International Criminal Court
Appeals Chamber
Situation: Republic of Côte d'Ivoire
In the case of The Prosecutor v. Laurent Gbagbo and
Charles Blé Goudé - ICC-02/11-01/15
Presiding Judge Chile Eboe-Osuji, Judge Howard Morrison,
Judge Piotr Hofmański, Judge Luz del Carmen Ibáñez Carranza and
Judge Solomy Balungi Bossa
Appeals Hearing - Courtroom 1 via Interactio
Monday, 22 June 2020
(The hearing starts in open session at 10.02 a.m.)
THE COURT OFFICER: [10:03:11] All rise.
The International Criminal Court is now in session.
Please be seated.
PRESIDING JUDGE EBOE-OSUJI: [10:03:45] Good morning.
Court officer, please put the case on the record.
THE COURT OFFICER: [10:03:53] Thank you, Mr President.
The situation in the Republic of Côte d'Ivoire, in the case of The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, case reference ICC-02/11-01/15.
For the record, we are in open session.
PRESIDING JUDGE EBOE-OSUJI: [10:04:12] Thank you very much.
Because of the circumstances in which we are holding this hearing, which is a remote, part remote, part presence in the courtroom, I need to say that three judges are sitting in the courtroom and two are taking part from remote locations.

The judges in the courtroom are Judge Morrison, Judge Ibáñez, and myself; the two judges participating remotely are Judge Hofmański and Judge Bossa.

I will now invite my colleagues to announce themselves so that everyone participating remotely can see them.

I call on Judge Morrison.

JUDGE MORRISON: [10:05:23] (Inaudible)

PRESIDING JUDGE EBOE-OSUJI: [10:05:30] Thank you.

Judge Hofmański.

JUDGE HOFMAŃSKI: [10:05:34] Good morning, colleagues. Good morning, everybody.

PRESIDING JUDGE EBOE-OSUJI: [10:05:38] Thank you.

Judge Ibáñez.

JUDGE IBÁÑEZ CARRANZA: [10:05:45] Hello. Good morning and welcome to this virtual hearing.

PRESIDING JUDGE EBOE-OSUJI: [10:05:48] Thank you.

Judge Bossa.

JUDGE BOSSA: [10:05:50] Good morning, Mr President, Judges, and everybody in the courtroom and elsewhere.

PRESIDING JUDGE EBOE-OSUJI: [10:05:55] Thank you.

Now, for purposes of camera angle, counsel today, for purposes of today's hearing, must remain seated while addressing the Court, otherwise there will be a need for the camera angles to be adjusted repeatedly. So counsel should remain seated while addressing the Court.

And also for purposes of introduction, it is enough that the lead on the team just to announce the names of their team members, indicating where they are,

whether they're in the courtroom or in a remote location.
When we get to the speaking part, the counsel who will be addressing the Court in the submissions, of course the camera will pick them up at that time.
So let us then take appearances, beginning with the Prosecution.
MS BRADY: [10:07:06] Good morning, your Honours.
Good morning, everybody in this virtual courtroom.
My name's Helen Brady and I'm the senior appeals counsel for the Prosecution.
And I'm here today in this virtual courtroom with the other members of the Prosecution team, and all Prosecution members are participating in this hearing remotely from different locations in The Hague.
And I'll introduce them: They are Mr Reinhold Gallmetzer, appeals counsel; Ms Priyadarshini Narayanan, appeals counsel; Mr Matteo Costi, appeals counsel; Ms Nivedha Thiru, assistant appeals counsel; Mr Eric MacDonald, senior trial attorney; and Mr Fabricio Guariglia, the Director of Prosecution Division.
Thank you.
PRESIDING JUDGE EBOE-OSUJI: [10:08:05] Thank you.
And counsel for Mr Gbagbo.
MR ALTIT: [10:08:20] (Interpretation) Good morning, Mr President, good morning the Judges.
The team of defence Gbagbo is located in France and the -- one of our colleagues in The Hague -- is in The Hague, Professor Jacobs is in The Hague.
And myself, Mr Altit, is in Paris.
PRESIDING JUDGE EBOE-OSUJI: [10:09:00] Before I proceed, I notice that

I was on the English channel. I did not receive interpretation. I don't know whether I was the only one who had that difficulty. But please, someone should look into it.

Maybe -- hold on, I think I know what happened. I know what happened. Due to technical configurations, when I have my speak button on I don't get the interpretation. So it is not your fault. So I think I have figured it out. Don't worry about that. Thank you.

Now let's proceed to the counsel for Mr Blé Goudé.

MR KNOOPS: [10:09:49] Good morning, your Honours.

My name is Alexander Knoops, counsel for Mr Charles Blé Goudé. I am currently in the courtroom. With me is Mr Charles Blé Goudé himself, on the left side. Behind me, Antonina Dyk, legal assistant, and Ms Sara Pedroso, legal assistant.

Remotely following on behalf of our team is Madam Laurine Vandeler, from Singapore. And from The Hague one of our other case managers, Madam Despoina Elefheriou.

Thank you very much.

PRESIDING JUDGE EBOE-OSUJI: [10:10:27] Thank you very much. Now I take the appearance for the counsel for victims.

MS MASSIDDA: [10:10:35] Good morning, Mr President, your Honours, and everybody in the courtroom and elsewhere. Victims in these proceedings are represented by counsel from the Office of Public Counsel for Victims.

Appearing today in Abidjan, Mr Brahima Sako, field assistant to counsel. In The Hague, in a remote location, Ms Ana Peña, case manager. And I'm attending the hearing within the ICC premises, my name is Paolina Massidda

and I am the principal counsel.

PRESIDING JUDGE EBOE-OSUJI: [10:11:15] Thank you very much.

(Redacted)

(Redacted)

MR ALTIT: [10:11:34] (No interpretation)

THE INTERPRETER: Mr President, unfortunately the English interpretation booth no longer hears the ...

MR ALTIT: (No interpretation)

PRESIDING JUDGE EBOE-OSUJI: [10:12:27] Did we get interpretation of that?

(Redacted)

(Redacted)

(Redacted)

MR ALTIT: [10:13:18] (Interpretation) (Redacted)

(Redacted).

(Redacted)

MR ALTIT: [10:13:45] (Interpretation) (Redacted)

(Redacted)

(Redacted)

(Redacted)

THE COURT OFFICER: [10:14:15] (Redacted)

(Redacted)

PRESIDING JUDGE EBOE-OSUJI: [10:14:33] (Overlapping speakers)

(Redacted)

The Appeals Chamber is convened to hear oral submissions in the appeal

of the Prosecutor against the judgment of Trial Chamber I, the verdict of which was announced on 15 January 2019, with its reasons issued on 16 July 2019. This is the first time that the Appeals Chamber has held a hearing in this manner. It is due to the exceptional circumstances of the COVID-19 pandemic in which we find ourselves.

As has already been noted, present - mostly virtually - at the hearing today are the judges and several legal staff of the Appeals Chamber; counsel appearing on behalf of the Prosecutor, the appellant; counsel for Mr Gbagbo and Mr Blé Goudé; and Mr Blé Goudé; counsel for the victims as well. Also present are staff of the Registry who assist the proceedings in the various ways, including with interpretation, stenography, and technical logistics of various kinds.

This is a part virtual hearing, meaning that some people are participating from the seat of the Court here in The Hague, either in the courtroom or in meeting rooms, and others are appearing from separate locations outside the Court, and some of them in distant countries. I would like to note that people appearing from -- people appearing in the courtroom are properly distanced from one another in accordance with the relevant health protocols. I should also expect the participants outside the Court, they're also observing the COVID distancing requirement required in the countries of their location.

Ordinarily all professionals are required to be attired in legal robes. But, it may be that the COVID-19 pandemic has impossibly distanced people from their legal robes. In that case, we would not stand on the strict sartorial protocol, we would permit formal business attire in those circumstances.

Also, as I noted earlier, counsel, when addressing the Court, should be seated

while doing so, for technical reasons of camera angles.

Although the public cannot be present at this hearing due to COVID-19 safety measures, there will be online streaming of the hearing on the Court's website, with the usual 30-minute delay.

This is the first time we are holding the hearing in this format. Again, I repeat, we hope it all goes smoothly, as smoothly as possible, but I crave everyone's indulgence and understanding and patience in the event of any glitches and hiccups that we may experience along the way.

Before inviting counsel to make their submissions I will summarise the background of these appellate proceedings in the briefest outline.

This appeal arises from a majority judgment of 15 January 2019, in which Trial Chamber I acquitted Mr Gbagbo and Mr Blé Goudé of all charges laid against them.

The written reasons for the judgment were issued on 16 July 2019.

Following the written reasons, the Prosecutor appealed the Trial Chamber's judgment.

The Prosecutor raises two grounds of appeal.

In the first ground, she contends that the majority erred in acquitting Mr Gbagbo and Mr Blé Goudé because the majority did not follow certain provisions of the Rome Statute which, she argues, are mandatory for trial chambers to follow when rendering judgments. In the alternative, the Prosecutor contends that in the event that those provisions are found to not be mandatory, but discretionary, the Trial Chamber still erred in how they exercised their discretion.

In the second ground of appeal, the Prosecutor contends that the majority erred

in law or procedure, or both, by acquitting Mr Gbagbo and Mr Blé Goudé without properly articulating and consistently applying a clearly defined standard of proof or approach to assessing the sufficiency of the evidence at that stage.

That's, as I said, a very, very brief outline of the appeal and the issues in it.

Turning now to the conduct of these proceedings. It is recalled that, in the decision rescheduling the hearing before the Appeals Chamber, the Chamber indicated both the order and the time allocated to counsel.

Due to the COVID-19 restrictions, the hearing will consist of these sessions of one hour each in duration, divided by two 45-minute breaks. The Appeals Chamber will invite the counsel to complement their submissions, while also addressing written arguments of other counsel with opposing positions on the particular point.

May I also remind counsel that they are expected to complete their submissions within the indicated time. The court officer will be monitoring the time and will signal to counsel five minutes before the end of time allocated to the speaker.

As regards the session submissions on ground one and ground two, counsel will be given 30 minutes each per ground to make their submissions. This is followed by the sessions concerning remedy, where counsel will be given 20 minutes each to present their submissions. Then the questions will be asked by the Bench, with 60 minutes allocated for this, and finally counsel will be given 15 minutes to make roundup submissions.

In making submissions, counsel should clearly identify which question he or she is speaking to. As much as possible, counsel should refrain from

repeating the arguments contained in their written submissions, where possible.

Now I will invite submissions from counsel concerning ground 1.

I will invite the counsel for the Prosecutor, you have 30 minutes, beginning now.

MR GALLMETZER: [10:23:32] Good morning, your Honours.

The Appeals Chamber has previously asked a number of questions that are key to resolving the Prosecution's appeal. We have provided our answers in writing. Today, I would like to respond to some of the Defence's arguments on those questions relating to the errors under ground 1. Ms Brady will then elaborate on the impact of those errors.

The 15 January decision granting the Defence's motion for acquittal was a final decision under Article 74, meaning one that determines that an accused is either convicted or acquitted of the charges. Through that decision, the majority acquitted both accused, it dismissed all the charges against them, it ordered their immediate release pursuant to Article 81, it terminated the trial proceedings, and it triggered *ne bis in idem*.

PRESIDING JUDGE EBOE-OSUJI: [10:24:35] Mr Gallmetzer, hold on for a minute. Triggered *ne bis in idem*, that's where you stop. I should say that, when counsel are speaking, please introduce yourself first, given that your picture did not show up the first time during appearances. Now this is Mr Gallmetzer speaking, so I have done it for you. So the next counsel who speak, please announce yourself.

Hold on, please, I understood there's a technical difficulty. Hold on, Mr Gallmetzer.

THE COURT OFFICER: [10:25:10] Indeed, Mr President, I've been made aware that there is no French interpretation. I would like to check with the French booth if everything is working, if I could get a sign?

THE INTERPRETER: [10:25:48] The French interpreter says that her microphone is open and that she's interpreting, but it appears that nobody is hearing her.

THE COURT OFFICER: [10:26:05] So I will ask Mr Reinhold to begin not where he left, but from the beginning, please.

MR GALLMETZER: [10:26:18] Thank you very much.

So again, my name is Reinhold Gallmetzer, I am representing the Office of the Prosecutor.

Your Honours, the Appeals Chamber has previously asked (inaudible) that are key to resolving the Prosecution's appeal. We have provided our answers in writing. Today, I would like to respond to some of the Defence's arguments on those questions relating to the errors under ground 1. Ms Brady will then elaborate on the impact of those errors.

