International Criminal Court
Appeals Chamber
Situation: Republic of Côte d'Ivoire
In the case of The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé
ICC-02/11-01/15
Presiding Judge Chile Eboe-Osuji, Judge Howard Morrison, Judge Piotr Hofmański, Judge Luz del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa
Appeals Hearing - Courtroom 1 via Interactio
Wednesday, 24 June 2020
(The hearing starts in open session at 10.01 a.m.)
THE COURT OFFICER: [10:01:03] All rise.
The International Criminal Court is now in session.
Please be seated.
PRESIDING JUDGE EBOE-OSUJI: [10:01:32] Thank you very much, court officer.
And welcome back everyone. We will again continue without fresh appearances, unless any team has experienced a change in their lineup, in which case I would like to see a show of electronic hands.
Seeing none, then we will proceed.
We will proceed in this way. The question that Judge Ibáñez asked yesterday was to everyone, but we will do this: Everyone, please take a minute or two, no more than two, to speak directly to the point, to the key point. Because this question is for everyone, we are constrained on time. There are a lot more questions for counsel to also address.
Anything that's left unsaid, you will have at the end an opportunity of rounding up submissions to address any issue that you were not given enough of a chance to

address in the round of questioning.

Judges will try, of course, to direct questions to particular counsel, if possible, without the need for every counsel to want to speak to that question at that time. Again, noting that at the end of the proceedings, towards the end, there is a time reserved for all counsel to speak.

The reason for all of this, as you know, this is the first time we're doing hearings in this format and we have been careful to schedule it such that we did not irritate the electronic system too much, so we were not elaborate in the time we wanted to do this.

So we will then commence with the question from Judge Ibáñez.

OTP, please, a minute or two.

MS NARAYANAN: [10:04:00] Good morning, your Honours.

Judge Ibáñez, your Honour, you asked yesterday how can the Appeals Chamber be sure that Judge Tarfusser did not apply the higher standard of proof as he was assessing the evidence he heard.

Your Honours, the Appeals Chamber cannot be sure that Judge Tarfusser did not apply the higher beyond reasonable doubt standard. In fact, based on the available evidence, we see two possibilities in terms of what Judge Tarfusser may have done, but neither of these possibilities entails his full endorsement of the no case to answer process that Trial Chamber I undertook or the no case to answer standard of proof reflected in Ruto and Sang, and that was ultimately reflected in his fellow majority Judge, Judge Henderson's approach.

Now the first possibility, and this is the most likely, and because it is based on his own express words in the 16 July separate opinion, is that he actually applied the higher standard of proof for conviction incorrectly at the halftime stage because he

said that Article 66(3) was the only evidentiary standard upon which the proceedings at this Court could be terminated. Presumably his separate opinion was his final word in the case and captured his views on the no case to answer standard of proof.

PRESIDING JUDGE EBOE-OSUJI: [10:05:34] Could you slow down. Take it pace, pace.

MS NARAYANAN: [10:05:38] Yes. I'm sorry. Sorry to the interpreters.

The second possibility, respectfully, is that Judge Tarfusser was not clear as to what standard he would use or used to assess the evidence. And we can see this in four ways:

One, his rejection of the Ruto and Sang no case to answer model in June 2018; two, his endorsement of the concept of beyond reasonable doubt on 15 January 2019 when he acquitted the two men; three, his rejection, the very next day, of the suggestion that the majority had applied the beyond reasonable doubt standard; and finally, his own confirmation in July 2019 that beyond reasonable doubt was the only relevant standard.

Now, whichever possibility, your Honour, Judge Tarfusser has never expressly supported Judge Henderson's adoption of the Ruto and Sang standard. In fact, while he said briefly that he concurred with the outcome and that he subscribed to the factual and legal findings in Judge Henderson's reasons - that is in paragraph 1 of the separate opinion - there are several contra-indications in the procedural history of this case and in at least 10 paragraphs of his separate opinion that his agreement with Judge Henderson did not extend to the no case to answer standard of proof.

PRESIDING JUDGE EBOE-OSUJI: [10:07:35] Ms Narayanan, we may have to leave it there.

MS NARAYANAN: [10:07:40] Yes, thank you.

PRESIDING JUDGE EBOE-OSUJI: [10:07:41] I'll give you 30 seconds more to round up.

MS NARAYANAN: [10:07:44] Just to say, your Honours, while at one point Judge Tarfusser may have said that he had taken all the evidence at its highest and holistically, he said five paragraphs before that he did not need to consider a standard and did not need to take the evidence at its highest because in his view there was no evidence. And you will find all the relevant authorities in A1 on our list of authorities that we filed on Monday.

Thank you, your Honour.

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

Counsel for victims.

MS MASSIDDA: [10:08:18] Thank you very much, your Honour. Good morning. I will be brief.

I think that the answer to the question can be found, as far as we are concerned, Madam Ibáñez, in our submissions. We refer to paragraph 123, 124 and 127 of our response to the appeal brief, which is filing 1326 of 8 April 2020. And I will add that in our submission Judge Tarfusser applied the standard beyond reasonable doubt and for us it's clear in reading paragraph 65, his reasoning, and I will quote to conclude: "The evidentiary standard is set forth in article 66, paragraph 3: '[i]n order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt' (emphasis added)" in the original of Judge Tarfusser. End of quote.

And this concludes my brief submission, your Honour.

PRESIDING JUDGE EBOE-OSUJI: [10:09:37] Thank you very much.

Mr Jacobs, I don't know that you need to respond to this question and this is why:

Your submissions, as we understand it, at least as I understand it, is to the effect that all this doesn't matter, you're saying. You're saying, from what I heard you say in your submission, that the Prosecutor is under an obligation anyway to prove his case beyond reasonable doubt. It becomes academic whether or not the lower standard was applied or not. Is that the sum of what you said? Can you confirm?

MR JACOBS: [10:10:23] (Interpretation) Good morning, Mr President. Good morning, your Honours.

Well, to clarify, it is not precisely what we said. If I can briefly respond to Judge Ibáñez's question. We said that Judge Tarfusser and Judge Henderson were in agreement that the Prosecutor's evidence did not reach the lower standard, the no case to answer standard. So as to whether he met the standard -- the higher standard, that's a theoretical question because he was not able to meet the lower standard and as such cannot meet the higher standard. I think we have to be fair with Judge Tarfusser here because everyone is quoting what he did or did not say without quoting him directly. And I think that if we're going to be fair with him, we need to look at what he wrote.

How can we be sure that he didn't apply the higher standard? He says so in paragraph 68 of his separate opinion where he says, and I quote: "The question of the standard and the" --

THE INTERPRETER: [10:11:44] Can counsel please be requested to slow down when he is quoting. Too fast. Too fast.

PRESIDING JUDGE EBOE-OSUJI: [10:11:51] The interpreters want you to slow down when you are quoting.

MR JACOBS: [10:12:02] (Interpretation) Yes, Mr President. I do apologise.

Were they to be considered at their maximum value in order to support a conviction

of guilt, we have never been in this position. And were this the case, it would have been necessary to continue the proceedings with the Defence case. In order to say things simply, there is no evidence under which -- under the applicable standard where the necessity to hear the Defence case and that decision to hear the Defence case would have been any different. In other words, it is not that the Prosecution evidence is not -- it is not that the Prosecution evidence, were it to be appreciated at its higher level, and had it been, it would have been necessary to discuss the standard. But in reality the Prosecution evidence, taken item by item or as a whole, does not support any of the charges against the accused.

PRESIDING JUDGE EBOE-OSUJI: [10:13:27] (Overlapping speakers) We can leave it there, Mr Jacobs. Your point is that you've given us the paragraph where Judge Tarfusser specifically deals with that matter. Thank you.

We will now take the response from Mr Knoops.

Briefly, please.

MR KNOOPS: [10:13:48] Good morning, Mr President. Just to make some corrections on the observations of the Prosecution.

First, Judge Henderson himself never said that he applied the Ruto and Sang test. To the contrary, he said himself that he could not apply the Ruto and Sang test - you will find this in paragraph 3 of his opinion - because of the particularities of the case. He explained three of them. And this led the majority not to apply the traditional common law standard as was initially adopted by Trial Chamber V(a) in the Ruto and Sang case. Was never any disagreement between the majority as to the applicable standard.

Secondly, if your Honours look at the transcripts of the hearing of 16 January 2019, lines 11-15 of the English transcript, page 4, you will see that Judge Tarfusser

explicitly said that the dissenting Judge is mistaken in stating that the majority acquitted Mr Gbagbo and Mr Blé Goudé by applying the beyond reasonable doubt standard. And at the same time, Mr President, you see how dangerous it is to try to look into the minds of the Judges, even for a dissenting Judge.

The second point is that Mr Tarfusser in his opinion, paragraph 68, clearly said no matter what standard we, majority, would have applied, it would not have made a difference. There was no evidence in respect of which the majority's determination as to the need of a Defence case would have changed depending on the standard applied. This is a quote from paragraph 68 of Judge Tarfusser's opinion. Therefore, the Judges were completely in agreement as to the applicable standard for the NCTA.

And finally in paragraph 1 of Judge Tarfusser's opinion, you will find again the emphasis that they were, the Judges, in complete agreement as to the factual and legal findings of Judge Henderson's decision and thus therefore there was no doubt as to the standard these two Judges applied. Similar to paragraph 1 of your opinion in the case of Ruto and Sang, we adopted the evidentiary view of Judge Fremr.

Thank you very much.

PRESIDING JUDGE EBOE-OSUJI: [10:16:54] Thank you.

Following up on this question, I will ask the Prosecution these series of questions on this issue, and the other counsel will not be invited to speak to it at this time but, again, address it later on when they are giving their round-up submissions.

To the Prosecution counsel, the question really is this: In this Court at the ICC, is it really that problematic to apply the regular standard of proof in a criminal case in a no case to answer proceeding?

And here is why I ask this:

In your submissions you do say that the no case to answer proceedings will need to

factor in the particular judicial circumstances, so to speak, of the ICC where we have no jury, professional judges deal with both questions of fact and questions of law. And of course that's a recognition perhaps that the no case to answer process in those national jurisdictions that have a jury appose their own -- the presence of the jury apposes special complication and one of those may be in the area of the standard of proof to apply at this stage.

And here is what I mean: If you have the case in which there is a jury and that jury understands that a no case to answer submission had been made at the end of the case for the prosecution but the judge rejected that application -- the reason for rejecting it is because, as the jury will understand, the judge says the prosecution at that stage has proved the case beyond reasonable doubt, that is a reason to reject it, an application of a regular standard -- you could very well see how a lay jury would close their mind, the prejudicial effect if the case was allowed to continue and the defence will call their case. The jury will think, well, the judge thinks the prosecution has established their case. So you see the confusion there?

But that confusion does not exist necessarily with a professional Bench who might have looked at it this way, looked at it this way: A prosecution -- the defence counsel, that is, who made the no case to answer submission, at this stage we have to dismiss your application because so far the prosecution has proved their case in their part of the case, so if the proceedings stopped right now, your client could be convicted because the case has been proved beyond reasonable doubt. But we are not stopping right now. We are putting you now to your defence so you lead your evidence. At the end of your evidence, we reassess to see whether your evidence has engaged reasonable doubt.

That is a distinction, is it not, a professional judge can make without prejudice to the

case, whereas you cannot trust that in a jury trial you can look at it that way, express it that way? Do you see the point? And what do you think about it?

MS NARAYANAN: [10:21:30] Thank you, your Honour. Yes, your Honour, we certainly submitted that in the context of where we are at the Court, the no case to answer proceedings must be seen in that context. And we are very aware of the difference between professional judges and the judge/jury distinction that you would ordinarily find in common law. But when we say that the ICC's particular context must be taken into account, we're also considering, for example, the spectrum on which a no case to answer proceeding would lie in the context of our Statute. And in our view it is closer to a confirmation proceeding than to the end of the case and the question of beyond reasonable doubt.

Now, there is a separate question, your Honours, about what does a professional judge who feels that the standard of proof has been engaged in terms of the final standard of proof, and that might be the case in their own minds, your Honours, but it is the wrong standard of proof to apply for a halftime proceeding. And why do we say that? Because there are no questions of guilt. A no case to answer judge at the ICC does not consider or forecast the question of guilt just to be able to see if a reasonable chamber, and in that case that would be those judges themselves, could convict at the end of the case. But it is not for the no case to answer judge to settle the question of guilt at the halftime stage.

Now, your Honours, the question of the beyond reasonable doubt and whether the Prosecution could have at that stage proved beyond reasonable doubt or not, that might be a question for a professional judge, but your Honours, the Prosecution's burden of proof to discharge and show beyond reasonable doubt -- or rather, guilt beyond reasonable doubt, engages the question of guilt which is for the final stage.

So, your Honours, it is really like two parallel tracks. The Prosecution does have the obligation to discharge its burden of proof and it would have done so or is expected to have done so at the halftime stage, for the most part. But the question before the no case to answer professional judge is a different one. It is based on those -- on that pool of evidence that's available which has to be assessed against the "could convict" test and not the "would convict" test and that would engage and settle the question of guilt whether the case can go forward. And that, your Honours, even though we do take into account the particular differences that a professional judge at the ICC may have, vis-à-vis a jury trial, there is still that qualitative difference between the assessment that is made at halftime and at the final stage.

PRESIDING JUDGE EBOE-OSUJI: [10:24:40] And you say it's about the test "could convict", isn't it?

MS NARAYANAN: [10:24:47] Yes.

