

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

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

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

5 I call on Judge Morrison.

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

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

8 Judge Hofmański.

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

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

12 Judge Ibáñez.

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

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

16 Judge Bossa.

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

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

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

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

1 whether they're in the courtroom or in a remote location.

2 When we get to the speaking part, the counsel who will be addressing
3 the Court in the submissions, of course the camera will pick them up at that
4 time.

5 So let us then take appearances, beginning with the Prosecution.

6 MS BRADY: [10:07:06] Good morning, your Honours.

7 Good morning, everybody in this virtual courtroom.

8 My name's Helen Brady and I'm the senior appeals counsel for the Prosecution.

9 And I'm here today in this virtual courtroom with the other members of
10 the Prosecution team, and all Prosecution members are participating in this
11 hearing remotely from different locations in The Hague.

12 And I'll introduce them: They are Mr Reinhold Gallmetzer, appeals counsel;
13 Ms Priyadarshini Narayanan, appeals counsel; Mr Matteo Costi, appeals
14 counsel; Ms Nivedha Thiru, assistant appeals counsel; Mr Eric MacDonald,
15 senior trial attorney; and Mr Fabricio Guariglia, the Director of Prosecution
16 Division.

17 Thank you.

18 PRESIDING JUDGE EBOE-OSUJI: [10:08:05] Thank you.

19 And counsel for Mr Gbagbo.

20 MR ALTIT: [10:08:20] (Interpretation) Good morning, Mr President, good
21 morning the Judges. * The defence team for Laurent Gbagbo today is made up
22 of Jennifer Naouri, Co-Counsel, who is in The Hague; Fiana Gantheret, in
23 France; Angèle Jeangeorge, who is in The Hague; Galadrièle Marchais and
24 Professor Jacobs, both of whom are equally in The Hague; and myself,
25 Emmanuel Altit, Lead Counsel, and I am in Paris."

1 PRESIDING JUDGE EBOE-OSUJI: [10:09:00] Before I proceed, I notice that
2 I was on the English channel. I did not receive interpretation. I don't know
3 whether I was the only one who had that difficulty. But please, someone
4 should look into it.

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

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

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

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

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

18 Thank you very much.

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

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

24 Appearing today in Abidjan, Mr Brahim Sako, field assistant to counsel. In
25 The Hague, in a remote location, Ms Ana Peña, case manager. And I'm

1 attending the hearing within the ICC premises, my name is Paolina Massidda
2 and I am the principal counsel.

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

4 (Redacted)

5 (Redacted)

6 MR ALTIT: [10:11:34] (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

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

16 MR ALTIT: (No interpretation)

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

19 (Redacted)

20 (Redacted)

21 (Redacted)

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

23 (Redacted)

24 (Redacted)

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

1 (Redacted)

2 (Redacted)

3 (Redacted)

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

5 (Redacted)

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

7 (Redacted)

8 The Appeals Chamber is convened to hear oral submissions in the appeal
9 of the Prosecutor against the judgment of Trial Chamber I, the verdict of which
10 was announced on 15 January 2019, with its reasons issued on 16 July 2019.

11 This is the first time that the Appeals Chamber has held a hearing in this
12 manner. It is due to the exceptional circumstances of the COVID-19 pandemic
13 in which we find ourselves.

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

21 This is a part virtual hearing, meaning that some people are participating from
22 the seat of the Court here in The Hague, either in the courtroom or in meeting
23 rooms, and others are appearing from separate locations outside the Court, and
24 some of them in distant countries. I would like to note that people appearing
25 from -- people appearing in the courtroom are properly distanced from one

1 another in accordance with the relevant health protocols. I should also expect
2 the participants outside the Court, they're also observing the COVID distancing
3 requirement required in the countries of their location.

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

8 Also, as I noted earlier, counsel, when addressing the Court, should be seated
9 while doing so, for technical reasons of camera angles.

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

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

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

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

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

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

25 The Prosecutor raises two grounds of appeal.

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

8 In the second ground of appeal, the Prosecutor contends that the majority erred
9 in law or procedure, or both, by acquitting Mr Gbagbo and Mr Blé Goudé
10 without properly articulating and consistently applying a clearly defined
11 standard of proof or approach to assessing the sufficiency of the evidence at
12 that stage.

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

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

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

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

1 As regards the session submissions on ground one and ground two, counsel
2 will be given 30 minutes each per ground to make their submissions. This is
3 followed by the sessions concerning remedy, where counsel will be given
4 20 minutes each to present their submissions. Then the questions will be
5 asked by the Bench, with 60 minutes allocated for this, and finally counsel will
6 be given 15 minutes to make roundup submissions.

7 In making submissions, counsel should clearly identify which question he or
8 she is speaking to. As much as possible, counsel should refrain from
9 repeating the arguments contained in their written submissions, where
10 possible.

11 Now I will invite submissions from counsel concerning ground 1.

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

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

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

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

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

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

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

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

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

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

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

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

25 The 15 January decision granting the Defence's motion for acquittal was a final

1 decision under Article 74, meaning one that determines that an accused is
2 either convicted or acquitted of the charges. Through that decision, the
3 majority acquitted both accused, it dismissed all charges against them, it
4 ordered their immediate release pursuant to Article 81(3), it terminated the trial
5 proceedings, and it triggered *ne bis in idem*. Mr Gbagbo and Mr Blé Goudé do
6 not contest any of these features of the decision. In fact, they argue that the
7 decision has all those effects. Mr Blé Goudé even agrees that final decisions
8 acquitting the accused are governed by Article 74. Yet he claims that the
9 appealed decision is not a final decision of acquittal. This is incorrect.
10 Mr Blé Goudé effectively argues that the Statute includes an unspecified legal
11 regime that allows a chamber to make final acquittal decisions with all its
12 effects but without complying with the requirements under Article 74(5). He
13 claims all the benefits of an acquittal decision under Article 74, without
14 adhering to the requirements - indeed, safeguards - under that provision.
15 This, your Honour, is legally incorrect, as a closer look at many of
16 Mr Blé Goudé's underlying arguments further shows.

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

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

1 MR GALLMETZER: [10:29:35] Okay, I shall slow down. I apologise.

2 Articles 66 or 67 do not constitute the procedural basis nor establish the
3 requirements for a final acquittal decision. Those decisions are instead
4 expressly governed by Article 74.

5 Question 2 on the interpretation of the term "decision" in Article 74:

6 The textual interpretation of Article 74 supports that this provision applies to
7 an acquittal, including when issued at the no case to answer stage. Exactly
8 because an acquittal is a final decision terminating the proceedings, the word
9 "decision" in Article 74 is used in the singular. The Chamber will only make
10 one such decision. The Chamber will base that acquittal decision on the entire
11 proceedings conducted up until that point, regardless of whether the Defence,
12 or even the victims or the Chamber have decided to present evidence.

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

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

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

22 Mr Blé Goudé's attempt to distinguish the nature of the decision from its effects
23 also does not support his argument. In this case the nature of the decision
24 cannot be detached from its effects. Regardless under which lens the decision
25 is examined, it always leads to the same conclusion: that it was an acquittal

1 decision under Article 74, which is the only provision under the Statute that
2 may trigger certain effects.