The 15 January decision granting the Defence's motion for acquittal was a final decision under Article 74, meaning one that determines that an accused is either convicted or acquitted of the charges. Through that decision, the majority acquitted both accused, it dismissed all charges against them, it ordered their immediate release pursuant to Article 81(3), it terminated the trial proceedings, and it triggered *ne bis in idem*. Mr Gbagbo and Mr Blé Goudé do not contest any of these features of the decision. In fact, they argue that the decision has all those effects. Mr Blé Goudé even agrees that final decisions acquitting the accused are governed by Article 74. Yet he claims that the

appealed decision is not a final decision of acquittal. This is incorrect. Mr Blé Goudé effectively argues that the Statute includes an unspecified legal regime that allows a chamber to make final acquittal decisions with all its effects but without complying with the requirements under Article 74(5). He claims all the benefits of an acquittal decision under Article 74, without adhering to the requirements - indeed, safeguards - under that provision. This, your Honour, is legally incorrect, as a closer look at many of Mr Blé Goudé's underlying arguments further shows.

Question 1 on the legal basis for an acquittal at the no case to answer stage: Article 66(2) cannot be the procedural basis for an acquittal decision and its requirements. It merely provides that the Prosecution has the onus to establish the guilt of the accused. This fundamental feature of the Statute applies throughout the entire trial. So do other provisions, such as Article 67 on the rights of the accused. However, Articles 66 or 67 do not constitute the procedural basis nor establish the requirements for a final acquittal decision.

PRESIDING JUDGE EBOE-OSUJI: [10:29:18] Can you hold on there, please. It is just some pace alert.

MR GALLMETZER: [10:29:35] Okay, I shall slow down. I apologise. Articles 66 or 67 do not constitute the procedural basis nor establish the requirements for a final acquittal decision. Those decisions are instead expressly governed by Article 74.

Question 2 on the interpretation of the term "decision" in Article 74: The textual interpretation of Article 74 supports that this provision applies to an acquittal, including when issued at the no case to answer stage. Exactly because an acquittal is a final decision terminating the proceedings, the word

"decision" in Article 74 is used in the singular. The Chamber will only make one such decision. The Chamber will base that acquittal decision on the entire proceedings conducted up until that point, regardless of whether the Defence, or even the victims or the Chamber have decided to present evidence.

The Chamber will consider all the evidence discussed and submitted, and it will evaluate it against the evidentiary standard applicable at the no case to answer stage.

That some Trial Chambers have labelled their final decisions as a "judgment" does not mean that Article 74 was not applicable in this case. Article 74 does not use the term "judgment". Accordingly, the labelling of a decision as "judgment" has no legal consequences.

Questions 3 and 4 on whether anything in Article 74 precludes its applicability to an acquittal at the no case to answer stage:

Mr Blé Goudé's attempt to distinguish the nature of the decision from its effects also does not support his argument. In this case the nature of the decision cannot be detached from its effects. Regardless under which lens the decision is examined, it always leads to the same conclusion: that it was an acquittal decision under Article 74, which is the only provision under the Statute that may trigger certain effects.

By its nature, the appealed decision is an acquittal decision dismissing all the charges against the accused. The Defence expressly requested such an acquittal and the Chamber granted its request.

The effects of the decision directly flow from its nature. The Chamber ordered the immediate release of Mr Gbagbo and Mr Blé Goudé and terminated the proceedings against them. The acquittals further triggered *ne bis in idem* and

the appellate regime under Article 81.

In any event, the rationale behind Article 74 requirements, that is, ensuring that the ultimate conclusions of a trial chamber is based on a solid, legal procedural and factual foundation, this rationale applies to all final decisions, unless otherwise provided by the Statute.

Judge Herrera Carbuccia did not make an Article 74 decision, neither did she have to. This is because in her view the Defence's no case to answer motions should have been rejected and the trial continued.

Both defence teams further rely on the Ruto and Sang case to support their arguments. However, the Ruto and Sang Chamber was not bound by Article 74(5). This is because its decision was not a final decision of acquittal comparable to the 15 January decision. It did not acquit the accused nor produce all the effects of such a final decision of acquittal. In particular, it vacated the charges without prejudice, therefore without triggering *ne bis in idem*. Had the Ruto and Sang Chamber acquitted the accused and dismissed the charges with prejudice, it would have had to enter a full acquittal in accordance with Article 74(5). Judge Henderson held that Mr Gbagbo's and Mr Blé Goudé's acquittals had the equivalent effects of a decision under Article 74. To trigger those effects, the majority was required to comply with the Article 74(5) requirements.

Question 7 on the general applicability of the safeguards under Article 74(5): Mr Blé Goudé argues that even if an acquittal was a final decision, this does not automatically trigger Article 74, as shown by the exception on admissions of guilt under Article 65.

The analogy to Article 65 does not support his argument: First, Article 65 is

the only exception in the Statute. Where the drafters foresaw an alternative legal basis for a final decision, they provided for that expressly. This confirms the rule that all other final decisions are governed by Article 74. Second, Article 65 is a very narrow exception. It can never be the legal basis for an acquittal. Article 65(3) provides that if the conditions for a conviction are not met, then the Trial Chamber will order that the trial be continued under the ordinary trial procedures. This means that Article 74 remains the only procedural basis under the Statute for acquittals.

Third, Article 65 has less strict procedural requirements than Article 74, because where a chamber finds that an accused has made a voluntary, fully informed and corroborated admission of guilt, there is less need for that chamber to follow the Article 74(5) procedure to make its findings on the evidence and conclusions and to convict the accused. In any event, as seen by the Article 65 conviction decision in the Al Mahdi case, the Trial Chamber nevertheless adhered to the Article 74(5) safeguards, *mutatis mutandis*.

Finally, question 8 on the requirements for an oral acquittal decision:

Both Mr Gbagbo and Mr Blé Goudé submit that the Statute allows for a separation between the verdict and the reasoning. They argue that the combination of the January verdict and the July reasons collectively meet the requirements under Article 74(5). This is incorrect. One cannot combine elements from separate judicial pronouncements to form a proper decision. Judicial decision making is not a patchwork. An acquittal, and a conviction, for that matter, must be made in one decision, which cannot be integrated, amended, added to or corrected by the Trial Chamber at some later stage. In this case, the accused were acquitted and the proceedings terminated through

the 15 January decision. In fact, on 16 January, the Chamber stated so expressly, and I quote, "This concludes the trial as far as this Chamber is concerned." End of quote.

Accordingly, the question in this appeal is not whether Judge Henderson's reasons delivered six months later were sufficiently detailed, but whether the 15 January acquittal decision was consistent with Article 74(5). It was not.

Even if *arguendo* Article 74(5) allowed the majority some leeway to first provide an oral summary of its reasons when acquitting the accused and then to defer the full written reasons to a later stage, the 15 January decision failed to meet the minimum requirements for such a summary.

First, a summary must include all the elements of the decision, even if in summary form. Since Article 74(5) requires the decision to contain a reasoned statement of the Chamber's findings on the evidence and conclusions, so must the summary. Otherwise it would not be a summary of the decision, but at best an excerpt of it.

The summary provided by Judge Fremr in the Ntaganda case is a good example. It set out in some detail, (a), how the Chamber assessed the evidence; (b) the Chamber's main factual findings; (c) the Chamber's findings on the charged crimes and criminal responsibility; and (d) the Chamber's overall conclusion on Ntaganda's guilt.

The 15 January decision can in no way be compared to the extensive and proper summary in the Ntaganda case. It merely indicated five core constitutive elements of the crimes for which the Prosecution had, in the majority's view, not met its burden of proof.

Second, to prevent the Chamber from engaging in result-driven reasoning, the

oral summary must clearly show that the Chamber has already made all its findings and what will follow is merely the completion of the editorial process. The 15 January decision did not show this. It included no reference to the Chamber's finding on the evidence. It is unlikely that the Chamber spent six months following the acquittal merely editing the full written reasons that had already been drafted before. Instead, it appears that a substantive part of the reasons were drafted only after the majority acquitted the accused.

Third, to comply with the one decision requirement, the Chamber's findings in the oral decision must be consistent with what follows in the full written decision. This was also not the case here. The summary and the written reasons are inconsistent on at least two key issues, namely, the legal basis of the decision and the applicable standard of proof.

Your Honours, the 15 January decision was a final acquittal decision that produced all the effects of a decision under Article 74. As such, the requirements under Article 74(5) should have been applied to the 15 January decision. The Trial Chamber erred by acquitting Mr Gbagbo and Mr Blé Goudé in violation of its fundamental obligations under Article 74(5).

This, your Honours, concludes my submissions and I am handing over to Ms Brady to address you on the impact on the errors under ground 1.

PRESIDING JUDGE EBOE-OSUJI: [10:41:59] Thank you.

Ms Brady.

MS BRADY: [10:42:02] Good morning again, your Honours.

So I'll now be addressing you on question 9, concerning the impact of the error in ground 1.

To overturn a final decision on appeal, an appellant must show both the error,

or errors, and the impact of the error or errors on the decision. This comes from Article 83(2), which requires that a legal or procedural error materially affected the decision.

Here, while the majority's errors in ground 1 may not have automatically invalidated the acquittal decision, its material effect on the decision clearly results from the fundamental and serious nature of the breach, whether we consider those individually or cumulatively with the errors in ground 2.

A Trial Chamber's written and public articulation of the reasoned basis for its decision to convict or to acquit an accused is critical to its decision-making process. The majority's violation of the requirements in Article 74 when acquitting Mr Gbagbo and Mr Blé Goudé was no harmless procedural irregularity; it tarnished the very essence of the judicial adjudicative process, thereby affecting the reliability and the integrity of the decision itself. As a result, a serious case of grave victimisation was, we say, wrongly stopped in its tracks at the close of the Prosecution's case. This is how it materially affected the decision.

Now, for legal and procedural errors, the test is that in the absence of the error, the decision would have substantially differed from the one rendered. For substantive legal issues, it's fairly straightforward to show that, but for the error, the final decision would have been different, or there's a high likelihood it would have been different.

But for procedural errors, and included here legal errors of a procedural nature, especially where the Trial Chamber has failed to take action, the test should be reasonably interpreted so as not to put an accused -- sorry, so as not to put an appellant to an impossible proof. This is the *probatio diabolica* which the

dissenting judges in Ngudjolo spoke about. And as your Honour Judge Eboe-Osuji said in Bemba in your separate opinion, an error will be material to the final decision if there is a reasonable likelihood that the Trial Chamber might have rendered a substantially different one had the error not occurred. In other words, your Honours, if the appellate court could not be sure that the trial court would have rendered the same judgment had the error not occurred. Now the Defence argue that the majority would anyway have reached the same conclusion that the evidence -- and in fact that they did reach that same conclusion in July, that the evidence was incapable of sustaining a conviction. And Mr Gbagbo takes this is a step further and argues that, well, in any event, if a retrial was ordered it would also lead to the same outcome.

First, your Honours, to show the materiality of the majority's error, we do not need to show that had they not erred, and instead followed the Article 74 requirements before acquitting them in January 2019, the majority would necessarily have dismissed the no case to answer motions and found a case to answer. It's impossible to go back now to before the oral acquittal and definitively show this.

But what we can say is that the majority's failure to render a proper reasoned decision which complied with all the Article 74(5) requirements when acquitting the two men was so fundamental that there is a reasonable likelihood that they might have. At least, your Honours, the Appeals Chamber cannot be sure that if the majority had not erred it would still have granted the Defence motions and acquitted them.

Likewise, if a new Trial Chamber was appointed to retry the case, and complied with all the requirements under 74(5), it could well conclude

differently. After all, the third judge in the case, Judge Herrera Carbuccia, she did. She would have dismissed the motions and allowed the case to proceed. Now, your Honours, you might think it is futile for us to make this argument given that six months later, in July 2019, the majority gave their full written reasons for acquitting the two men, for acquitting Mr Gbagbo and Mr Blé Goudé. But by then the damage was already done. We argue this at length in our brief.

If a Trial Chamber doesn't make its full and proper reasoned findings before it acquits, it risks not having made a properly reasoned - in other words, fully informed - decision. This risk is heightened in a Chamber which, like the present one, which applied the submission regime, the submission regime for evidence. Because unlike a chamber which applies the admission evidentiary regime at this point -- by this point at the end of the Prosecution's case, the Trial Chamber had not yet considered the basic relevance, probative value and reliability, in other words, authenticity of the items of evidence and, as such, may be less familiar with the evidence than a trial chamber which had already made such rulings.