PRESIDING JUDGE EBOE-OSUJI: [10:24:48] Okay. If we look at, for instance, what the Kosovo -- the rules of procedure of the Kosovo Specialist Chamber - I don't know whether you have seen that - in Rule 130(3) it says this, quote: "Having heard the Parties and, where applicable, Victims' Counsel, the Panel may dismiss some or all charges therein by oral decision, if there is no evidence capable of supporting a conviction beyond reasonable doubt on the particular charge in question." Unquote. So here is interpretation of "could convict" at that stage.

And in the Jelisić case - you know that, you smile I see - paragraph 35 and 36 of Jelisić makes precisely the same point that when you talk about could reasonably convict, you ask yourself on what basis could a court reasonably convict at any stage, and the Jelisić says it has to be on the basis of proof beyond reasonable doubt.

Do these make a difference to us?

MS NARAYANAN: [10:26:39] Your Honour, on Jelisić, we believe it provides wonderful guidance on many points relating to the no case to answer standard, but except for two points. One is precisely what your Honour mentioned and that's the importing of the "beyond reasonable doubt" phrase into the no case to answer standard. And the second is that it doesn't really use the phrase "*prima facie* review" which we think would be necessary for the no case to answer standard.

And this is why, your Honours, Ruto and Sang Decision No. 5 standard is a much better articulation in terms of it doesn't lead to any confusion as to what one would do with the beyond reasonable doubt standard. You simply do not have to apply it, and if you do not have to apply it, it doesn't have to feature in the standard.

PRESIDING JUDGE EBOE-OSUJI: [10:27:36] Last point and then I leave you on that issue.

When you look at Article 66 of our Statute, paragraph (3), it says this: "In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt." Unquote.

Does this give us something of an indication of how we apply that test of could reasonably -- whether there is sufficient evidence upon which a reasonable trier of fact could reasonably convict? Could you convict without taking into account paragraph 66 -- sorry, Article 66(3) at any stage?

MS NARAYANAN: [10:28:35] Well, your Honour, I think if your Honour's reference is to the word "convinced" in Article 66(3), well, your Honours, it's a certainly higher degree of conviction that a judge must bring to convict beyond reasonable doubt. Now that same level of conviction is not necessary at the no case to answer stage. And this is also why we say you could convict, so you can forecast.

So, for example, if I could think of, think of an analogy, you might be able to forecast

that it rains next week, you might be, but you do not have to carry the umbrella today. So in that sense, your Honours, you do have a certain degree of say something more along the lines of balance of probabilities at the no case to answer stage to forecast if you could convict. But you do not need to be convinced.

PRESIDING JUDGE EBOE-OSUJI: [10:29:32] It depends, of course, whether it's been raining all along or whether you've been having showers all through the day for us to make -- whether or not your forecast makes sense or not, doesn't it?

MS NARAYANAN: [10:29:44] Yes, I was taking today as an example, your Honours. I don't think an umbrella is necessary.

PRESIDING JUDGE EBOE-OSUJI: [10:29:51] Okay, thank you. Thank you very much. We'll leave it at that.

MS NARAYANAN: [10:29:56] Thank you.

JUDGE MORRISON: [10:29:58] When I was sitting as a judge in the UK in jury trials on many occasions I had submissions of no case to answer at the halfway stage, i.e., at the close of the prosecution case. The procedure is that counsel rises and says I have a submission to make, doesn't say what it is because the jury is still in court, but then the jury is asked to retire, you hear the submission from counsel, and it's generally a very quick procedure. You hear from counsel for defence, who is making the application. You hear from counsel for the prosecution, who is no doubt resisting it, unless the case has proved to be completely hopeless and the prosecutor, as a minister of justice, will throw his or her hand in. That happens rarely.

But the core is has the prosecution established a *prima facie* case on the charges which it's brought? And you are certainly not making a determination of guilt, you are simply allowing the trial to continue. There is no pressure upon the defence to give or call evidence. That's a decision they must make for themselves. And often times

a defence will stand on its submission of no case and not call any evidence, in which case the case proceeds to the summing up to the jury and the retirement of the jury with a careful warning that the fact that the defendant has not given evidence is not indicative of guilt, with the burden remaining very firmly upon the prosecution to prove its case. And at that stage of course the jury has to determine the case upon the reasonable doubt basis, beyond a reasonable doubt. And judges are often motivated by the court of appeal not to expand too hard or too finally on what amounts to beyond reasonable doubt, but rather to tell the jury that they have to be sure of guilt and use analogies such as they would have in their everyday lives of things they were sure about and things they were not sure about.

It's a relatively well-tested procedure and it happens in a significant number of cases. In the international sphere, of course, first of all, we don't have juries; secondly, it's not a common procedure. The number of trials at international courts is far, far less than in any major national jurisdiction. And so we have to adapt and adopt accordingly.

But is there anything inherently wrong with simply using the *prima facie* test, simply saying at the halftime stage, at the close of the Prosecution stage -- actually, halftime is a misnomer because it is only halftime if the match continues as it were into the second half. But at the close of the Prosecution case is there anything inherently wrong or unfair with professional judges simply determining whether or not a *prima facie* case has been raised by the prosecution and allowing the trial to continue? And a *prima facie* case is simply evidence upon which a reasonable trier of fact could convict. It seems to me that that is a fairly simple way of approaching it.

PRESIDING JUDGE EBOE-OSUJI: [10:34:08] May I invite -- the Prosecution should not deal with that for now because I believe your submissions already are there on

that, but I will invite the counsel for the Defence to respond, both counsel.

Mr Jacobs.

MR JACOBS: [10:34:36] (Interpretation) Yes, thank you, Mr President.

Thank you, Judge Morrison, for your question.

It would seem to us that in practice this is what the majority Judges did in the matter at hand in the case at bar in a far more complex case in a rather detailed manner. They explained clearly that they were taking the evidence of the Prosecution at the higher level and that they were working on the basis that the evidence was admissible, giving the Prosecution the benefit of the doubt as to *the authenticity and credibility of its evidence in most cases. And one can very well reach the conclusion in the light of reading the reasons that they thought *prima facie* that there was no case that would enable the proceedings to continue. So the *prima facie* test is completely in compliance with what the Judges did. They applied a lower standard and they were of the opinion that even in the light of said standard the Prosecutor's evidence was insufficient.

PRESIDING JUDGE EBOE-OSUJI: [10:36:00] Did they say they were applying a *prima facie* test?

MR JACOBS: [10:36:06] (Interpretation) Thank you, Mr President. No, they didn't say explicitly that they were applying a *prima facie* test. For us, the question of the theoretical label, you know, takes *a back seat. We need to look concretely at what the Judges actually did. And clearly what they did was to take the evidence at the higher level, at -- you know, within the reasoning of the manner in which you described it in the Ruto case. So taking it at its higher means taking it in its entirety with its weaknesses and the strengths, as you said in your separate opinion in the Ruto case, but without going into a detailed analysis of all the evidence, that would be

beyond the scope of the *prima facie*. So that is what I say when I said that in practice this test is equivalent, even though they did not explicitly say that they had or were applying a *prima facie* test.

PRESIDING JUDGE EBOE-OSUJI: [10:37:17] But they did go into detail, did they not, in the assessment of the evidence?

MR JACOBS: [10:37:25] (Interpretation) They explained their understanding of the Prosecutor's evidence. The question as to the detail is relative because, once again, if you take both the opinion of Judge Tarfusser and that of Judge Henderson, they explained that they could have gone further into detail as to the assessment of the authenticity and credibility of the evidence.

PRESIDING JUDGE EBOE-OSUJI: [10:37:58] They wrote how many pages of reasoning to explain their judgment? Should we have expected more by the standards of judgments in international criminal tribunals?

MR JACOBS: [10:38:22] (Interpretation) Of course it does seem lengthy and Judge Henderson, with Judge Tarfusser's support, in the introduction explains that the scale of the judgment was pedagogical. It was for the information of the general public important to explain their understanding of the evidence which is complex, as the Prosecutor said, with thousands of documents and a hundred witnesses.

So this is incompressible in terms of scale, to answer your question. Were the Judges to express themselves on the admissibility of each item of evidence, then the judgment of course could have been lengthier at a higher standard. And once again, as Judge Henderson, with Judge Tarfusser's support, indicated in the reasons, were they to have expressed themselves as to the admissibility of the entirety of the evidence with regard to *ouï-dire*, anonymous *ouï-dire*, hearsay, then of course they would have had to be lengthier on the subject.

PRESIDING JUDGE EBOE-OSUJI: [10:39:40] (Overlapping speakers) all right.
Thank you very much, Counsel.
Mr Knoops, quickly please.
MR KNOOPS: [10:39:45] Thank you, honourable Judge Morrison, for your concise summation of the NCTA proceedings, which in my submission was exactly followed by the majority in this case. And to answer your question directly, your Honour, there was nothing wrong with the way procedurally or in terms of standard the Judges applied their responsibility to not wait to a final judgment.
A *prima facie* case, *prima facie* assessment, without going into details, is virtually in these proceedings not possible compared to domestic trials. The Judges were facing a submission regime and witnesses were questioned on the basis of a mode of questioning which deviated from other Trial Chambers and therefore it's totally understandable why they went into details to explain why there was no *prima facie* case, Mr President.
If you look at paragraph 17 of Judge Henderson's opinion and paragraph 2 and 14 of Judge Tarfusser's opinion, you can easily deduce from those paragraphs that this was a *prima facie* assessment of them, irrespective of how you qualify the standard legally. So there was nothing wrong with the proceedings, to answer the question directly of honourable Judge Morrison.
PRESIDING JUDGE EBOE-OSUJI: [10:41:22] Thank you very much.
I want to invite my colleagues who are in the remote locations. Does anyone want to -- does anyone have a question at this stage?
Judge Hofmański.
JUDGE HOFMAŃSKI: [10:41:45] Thank you, Mr President.
I'd like to ask the question to the Prosecutor. The Prosecutor argues that the

Trial Chamber did not identify the applicable standard of proof, but the question is whether it was indeed necessary in the case.

Would it be possible just to accept the assumption that the standard of proof for the no case to answer procedure is determined by the very nature of this legal concept? It seems to be obvious for everyone that making a decision to acquit the accused person halfway on the basis of the Defence motion is only possible if, in the light of the evidence provided by the Prosecutor, it will be simply impossible for the Chamber to determine beyond reasonable doubt the guilt of the accused person even if the Defence does not present any new arguments.

So two fundamental assumptions must be made here. And the first one is that the Prosecutor who has already completed his case would not provide any new incriminating evidence; the second one, that the Defence would also do -- not to do so, which moreover has the right to do.

If these assumptions are true, can it be assumed that the standard of proof for no case to answer procedure is essentially an inverted standard beyond reasonable doubt and understood in such a way that it cannot be met in any expected circumstances?

Thank you.

MS NARAYANAN: [10:43:44] Thank you, your Honour, Judge Hofmański.

I'd like to make three points.

Your Honour, we did need a standard, I believe that is a lens that's a fundamental feature of any international criminal proceeding. And just as much you would need a standard of proof to convict at the end of the case or to acquit at the end of the case, you would also need a no case to answer standard which * conducted in the middle of the proceedings and just as much as you would need one for confirmation in advance -- I'm sorry, ahead of the proceeding.

Now, your Honour, in terms of whether the Prosecution has discharged its burden of proof, the majority in this case made certain determinations of that. But, your Honours, that determination was missing the lens. So in a sense those comments about whether the Prosecution had a case or whether their case was strong or weak are quite prejudicial to the Prosecution at this point and they should not have been made in that context.

And I would like to go back to what Judge Morrison said about the need to keep this at the *prima facie* level and at the simple level and not address specifically questions of strength or weakness for the case for all the reasons that we've set out before, which is that, for example, if the case were to go forward, of course that would prejudge the Chamber, but equally, if the case was terminated, including these questions of strength in the record, and if the decision was reversed on appeal, those comments still remain on the public record of this Court, and unfairly, if I might add.

The other question, your Honours, about whether the no case to answer standard was necessary, it was particularly necessary in this case, your Honours, because we do not know what united or * uniform standard Judge Henderson and Judge Tarfusser used to assess the evidence. There's a bigger question in this case beyond whether one would need a standard, which we say is necessary, is on what standard or what common view, whatever you might call it, was the evidence in this case assessed to find that there was no case?

PRESIDING JUDGE EBOE-OSUJI: [10:46:11] You said -- what was that? I'm interested in your complaint that to assess it - correct me if I heard you wrongly, we don't have real-time so we have to make due with our notes - that the assessment at the level or at the standard of proof beyond reasonable doubt would be prejudicial to -- or was prejudicial to the Prosecution in this case. Is that what you said, and

why do you say that?

MS NARAYANAN: [10:46:45] Your Honour, I was referring to comments about the strength of the case are not necessary --

PRESIDING JUDGE EBOE-OSUJI: [10:46:53] Indeed, that's correct. Yes, the comments about the strength of the case was prejudicial to the Prosecution at that stage. Why?

MS NARAYANAN: [10:47:02] For two reasons.

One, those comments were made without the majority Judges having the appropriate lens. So it comes back to the point we made about putting the cart before the horse. You cannot say that there was no evidence or that the Prosecution's case was weak if you did not have the appropriate lens in the first place to view it.

And the second point is that if your Honours should reverse this decision on appeal, those comments are made in the public record of the case. And still remain there.

PRESIDING JUDGE EBOE-OSUJI: [10:47:38] Now, there is a question connected to that point you made here, as I've always had for you, the Prosecution. This is the question that arose from submissions of Mr Gallmetzer, I believe, and also Ms Brady. Talking about results-oriented assessment and also the football analogy that Ms Brady used, the result-oriented reasoning, rather, does that not presume that the Judges all along all through the trial were not entitled to evaluate and re-evaluate the case as it unfolded? Is that something judges are entitled to do in a trial or not? If they are entitled to do that, what does that do to the argument that their reasoning was something arrived after the fact of pronouncement of the verdict of acquittal?

