment', motion for 'summary judgment' and so on. That the terminology of 'no case to answer' is mostly used here implicates no rational preference for the choice—except, perhaps, the descriptive nature of the terminology.

14. Since the procedure is a product of trials by judge and jury, it may be helpful to keep in mind the different stages into which such a trial may be divided—for a better understanding of the possibilities in a case in which a motion has been made for judgment of 'no case' to answer. In particular, indicating the different stages of the criminal justice process may make it easier to appreciate the following: (a) the kinds of decision that the court (judge and/or jury) is called upon to make for purposes of either continuing or stopping (or terminating) a trial; and (b) the peculiar considerations implicated at the point that the court (judge and/or jury) is called upon to decide the particular question presented.

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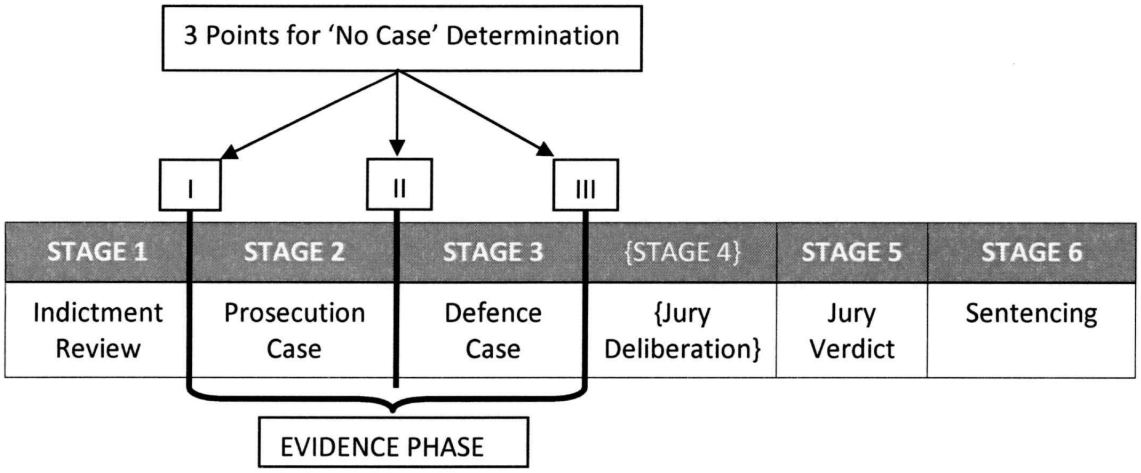
[3] *Ibid*, p 232.



I. At the conclusion of Stage 1 (Indictment Review) the judge reviewing the indictment may, *suo motu* or at the urging of counsel, decide to stop the case, by refusing to confirm the indictment, on grounds that the prosecution evidence reveals 'no case' for the suspect to answer.

II. At the conclusion of Stage 2 (Prosecution Case), and before the accused has been put to his defence, the trial judge may, usually at the urging of counsel but also *suo motu*, decide to terminate the case, on grounds that there is 'no case' to answer.

III. Stage 3 is the case for the defence. It is engaged when the accused has been put to his defence, either by electing to open his case or his 'no case' motion has been rejected. After electing to open their case, the Defence may call ample or minimal evidence; or they may choose to close their case without calling any evidence at all, thus leaving the case to be decided entirely on the strength of the evidence called by the Prosecution. But at the conclusion of Stage 3 (Defence Case), the trial judge may decide to terminate the case, as a matter of law, and not send it to the jury, on grounds that the evidence called in the entire case reveals 'no case' to send to the jury. When that occurs, the trial will not get to Stage 4.

15. Additionally, in the United States, the Defence may challenge jury verdicts of conviction reached at the conclusion of Stage 5 (Jury Verdict) and Stage 6 (Sentencing), on grounds that the case did not reveal sufficient evidence to justify the verdict of guilty. As will be seen later, this was the procedure that the US Supreme Court confirmed in *Jackson v Virginia*. The essential focus of the challenge is the jury verdict of guilty. But the challenge may also implicate a related question (where applicable) that the trial judge erred on her own part (a) in dismissing a prior motion of 'no case' to answer made at the conclusion of Stage 2 (the Prosecution Case); and (b) in declining to withdraw the case from the jury at the conclusion of Stage 3 (the Defence Case) of the Evidence Phase.

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16. In a discussion in a recent judgment about the theories of the incidence of the evidential burden that may fall upon defendants in certain circumstances in criminal cases, the Supreme Court of Canada saw fit to observe as follows: *'But in this as in other branches of the law, pure logic must yield to experience and, without undue distortion of principle, to a more practical and more desirable approach.'*[4]

17. That is a most important injunction that should guide the discussion in relation to the matter now before the Chamber. That is particularly the case in relation to any undertaking that is aimed at resolving the discrepancies or divergences or perceived incongruities in the strands of jurisprudence that bear on the subject.

Conflicting Views of the Test for Determination of 'No Case' Submissions

18. For purposes of the ICC process, there is a need (to which paragraph 23 of the Chamber's decision hopefully speaks) to resolve the divergence that currently exists in the understanding of the test to apply in the determination of defence motion for a verdict of acquittal at the close of the prosecution case, when the Defence submits that the evidence led in the case for the Prosecution discloses 'no case' for the accused to answer. The divergence appears as follows. On the one hand, it is said that the applicable test is whether the case for the Prosecution has failed to disclose sufficient evidence, which, if believed, could satisfy a reasonable tribunal of fact *beyond reasonable doubt* that the accused is guilty. The competing test is whether the case for the Prosecution has failed to disclose sufficient evidence to establish *substantial grounds to believe* that the accused committed the crime charged.

19. In the jurisprudence of the ICTY, the former test (i.e. proof beyond reasonable doubt) appears to have now become prevalent, without a satisfying discussion (in my respectful view) as to the place of the latter test. It is my view that the more appropriate test is the latter test. Without limiting the generality of its equally correct application to the other international criminal courts and national courts, that test is particularly suitable to the circumstances of the ICC.

[4] *R v Fontaine* [2004] 1 SCR 702 [Supreme Court of Canada] at para 57.

'No Case' Submissions as a Matter of a 'Prima Facie' Case

20. Upon a review of the jurisprudence of common law jurisdictions (which is the fountain of the notion of 'no case' motion at the end of the prosecution case) and of the *ad hoc* international criminal tribunals (that derived inspiration from the common law), one encounters discussions as to the right standard for the appraisal of the prosecution evidence for purposes of a 'no case' motion.

21. It is said that the right standard is whether the prosecution case discloses a '*prima facie*' case to put the accused to his defence. Observations to that effect include those of Mr Justice Roger Salhany of Canada (a very experienced former criminal trial judge). As he put it:

> If the trial judge is satisfied, as a matter of law, that *the Crown has failed to establish a* prima facie *case*, he or she must direct the jury to return a verdict of not guilty; if the judge is the trier of fact, he or she must acquit the accused: *Comba* (1938), 70 CCC 205 (SCC); *Walker* (1939), 71 CCC 305 (SCC).
>
> The judge must rule immediately on the *question of whether there is a* prima facie *case*. It is improper for the judge to reserve his or her decision and put the accused to his or her election as to whether the accused intends to call evidence: *Seamans* (1978), 41 CCC (2d) 446 (NB CA).[5]

22. Prior to the *Jelisić* case, the same language of '*prima facie* case' had made notable appearance in the ICTY jurisprudence, in the context of decisions on 'no case' submissions made at the close of the case for the Prosecution. Notably, that was the language that ICTY Trial Chamber I had employed in their decision of 3 September 1998 in *Blaškić*.[6] Writing extra-judicially on the subject, Judge Hunt (formerly of the ICTY) significantly observed as follows: '[W]ith the possible exception of *Jelisić*, every decision in relation to whether the accused has a case to answer at the conclusion of the prosecution case has expressed the test in terms equivalent to whether a *prima facie* case has been established.'[7] In *Jelisić*, the Trial

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[5] Judge Roger E Salhany, *Criminal Trial Handbook* [Toronto: Carswell, 1992] §11.2(A). See also *R v Monteleone* [1987] 2 SCR 154 [Supreme Court of Canada] at para 6. Also in *Archbold*, references are made to '*prima facie case*' in the context of discussion of 'no case' submissions. For example, 'As to whether the trial judge is obliged, or even entitled to stop a case where he is of the opinion (subject to inviting and considering submissions) that no prima facie case has been made out, but where no contention to that effect has been put forward by defence advocate, see post [section reference omitted]': *Archbold's Criminal Pleading, Evidence and Practice* [P J Richardson (ed), London: Sweet & Maxwell, 2011] §4-292. Similarly in the context of discussion of 'no case' submission, one also finds the following observation: 'In *Brooks v DPP* [1994] 1 AC 568 at 581, PC, it was said (in the context of committal proceedings) that questions of credibility, except in the clearest of cases, do not normally result in a finding that there is no *prima facie* case': *ibid*, §4-295.

[6] *Prosecutor v Blaškić (Decision of Trial Chamber I on the Defence Motion to Dismiss)* dated 3 September 1998 [ICTY Trial Chamber].

[7] David Hunt, 'The Meaning of a *"prima facie* Case" for the Purposes of Confirmation' in Richard May et al (ed), *Essays on ICTY Procedure and Evidence—In Honour of Gabrielle Kirk McDonald* [The Hague: Kluwer, 2001] p 146.

Chamber and the Appeals Chamber did not employ the terminology of '*prima facie*' in their description of the standard required in their decision under ICTY Rule 98*bis* (dealing with 'no case' submissions).

23. In the equivalent ICTR Rule 98*bis* decision in the *Semanza* case, rendered in September 2001, ICTR Trial Chamber III followed the jurisprudence of the ICTY Appeals Chamber in *Jelisić*. Nevertheless, the Trial Chamber in *Semanza* still described the applicable standard in terms of '*prima facie* case'. As the Chamber put it: 'At this stage of the proceedings all that is required of the Prosecution is to establish a *prima facie* case against the Accused.'[8] In their further observation, the Chamber noted: 'Once the Prosecutor has established a *prime facie* case against the Accused then it is incumbent on the Trial Chamber to require the Accused to answer the charges against him.'[9] In other ICTR Rule 98*bis* decisions, some Trial Chambers had been confronted with the terminology of *'prima facie*' case during the submissions of counsel. But the reasoning of the judges, in their turn, avoided using the expression, without much discussion that shows that the avoidance of the term was a conscious choice and why.[10]

24. Judge Hunt, a very experienced judge indeed, insists that '*prima face*' case is the necessary terminology to describe the applicable standard.[11] In my view, the *'prima facie*' label is a correct terminology to describe the nature of the exercise. But, the label for the standard does not become as controversial as the test to be employed to give effect to the appropriate standard.

Proof Beyond Reasonable Doubt as the Right Test for 'No Case' Submissions

25. In Judge Hunt's view, it seems, the applicable test imports, in turn, the standard of proof beyond reasonable doubt. As he expressed the position: 'The universal test as to whether such a case exists is whether there is evidence which, if accepted, could establish beyond reasonable doubt that the accused is guilty of the offence charged—in other words, that there is a *prima facie* case.'[12] It is a difficult position, in my view, to the extent of the focus of attention on the standard of proof beyond reasonable doubt at both the stage of 'no case' motion and to the notion of '*prima facie* case'. In the *Jelisić* judgment, rendered after Judge

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[8] *Prosecutor v Semanza (Decision on the Defence Motion for a Judgement of Acquittal in respect of Laurent Semanza after Quashing the Counts Contained in the Third Amended Indictment (Article 98bis of the Rules of Procedure and Evidence)* dated 27 September 2001 [ICTR Trial Chamber] para 15.
[9] *Ibid*, para 16.
[10] See, for instance, *Prosecutor v Kamuhanda (Decision on Kamuhanda's Motion for Partial Acquittal Pursuant to Rule 98bis of the Rules of Procedure and Evidence)* dated 20 August 2002 [ICTR Trial Chamber II]. See also *Prosecutor v Rwamakuba (Decision on Defence Motion for Judgment of Acquittal)* dated 28 October 2005 [ICTR Trial Chamber III].
[11] Hunt, *supra*, generally, especially at pp 138 and 140.
[12] *Ibid*, p 139.