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

6 The effects of the decision directly flow from its nature. The Chamber ordered
7 the immediate release of Mr Gbagbo and Mr Blé Goudé and terminated the
8 proceedings against them. The acquittals further triggered *ne bis in idem* and
9 the appellate regime under Article 81.

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

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

17 Both defence teams further rely on the Ruto and Sang case to support their
18 arguments. However, the Ruto and Sang Chamber was not bound by
19 Article 74(5). This is because its decision was not a final decision of acquittal
20 comparable to the 15 January decision. It did not acquit the accused nor
21 produce all the effects of such a final decision of acquittal. In particular, it
22 vacated the charges without prejudice, therefore without triggering *ne bis in*
23 *idem*. Had the Ruto and Sang Chamber acquitted the accused and dismissed
24 the charges with prejudice, it would have had to enter a full acquittal in
25 accordance with Article 74(5). Judge Henderson held that Mr Gbagbo's and

1 Mr Blé Goudé's acquittals had the equivalent effects of a decision under
2 Article 74. To trigger those effects, the majority was required to comply with
3 the Article 74(5) requirements.

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

8 The analogy to Article 65 does not support his argument: First, Article 65 is
9 the only exception in the Statute. Where the drafters foresaw an alternative
10 legal basis for a final decision, they provided for that expressly. This confirms
11 the rule that all other final decisions are governed by Article 74. Second,
12 Article 65 is a very narrow exception. It can never be the legal basis for an
13 acquittal. Article 65(3) provides that if the conditions for a conviction are not
14 met, then the Trial Chamber will order that the trial be continued under the
15 ordinary trial procedures. This means that Article 74 remains the only
16 procedural basis under the Statute for acquittals.

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

24 Finally, question 8 on the requirements for an oral acquittal decision:
25 Both Mr Gbagbo and Mr Blé Goudé submit that the Statute allows for

1 a separation between the verdict and the reasoning. They argue that the
2 combination of the January verdict and the July reasons collectively meet the
3 requirements under Article 74(5). This is incorrect. One cannot combine
4 elements from separate judicial pronouncements to form a proper decision.
5 Judicial decision making is not a patchwork. An acquittal, and a conviction,
6 for that matter, must be made in one decision, which cannot be integrated,
7 amended, added to or corrected by the Trial Chamber at some later stage. In
8 this case, the accused were acquitted and the proceedings terminated through
9 the 15 January decision. In fact, on 16 January, the Chamber stated so
10 expressly, and I quote, "This concludes the trial as far as this Chamber is
11 concerned." End of quote.

12 Accordingly, the question in this appeal is not whether Judge Henderson's
13 reasons delivered six months later were sufficiently detailed, but whether the
14 15 January acquittal decision was consistent with Article 74(5). It was not.
15 Even if *arguendo* Article 74(5) allowed the majority some leeway to first provide
16 an oral summary of its reasons when acquitting the accused and then to defer
17 the full written reasons to a later stage, the 15 January decision failed to meet
18 the minimum requirements for such a summary.

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

24 The summary provided by Judge Fremr in the Ntaganda case is a good
25 example. It set out in some detail, (a), how the Chamber assessed the

1 evidence; (b) the Chamber's main factual findings; (c) the Chamber's findings
2 on the charged crimes and criminal responsibility; and (d) the Chamber's
3 overall conclusion on Ntaganda's guilt.

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

8 Second, to prevent the Chamber from engaging in result-driven reasoning, the
9 oral summary must clearly show that the Chamber has already made all its
10 findings and what will follow is merely the completion of the editorial process.

11 The 15 January decision did not show this. It included no reference to
12 the Chamber's finding on the evidence. It is unlikely that the Chamber spent
13 six months following the acquittal merely editing the full written reasons that
14 had already been drafted before. Instead, it appears that a substantive part of
15 the reasons were drafted only after the majority acquitted the accused.

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

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

1 This, your Honours, concludes my submissions and I am handing over to

2 Ms Brady to address you on the impact on the errors under ground 1.

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

4 Ms Brady.

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

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

8 To overturn a final decision on appeal, an appellant must show both the error,
9 or errors, and the impact of the error or errors on the decision. This comes
10 from Article 83(2), which requires that a legal or procedural error materially
11 affected the decision.

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

16 A Trial Chamber's written and public articulation of the reasoned basis for its
17 decision to convict or to acquit an accused is critical to its decision-making
18 process. The majority's violation of the requirements in Article 74 when

19 acquitting Mr Gbagbo and Mr Blé Goudé was no harmless procedural
20 irregularity; it tarnished the very essence of the judicial adjudicative process,

21 thereby affecting the reliability and the integrity of the decision itself. As a

22 result, a serious case of grave victimisation was, we say, wrongly stopped in its
23 tracks at the close of the Prosecution's case. This is how it materially affected
24 the decision.

25 Now, for legal and procedural errors, the test is that in the absence of the error,

1 the decision would have substantially differed from the one rendered. For
2 substantive legal issues, it's fairly straightforward to show that, but for the
3 error, the final decision would have been different, or there's a high likelihood
4 it would have been different.

5 But for procedural errors, and included here legal errors of a procedural nature,
6 especially where the Trial Chamber has failed to take action, the test should be
7 reasonably interpreted so as not to put an accused -- sorry, so as not to put an
8 appellant to an impossible proof. This is the *probatio diabolica* which the
9 dissenting judges in Ngudjolo spoke about. And as your Honour Judge
10 Eboe-Osuji said in Bemba in your separate opinion, an error will be material to
11 the final decision if there is a reasonable likelihood that the Trial Chamber
12 might have rendered a substantially different one had the error not occurred.
13 In other words, your Honours, if the appellate court could not be sure that the
14 trial court would have rendered the same judgment had the error not occurred.
15 Now the Defence argue that the majority would anyway have reached the
16 same conclusion that the evidence -- and in fact that they did reach that same
17 conclusion in July, that the evidence was incapable of sustaining a conviction.
18 And Mr Gbagbo takes this a step further and argues that, well, in any event,
19 if a retrial was ordered it would also lead to the same outcome.

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

1 But what we can say is that the majority's failure to render a proper reasoned
2 decision which complied with all the Article 74(5) requirements when
3 acquitting the two men was so fundamental that there is a reasonable
4 likelihood that they might have. At least, your Honours, the
5 Appeals Chamber cannot be sure that if the majority had not erred it would
6 still have granted the Defence motions and acquitted them.
7 Likewise, if a new Trial Chamber was appointed to retry the case, and
8 complied with all the requirements under 74(5), it could well conclude
9 differently. After all, the third judge in the case, Judge Herrera Carbuccia, she
10 did. She would have dismissed the motions and allowed the case to proceed.
11 Now, your Honours, you might think it is futile for us to make this argument
12 given that six months later, in July 2019, the majority gave their full written
13 reasons for acquitting the two men, for acquitting Mr Gbagbo and
14 Mr Blé Goudé. But by then the damage was already done. We argue this at
15 length in our brief.