MS BRADY: [10:49:08] Good morning, your Honours. And I think I'm probably best positioned to take that question on our team.

Of course as a trial unfolds judges are constantly hearing evidence, they are

constantly hearing the evidence unfold before them as it's coming in, they are hearing witnesses, and they will make certain evaluations, as it were.

However, what is required by Article 74 is a most definite reasoning exercise, a reasoning on all the evidence in order to draw the facts and the conclusions.

And when I made the point, for example, that this Chamber was a *submission-scheme Chamber, they used a submission scheme of evidence, my point there was not that there's something, you know, better or worse about an admission scheme or a submission scheme, we know both are equally valid in this Court, that's been endorsed. But my point there is that I made it about a lack of -- not a lack, a lesser familiarity. Going through the process, if you're a submission-scheme Chamber, you haven't done let's call it the hard yards, the really focussed hard yards of making your considerations on relevance, probative value, and reliability and authenticity. That hasn't happened yet.

PRESIDING JUDGE EBOE-OSUJI: [10:50:53] Is that a speculative argument, Ms Brady? Are you in a position to say that just because judges receive a piece of evidence that they did not look at it as they went home to their chambers?

MS BRADY: [10:51:07] Your Honour, no, I wouldn't, I wouldn't say it definitively. I wouldn't say, oh, no, absolutely they haven't looked. But I would say that there is -- the highest I will put it is to say there is some difference between a judge or chamber that has made the final determinations on these topics and one that has not. In this case, as we know, the Trial Chamber had not yet made its considerations of these basic features of the evidence. And the reason why it's particularly problematic -- and actually Judge Henderson himself recognised this in his written reasons, he was struggling with this. The reason why it's particularly difficult or becomes *stark is because here there's just such a volume of evidence presented by

the Prosecution. There were 4,600 documents - I've already given these figures – 96 witnesses and 40 statements.

Now even Judge Henderson said, this is coming from paragraph 25 of his written reasons, he said that the sufficiency of evidence is predicated *inter alia* upon its relevance. Now in the written reasons he got around this problem by accepting all the evidence as in and then evaluating against the no case to answer standard.

But they, both Judges, and it was very clear from what they said on 16 January, they said that they hadn't done it. Because this was one of the criticisms, you will remember, that Judge Herrera Carbuccia made in her dissent on 15 January. She said * they haven't even done this, you know, basic admissibility -- the considerations of these factors. And so it wasn't done.

So our query -- this becomes a relevant factor is that in light of the volume -- and yes, I do take it, I understand, they were there in the courtroom for two years while the Prosecution presented its case, that's clear, but because of the volume, because of the time, very short time from the close of the no case to the January acquittal, how could they have properly done, that's our query, the full reasoning exercise which is required by Article 74 if on their own say-so, on their own admission, they haven't even yet examined their relevance. And I think that is why Judge Henderson in the written reasons goes into this very elaborative 960 pages.

And that's one factor, among the eight or nine I already mentioned, that are objective factors that we say point in one direction. And the direction is that, and I say this with respect, that the written issue -- the written reasons which were issued six months later look like an after-the-fact justification of the verdict rather than an articulation of the reasoning that led to the verdict announced on 15 January.

In other words - and I'll end here - it's reasonable to conclude that the written reasons

delivered six months later after the announced decisions did not reflect the reasoning or the basis for the acquittals.

PRESIDING JUDGE EBOE-OSUJI: [10:55:03] Would it be possible - and again, this will be my last question to you on this - is it possible that a formation of the impression of a case -- or rather, conviction of the mind as a case unfolds from witness to witness, piece of evidence to piece of evidence is something quite separate from the actual articulation of that process of formation in the mind to explain it to the public that this is how we arrived at our thinking on this? Could be a separate matter, is it, from having that impression or making that formation whenever you make it?

MS BRADY: [10:56:01] Yes, your Honour, I think herein lies the -- herein lies the problem you've identified which is the very problem about result-driven reasoning. And it's also why in many countries this *ex post facto* giving of reasons --

PRESIDING JUDGE EBOE-OSUJI: [10:56:25] No, no, no. I don't think we're on the same path now, on the same wavelength. Result-driven reasoning means you reach a conclusion and then you work backwards to justify it, isn't it? Whereas my question is, is it possible that somebody might have reached that conclusion all along by evaluating and re-evaluating upon the point where they say, okay, I have lived with this case all along now over the years, over the months, over the days that I've heard the evidence, this is what I think of it in sum and then I have to put it in writing, is that result-driven reasoning? If that's what happened.

MS BRADY: [10:57:15] No.

PRESIDING JUDGE EBOE-OSUJI: [10:57:16] Assuming.

MS BRADY: [10:57:17] Okay. Your Honour, no, that wouldn't be result-driven reasoning. That would be a judge making assessments and reaching the conclusion at the end, which may very well be the case in especially smaller cases, domestic cases,

you have one witness, two witnesses, a few documents, yeah, as a judge you're pretty much getting the sense of the case. This a highly complex, highly complex circumstantial case on a vast evidentiary basis.

I take your point, your Honours. Of course they can be making their evaluations, they have lived with it, et cetera, all the things that you've said; however, a judgment -- a decision has to be logical, it has to be deductive, it has to be -- that's behind the reasoning process, that's behind the fully reasoned idea in Article 74. It's not a sort of impressionistic, intuitive sort of reaction.

Maybe for a jury, yes, who doesn't provide reasons, because don't forget there's another purpose of the decision. It's not just is the decision properly reasoned from the point of view of the judges? Equally important is the transparency and the accountability of judges for their decisions to the public. So you need -- both of those twin things have to be satisfied by the decision. That's why this kind of, you know, well, I kind of got the right impression as it was going along and, yeah, that's my conclusion, I'm not sure, I don't think that really works in these sorts of cases.

Remember in our brief we've referred to several judges, I believe -- well, I know Judge Wald said this, you know, you sit down and you write the judgment and it just won't write. You think, you think you're going in a certain way and then you sit down and you go piece by piece by piece - we've all had that experience, you as Judges of course more so than most - and then as you're going through you go, oh, actually, it won't write that way, and you can reverse course. And that's exactly the problem with this sort of intuitive evaluate as you go approach.

I'm not saying that evaluate as you go does not have some role. Of course the Judges are not sitting there like some *tabula rasa* --

PRESIDING JUDGE EBOE-OSUJI: [10:59:43] If we, if we buy that proposition, what

does that do to jury trials? Isn't that what juries do effectively?

MS BRADY: [10:59:53] Well, I mean, your Honours, that's a -- in jury -- in domestic systems that use juries, yes, that's the system. And, I mean, juries can be used for more or less complicated cases. They can be very short cases and very complicated cases. I think that actually in a lot of cases, at least in my jurisdiction where there was very complicated, like corporate crime cases, there could be an election for a judge alone and in other complicated cases as judge alone, so then you're going to get reasons. But, I mean, clearly the jury system is fine for those that use the system, but we don't have that system. We have a very clear mandated -- as Judge Ibáñez said, following the principle of legality, it's clearly written in the Statute what needs to be done and that's Article 74.

PRESIDING JUDGE EBOE-OSUJI: [11:00:56] All right. Thank you very much. I think we will leave it there and take our morning break. We've spent the entire morning session on questions. When we come back we will go to submissions on the last issue which is remedies. And after that we may continue with questions after that.

When we come back, sorry, Judge Bossa will ask a question and then we will continue.

Thank you.

THE COURT OFFICER: [11:01:35] All rise.

(Recess taken at 11.01 a.m.)

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

THE COURT OFFICER: [11:50:58] All rise.

Please be seated.

PRESIDING JUDGE EBOE-OSUJI: [11:51:29] Welcome back everyone.

Now we will -- Judge Bossa has a question.

Judge Bossa, please.

JUDGE BOSSA: [11:51:40] Thank you, Mr President. Good morning once again, everyone.

I have two questions, but the first one goes to counsel for Mr Blé Goudé. I heard you say, and I stand to be corrected because I don't have the transcripts in live time, I heard you say that Judge Tarfusser stated in his separate opinion that no matter what standard was applied in this case, there was no evidence anyway. So two questions: First of all, did I quote you correctly?

And then, if that is the case, how can the Appeals Chamber be sure of the basis on which the learned judge analysed the evidence?

And two, does procedural justice mean anything in the context of the proceedings at the International Criminal Court?

Thank you.

PRESIDING JUDGE EBOE-OSUJI: [11:53:12] Mr Knoops.

MR KNOOPS: [11:53:15] Thank you very much, Honourable Judge, for your questions.

As to your first question, indeed, this was a quote from paragraph 68 of the opinion of Judge Tarfusser. I quote --

PRESIDING JUDGE EBOE-OSUJI: [11:53:42] Counsel, sorry to intervene. Did he say there was no evidence or did he say there was insufficient evidence upon which --

MR KNOOPS: [11:53:52] No, no.

PRESIDING JUDGE EBOE-OSUJI: [11:53:54] -- could be a conviction. Can you please verify for the record. There may be a difference.

MR KNOOPS: [11:54:00] Yes. The quotation from paragraph 68 is there was no

evidence, there was "no evidence in respect of which the Majority's determination as to the need for a defence case would have changed depending on the standard applied." End quote. There was no, there was no evidence, so not even a *prima facie* case.

As to your second question, how did Judge Tarfusser -- how does the Appeals Chamber be sure that Judge Tarfusser digested all the materials? Well, I think the answer is quite obvious, I think the length of the decision of the majority speaks for itself. Judge Tarfusser, like Judge Henderson, digested the whole prosecution case and came to the conclusion that there was no evidence whatsoever.

And even more so, if you see into paragraph 5 of the opinion of Judge Henderson -- you have it here for me, paragraph 5? Yes.

The paragraph reads, and Judge Tarfusser was totally in consent with this paragraph, that the investigation of the Prosecution that in this case resulted in a partial, unbalanced and ultimately unpersuasive portrayal of what allegedly occurred in the run up, as well as during those fateful months of 2010 and 2011, ending with Mr Gbagbo's capture.

In other words, the judges, including Judge Tarfusser, which -- who adopted the opinion of Judge Henderson without any limitation, looks not only at the evidence of the Prosecution, but looked also at the history of the case. It looked therefore at the totality of the evidence and the judges even observed that there was not a shred of evidence to sustain a case to continue with this case. I think these strong words of Judge Henderson speaks for themselves, that the judges were -- very scrupulously examined the evidence.

As to your last question, Honourable Judge, does procedural justice means something in this Court? Of course, but, and I quote again Judge Carmonso (phon):

"There is no such ... an endemic right --"

PRESIDING JUDGE EBOE-OSUJI: [11:58:11] You mean, you mean Carmona.

MR KNOOPS: [11:58:13] Pardon, Carmona, Judge Carmona.

"There is no such ... an endemic right to a guilty verdict."

The question is whether procedural justice proceeds over substantive justice. In case, as the Prosecution suggests, procedural errors would have been made before this Court before the Trial Chamber, by the Trial Chamber, and this allegedly caused procedural injustice, but everyone is in agreement that on the substance, on the merits of the case, justice has been done, namely there was no shred of evidence after the conclusion of the Prosecution case where the Prosecution had all opportunities to present its case and there were no forensic deficiencies such as in the Ruto Sang case. Prosecution was not hampered in any way to present its case and we agree that on the merits justice was done. It's my submission that that type of justice prevails over procedural justice, also for the victims.

Thank you.

PRESIDING JUDGE EBOE-OSUJI: [11:59:52] Thank you very much, Mr Knoops.

We have to move on now. We are quite alive to the fact that there are other counsel who would like to also address the Court. But let's do it this way, we will proceed now. As I indicated earlier, there will be a time for counsel to make roundup submissions, they can use that time to speak to issues they would like to speak to but didn't get a chance to do so. We also may consider allowing limited scope for written final thoughts on your part. We will deliberate on that amongst ourselves, the judges.

We will now open the floor for submissions on the third issue, and that is the issue of remedies. As already indicated, counsel will have 20 minutes each to speak to that

matter.

I now invite counsel for the Prosecution to make their submissions on remedies.

MS BRADY: [12:01:15] Good morning, again, your Honours.

I will now turn directly to make the Prosecution's submissions on remedy.

Firstly, your Honours, the Prosecution has not changed its position on remedy in this appeal. In our appeal brief we ask the Appeals Chamber to reverse the decision, declare a mistrial and return the case to the Prosecutor to decide on its future course. Four months later, in February 2020, the Prosecutor confirmed that if her appeal succeeded she would retry them. That remains our requested remedy.

Before going into specific points, I'd like to reply to, particularly from the Defence, recent filings relating to mistrial and retrial and touching on your Honour's questions. I'd firstly like to briefly respond to the suggestion made by both Defence in their recent filing that we cannot now ask for a retrial as we didn't expressly do so in our appeal brief.

To clarify, your Honours, we're not asking the Appeals Chamber to directly order a retrial. However, you could do so, you could do so if you consider that to be the correct remedy. In other words, what I'm saying is that this Chamber, the Appeals Chamber, is not bound by the Prosecutor's request.