Hunt's article, the ICTY Appeals Chamber also appears to have come to the view that the applicable test for a defence motion of 'no case to answer' at the close of the case for the Prosecution 'must of necessity import the concept of guilt beyond reasonable doubt'.[13] Similarly, in their dissenting opinion in *Charemski v R*, McLachlin J (as she then was) and Major J of the Supreme Court of Canada insisted that the applicable test is 'whether a properly instructed jury acting reasonably could find guilt beyond a reasonable doubt.'[14] But, McLachlin and Major JJ said that in a dissenting opinion. As will be seen later, there are reasons to believe that the majority did not share that view.

26. It is generally accepted that the idea and procedure of 'no case' to answer as a current feature of international criminal law was inspired by and derives guidance from the practice and procedure of common law jurisdictions. The ICTY Appeals Chamber clearly recognised that relationship, notwithstanding their correct rider that the jurisprudence of national law does not, as with much else, control the matter at the international stage.[15]

Proof Beyond Reasonable Doubt as the Wrong Test for 'No Case' Submissions

27. It may safely be supposed that when Judge Hunt wrote in 2001 that the 'universal test' imports a determination of the question whether the evidence at that stage has established guilt 'beyond reasonable doubt', he was no doubt alluding to the test as applied in the common law world. While a review of the jurisprudence and literature of common law jurisdictions reveals pronouncements consistent with the views expressed by Judge Hunt and the ICTY Appeals Chamber in *Jelisić*,[16] serious doubt attends the suggestion that there is a 'universal' acceptation that the standard of proof of guilt beyond reasonable doubt is an appropriate standard for 'no case' submissions that Defence counsel could make at the close of the prosecution case.

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[13] As the ICTY Appeals Chamber put it: '[I]t appears to the Appeals Chamber that those words ["the evidence is insufficient to sustain a conviction"] must of necessity import the concept of guilt beyond reasonable doubt, for it is only if the evidence is not capable of satisfying the reasonable doubt test that it can be described as "insufficient to sustain a conviction" within the meaning of Rule 98*bis*(B). Rule 87(A), confirms this interpretation by providing that a "finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt"': *Prosecutor v Jelisić (Judgment)* dated 5 July 2001 [ICTY Appeals Chamber] para 35. The confusion is particularly compounded by the Appeals Chamber's citation of ICTY Rule 87(A), which clearly deals with the scenario 'when both parties have completed their presentation of the case' and the Presiding Judge has 'declare[d] the case closed'.

[14] See *Charemski v R* [1998] 1 SCR 679 [Supreme Court of Canada], Dissenting Opinion of McLachlin and Major JJ at para 30. See also paras 20, 23 and 25.

[15] See *Jelisić* appeal judgment, *supra*, para 33.

[16] See for instance, Eric J Edwards, 'Proof and Suspicion' (1969) 9(2) *Western Australia Law Review* 169 at p 184.

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28. As noted earlier, in their dissenting opinion in *Charemski v R*, Justices McLachlin and Major of the Supreme Court of Canada appeared to insist that the applicable test is 'whether a properly instructed jury acting reasonably could find guilt beyond a reasonable doubt.'[17] They were, as observed earlier, dissenting in the judgment in which the majority of the Canadian Supreme Court had clearly applied a lower standard in their finding that the accused had a case to answer. The circumstances were these. *Charemski* was a case that Justices McLachlin and Major had characterised by observations such as these: 'The Crown's case was woefully weak.'[18] 'This is said to be a murder case, although no one can be sure there has been a murder.'[19] 'The most glaring deficiency was the inability of the pathologists to determine whether a murder had been committed. The other evidence was, at best, equivocal.'[20] The majority largely did not really dispute the factual matter of these characterisations. Notably, the majority of the Court had observed as follows:

> [T]he forensic evidence did not establish that the deceased was murdered and was inconclusive on this point. Two medical experts examined the body and were unable to determine definitively whether the deceased died from natural causes, or as a result of an accident, suicide or homicide. The trial judge concluded that "from an examination of the body, as a matter of law, there is no evidence that she met with foul play or that, in the words of the definition of homicide, that somebody caused her death". The evidence in the deceased's apartment also did not establish any foul play. The trial judge concluded that "with respect to the apartment, there is no evidence of a homicide other than the fact that the body is there". Finally, the Crown presented no direct evidence (e.g., fingerprints or eyewitness testimony) placing the accused in his wife's apartment on the night she died, and no evidence that he actually knew of the manner of her death before being informed by the police. On the basis of these observations, the trial judge concluded that there was no evidence on the issue of causation, a gap which would preclude any reasonable jury from returning a verdict of guilty.[21]

29. It was thus clear that the majority did not dispute the evidential weaknesses of the case generally speaking. Their point, rather, was that the 'purportedly missing element'[22] of the prosecution case did not leave the case without factual bases from which a jury acting reasonably could have drawn 'possible inferences'[23] of motive, opportunity and causation. In that connection, the majority noted as follows, among other things:

> First, the Crown adduced evidence relating to animus and to motive. The appellant and the deceased had a difficult marriage marked by periods of separation. During one such period,

[17] See *Charemski v R*, *supra*, at para 30. See also paras 20, 23 and 25.
[18] *Ibid*, at para 17.
[19] *Ibid*, at para 16.
[20] *Ibid*, at para 17.
[21] *Ibid*, at para 6.
[22] *Ibid*, at para 7.
[23] *Loc cit.*

> the deceased began a relationship with another man, which the appellant found "shameful" and which had made him feel "like an idiot". The appellant told police that the deceased had taken lovers in the past and was always "making problems" for him. On one occasion, the deceased told her doctor that she was afraid of staying with her husband and wanted to move away from him, and the doctor told the deceased about a women's shelter. The deceased also once told a friend that the appellant was verbally abusive and that she was afraid of him. The Crown also led evidence suggesting the appellant may have had a financial motive to kill his wife. The appellant, who receives social assistance, held a life insurance policy on the deceased in the amount of $50,000. The Crown adduced evidence to establish that this represents a great deal of money in Poland, where the appellant (who is Polish) has been living on and off for the past five years. On the basis of these facts, the Crown, in my opinion, adduced sufficient evidence from which a jury, properly instructed, could have inferred the requisite mental state for the homicide. That is, the jury could have inferred from the evidence of animus and financial motive that the accused intended to kill his wife.[24]

30. A careful review of this case suggests that the majority did not consider that the standard for the assessment of the prosecution case upon a 'no case' submission is the standard of proof beyond a reasonable doubt. One signal of that interpretation is the majority's view that '*possible inferences … could* be drawn' from some of the facts established in the case for the Prosecution. The standard of proof beyond reasonable doubt is scarcely satisfied if all that there is to the evidence is that a 'possible inference' of guilty 'could' be drawn. Another signal is the majority's observation that the judge should have sent the case to the jury with a direction 'that a finding of guilt could only be made where there was no other rational explanation for the circumstantial evidence but that the defendant committed the crime …'[25]. The emphasis appears in the original. One obvious aim of such a direction would be to offset the incidence of having sent to the jury a case whose *prima facie* worth was, on a 'no case' submission, assessed only at the standard of proof on a balance of probabilities.

31. If it be the correct interpretation of the majority's view, that the correct standard is not that of proof beyond reasonable doubt, such a view will be wholly consistent with the position earlier expressed by the same Supreme Court of Canada (though differently constituted) in earlier cases on 'no case' submissions. But, before we review those cases, it may be observed that the facts of *Charemski* made it wholly unnecessary for the dissenting judges to reach for the standard of proof beyond reasonable doubt for purposes of the 'no case' submission in that case. For, according to the view of Justices McLachlin and Major as to the level of the evidential weakness of the case for the Prosecution, the case for the Prosecution was 'woefully weak'. A prosecution case so weak will seldom attain the level of parity of opposing likelihoods, let alone satisfy the degree of cogency of 'more likely than not' that is the standard of proof on a balance of probabilities.

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[24] *Ibid*, at para 7.
[25] *Ibid*, at para 13.

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32. The view that the stage of decision on a motion of 'no case to answer' is not the stage to consider proof beyond reasonable doubt is sufficiently clear from the judgment of the Supreme Court of Canada in *R v Morabito*.[26] There, the Supreme Court had disposed of the appeal on the basis of the dissenting opinion of Roach JA of the Ontario Court of Appeal: who had held, for his part, that when assessing the prosecution case in consequence of 'no case' submissions, the 'question of reasonable doubt does not arise at that stage.'[27] In *Rose v R*, the Supreme Court of Canada restated the same position in the following words: 'Of course, when the trial judge sits as a jury, he has to instruct himself as if he were instructing the jury, and if there is a *prima facie* case he must reject a motion to dismiss. Then, there is no room for the benefit of the doubt. It is only when all the evidence is adduced that this benefit may be granted to the accused.'[28]

33. Another line of jurisprudence from the Supreme Court of Canada that detracts from the universality of the proof-beyond-reasonable-doubt standard at the stage of 'no case' submissions is the line of case law according to which 'the standard of proof beyond a reasonable doubt apply only to the jury's final evaluation of guilt or innocence and is not to be applied piecemeal to individual items or categories of evidence.'[29] In disapproving the idea of the criminal standard of proof to each item or categories of evidence, Sopinka J wrote as follows in *R v Morin*: 'In principle it is wrong because the function of a standard of proof is not the weighing of individual items of evidence but the determination of ultimate issues. Furthermore, it would require the individual member of the jury to rely on the same facts in order to establish guilt. The law is clear that the members of the jury can arrive at their verdict by different routes and need not rely on the same facts. Indeed the jurors need not agree on any single fact except the ultimate conclusion.'[30]

34. The significance of this line of jurisprudence to the issue of the correct standard of proof in 'no case' submissions lies not only in what it says, but also in its associated considerations discussed elsewhere. On its face alone, a rule that forbids the jury from applying the standard

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[26] *R v Morabito* [1949] SCR 172 [Supreme Court of Canada].
[27] As Roach JA put the point: 'Where an accused is being tried by a judge alone under Part XVIII of the Criminal Code and there is evidence which should be left to the jury, if the accused were being tried by a jury, the judge has no power to acquit the accused at the close of the Crown's case on the ground that the evidence for the Crown is such that, in his opinion, it leaves a reasonable doubt as to the guilt of the accused. The question of reasonable doubt does not arise at that stage': *R v Morabito* (1948) 91 CCC 210 [Ontario Court of Appeal, Canada] at para 27.
[28] *Rose v R* [1959] SCR 441 [Supreme Court of Canada] p 444.
[29] See *R v Ménard* [1998] 2 SCR 109 [Supreme Court of Canada] at para 23; *R v White* [1998] 2 SCR 72 [Supreme Court of Canada] at para 39. See also *R v Morin* [1988] 2 SCR 245; *R v Stewart* [1977] 2 SCR 748 [Supreme Court of Canada] p 759.
[30] *R v Morin*, *supra*, at para 36.

of proof beyond reasonable doubt to individual items or categories of evidence should ensnare the application of that standard of proof to a 'no case' submission—the latter being an exercise in which the judge is required to reject the motion if any or some evidence, taken at its highest, could reasonably justify conviction.