Now, in his written opinion, Judge Henderson acknowledged this issue and his solution was to accept all the evidence submitted as in and analyse all of it against the no case to answer standard. But this doesn't get around the problem that by 15 January they had not done so, as Judge Tarfusser openly acknowledged in court on 16 January.

This and other objective facts all point in one direction, that the majority had not completed the full reasoning exercise required by Article 74(5) by the time they orally acquitted in January 2019.

What are these objective facts, apart from the one I've mentioned about the admissibility -- the submission scheme regime being applied in this context? The volume of the evidence. Let's remember there were 4,600 documents. I think actually 4,610 documents and 96 witnesses in the Prosecution's case, and of those 96 witnesses almost 40 gave written statements in whole or in part under Article -- Rule 68(2) or (3).

The second, another factor, the extensive briefs by the parties.

Another factor, the third factor, the short time frame between the no case to answer proceedings and the acquittal in January 2019.

The next factor, the scant details in the oral acquittal decision.

The next factor, the inconsistencies between the majority judges on key matters that can be seen even six months later.

The next factor, the lack of a clear link between the oral acquittal decision and the written reasons.

And finally, the very fact that it took six months to issue those written reasons. Those written reasons issued six months later cannot cure the deficiencies in the January decision. And because of the real possibility of result-driven reasoning, which my colleague Mr Gallmetzer has mentioned and we discuss at length in our brief, the written reasoning that the majority gave six months later does not prove that they would have reached that decision in any event. Once the majority had made and announced its decision in January, it would hardly have reversed course.

Secondly, your Honours, in any event, we can show that the decision would have been substantially different. The essential and serious nature of the violations of the Article 74 requirements so tainted the decision-making

process of the majority as to cast a pall of doubt over the reliability of the decision and the integrity of its outcome. In other words, the requirements mandated by Article 74 are so fundamental to ensuring a reliable decision that without them the decision can barely be considered a valid legal outcome at all.

PRESIDING JUDGE EBOE-OSUJI: [10:53:03] Can you hold on there. I've been asked to give you the time warning. Three minutes, I understand. You can have five.

MS BRADY: [10:53:25] Your Honour, I need one. I just want to finish --

PRESIDING JUDGE EBOE-OSUJI: [10:53:28] Excellent.

MS BRADY: [10:53:29] Yes. I just want to finish with an analogy. Imagine, your Honours, you have a sporting match in which you have two teams, team A and team B, and they're tied. In the last 30 seconds team A scores a goal and is declared the winner. Team B may believe that the goal was not properly awarded. But if it's discovered that the clock, the timekeeping clock for the game was faulty and the game should have ended 30 seconds earlier, team B would not and need not challenge the game's outcome based on whether the goal was correctly awarded or not. * A fundamental procedural irregularity will have spoilt the game and ruptured its outcome. Your Honours, the error here is of a similar nature, although obviously in a different context.

Those conclude the submissions for the Prosecution on ground 1. They conclude my submissions and the submissions on ground 1 for the Prosecution.

Thank you.

PRESIDING JUDGE EBOE-OSUJI: [10:54:50] Thank you very much,

Ms Brady.

So we move on now to counsel for victims.

MS MASSIDDA: [10:55:05] Good morning, your Honour. May I just ask the Chamber to clarify at which point we will have the pause, for the purposes of cutting my speech?

PRESIDING JUDGE EBOE-OSUJI: [10:55:22] Thank you.

The court officer signals six minutes, five/six minutes.

MS MASSIDDA: [10:55:32] Thank you very much. I should be able then to address first the main concerns of the victims before addressing more specifically ground 1.

Mr President, your Honours, victims support and endorse the Prosecution arguments showing that the majority committed several errors of law and/or procedure. However, it's also important for victims to stress that said errors are the result of extremely defective proceedings and just some of the most illustrative of the Trial Chamber's overall failure to conduct a fair trial, including vis-à-vis the victims.

PRESIDING JUDGE EBOE-OSUJI: [10:56:28] Ms Massidda, can you repeat that thought, because when you were about to start it there was a technical intervention that cut out what you were trying to say.

MS MASSIDDA: [10:56:37] Certainly, your Honour.

I started my proposals indicating that victims support and endorse the Prosecution arguments showing that the Trial Chamber, the majority, committed several errors of law and procedure. But for victims it's also important to stress that said errors are the result of extremely defective proceedings and just the most illustrative of the Trial Chamber's overall failure

to conduct a fair trial, including vis-à-vis the victims.

In over four years of trial, critical flaws affected the proceedings and led to substantial unfairness. Major conflicting approaches of such a gravity to have repeatedly fractured the Chamber on many crucial issues - to use the words of Judge Tarfusser, characterised the entire trial.

The Trial Chamber, in a constant changing of the composition of its majority, was unable to agree on many critical topics, including the approach of the Bench to the evidence, the treatment of previous statements under Rule 68 of the Rules, procedure to adopt -- to question expert witnesses, just to recall some. There were only a handful instances in which a decision could be unanimously taken by the three judges.

The Trial Chamber inability, and more importantly the majority inability, to agree on any of the essential questions of law and procedure during the trial, led to a manifest lack of predictability and legal certainty in the course of the proceedings, issue which critically affected the victims' interests and the Chamber's own duty to conduct a fair trial.

The errors identified in the Prosecution appeal brief, to use the words of the judgment in the Ngudjolo Chui case, fall within the scope of Article 64(2) of the Statute, governing the Trial Chamber's powers for the proper conduct of the proceedings and affect its core judicial duty to establish the truth.

Judge Eboe-Osuji extended the right to a fair trial to the victims in the Ruto case indicating, and I quote, "[a] trial must be fair to all the parties and participants in the case - the Defence and the Prosecution alike. And victims, too."

In this sense, the right to a fair trial corresponds with the Chamber's ultimate

duty of ensuring fairness, expeditiousness and the establishment of the truth. Victims contribute to the fairness of the proceedings by sharing and explaining their sufferings and the consequences of the crimes on their lives, families and communities. They participated in the present case with the hope that justice one day will be rendered to them.

However, the victims' right to truth, justice and eventually reparation have been prejudiced by the overall failure of the Trial Chamber to conduct fair proceedings and even more so by the errors identified in the Prosecution brief. In particular, the error of law and/or procedure regarding the violation of the mandatory requirements of Article 74(5) of the Statute and the failure to articulate and apply a clear standard of proof in deciding the no case to answer motions deprive victims of a cogent enquiry into the crimes they suffered from and, eventually, a remedy.

In deciding to entertain no case to answer motions, the Trial Chamber violated victims' rights to truth and justice because no exceptional circumstances justify the triggering of said procedure. By failing to define a proper standard of proof, the Trial Chamber deprived victims of their ability to present properly views and concerns and give properly instructions to their counsel. By discarding without valid grounds the account of the five charged incidents, the Trial Chamber also failed to shed light on the events victims suffered from.

This concludes, your Honour, my brief presentation on the main core interest of victims in these proceedings. I will start now with some observation on ground 1 and I'm looking for your guidance on whether this could be an appropriate moment to pause.

PRESIDING JUDGE EBOE-OSUJI: [11:03:16] Hold on a minute. Yes, I think

so.

Yes, indeed, this will be the right moment for us to take the morning break and we will rise and come back in 45 minutes, that will be at 11.45.

MS MASSIDDA: [11:03:58] Thank you, your Honour.

PRESIDING JUDGE EBOE-OSUJI: [11:03:59] Thank you.

The Court will rise. During that time, if there have been any technical difficulties to sort out, the Court Registry will attend to it.

Thank you.

(Recess taken at 11.03 a.m.)

(Upon resuming in open session at 11.50 a.m.)

THE COURT USHER: [11:50:11] All rise.

PRESIDING JUDGE EBOE-OSUJI: [11:50:26] Ms Massidda, please continue.

MS MASSIDDA: [11:50:35] Thank you very much, Mr President.

In making some statements in relation to all the interests of the victims who were affected by the impugned decision and the proceeding as a whole, I will now turn on the ground 1 of the appeal.

It is my submission, your Honour, that the majority erred in law and/or procedure failing to comply with the mandatory requirements of Article 74(5) of the Statutes when orally acquitting Mr Gbagbo and Mr Blé Goudé through an unreasoned and not fully informed oral decision, followed six months later by the written reasons.

As already indicated in the written submissions, the provision governing a ruling following a no case to answer motion depends on the outcome of such proceedings. In particular, it depends on whether the Trial Chamber decides to issue a judgment of acquittal or instead a decision to dismiss the motion and

continue the trial.

In case of an acquittal following a no case to answer proceedings, the only applicable provision is Article 74 of the Statute. In this regard, and according to the constant ICTY jurisprudence, granting a no case to answer motion and entering consequently a judgment of acquittal at halfway stage - as also recalled by Mr Gallmetzer this morning - has the same practical effect as entering a judgment of acquittal at the end of a trial.

Contrary to what the Defence of Mr Blé Goudé suggests, the ICTY jurisprudence never distinguished acquittals following a decision granting a no case to answer motion from judgments entered at the end of a trial. Instead, the ICTY jurisprudence has been constant in finding that only a decision dismissing a no case to answer motion requires certification by the relevant trial chamber. Such certification is never required in the case of decision granting a no case to answer motion and acquitting an accused.

In the three cases quoted by the Blé Goudé Defence, the relevant chambers explained at length:

One, the difference between dismissing a no case to answer motion and issuing a final judgment convicting an accused; and two, the fact that appeal against a decision dismissing a no case to answer motion always require certification by a trial chamber.

Both the ICTY Trial and Appeals Chambers have provided a clearer explanation on the difference in terms of nature and available remedies between a decision granting and one denying a no case to answer motion.

A decision granting a no case to answer motion has been assimilated to a final judgment of acquittal.

In the Blagojević case, the Trial Chamber noted, and I quote:
"The effect of granting, in whole or in part, a motion pursuant to Rule 98 *bis* of the Rules" - which is the provision governing before the tribunal a no case to answer procedure - "is that a judgement of "acquittal" is entered [...]
End of quote.
And the reference for the record, is the Blagojević and Jokić case, decision of 23 April 2004, paragraph 11 to 13.
In the Karadzic case, the Trial Chamber further clarified that a judgment on a successful no case to answer motion, and I quote again:
"[...] cannot be considered a decision, which requires certification before an interlocutory appeal can proceed [...]" Differently from:
"[...] a decision to dismiss a Rule 98 *bis* motion, which does not involve the Chamber rendering a judgement on the guilt of an accused, and remains a decision, from which certification is required in order to appeal." End of quote.
And the reference is the Karadzic case, decision of 13 July 2012 at paragraph 10, a conclusion which was upheld by the Appeals Chamber in the same case with the judgment of 11 July 2013, and I refer specifically to paragraph 9.
It can, therefore, be concluded that it is the final nature of an acquittal decision and the applicability of the *ne bis in idem* regime that determines its nature of final judgment and its direct appellate review.
Turning to the main errors identified in ground 1 of the Prosecution's appeal brief and the majority's violation of the mandatory requirements of Article 74(5) when acquitting the defendants, I concur with the Prosecution and with Judge Herrera Carbuccia that the majority violated its legal obligation to deliver one

fully reasoned judgment in writing in open court by rendering instead an oral decision acquitting Mr Gbagbo and Mr Blé Goudé on 15 January 2019.

As far as the four mandatory requirements included in Article 74(5) of the Statute are concerned:

First, the literal tenor of the provision requires that the decision be in writing. The written reasons issued on 16 July 2019 cannot be considered as a remedy to the violation of Article 74(5) of the Statute committed with the issuance of only the oral decision of 15 January 2019. Because the acquittal of the defendants took place with the rendering of the 15 January 2019 oral decision, said acquittal required a decision in writing.

This requirement stems from the interpretation and application of Article 74(5) consistently with internationally recognised human rights, in accordance with Article 21(3) of the Statute. The Human Rights Committee, the European Court of Human Rights as well as the Inter-American Court of Human Rights all require the provision of a timely written judgment to protect from arbitrariness and to ensure the right to an appeal, in particular, regarding the essential elements of a case heard by a court.

The fact that anyone may at present consult or obtain a copy of the full text of the 16 July 2019 reasons does not validate the oral issuance of the disposition six months before said date. There was no other decision previously taken or issued on the facts and merits of a no case to answer motions, and it was therefore necessary for the public and more importantly for the victims to know the reasons why the two defendants were acquitted.