Mr Blé Goudé relies on the ICTY case of Gotovina to say that somehow the Chamber, Appeals Chamber is estopped from a remedy that has not been requested by the Prosecution or a party. But that case doesn't support that proposition. In that case the Appeals Chamber overturned the convictions upon an appeal by two accused persons who had been convicted but didn't address a possible retrial. And even Judge Robinson, who was the only appeals judge to expressly address retrial, the issue of retrial or the potential therefor, he didn't mention this factor that

the Prosecution hadn't asked for the retrial, he didn't mention that as a reason for not ordering a retrial. He used other factors such as the factors in the case of Gilham, which is in our -- the Gilham New South Wales Court of Criminal Appeal case which is in our filing.

In fact, your Honours, the Appeals Chamber of the ad hoc tribunals did not consider itself bound by the Prosecution's requested remedy. And you'll find case examples at B1 on our list of authorities. We have noted in that list the Delić, Mucić et al case, otherwise known as Celibici; the Stanišić and Simatović appeals judgment; and the Muvunyi appeals judgment. And these latter two, Stanišić and Simatović, and Muvunyi, are especially relevant because in both of those cases a retrial was ordered by the Appeals Chamber even though no party had actually asked for that remedy.

Likewise, your Honours, at the ICC the Appeals Chamber is not bound by the remedy which has been requested. And we * have some examples there at B2 of our list, including the Bemba et al judgment, appeals judgment, and the -- there's also a decision in the Banda and Jerbo case, an appellate decision there.

What this means then is that if your Honours find that the majority erred on either ground 1 or ground 2, or both, then apart from the remedy we have requested you could consider others within your remit, including * reversing the acquittals, by which we mean quashing the decision, and directly ordering a retrial. That does remain a potential for you.

As for the potential remedy of reversing the acquittals and ordering that the trial proceed before the trial, the original Trial Chamber, in our view this is not viable because of the - we pointed them out - problems in reconstituting the Trial Chamber and the clear prejudging issues if the majority judges were to continue with the case.

Finally, your Honours, if you consider that a retrial is fundamentally incompatible

with a fair and expeditious trial, potentially you could reverse the acquittals, in other words quash the decision, and vacate the charges with prejudice. That is allowing no possibility of retrial. But two comments on that. It's not entirely clear that that remedy exists under the Statute. And the second point is that, in any event, it's not what we seek so I need not explore it any further.

Turning then to make some points, some submissions about mistrial as a remedy. We've already made extensive submissions on this remedy in our recent filing, in terms of what it means, its effect, its source in the Statute, et cetera, et cetera, so I won't repeat what we have already said because we are quite, quite complete in that filing. But I would like to just address a few points raised by the Defence regarding a mistrial.

Firstly, according to Mr Gbagbo's arguments, he argues that our remedy is what he calls a procedural abuse, because we didn't show or haven't shown that the majority's decision was unreasonable.

In a related submission yesterday, he made this in relation to ground 1 - I think it was yesterday, yes, I am pretty sure it was yesterday - Mr Jacobs said that our appeal was incoherent because we do not challenge the acquittals. Ms Narayanan touched on this as well yesterday. Of course we're challenging the acquittals, that's the point of our appeal, we're challenging the acquittals, not on the basis of a factual appeal, rather, we're asking this Appeals Chamber to overturn the acquittals based on the clear legal and procedural errors we have identified.

As such, we're not also required to show that the majority's ultimate decision on the facts was unreasonable. That would be like insisting that an appellant who brings a procedural error must also bring a factual error simultaneously, and that's contrary to the express terms of Article 81(1). Instead, as I argued on Monday, the nature and

seriousness of the errors so tainted their decision-making, the majority's decision-making, that it did not and could not lead to a reliable and just outcome. And finally, just to deal with a point also raised by Mr Gbagbo, he argues that there will be this perpetual sword of Damocles arising from our remedy which will hang over his head. The Prosecutor has already confirmed, we said it at the February 2020 hearing and also in our recent 22 May filing, she has confirmed that she will decide on retrial and its scope as expeditiously as possible once the appeals judgment comes out.

Now turning to a point raised by Mr Blé Goudé, and again we have discussed it in our recent filing, our mistrial request is not contrary to Article 61(9) and the case law surrounding that article.

This is because a mistrial declaration, the effect of it will be to vacate the charges without prejudice. As such, Trial Chamber permission is not needed. Indeed, in this scenario, the Prosecutor would need to have the charges confirmed again to run -- to bring the retrial. And the Kenyatta and Muthaura decisions that Mr Blé Goudé cites do not show otherwise, because there the Prosecutor had to obtain the Trial Chamber's permission to vacate the existing charges, they were extant at that time. She was asking to withdraw. But that was without prejudice to her bringing charges in the future, as would be the case here except with the additional that she has given the commitment that she will make a decision as soon as possible.

I'll conclude with just a few remarks on retrial, again because we've made very detailed submissions on this in our recent filing. We're of course aware that a decision on retrial involves very a complex balancing of a number of competing interests; the time elapsed since the offence, the difficulties in obtaining evidence that may be posed for the Defence, time already spent in detention, and potential undue

oppression for acquitted persons who will be facing a retrial. These are all relevant factors, we don't disagree with Mr Blé Goudé on that point. But, in our view, countervailing factors override these in favour of retrial, especially the seriousness of the offences and the right of the Prosecutor and the victims, and indeed the public interest, to seek justice and have the case adjudicated by a bench which follows proper procedures.

And finally, just one point more in relation to Mr Blé Goudé's submissions - actually two points - Mr Blé Goudé's estimate that new proceedings would take, in his view, another five to 10 years to carry out and complete, in our view this is unduly pessimistic, given the modalities that we have outlined in the filing for expediting a retrial. And I won't go through those again, we've put them in our 22 May filing.

Now to confirm, the Prosecutor's present intention is to hold a retrial should her appeal succeed, but her final decision on retrial and its scope can only be made once she considers the appeals judgment in light of the majority and the dissenting judges' findings and the current state of the evidence and cooperation. This careful approach speaks to her care before launching a retrial and not to equivocation about the case, as Mr Blé Goudé argues.

Finally, your Honours, I'd like to just counter the Defence suggestion again made by both of them, that we're seeking a retrial to somehow get better evidence or more evidence. This is not correct. The Prosecutor's ambition for a retrial is far more modest. It is to have charges as grave as these tried by a Trial Chamber that follows the Statute's key procedural requirements for the decision and applies a clear and shared view on the standard of proof for assessing evidence before doing so. Only in this way can a strong foundation for a just decision be ensured and the truth thereby established. The victims in this case and the international community

deserve no less.

Thank you very much, your Honours. That completes my submissions, the Prosecution's submissions on remedy.

PRESIDING JUDGE EBOE-OSUJI: [12:15:34] Thank you very much, Ms Brady. I will now invite victims' counsel for her such missions. You have 20 minutes.

MS MASSIDDA: [12:15:49] Thank you very much, your Honour. Since I don't see my camera, can someone confirm that you can hear me?

PRESIDING JUDGE EBOE-OSUJI: [12:16:06] We can hear you and we can see you, please proceed.

MS MASSIDDA: [12:16:09] Thank you very much, sorry.

PRESIDING JUDGE EBOE-OSUJI: [12:16:11] And if, at any time if we can't hear you or see you, I will let you know.

MS MASSIDDA: [12:16:17] Thank you very much, your Honour. The events of the post-electoral crisis occurred in Ivory Coast between November 2010 and April 2011 had and continue to have serious and important consequences on the participating victims.

Despite the acquittal, victims continue to believe that justice will be rendered to them one day.

As such, victims find that the appropriate remedy in this appeal is that the acquittal decision is reversed as indicated by the Prosecution in its submissions on the questions of the Chamber at paragraph 49 is that the acquittals will be, in the words of the Prosecution, "quashed and nullified".

However, this is not a sufficient remedy for the participating victims. For them, what matters is the continuation of proceedings against the defendants.

In this sense, victims clearly express the view that not only the decision has to be

reversed and declared null and void, but also that the Appeals Chamber declare a mistrial without prejudice which will entail the possibility of new proceedings against both defendants so that victims can pursue their quest for justice.

In fact, and also as just recalled by Ms Brady, given the gravity of the identified errors and their impact on the overall fairness of the proceedings, a declaration of mistrial is, in our submission, the most appropriate remedy. The miscarriage of the trial process by the Trial Chamber, in violation of Article 64(2) of the Statute, cannot be addressed otherwise.

In this regard, as also argued in our written submissions in response to the Appeals Chamber questions at paragraph 37 and following, the Chamber, the Appeals Chamber can use its inherent and implied powers to arrive at said conclusion. In particular, to quote Judge Eboe-Osuji, the Chamber has the authority to declare a mistrial without prejudice if there is a, and I quote, "manifest necessity", end of quote, for doing so, and does not require fault finding against a party in this case.

It is our submission that the Appeals Chamber must do so also to set the standard of fairness and expeditiousness for future cases before this Court.

Finally on the remedy, your Honour, allow me to address an issue of particular importance for the participating victims.

In the recent decision by the Appeals Chamber on Mr Gbagbo's request for reconsideration of the judgment on review of the conditions of release of both defendants, which was issued by this Chamber on 28 May 2020, the Chamber has indicated that, and I quote paragraph 70 of decision 1355:

"... the continuance of the proceedings without the physical presence of the accused is prohibited neither by the Statute properly understood, nor by general principles of

law." End of quote.

Now, while proceedings may be permissible in the absence of the accused, as recently stated by the Chamber, and I quote again, "in the realms of both international and domestic law" provided that the "right to a fair trial is scrupulously respected" end of quote and is paragraph 71, this course of events would be problematic, at least for the participating victims in the circumstances of this case.

In this regard your Honours may recall that, in the framework of the discussions on the modification of the conditions of release of the defendants, I conveyed to the Chamber the concerns of the victims who expressed their fear that releasing the defendants would allow them to return to Côte d'Ivoire, seek political power in order to actively hinder the appeals proceedings or any subsequent proceedings before this Court.

The mere presence of the two defendants in the country, as put in the words of the victims, it is likely to rekindle animosity, intimidate and hinder future investigations and prosecutions, should a new proceedings take place. Victims also indicated that should the defendants be re-elected they may use their powers to obstruct the course of justice before the Court and render a further prosecution impossible.

The same concern has been recently reiterated by the victims I represent after the 28 May 2020 decision. They again stressed that the mere presence of the defendants in Côte d'Ivoire will have the potential of intimidating the victims, their families, the affected communities and all potential witnesses, as well as to obstruct future proceedings by virtue of the very active network they have and with no need for any active hindering conduct by the two defendants. Victims therefore ask that this concern should be taken into consideration also in the eventual deliberation by the Appeals Chamber.

This concludes, Mr President, your Honours, my submissions on behalf of the victims participating in this case on the remedies of.

Thank you very much.

PRESIDING JUDGE EBOE-OSUJI: [12:23:26] Thank you, Ms Massidda.

Counsel for Gbagbo, please.

Mr Altit or Mr Jacobs, it's your turn now.

MR ALTIT: [12:23:56] (Interpretation) Mr President, thank you. You are entirely right, it is indeed Professor Jacobs who is going to be intervening on this point.

PRESIDING JUDGE EBOE-OSUJI: [12:24:07] Mr Jacobs, you have 20 minutes.

MR JACOBS: [12:24:14] (Interpretation) Thank you, Mr President.

Mr President, your Honours, with regard to the remedy that the Prosecution has requested of the Chamber, that is to say mistrial, it would seem to us that the situation is clear. Firstly, in her appeal brief the Prosecutor explicitly requested of the Chamber, of the Appeals Chamber to enter a declaration of mistrial, clearly indicating that, and I quote paragraph 266 of the Prosecutor's appeal brief, I quote: "... instead of requesting the Appeals Chamber to order the continuation of the trial before the Trial Chamber ... or *to order a new trial (which would be a possibility), the Prosecution requests the Appeals Chamber to declare a mistrial. This will leave the case in the hands of the Prosecutor to decide on its future course and how justice may best be served in this case." End of quote.

The position adopted by the Prosecutor leaves no doubt whatsoever that mistrial is requested instead of ordering a new trial, so in this quote there is no indication that the Prosecutor has already decided to conduct a new trial. Under these circumstances, the position adopted by the Prosecutor during the hearing of 6 February 2020 and a few moments ago is surprising, because she suggests that

the Prosecutor has always wanted to conduct a new trial and that there has been no change whatsoever in the Prosecutor's position, which is of course not the case. In the Defence's opinion, what here is clearly a change of position, despite the Prosecutor's denials, should legally be construed as an attempt to orally amend the appeal brief during a hearing focusing on quite a different matter, that is to say that of last February, 6 February 2020, in an attempt to amend the appeal brief. Such an attempt cannot succeed.

Secondly, another very clear point, the Prosecutor is suggesting to the Appeals Chamber that it grant a remedy that is not provided for in the Rome Statute of the International Criminal Court. Article 83(2) of the Statute sets out an exhaustive list of remedies available to the Appeals Chamber were it to find that errors had affected the impugned decision. The mistrial is not one of said remedies.

Thirdly, the fact that a mistrial is not an appropriate remedy at appeal is confirmed in the ICTY jurisprudence, according to which it was deemed that a mistrial "is not available or necessary in appeal phase of a case." End of quote.

And I refer you here to the Stanišić and Župljanin decision, paragraph 33 of the ICTY.

THE COURT OFFICER: [12:29:55] (No interpretation)

MR JACOBS: [12:30:04] (Interpretation) Can you hear me now?

PRESIDING JUDGE EBOE-OSUJI: [12:30:11] (Overlapping speakers) the interpretation, what was the problem?

MR JACOBS: [12:30:23] (Interpretation) I don't know. Shall I go on? Shall I continue?