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35. American jurisprudence also does not support the view of universality of the beyond-reasonable-doubt standard as the proper standard of evidential assessment of the prosecution case at the 'no case' submission stage. In *Pierce v United States*, the US Supreme Court had dismissed a 'no case' motion—generally known in the US as a motion for 'directed verdict' of acquittal, among other names. In doing so, the Court said, 'The question whether the effect of the evidence was such as to overcome any reasonable doubt of guilt was for the jury, not the court, to decide.'[31] This is very much the same thing that the Supreme Court of Canada had said in *Morabito* and *Rose*.

36. Similarly, in *Hays v United States* (a case involving prosecution for prostitution and procurement of prostitution in violation of the White Slave Act), the US Court of Appeals for the Eighth Circuit held that where there was substantial evidence to establish all the elements of the offence, the motion for directed verdict of acquittal cannot be granted on the theory that the evidence was insufficient to convince the jury of guilt beyond a reasonable doubt. As Judge Amidon wrote on behalf of the Court:

> At the conclusion of the plaintiff's case a motion was made for a directed verdict, and its denial is one of the principal errors now relied on. While it is conceded that there is substantial evidence to establish all the elements of the offenses charged in the indictment, it is urged that such evidence is insufficient to convince the jury beyond a reasonable doubt. This assignment of error is without merit. *Where there is substantial evidence tending to prove each element of the offense charged, the verdict of the jury is final. Whether the evidence is of sufficient probative force to convince the mind beyond a reasonable doubt is addressed solely to the judgment of the jury.* The court can do no more than accurately state the rule of law. There is no way by which the doctrines of reasonable doubt and presumption of innocence can be properly used to create a new zone of error, or devolve upon appellate courts the duty to examine evidence its probative force.[32]

37. In *United States v Feinberg*, Judge Learned Hand agreed with Judge Amidon on the applicable standard for determining when a case should be sent to the jury. In refusing 'to distinguish between the evidence which should satisfy reasonable men, and the evidence which should satisfy reasonable men beyond a reasonable doubt,' Judge Hand registered the following signal observation: 'While at times it may be practicable to deal with these as

[31] *Pierce v United States*, 252 US 239 (1920) [US Supreme Court] pp 251—252.
[32] *Hays v United States*, 231 F 106 (1916) [US Court of Appeals, 8th Cir] p 108 [emphasis added].

separate without unreal refinements, in the long run the line between them is too thin for day to day use.'[33] Judge Hand was, notably, subsequently overruled (by a latter-day composition of his own court presided over by Chief Judge Friendly) in *United States v Taylor*, in the substantive effect that Judge Hand's observation had favoured a probative standard that is lower than the standard of proof beyond reasonable doubt, as the correct standard for directed verdicts of acquittal.[34]

38. But, it is possible that Judge Hand might have been overruled on that substantive point on doubtful grounds. This is because the overruling was based largely[35] on the dictum of Judge Prettyman in the earlier case of *Curley v United States*.[36] But, as will be seen presently, it is not clear that Judge Prettyman had really favoured the standard of proof beyond reasonable doubt as the correct standard of proof for 'no case' submissions at the end of the prosecution case, as opposed to the lower standard of proof. I set out below what he actually said. And it should be observed that he started with a reaction to what he described as a misleading interpretation of a case law pronouncement that had 'become trite by repetition':

> It is true that the quoted statement seems to say that unless the evidence excludes the hypothesis of innocence, the judge must direct a verdict. And it also seems to say that if the evidence is such that a reasonable mind might fairly conclude either innocence or guilt, a verdict of guilt must be reversed on appeal. But obviously neither of those translations is the law. Logically, the ultimate premise of that thesis is that if a reasonable mind might have a reasonable doubt, there is, therefore, a reasonable doubt. That is not true. Like many another rule become trite by repetition, the quoted statement is misleading and has become confused in application.
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> The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen *must necessarily have such a doubt, the judge must require acquittal*, because no other result is permissible within the fixed bounds of jury consideration. *But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make.* The law recognizes that the scope of a reasonable mind is broad. Its conclusion is not always a point certain, but, upon given evidence, may be one of a number of conclusions. Both innocence and guilt beyond reasonable doubt may lie fairly within the limits of reasonable conclusion from given facts. The judge's function is exhausted when he determines that the evidence *does or does not* permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind.[37] [Emphases added.]

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[33] *United States v Feinberg*, 140 F 2d 592 (1944) [US Court of Appeals, 2nd Circuit] p 594.
[34] *United States v Taylor*, 464 F 2d 240 (1972) [US Court of Appeals, 2nd Circuit].
[35] See *ibid*, p 243.
[36] *Curley v United States*, *supra*.
[37] *Ibid*, p 232.

39. From that exordium, Judge Prettyman ended up with the following statement of what he described as the 'true rule' that should guide the determination of motions for directed verdict:

> The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence *there must* be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is *no evidence* upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. *If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.* In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts. The task of the judge in such case is not easy, for the rule of reason is frequently difficult to apply, but we know of no way to avoid that difficulty.[38] [Emphases added.]

40. A number of things stand out from Judge Prettyman's pronouncement: such that makes it a doubtful basis for Judge Learned Hand's successors in office to overrule in *Taylor* the lower standard that he indicated in *Feinberg*. First, the great erudition of Judge Prettyman's pronouncement in *Curley* is inversely proportional to its easy readability about the correct standard of proof for purposes of 'no case' motion. Second, a closer look at the dictum does not truly exclude a probative standard that is lower than proof beyond reasonable doubt standard for purposes of 'no case' motion. To say, as he did, that '*either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible*' (emphases added) does not confidently support the interpretation that what was contemplated for a 'no case' submission is standard of proof beyond reasonable doubt. Third, the primary focus of Judge Prettyman's pronouncement was upon what is permissible (or impermissible) of a *jury* by way of a correct verdict in terms of a reasonable mind acting fairly. Fourth, when he got around to the matter of the applicable standard of proof for purposes of 'no case' submission, his dictum, upon a closer examination, appears to indicate greater affinity with a balance of probabilities—if not a parity of likelihoods of the opposing conclusions—than the beyond-reasonable-doubt standard, for purposes of 'no case' determination. That is the case in spite of the frequency of the phrase 'reasonable doubt' in the dictum. It should be noted, in this connection, that what he set out to address were understandings that he considered to be wrong. Those understandings were as follows: that 'unless the evidence excludes the hypothesis of innocence, the judge must direct a verdict. And ... if the evidence is such that a reasonable mind might fairly conclude either innocence or guilt, a verdict of guilt must be reversed on appeal.' Remarkably, these propositions that Prettyman J disagreed with are propositions that tend towards an insistence on proof beyond reasonable doubt as the correct standard of proof

[38] *Ibid*, pp 232—233.

in the context of 'no case' submissions. Judge Prettyman disagreed with that insistence. As he wrote: 'But obviously neither of those translations is the law. Logically, the ultimate premise of that thesis is that if a reasonable mind might have a reasonable doubt, there is, therefore, a reasonable doubt. That is not true. …'.

41. The closer affinity of his pronouncements with the standard of proof on a balance of probabilities than the standard of proof beyond a reasonable doubt becomes clearer with his eventual statement of the correct standard for purposes of 'no case' motions. It bears repeating, as follows (the italics are mine): 'The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind *might* fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence *there must be such a doubt* in a reasonable mind, he must grant the motion; or, to state it another way, if there is *no evidence* upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. *If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.* In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts.'

42. An analysis of that quote suggests the following. First, to require the trial judge to consider whether a reasonable mind in the jury '*might* fairly conclude [guilt beyond a reasonable doubt]' is no more than an exercise in *the weighing of the probabilities* (of guilt beyond reasonable doubt). Expressed differently, he had put on the scale of probability or 'fair possibility' the prospect of conviction of the mind beyond a reasonable doubt that the accused is guilty. As will be seen later, the idea is the same thing that had been described in an earlier edition of *Cross on Evidence* as to 'satisfy a reasonable doubt on the balance of probability.'[39] Second, to require the trial judge to grant the motion of 'no case' to answer *only* if he concludes that upon the evidence 'there must' be a reasonable doubt, compels no interpretation that results in a standard of proof that is more exacting than proof on a balance of probabilities, for purposes of 'no case' submissions. For, an assessment at half-time that results in a *necessary* conclusion of reasonable doubt is still consistent with the idea of assessment of 'no case' submissions on a balance of probabilities. This is because a prosecution case so extremely deficient will be unable to pass the threshold of balance of probabilities. Such a case does not bring conviction to the balance. As it cannot be seen as a case in which (in the traditional formulation of the test of 'no case to answer') a reasonable tribunal of fact 'could' reasonably convict upon the evidence thus far led. Third, Judge

[39] See Edwards, *supra*, p 183.

Prettyman's restatement of the rule—in the terms of 'if there is no evidence' upon which a reasonable mind 'might fairly' conclude guilt beyond a reasonable doubt—similarly does not result inevitably in the view that Judge Prettyman necessarily had in mind a higher standard of proof than balance of probabilities for 'no case' motions. This is also because the case for the Prosecution will necessarily fail the standard of proof on a balance of probabilities, 'if there is *no evidence* upon which a reasonable mind *might fairly* conclude guilt beyond a reasonable doubt.' Finally, it is eminently arguable that Judge Prettyman would, for purposes of 'no case' submissions, accept a standard of proof less exacting than the balance of probabilities of conviction for a case to be sent to the jury. That interpretation results from his observation as follows: 'If [the judge] concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.' What he was saying in effect is that where the prospect of finding criminal responsibility is 'as likely as it is unlikely', then the 'no case to answer' motion must be dismissed and the case sent to the jury to decide. Surely, a forecast that hangs so equally on the balance—a veritable flat-line on the scale—does not readily lead to a view of a balance of probabilities that is tipped in favour of the conclusion that the jury might find a reasonable doubt. It is, thus, not a formula for a probative standard of proof beyond reasonable doubt, as the proper standard at the stage of 'no case to answer'.

43. In view of the foregoing, I remain of the view that Judge Learned Hand's statement of the correct standard of proof remains undisturbed in its correctness, as it appears ultimately consistent with Judge Prettyman's own dictum on the basis of which Judge Learned Hand was overruled.

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44. But, besides the correct interpretation of Judge Prettyman's dictum relative to Judge Hand's indication of the correct probative standard for the assessment of motions for directed verdict of acquittal, there is another nuance in the case law of the United States that needs to be considered with care. This concerns the judgment of the majority of the US Supreme Court in *Jackson v Virginia*,[40] which has often been cited[41] to support the proposition that the standard of proof beyond a reasonable doubt applies in motions for judgment of acquittal made at the conclusion of Stage 2 of the criminal process (the prosecution case), when the defence case (Stage 3) has not yet been closed. But, doubt exists that *Jackson v Virginia* truly supports the proposition. This is because the case concerns an application for *habeas corpus* in respect of a *convicted and sentenced* prisoner who claimed that his *conviction* and

[40] *Jackson v Virginia*, 443 US 307 (1979) [United States Supreme Court].
[41] See for instance, *Charemski*, *supra*, Dissenting Opinion of McLachlin and Major JJ, at para 25.

sentencing—consummated events at the conclusions of Stage 5 (Jury Verdict) and Stage 6 (Sentencing)—occurred in the absence of evidence capable of establishing guilt beyond reasonable doubt.[42]

45. The true significance of *Jackson v Virginia* lies in an appreciation of the fact that juries do not give reasons for their verdicts. As a result, findings of fact by juries are not easily reviewed. Hence, defence appeals in jury trials are ordinarily anchored upon claims of erroneous instructions that the trial judge left with the jury at the end of the trial. But a *habeas corpus* application brought, after conviction and sentencing (Stages 5 and 6), following a jury trial is one way of indirectly challenging jury verdicts—on grounds of lack of evidence to support the jury verdict. The use of *habeas corpus* applications to challenge jury verdicts is often to the effect that the jury acted in excess of jurisdiction in convicting without evidence capable of supporting conviction in a criminal case.[43] It is uniquely rooted in article 1(9)(2) of the US Constitution: 'The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.' A notable rationale for its use regardless of the ordinary appellate process in criminal cases is found in the following pronouncement of the US Supreme Court: 'Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged.'[44]

46. In the context of *habeas corpus* applications following conviction and sentencing, the Supreme Court observed as follows in *Jackson v Virginia*: '[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." … Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond reasonable doubt.'[45]

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[42] Notably, 28 USCA §2254(d)(2) provides: 'An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—[…] resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'

[43] As *Black's Law Dictionary* (7th edn) informs: 'In addition to being used to test the legality of an arrest or commitment, the writ [of habeas corpus] may be used to obtain review of … the jurisdiction of a court that has imposed a criminal sentence.'