Second, Article 74(5) also literally requires that the decision contain a full and reasoned statement of a trial chamber's findings on the evidence and the

conclusions. The majority provided an insufficient explanation of how it reached its findings. The reading of the conclusions and the verdict contained in the oral decision of 15 January 2019 cannot for sure be considered a full and reasoned statement of the findings, since the Trial Chamber did not even provide a summary of the manner in which it reached its conclusions.

The Chamber should have explained, even in summary form, how it assessed the evidence and which facts it found to be relevant in coming to its conclusions. Whereas instead, no full explanation, even no explanation at all in the 15 January 2019 oral decision.

Third, the majority failed to deliver in open court the reasons of the decision. And again, your Honours, the literal tenor of the provision requires that the decision or a summary with the views of the majority and minority be delivered in open court. In this regard, the Trial Chamber erred in law by relying on Rule 144 of the Rules to issue exclusively in writing the reasons for the 17 (sic) January 2019 oral decision.

Rule 144(2) only refers to providing all participants in the proceedings with copies of the decision of the Trial Chamber on the criminal liability of the accused. The wording of the Rule does not exempt the Trial Chamber from issuing said reasons also orally, pursuant to the literal tenor of Article 74. It was, therefore, wrong for the Trial Chamber to rely on Rule 144(2) in not providing orally the reasons of its decision on 15 January 2019 and in doing so in writing only on 16 July 2019.

Nothing in Rule 144(2) contradicts the wording of Article 74(5) of the Statute. Assuming *arguendo* that there is a contradiction between the two provisions, then Rule 144 must always be interpreted and applied consistently with

Article 74(5) as required by Article 51(4) and (5) of the Statute.

Also, your Honour, the fact of not rendering orally the 16 July 2019 reasons or a summary of it is inconsistent with the obligation under Article 21(3) of the Statute to apply and interpret of -- Article 74(5) and Rule 144 in a manner consistent with internally recognised human rights.

As consistently found by the Appeals Chamber, internationally recognised human rights cannot alter the content of legal texts of the Court, but are of assistance in applying and interpreting said legal texts.

In the present case, an interpretation of Article 74(5) of the Statute and Rule 144 of the Rules consistent with internationally recognised human rights required the delivery in open court of the 16 July 2019 reasons.

Fourthly, the majority failed to provide simultaneously the verdict and the reasons for said verdict. Once more, a literal interpretation of Article 74 suffices to conclude that the Trial Chamber was obliged to issue at the same time the verdict and the reasons for the verdict.

The 15 January 2019 oral decision did not include the slightest reference to the admissibility of particular pieces of evidence, not even the most relevant to the majority's conclusions.

Therefore, in not delivering at the same time the dispositive part of its findings and the full or summarised version of the 16 July 2019 reasons, the Trial Chamber committed an error of law and/or procedure.

Although it is acceptable for a first instance court to pronounce reasons for a decision shortly after its adoption, the decision must give reply to the main arguments submitted by the parties and participants.

This approach has been adopted by the ad hoc tribunals and by the

Extraordinary Chambers in the Courts of Cambodia, which the pre-trial chamber, in particular, found that the approach of delivering reasons at a later date cannot apply to final procedural acts following which the issuing authority is *functus officio*.

Lastly, the 16 July 2019 reasons do not cure the Trial Chamber's failure to comply with the requirements of Article 74(5) of the statute because:

One, were issued in violation of the Statute and the Rules because only notified only in writing.

Second, do not provide a full and reasoned statement of the joint findings and conclusions of the majority, but only a common understanding and agreement of Judge Henderson and Judge Tarfusser on their conclusion to end the proceedings.

In the circumstances of this case, as also underlined by Ms Brady this morning, there is a high likelihood that the Trial Chamber, had it not committed the procedural and legal errors, would not have issued the sparse 15 January 2019 oral decision and would have carefully considered all the evidence before discontinuing the case.

In addition and concluding, the procedural history of this case further supports Judge Herrera Carbuccia's view that the decision with reasons to follow suggests that the majority had not analysed all the facts and evidence prior to issuing its judgment in violation of the duty to conduct a fair and expeditious trial.

This statement by Judge Herrera Carbuccia seems supported by the fact that on 10 December 2018, the majority *proprio motu* scheduled a hearing then held on 13 December 2018, on the continued detention of the defendants, seeking the

views of the parties and participants on the appropriateness and modalities of interim release.

PRESIDING JUDGE EBOE-OSUJI: [12:09:33] Ms Massidda, you have five minutes.

MS MASSIDDA: [12:09:38] Thank you, your Honour.

At that time, on 13 December 2018, deliberations were still to be concluded as the oral pleadings on the no case to answer motion had only taken place less than three weeks earlier. Between 13 December 2018 and 15 January 2019 oral decision, less than one month passed by which counted the judicial recess and festive period. It is therefore hard to conceive how the Chamber had the time to even start discussing the totality of the parties' and participants' lengthy submissions on the no case to answer motions.

And this concludes, your Honour, my submissions on ground 1, which we plead should be granted.

Thank you very much.

PRESIDING JUDGE EBOE-OSUJI: [12:10:44] Thank you, Ms Massidda. I will now invite counsel for Mr Gbagbo for their submissions. You have 30 minutes.

MR ALTIT: [12:11:06] (Interpretation) Yes, good morning. Professor Jacobs on behalf of the Gbagbo team will be answering the first ground of appeal.

Thank you.

PRESIDING JUDGE EBOE-OSUJI: [12:11:26] Mr Jacobs, please proceed.

MR JACOBS: [12:11:31] (Interpretation) Thank you, your Honour.

Your Honours, we thought that today we would be answering one prosecutor. Now, in the light of the submissions of the Legal Representatives of Victims, it

would seem that today we are answering two prosecutors.
Indeed, the Legal Representatives of Victims seems to be stepping outside using this context of the appeals and is placing herself as a prosecutor *bis* coming back on all sorts of fault that she's finding with the Trial Chamber, which is not actually part of the Prosecutor's appeal.
The Legal Representatives of Victims is acting as a second prosecutor and this goes beyond the context of the appeal and in so doing, affects the fairness and the equity of these proceedings.
We should, therefore, come back to the observations made by the Legal Representatives of Victims before addressing those of the Prosecutor.
First of all, the LRV is calling into question the fact -- the manner in which the Trial Chamber was conducted generally speaking, whilst as we showed in our response to her written observations, she never complained about the procedure during the proceedings itself; and secondly, she omits to say that each procedural example that she gives has had as a consequence that the Prosecutor had a large or great margin of manoeuvre and a great amount of freedom to present its case as -- or present her case as well she seemed fit -- she deemed fit.
For example, as Judge Henderson said when talking on behalf of the majority Judges, is that in examining the admissibility during the (Overlapping speakers)
THE INTERPRETER: [12:13:21] Could counsel please be requested to slow down when quoting. Please, could he please be requested to slow down.
MR JACOBS: [12:13:40] (Interpretation) And I refer you here to paragraph 41 (Overlapping speakers)

PRESIDING JUDGE EBOE-OSUJI: [12:13:52] Mr Jacobs, there is a pace alert. Thank you.

MR JACOBS: [12:13:59](Interpretation) So I would refer you to paragraph 41 of the draft translation into French of the grounds, and I quote: If I had systematically assessed the credibility and reliability of the testimony, witness statements -- witness testimony provided by the Prosecution, there would be no -- even less reason to proceed in the case at bar in these proceedings.

End of quote.

This point is important because it leads us to note that in this procedural context, which -- the most favourable for him, the Prosecutor has not been in a situation to demonstrate the existence of the alleged charges against the accused person. Now to come today to find fault with the Judges for having effected the fairness of the procedure by adopting practices that were in favour of the Prosecution - so they contend - is not an admissible argument.

Now, still extending beyond the scope of the appeal, the Legal Representatives of Victims in her response to the questions of the Judges - and she said it just a moment ago in the hearing - states that the no case to answer proceedings does not have its place in the legal framework of the Court, namely, because the phase of no case to answer proceedings is a sufficient filter, she claims.

And I quote the draft translation of 1351, paragraph 7 of the Legal Representatives of Victims:

Generally speaking, there should not be any change between the evidence that has already been examined at the pre-trial phase and those presented at the trial phase. End of quote.

Firstly, the LRV is conducting herself as if the -- as if it is a replay on the part of the Prosecutor of what it had contended during the confirmation of charges. So in other words, if we take our case, the case at bar, in other terms if we take our case at bar, two days of submissions, of oral submissions during the confirmation of charges would be the equivalent of two years of presentation of her evidence on the part of the Prosecutor during her trial.

And if we follow the logic of the LRV, we could, according to her, go directly from the confirmation of charges phase to the Defence case because nothing would then have changed in the Prosecutor's case between those two moments in time.

Secondly, the contention on the part of the LRV tries to have us forget specifically what happened in this case because in February 2018, the Chamber had required, after the Defence filed its no case to answer, that the Prosecutor submit a mid-trial brief that would indicate the manner in which the evidence supports the charges. And I refer you to decision 1124, paragraph 9. It was necessary for the Prosecutor to file a mid-trial brief at the end of its case because it was impossible at that moment in time to ascertain precisely what their case was, having -- because the testimony had not corroborated or had not supported the charges.

The Legal Representatives of Victims has us understand that she was limited by the Judges in the presentation of her evidence during the case, but the reality is that the Prosecutor was entirely free to question the witnesses, and as we reminded -- as we replied in ... she often chose not to question the victims or to reduce those questions to a bare minimum.

She also chose -- she also chose to not have witnesses come to testify and to

present evidence when the opportunity was provided to her. In such conditions, to suggest that the Judges did not leave the Legal Representatives of Victims her just position or place during the trial is not a proper approach. Now to come back to the Prosecutor's submission on her first ground of appeal, the *raison d'être* of a no case to answer proceedings is the safeguarding of the rights of the accused. No case to answer proceedings follow a clear rationale. It would be unjust to compel the Defence to present a case when the Prosecutor at the close of her case has failed to present the Judges with sufficiently strong evidence to sustain a conviction.

This position follows on from the fact that the burden of proof is upon the Prosecutor as a procedural consequence of the respect for the presumption of innocence. In addition, one must preserve the interests of justice itself in order not to unnecessarily prolong the proceedings. It is in the interest of all involved to guarantee the efficiency of the proceedings and the reasonable utilisation of the Court's means.

All of these rights and interests that are protected by a no case to answer proceedings were recalled in the Ruto case, and I would refer you to decision 1334, paragraph 12 and 16. To suggest that the no case to answer should not even exist before the ICC is a direct challenge to the innocence and rights of the accused. It is a direct challenge to the interests of justice that a no case to answer proceedings preserves.

In this context, we should note that in this case at bar, the Trial Chamber was clearly guided during the no case to answer proceedings to safeguard the rights of the accused, and generally speaking followed a clear and respectful tact. It safeguarded the interests of justice in so doing.

In view of the time given over to the preparation of this hearing, I will only come back to a number of points that illustrate the approach that is quite normal and respectful of both the accused rights and the Statute of Rome that was adopted by the Trial Chamber when rendering or issuing its oral decision and written reasons.

Firstly, with regard to the oral decision, the Judges entered a decision in full respect of the rights of Laurent Gbagbo and in keeping with the spirit of the Statute. After having conducted an in-depth analysis of the Prosecution evidence according to the standard of proof they had adopted, they reached the finding that the Prosecution had not presented sufficient evidence in support of the charges and decided to acquit Laurent Gbagbo.

They entered this acquittal on 15 January 2019 with the immediate and logical effect of Mr Gbagbo's release whilst they undertook to draft the written reasons. Laurent Gbagbo's rights were at the forefront of the Judges' approach as they would have been for any other judge in the same situation. What justice would there have been in keeping an individual in detention - whom they knew that they would acquit - for six additional months just to give them enough time to finalise their written reasons? On the contrary, it would have been a true injustice to proceed in such a manner. And the Prosecutor is specifically finding fault with the Judges for having failed to commit this injustice.

We would note that both the Prosecutor and the LRV talk about Article 21(3) of the Statute except when protecting the rights of the accused and his fundamental rights to liberty, to freedom. So by ignoring the fundamental rights of Laurent Gbagbo, the Prosecutor contends that the Judges should

strictly have applied the Article 74(5) of the Statute.

A number of rapid observations on this point.

First observation: As no case to answer proceedings are not specifically provided for in the Rome Statute, it is difficult to claim, as does the Prosecutor, that Article 74(5) should be automatically applied to the entering of a no case to answer decision.