PRESIDING JUDGE EBOE-OSUJI: [12:30:29] (Overlapping speakers) I understand you may have pressed a button on your end that stopped. Can you proceed please, we are fine now.

MR JACOBS: [12:30:42] (Interpretation) Thank you, Mr President.

So it is the very nature of a mistrial that leads the judges to deem that it is not a remedy on appeal. Indeed, a mistrial is a means of bringing proceedings to a close on the basis, for example, of the violation of an accused person's fundamental rights without a judgment being entered on the merits, a situation that can only occur before a Trial Chamber.

If the Trial Chamber judges have not declared a mistrial and the Appeals Chamber judges are faced with a question of whether rights were violated, the Appeals Chamber judges will broach the issue of this violation as an ordinary ground and the remedy applied will that be generally applied on an appeal, not a mistrial.

Fourthly, even if hypothetically speaking the Appeals Chamber were to find that it can declare a mistrial on appeal, the Defence will recall that this concept, as developed and applied in the Ruto case, does not apply in the instant case. Let us recall that in the Ruto case the two majority judges considered that, one, the Prosecutor had no case; and two, the logical consequence of such a finding is the decision to acquit. Nevertheless, bearing in mind the interferences and pressure exerted upon the witnesses during the trial, according to the judges, the majority decided to declare a mistrial.

It is interesting to note the approach followed by Judge Eboe-Osuji in his separate opinion. Having recalled at the outset that he agreed with Judge Fremr as to the weakness of the Prosecutor's case, he went on to wonder whether the weakness of the Prosecutor's case could be put down to external interference or not, considering that it was impossible to determine the impact of said external interference on the Prosecutor's evidence and that it was therefore preferable to declare a mistrial.

And I refer you to paragraph 2 of Judge Eboe-Osuji's reasons in the Ruto case.

This reasoning can obviously not be applied here because the Prosecutor fails to mention in her appeal brief at any moment any instance of interference and associated difficulties in the presentation of her case. The Prosecutor was able to investigate over several years, with the full support of the new Ivorian regime, and at trial she was able to freely and exhaustively present her evidence and call all witnesses she deemed necessary to testify.

It is clear beyond doubt, therefore, that the weakness of the Prosecution evidence is solely attributable to the Prosecutor's inability to build a solid and convincing case. As the majority judges rightly recalled, this weakness is inherent to the Prosecutor's case. It is not that the judges assessed the evidence incorrectly and failed to appreciate its importance, it is quite simply that the evidence was entirely lacking. This has nothing to do with the manner in which the no case to answer proceedings were conducted. This is evidenced by the fact that already back in 2013 when it adjourned the confirmation charges hearing, the Pre-Trial Chamber noted the weakness of the Prosecutor's case, notably with regard to the contextual elements of the crimes against humanity.

May I refer you to paragraph 35 of the adjournment decision, filing 432. It is the same, that the majority judges made the same determination in their decision to acquit. This was a determination based on the full and in-depth analysis of the Prosecutor's evidence.

The Defence notes *en passant* that by erroneously relying on the Ruto case law the Prosecutor is conceding that, in reality, it does not have a case, as the judges in the Ruto case were in agreement that the Prosecutor had no case. In other words, in Ruto, the request for a mistrial means *ipso facto* that the Prosecutor is acknowledging that they do not have a case.

Fifthly and lastly, to the extent that the Prosecutor does not challenge the acquittal - and may I briefly answer Helen Brady's intervention earlier on when she is talking about the acquittal - the appeal brief is very clear on the fact that the general conclusions or findings of the Chamber have not been challenged, neither has the standard of proof, neither have the general conclusions of the Chamber. The fact that the Prosecutor is challenging as a sideshow, if you like, or formally challenging the acquittal doesn't mean to say that she is challenging it on the merits, because she is not talking about any errors, factual errors or legal errors that would challenge the decision of the Chamber, the absence of policy, the absence of common plan, the weakness of the evidence.

*Madam Brady says that one cannot require the appellant to present factual errors, it is true, but in the absence of any such alleged errors, one should note that the Prosecutor does not challenge the factual findings.

PRESIDING JUDGE EBOE-OSUJI: [12:39:03] How many more minutes do you have to go?

MR JACOBS: [12:39:07] (Interpretation) One minute remaining, your Honour, one or two.

PRESIDING JUDGE EBOE-OSUJI: [12:39:13] (Overlapping speakers)

MR JACOBS: [12:39:15] (Interpretation) Thank you.

So, we maintain that when reading the appeal brief we can see that she is not challenging the acquittal on the merits. *And that is why, under such conditions, requesting of the Chamber that it declare a mistrial is in fact an abuse of process because then, were Laurent Gbagbo to be acquitted he would no longer enjoy the protection of the Statute under *ne bis in idem* and would find himself at the mercy of the Prosecutor.

A final word on what the Legal Representative of Victims said at an earlier stage today, and I paraphrase - with the absence of the transcript, I do apologise - she stated that despite the acquittals the victims believe that justice will be served one day. Now, with respect to what I was saying the other day, the LRV is very clear indeed, this means one thing, that for the Legal Representative of Victims justice means a conviction, which is the negation in itself of a legal process.

Thank you, your Honour, Mr President.

PRESIDING JUDGE EBOE-OSUJI: [12:40:45] Thank you very much, Mr Jacobs. Mr Knoops, we will be rising at 12.45, that's five minutes away, but we are now scraping the barrel of the bottom of time, so we will have you proceed and keep an eye at 12.45, then we will rise, come back and you will finish. So if you may, please begin your submissions.

MR KNOOPS: [12:41:26] Mr President, if I promise the Court to conclude in 10 minutes in one time, I prefer to speak without pause, then I finish my submission 10 minutes -- sorry, 15 minutes, I apologise. Twenty minutes is the time frame for these submissions, 15 minutes I finish.

PRESIDING JUDGE EBOE-OSUJI: [12:41:46] We would have considered 10 minutes; 15 minutes begins to strain it. So keep going until 12.45 and then we will break at that time, just pause at that, come back and you finish.

MR KNOOPS: [12:41:58] Okay.

PRESIDING JUDGE EBOE-OSUJI: [12:41:58] Thank you.

MR KNOOPS: [12:41:59] Mr President, in paragraph 43 of the answers of the Prosecution of 22 May, the Chamber will find that the Prosecution appeal is not overall a factual one. There is no dispute about that.

The Prosecution has, in light of the consultation, the observation that it has no

arguments to dispute the evidence as digested by the Chamber, has chosen the strategy to proceed with alleged procedural errors in order to get a mistrial and through this mistrial actually gets a second chance. And I think the submission of the Prosecution also of today made it quite clear that this is actually the purpose and the difference with a retrial, because the Prosecution is aware that with the current file it would not make a chance for a retrial. And if your Honours would indeed reject procedural errors, it could not possibly argue that a reasonable chamber could have convicted.

And I think, Mr President, this is the whole crux of the case. By asking now in paragraph 57 of its written submissions of 22 May, not only to ask for a mistrial but also for a new trial, it introduces the concept of bringing new charges for the confirmation before the Pre-Trial Chamber. And after the break I will go into the legitimacy of this, speaking about the principle of legality of this Court. And this is the whole crux, the Prosecution of course at the Pre-Trial Chamber in this scenario will introduce new charges, will introduce new evidence, because otherwise how can a Pre-Trial Chamber confirm new charges?

So this person, Mr Blé Goudé, in a few years from now, because the scenario we sketch is far from pessimistic, Mr President, we all know in this Court how much time it will take to bring new charges to a Pre-Trial Chamber, and after a Pre-Trial Chamber would have confirmed the charges, how much time it will take to have a new trial. So it's far from pessimistic. The essential point is, Mr President, that by avoiding to ask for a retrial and first ask for a mistrial, the Prosecution gets a second chance because it will introduce new charges. They will probably not restrict themselves to crimes against humanity, they will expand, of course. Everybody in this Court. If I were a Prosecutor I would do the same, I would lure

the Appeals Chamber into a mistrial, because only through this mechanism the Prosecution can remedy the absence of evidence. And this is quite clearly established before this Court also during the appeal. There is no factual error. The six incidents are qualified as so-called "mini" errors by the Prosecution in paragraph 53 -- 43, pardon, of its answers to the questions. So please, Mr President, your Honours, this is the reality we are facing here.

After the break I will go into the principle of legality of this suggested way of proceedings of the Prosecution.

PRESIDING JUDGE EBOE-OSUJI: [12:46:09] Thank you very much, Mr Knoops, that's indeed the place to stop now, 12.45. We will adjourn and come back at 1.30. The Court will adjourn now.

THE COURT OFFICER: [12:46:25] All rise.

(Recess taken at 12.46 p.m.)

(Upon resuming in open session at 1.35 p.m.)

THE COURT OFFICER: [13:35:51] All rise. Please be seated.

PRESIDING JUDGE EBOE-OSUJI: [13:36:20] Thank you.

We will continue with submissions of Mr Knoops for another 15 minutes left. You can finish your submissions.

After that, we will do another round of question time for Judges, and following which we will go to final submissions from counsel. And in all of that, we've now added on another session from three to four. Three to four if need be, but there will be a guillotine at four in any event. Once we get to four, we must stop because it's in added time and there are other engagements that have been made.

So we will now continue with Mr Knoops.

MR KNOOPS: [13:37:42] Mr President, your Honours, before the break speaking

about weather conditions today, we showed to the Chamber that under the umbrella, which we don't need today we heard from the Prosecutor, under the umbrella of procedural errors - which did not have, and will not have any impact on the acquittal because no factual errors were determinated as a ground of appeal - the Prosecution introduces the concept of a mistrial to get certainly a second chance.

Because otherwise, if that was not really the purpose, they would have asked for a retrial, which would not have allowed them to bring new charges and they would have limited them to the principal, the same material as submitted to the Trial Chamber.

That was my first point, Mr President, Your Honours, before the break.

Now, this position of the Prosecutor, which the Prosecutor wants the Court to adopt is, of course, highly prejudicial to a defendant. This morning, we spoke about procedural justice, procedural fairness, the principle of legality and we submit that this approach of the Prosecution in no way reflects procedural justice or fairness whatsoever.

Even if you look, Mr President, your Honours, to the way the Prosecutor has introduced its alleged remedy, you'll find evidence in their own submissions that indeed they changed their position. No way you can deny it.

I will give you three examples. First, in the appeal brief, in paragraph 266, it was clearly stated that they would ask for a mistrial and they, instead of asking for a retrial, they just touched upon it as a potential remedy. And this position was affirmed in paragraph 50, 5-0, of the answers to the Court, the Chamber.

You heard the Prosecution acknowledge that in her appeal brief, they did not expressly ask the Appeals Chamber to order a retrial. It's literally in their answer to the questions of the Judges of this Bench, paragraph 50.

Only during the hearing of the 6 February 2020, Mr President, while discussing a totally different topic, it reveals for the first time its intention to continue proceedings in this case, if the Court would accept a mistrial.

And the Presiding Judge, you, Mr President, you might recall that pressuring the Prosecution on this, the Prosecution tried unconvincingly to explain how, after a declaration of mistrial, the case would be left at the hands of the Prosecutor to decide its future course, thereby conflating the notion of mistrial and retrial.

I leave apart a discussion of a mistrial can be asked in appeal, because that was denied by the Appeals Chamber in the Mićo Stanišić case, in paragraph 33.

Finally, Mr President, your Honours, finally, on 22 of May of this year - paragraph 57 of the response of the Prosecution to the questions of the Bench - again, the Chamber asked the Prosecutor clearly, what are you actually pursuing with this remedy?

And the Prosecution expanded once again its request, including this time not only a mistrial, not only a retrial, but now, negating the charges and bringing new charges against Mr Charles Blé Goudé with a confirmation hearing before the Pre-Trial Chamber, Mr President.

That is the reality you are facing. And this is what procedural justice is about? Is this in accordance with the principle of legality? Is this honest to a defendant against whom no evidence exists?

Speaking about this issue, Mr President, if you look at paragraph 57 of the Prosecution's answers to the questions of the Bench, they clearly now state literally to do so. She, the Prosecutor, would need to bring new charges for confirmation before the Pre-Trial Chamber.

So she's asking you to do what every Prosecutor who has no case would do. Please give me, Prosecutor, a second chance. Let me introduce new evidence and new

crimes on the basis of new qualifications.

That is the disguise with which the Prosecutor actually tries - the Chamber - to lure into this trap of a mistrial.

And Mr President, your Honours, speaking about procedural justice, there was a question of one of the Judges to me this morning, speaking about procedural justice and fairness and speaking about result driven and written after the fact.

I think we should first look at the position of the Prosecutor, before we can at all speak about procedural justice for the victims.

It's about procedural justice for this defendant, who now, nine years after the events, the alleged events, apparently has to face a mistrial with the unfettered power of the Prosecutor - if you would follow the Prosecutor's position - to let her decide on new charges against this defendant.

And speaking about procedural justice and fairness and about legality, isn't this in contravention to Article 83(2)(b) of the Statute? Which stipulates, literally, that the chamber, in appeal, may order a new trial before a different chamber.

And the wording, Mr President, of the Statute is very clear. It's not about new charges or new evidence. It refers to a new trial and not to a new prosecutor. Not to a new prosecution. That is the difference.

A mistrial, in view of the Prosecutor, would allow them to bring this case again to a pre-trial chamber for a confirmation of charges, and that would open the Pandora box for new qualifications of alleged crimes and new evidence. A second chance, therefore.

It means that in the extraordinary event a retrial would be ordered by this Chamber, which we refute, the case can only resume at trial and not in pretrial as argued by the Prosecutor and disputed by us in our written response to the Chamber's questions,

paragraphs 49 and 50.