[44] *Kaufman v United States*, 394 US 217 (1969) at p 228 [US Supreme Court].

[45] *Jackson v Virginia*, *supra*, at pp 318—319 [emphasis received].

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47. *Jackson v Virginia*—in engaging errors committed at the conclusion of Stages 5 and 6—is thus materially distinguishable from relevance to 'no case' submissions at the conclusion of the prosecution case (Stage 2), regardless of the similarity of language employed to describe the applicable test for insufficiency of evidence in either instance. To say that a judge is correct in dismissing a motion for directed verdict made at the close of the prosecution case, using the standard of proof on a balance of probabilities, is not to say that a jury may convict on the standard of proof lower than proof beyond a reasonable doubt. It is certainly correct to apply the criminal standard in any review of the question whether the jury verdict of *conviction* was correctly founded upon the right quality of evidence. It may even be accepted that the criminal standard of proof could be applied in determining the correctness of leaving the jury with the case at the end of the trial—after the defence has closed their case (at the conclusion of Stage 3)—when the jury verdict may result in a *conviction*. But those considerations are significantly different in the circumstances of a motion for judgment of *acquittal* brought at the end of only the case for the Prosecution (at the conclusion of Stage 2)—with no risk of conviction involved at that stage, because the jury is not being left with the question of conviction.

48. In the circumstances, the clearer relevant pronouncement (as regards the applicable probative standard for the assessment of the case for the Prosecution on a 'no case' submission) appears to be the statement of the US Supreme Court in *Pierce v United States*. It is inconsistent with the suggestion of universality of the view that the proof-beyond-reasonable-doubt standard is the correct standard for the assessment of the prosecution case at half-time.

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49. In England and Wales, the guiding law on the assessment of 'no case' submissions is the pronouncement of Lord Lane CJ in *R v Galbraith*. The guidance appears in the following words:

> How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence

> upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. ...
>
> There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.[46]

50. A careful attention to the general import of these words does not readily lend them to the view that the required standard for the assessment of 'no case' submissions is the standard of proof beyond a reasonable doubt. In other words, they do not support any view of universal application of that standard at that stage. As with the majority judgment in *Charemski*, and as in Judge Prettyman's dictum in *Curley v United States*, one also sees in the *Galbraith* direction, the indication that a 'no case' submission would fail 'where on *one possible view of the facts* there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty.' A standard of proof beyond reasonable doubt is hardly satisfied when only 'one possible view of the facts' is consistent with guilt. Nor is that standard implicated in the earlier (1962) practice direction that Lord Parker CJ issued to magistrates, in the following words:

> A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it.
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> Apart from these two situations a tribunal should not in general be called upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If however a submission is made that there is no case to answer, *the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.*[47]

51. The emphasised words are not easily reconciled with the idea that the standard of proof for the assessment of a 'no case' submission is the standard of proof beyond a reasonable doubt. In an earlier edition of *Cross on Evidence*, that practice direction was cited in support of the following view: '[e]ven in a criminal case the evidence sufficient to constitute a case to answer need, at the most, be such as would satisfy a reasonable doubt on the balance of probability.'[48] That was the correct interpretation.[49] This is because on any correct sense of

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[46] *R v Galbraith* [1981] 1 WLR 1039 [Court of Appeal of England and Wales] p 1042.

[47] See Practice Direction (Submission of No Case) [1962] 1 All ER 448, [1962] 1 WLR 227 [emphases added].

[48] See Edwards, *supra*, p 183.

[49] It may be noted that in a specific reaction to an adverse commentary by Edwards, *supra*, (a proponent of the standard of proof beyond reasonable doubt for the assessment of 'no case' submissions), *Cross and Tapper on Evidence* pulled back from an unequivocal statement that the applicable standard is the balance of probabilities, without clearly embracing the standard of proof beyond reasonable doubt as so clearly advocated by Edwards in his commentary. What one now finds in the current edition of *Cross and Tapper* in place of any clear indication of the applicable standard is 'having regard to the degree of proof demanded by the law with regard to the

the modal verb 'would' convict (which Lord Parker indicated as 'not so much' the question) is more consistent with the question whether the mind is convinced of guilt beyond a reasonable doubt; while 'might' convict is more consistent with the balance of probabilities.

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52. From Judge Hunt's own Australia comes *Zanetti v Hill*. There, Mr Justice Kitto of the High Court of Australia raised the need for careful distinction between a 'no case' determination at half-time and considerations of guilt beyond reasonable doubt. As he put it:

> The question whether there is a case to answer, arising as it does at the end of the prosecution's evidence in chief, is simply the question of law whether the defendant could lawfully be convicted on the evidence as it stands, - whether, that is to say, there is with respect to every element of the offence some evidence which, if accepted, would either prove the element directly or enable its existence to be inferred. *That is a question to be carefully distinguished from the question of fact for ultimate decision, namely whether every element of the offence is established to the satisfaction of the tribunal of fact beyond a reasonable doubt.* See *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654. The ultimate question of fact must be decided on the whole of the evidence …[50] .

53. The pronouncement of Kitto J is traceable to the judgment of the Full Court of the Supreme Court of South Australia, in *Wilson v Buttery*, delivered by Napier J (as he then was). There the Court had observed as follows:

> It is … necessary to consider whether the evidence before the justices disclosed what is referred to as a *prima facie* case. Of course, the charge was one of an offence, and when the evidence came to be finally considered it was necessary that it should be such as enabled the Court to come to a conclusion, free from any reasonable doubt. *But, for the purpose of raising a prima facie case and thereby throwing upon the defendant the onus of making an answer, or giving an explanation for facts which he may be presumed to know, we cannot find that there is any distinction between civil and criminal cases*.[51]

54. In *May v O'Sullivan* (to which Kitto J had referred in *Zanetti v Hill*), the High Court of Australia considered the import of the above quoted pronouncement. They quarreled only with the following words '*and thereby throwing upon the defendant the onus of making an answer, or giving an explanation for facts which he may be presumed to know*'. The High Court found the words to be apt to mislead, as: 'It is not really correct to say that the "raising of a prima facie case" throws upon the defendant "the onus of making an answer".'[52] Aside from those words—which the High Court found to be 'not essential to the reasoning of the

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particular issue', which was the initial observation stated in the first edition of *Cross on Evidence*. See Colin Tapper, *Cross and Tapper on Evidence*, 12th edn [Oxford: OUP, 2010 (reprint 2013)] p 185.

[50] *Zanetti v Hill* (1962) 108 CLR 433 [High Court of Australia] pp 442—443 [emphasis added].

[51] *Wilson v Buttery* (1926) SASR 150 [Supreme Court of South Australia] pp 153—154 [emphasis added].

[52] *May v O'Sullivan* (1955) 92 CLR 654 [High Court of Australia] p 657.

learned judges for the purpose in hand'—the High Court approved of the remainder of the *Wilson v Buttery* pronouncement to be 'an accurate statement of the law'.[53] In other words, the High Court of Australia approved as an accurate statement of the law, the pronouncement that 'for the purpose of raising a *prima facie* case … there is [no] distinction between a civil and criminal cases'.

55. The significance of the *Wilson v Buttery* pronouncement, as approved in *May v O'Sullivan*, is a necessary reduction of the standard of proof of the '*prima facie* case' to less than the evaluation of the case at the level of guilt beyond reasonable doubt; for, that is not the standard in civil cases. The indicated standard, rather, is proof on a balance of probabilities. Indeed, that proposition was so clearly stated in *Wilson v Buttery*:

> The expression used by Blackburn J., in *R v Smith*, (1865) 34 L.J. M.C. 153, with reference to a criminal case, is that which would be used in a civil case, namely, that "there must be more than a mere scintilla of evidence before the case is submitted to the jury."
>
> At this stage and for this purpose the question is not, are the facts proved by the prosecution capable of any reasonable construction consistent with innocence? but this, do they establish a substantial balance of probability in favour of the inference which the prosecution seeks to draw?[54]

56. There is indeed a storied value to the pronouncement that 'there must be more than a mere scintilla of evidence before the case is submitted to the jury.' Its value resounds in the very definition of a *prima facie* case, at every stage where that concept is in play.

An ICC Standard Equivalent to 'Prima Facie *Case' to Keep in Mind*

57. The invocation of Blackburn J's pronouncement in *R v Smith* to the effect that 'there must be more than a mere scintilla of evidence' to establish a *prima facie* case, is very significant indeed, as regards the evaluation of evidence at relevant stages at the ICC. It has been observed that to say 'that there must be more than a mere scintilla of evidence' means that 'there must be substantial evidence' that is adequate to support a conclusion that a tribunal is called upon to make.[55] For his part, Professor Blume explained the notion as follows: 'The term "substantial" is used to distinguish evidence which is so slight that it must be disregarded under the doctrine of *de minimis non curat lex*, from evidence which is worthy

[53] *Ibid.*
[54] *Wilson v Buttery*, *supra*, p 154.
[55] *Consolidated Edison Co v Labor Board*, 305 US 197 (1938) [US Supreme Court] at p 229.

of consideration by a court.'[56] And, according to him, the existence of such evidence 'shows a prima facie case.'[57]

58. These understandings of the meaning of a '*prima facie* case' has a particularly serviceable value in relation to relevant procedures in modern international criminal law where the notion of *prima facie* case appears—either by that Latin phrase or by a description that suggests a standard of proof lower than proof beyond reasonable doubt.