By making such a claim, the Prosecution choses to ignore the clear precedent set out in the Ruto case where the Judges entered a decision in a no case to answer without relying on Article 74. The Prosecutor contends that this jurisprudence is not applicable because the Judges had dismissed the charges rather than acquitting. But nothing indicates in the Ruto decision that the Judges would have gone about it any differently had they entered an acquittal rather than dismissed the charges. Nothing indicates that they would have followed the requirements of Article -- of Article 74(5).

Both Judge Fremr and Judge Eboe-Osuji said at the time that the conditions of the acquittal were there, an acquittal that they decided not to enter by virtue of the particular circumstances surrounding the unfolding of the trial.

The approach that should be adopted is as follows, therefore, even if there is no provision within the Statute that can automatically be applied to a no case to answer proceedings, it is only natural for the Judges to seek inspiration on a case-by-case basis from the provisions of the Statute whose contents can assist and guide them throughout the proceedings.

For example, it is logical that having entered an acquittal, the Judges sought inspiration from the provisions of Article 81 of the Statute in order to order the immediate release of Laurent Gbagbo.

This is not because this Article is formally applicable to a no case to answer, but because this Article really encompasses the musings of the Statute's drafters as a logical consequence in the context of an acquittal, that is to say, the immediate release of the acquitted individual.

Flowing on from this, even if Article 74(5) is not formally applicable to a no case to answer proceedings, it is normal for them to -- for the Judges to seek inspiration from this Article because it is -- it contains what the drafters of the Statute thought was important and applicable to follow when issuing such a decision, namely, that they issue one single decision, that they provide reasons for it, and that they do so in public.

So for the Defence of Laurent Gbagbo, it is not so much that one needs to identify the Articles of the Statute that would automatically be applied to a no case to answer proceedings, but rather to determine whether in the case at bar the procedure followed by the Judges respected the spirit of the Statute, which was drafted with a view to safeguarding the rights of the accused.

Second observation: It should be noted that the Prosecutor is incapable of demonstrating how the Chamber might have erred in entering an acquittal in January 2019 and issuing subsequently its written reasons in July 2019.

Third observation: The Prosecutor finds fault with the oral decision of January 2019 for its lack of sufficient reasons. In saying this, the Prosecutor maintains a state of confusion from the beginning of the appeal between the oral and the written decision.

One need only read Article 74(5) to the extent where one can seek inspiration therein in the context of a no case to answer proceedings to see the requirement for reasons -- to see that the reasons apply to the written decision, not the oral

decision.

The Prosecution maintains this state of confusion because quite simply she is incapable of finding fault in anything specific undertaken by the Judges in their issuing of their oral decision as there is nothing in the authorities, the jurisprudence or the objective criteria that the Chamber should apply when issuing an oral decision.

Fifth observation: As to the oral decision on acquittal, once again, the Judges had ample time to analyse the Prosecutor's evidence and the parties' arguments as they recalled in the oral decision itself and because they entered an acquittal, and I quote:

Having meticulously analysed the evidence and considered all the legal and factual arguments presented orally and in writing by the parties and participants.

End of quote.

I have just quoted T-232, French version, page 2, lines 26 to 28.

The Prosecutor's contention that the Judges were not fully informed at the time of issuing their decision as they had not had the time to analyse all the Prosecution evidence is an unfounded attack upon the Judges' integrity.

The Prosecutor makes out that the Judges embarked on a no case to answer proceedings without knowledge of the case, without having sat through two years of trial during which they familiarised themselves with the Prosecutor's case through the witness testimony and the evidence.

The Judges did not make their first acquaintance with the Prosecutor's case when the Defence filed its no case to answer motion. They did not have to wait until the end of the hearings in November 2018 to be familiar with the

substance of the Prosecutor's case.

As soon as January, Judge Carbuccia said that it should be -- it should not be necessary to continue the proceedings. If the Prosecutor estimates or feels that the Prosecutor's -- let us say that for the problem of a discussion, we should talk about the no case to answer. The Judges had the power to take a decision that the charges -- the charges had been ... The charges had been clear, but let us say it very clearly --

PRESIDING JUDGE EBOE-OSUJI: [12:35:53] (Overlapping speakers)

Mr Jacobs, can you repeat --

MR JACOBS: [12:35:55] (Interpretation) Let us say it very clearly --

PRESIDING JUDGE EBOE-OSUJI: [12:35:57] -- your last two points. We're not getting it quite well. It's not coming across properly.

MR JACOBS: [12:36:05] (Interpretation) The Judges should ... Mr President, I will repeat.

(Pause in proceedings)

THE INTERPRETER: [12:36:35] Can the speaker repeat the sentence because it was not clear in -- on the document where the speaker was speaking from.

PRESIDING JUDGE EBOE-OSUJI: [12:36:56] Maybe it may be a matter of pace. Not really on the document. The interpreter will need to listen to what Mr Jacobs is saying.

Maybe, Mr Jacobs, you need to slow down so that the interpreters can hear you. It looks like -- I don't know if what's happening is they're looking at where you are on a document as opposed to listening to what you're saying, which should be it, and then you need to slow down.

Thank you.

MR JACOBS: [12:37:35] (Interpretation) Thank you, Mr President. I'm trying to go as slowly as possible and I will repeat the two last points that I was talking about.

The Prosecutor is reproaching the Judges about their decisions prior to their acquitment in January 2019.

I'm seeing messages on the chat box about the transfer of interpretation.

THE INTERPRETER: [12:38:53] Can the speaker simply --

PRESIDING JUDGE EBOE-OSUJI: [12:38:54] Mr Jacobs, can you just

(Overlapping speakers)

THE INTERPRETER: [12:38:55] -- repeat the sentences prior to the transfer of the interpretation.

MR JACOBS: [12:39:07] (Interpretation) Yes, it is perfect now, Mr President. What I'm saying is that if -- if the Prosecutor is reproaching the Chamber not to have talked -- assessed all the Chamber's assessment, then they should have also achieved ... achieved the -- the ... Because they should have taken the decision of the majority.

(Pause in proceedings)

MR JACOBS: [12:40:48] (Interpretation) Mr President, if you can give me a second.

THE INTERPRETER: [12:40:53] From the interpreters: The dashboard doesn't seem to be working well and the mouse is having a problem, but we will sort it out in a short while.

(Pause in proceedings)

MR ALTIT: [12:42:00] *Monseieur le Président*?

PRESIDING JUDGE EBOE-OSUJI: [12:42:04] Yes, proceed.

MR ALTIT: [12:42:06] (Interpretation) Mr President, thank you. Professor Jacobs is speaking slowly and he is speaking on the basis of his speaking notes that he sent to the interpreters. So what I would suggest with your leave, Mr President, for things to continue in the best manner possible, is that maybe you suspend the hearing for a few moments so that the second interpreter can organise him or herself on the basis of the speaking notes, so that we can take on from that in a harmonious and rapid manner.

PRESIDING JUDGE EBOE-OSUJI: [12:42:54] Mr Altit, we've heard you. You may be fared from different stations as well, maybe there are difficulties, but I can see that the language section is looking into it. But we have yet another 15 or so minutes to go, 13 minutes so -- and we are reluctant to suspend the hearing for that long if we haven't exhausted all options.

Now can you try again, Mr Jacobs. Can you try again? Just the last point you were making.

MR JACOBS: [12:43:46] (Interpretation) Thank you, your Honour. Now these will have been points that will have been made in a clear and repetitive manner, will they not?

So the penultimate point that I was making was to ascertain how it is that the Prosecutor when he finds or she finds fault with the majority Judges for having issued a decision in January 2019, without having had the time to analyse all of the Prosecution evidence, why is it that fault is not found in a similar manner with Judge Carbuccia who, under the very same conditions, with the same time, was in a position to be able to claim in January 2019 that the Prosecutor file was sufficiently solid or strong -- or the Prosecutor's case was sufficiently solid or strong.

Now the other point that I was making, if we put to one side the no case to answer proceedings, it is normal for at the end of the Prosecutor's case that in the spring of 2018, the Judges were able to come to a conclusion as to the strength or weakness of the Prosecution case and they were in a position to ascertain whether they could state that the Prosecutor had proved the charges beyond all reasonable doubt.

Under these conditions, is it not therefore normal for a Judge who has taken part or been in assistance during the entire presentation of the Prosecution evidence over a two-year period, is it not therefore normal that this Judge or these Judges can be in a position to have a good idea as to the strength or weakness of the Prosecution case, and this independently from the fact that the Defence has filed a no case to answer motion.

Let us say clearly the fact that a judge has a clear idea of what the Prosecutor's case is at the end of the presentation of the Prosecution case cannot be said to be a biased position contrary to that suggested by the Prosecutor. This is all part of the -- this is all part of being a judge and exercising --

THE INTERPRETER: [12:47:46] Message from the interpreter: We're having a problem with echo and we can't hear everything that is said clearly.

PRESIDING JUDGE EBOE-OSUJI: [12:48:13] Mr Jacobs, did you hear that? The interpreter is saying that they are getting an echo and they couldn't hear clearly everything you have said. I wouldn't know where the echoes are coming from.

Perhaps what we can do in the meantime, if the court officer, who is assisting me, see if anybody else's microphone is on, we can turn those off. I don't know if that the problem, but try that and see.

She's shaking her head. That's not -- so everybody's microphone is off. Okay. So there are only two microphones on, mine and yours as well as the interpreters.

Can you try again, please? I know we've taken -- we've slowed you down, don't worry we will add that time we have taken. We will give it back to you. Is that better now?

MR JACOBS: [12:49:10] (Interpretation) Thank you, your Honour. I shall repeat the last sentence that I uttered.

The fact that a judge has a clear idea of the Prosecution case at the end of the presentation of said case cannot be misconstrued as bias as the Prosecutor seems to be claiming. Quite to the contrary, this is all part of the normal undertaking as a function of being a judge.

One last point on the oral -- one last point on the oral decision before I move on to the written decision. The Prosecutor is finding fault with the majority Judges for having not undertaken an assessment of the admissibility of all ... This position would seem quite a strange one to us because, firstly, the Prosecutor has spent the entire duration of the no case to answer proceedings stating that one should not be examining the strength of his evidence and that the evidence should be considered at its highest; and secondly, and I recall this point earlier on, this position of the Judges was after all favourable to the Prosecutor. Because as I said at an earlier stage, Judge Henderson recalled that had he been interested or looked in more depth at the Prosecution evidence in terms of credibility, admissibility et cetera, he would have had yet more reason to exclude a large portion of this evidence and to dismiss the charges.

PRESIDING JUDGE EBOE-OSUJI: [12:52:38] Now, Mr Jacobs, let's leave it there for now and take our break at this time and also give the interpreter some rest. She's been running a marathon. We recognise that and let's give her some rest and when we come back, we'll pick up your submission. We'll give you another -- one second.

(Pause in proceedings)

PRESIDING JUDGE EBOE-OSUJI: [12:53:25] Your time should be up by now, but then as I said because you were interrupted because of technical difficulties, when we come back you will have another five minutes to wrap up. All right?

MR JACOBS: [12:53:38](Interpretation) Thank you, your Honour.

PRESIDING JUDGE EBOE-OSUJI: [12:53:40] Thank you very much.

We will now rise, it is 12.45, we should be coming -- so, we should have risen at 12.45 to return at 1.30.

So we will rise in come back at 1.30. Yes, 1.30. Thank you.

THE COURT OFFICER: [12:54:06] All rise.

(Recess taken at 12.54 p.m.)

(Upon resuming in open session at 1.36 p.m.)

THE COURT OFFICER: [13:36:14] All rise.

PRESIDING JUDGE EBOE-OSUJI: [13:36:50] Thank you very much.

Mr Jacobs, you may continue for another five minutes.

MR JACOBS: [13:37:01] (Interpretation) Thank you very much, your Honour. Before going forward, I would like to ask a question as to whether the technical issues have been --

PRESIDING JUDGE EBOE-OSUJI: [13:37:17] (Overlapping speakers) continue.

If we have a problem, we will let you know.

MR JACOBS: [13:37:18] (Interpretation) Have the interpretation issues been solved or not? As I don't know quite when the technical issue arose, I'm not sure whether everything that I have said during the first part of my intervention has indeed been recorded and whether it's been interpreted, et cetera.

PRESIDING JUDGE EBOE-OSUJI: [13:37:37] (Overlapping speakers) we have noted, we just gave you an additional five minutes to round up your submissions because the five minutes that we are adding on was the five minutes that was taken up from stopping you at the time. So use the five minutes now to finish up, please.

MR JACOBS: [13:37:54] (Interpretation) Thank you, your Honour.