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

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

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

9 What are these objective facts, apart from the one I've mentioned about the
10 admissibility -- the submission scheme regime being applied in this context?

11 The volume of the evidence. Let's remember there were 4,600 documents. I
12 think actually 4,610 documents and 96 witnesses in the Prosecution's case, and
13 of those 96 witnesses almost 40 gave written statements in whole or in part
14 under Article -- Rule 68(2) or (3).

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

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

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

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

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

23 And finally, the very fact that it took six months to issue those written reasons.

24 Those written reasons issued six months later cannot cure the deficiencies in
25 the January decision. And because of the real possibility of result-driven

1 reasoning, which my colleague Mr Gallmetzer has mentioned and we discuss
2 at length in our brief, the written reasoning that the majority gave six months
3 later does not prove that they would have reached that decision in any event.
4 Once the majority had made and announced its decision in January, it would
5 hardly have reversed course.

6 Secondly, your Honours, in any event, we can show that the decision would
7 have been substantially different. The essential and serious nature of the
8 violations of the Article 74 requirements so tainted the decision-making
9 process of the majority as to cast a pall of doubt over the reliability of the
10 decision and the integrity of its outcome. In other words, the requirements
11 mandated by Article 74 are so fundamental to ensuring a reliable decision that
12 without them the decision can barely be considered a valid legal outcome at all.

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

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

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

18 MS BRADY: [10:53:29] Yes. I just want to finish with an analogy.

19 Imagine, your Honours, you have a sporting match in which you have two
20 teams, team A and team B, and they're tied. In the last 30 seconds team A
21 scores a goal and is declared the winner. Team B may believe that the goal
22 was not properly awarded. But if it's discovered that the clock, the
23 timekeeping clock for the game was faulty and the game should have ended 30
24 seconds earlier, team B would not and need not challenge the game's outcome
25 based on whether the goal was correctly awarded or not. * A fundamental

1 procedural irregularity will have spoilt the game and ruptured its outcome.

2 Your Honours, the error here is of a similar nature, although obviously in
3 a different context.

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

7 Thank you.

8 PRESIDING JUDGE EBOE-OSUJI: [10:54:50] Thank you very much,
9 Ms Brady.

10 So we move on now to counsel for victims.

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

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

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

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

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

25 PRESIDING JUDGE EBOE-OSUJI: [10:56:28] Ms Massidda, can you repeat

1 that thought, because when you were about to start it there was a technical
2 intervention that cut out what you were trying to say.

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

4 I started my proposals indicating that victims support and endorse
5 the Prosecution arguments showing that the Trial Chamber, the majority,
6 committed several errors of law and procedure. But for victims it's also
7 important to stress that said errors are the result of extremely defective
8 proceedings and just the most illustrative of the Trial Chamber's overall failure
9 to conduct a fair trial, including vis-à-vis the victims.

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

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

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

25 The errors identified in the Prosecution appeal brief, to use the words of the

1 judgment in the Ngudjolo Chui case, fall within the scope of Article 64(2)
2 of the Statute, governing the Trial Chamber's powers for the proper conduct of
3 the proceedings and affect its core judicial duty to establish the truth.

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

8 In this sense, the right to a fair trial corresponds with the Chamber's ultimate
9 duty of ensuring fairness, expeditiousness and the establishment of the truth.

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

14 However, the victims' right to truth, justice and eventually reparation have
15 been prejudiced by the overall failure of the Trial Chamber to conduct fair
16 proceedings and even more so by the errors identified in the Prosecution brief.

17 In particular, the error of law and/or procedure regarding the violation of the
18 mandatory requirements of Article 74(5) of the Statute and the failure to
19 articulate and apply a clear standard of proof in deciding the no case to answer
20 motions deprive victims of a cogent enquiry into the crimes they suffered from
21 and, eventually, a remedy.

22 In deciding to entertain no case to answer motions, the Trial Chamber violated
23 victims' rights to truth and justice because no exceptional circumstances justify
24 the triggering of said procedure. By failing to define a proper standard of
25 proof, the Trial Chamber deprived victims of their ability to present properly

1 views and concerns and give properly instructions to their counsel. By
2 discarding without valid grounds the account of the five charged incidents, the
3 Trial Chamber also failed to shed light on the events victims suffered from.
4 This concludes, your Honour, my brief presentation on the main core interest
5 of victims in these proceedings. I will start now with some observation on
6 ground 1 and I'm looking for your guidance on whether this could be an
7 appropriate moment to pause.

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

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

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

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

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

16 Thank you.

17 (Recess taken at 11.03 a.m.)

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

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

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

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

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

25 It is my submission, your Honour, that the majority erred in law and/or

1 procedure failing to comply with the mandatory requirements of Article 74(5)
2 of the Statutes when orally acquitting Mr Gbagbo and Mr Blé Goudé through
3 an unreasoned and not fully informed oral decision, followed six months later
4 by the written reasons.

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

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

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

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

25 One, the difference between dismissing a no case to answer motion and issuing

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

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

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

9 In the Blagojević case, the Trial Chamber noted, and I quote:

10 "The effect of granting, in whole or in part, a motion pursuant to Rule 98 *bis* of
11 the Rules" - which is the provision governing before the tribunal a no case to
12 answer procedure - "is that a judgement of "acquittal" is entered [...]

13 End of quote.

14 And the reference for the record, is the Blagojević and Jokić case, decision of 23
15 April 2004, paragraph 11 to 13.

16 In the Karadzic case, the Trial Chamber further clarified that a judgment on a
17 successful no case to answer motion, and I quote again:

18 "[...] cannot be considered a decision, which requires certification before an
19 interlocutory appeal can proceed [...]" Differently from:

20 "[...] a decision to dismiss a Rule 98 *bis* motion, which does not involve the
21 Chamber rendering a judgement on the guilt of an accused, and remains
22 a decision, from which certification is required in order to appeal." End of
23 quote.

24 And the reference is the Karadzic case, decision of 13 July 2012 at paragraph 10,
25 a conclusion which was upheld by the Appeals Chamber in the same case with

1 the judgment of 11 July 2013, and I refer specifically to paragraph 9.

2 It can, therefore, be concluded that it is the final nature of an acquittal decision
3 and the applicability of the *ne bis in idem* regime that determines its nature of
4 final judgment and its direct appellate review.

5 Turning to the main errors identified in ground 1 of the Prosecution's appeal
6 brief and the majority's violation of the mandatory requirements of Article 74(5)
7 when acquitting the defendants, I concur with the Prosecution and with Judge
8 Herrera Carbuccion that the majority violated its legal obligation to deliver one
9 fully reasoned judgment in writing in open court by rendering instead an oral
10 decision acquitting Mr Gbagbo and Mr Blé Goudé on 15 January 2019.