59. In that connection, it may be helpful to consider how the US Supreme Court has treated the requirement that a finding of fact be supported by 'evidence'. In the context of judicial review of the decisions of the labour relations board, the National Labour Relations Act of 1935, colloquially known as the Wagner Act, required appellate deference to be given to factual findings made by the Board. The Act provided as follows: 'The findings of the Board as to the facts, if supported by evidence, shall be conclusive.' The US Supreme Court first interpreted 'evidence' to mean 'substantial evidence'[58], explaining that '[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'[59] And, in a further explanation, the Court held that such evidence 'must do more than create a suspicion of the existence of the fact to be established. . . . *[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.*'[60]

60. With time, the Court's jurisprudence—which held that 'evidence' meant 'substantial evidence'—resulted in criticisms in the context of labour relations law. The criticisms were to the effect that the jurisprudence lent itself to the view 'that it was enough that the evidence supporting the [decision of the Labour Board under the Wagner Act] was "substantial" when considered by itself.'[61] The '"prevalent" interpretation of the "substantial evidence" rule' was reported to be that '"if what is called 'substantial evidence' is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily the countervailing evidence may preponderate—unless, indeed, the stage of arbitrary decision is reached. Under this interpretation, the courts need to read only one side of the case, and, if they find any evidence there, the administrative action is to be sustained, and the record to the contrary is to be ignored.'[62] The Supreme Court itself

[56] William Wirt Blume, 'Origin and Development of the Directed Verdict' (1950) 48 *Michigan Law Review* 555 at p 576.
[57] *Loc cit.*
[58] *Washington, V & M Coach Co v Labor Board*, 301 US 142 (1937) [US Supreme Court].
[59] *Consolidated Edison Co v Labor Board*, 305 US 197 (1938) [US Supreme Court] p 229.
[60] *Labor Board v Columbian Enameling & Stamping Co*, 306 US 292 (1939) [US Supreme Court] p 300 [emphasis added].
[61] See *Universal Camera Corp v Labor Board*, 340 US 474 (1951) [US Supreme Court] pp 477—478.
[62] *Ibid*, p 481.

eventually accepted that 'It is fair to say that, by imperceptible steps, regard for the factfinding function of the Board led to the assumption that the requirements of the Wagner Act were met when the reviewing court could find in the record evidence which, when viewed in isolation, substantiated the Board's findings.'[63] It was, thus, understandable that the law as to the conclusiveness of the labour board's finding of fact was ultimately refined to require the board's findings of fact to be 'supported by substantial evidence on the record considered as a whole'.[64]

61. The value of that ultimate refinement is truly obvious in the context of labour relations law—considering that what was contemplated for purposes of appellate deference to the labour board's findings of fact was the ultimate decision of the board on the merits of the whole case, comprising the entire evidence adduced by all the parties in the case. In substance, then, the essence of the criticism thus remedied by the ultimate refinement was not so much that 'evidence' should mean 'substantial evidence' as it is that the labour relations board's final decision was enjoying curial deference, when the decision itself might only have reflected the evidence (in whole or in part) adduced by one party in the case and not the entire evidence adduced in the case. The situation would be similar to saying that a court of appeal must defer to the *final* verdict of a criminal court if there is 'evidence' on the record that supports the verdict, and that there was no need to consider other evidence led in the case as a whole.

62. Thus, beyond the purposes of the ultimate refinement of the meaning of 'evidence' in the context of labour relations law, there remains residual utility in the Supreme Court's prior jurisprudence that 'evidence' means 'substantial evidence', for other purposes when 'evidence' is required to support a factual finding necessary for a legal consequence. This means, in turn, that there must be 'more than a mere scintilla of evidence.' The residual value of that line of jurisprudence is particularly evident in its contemplated application in motions for decisions on 'no case' submissions or 'directed verdicts' in jury trials, as appears in the Supreme Court's pronouncement that what they meant by 'substantial evidence' is evidence that is enough to justify 'if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury'. That is precisely what is involved in decisions on 'no case' submissions.

63. And, for that particular purpose, the value of that line of jurisprudence is not diminished, it is rather enhanced, by the concerns (quite valid in the context of the appellate deference contemplated in the Wagner Act) regarding what became the 'prevalent interpretation of the substantial evidence rule'. The prevalent interpretation being that the requirements of the

[63] *Ibid*, p 478.
[64] See *ibid*, generally.

indicated standard of proof 'were met when the reviewing court could find in the record evidence which, when viewed in isolation, substantiated the [factual] findings.' In other words, '[u]nder this interpretation, the courts need to read only one side of the case, and, if they find any evidence there, the administrative action is to be sustained, and the record to the contrary is to be ignored.' Again, that is precisely what is required for purposes of 'no case' submissions. To be sufficient to defeat a 'no case' submission or justify 'refusal to direct a verdict' of acquittal—on the basis that a '*prima facie* case' had been made out—the evidence in the case for the Prosecution must necessarily be viewed in isolation.

The Precursor to the ICC Standard of Proof for 'Prima Facie' *Cases*

64. Early incidences of the notion of '*prima facie* case' in the annals of modern international criminal law occurred in article 18(4) and article 19(1) of the ICTY Statute indicating the standard for confirmation of indictments. [The equivalent provisions appear at article 17(4) and article 18(1) of the ICTR Statute.] Article 18(4) of the ICTY Statute provides: 'Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.' And, article 19(1) provides: 'The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.' Article 19(2) provides, among other things, that upon confirmation of the indictment, the judge may issue an arrest warrant at the request of the Prosecutor.

65. But, the ICTY Statute gave no definition to the expression '*prima facie* case'. The ICTY judges were thus left to define the expression in the Rules of Procedure and Evidence. And they defined it in r 47(B), by providing that if in the course of an investigation, the Prosecutor is 'satisfied … that there is *sufficient evidence to provide reasonable grounds for believing* that a suspect has committed a crime within the jurisdiction of the Tribunal', the Prosecutor 'shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material.' [Emphasis added.] Rule 47(B) itself does not contain the expression '*prima facie* case'; but there is no doubt that it is that expression that the provision explains.[65] With particular regard to the incidence of the expression '*prima facie* case' in decisions on 'no case' submissions, Judge Hunt has criticised some of his colleagues at the ICTY, particularly Judge Sidhwa, who had given an understanding of '*prima facie* case' the

[65] See Hunt, *supra*, pp 140—141.

meaning indicated by r 47(B), which meaning is lower in threshold than proof beyond a reasonable doubt.[66] Judge Hunt wrote more approvingly of an interpretation of '*prima facie* case' that 'places much more onerous requirement upon the Prosecutor than that adopted by Judge Sidhwa.'[67] He particularly considered that Judge Sidhwa had committed a 'fundamental error, in that he did not take into account that the necessary consequence of the low level of satisfaction which his interpretation of Articles 18 and 19 permitted was that the generally accepted rights of the accused as to what is required for him to be put on trial and for the establishment of a case to answer were also reduced.'[68] It was in those circumstances that Judge Hunt considered that the 'universal test' for what was required in a 'no case' submission was proof of the guilt of the accused beyond reasonable doubt.

66. As is clear from the review of authorities undertaken above, Judge Hunt was not justified in criticising Judge Sidhwa for adopting the lower level of proof (for the establishment of a '*prima facie* case') than proof beyond reasonable doubt. Judge Sidhwa's adherence to the lower level of proof for '*prima facie* case'—particularly in the circumstances of Judge Sidhwa's decision (indictment confirmation)—is also entirely consistent with the following correct observations of the editors of *Blackstone's Criminal Practice*:

> In practice, the standard of proof the prosecution are required to satisfy at committal proceedings is *very low*. It is commonly expressed as establishing a 'prima facie case' or a 'case to answer'. It must be borne in mind that in committal proceedings under the MCA 1980, s 6(1), there is no oral testimony: the prosecution simply tender written evidence, and so there is no opportunity for the defence to cross-examine the prosecution witnesses at the committal proceedings. If the written evidence is hopelessly contradictory or makes assertions that are inherently unlikely, this may enable the justices to hold that there is no case to answer. In general, however, it is likely that the magistrates will be concerned only with evidential sufficiency and will leave questions of credibility to the Crown Court, where the jury will have a chance to assess the witnesses at first hand.[69]

67. What is known as 'committal proceedings' in some common law jurisdictions, including England and Wales, is the equivalent of what is referred to in international criminal procedure as confirmation of indictment or charges. The editors of *Blackstone's Criminal Practice* tell us that 'the standard of proof' that the prosecution is required to satisfy is 'very low'.

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[66] According to Judge Hunt, 'Judge Sidhwa did not consider the effect which that interpretation would have upon any subsequent submission by the accused that there was no case to answer': *ibid*, p 141.
[67] *Ibid*, p 143.
[68] *Ibid*, p 144.
[69] *Blackstone's Criminal Practice* [Oxford: OUP, 2012] §D10.41 [emphasis added].

Equivalent Provisions in the Rome Statute

68. In their draft Statute for an International Criminal Court, the International Law Commission proposed in draft article 27 a procedure that approximated articles 18(4) and 19(1) of the ICTY Statute—including the terminology of '*prima facie* case'—for purposes of confirmation of the 'indictment'. But, in the final product—the Rome Statute—the expressions 'indictment' and '*prima facie* case' were not retained. Also rejected was the summary indictment confirmation procedure that the ILC draft had proposed, that was similar in nature to the procedure at the ICTY and ICTR.

69. Instead of the word 'indictment' that appears in the ICTY Statute, the expression 'document containing the charges' is used in the Rome Statute. And, the expression '*prima facie* case' used in the ICTY Statute was not used in the Rome Statute. But, what appears in the Rome Statute, for purposes of confirmation of charges, was a test that appears similar in phrasing as the test for '*prima facie* case' that appears in ICTY Rule 47(B).[70] Notably, article 61(5) of the Rome Statute provides, among other things, that 'the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged....'. And article 61(7) provides: 'The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. ...'.

70. It is also to be noted that article 58(1)(a) and article 58(7) of the ICC Statute provide that the Pre-Trial Chamber shall issue an arrest warrant or summons to appear, respectively, where the Pre-Trial Chamber is satisfied that there are 'reasonable grounds to believe' that the suspect committed crimes within the jurisdiction of the Court.

71. In an *obiter dictum* in *Mbarushimana*, the ICC Appeals Chamber had observed that the indication of 'substantial grounds to believe' (as the applicable standard for confirmation of charges) for purposes of article 61 of the Rome Statute is a higher standard of proof than ICTY r 47(B)'s indication of 'sufficient evidence to provide reasonable grounds for believing'.[71] It may be possible to accept that proposition. But, as the jurisprudence of the US Supreme Court reviewed above suggests, the requirement of 'evidence' to support the factual findings of a tribunal means 'substantial evidence' that is 'adequate to support a conclusion' from which a legal consequence may flow. On that view, then, the question may respectfully

[70] See *Prosecutor v Mbarushimana (Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on confirmation of charges")* dated 30 May 2012 [ICC Appeals Chamber] para 43.
[71] *Ibid.*

be asked whether there is really a material difference in the required standard of proof for purposes of a confirmation of indictments either at the ICC or at the ICTY and ICTR, where one standard requires 'sufficient evidence to provide reasonable grounds for believing' (ICTY/ICTR) while the other requires 'sufficient evidence to establish substantial grounds to believe' (ICC). It is a question respectfully posed for reconsideration at an opportune moment in future.

72. But, be that as it may, the required standard for proof of a '*prima facie* case' as a matter of confirmation of indictments either at the ICC or the ICTY and ICTR remains lower than the standard of proof beyond reasonable doubt. At the ICC, in particular, the Appeals Chamber has indicated that while the 'substantial grounds to believe' standard 'clearly requires the Pre-Trial Chamber to go beyond looking at the Prosecutor's allegations "on their face"',[72] the 'Pre-Trial Chamber need not be convinced beyond a reasonable doubt'.[73] The Appeals Chamber's pronouncements are readily synthesised and at one with (a) the view of the Full Court of the Supreme Court of South Australia in *Wilson v Buttery* that the equivalence of the standard of '*prima facie* case' in a criminal case means no more than 'that there must be more than a mere scintilla of evidence'; and, (b) with the jurisprudence of the US Supreme Court that equates the requirement that 'there must be more than a mere scintilla of evidence' with the idea that 'there must be substantial evidence'.

73. The question now is whether the standard of proof need be any different at the ICC for the determination of a motion of 'no case to answer', which for all intents and purposes, also entails the standard of '*prima facie* case'?