Your Honours, one last word as to the written reasons. The majority Judges perfectly respected the requirement that the spirit of the Statute imposed upon them, that of providing a reasoned decision, because the 950 pages of Judge Henderson's reasons, supported by Judge Tarfusser, lead the parties and participants and general public to understand just how it is that the Judges were of the opinion on the basis of a standard of proof that has been clearly exposed and explained and by virtue of the fact that the Prosecution case is so weakness -- is so weak there was indeed absolutely no case to answer at the end of the Prosecution case.

The arguments of the Judges is not only detailed but also exhaustive and provides a legally and factually founded argument, argument on the manner in which the Judges understood the Prosecution evidence.

Furthermore, it is apparent, without any ambiguity whatsoever from

Judge Tarfusser's opinion, that he entirely adopted the factual and legal detailed conclusions of Judge Henderson's reasons. Because in paragraph 1 of his opinion, which is 1263, filing 1263, and I quote: In providing the reasons of the majority judges, I am in support, full support of the legal and factual findings outlined in Judge Henderson's written reasons. End of quote. However, the Prosecutor once again is calling into question the professional integrity of the Judges by suggesting and actually saying in her appeal brief that the Judges did not deliberate together. Such an unfounded attack on the teamwork of the Judges is serious and could not prosper before an Appeals Chamber.

We should recall in this regard that the majority Judges in this case at bar went about things in exactly the same manner as the majority Judges did in the Ruto case without the Prosecutor having anything whatsoever to say at the time of the Ruto case. In Ruto once again the two Judges of the majority filed two separate opinions, Judge Eboe-Osuji at the time saying in his opinion that he was entirely in agreement with his learned colleague Judge Fremr's conclusions.

So it is quite striking for us to note that this judgment of over 900 pages is really -- really notes the absence of a Prosecution case. In fact, the Prosecutor herself concedes that she does not call into question the standard of proof adopted as detailed in the reasons of the majority Judges.

PRESIDING JUDGE EBOE-OSUJI: [13:42:53] (Overlapping speakers) Mr Jacobs, we will leave it there for now. Thank you. Your time is up.

MR JACOBS: [13:43:00] (Interpretation) Your Honour, I have two more minutes, if you don't mind. I spoke extremely slowly in order to enable the

interpretation to go ahead.

PRESIDING JUDGE EBOE-OSUJI: Two minutes.

MR JACOBS: [13:43:07] Just two minutes if you don't mind.

PRESIDING JUDGE EBOE-OSUJI: [13:43:15] (Overlapping speakers)

MR JACOBS: [13:43:17] (Interpretation) Thank you very much indeed, your Honour.

So the Prosecutor does not call into question the standard of proof at appeal, nor does he call into question the acquittal because he indicates in paragraph 129 of his appeal brief that he does not call into question the general conclusions reached by the Chamber. And this is why quite naturally the Prosecutor is incapable of showing that the alleged errors had whatever effect upon the Impugned Decision, saying as a pretext and in order to circumvent the issue that it is not up to her to show that there was such an impact.

So by way of conclusion on the first ground of appeal, the Prosecutor is trying to have an acquittal decision annulled that does not call into question on the basis of alleged errors that he is incapable -- or she is incapable of showing and that, whatever the case may be, had no impact whatsoever on the Impugned Decision.

Under such circumstances, the Defence calls upon the Appeals Chamber to quite simply reject the first ground of appeal.

Thank you, your Honour.

PRESIDING JUDGE EBOE-OSUJI: [13:45:02] Thank you very much, Mr Jacobs.

Now we will invite counsel for Mr Gbagbo to make submissions. He's in the courtroom with us and I also again, I'm sure you did say it when you were

making the appearances, but because Mr Blé Goudé is in the courtroom and I see him, so I did not make a point of mentioning the matter, but I think that resolves it. So he is in the courtroom with us sitting with you.

Please proceed, Counsel.

MR KNOOPS: [13:45:40] Thank you, Mr President.

My name is Alexander Knoops, counsel for Mr Charles Blé Goudé. I will address this afternoon a short comment on the nine questions the Chamber asked and especially we will go into the answers of the Prosecution and the LRV, not to repeat our submissions.

My first comment is on question 1. The Trial Chamber correctly based its decision on Article 66(2) of the Statute. It is -- the decision that there is no case to answer is not a formal judgment of acquittal on the basis of the application of the beyond reasonable doubt standard in accordance with Article 74.

The Prosecution in its answers to the Bench of 22 May submits that the legal basis for an NCTA decision, no case to answer decision, depends on the effect of that decision. We respond as follows, Mr President, your Honours:

The Prosecution and the LRV both do not address or can't reveal the clear jurisprudence of the International Criminal Court cited by the Defence, namely the Mbarushimana and Lubanga cases, which only support the Defence argument that it is the nature of the procedure leading up to that decision itself, and not the outcome or effect of that decision, which ultimately determines which legal regime applies.

I refer in specific to paragraph 22 of the Appeals Chamber decision of 19 December 2011 in the Mbarushimana decision, it's a decision which is also mentioned in our Defence response that the jurisprudence of the Appeals

Chamber addresses the question in the context of Article 82(1)(b) of the Statute by pointing out that the implications or effects of a decision do not change its character or nature. And more specifically with respect to the concrete question at issue in that case, your Honours, the Chamber ruled in the decision in Lubanga, number 8, that the decision confirming the charges neither grants nor denies release. Therefore, words of the Chamber, "the effect or implications of a decision confirming [the charges] or denying the charges do not qualify or alter the character of the decision." And therefore, the Chamber is not able to entertain the appeal under Article 82(1)(b) of the Statute.

You find a similar reasoning, your Honours, in the Appeals Chamber decision 29 January 2007 in the case of Prosecutor versus Lubanga, paragraphs 15 till 16.

When we apply this reasoning, your Honours, of the ICC Appeals Chambers to the instant appeal, the fact that the Chamber granted the Defence request to file a no case to answer and that it might have led, in its effect, to the acquittal of Mr Charles Blé Goudé is therefore not decisive for the legal regime, as it does not in any way change the type or nature of the decision itself, which, as mentioned by the Appeals Chamber, does not depend on its ultimate outcome.

As argued in our written submissions, a final judgment made after the close of the Defence case based on another evidentiary standard, i.e. standard of reasonable doubt, differs therefore fundamentally from a decision made at the NCTA halfway stage and therefore also involves a totally different evidentiary standard.

Second argument to refute the Prosecution and LRV submissions is that in their answers they do not address the Defence argument that under the Statute not all decisions which result in a conviction or acquittal of a person and which

triggers the *ne bis in idem* principle are all governed by Article 74, such as decisions on the admission of guilt.

Now the Prosecution this morning said that this is a unique procedure in the Statute, the procedure leading to admission of guilt, but to use the same words of Prosecution, the NCTA procedure is even more unique because it's not even governed in the Statute.

We turn now to question number 2 of the questionnaire. Does the NCTA decision qualify as such as a final judgment for the purpose of Article 74?

The clear answer should be no. The NCTA decision is made at the halfway stage based on the exceptional weakness of the evidence, i.e. when the evidence is incapable of belief. This is more akin to a decision on admission of guilt insofar as the legal effect of that decision triggers the *ne bis in idem* principle, but it does not involve, and that's the difference with a formal acquittal, it does not involve an assessment of the Trial Chamber of the totality of the evidence in order to determine guilt or innocence beyond reasonable doubt. We therefore cannot speak of the entire proceedings as provided for in Article 72 of the Statute. And also the academic commentaries which we cited support this view.

Now, your Honours, we can observe that also the honourable Judge Carbuccia Herrera in her dissenting opinion in the Ruto and Sang case emphasised that the NCTA is indeed a halfway decision not governed by Article 74 which requires a higher evidentiary standard.

In her dissenting opinion, paragraph 67, honourable Judge Carbuccia Herrera writes the following observation, I quote: "Moreover, the subjective or mental element must be analysed taking into [account] that this is a halfway

decision, and not" and not, Mr President, "a decision pursuant to Article 74 of the Statute, which would require a higher evidentiary standard vis-à-vis the mental element." Unquote.

Therefore, the mere fact that the outcome of an NCTA may be an acquittal in its effect does not trigger the regime of Article 74 which was intended by the drafters of the Statute to apply solely to final judgments made by the Chamber on the basis of the totality of the evidence based on a different evidentiary standard. And this is also the view of Judge Fremr in the Ruto and Sang case, paragraph 1 of his opinion, where he held that the legal basis for an NCTA decision were the Articles 64, 66 and 67, and not Article 74.

We now go into the questions 3 and 4 and the response to our Prosecution --

PRESIDING JUDGE EBOE-OSUJI: [13:55:02] Mr Knoops, one second. What paragraph of the decision did you just mention, of the Ruto and Sang judgment?

MR KNOOPS: [13:55:11] The opinion of Judge Fremr, paragraph 1.

PRESIDING JUDGE EBOE-OSUJI: [13:55:16] Paragraph 1. Thank you. Please proceed.

MR KNOOPS: [13:55:20] Thank you very much.

With respect to the questions 3 and 4, Defence has already extensively elaborated in our written submissions on the response to those questions. We limit our remark to the following observation:

The Prosecution in its answers to the questions of the Bench, and also the LRV, and that was in specific question 4(c), mentioned the Ntaganda jurisprudence. We respond that the decided Ntaganda jurisprudence could be of guidance insofar as it underlines the totally different nature, the discretionary nature of

the entire NCTA procedure in contrast to the procedure leading to a final judgment. And this is exactly also the difference with the system of the ICTY, the possibility to file an NCTA decision is not discretionary for the judges, but it's a right for the Defence.

In other words, the discretionary nature of the NCTA procedure further distinguishes an NCTA decision from a classic Article 74 judgment. As with the decision made on the basis of the admission of guilt, NCTA decisions therefore differ in terms of a legal regime.

We now turn to question number 5 and respond to the LRV and OTP responses and answers.

The LRV evokes the victims' right to truth and justice. As we argued in our response, your Honours, to the LRV's observations, the victim's right to truth rather than undermined is, in our view, promoted through the decision at hand. The truth is better served by not extending proceedings unnecessarily when the evidence brought by the Prosecution after years of investigation and trial seems to be extraordinarily weak.

The victims' suffering, which was expressly recognised by the honourable Judge Henderson in its majority opinion, paragraph 7, saying the acquittal of the accused should not in any way be construed as a denial of the suffering of the victims of the post-electoral crisis. This suffering of victims does not justify continued trial against Charles Blé Goudé, especially when, as the Court has recognised in the Katanga case, it is decision of 30 May 2008, paragraph 36, where the Court recognised the victims' central interest in the search for the truth and that it can only be satisfied, one, if those responsible for perpetrating the crimes for which they have suffered harm are declared guilty, and two,

those not responsible for such crimes are acquitted so that the search for the -- for those who really are criminally liable could continue.

And it was you, Mr President, yourself in the -- in your concurring separate opinion in the Bemba case, as you might recall, in June 2018 where you cited Anthony Carmona, a former Judge of the International Criminal Court, saying "There is no such thing as an endemic right to a guilty verdict. The endemic right lies in a just verdict."

In the same vein it should therefore be noted that the victims' right to reparations is not pertinent in the context of an acquittal. Even if the case would have followed its natural course, namely Defence case, there would still be no reparations given, the not contested by the Prosecution, not contested exceptional weakness of the Prosecution case. Thus, it would not have led to Mr Blé Goudé's conviction and accordingly reparations.

Question number 6, the guidance to be derived from the ICTY jurisprudence. The Prosecution argues that while ICTY decisions rejecting NCTA motions were routinely treated as interlocutory decisions that were appealable only with certification, it ignores that with respect to the applicable appellate regime at the ICC there is no gap in the law. The Rome Statute provides exhaustively for two possible avenues to appeal any decision of the Court, including those decisions which are not specifically provided for in the Statute, such as NCTA decisions, pursuant to the regime of Article 81 and 82 of the Statute.

Question number 7. The Prosecution does not provide in its answers to the Bench any support for the position that Article 74 should be deemed to apply solely for the reason that it, in its effect, would be a final decision. The Prosecution argument as to question 7 is unconvincing in light of the many

countervailing factors which support the Defence position showing that Article 74 does not apply to NCTA decisions, which is supported by, as mentioned, the dissenting opinion of Judge Carbuccia Herrera and Judge Fremr.

In other words, we should not be looking solely at the effect of the decision and simply apply Article 74 by analogy because it is convenient for the Prosecution.