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

13 First, the literal tenor of the provision requires that the decision be in writing.

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

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

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

7 Second, Article 74(5) also literally requires that the decision contain a full and
8 reasoned statement of a trial chamber's findings on the evidence and the
9 conclusions. The majority provided an insufficient explanation of how it
10 reached its findings. The reading of the conclusions and the verdict contained
11 in the oral decision of 15 January 2019 cannot for sure be considered a full and
12 reasoned statement of the findings, since the Trial Chamber did not even
13 provide a summary of the manner in which it reached its conclusions.

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

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

24 Rule 144(2) only refers to providing all participants in the proceedings with
25 copies of the decision of the Trial Chamber on the criminal liability of the

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

6 Nothing in Rule 144(2) contradicts the wording of Article 74(5) of the Statute.
7 Assuming *arguendo* that there is a contradiction between the two provisions,
8 then Rule 144 must always be interpreted and applied consistently with
9 Article 74(5) as required by Article 51(4) and (5) of the Statute.

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

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

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

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

24 The 15 January 2019 oral decision did not include the slightest reference to the
25 admissibility of particular pieces of evidence, not even the most relevant to the

1 majority's conclusions.

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

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

8 This approach has been adopted by the ad hoc tribunals and by the
9 Extraordinary Chambers in the Courts of Cambodia, which the pre-trial
10 chamber, in particular, found that the approach of delivering reasons at a later
11 date cannot apply to final procedural acts following which the issuing
12 authority is *functus officio*.

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

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

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

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

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

6 This statement by Judge Herrera Carbuccia seems supported by the fact that on
7 10 December 2018, the majority *proprio motu* scheduled a hearing then held on
8 13 December 2018, on the continued detention of the defendants, seeking the
9 views of the parties and participants on the appropriateness and modalities of
10 interim release.

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

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

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

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

23 Thank you very much.

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

1 minutes.

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

4 Thank you.

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

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

7 Your Honours, we thought that today we would be answering one prosecutor.

8 Now, in the light of the submissions of the Legal Representatives of Victims, it
9 would seem that today we are answering two prosecutors.

10 * Indeed, the Legal Representatives of Victims seems to be stepping outside
11 the legal framework of the appeals. She does not feel that she needs to follow
12 any particular rule, and is placing herself as a prosecutor bis coming back on
13 all sorts of fault that she's finding with the Trial Chamber, which is not
14 actually part of the Prosecutor's appeal. The Legal Representatives of Victims
15 is acting as a second prosecutor and this goes beyond the context of the appeal
16 and in so doing, affects the fairness and the equity of these proceedings.

17 We should, therefore, come back to the observations made by the Legal
18 Representatives of Victims before addressing those of the Prosecutor.

19 First of all, the LRV is calling into question the fact -- the manner in which the
20 Trial Chamber was conducted generally speaking, whilst as we showed in our
21 response to her written observations, she never complained about the
22 procedure during the proceedings itself; and secondly, she omits to say that
23 each procedural example that she gives has had as a consequence that the
24 Prosecutor had a large or great margin of manoeuvre and a great amount of
25 freedom to present its case as she deemed fit.

1 * For example, as Judge Henderson said when talking on behalf of the majority
2 Judges in their reasons, assessing the admissibility of evidence in the course of
3 the trial would have led to the exclusion of a large part of such evidence
4 upstream, leading to even stronger grounds to dismiss these allegations at the
5 “No case to answer” stage. And here, I would like to refer you to paragraph
6 41....

7 THE INTERPRETER: [12:13:21] Could counsel please be requested to slow
8 down when quoting. Please, could he please be requested to slow down.

9 MR JACOBS: [12:13:40] (Interpretation) And I refer you here to paragraph 41
10 (Overlapping speakers)

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

13 MR JACOBS: [12:13:59](Interpretation) * Thank you, Mr. President. I will
14 slow down. So I would refer you to paragraph 41 of the draft translation into
15 French of the grounds, and I quote:

16 If I had systematically assessed the credibility and reliability of the testimony,
17 witness statements -- witness testimony provided by the Prosecution, there
18 would be no -- even less reason to proceed in the case at bar in these
19 proceedings.

20 End of quote.

21 This point is important because it leads us to note that in this procedural
22 context, which -- the most favourable for him, the Prosecutor has not been to
23 demonstrate the existence of the alleged charges against the accused person.

24 *Now to come today to find fault with the Judges for having undermined the
25 fairness of the procedure by adopting practices that were in favour of the

1 Prosecution is not an admissible argument.

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

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

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

12 *Firstly, the LRV is acting as though the trial phase devoted to the presentation
13 of her case by the Prosecutor is an identical replay of the presentation of her
14 case during the confirmation of charges. So in other words, if we take our
15 case, the case at bar, in other terms if we take our case at bar, two days of
16 submissions, of oral submissions during the confirmation of charges would be
17 the equivalent of two years of presentation of her evidence on the part of the
18 Prosecutor during her trial.

19 And if we follow the logic of the LRV, we could, according to her, go directly
20 from the confirmation of charges phase to the Defence case because nothing * is
21 supposed to have changed in the Prosecutor's case between those two
22 moments in time.

23 Secondly, the contention on the part of the LRV tries to have us forget
24 specifically what happened in this case because in February 2018, the Chamber
25 had required, after the Defence filed its no case to answer, that the Prosecutor

1 submit a mid-trial brief that would indicate the manner in which the evidence
2 supports the charges. And I refer you to decision 1124, paragraph 9. * It was
3 necessary for the Prosecutor to file a mid-trial brief at the end of the
4 presentation of her case because it was impossible at that moment in time to
5 ascertain precisely what their case was, because their witnesses had given a
6 version of the events in-court that had not supported the charges.

7 *The Legal Representatives of Victims would have us understand that she was
8 limited by the Judges in the presentation of her evidence during the case, but
9 the reality is that she was entirely free to question the witnesses, and as we
10 recalled in our response to her observations, she often chose not to question the
11 victims or to reduce those questions to a bare minimum.

12 She also chose -- she also chose to not have witnesses come to testify and to
13 present evidence when the opportunity was provided to her. *In such
14 conditions, to suggest that the Judges did not allow the Legal
15 Representatives of Victims to play her role during the trial is not based on
16 reality. Now to come back to the Prosecutor's submission on her first ground
17 of appeal, the *raison d'être* of a no case to answer proceedings is the
18 safeguarding of the rights of the accused. No case to answer proceedings
19 follow a clear rationale. It would be unjust to compel the Defence to present
20 a case when the Prosecutor at the close of her case has failed to present the
21 Judges with sufficiently strong evidence to sustain a conviction.

22 This position follows on from the fact that the burden of proof is upon the
23 Prosecutor as a procedural consequence of the respect for the presumption of
24 innocence. In addition, one must preserve the interests of justice itself in
25 order not to unnecessarily prolong the proceedings. It is in the interest of all

1 involved to guarantee the efficiency of the proceedings and the reasonable
2 utilisation of the Court's means.

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

9 *In this context, we should note that in this case at bar, the Trial Chamber was
10 clearly guided during the no case to answer proceedings by the requirement to
11 safeguard the rights of the accused, and generally speaking, the Chamber
12 followed a procedure that was clear and respectful of the procedural rights of
13 all the parties and participants. It safeguarded the interests of justice in so
14 doing.