The Lower Threshold as the Better Standard to Determine 'No Case' Submissions

74. There is much that recommends the Chamber's view that for purposes of decision on a 'no case' motion, being an exercise in the evaluation of a *prima facie* case, '[t]he emphasis is on the word 'could' and the exercise contemplated is thus not one which assesses the evidence to the standard for a conviction at the final stage of a trial.' That is to say, did the case for the prosecution, at half-time, reveal sufficient evidence upon which a tribunal of fact 'could' reasonably convict? That view is consistent with the views of the Supreme Court of Canada in *Morabito* and *Rose*; of the High Court of Australia and of the Full Court of the Supreme Court of South Australia respectively in *May v O'Sullivan* and *Wilson v Buttery*; of the US Supreme Court in *Pierce*, of Judge Amidon in *Hays* and of Judge Learned Hand in *Feinberg*—to the effect that the stage of 'no case' submission is not the stage to consider

[72] *Ibid.*
[73] *Ibid*, para 47.

whether the case of the Prosecution has established guilt beyond reasonable doubt. It holds especial value in the circumstances of administration of justice at the ICC. Some of the value of that position will be reviewed next.

75. For one thing, the distinctions that the proponents of standard of proof beyond reasonable doubt, are often compelled to make to justify the application of that standard tend to be too abstract or fictive for useful application in an actual case before an international criminal court. For instance, the position is often explained with arguments along the following lines: 'The court is concerned with the sufficiency of the evidence as a matter of law, not its sufficiency as a matter of fact at some lower standard.'[74] It is easy enough to say that 'sufficiency of the evidence' refers to the mere body of evidence presented in support of the charge. But, it is not as easily said that this is a matter of law only, and that the existence of that body of evidence is not a matter of fact. Nor is it easy to make any determination as to the sufficiency of the evidence as a matter of law, as opposed to a matter of fact, in any case—particularly a circumstantial case or a complex case of the type often seen before international criminal courts—except the case in which there was a total absence of evidence on the elements of the offence.

76. Lord Lane's own direction in *Galbraith* sufficiently demonstrates the difficulty of the application of the distinction. The direction clearly shows progressive reduction of clarity with the complexity of the cases, with concomitant difficulty inversely increasing in relation to the appraisal of evidential sufficiency. It continues to the blurry point where matters, in Lord Lane's direction, are to be safely left to the discretion of judges in borderline cases. American judges have similarly acknowledged the complexity of the 'real world application' of the governing test.[75] Judge Learned Hand, as we saw earlier, had found 'too thin for day to day use' the line 'between the evidence which should satisfy reasonable men, and the evidence which should satisfy reasonable men beyond a reasonable doubt.'[76] Although he was, as we saw earlier, eventually overruled by his latter day colleagues as regards the correct standard for directed verdicts of acquittal,[77] he was not overruled as to the thinness of the dividing line between one standard and the other for practical application in the average case.[78]

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[74] Edwards, *supra*, p 185.
[75] See *United States v Olbres*, 881 F. Supp. 703 (1994) [US District Court, New Hampshire] p 712.
[76] *United States v Feinberg*, *supra*, p 594.
[77] *United States v Taylor*, *supra*.
[78] *Ibid*, p 243.

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77. As will be seen presently, *Cross and Tapper*'s formulation of the governing test also clearly acknowledged the problem of application. There, the basic principle as to whether there is a case to answer is stated as follows: 'Before an issue can be submitted to the jury, the judge must be satisfied that there is sufficient evidence in support of the proponent's contention for its consideration, and, if he is of the opinion that the evidence is insufficient, he must decide the issue in favour of the opponent. … The standard for intervention is always high …'.[79]

78. In a footnote, *Cross and Tapper* explains that the 'proponent is the party bearing the evidential burden on that issue, usually the claimant in a civil case, and the prosecutor on a criminal charge, but not necessarily so.'[80] This is a significant observation: not only because it makes the notion of discharge of 'evidential burden' the point of the inquiry in the determination of whether there is a case to answer; but it is also explained that there are exceptions to the general rule that make the Prosecution the usual bearer of that burden in a criminal case.

79. Often in common law literature, one encounters the concepts of 'persuasive burden' and 'evidential burden'. They are different concepts. The 'persuasive burden' may be defined as 'the obligation of a party to meet the requirement of a rule of law that a fact in issue must be proved or disproved'[81] at the required standard of proof. In a criminal case, the persuasive burden addresses the issues pleaded in the indictment, the overarching issue being whether the accused is guilty as charged. The persuasive burden on the issues pleaded in the indictment is always on the shoulders of the Prosecution.

80. 'Evidential burden', for its part, has been defined as 'the obligation to show, if called upon to do so, that there is *sufficient evidence to raise an issue* as to the existence or non-existence of a fact in issue.'[82] In *R v Fontaine*, the Supreme Court of Canada explained that 'evidential burden' is not a burden of proof.[83] Its function is to determine 'whether an issue should be left to the trier of fact, while "persuasive burden" determines how the issue should be decided.'[84] In other words, the 'burden' in the context of 'evidential burden' is merely the obligation to adduce evidence that is enough to give an air of realism to the issue aimed at by the evidence in question, thus putting the issue beyond a bare assertion or mere conjecture. It

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[79] *Cross and Tapper on Evidence*, *supra*, p 185.
[80] *Loc cit*, footnote 115.
[81] *Ibid*, p 124.
[82] *Loc cit* [emphases added].
[83] *R v Fontaine*, *supra*, at para 11.
[84] *Loc cit.*

helps to note that another name for the burden is the 'burden of adducing evidence' as to the issue in question. Depending on what the *issue* is, the evidential burden on the matter may encumber the Prosecution or the Defence. The Defence generally bear the evidential burden when they raise an affirmative defence. And, since a criminal case generally involves the prosecution allegation that the accused is guilty of a crime, the guilt of the accused is thus always at issue. In consequence, the evidential burden is always on the Prosecution on the issue of the accused's guilt; as is the persuasive burden.

81. It has been noted that the 'concept of evidential burden is the product of trial by jury and the possibility of withdrawing an issue from that body.'[85] 'Persuasive burden' is always a critical matter in litigation about questions of fact. But, 'evidential burden' as a forensic question does not always arise in the course of a trial, beyond the initial determination (at the confirmation of an indictment) to send a case to trial. It will particularly not arise in the course of a trial where the Court has not been called upon—either *suo motu* or at the instance of a party—to consider whether an issue should be withdrawn from the trier of fact.[86]

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82. Returning now to the basic principle, *Cross and Tapper*'s explanation of the test shows that the difficulty is more in the application of the test than in the formulation of the basic principle. In that regard, the following is said:

> The test to determine whether there is sufficient evidence in favour of the proponent of an issue, is for the judge to inquire whether there is evidence that, if untainted and uncontroverted, would justify men of ordinary reason and fairness in affirming the proposition that the proponent is bound to maintain, having regard to the degree of proof demanded by the law with regard to the particular issue. This test is easy to apply when the evidence is direct, for, unless their cross-examination were utterly shattering, the question whether witnesses are to be believed must be left to the jury, but it is necessarily somewhat vague when circumstantial evidence has been considered. In that case, little more can be done than inquire whether the proponent's evidence warrants an inference of the facts in issue, or whether it merely leads to conjecture concerning them, but conversely if the opponent's opposition itself is itself conjectural his application must be dismissed. At this stage, the submission should succeed only if the circumstantial evidence raises no hypothesis consistent with guilt.[87]

83. For many reasons, the *Cross and Tapper* approach appears the better guide to the determination of whether there is a case to answer. For one thing, it does not doctrinally insist on the standard of proof beyond reasonable doubt (it leaves it sufficiently free for adaptation according to evolving jurisprudence and applicable legislation); nor does it engage in its

[85] *Cross and Tapper on Evidence*, *supra*, p 125.
[86] See *loc cit.*
[87] *Ibid*, pp 186—187.

justification by resorting to distinctions that tend to compound the difficulties that already attend the application of the basic principle regardless of which standard of proof is adopted.

84. Another instance of such difficult distinctions appears in the judgment of the ICTY Appeals Chamber in *Jelisić*. As part of the Appeals Chamber's reasoning that the determination of 'no case to answer' motions necessarily imports the standard of proof beyond reasonable doubt, the Appeals Chamber resorted to the usual device of emphasizing the word *could* in the phrase 'could convict', as comprehending the difference. The explanation was stated as follows:

> "[T]he test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question". The capacity of the prosecution evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt.[88]

85. With respect, the usual emphasis literally placed on the phrase '*could* convict' does very little to sustain the intended distinction when proof beyond reasonable doubt is made the test for 'no case' motions. In other words, where the standard of proof beyond a reasonable doubt is taken as the proper probative standard at both the stage of 'no case' to answer at the close of the prosecution case (Stage 2), as well as at the stage of judgment at the close of the case for the defence (Stage 3), it is difficult to see how emphasising the word 'could' should make the difference in the formulation of the test that applies for no case submission made at the close of the prosecution case. This is because '*could* convict' also plays a role in the final determination of whether a case has been proved beyond a reasonable doubt at the end of the entire case at the close of the case for the defence. This is particularly (but not exclusively) so when the Defence choses to call little or no evidence beyond the case for the Prosecution. It must be acknowledged that there is no known mathematical formula that requires that every trier of fact acting reasonably *must* or *would*—instead of *could*—convict the accused upon the adducing of any type of evidence. For purposes of acquittal at the end of a case, different triers of fact, acting reasonably, may interpret the evidence differently in a manner that *could* result in different verdicts. This is especially so for cases built on circumstantial evidence as regards essential elements of the offence. It is to be recalled, in this connection, that Lord Macmillan once observed that 'in almost every case, except the very plainest, it would be

[88] *Prosecutor v Jelisić*, *supra*, para 37 [emphasis received and internal footnotes omitted].

possible to decide the issue either way with reasonable legal justification'[89] with ethical considerations then left to guide the outcome.[90] Lord Macmillan was saying effectively what the ICTY Appeals Chamber came later to express thus in *Aleksovski*: the 'Appeals Chamber may overturn the Trial Chamber's finding of fact only where the evidence relied on *could* not have been accepted by any reasonable tribunal or where the evaluation of the evidence is wholly erroneous.'[91] In the same vein, the ICTY Appeals Chamber had also thought it 'important to note' in *Tadić* 'that two judges, both acting reasonably, *can* come to different conclusions on the basis of the same evidence.'[92] It is, therefore, difficult to see how '*could* convict' is to be taken as making all the difference that is foisted upon that notion in order to separate the application of the standard of 'proof beyond reasonable doubt' at the stage of determination of a 'no case' motion (at the close of the prosecution case) from the application of the same standard when all evidence is in (at the close of the defence case).

86. But confronted with the dilemma that the observation in *Tadić* ('that two judges, both acting reasonably, *can* come to different conclusions on the basis of the same evidence' at the end of the case) presents to the application of the standard of proof for 'no case' motions indicated in *Jelisić*, the ICTY Appeals Chamber resorted to yet another difficult explanation, in further justification of the indicated standard of proof. As the Chamber put it:

> In the view of the Appeals Chamber, the *Tadić* principle applies to the evaluation of facts, and has no bearing on the principal question here, i.e., whether the Trial Chamber was entitled to make its own evaluation of the relevant evidence. The *Tadić* principle applies only where the decision in question was one which the trier of fact was authorised to make; if, being authorised to make the decision, he makes it on the basis of material on which a reasonable trier of fact could have reached the same conclusion, his decision will not be overruled because another equally reasonable trier of fact would, on the same material, have reached a different but equally reasonable conclusion. The principle does not apply to issues of whether the Trial Chamber had the authority to make that evaluation of the evidence in the first place. The Appeals Chamber considers that the Trial Chamber was required to assume that the prosecution's evidence was entitled to credence unless incapable of belief. That is, it was required to take the evidence at its highest and could not pick and choose among parts of that evidence.[93]

87. Not only is the distinction difficult to follow and apply; but it is also founded upon a glaring fiction in the circumstances of the ICTY, ICTR or ICC.