The Prosecution has, fortunately still in the Statute, limited powers. Any other interpretation would be inconsistent with the Statute and the equality of the parties. And that would mean procedural injustice, Mr President. Nothing else. That would really mean procedural injustice in this Court.

By allowing the Prosecutor to enjoy power -- greater power over a defendant, by putting "a prolonged lien on the defendant's freedom from fear and the right to good name, beyond what is strictly permissible".

And these were your own words, Mr President, as Presiding Judge in your concurring separate opinion in the Muthaura case, Kenyatta case of 18 March 2013, paragraphs 11 and 30.

Finally, Mr President, to conclude my observations on the alleged remedy, the two cases cited by the Prosecution in its written response to the Chamber's questions, para 54, the case, R v. SH, where the UK Court of Appeal reversed the judge's decision that an accused had no case to answer on one count and the jury's subsequent acquittal on the second count - and this was due to the judge's errors in applying the standard and his remarks to the jury - the Court of Appeal ordered a retrial.

But, there is a fundamental difference with the case of Mr Charles Blé Goudé. The difference being, the division between the judge and the jury where the judge in that scenario, in that case, this British case, expressing his position against the Crown's case probably influencing the jury.

And in the present case, Mr President, there is none of these issues to be observed.

Secondly, paragraph 60, the US Supreme Court, Illinois v. Somerville. In that case, one dealt with a defective indictment that could not have been remedied by any other means. As a result, there had to be a mistrial and the whole case had to start anew.

Even though the case started anew, and even though the Supreme Court acknowledged that would violate the principle of *ne bis in idem*, the Supreme Court of the United States affirmed that the public's right to a fair trial would, in that situation, prevail.

But also here, there is a fundamental difference with the case of Charles Blé Goudé. The Prosecution's arguments to justify a mistrial, Mr President, your Honours, do not reach the threshold set --

PRESIDING JUDGE EBOE-OSUJI: [13:49:31] Mr Knoops, five more minutes to go.

MR KNOOPS: [13:49:35] Yes.

PRESIDING JUDGE EBOE-OSUJI: [13:49:36] Hopefully, you will finish before --

MR KNOOPS: [13:49:36] Yes, yes, I will finish before that, Mr President.

In the case of Mr Charles Blé Goudé, no such circumstances arise. The standard which was set by you, Mr President, in the Ruto Sang case for mistrial is completely different from the instant case.

In paragraph 139, in your opinion in the Ruto and Sang case, you determined to terminate the case by declaring a mistrial because, I quote:

"[...] the basic [...] premise" --

"[...] the basic forensic premise that no-case submissions assume."

Was, in that scenario, not valid.

The basic premise assumes, namely, that the Prosecutor was able to conduct its case freely, both with respect to investigation and presentation of evidence.

In the scenario of Mr Blé Goudé's case, the Prosecutor was fully free from any interference or intimidation, and therefore the assumption in the Ruto and Sang case does not arise here. There is, therefore, no legal room for a mistrial whatsoever.

Finally, Mr President, your Honours, in conclusion, speaking about procedural justice

before this Court, it is clear that through the disguise of a purported mistrial, the Prosecution is creating in a creative way, a mechanism to evade an acquittal so it can get a second chance, starting with a new hearing at the pre-trial phase, confirmation of charges, at an unknown point in time to redo its case.

The Prosecution's actions and its explanation on the remedies reveal that the decision to acquit was correct, since the Prosecutor is unable - after almost a decade, Mr President - to state whether it can adduce sufficient evidence to sustain a conviction against Mr Charles Blé Goudé. And if decided, and when new charges would be brought against him, what will happen then?

Therefore the Prosecution request for a mistrial has, therefore, become a mere tool to render Article 20 of the Statute inapplicable, to pursue prosecution ad infinitum in this case. And I close with the very important ruling of the US Supreme Court of 1978 in the Arizona v. Washington case that the double jeopardy clause protects defendants from prosecutors who try to misuse mistrials as an opportunistic tool to avoid an acquittal.

And that, Mr President, is really about procedural justice, which we need in this Court for a defendant. That is the person against whom this trial is about. It's not about victims. It's about his liberty. And there we should primarily, we should apply procedural justice. There, it belongs.

Thank you very much.

PRESIDING JUDGE EBOE-OSUJI: [13:53:07] Thank you, Mr Knoops. Now we finished the submissions on remedy. We will now move into some more questions from the Bench. In these questions, so that the parties' minds are opened up enough to know where they're coming, there may be some leftover questions coming from grounds 1 and 2, in addition to the issue of remedy. So be prepared to receive

questions from grounds 1 and 2 as well.

Judge Ibáñez has a question.

JUDGE IBÁÑEZ CARRANZA: [13:53:58] Thank you very much, Mr President, for the floor.

Under the second ground of appeal and about sufficiency of evidence and modes of assessment, the evidence and the role of inferences - just to be clear on your position, it is for the OTP - what exactly do you think should the Judges analyse and consider when assessing the sufficiency of evidence at halfway proceedings, such as a no case to answer?

And what is the purport of the inferential evidence or, so to speak, the reasonable inference in this assessment?

And what is the importance or relevance of the inferential evidence within the context of complex and massive cases, such as the cases before this Court? And, particularly, in the case at stake where it's needed to be determined crucial, complex aspects like common plan, policies and patterns?

PRESIDING JUDGE EBOE-OSUJI: [13:55:23] Prosecution, you may reply.

MS NARAYANAN: [13:55:27] Thank you very much, Judge Ibáñez.

On your first question on what is the role of and how does one analyse sufficiency of evidence in relation to this case particularly, in general, your Honours, I go back to the prima facie review that is necessary at the no case to answer stage.

So it may not be necessary for a Chamber to indulge in that full evaluation that Judge Henderson did in his reasons. The question again comes back to the correct standard, and that's the could convict test, and questions of credibility and reliability are only looked into to the extent that, for example, if the Prosecution's case was considered to have been fully broken down, but not otherwise. Otherwise, we get

into the problem of pre-judging.

Now in terms of your question on inferences - and I believe that's particularly relevant to circumstantial cases - and as we know, many of the cases that this Court concerns do concern that because they are, as you say, very complex, very difficult cases and they're not always made on direct evidence.

Now, the question of how one would consider a circumstantial case at the no case to answer has been hotly debated. But in our view, it should be assessed in the same way and the same principles that one would apply to any other no case to answer case, and that's the could convict test and that's Decision No. 5.

Now in terms of inferences, what is the role of inferences, then? The question is again that the no case to answer chamber is entitled to see if inferences are possible to make sure that the case can go forward. But it must not draw those inferences because that would be exactly like the other question, which is of settling of guilt. So it's the same distinction we would make in the circumstantial case as well.

Now -- so then, in effect, there would be two circumstances, yes, circumstances in a circumstantial case when the case goes forward: One, when guilt is a possible inference. It has to be a realistic inference and a compelling inference, but that's about as high as we would take it.

And the second instance when a case must go forward, is when you have two equally compelling likelihoods - one of guilt and one of innocence. At that point as well, the case must go forward and the no case to answer motion must fail.

Now, your Honours, your third point about complex cases and how does -- what sort of care does one bring to a complex case. Absolutely, your Honours must be particularly careful with complex cases such as the ones that we have; that it's not prematurely and wrongly halted in its tracks because of a wrong assessment at the no

case to answer stage.

So in this case, your Honours - and Judge Shahabuddeen makes this point very well in his Jelisić separate opinion, and I believe that's paragraph 17 of the separate opinion - a wrong or a misapplication of the standard of proof at the no case to answer stage affects the pool of the evidence. And in this case, it affected the pool of the evidence because it disregarded witnesses when -- despite the fact that they were only -- they had minor inconsistencies, that they testified under trauma, that they testified from different vantage points, and all of that is possible. It's possible to rely on witnesses despite all of that and we know that.

Likewise, there are victims of sexual violence whose evidence was disregarded purely because crimes of sexual violence were treated to a higher and unfair level of scrutiny that they did not deserve.

And likewise, your Honours, even with corroboration, corroboration is usually just common sense and it should be a flexible understanding. But the Chamber, Judge Henderson, applied a rather overly rigid understanding and, again, your Honours, that affected the pool of sufficiency of evidence and stopped this case unfairly in our view.

PRESIDING JUDGE EBOE-OSUJI: [14:00:01] Ms Narayanan, following up from your answer there - and it brought to my mind the question posed by Judge Hofmański earlier - and I ask you this as a follow up: To what extent should the Prosecution truly be wary of the standard of proof beyond reasonable doubt at the no case to answer stage, if one considered that the standard of proof beyond reasonable doubt is a burden that rests on the Prosecution from the very beginning of the case and remains constant all through? If by the close of the case for the Prosecution, the Prosecution does not fully embrace that standard to be applied at that stage, in what

circumstances should it be more confident that the case would be proved during the Defence case, such as to make the Prosecutor more comfortable with applying that standard of proof at the Defence side of the case than at the Prosecution side of the case?

MS NARAYANAN: [14:02:07] Thank you, your Honour. On the Prosecution's burden of proof, we accept it, we embrace it. Your Honours, that we're absolutely comfortable with and we know that the burden rests with us and that by the midway stage, we should have led most of our evidence, if not all, and that's our position. But the question here, your Honours, and you asked what should we be wary of, the point is that we're not so sure that this case was heard in the right way. That's where the wariness or the trepidation comes from and that's what the appeal is about. But otherwise, your Honours, we absolutely accept our burden of proof.

PRESIDING JUDGE EBOE-OSUJI: [14:02:46] Then, that may not be a matter - correct me if I'm wrong - of when the assessment was made. If your concern was that the case was not heard the right way, that concern would necessarily persist even if we had a Defence case. Unless I'm mistaken in hearing what your submission is.

MS NARAYANAN: [14:03:09] Your Honours, I'm not sure if I completely understood your question, I apologise if I don't. But if this case had continued in the same way and been heard in the same way, then yes, your Honours, that concern would have remained.

Yes, maybe the case would have gone forward, but who knows what else might have happened. But, your Honours, I just wanted to distinguish between the two issues again. The Prosecution's burden of proof rests with us. That should be clear, and I believe that's very clear.

But the question is - again, your Honour is coming back to our discussions from

yesterday, it's a question of procedural justice and the Prosecution is as much invested that procedural justice in the case is done as the Defence should be, as the victims are, and in fact, it furthers confidence in the Court and that's where the caution and this appeal comes from.

PRESIDING JUDGE EBOE-OSUJI: [14:04:10] The point I was making is whether your concern really -- when you said your difficulty was that the case was not heard the right way, and I'm anxious to know whether it's the matter of freely looking -- your issue, is it really that the case was stopped at a no case to answer point? Or are you saying you had a general problem with the case anyway, which changes perhaps the texture of the appeal and the issue you have.

You see the difficulty there?

MS NARAYANAN: [14:04:51] Your Honours, our appeal is not about the case itself. When I said how the case is heard, the question is, how were these no case to answer proceedings conducted? They were conducted without a standard. That, in our view, means it wasn't heard properly in that sense, your Honours, and that's -- that's what our issue is. Not with the case itself.

PRESIDING JUDGE EBOE-OSUJI: [14:05:11] I see that point. Okay, thank you very much for that clarification.

One question for Ms Brady.

(Appeals Chamber confer)

PRESIDING JUDGE EBOE-OSUJI: [14:05:04] Ms Brady, a question for you. In your submissions on materiality and the test of materiality, you made the submissions and urged the test of a reasonable likelihood that the same conclusion may not have been reached but for the error, or that the Appeals Chamber could not be sure that the same conclusion might have been reached, but for the error.

The question to you is this, that test of materiality, does it apply in a vacuum, in a vacuum of the entire proceeding itself? Is the Appeals Chamber -- would it be correct for the Appeals Chamber in making that assessment, asking itself those two questions in the test, taking into account the fact that there had been a trial, and, as you rightly said earlier, the Judges at trial, it is proper for them to be evaluating and re-evaluating evidence and testimony as the case unfolds.

That being the case, would the assessment of materiality and the test for materiality take that feature of a trial process into account?

MS BRADY: [14:07:25] Thank you, your Honour. As you know, we have argued the impact in two ways, one of which is on the lower prognostic standard that you set out in Bemba in a separate opinion. And we also argued it on the second alternative basis, applying the classical would have been substantially different standard.

Simply put, we say that the majority's violations of the Article 74 requirements and their errors regarding the standard of proof tainted the decision and destroyed the reliability of their decision.

These are so fundamental that they can't lead to a reliable and just decision. And I said, it can barely. In other words, it can hardly be considered a valid legal outcome at all.

Now, that's at the outset. You've got to have procedural justice in order to be able to get substantive justice. This brings me to my answer, the answer of the Prosecution to question 9.

What we're saying is that we can't get a reliable result on this stage of the proceedings because you can't get substantive justice from a procedurally deficient process. And if we can't get procedural justice at this point, we also were unable to get procedural justice at the end point because it already had influenced -- it would already have

influenced the Chamber's view.

You asked whether -- well, can you look at the whole case and can you say, well, substantively, justice has been served anyway. Well, if you're asking us whether the majority reached the correct decision in dismissing the charges, then the answer for us is no. No, because we believe that just as one Judge found, there was a case for the pair to answer. And as I've said, even if on a narrower set of *incidents and modes of liability.

This jumps a bit ahead to the retrial, but that's essential. What is it? What's going to be the scope of the retrial?