And even if we would follow the Prosecution's position, we can remind the Chamber, which has been mentioned by our learned friend from the Mr Gbagbo team, that the Chamber clearly abided by the requirements of Article 74(5) and it had in that respect not triggered any error.

Question number 8. Mr President, your Honours, regardless of the question whether Article 74(5) applies or not here, it does, in any event, not prohibit the issuance of an oral decision with reasons to follow. To be complete, a decision must contain under this regime a full and reasoned statement of the Chamber on the Chamber's findings on the evidence and the conclusions. We submit this was the case here.

By providing the possibility to deliver a summary of the decision in open court, the plain text of Article 74(5), which the Prosecution is so keen to interpret, acknowledges that at the minimum that a disassociation in space and time between the oral decision and the full written decision is possible and when the text of the law is silent as to any order in which these two acts should be passed or even within which time frame, the possibility to issue a summary in open court should be an indication, if any, that the Chambers of the ICC are not prohibited under the current regime from delaying the issuance of their reasons. You find in our written submissions in paragraph 72 some authorities in this regard, ICTR authorities, and even the Prosecution in its

document in support of appeal under paragraph 31 refers to also other domestic courts and procedures such as the German criminal procedure which allows judges to separate the reasons from the verdict while ensuring that at the time of the verdict a summary of the essentials be read out.

Second, still addressing question number 8, the Prosecution submitted in its response that there should be a risk of a result-driven reasoning. The existence, Mr President, of such a risk, risk of a result-driven reasoning, if you would split the oral decision from a written decision which would be issued later, that potential risk did not refrain other international tribunals, such as the ICTR, from allowing their chambers to issue oral decisions with reasons to follow, and also this case law you find abundantly in our filings.

The Prosecution seems to ignore that there is a presumption of integrity of the judges. As held in the Ontario Court of Appeal case cited by the Prosecution itself, R v. Cunningham, where by the way between the oral decision and the written decision 25 months expired, Mr President, 25 months, the Ontario Court of Appeal presumed to reflect that reasoning in the ultimate written decision, presumed to reflect the reasoning according to the more general principle of integrity of the judges. And this presumption, integrity of the judges, applies and the burden of proof lies on the applicant, i.e. the Prosecution, to show that this integrity was not complied with.

In the present case we can observe that the Prosecution failed to adduce evidence that the written decisions were an after-the-fact justification, an after-the-fact justification for the decision. It's utterly clear from the decision that the majority Judges did not find themselves in the situation where they had to come to a definite conclusion, yet later found that that conclusion was

indefensible when they wrote their opinion. There are numerous statements in either Judge Henderson's or Judge Tarfusser's opinion, leaving no doubt whatsoever to the reader of the judgment that the outcome of this trial was based on an obvious and sustainable conclusion which did not change to the slightest since 15 January 2019. And you find in our response to the Prosecution -- Defence -- the Prosecution appeal brief footnote 123, all those references which clearly show there was no disagreement between Judge Henderson and Judge Tarfusser on this -- in this regard.

Completely new, Mr President, and as such should be disregarded as outside the scope of the appeal of the Prosecution, is the Prosecution allegation in its answers to the Bench that the oral decision must clearly show that the full written reasoned decision was complete at the time it was delivered, that the Chamber has already made all its findings therefore, and what will follow was to be merely a completion in editorial process as mentioned by the OTP.

Well, if you look, Mr President, your Honours, closely to the document in support of the appeal written by the Prosecution, this argument was not included in the paragraphs 111 till 112. That was not addressed in these paragraphs. Be it as it may, should the Chamber decide to consider this new argument of the Prosecution, although it's never raised explicitly before, we should briefly point out, Mr President, that the jurisprudence cited by the OTP does not support its arguments and that, to the contrary, many counterexamples can be given to defeat that point.

First the Bagosora case, which is cited by the Prosecution in paragraphs 23-25 of its answers, it's a case which totally differs from the case at hand. In that situation the Appeals Chamber tried to determine whether or not Judge Reddy,

whose mandate had expired between the issuance of the oral summary and the written decisions, had fulfilled his judicial duty in full prior to the expiration of his mandate.

PRESIDING JUDGE EBOE-OSUJI: [14:11:08] You have five minutes.

MR KNOOPS: [14:11:11] Thank you, Mr President.

So this was a case completely different from the case at hand.

Also the other cases cited, such as the one of Teskey and Cunningham, Canadian cases, the case mentioned which came before the Cambodia chambers, are all quite different from the case at hand.

There are even several counterexamples to be given to show that sometimes chambers, international criminal tribunal chambers did not have at the time of their oral decision completed its written narrative. One of the most striking examples is the case of Prosecutor v. Jelena Rašić, a judgment of 6 March 2012 where the presiding judge announced that the written decisions were to follow and the presiding judge said in that case, Mr President, I cite from the transcripts: "Very well. What we do is, as a Chamber, we will consider the question of lifting the ex parte nature of those documents, and we will include that in the written judgment which will follow on from this oral judgment." End of quote. You see here an example where at the time the oral reasons were given the written summary was not yet available.

In the instant case the situation is quite different.

Finally on the point of question 8, the jurisprudence cited by the LRV, the jurisprudence of the European Court of Human Rights does not support its argument that the question when reasons should be issued was at hand. The European Court addressed simply the question what the reasons should

contain and the degree of details they should handle. Therefore also this case law is not applicable to the case at hand.

Finally question number 9, the material effect. First of all, the criterion has been constantly applied by the Appeals Chambers of this Court that the appellant bears the burden of demonstrating this requirement with sufficient precision, even when it concerns procedural errors such as the one which was at stake in the case of Prosecutor v. Bemba, 24 June 2012, which already refutes the argument of the counsel of Prosecution Mrs Brady when she said that for procedure errors the tests should be more flexible. The Appeals Chambers, both in the case of Prosecutor v. Kony and Bemba didn't differentiate between substantive errors and procedural errors.

Moreover, in the Prosecutor v. Ngudjolo case of 7 April 2015 you find that this requirement is even heightened in situations of acquittals, as held by the Appeals Chamber in that case, 7 April 2015, paragraph 284. It is not sufficient for the appellant to establish an error. That's the citation from the Appeals Chamber decision. The appellant is obliged not only to set out the alleged error, but also indicate with sufficient precision how this error would have materially affected the decision. And that criterion cannot be disturbed lightly, particularly in the case of an acquittal. These were the words of the Appeals Chamber in the Ngudjolo Appeals Chamber judgment.

You find the same requirement in various domestic jurisdictions, in my jurisdiction, the Dutch Supreme Court also demands from the appellant to demonstrate that the error caused material damage to his or her position, Article 359(a) of the Dutch Criminal Code.

The Prosecution in this case also this morning failed to identify the precise

impact of the errors of the decision, alleged errors of the decision. And despite its duty to show and to dispose of this burden, it did not give one single example, other than the argument that because the alleged errors were of a fundamental nature, that would have impacted upon the integrity of the proceedings. But again here no precision, Mr President, no explanation what effect did this have on the ultimate decision in this case.

Finally, Mr President, the Prosecution intends to rely on a lower standard for the materiality of the error requirement and relies on your concurring separate opinion in the Bemba case of 2018, in the paragraphs 82 till 85. But even -- and your Honours, you will acknowledge at that time that this was a standard which was a departure from the established test, but even when we were to apply this test, the Prosecution did not show that the alleged two procedural errors fundamentally compelled the view of likelihood that the Trial Chamber might have rendered a substantially different judgment had the error not occurred, or if the Chamber -- the Appeals Chamber could not be sure that the Chamber would have rendered the same judgment had the error not occurred.

Secondly, your separate concurring opinion related to the position of a convicted person appealing that conviction which could potentially of course lead to unfairness to a defendant. Here we're dealing with an appeal of the Prosecution and the difference is that the Prosecution bears the burden of proof and therefore the lowering of the standard of the material impact cannot be justified based on a reference to your separate opinion because this related simply to the position of the convicted person.

Mr President, this concludes our remarks.

Just one final observation. The Prosecution also this morning asked the question: How can the Appeals Chamber be sure that the Trial Chamber would have acquitted if the case would have continued? Well, to say to you, Mr President, as a final remark, absolute certainty is not required and it's certainly not a bar for dismissing the standard the Prosecution is asking for. Judges are called upon to make sometimes hypothetical assessments and projections at all times. Some level of uncertainty is a common denominator in any judicial proceeding, but here we're dealing with the test: Was there sufficient evidence upon which a Trial Chamber could convict? Therefore the Prosecution argument that the materially affect criterion need not to show with certainty is and should be rejected. Thank you very much.

PRESIDING JUDGE EBOE-OSUJI: [14:19:20] Thank you very much. So that concludes submissions on ground 1.

One second, please, a housekeeping matter.

(Pause in proceedings)

THE INTERPRETER: [14:19:41] Message from the interpreter: Could Mr Knoops please turn his microphone off, thank you.

PRESIDING JUDGE EBOE-OSUJI: [14:19:55] We note that the interpreters have been working overtime. I'm going to crave your indulgence for us to just do the 30 minutes of the Prosecutor today so we get it out of the way and so we have a fresh start tomorrow with a new person.

So Prosecutor, you will now start your ground 2. You do your 30 minutes today and we close it there. All right? So Prosecutor, you may begin ground 2.

MS NARAYANAN: [14:20:31] Good afternoon, your Honours. I'm

Priya Narayanan, appeals counsel for the Office of the Prosecutor, and I will be addressing you on ground 2 of our appeal.

Just a point of clarification before I begin, and this might come as some relief to the interpreters, I don't intend to take all of the 30 minutes, so I hope that will be all right.

Your Honours, the Prosecution has advanced two discrete but interlinked errors under this ground. The first error is a legal error. The majority erred in law by failing to direct itself to which standard of proof applied to the no case to answer proceedings. The second error is a procedural error. The majority erred procedurally when it conducted these no case to answer proceedings because it failed to set out a clear approach on how it would assess the evidence before it assessed that evidence. Both these errors occurred in 2018 and early 2019 when the no case to answer proceedings were begun in this case.

These errors and their impact manifested for the first time on 15 January 2019 when the majority Judges orally acquitted Mr Gbagbo and Mr Blé Goudé. And they were not cured by any explanation provided in the written reasons on the standard of proof six months later. Why? * Because by 15 January the errors had fundamentally ruptured the proceedings, casting doubt on the decision to acquit. Your Honours, it was too late to correct or change course in the written reasons. The proverbial horse had already bolted.

This afternoon I will briefly touch upon three issues that arise from the 22 May 2020 responses to your questions, particularly from the Defence submissions.

First, what is the standard of proof for a no case to answer proceeding at this

Court? That's question 10.

Second, did the majority Judges err when they acquitted Mr Gbagbo and Blé Goudé when they fundamentally disagreed on what that standard of proof should be and what was the impact of this error? That's questions 14 and 16.

And third, what standard of appellate review should you, your Honours, use to examine our second *ground of appeal? That's questions 17 to 19.

Before I turn to the issues, a point of clarification arising from Mr Gbagbo's * counsel's submissions this morning relating to ground 1. It was not entirely clear to us from his submissions who or what was meant, but the Prosecution has never argued that no case to answer proceedings should not exist at this Court, whether at trial or during the appeal proceedings. We accept and we follow the Appeals Chamber's pronouncement in Ntaganda that obviously permits no case to answer proceedings at this Court at a Trial Chamber's discretion.

Allow me to turn to the first issue, the no case to answer standard of proof. Mr Blé Goudé argues for the first time in his most recent submissions that each Trial Chamber at this Court should be left to define the standard at their discretion when they conduct such proceedings. Your Honours, this cannot be. There should be only one standard of proof governing all no case to answer proceedings at this Court across all Trial Chambers. It should not vary from Chamber to Chamber. Why is that? Because the standard of proof is the lens through which a Chamber assesses the evidence. While the evidence may differ from case to case, the lens must be constant across all cases. This ensures that all proceedings at this Court are guided by the same fundamental rules and remain predictable for the parties, the victims and the

international justice community. All cases before the Court and all accused persons, no matter the charges, are tried in the same fundamental circumstances to the extent possible.

This principle applies at conviction at trial, all Chambers must apply the same standard of proof set out in Article 66(3) of the Statute, that's beyond reasonable doubt. And the same principle applies at confirmation of charges, all Chambers must follow the standard of proof set out in Article 61(7).

So, your Honours, in this sense a no case to answer proceeding is no different. Like at confirmation or at final adjudication in no case to answer proceedings Chambers must consider if the evidence is sufficient for its purpose. They must use the same standard of proof to assess evidence, even if they might have differently adopted the admission or the submission evidentiary schemes to allow that evidence into the case.