88. The implicit suggestion that the Trial Chamber was not 'entitled to make its own evaluation of the relevant evidence' on the occasion of a 'no case' submission rests on the

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[89] Lord Macmillan, *Law and Other Things* [Cambridge: CUP, 1937] p 48.
[90] *Ibid*, p 36.
[91] *Prosecutor v Aleksovski (Judgment)* dated 24 March 2000 [ICTY Appeals Chamber] para 63 [emphasis added].
[92] *Prosecutor v Tadić (Judgment)* dated 15 July 1999 [ICTY Appeals Chamber] para 64 [emphasis added].
[93] *Jelisić*, *supra*, para 55.

theory of separation of functions between the judge and the jury, with the latter as 'the trier of fact'. In that separation, the evaluation of the evidence is a matter for the jury, and the judge is not 'entitled to make [his or her] own evaluation of the relevant evidence'. But the theory vanishes in value in non-jury trials. That the fiction has been maintained (largely out of convenience) in common law countries when 'no case' submissions have been made in judge-alone trials is no reason to continue the pretence, unquestioned in utility, before international criminal courts that neither feature that separation nor recognise its incidence in many instances where it would ordinarily apply in national jurisdictions. Indeed, the ramparts of that separation are being weakened in some respects even in some common law countries.[94]

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89. It is observed in *Cross and Tapper* that '[s]ome of the difficulty is created by the words in which the standard is formulated.'[95] Although the observation may have been made for a different purpose, it is apposite for present purposes. On a certain view, the culprit of the confusion is appreciably the classic formulation of the test at a certain level of abstraction that recommends an apparent logic that is attractive to the proponents of the applicability of the standard of proof beyond reasonable doubt in 'no case' submissions. That classic formulation was restated in ICTY r 98*bis* in the following way:

> The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or *proprio motu* if it finds that *the evidence is insufficient to sustain a conviction* on that or those Charges.' [Emphasis added].

90. And the apparent logic of that formulation was stated as follows by the ICTY Appeals Chamber in *Jelisić*: 'what does its reference to a test of whether "the evidence is insufficient to sustain a conviction" mean? … it appears to the Appeals Chamber that those words must of necessity import the concept of guilt beyond reasonable doubt, for it is only if the evidence is not capable of satisfying the reasonable doubt test that it can be described as "insufficient to sustain a conviction" within the meaning of Rule 98*bis*(B). Rule 87(A), confirms this

[94] To be noted in this respect is that in England and Wales, the Royal Commission on Criminal Justice has recommended a reversal of *R v Galbraith*, 'so that a judge may stop any case if he or she takes the view that the prosecution evidence is demonstrably unsafe or unsatisfactory or too weak to be allowed to go to the jury': Royal Commission on Criminal Justice, *Report*, (Cm 2263, 1993), Ch 4, para 42. See also *ibid*, Recommendation 86. That recommendation was made in direct rejection of the following pronouncement made in *Galbraith*: 'Where, however, the prosecution evidence is such that its weakness depends on the view to be taken of *a witness's reliability or other matters which are generally speaking within the province of the jury* and when on one possible view of the facts there is evidence upon which a jury could properly come to a conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.'

[95] *Cross and Tapper on Evidence*, *supra*, p 161.

interpretation by providing that a "finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt".[96]

91. The apparent problem with that classic formulation is its evident focus on *conviction.* Over the years, the formulation has become so trite by sheer repetition that no one appears to have stopped to question its fitness for purpose; in the face of a real possibility that its form may be inducing an answer that may be incorrect in the circumstances. The concern is that the court is not called upon to *convict* the accused at the stage of 'no case' submissions made upon the closing of the prosecution case—when the Defence has not brought the entire case to a close by indicating that it has limited or no evidence to call.

92. It is always worth keeping in mind that in the litigation of a 'no case' submission made at the close of the prosecution case, the issue under consideration is the proposition that the accused must be *acquitted.* Thus, the question is never engaged whether the accused may be *convicted* at that point in the proceedings. The moving party for the 'no case' submission is the Defence. The question they pose in their motion could not possibly result in a conviction. If that is the case, why should the formulation for the test focus its attention so much on the question of conviction, which could not possibly result from any answer to the question with which the court is seised at the moment?

93. It may further be considered that since the defence is the proponent of the 'acquittal' proposition directly engaged in the motion, and the party wielding the sword of that issue, the argument may be made that it is entirely fair to require them to bear the incidence of overcoming the legal hurdle of persuasion on *their own motion* <u>*on that particular issue*</u>, which, it bears repeating, exclusively contemplates an acquittal and never a conviction at that stage. It must be stressed that it is a Defence motion and *ei qui affirmat non ei qui negat incumbit propandi.* The notion here is appreciably different from placing upon the Defence the *burden of persuasion in the case* as a whole.[97] The burden of persuasion in the case is always on the Prosecution and never shifts to the Defence. It comes into play the moment the entire case comes to a close, in the sense that all the evidence in the case 'is in' and the trier of fact must make the final determination on whether or not to *convict.* At that final stage, the Prosecution is always the party with the burden of persuasion that the accused must be convicted. But at the earlier stage of motion of 'no case to answer' or judgment of *acquittal,*

[96] *Jelisić*, *supra*, para 35. See also the Dissenting Opinion of McLachlin J (as she then was) and Major J of the Supreme Court of Canada in *Charemski v R*, *supra*, para 20.

[97] The US Supreme Court correctly captured this principle of distribution of burdens when in the context of a 'no case to answer' motion in a libel suit, the Court observed as follows: 'The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict': *Anderson v Liberty Lobby, Inc,* 477 US 242 (1986) [US Supreme Court] p 256. The principle of distribution of burdens is the same in civil and criminal cases, what changes is the degree of the burden.

it is not unfair to require the Defence to overcome the legal hurdle of persuasion on their own motion that the accused must be *acquitted* immediately upon the close of the case for the Prosecution. The fairness of the requirement is underscored by the strategic choice (always available to the Defence) simply to seek to bring the entire case to a close by electing to call limited or no evidence; thereby triggering the immediate operation of the Prosecution's burden of persuasion in the case, on the standard of proof beyond reasonable doubt. Such a strategic manoeuvre will necessarily force the Prosecution to urge the trier of fact to *convict* the accused, and, thus, bear the incidence of the maxim *ei qui affirmat non ei qui negat incumbit propandi.*

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94. But, it may not be necessary, in the end, to resort to the reasoning indicated immediately above. It may be sufficient to consider that even the attractiveness of the logic of the classic formulation is only superficial. For, its stress on 'could convict'—as opposed to 'would convict'—need not lead inevitably to the standard of proof beyond reasonable doubt for purposes of the decision on the 'no case' motion. That is to say, the basic formula may just as easily lead to the standard of proof on a balance of probabilities, without needing to get to the higher standard. This is because the modal verb 'could' is an auxiliary verb that does no more than indicate permissibility or possibility of the contemplated circumstance. In its service to the main verb 'convict' (as in 'could convict'), 'could' indicates no more than the *permissibility* or *possibility* of conviction. Indeed, a certain observation of Justices McLachlin and Major in their dissenting opinion in *Charemski* implicates that interpretation of the classic formulation. In their observation: 'The difference between the judge's function on a motion for a directed verdict and the jury's function at the end of the trial is simply this: *the judge assesses whether, hypothetically, a guilty verdict is possible; the jury determines whether guilt has actually been proved beyond a reasonable doubt.*' [Emphases added.]

95. Measured against the explanation of balance of probabilities as meaning 'more probable than not'[98] it becomes quite clear that a case in which the evidence indicates guilt on a balance of *probabilities* at the end of the prosecution case will most assuredly satisfy the test indicated by Justices McLachlin and Major in *Charemski*—as well as the hallmark of the classic formulation of the test in the terms of '*could* convict'. Hence, there is really nothing in the classic formulation that truly implies a standard of proof for 'no case' submission that is higher than the standard of proof on a balance of probabilities.

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[98] See *Miller v Minister of Pensions* [1947] 2 All ER 372 [Court of Appeal for England and Wales] at p 374.

96. A further flaw beneath the syllogism of the classic formulation is its invitation of judges to speculative decision-making. The simplicity of the logic proceeds as follows. The premise is anchored in the basic rule that a court must decide that there is no case to answer 'if it finds that *the evidence is insufficient to sustain a conviction* on that or those charges.' The reasoning in the syllogism is comprised in the rhetorical question: 'What does the basic rule's reference to "conviction" imply when the test is whether "the evidence is insufficient to sustain a *conviction*"? The conclusion in the syllogism thus becomes this: 'Those words must of necessity import the concept of guilt beyond reasonable doubt, for it is only if the evidence is not capable of satisfying the reasonable doubt test that it can be described as "insufficient to sustain a *conviction*".' The logic is, perhaps, much too simple for purposes of administration of justice.

97. Particularly on the theory of separation of functions between judge and jury, this logic leaves the judge speculating about the jury's state of mind in the event the judge is asked to answer the question as to the existence of *doubt* in the minds of members of the jury. Any doubt to speak of in relation to acquittal or conviction at the end of the case is necessarily a doubt in the jury's mind. The judge is simply not in a position to forecast it at half-time in any way that is not speculative. The concern is clear enough from the observation in *Morin* about the undesirability of 'requir[ing] individual members of the jury to rely on the same facts in order to establish guilt. The law is clear that the members of the jury can arrive at their verdict by different routes and need not rely on the same facts. Indeed the jurors need not agree on any single fact except the ultimate conclusion.'[99] How then is a judge at half-time to know which evidence could influence individual members of the jury to certitude of the mind beyond reasonable doubt? The predictable response to this question will be to recall that the statement of the test does not require the judge to know whether the jury 'would' convict—but only that they 'could' convict. Indeed, so. But, that takes the matter back to the realms of probability. The best the judge can do legitimately is to consider the *probability* that the jury may find—or not find—that the case has been proved beyond reasonable doubt. That then necessarily makes the judge's half-time determination in that regard an exercise in the balancing of probabilities.

98. Even so, one is reminded of Lord Diplock's dissatisfaction with the application of burdens of proof in a prophetic manner relative to future risks. Speaking in the context of balance of probabilities, he observed as follows:

> It is a convenient and trite phrase to indicate the degree of certitude which the evidence must have induced in the mind of the court as to the existence of facts, so as to entitle the court to treat them as data capable of giving rise to legal consequences. But the phrase is inappropriate

[99] *R v Morin*, *supra*, at para 36.

> when applied not to ascertaining what has already happened but to prophesy what, if it happens at all, can only happen in the future. *There is no general rule of English law that when a court is required, either by statute or common law, to take account of what may happen in the future and to base legal consequences on the likelihood of its happening, it must ignore any possibility of something happening merely because the odds upon it happening are fractionally less than evens.*[100]

99. 'English law' is not alone in its failure to recognise any general rule of the sort to which Lord Diplock was alluding. No such rule is known to exist in international criminal law. *Cross and Tapper* correctly, in my view, applies the wisdom of Lord Diplock's observations to standards of proof in general,[101] adding that '[t]he problem is still worse in criminal cases where it is hardly intelligible to *direct a jury* to determine whether it is satisfied beyond reasonable doubt that something is more probable than not.'[102]

100. And, in my view, the predicament identified in both observations is more pressing as regards any expectation, let alone requirement, of the court 'to prophesy', as a matter of its own certitude of mind beyond reasonable doubt at half-time, that the trier of fact (the jury) *could* have certitude of mind beyond reasonable doubt at full-time.