15 *In view of the time given over to the preparation of this hearing, and for the
16 presentation of our submissions during the hearing, I will only come back to a
17 number of points that illustrate the approach that is quite normal and
18 respectful of both the Rome Statute and the rights of Laurent Gbagbo, that was
19 adopted by the Trial Chamber when rendering its oral decision and written
20 reasons.

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

1 support of the charges and decided to acquit Laurent Gbagbo.

2 They entered this acquittal on 15 January 2019 with the immediate and logical
3 effect of Mr Gbagbo's release whilst they undertook to draft the written reasons.

4 Laurent Gbagbo's rights were at * the heart of the Judges' approach as they
5 would have been for any other judge in the same situation. What justice

6 would there have been in keeping an individual in detention - whom they
7 knew that they would acquit - for six additional months just to give them

8 enough time to finalise their written reasons? On the contrary, it would have
9 been a true injustice to proceed in such a manner. * And the Prosecutor is, to

10 all intents and purposes, finding fault with the Judges for having failed to
11 commit this injustice.

12 *We would note that both the Prosecutor and the LRV talk about Article 21(3)
13 of the Statute except when it comes to protecting the rights of the accused and
14 his fundamental rights to freedom. So by ignoring the fundamental rights of
15 Laurent Gbagbo, the Prosecutor contends that the Judges should strictly have
16 applied the Article 74(5) of the Statute.

17 A number of rapid observations on this point.

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

22 By making such a claim, the Prosecution choses to ignore, *both in her written
23 submissions and a short while ago in the courtroom, the clear precedent set out
24 in the Ruto case where the Judges entered a decision in a no case to answer
25 without relying on Article 74. The Prosecutor contends that *this precedent is

1 not applicable because the Judges had dismissed the charges rather than
2 acquitting. But nothing indicates in the Ruto decision that the Judges would
3 have gone about it any differently had they entered an acquittal rather than
4 dismissed the charges. Nothing indicates that they would have followed the
5 requirements of Article -- of Article 74(5).

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

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

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

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

21 *Flowing on from this, even if Article 74(5) is not formally applicable to a no
22 case to answer proceedings, it is normal for the Judges to seek inspiration from
23 this Article because it is -- it contains what the drafters of the Statute thought
24 the judges should do when issuing such a decision, namely, that they issue one
25 single decision, that they provide reasons for it, and that they render a public

1 decision.

2 So for the Defence of Laurent Gbagbo, it is not so much that one needs to
3 identify the Articles of the Statute that would automatically be applied to a no
4 case to answer proceedings, but rather to determine whether*, on a
5 case-by-case basis, the procedure followed by the Judges respected the spirit of
6 the Statute, which was drafted with a view to safeguarding the rights of the
7 accused.

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

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

15 One need only read Article 74(5) to the extent where one can seek inspiration
16 therein in the context of a no case to answer proceedings to see the requirement
17 for reasons *applies to the written decision, not the oral decision.

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

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

1 and I quote:

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

5 End of quote.

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

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

10 *The Prosecutor is acting as though the Judges embarked on a no case to
11 answer proceedings without knowledge of the case, without having sat
12 through two years of trial during which they familiarised themselves with the
13 Prosecutor's case through witness testimony and the tendering of evidence.
14 The Judges did not make their first acquaintance with the Prosecutor's case
15 when the Defence filed its no case to answer motion. They did not have to
16 wait until the end of the hearings in November 2018 to be familiar with the
17 substance of the Prosecutor's case.

18 *The Defence notes that the Prosecutor is reproaching the majority judges, and
19 yet such a reproach in fact applies to the three judges of the Chamber given
20 that, as early as January 2019, in the same circumstances, Judge Carbuccia was
21 of the opinion that she could continue with the proceedings. And if, as far back
22 as January 2019, Judge Carbuccia was able to have an opinion on the
23 Prosecutor's case, the Prosecutor should understand that the same is true for
24 the majority judges. Let us go further and, for the purposes of the discussion,
25 temporarily set aside the "no case to answer" proceedings. In all logic,

1 considering that the burden of proof rests with the Prosecutor, the judges
2 should in theory be able to determine whether or not the Prosecutor had
3 proven the charges at the end of the presentation of her case in the Spring of
4 2018, and solely on the basis of the prosecution evidence. Let us be clear about
5 that...

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

7 Mr Jacobs, can you repeat --

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

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

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

13 (Pause in proceedings)

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

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

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

23 Thank you.

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

1 talking about.

2 *The last point... the last but one point I wished to underscore is that the
3 Prosecutor is reproaching the majority judges for not having had the time to
4 analyze the Prosecutor's evidence in its entirety before handing down the
5 acquittal decision in January 2019.

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

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

8 PRESIDING JUDGE EBOE-OSUJI: [12:38:54] Mr Jacobs, can you just
9 (Overlapping speakers)

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

12 MR JACOBS: [12:39:07] (Interpretation) Yes, it is perfect now, Mr President.

13 *Now, the point I was making is that if the Prosecutor is reproaching the
14 majority judges for not having had the time to analyze all the Prosecution
15 evidence prior to issuing the acquittal in January 2019, the Prosecutor should
16 equally make the same reproach against Judge Carbuccia who, in the same
17 circumstances as the majority judges, was of the view, in January 2019, that the
18 Prosecutor's evidence was sufficient to continue with the trial. This
19 presupposes that she had had the time to analyze it

20 (Pause in proceedings)

21 MR JACOBS: [12:40:48] (Interpretation) *Is everything ok with interpretation?

22 Mr President, if you can give me a second. I crave your indulgence

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

1 (Pause in proceedings)

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

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

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

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

19 MR JACOBS: [12:43:46] (Interpretation) Thank you, your Honour. Now
20 these will have been points that will have been made in a clear and repetitive
21 manner, will they not?
22 So the penultimate point that I was making was to ascertain how it is that the
23 Prosecutor when he finds or she finds fault with the majority Judges for having
24 issued a decision in January 2019, without having had the time to analyse all of
25 the Prosecution evidence, why is it that fault is not found in a similar manner

1 with Judge Carbuccia who, under the very same conditions, with the same
2 time, was in a position to be able to claim in January 2019 that the Prosecutor
3 file was sufficiently solid or strong -- or the Prosecutor's case was sufficiently
4 solid or strong.

5 *Now the other point that I was making, if we put to one side the no case to
6 answer proceedings, it is normal at the end of the Prosecutor's case in the
7 spring of 2018, for the Judges to have been able to make their minds up about
8 the solidity of the Prosecution case, and ascertain whether it was possible to
9 determine if the Prosecutor had proved the charges beyond reasonable doubt.

10 *Under these conditions, is it not therefore normal for a Judge who has taken
11 part or been in attendance during the entire presentation of the Prosecution
12 evidence over a two-year period, is it not therefore normal that this Judge
13 would be capable of having a clear idea as to the strength or weakness of the
14 Prosecution case, and this independently from the fact that the Defence has
15 filed a no case to answer motion.