Maybe I'm jumping ahead too much here now, and I'm happy to answer that question, to answer Mr Blé Goudé's comment that somehow we're doing it to introduce all these new charges. No. If anything, the Prosecution would narrow to those charges that she believes has a reasonable prospect of success of conviction.

PRESIDING JUDGE EBOE-OSUJI: [14:10:44] Wait a minute, we're not now -- this is not about Mr Blé Goudé's response now, we'll come to that later. It was a specific question to you. Thank you.

I will invite Judge Ibáñez to ask you another question or the last of her questions.

JUDGE IBÁÑEZ CARRANZA: [14:10:59] Okay, thank you. Thank you, Mr President, for the follow-up questions.

Now coming back to the sufficiency of evidence and the role of inferences and regarding the alleged failure of the majority to draw reasonable inferences from the available evidence in its totality, in paragraphs 162, 170, 172 and 238, 245 of the appeal, the question is, whether it is possible as a matter of law to reject inferential evidence at a halfway trial under a no case to answer standard that supposedly looks at evidence at its highest? Should this include the inferential evidence?

Another question, please, for some clarification. Are inferences the same thing than inferential proof? And could this last one to be determined in a middle stage of a trial such as at the no case to answer stage? Thank you.

MS NARAYANAN: [14:12:24] Thank you, Judge Ibáñez. I believe that question would be for me.

Your Honours, you asked is it possible as a matter of law to reject an inferential evidence when you're supposed to take it at its highest?

No, your Honours, you cannot do that at the no case to answer stage.

The question at the no case to answer stage is only about whether there's sufficient evidence for the case to go forward. If the Chamber is in the business of rejecting inferences at the no case to answer stage, then it is actually drawing those inferences from the evidence to settle the question of guilt. And so -- and that is prohibited at the no case to answer stage, especially because as you say, evidence must be taken at its highest at that point.

In terms of your second question, about whether there's the difference between inferences and inferential proof, yes, your Honours, there would be in our view. The question of inferences is just what the evidence might lead to. For example, you could connect the dots between the evidence to see what the proposition is.

But the question of inferential proof is the question that attaches to the question of guilt, which comes right at the end of the trial and is inappropriate to draw at the half-time stage.

JUDGE IBÁÑEZ CARRANZA: [14:13:51] Thank you.

And my last question, also for the OTP, about liability.

In the context of the different modes of liability in this case and the alleged failure of the majority to draw reasonable inferences as to Mr Gbagbo's participation in

paragraphs 201 to 213 of the appeal, I would like to know, first, whether the standard of proof applicable to a no case to answer is, as a matter of law, incompatible with inferential evidence of complex mass criminality and the modes of liability other than those of the person who has, so to speak, did not pull the trigger?

And (b) Can you clarify how necessary are inferences for those modes of liability?

Thank you.

MS NARAYANAN: [14:14:56] Thank you, your Honour.

In terms of the relevance of modes of liability and whether they might factor differently at the no case to answer stage, your Honours, not necessarily.

We believe that the could convict test could apply to all modes of liability and not just the person who pulled the trigger. And if we can see, although it's not binding on us, the ad hoc tribunals have dealt with all manner of cases at the no case to answer stage.

What would be more important in our view is that it is -- what the Chamber undertakes at the half-time stage is actually a provisional review or a half-time review that's suited to that stage.

Of course, your Honours, there's another question about does one really need to find an all modes of liability at the no case to answer stage. You do not. You could find just on the most - how do I put this? The easiest mode of liability. If there's evidence on that, the case would go through and that's also set out in Ruto and Sang, Decision No. 5, which is the approach that we follow.

JUDGE IBÁÑEZ CARRANZA: [14:16:13] Thank you.

Thank you, I'm done.

PRESIDING JUDGE EBOE-OSUJI: [14:16:17] Thank you very much, Judge Ibáñez.

I don't know whether any other questions are coming from the Bench.

In the absence of any other question from the Bench, we will now commence the final

rounds of submissions from the parties -- or from the counsel, 15 minutes each for round-up submissions.

We will start with the Prosecution. You have 15 minutes and you'll take us to the break point.

Prosecution.

MS BRADY: [14:17:10] Thank you, your Honour.

I'll start just by making three brief points in reply to the Defence's submissions and then I'll conclude with just a few closing remarks.

The first point I'd like to respond on, the Defence has said that our appeal, both grounds 1 and 2, are challenging the integrity of the Judges or alleging their bias. We refute this. Yes, there's a presumption of integrity and impartiality of Judges, and yes, the majority sat through the Prosecution's case for two years and on January the 15th, when issuing their oral decision, stated that they had thoroughly analysed the evidence and considered all the parties' arguments. And yes, in paragraph 1 of his opinion, we see that Judge Tarfusser said that he subscribed to the factual and legal findings in Judge Henderson's reasons.

PRESIDING JUDGE EBOE-OSUJI: [14:18:16] I've been asked to request -- to personally request from the interpreters for you to watch your pace, please.

MS BRADY: [14:18:23] I apologise to the interpreters. I will definitely slow down. We're not challenging their integrity or the impartially or questioning their good faith. The Judges no doubt believe that what they did was sufficient for the purposes of rendering their decision to acquit on the 15th of January. But objectively, under the Statute, it was not. And therein lies the error in ground 1. The eight or nine objective factors I mentioned on Monday, as I said, they all point in one direction, that the majority had not fully reasoned their decision as they were duty bound to do

under Article 74(5) before acquitting on the 15th of January.

Likewise, the Judges no doubt believed that they were sufficiently *ad idem*, sufficiently in agreement to form a majority, but a closer analysis - as Ms Narayanan has demonstrated this morning - shows that they were not.

Both of these were errors, pure and simple. That's all it is. But they were of such fundamental importance that either on their own or together they should lead to a reversal of the decision.

The Defence's argument that we are challenging the integrity of the Judges in bringing this appeal would effectively turn every error, which the Prosecution or a party alleges against a Trial Chamber decision, into a potential challenge to integrity or impartiality of judges. This can't be right.

Secondly, the point I want to make is that Mr Blé Goudé yesterday argued that our impact argument solely pivoted on my argument that the Appeals Chamber should adopt a lower standard for the impact test. And he also said, well, we were not specific enough on impact.

This is inaccurate on both fronts. As I've just said in reply to Judge Eboe-Osuji's question, we've argued the impact in two ways. Firstly, on the lower prognostic standard set out by his Honour in Bemba, but secondly on the classical would have been substantially different standard.

Applying that standard, the majority's violations of Article 74 and their errors about the standard of proof so tainted their decision-making process to destroy the reliability of their decision.

To be more specific, a decision which is not fully and properly reasoned, not fully informed and where the two Judges in the majority had no clear, let alone shared, standard for assessing the evidence cannot lead to reliability -- or a reliable and just

decision. It's hardly a legal -- a valid legal outcome at all.

And just the third point I want to address is the one that was recently made by Mr Blé Goudé just then, just this morning. We refute, we very much refute - and I want to put that firmly on the record - that we are seeking a mistrial to somehow lure the Appeals Chamber or in some disguised way to lure the Appeals Chamber to vacate the charges so that we can now bring new charges or additional charges. That's not correct.

What we said in paragraph 57 of the filing that we're going to bring new charges were not meaning, you know, new charges out of whole cloth. The fact is that if you declare a mistrial, the charges will be vacated. So we're going to have to go through that process again.

It's more likely - and as we have said, we have indicated this quite strongly already in our written filing, I point your Honours to paragraph 50, that the Prosecutor may indeed narrow the charges. Narrow the charges. And I can say today that that would be on the basis of the facts and circumstances of the charges which were found by Judge Herrera Carbuccia. That would be the outside parameters. It may even narrow from there.

So we're not seeking to add new charges, but doing it on the basis of the facts and circumstances below or at the base of the charges which Judge Herrera Carbuccia found there was a case to answer for.

And if your Honours had any doubt about that, then -- and assuming you were to follow our request and grant the mistrial, you can make any -- you can make all clear -- you can make that totally clear in any directions you give about the scope of a retrial and obviously we'll abide by that, of course. We will follow your directions. We will also follow any directional guidance you give us about new evidence in

a retrial. We're not saying that new evidence may -- I mean, obviously we're not going to preclude completely that new evidence may go into a retrial, but it will be completely fair to adopt a standard such as in Haradinaj, where it was only evidence which *could not have been previously found by due diligence by the Prosecutor. So it's really about if your Honours do grant this remedy of mistrial, enabling us to do a retrial, it's really about narrowing the scope of the charges and giving appropriate directions that we can follow.

And that's really why the Prosecutor is waiting eagerly for the appeals judgment because it's only then that she can make that final decision exactly on the scope, as a Prosecutor, on the scope of the charges to bring.

Your Honours, that's all I'll say in reply. But I would like to make a few comments just to conclude the Prosecution's case, since this will be my last opportunity I think to address you.

Your Honours, all cases before this Court are important. But this one was particularly so. It involved the adjudication of the criminal responsibility of a former head of state and his youth minister for a wave of violence against victims, including the several hundreds who suffered as a result of the incidents charged in this case. When examining the evidence at the no case to answer stage, the case required a careful and proper assessment by a chamber applying a clear, predictable and shared standard of proof and which respected the mandatory requirements for decision-making under the Statute.

The victims and the affected communities in Côte d'Ivoire deserve no less. But this is not what happened. Drawing back the curtain on the majority's errors reveals a deeply fractured majority, united on their final result, but unable to agree on matters as basic as the standard of proof and even how to reach the final outcome.

And who approached the adjudicative process and rendered a decision to acquit in January 2019 in a way that turned Article 74(5) on its head.

Six months later, in what looks like an *ex post facto* justification of their earlier decision -- more like an *ex post facto* justification of their earlier decision than an explanation of actually how they had reached their decision, the majority used defective evidentiary approaches to shore up the decision they had previously given.

Your Honours, this should not be the process and outcome that the victims and the affected communities should receive from this Court. Such fundamental irregularities and flaws should not be sanctioned by this Appeals Chamber nor should they constitute a legacy of this Court in this case.

These fundamental flaws impeded the majority's ability to deliver a reliable and just outcome and should lead your Honours to reverse, to quash the acquittals. Having done so, we ask your Honours to declare a mistrial, vacate the charges without prejudice and return the case to the Prosecutor for her final decision on the retrial and its scope.

In this way, justice may at last have a chance to be served in this case.

Thank you very much, your Honours, and that completes the submissions for the Prosecution.

PRESIDING JUDGE EBOE-OSUJI: [14:29:12] Thank you very much, Ms Brady.

We will take a 30-minutes' break now and reassemble to complete the proceedings.

The Court will rise.

THE COURT OFFICER: [14:29:33] All rise.

(Recess taken at 2.29 p.m.)

(Upon resuming in open session at 3.02 p.m.)

THE COURT OFFICER: [15:02:46] All rise.

Please be seated.

PRESIDING JUDGE EBOE-OSUJI: [15:03:11] We will now receive the final submissions from Ms Massidda, during which of course she will address any questions that she was not able to get to during the question time from the Bench. Ms Massidda.

MS MASSIDDA: [15:03:33] Thank you, Mr President.

I will have three brief issues to address, the fourth having already been taken by the Prosecution in one of the answers to the questions of I think it was Judge Morrison. The first issue I wish to address is the argument the Defence of Mr Gbagbo repeated several times in the last couple of days and it's the argument according to which victims should have addressed during the trial any concerns about the fairness of the proceedings instead of raising them now on appeal.

Now, your Honours, my learned colleague Professor Jacobs knows very well that victims have no procedural avenue, contrary to the parties, to directly challenge the rulings of relevant Chambers. Victims cannot request leave to appeal interlocutory decisions and essentially rely on the Prosecution's willingness to address legal and/or procedural issues which may also touch upon the victims' rights and interests.

The Defence of Mr Gbagbo is also cognizant that the concerns of the victims were absolutely clearly presented to the Trial Chamber, particularly in relation to the no case to answer procedure and the standard to be applied.

The second issue, the second issue concerns the criticism I have heard in relation to the choice of not calling witnesses or participating victims to testify in the case. Firstly, it goes without saying that this is a matter that purely relates to counsel's strategy, a decision which incidentally was rooted on other proceedings, and the questioning of crime based witnesses in particular were handled by the Trial

Chamber. But more important, the Defence does not show how this argument is relevant to the two grounds we have been discussing in this appeal.

The third issue, your Honour, and finally, in relation to both Defence teams' arguments on the role of victims in these proceedings, I wish to stress that the fact that victims may agree with the arguments put forward by the Prosecution does not turn them into a second Prosecutor. Victims have an independent voice and role before this Court.

And, your Honour, this case is not about justice for the defendants, as we have heard several times, including this morning, mainly by the Defence of Mr Blé Goudé. This case, it's about justice for all parties and participants in the proceedings.

In this case, victims have one fundamental interest, and that is that the fairness of these proceedings is ensured. It wasn't, in our submission, the case. And it is with this in mind that victims support the Prosecution request that the decision of acquittal is reversed and a mistrial declared.

Thank you very much, your Honours, for listening to the views and concerns of the victims in this important appeal.

PRESIDING JUDGE EBOE-OSUJI: [15:07:48] Thank you, Ms Massidda. And I note that you did that in three minutes or less. Much appreciated.

MS MASSIDDA: [15:08:01] My pleasure, your Honour.

PRESIDING JUDGE EBOE-OSUJI: [15:08:04] Thank you.

Now we come to counsel for the Defence. We received a request from the Gbagbo counsel for written submissions. We will not grant written submissions. We expect you to use the round-up period you have now to address any matter you weren't able to deal with or get to during the course of the proceedings.