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101. The need to have a clear view of the correct standard of proof for purposes of a 'no case' submission is not diminished by the trite expression that the judge is to take the evidence for the Prosecution 'at its highest'. It is a useful rule of thumb, of course. But, it gives no guidance at all about the correct standard of proof.

102. It only has a proper meaning when understood 'having regard', as *Cross and Tapper* rightly says, 'to the degree of proof demanded by the law with regard to the particular issue'. The evidence for a party 'taken at its highest' will have a different outcome if it must satisfy a proposition at the standard of proof on a balance of probabilities than at the standard of proof beyond a reasonable doubt.

103. Now, in the order of application of ideas beyond abstract debates, it may aid an effective appreciation of the matter if regard is had to a useful explanation of the standard of proof on a balance of probabilities alone. Denning LJ (as he then was) offered this formula for the standard: 'If the evidence is such that the tribunal can say: "we think it more probable than not", the burden is charged, but if the probabilities are equal it is not.'[103]

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[100] *Fernandez v Government of Singapore* [1971] 2 All ER 691 [House of Lords] p 696 [emphasis added].
[101] *Cross and Tapper*, *supra*, p 157.
[102] *Ibid*, p 158 [emphasis added].
[103] *Miller v Minister of Pensions*, *supra*.

104. Hence, it will be strange, indeed, to terminate a criminal case, on a 'no case' submission, as not raising a '*prima facie* case', if the evidence led by the prosecution is such that the probability of guilt is equal to that of the presumption (or evidence) of innocence. It will be stranger still to terminate the proceedings, at half-time, as not raising a '*prima facie* case', if the evidence thus far led is such as enables the court to say: 'we think it more probably than not' that the accused committed the crime as charged. The oddness of that situation does re-engage the wisdom of Judge Learned Hand's observation that '[w]hile at times it may be practicable to deal with these as separate without unreal refinements, in the long run the line between them is too thin for day to day use.'[104]

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105. In the end, the better approach will be one that maintains a coherent approach in the different instances in which '*prima facie* case' is required to be established in a case at the ICC. Two notable such instances are the indictment confirmation stage and the close of the case for the Prosecution when the Defence makes a 'no case to answer' motion. As the editors of *Blackstone's Criminal Practice* correctly observed, the confirmation of indictment is a preliminary judicial decision saying that the accused has a 'case to answer'. And, contrary to the position contended by the highly esteemed Judge Hunt, both the editors of *Blackstone's Criminal Practice* and the ICC Appeals Chamber (in *Mbarushimana*) have rightly observed that the standard of proof is low for the preliminary determination that the accused has a case to answer—thus warranting the confirmation of the indictment. The correct standard of proof is not at the level of the standard of proof beyond reasonable doubt. It may be recalled that the editors of *Blackstone's Criminal Practice* have described the procedure as one of establishing a '*prima facie* case'.

106. It is, in my view, both appropriate and desirable to maintain the same approach in the formulation of the standard of proof for purposes of 'no case' submissions made at the close of the case for the prosecution. It is to be recalled that the review of authorities (conducted above) indicates ample support for such a lower standard, either by explicit pronouncement of the highest national courts or by necessary implication.

107. The appropriateness of maintaining uniformity in the formulation of the applicable standard includes the following consideration. The purpose of that test in the particular context of a 'no case' submission is to assess, at the half-way point, whether the evidence that the Prosecution has presented thus far before the Trial Chamber—i.e. in the course of the actual trial—has managed (or failed) to *sustain* a forensic reality, at the *prima facie* level, that

[104] *United States v Feinberg*, *supra*, p 594.

the accused has a case to answer; in the sense that the evidence thus far presented by the Prosecution has been able (or unable) to support any hypothesis that is consistent with guilt on the part of the accused. In other words, for the trial to continue on to the case for the Defence, the substantive evidence presented at trial—during the case for the Prosecution—needs *only* be seen as continuing to implicate the accused factually in the criminal conduct contemplated in the indictment. Since an accused is never *convicted* immediately at the close of the case for the Prosecution (before the close of the case for the defence), it is not really necessary at this stage to trouble in any way the question whether or not the evidence establishes guilt beyond a reasonable doubt. As shown above in the discussion of the case law, and consistent with the Chamber's pronouncement at paragraph 23, the classic formulation of 'no case to answer' test—in the manner of considering whether there is evidence upon which a trier of fact *could* reasonably *convict*—does not inevitably invite that higher standard of proof for consideration at the half-time. It is also not desirable to heed such an avoidable invitation: considering, particularly, that to heed the invitation may be to invite, in turn, lingering concerns about prejudgment of a case that is not terminated on the basis of a 'no case' submission.

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108. It must also be said that in the matter of the determination of the appropriate standard of proof in the course of litigation, the binding agency of public policy also plays a role, as with much else in the law. This is recognised in *Cross and Tapper.*[105] And, notably, in *R v Fontaine*, the Supreme Court of Canada observed that '*in this as in other branches of the law, pure logic must yield to experience and, without undue distortion of principle, to a more practical and more desirable approach.*'[106] This is thematically consistent with the counsel of Mr Justice Oliver Wendell Holmes Jr against the fallacy which assumes that logic is the only force at work in the development of the law.[107] Without a doubt, the most acceptable guides 'to a more practical and more desirable approach' that remains consistent to principle will be considerations of public policy. And, as Holmes observed, '[e]very important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy ...'[108].

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[105] 'The ascription of the appropriate standard is a matter of policy, and it is at this point that the seriousness of the consequences of finding a particular issue proved fall to be considered. Ascription may vary even within different provisions of the same statute, or be influenced by analogy with a different provision': *Cross and Tapper*, *supra*, p 158.
[106] See *R v Fontaine*, *supra*, para 57.
[107] See Oliver Wendell Holmes Jr, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457 at p 465. See also Oliver Wendell Holmes Jr, *The Common Law* [Boston: Little, Brown and Company, 1881] p 1.
[108] *Ibid*, p 35.

109. In *Fontaine*, the Supreme Court of Canada indicated some of the policy considerations that motivate aspects of the law in the relevant respect in the following words: 'This requirement of a sufficient evidential foundation aims primarily to avoid wrongful conviction and unwarranted acquittals, while at the same time leaving it to the jury to discharge the responsibilities that are by law within its exclusive domain.'[109] *Cross and Tapper* similarly identifies the need to 'minimi[se] the risk of convicting the innocent' as one of the factors implicated in the policy considerations associated with the ascription of burdens of proof in criminal cases.[110]

110. The role of public policy must be adapted, of course, to the particular circumstances of the sphere in which the resulting rule is meant to operate. For, the factors may vary in their values, directions and emphases according to the particular circumstances of the sphere. The concern of wrongful conviction has a certain value in the circumstances of administration of justice in the domestic legal sphere, where the risks confronting the accused include not only his or her lower position of power relative to the State and its sovereign agents; but also the absence of reasons for judgment in jury trials (which generally deprives convicts the ability to appeal jury verdicts as wrongfully founded[111]).

111. The same considerations do not have the same value in the administration of justice at the ICC. As indicated in the preamble of the Rome Statute, of the greatest concern is the need to curb unbridled impunity for accused persons who had (at times material to the inquiry) enjoyed the power of life and death over their fellow human beings that are or were victims of the crime. And the trial is conducted before a panel of judges who must clearly explain the reasons for their judgments, and which reasons may be subject to appellate review. These considerations may implicate different values and emphases in the primary function of standard of proof, which, in the explanation of the Supreme Court of Canada in *Fontaine*, is the need to avoid 'wrongful convictions and unwarranted acquittals'.

112. It is against that background that the test of *prima facie* case, as a matter of actual evidence that has continued to sustain the forensic reality that the accused has a case to answer, is a sensible basis (and fair) at which to consider whether the case should proceed—even in the absence of a judicial pronouncement that there is sufficient evidence to sustain a conviction at that stage. This is especially the case for purposes of the ICC whose *raison d'être* is to bring accountability to bear, against those suspected of committing crimes that shock the conscience of humanity. First, society—both at the international level and the local

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[109] See *R v Fontaine*, *supra*, para 58.
[110] See *Cross and Tapper*, *supra*, p 158.
[111] Except, perhaps, in the United States where the convicted prisoners may follow the alternative route of *habeas corpus* applications.

level of situation countries—has an interest in that exertion of accountability. That being the case, for a criminal trial at the ICC to continue beyond the close of the prosecution case, by putting the accused to his or her defence, it should be enough that the evidence that the Prosecution has presented as at half-time is only seen to support a hypothesis that is consistent with guilt on the part of the accused. It should be sufficient to appraise the level of consistency at no higher than at par with the presumption (or evidence) of innocence. The level of consistency of the evidence with guilt should be more than ample if it is appraised as 'more likely than not'. But, a balanced view of justice should not require the case at half-time to show proof beyond reasonable doubt, in order to avoid summary judicial termination as a result of a motion of 'no case to answer' made at that stage.

113. A second and related consideration is that in the course of a defence that is commenced upon a determination that the case for the Prosecution had disclosed a *prima facie* case against the accused, the Prosecution is entitled to strengthen its case on the basis of any evidence that the Defence may call—including the testimony of the accused himself.[112] It is to be noted that the Defence enjoys precisely the same right to build their case, by using witnesses called by the Prosecution. But considerations of accountability particularly warrant a special value for the prospect that an accused person that testifies in his own defence, when the case is fairly allowed to proceed beyond the close of the prosecution case, may be subjected to thorough and appropriate cross-examination by counsel for both the Prosecution and the Victims. It is, of course, entirely up to the Defence, as a matter of legitimate strategy to which they are entitled, to seek to avoid or reduce that possibility by limiting the evidence they call—or by closing their case entirely without calling any evidence—thereby compelling the trier of fact to make a definitive determination on the case on the basis of whether the Prosecution has proved guilt beyond reasonable doubt, subject to the Trial Chamber exercising its powers to direct further evidence to be called. The decision of competent defence counsel to call limited or no evidence does no more to validate speculations of absence of evidence that she could have called to show reasonable doubt, as it may be consistent with an astute calculation that a definitive answer to the question of proof beyond reasonable doubt, at that point, will return a verdict of not guilty. The decision of the Defence

[112] As Kitto J observed in *Zanetti v Hill*, 'there is no more reason than there is in any other case why a weakness in the prosecution's case may not be eked out by something in the case for the defence, or why a prima facie inference which by itself would not be strong enough to exclude reasonable doubt may not be hardened into satisfaction beyond reasonable doubt by a failure of the defendant to provide satisfactory evidence in answer to it when he is in a position to do so …': *Zanetti v Hill*, *supra*, p 442. See also *Caminetti v United States*, 242 US 470 (1917) [US Supreme Court] at pp 493—495; *R v Pincemin*, 2004 SKCA 33 [Saskatchewan Court of Appeal] at paras 28—35; *R v Burdett* (1820) 106 ER 873 at p 898; *R v Lepage* [1995] 1 SCR 654 [Supreme Court of Canada].

to call limited or no evidence is a strategy that also promotes judicial economy; noting that to be one of the values of 'no case to answer' motions.

114. Finally, a clear understanding that the assessment of a 'no case' submission will not engage the question of whether there is sufficient evidence upon which a trier of fact could reasonably convict, may be able to discourage fishing expeditions by counsel who may hope, at least, for a preview of judges' assessment of the strength of the case for the Prosecution at the half-time point.

115. It is for the foregoing reasons that I fully support the Chamber's observations made in paragraph 23 of the Decision.

Done in both English and French, the English version being authoritative.

Chile Eboe-Osuji
(Presiding Judge)

Dated 3 June 2014
At The Hague, The Netherlands