The examples that Mr Blé Goudé provides, of witness preparation and questioning witnesses, do not show otherwise. A Chamber may legitimately exercise its discretion to adopt the practice of witness preparation in a case or not and likewise a Chamber may also legitimately exercise its discretion to adopt no case to answer proceedings in a case or not. But once they have exercised that discretion and decided to do so, they must, as a matter of law, adopt the same uniform standard of proof.

And what should this standard of proof for no case to answer proceedings at this Court be?

Your Honours, the one expressed in Ruto and Sang decision number 5, read within the Court's context where, unlike the strictly common law context, professional judges are also the triers of fact. In other words, whether there is

sufficient evidence introduced on which, if accepted, a reasonable trial chamber could reasonably convict the accused.

The no case to answer standard of proof must be based on the following three principles:

First, the emphasis at the halftime stage is on the phrase "could convict" or "could reasonably convict" and not on "would convict". Assessing guilt or applying the standard of beyond reasonable doubt is irrelevant at this stage.

On this point we note that Mr Blé Goudé's submissions, some of which asked the Chamber to assess guilt prematurely at the halftime stage, are internally inconsistent. If a Chamber cannot convict but only acquit at the halftime stage, and this is correct in our view, then the notion of beyond reasonable doubt, upon which a conviction rests, is also irrelevant at this stage.

THE COURT OFFICER: [14:29:36] I am sorry to interrupt you. We seem to have a problem with the French interpretation.

MR ALTIT: [14:30:03](Interpretation) Your Honour, with your leave I would like to answer what the French interpreters had to say. I did hear your question, but for a few minutes we did not have any interpretation into French. So I can't give you the entire duration of lack of French interpretation, but there was quite some time without any French booth activity.

PRESIDING JUDGE EBOE-OSUJI: [14:30:33] Mr Altit, can you help us. Do you remember the last thing you heard?

MR ALTIT: [14:30:48](Interpretation) Your Honour, that's a very difficult question to ask because I was following the line of argumentation and I think I would say something silly were I to say precisely where it stopped. I think the last five minutes or so. Let's say that for the last five minutes or so

probably we did not have any interpretation.

PRESIDING JUDGE EBOE-OSUJI: [14:31:22] Let's do this: Ms Narayanan.

MS NARAYANAN: [14:31:28] Yes, your Honour.

PRESIDING JUDGE EBOE-OSUJI: [14:31:30] Is it correct to say that your submissions are more or less what you have put down in your answers, in your written answers?

MS NARAYANAN: [14:31:44] Yes, certainly, your Honours. We've of course expanded on some points, but the answers, the written answers should certainly help to some degree.

PRESIDING JUDGE EBOE-OSUJI: [14:32:07] One second.

(Pause in proceedings)

PRESIDING JUDGE EBOE-OSUJI: [14:32:35] Mr Altit, is the interpretation now corrected? At least we know as we speak that you can get the interpretation?

MR ALTIT: [14:32:48](Interpretation) Your Honour, I can hear the French interpretation, yes.

PRESIDING JUDGE EBOE-OSUJI: [14:32:52] All right. Ms Narayanan, can you just try and look back sort of about, take a judgment call, about three, five minutes back and take it back from there.

MS NARAYANAN: [14:33:08] All right. Thank you very much, your Honour. I'll begin just from the point just before I started with the no case to answer standard. That should be adequate.

Your Honours, in the sense of both confirmation proceedings as well as final adjudication, a no case to answer proceeding is no different, and in no case to answer proceedings Chambers must use the same standard of proof to assess

evidence, even if they might have differently adopted the admission or the submission evidentiary schemes to allow that evidence into the case.

Now the examples that Mr Blé Goudé provides, of witness preparation and of questioning witnesses, do not show otherwise. Just as a Chamber can legitimately exercise its discretion to adopt the practice of witness preparation, so can the Chamber do the same to adopt no case to answer proceedings. But once they have exercised their discretion and decided to adopt no case to answer proceedings, they must, as a matter of law, adopt the same uniform standard of proof.

And what should this standard of proof for no case to answer proceedings at this Court be? The one expressed in Ruto and Sang decision number 5 read within the Court's context where, unlike the strictly common law context, professional judges are also the triers of fact. In other words, whether there is sufficient evidence introduced on which, if accepted, a reasonable trial chamber could reasonably convict the accused.

Your Honours, the no case to answer standard of proof must be based on the following three principles:

First, the emphasis at the halftime stage is on the phrase "could convict" or "could reasonably convict" and not on "would convict". Assessing guilt or applying the standard of beyond reasonable doubt is irrelevant at this stage.

And on this point we note that Mr Blé Goudé's submissions, some of which asked the Chamber to assess guilt prematurely at the halftime stage, are internally inconsistent. If a Chamber cannot convict but only acquit at the halftime stage, and this is correct in our view, then the notion of beyond reasonable doubt, upon which a conviction rests, is also irrelevant at this stage.

The no case to answer standard uses the phrase "could convict" to forecast what a reasonable Chamber could do in the circumstances, but this does not mean that the standard of proof to convict must itself be imported wholesale at the halftime stage.

Second, at the halftime stage the Prosecution's case must be taken at its highest. What does this mean? The Chamber cannot pick and choose among parts of the evidence. It must be assessed as a whole or looked at in the round.

Your Honours, the imperative to take the Prosecution's case at its highest at halftime is an obligation of process. But by arguing that a Chamber is not required to take the Prosecution's case at its highest if the case is patently weak, Mr Blé Goudé conflates this obligation of process with an obligation of result. It is only when the Chamber takes the case at its highest that it can determine if the case may go forward or if it is so weak that it must be terminated.

Third, in principle, a Chamber must not make exhaustive or fine determinations of questions of credibility and reliability at the halftime stage. But we note, of course, that a Chamber can, in exceptional circumstances, consider the strength of the case and questions of credibility and reliability, notably when the evidence is incapable of belief or when the Prosecution's case has completely broken down.

Your Honours, we accept that professional judges may form their own impressions of witnesses when they hear them or of other evidence when it is so presented. However, to fully respect the purpose of the no case to answer proceedings, if one is held, it is essential that the Chamber generally does not pronounce or express itself on questions relating to the strength of the case. To do otherwise would risk prejudging the case at halftime, if the case were to

go forward, or risk that the Chamber is barred from continuing to hear the case, if the case were then tem -- terminated, I beg your pardon, but that decision was overturned on appeal.

Turning to the second issue, the majority's disagreement and ambiguity on the standard of proof and its impact on their decision to acquit.

Your Honours, everyone, the Defence included, agrees that in principle judges must have absolute clarity on the relevant standard of proof when they apply it. But the Defence tried to explain the events of this case as a healthy judicial compromise. Your Honours, in our view, a workable judicial compromise between two judges exists when those two judges actually agree on a strong central core of key issues, including the standard of proof, although they may then choose to legitimately disagree or compromise on other issues.

So for instance, in Ruto and Sang, all the Judges agreed that they were conducting no case to answer proceedings. That was never in doubt. They also agreed on the could convict test at halftime, even though they expressed themselves differently on how best to interpret that test. Likewise, although Judge Fremr appeared to favour an acquittal, he agreed to the vacation of charges proposed by Judge Eboe-Osuji in the special circumstances of that case.

But a judicial compromise of this nature did not feature in the Gbagbo and Blé Goudé case. Rather, the majority differed on fundamental issues such as the standard of proof and whether one was even needed. This can be seen in two ways at least.

First, one of the majority Judges, Judge Tarfusser, did not consider that clarity on the standard of proof was necessary since in his view there was no evidence requiring the case to proceed to the Defence phase. And despite earlier

stating that such clarity was needed, Mr Blé Goudé seems to take the same view. But respectfully, your Honours, this puts the cart before the horse. One cannot determine that there is no evidence at the close of the Prosecution's case without first clarifying what standard of proof would apply to examine if there was indeed no such evidence.

Second, the majority were never united on what standard of proof applied. Although the Chamber in February 2018 called for the submission of no case to answer motions, apparently modelled on the Ruto and Sang approach, by June 2018, Judge Tarfusser seemed to have a different view when he clarified that he was not following the Ruto and Sang standard or approach. But he did not say what standard and approach would apply. Seven months later when the majority acquitted the two men on 15 January 2019, the majority said that the Prosecution had not discharged its burden of proof to the requisite standard under Article 66, but again, they did not refer to a standard of proof that they had used to assess the evidence as such. The very next day, on 16 January 2019, Judge Tarfusser said that the majority had not applied the beyond reasonable doubt standard. Six months later, on 16 July 2019, and for the first time in these proceedings, Judge Henderson articulated the Ruto and Sang decision number 5 standard of proof as the one he applied. But at the same time, however, in his separate opinion, Judge Tarfusser continued to express his view that the exercise that the Chamber undertook had not replicated the Ruto and Sang model. He maintained his view that no case to answer proceedings were unnecessary and that Article 66(3), the standard of proof for conviction, was the only way to terminate a case.

So in effect, your Honours, it appears that the majority Judges used two

different standards of proof, one, the Ruto and Sang no case to answer standard, and the other apparently the Article 66(3) beyond reasonable doubt standard to assess the evidence.

How then could their assessment of the evidence be considered joint, let alone reliable?

Put simply, your Honours, please consider this: A person wishes to drive you on a busy city road at night with oncoming traffic and glaring headlights. But rather than being able to see clearly, this person wrongly uses a pair of eyeglasses with two differently configured lenses. The right one is configured to nearsightedness and the left one to farsightedness. Could you trust that you would be safely delivered to your destination? And therein, your Honours, lies the impact of the majority's errors.

The majority --

PRESIDING JUDGE EBOE-OSUJI: [14:44:44] How much longer do you have to go? Be careful what examples you use. Go on.

MS NARAYANAN: [14:44:51] Your Honour, I believe I have only a few minutes. I should be done within five.

The majority took the most significant -- I'm sorry, your Honour, would that be all right?

PRESIDING JUDGE EBOE-OSUJI: [14:45:08] Yes. Proceed, please.

MS NARAYANAN: [14:45:12] Thank you.

The majority took the most significant step of acquitting the two men of serious charges without having clearly adopted and directed themselves on the appropriate standard of proof or reproach. And this also led to and can be seen in their erroneous assessment of the evidence. When the process of

adjudication is tainted, so is the decision to acquit, and this decision to acquit can hardly be considered reliable or to have led to a valid legal outcome at all. And moving to my third and final issue, the standard of appellate review that applies to ground 2. Because the errors in ground 2 are fundamentally legal and procedural in nature, we ask your Honours to assess them accordingly under the legal and procedural standards of appellate review. The six examples are only one aspect of this ground to demonstrate the larger procedural error and can be assessed in two alternative ways under the procedural standard of review, both approaches require the Appeals Chamber to review the majority's reasoning. Even if the six examples of factual findings were viewed as, quote, unquote, mini factual errors, under our second proposed approach, we have demonstrated their unreasonableness. They do not therefore deserve deference, whether deference is said to apply in the same manner at the halftime stage as at the conclusion of the Defence case or not. And finally, your Honours, the Prosecution, as the appellant, is entitled to bring the appeal it believes best characterises the nature of the errors, * and so it brought a legal and procedural appeal and not a factual one. Contrary to the Defence views, the Prosecution was not obliged to bring a factual appeal and to show that the majority's ultimate decision on the no case to answer motions were unreasonable. And in no circumstance, and this follows the position taken at the ad hoc tribunals, does the Prosecution need to eliminate all doubt of the acquitted person's guilt in an appeal against a halftime decision.

To impose this burden on the Prosecution in an appeal against a halftime decision is illogical since, unlike an appeal at the end of the Defence case, no

first instance Chamber has made a finding on guilt as yet and is in fact barred from considering questions of guilt at this stage.

The Ngudjolo decision that Mr Blé Goudé relies on applies to factual errors in an acquittal decision at the conclusion of the Defence case. Here, your Honours, we are not alleging factual errors and our appeal does not come at the end of the Defence case, but at halftime.

This should conclude my submissions and the Prosecution's on ground 2 for the moment, your Honours. Thank you very much.

PRESIDING JUDGE EBOE-OSUJI: [14:48:35] Thank you very much, Ms Narayanan.

And we have now come to the end of our proceedings for the day. Tomorrow we will reconvene and we will start with the counsel for victims.

The Court is adjourned.

THE COURT OFFICER: [14:48:58] All rise.

(The hearing ends in open session at 2.49 p.m.)