16 Let us say clearly the fact that a judge has a clear idea of what the Prosecutor's
17 case is at the end of the presentation of the Prosecution case cannot be said to
18 be a biased position contrary to that suggested by the Prosecutor. *This is a
19 normal part of the judicial function of a judge.

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

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

1 Perhaps what we can do in the meantime, if the court officer, who is assisting
2 me, see if anybody else's microphone is on, we can turn those off. I don't
3 know if that the problem, but try that and see.
4 She's shaking her head. That's not -- so everybody's microphone is off. Okay.
5 So there are only two microphones on, mine and yours as well as the
6 interpreters.
7 Can you try again, please? I know we've taken -- we've slowed you down,
8 don't worry we will add that time we have taken. We will give it back to you.
9 Is that better now?

10 MR JACOBS: [12:49:10] (Interpretation) * I shall repeat the last sentence that I
11 uttered.

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

16 *One last point on the oral decision before I move on to the written decision.

17 The Prosecutor is finding fault with the majority Judges for having not
18 undertaken an assessment of *the admissibility of the entirety of the
19 evidence ... This position would seem quite a strange one to us because,
20 firstly, the Prosecutor has spent the entire duration of the no case to answer
21 proceedings stating that one should not be examining the strength of his
22 evidence and that the evidence should be considered at its highest; and
23 secondly, and I recall this point earlier on, this position of the Judges was after
24 all favourable to the Prosecutor. Because as I said at an earlier stage, Judge
25 Henderson recalled that had he been interested or looked in more depth at the

1 Prosecution evidence in terms of credibility, admissibility et cetera, he would
2 have had yet more reason to exclude a large portion of this evidence and to
3 dismiss the charges.

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

9 (Pause in proceedings)

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

14 * PRESIDING JUDGE EBOE-OSUJI: [12:53:40] Thank you very much.
15 We will now rise, it is 12.45, we should be coming -- so, we should have risen at
16 12.45 to return at 1.30.

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

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

19 (Recess taken at 12.54 p.m.)

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

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

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

23 Mr Jacobs, you may continue for another five minutes.

24 MR JACOBS: [13:37:01] (Interpretation) Thank you very much, your Honour.*

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

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

2 MR JACOBS: [13:37:18] (Interpretation) Have the interpretation issues been
3 solved or not? As I don't know quite when the technical issue arose, I'm not
4 sure whether everything that I have said during the first part of *my
5 intervention has indeed been placed on the record.

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

11 MR JACOBS: [13:37:54] (Interpretation) Thank you, your Honour.
12 Your Honours, one last word as to the written reasons. The majority Judges
13 perfectly respected the requirement that the spirit of the Statute imposed upon
14 them, that of providing a reasoned decision, because the 950 pages of
15 Judge Henderson's reasons, supported by Judge Tarfusser, lead the parties
16 and participants and general public to understand just how it is that the Judges
17 were of the opinion on the basis of a standard of proof that has been clearly
18 exposed and explained and by virtue of the fact that the Prosecution case is so
19 weakness -- is so weak there was indeed absolutely no case to answer at the
20 end of the Prosecution case.

21 The arguments of the Judges is not only detailed but also exhaustive and
22 provides a legally and factually founded *demonstration of the manner in
23 which the Judges understood the Prosecution evidence.

24 Furthermore, it is apparent, without any ambiguity whatsoever from
25 Judge Tarfusser's opinion, that he entirely adopted the factual and legal

1 detailed conclusions of Judge Henderson's reasons. Because in paragraph 1 of
2 his opinion, which is 1263, filing 1263, and I quote: In providing the reasons
3 of the majority judges, I am in support, full support of the legal and factual
4 findings outlined in Judge Henderson's written reasons. End of quote.

5 However, the Prosecutor once again is calling into question the professional
6 integrity of the Judges *by suggesting... by saying in her appeal brief that the
7 Judges would not have deliberated together. Such an unfounded attack on the
8 teamwork of the Judges is serious and could not prosper before an Appeals
9 Chamber.

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

17 *So it is quite striking for us to note that this judgment of over 900 pages is
18 conspicuous by its absence in the Prosecutor's appeal.

19 In fact, the Prosecutor herself concedes that she does not call into question the
20 standard of proof adopted as detailed in the reasons of the majority Judges.

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

23 MR JACOBS: [13:43:00] (Interpretation) *Your Honour, I need two more
24 minutes, if you don't mind. I spoke extremely slowly in order to enable the
25 interpretation to go ahead.

1 PRESIDING JUDGE EBOE-OSUJI: Two minutes.

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

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

4 MR JACOBS: [13:43:17] (Interpretation) *

5 So the Prosecutor does not call into question the standard of proof at appeal,
6 nor does he call into question the acquittal because he indicates in paragraph
7 129 of his appeal brief that he does not call into question the general
8 conclusions reached by the Chamber. And this is why quite naturally the
9 Prosecutor is incapable of showing that * the alleged errors might have had
10 any impact whatsoever upon the Impugned Decision, saying as a pretext and
11 in order to circumvent the issue that it is not up to her to show that there was
12 such an impact.

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

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

20 Thank you, your Honour.

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

22 Mr Jacobs.

23 Now we will invite counsel for Mr Gbagbo to make submissions. He's in the
24 courtroom with us and I also again, I'm sure you did say it when you were
25 making the appearances, but because Mr Blé Goudé is in the courtroom and I

1 see him, so I did not make a point of mentioning the matter, but I think that
2 resolves it. So he is in the courtroom with us sitting with you.

3 Please proceed, Counsel.

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

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

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

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

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

22 I refer in specific to paragraph 22 of the Appeals Chamber decision of
23 19 December 2011 in the Mbarushimana decision, it's a decision which is also
24 mentioned in our Defence response that the jurisprudence of the Appeals
25 Chamber addresses the question in the context of Article 82(1)(b) of the Statute

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

9 You find a similar reasoning, your Honours, in the Appeals Chamber decision
10 29 January 2007 in the case of Prosecutor versus Lubanga, paragraphs 15 till 16.
11 When we apply this reasoning, your Honours, of the ICC Appeals Chambers to
12 the instant appeal, the fact that the Chamber granted the Defence request to file
13 a no case to answer and that it might have led, in its effect, to the acquittal of
14 Mr Charles Blé Goudé is therefore not decisive for the legal regime, as it does
15 not in any way change the type or nature of the decision itself, which, as
16 mentioned by the Appeals Chamber, does not depend on its ultimate outcome.

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

22 Second argument to refute the Prosecution and LRV submissions is that in their
23 answers they do not address the Defence argument that under the Statute not
24 all decisions which result in a conviction or acquittal of a person and which
25 triggers the *ne bis in idem* principle are all governed by Article 74, such as

1 decisions on the admission of guilt.

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

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

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

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

22 In her dissenting opinion, paragraph 67, honourable Judge Carbuccia Herrera
23 writes the following observation, I quote: "Moreover, the subjective or
24 mental element must be analysed taking into [account] that this is a halfway
25 decision, and not" and not, Mr President, "a decision pursuant to Article 74 of

1 the Statute, which would require a higher evidentiary standard vis-à-vis the
2 mental element." Unquote.

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

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

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

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

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

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

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

21 The Prosecution in its answers to the questions of the Bench, and also the LRV,
22 and that was in specific question 4(c), mentioned the Ntaganda jurisprudence.
23 We respond that the decided Ntaganda jurisprudence could be of guidance
24 insofar as it underlines the totally different nature, the discretionary nature of
25 the entire NCTA procedure in contrast to the procedure leading to a final

1 judgment. And this is exactly also the difference with the system of the ICTY,
2 the possibility to file an NCTA decision is not discretionary for the judges, but
3 it's a right for the Defence.

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

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

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

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

1 the -- for those who really are criminally liable could continue.

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

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

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

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

1 74 does not apply to NCTA decisions, which is supported by, as mentioned,
2 the dissenting opinion of Judge Carbuca Herrera and Judge Fremr.
3 In other words, we should not be looking solely at the effect of the decision and
4 simply apply Article 74 by analogy because it is convenient for the Prosecution.
5 And even if we would follow the Prosecution's position, we can remind the
6 Chamber, which has been mentioned by our learned friend from the
7 Mr Gbagbo team, that the Chamber clearly abided by the requirements of
8 Article 74(5) and it had in that respect not triggered any error.

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

15 By providing the possibility to deliver a summary of the decision in open court,
16 the plain text of Article 74(5), which the Prosecution is so keen to interpret,
17 acknowledges that at the minimum that a disassociation in space and time
18 between the oral decision and the full written decision is possible and when the
19 text of the law is silent as to any order in which these two acts should be
20 passed or even within which time frame, the possibility to issue a summary in
21 open court should be an indication, if any, that the Chambers of the ICC are not
22 prohibited under the current regime from delaying the issuance of their
23 reasons. You find in our written submissions in paragraph 72 some
24 authorities in this regard, ICTR authorities, and even the Prosecution in its
25 document in support of appeal under paragraph 31 refers to also other

1 domestic courts and procedures such as the German criminal procedure which
2 allows judges to separate the reasons from the verdict while ensuring that at
3 the time of the verdict a summary of the essentials be read out.

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

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

20 In the present case we can observe that the Prosecution failed to adduce
21 evidence that the written decisions were an after-the-fact justification, an
22 after-the-fact justification for the decision. It's utterly clear from the decision
23 that the majority Judges did not find themselves in the situation where they
24 had to come to a definite conclusion, yet later found that that conclusion was
25 indefensible when they wrote their opinion. There are numerous statements

1 in either Judge Henderson's or Judge Tarfusser's opinion, leaving no doubt
2 whatsoever to the reader of the judgment that the outcome of this trial was
3 based on an obvious and sustainable conclusion which did not change to the
4 slightest since 15 January 2019. And you find in our response to the
5 Prosecution -- Defence -- the Prosecution appeal brief footnote 123, all those
6 references which clearly show there was no disagreement between Judge
7 Henderson and Judge Tarfusser on this -- in this regard.

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

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

22 First the Bagosora case, which is cited by the Prosecution in paragraphs 23-25
23 of its answers, it's a case which totally differs from the case at hand. In that
24 situation the Appeals Chamber tried to determine whether or not Judge Reddy,
25 whose mandate had expired between the issuance of the oral summary and the

1 written decisions, had fulfilled his judicial duty in full prior to the expiration of
2 his mandate.

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

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

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

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

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

20 In the instant case the situation is quite different.

21 Finally on the point of question 8, the jurisprudence cited by the LRV, the
22 jurisprudence of the European Court of Human Rights does not support its
23 argument that the question when reasons should be issued was at hand. The
24 European Court addressed simply the question what the reasons should
25 contain and the degree of details they should handle. Therefore also this case

1 law is not applicable to the case at hand.

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

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

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

24 The Prosecution in this case also this morning failed to identify the precise
25 impact of the errors of the decision, alleged errors of the decision. And

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

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

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

24 Mr President, this concludes our remarks.

25 Just one final observation. The Prosecution also this morning asked the

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

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

13 One second, please, a housekeeping matter.

14 (Pause in proceedings)

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

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

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

24 MS NARAYANAN: [14:20:31] Good afternoon, your Honours. I'm
25 Priya Narayanan, appeals counsel for the Office of the Prosecutor, and I will be

1 addressing you on ground 2 of our appeal.

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

5 Your Honours, the Prosecution has advanced two discrete but interlinked
6 errors under this ground. The first error is a legal error. The majority erred
7 in law by failing to direct itself to which standard of proof applied to the no
8 case to answer proceedings. The second error is a procedural error. The
9 majority erred procedurally when it conducted these no case to answer
10 proceedings because it failed to set out a clear approach on how it would assess
11 the evidence before it assessed that evidence. Both these errors occurred in
12 2018 and early 2019 when the no case to answer proceedings were begun in
13 this case.

14 These errors and their impact manifested for the first time on 15 January 2019
15 when the majority Judges orally acquitted Mr Gbagbo and Mr Blé Goudé.

16 And they were not cured by any explanation provided in the written reasons
17 on the standard of proof six months later. Why? * Because by 15 January the
18 errors had fundamentally ruptured the proceedings, casting doubt on the
19 decision to acquit. Your Honours, it was too late to correct or change course
20 in the written reasons. The proverbial horse had already bolted.

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

24 First, what is the standard of proof for a no case to answer proceeding at this
25 Court? That's question 10.

1 Second, did the majority Judges err when they acquitted Mr Gbagbo and
2 Blé Goudé when they fundamentally disagreed on what that standard of proof
3 should be and what was the impact of this error? That's questions 14 and 16.
4 And third, what standard of appellate review should you, your Honours, use
5 to examine our second *ground of appeal? That's questions 17 to 19.

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

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

1 persons, no matter the charges, are tried in the same fundamental
2 circumstances to the extent possible.

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

7 So, your Honours, in this sense a no case to answer proceeding is no different.

8 Like at confirmation or at final adjudication in no case to answer proceedings

9 Chambers must consider if the evidence is sufficient for its purpose. They

10 must use the same standard of proof to assess evidence, even if they might

11 have differently adopted the admission or the submission evidentiary schemes

12 to allow that evidence into the case.

13 The examples that Mr Blé Goudé provides, of witness preparation and

14 questioning witnesses, do not show otherwise. A Chamber may legitimately

15 exercise its discretion to adopt the practice of witness preparation in a case or

16 not and likewise a Chamber may also legitimately exercise its discretion to

17 adopt no case to answer proceedings in a case or not. But once they have

18 exercised that discretion and decided to do so, they must, as a matter of law,

19 adopt the same uniform standard of proof.

20 And what should this standard of proof for no case to answer proceedings at

21 this Court be?

22 Your Honours, the one expressed in Ruto and Sang decision number 5, read

23 within the Court's context where, unlike the strictly common law context,

24 professional judges are also the triers of fact. In other words, whether there is

25 sufficient evidence introduced on which, if accepted, a reasonable trial

1 chamber could reasonably convict the accused.

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

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

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

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

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

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

21 MR ALTIT: [14:30:48](Interpretation) Your Honour, that's a very difficult
22 question to ask because I was following the line of argumentation and I think
23 I would say something silly were I to say precisely where it stopped. I think
24 the last five minutes or so. Let's say that for the last five minutes or so
25 probably we did not have any interpretation.

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

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

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

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

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

10 (Pause in proceedings)

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

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

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

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

22 Your Honours, in the sense of both confirmation proceedings as well as final
23 adjudication, a no case to answer proceeding is no different, and in no case to
24 answer proceedings Chambers must use the same standard of proof to assess
25 evidence, even if they might have differently adopted the admission or the

1 submission evidentiary schemes to allow that evidence into the case.

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

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

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

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

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

25 The no case to answer standard uses the phrase "could convict" to forecast

1 what a reasonable Chamber could do in the circumstances, but this does not
2 mean that the standard of proof to convict must itself be imported wholesale at
3 the halftime stage.

4 Second, at the halftime stage the Prosecution's case must be taken at its highest.

5 What does this mean? The Chamber cannot pick and choose among parts of
6 the evidence. It must be assessed as a whole or looked at in the round.

7 Your Honours, the imperative to take the Prosecution's case at its highest at
8 halftime is an obligation of process. But by arguing that a Chamber is not
9 required to take the Prosecution's case at its highest if the case is patently weak,

10 Mr Blé Goudé conflates this obligation of process with an obligation of result.

11 It is only when the Chamber takes the case at its highest that it can determine if
12 the case may go forward or if it is so weak that it must be terminated.

13 Third, in principle, a Chamber must not make exhaustive or fine
14 determinations of questions of credibility and reliability at the halftime stage.

15 But we note, of course, that a Chamber can, in exceptional circumstances,
16 consider the strength of the case and questions of credibility and reliability,
17 notably when the evidence is incapable of belief or when the Prosecution's case
18 has completely broken down.

19 Your Honours, we accept that professional judges may form their own
20 impressions of witnesses when they hear them or of other evidence when it is
21 so presented. However, to fully respect the purpose of the no case to answer
22 proceedings, if one is held, it is essential that the Chamber generally does not
23 pronounce or express itself on questions relating to the strength of the case.

24 To do otherwise would risk prejudging the case at halftime, if the case were to
25 go forward, or risk that the Chamber is barred from continuing to hear the case,

1 if the case were then terminated, I beg your pardon, but that decision
2 was overturned on appeal.

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

5 Your Honours, everyone, the Defence included, agrees that in principle judges
6 must have absolute clarity on the relevant standard of proof when they apply it.

7 But the Defence tried to explain the events of this case as a healthy judicial
8 compromise. Your Honours, in our view, a workable judicial compromise

9 between two judges exists when those two judges actually agree on a strong
10 central core of key issues, including the standard of proof, although they may
11 then choose to legitimately disagree or compromise on other issues.

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

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

22 First, one of the majority Judges, Judge Tarfusser, did not consider that clarity
23 on the standard of proof was necessary since in his view there was no evidence
24 requiring the case to proceed to the Defence phase. And despite earlier
25 stating that such clarity was needed, Mr Blé Goudé seems to take the same

1 view. But respectfully, your Honours, this puts the cart before the horse.

2 One cannot determine that there is no evidence at the close of the Prosecution's
3 case without first clarifying what standard of proof would apply to examine if
4 there was indeed no such evidence.

5 Second, the majority were never united on what standard of proof applied.

6 Although the Chamber in February 2018 called for the submission of no case to
7 answer motions, apparently modelled on the Ruto and Sang approach, by

8 June 2018, Judge Tarfusser seemed to have a different view when he clarified
9 that he was not following the Ruto and Sang standard or approach. But he

10 did not say what standard and approach would apply. Seven months later

11 when the majority acquitted the two men on 15 January 2019, the majority said

12 that the Prosecution had not discharged its burden of proof to the requisite

13 standard under Article 66, but again, they did not refer to a standard of proof

14 that they had used to assess the evidence as such. The very next day, on

15 16 January 2019, Judge Tarfusser said that the majority had not applied the

16 beyond reasonable doubt standard. Six months later, on 16 July 2019, and for

17 the first time in these proceedings, Judge Henderson articulated the Ruto and

18 Sang decision number 5 standard of proof as the one he applied. But at the

19 same time, however, in his separate opinion, Judge Tarfusser continued to

20 express his view that the exercise that the Chamber undertook had not

21 replicated the Ruto and Sang model. He maintained his view that no case to

22 answer proceedings were unnecessary and that Article 66(3), the standard of

23 proof for conviction, was the only way to terminate a case.

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

25 different standards of proof, one, the Ruto and Sang no case to answer

1 standard, and the other apparently the Article 66(3) beyond reasonable doubt
2 standard to assess the evidence.

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

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

12 The majority --

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

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

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

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

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

21 The majority took the most significant step of acquitting the two men of serious
22 charges without having clearly adopted and directed themselves on the
23 appropriate standard of proof or reproach. And this also led to and can be
24 seen in their erroneous assessment of the evidence. When the process of
25 adjudication is tainted, so is the decision to acquit, and this decision to acquit

1 can hardly be considered reliable or to have led to a valid legal outcome at all.
2 And moving to my third and final issue, the standard of appellate review that
3 applies to ground 2. Because the errors in ground 2 are fundamentally legal
4 and procedural in nature, we ask your Honours to assess them accordingly
5 under the legal and procedural standards of appellate review. The six
6 examples are only one aspect of this ground to demonstrate the larger
7 procedural error and can be assessed in two alternative ways under the
8 procedural standard of review, both approaches require the Appeals Chamber
9 to review the majority's reasoning. Even if the six examples of factual
10 findings were viewed as, quote, unquote, mini factual errors, under our second
11 proposed approach, we have demonstrated their unreasonableness. They do
12 not therefore deserve deference, whether deference is said to apply in the same
13 manner at the halftime stage as at the conclusion of the Defence case or not.
14 And finally, your Honours, the Prosecution, as the appellant, is entitled to
15 bring the appeal it believes best characterises the nature of the errors, * and so
16 it brought a legal and procedural appeal and not a factual one. Contrary to
17 the Defence views, the Prosecution was not obliged to bring a factual appeal
18 and to show that the majority's ultimate decision on the no case to answer
19 motions were unreasonable. And in no circumstance, and this follows the
20 position taken at the ad hoc tribunals, does the Prosecution need to eliminate
21 all doubt of the acquitted person's guilt in an appeal against a halftime
22 decision.
23 To impose this burden on the Prosecution in an appeal against a halftime
24 decision is illogical since, unlike an appeal at the end of the Defence case, no
25 first instance Chamber has made a finding on guilt as yet and is in fact barred

1 from considering questions of guilt at this stage.

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

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

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

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

12 The Court is adjourned.

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

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