Please proceed with your submissions.

MR ALTIT: [15:08:45](Interpretation) Thank you, Mr President.

Mr President, your Honours, we have demonstrated that the Prosecutor's allegation as to the existence of errors committed by the Trial Chamber Judges invalidating the acquittal decision is unfounded. The Judges have been extremely respectful of the rights of all *those involved and of procedural logic, and have shown themselves to be the best stewards of justice.

THE INTERPRETER: [15:09:16] Message from the interpreter: Could counsel please slow down when he is reading, please.

PRESIDING JUDGE EBOE-OSUJI: [15:09:23] Mr Altit, there is a request from the interpreters for you to go slow, especially when you are reading.

MR ALTIT: [15:09:33](Interpretation) Very well. Thank you, Mr President.

*As for the Prosecution, or the Prosecutor, in actual fact, she has nothing to complain about, having been able to present the entirety of her evidence in the manner she deemed appropriate, according to the highest standard of beyond reasonable doubt. The Judges granted her all the latitude in order to do so. The no case to answer proceedings were conducted after two years of trial and the Prosecutor cannot, cannot make believe that the Judges only familiarised themselves with the no case -- with the case during the no case to answer. They were only too familiar with it before the no case to answer proceedings and that is why in January 2019 they were able to enter a fully informed decision.

And they were also able to apply the adequate standard or appropriate standard to a no case to answer that was then detailed in their written reasons.

In January 2019, it is the essence of the decision that was handed down by the Judges once they had, and I quote, "meticulously analysed all the evidence and considered all the legal and factual arguments presented orally and in writing by the parties and

participants." End of quote. This is the French transcript, T-232, dated 15 January 2019, page 2, lines 26 to 28.

Six months were then required for the drafting of the extremely detailed and meticulous reasons adopted by the majority, who were required, *in accordance with the spirit of the Rome Statute, they were required to furnish a robustly reasoned decision.

Now, Mr President, your Honours, should the decision to release Mr President for the six-month drafting period have been shelved, or should -- once the Judges had reached an agreement, should he have been acquitted and released? Waiting for the decision to be drafted would have been a terrible violation of Mr Gbagbo's rights.

The Judges did well to act as they did in January 2019. They acted in the best possible manner by respecting *the rights of the people involved, the major principles of law, internationally recognised human rights and the spirit of the Rome Statute. Did their actions lack the formality required in such a situation? Not at all. And we have demonstrated this. The Trial Chamber Judges did not err. Quite to the contrary, their work was exemplary. Once this observation has been made, what is interesting to note is that not only are the Prosecutor's arguments presented on appeal weak, but they also fail to focus on anything fundamental. The appeal * does not cover the guilt or responsibility of Laurent Gbagbo, nor does it turn to the manner in which the proceedings unfolded or the standard adopted by the Judges at the no case to answer stage, or even on the manner in which they entered their judgment in July 2019, or even the reasons underlying the 2019 judgment.

The appeal merely focuses on the fact that the January 2019 oral delivery of the judgment did not satisfy the formal requirements. In other words, the appeal focuses on matters that are accessory to the trial itself and the manner in which it was

conducted.

Under these conditions, it would seem that the remedy requested, that is to say, a mistrial, is completely inadequate with regard to the criticism levelled at the Trial Chamber Judges by the Prosecutor. *And a mistrial, as we have said, would seem to us to be a remedy reserved for situations where the Prosecutor found that her ability to present her evidence freely was profoundly affected, for example, by the existence of external factors, as found by the Judges in the Ruto case.

So what could be the rationale underlying the request for a mistrial? It seems to us to flow from the manner in which the Prosecutor presented her appeal.

* In using the idea of a mistrial, even though none of its arguments support such a possibility, the Prosecutor seems to want at all cost to obtain a sort of carte blanche from the Chamber whereby she would be cleared of her failure and could lay the blame at the Judges' door without taking the risk of venturing on to the terrain of a more serious appeal, an appeal concerning or responsibility, for example, that she would be incapable of arguing.

In other words, the notion of a mistrial seems here to be used by the Prosecutor to save face, for her to be able to give the impression to the outside world that the acquittal was not her fault, that the acquittal is not the logical, natural and inexorable result of a botched investigation that produced weak evidence to support an artificial narrative as ascertained by the Trial Chamber Judges.

From this viewpoint, it is interesting to note that the Prosecutor, by turning logic on its head, bases her arguments on the idea that it was the Judges' inability to put a clear no case to answer in place that led to an acquittal while forgetting the two years of trial when it was free to present -- where she was free to present her evidence in full.

It is apparent from reading the Prosecutor's appeal brief, as well as her answers to the

questions put by the Chamber and observations during the hearing, that the Prosecutor would like to give the impression during this appeal that the acquittal can be put down *solely to errors *allegedly committed by the Trial Chamber Judges. How could one not then think when reading and listening to the Prosecutor that the notion of a mistrial here serves one purpose alone, that of removing the lacunae in her case that have been pointed out by the Judges?

A declaration of mistrial would free the Prosecutor from having to face up to the choices she made during the trial and enable her to avoid any discussion on her investigation and the manner in which she presented her case.

So the problem that the Prosecutor is up against is that a mistrial in this instance is impossible to support, as has been demonstrated. * How can one then go about convincing anybody on the basis of such tenuous legal elements that perhaps there had been a so-called error in an oral decision… in the oral decision of January 2019? How can one convince anybody that there may have been a mistrial?

And this is where the ideal -- idea of a mistrial comes in, if we follow the Prosecutor's reasoning. It was tardily introduced on 6 February 2020 as if the mistrial idea needed to be shored up or buttressed.

The question of a retrial has the benefit of moving the debate away and shifting the focus away from the criteria for a mistrial. Substituting the retrial discussion for the mistrial discussion could be seen as a means of changing the terms of a difficult debate by --

PRESIDING JUDGE EBOE-OSUJI: [15:20:12] (Overlapping speakers) Counsel, by now you should have four minutes left, but you can take five. Proceed.

MR ALTIT: [15:20:19](Interpretation) Thank you, Mr President.

By introducing the idea of a retrial, the Prosecutor is reducing the discussion to the

idea that she was unable to freely present evidence at trial.
In other words, the retrial idea enables her to reintroduce the issue of facts just as if the two years of trial never existed, just as if the no case to answer proceedings had never existed. And here then the true nature of the appeal before you is revealed. *Your Honours, it is quite simply --- and no more than ---a disagreement. The Prosecutor is expressing her disagreement with the findings of the Trial Chamber Judges after having exhaustively and scrupulously examined the evidence, that of an acquittal. It is the acquittal that is scandalous to the Prosecutor, not the manner in which the Judges reached their determination.
So we need to turn briefly to the idea of a retrial. I note that the Prosecution on a number of occasions said that the Judges put an abrupt stop to the case or that they stopped the case halfway through, and on each occasion they want us to have -- they want to have us believe that the trial could have continued and that they could have continued to present the evidence. But it's not the truth. *The Prosecutor had presented the entirety of their case at the end of the trial in the spring of 2018. That is the reality. So the match is over for her, because had the Defence chosen not to present their case, it would have been on the basis of her case in its existing form that the Judges would have reached a determination. When they talk about a midway stage, the Prosecutor is trying to make the observers believe that *if the trial had continued to the very end, the result would have been quite a different one. But it's not an expression of reality.
*The idea that the Prosecutor could have found better evidence whilst she was able to investigate unimpeded for several years with the help of the Ivorian authorities is inconceivable. There is no reason why she would now chance upon new evidence in support of her case when she has been incapable of *finding any over the years. It is

easy to understand what was clearly borne out at trial, namely that *such evidence quite simply does not exist.

Finally, last word, Mr President, on the item of *non bis in idem*, without a full acquittal, there would be no protection associated with the application of the *non bis in idem* principle. This has been discussed, and as we said earlier, declaring a mistrial would constitute an abuse of process from this viewpoint.

I would like to take this further for a moment. If we consider that, as the Prosecutor has had the latitude to present *her evidence in full and freely over a period of two years, according to the higher standard, and as she has not appealed the Judges' findings at the -- as to Laurent Gbagbo's responsibilities, these findings can be deemed final and revisiting them in the context of a retrial*, whether or not you decide that there has been a mistrial, revisiting the findings would be undermining the very principle of *non bis in idem*.

And I shall end on this: So a retrial is impossible because it would be a violation of *non bis in idem* and also because the Prosecutor cannot find any new evidence. And if the idea of a possibility of a retrial were to disappear, then the reasons presented by the Prosecutor as *a step towards a retrial would also disappear.

Thank you.

PRESIDING JUDGE EBOE-OSUJI: [15:25:06] Thank you very much, Mr Altit.

Now finally counsel for Blé Goudé. Please use this opportunity to speak to any of the questions posed from the Bench that you might have wanted to deal with but were not called upon specifically to.

Please proceed.

MR KNOOPS: [15:26:12] Thank you, Mr President, your Honours.

My closing arguments will embark upon two major points of this case:

First, your question, Mr President, whether the materiality test should be applied in a vacuum or not. May I take the Bench to one example, may I take the Bench to the jurisprudence of the European Court of Human Rights when it concerns assistance of counsel during a police interrogation, which is, as the European Court of Human Rights has assessed, a fundamental procedural right, fundamental.

I refer to the landmark case of Salduz, the Salduz case, which has been implemented in all European states to say that a defendant, the accused person, who is subjected to a police interrogation can be assisted by counsel.

PRESIDING JUDGE EBOE-OSUJI: [15:27:25] Can you spell it for the record so that -- (Overlapping speakers)

MR KNOOPS: [15:27:29] Salduz, S-A-L-D-U-Z.

Notwithstanding that this is a fundamental human right of procedural justice, a violation of this right does not lead to a mistrial. The European Court has ruled in several judgments after Salduz that only if the statement of that accused person, taken without respect for this fundamental right, i.e. the presence of counsel during a police interrogation, that even that statement of the defendant notwithstanding the absence of counsel does not affect the trial, but only if that statement is admitted as evidence.

And this is a clear example, Mr President, to show the Bench that procedural justice is closely connected to substantive justice. Procedural justice does not automatically in a vacuum lead to procedural injustice, or on the merits. That's to say that the materiality test can indeed not apply it in a vacuum. It's up to the appellant to show, in line with the jurisprudence of this Court, Kony and Bemba examples, where dealt with procedural errors, materiality test was not weakened or being applied less stringent.

In this case, the Chamber has nothing heard other than the fundamental right has

been violated, without showing that it did affect with specificity how precisely that alleged procedural error affected the outcome of the case or of the evidence. So the analogy with the European Court of Human Rights jurisprudence in Salduz is quite prominent. If one accepts that the fundamental right of a defendant to have counsel present and which in a certain situation is violated does not lead to a total collapse of the case, but only if that procedural deficiency has led to an effect on the trial, only then consequences can be made. So that's my first point.

Second point is the issue of the inferences. This case, Mr President, your Honours, was totally built on inferences. There were various examples that the Court, the majority, acknowledged there was no direct evidence whatsoever. The Prosecution in one of its early status conferences acknowledged that this case was to be built on inferences, on circumstantial evidence, so then of course at the halfway stage a Chamber is confronted with the question whether, based on inferences, there is a reasonable case to answer. And then of course the Chamber did apply the proper test, namely the test if that specific inference the Prosecution wants to draw is the only reasonable inference with the exclusion of others. That is the proper test which must be made in this case. And this test was not because the judges liked this test, this was because the judges were confronted with a case based on circumstantial evidence. There was no direct evidence against Mr Charles Blé Goudé, he was not a direct perpetrator.

I remind the Judges to the testimony of the commissioner of the 7th arrondissement, he came in this courtroom, Mr President, and he was directly asked: Did you ever see Charles Blé Goudé in the 7th arrondissement? And that was the allegation of the Prosecutor, that Charles was there. He said "I never saw him." So the Judges were confronted with the case based on inferences and, therefore, they had to deal on this

halfway stage with inferences.

And taking the evidence at its highest when we speak about inferences is not -- does not mean believing what the Prosecution wants to believe as being to be drawn from an inference. That is not the conclusion one can draw.

Taking the evidence at its highest does therefore not mean that we simply should draw the conclusion the Prosecution wants to draw from that inference. Therefore, the proper test at the halfway stage was also applied by the Judges when it concerns inferences.

And my third remark, Mr President, if the Prosecution in its answers to the Bench in question number 30, three zero, clearly says: Accordingly, notwithstanding that Judge Henderson articulated the correct standard -- the standard correctly in his July 2019 reasons, the Majority's failure to direct itself initially to that standard would have caused an appealable error.

This is purely speculation and it's not relevant.

If the standard was with acknowledgment of the Prosecutor applied correctly by Judge Henderson with consent of Judge Tarfusser, what are we speaking about in this courtroom, what is the relevance of this discussion, with all due respect? The standard was correctly applied in the July 2019 reasoning, the Prosecution admits this in its answers to the Bench in paragraph 30.

And if Judge Henderson and Mr Tarfusser applied the correct standard admitted by the Prosecution in paragraph 13 and we look, Mr President, at the way, the detailed way they explained why - also for the victims - why they applied the correct standard, there is no doubt that the standard was correctly applied, but, secondly, that it was totally justified that this standard led to the acquittal.

The fundamental weakness of the Prosecution began with its inability to prove the

existence of an alleged pattern of criminality. The majority clearly explained that the attempts of the Prosecution to demonstrate that the 24 incidents she relied upon to prove this so-called pattern were far from representative and that the Prosecution was actually guilty of cherry-picking to constitute an alleged representative sample of such a pattern. This you can find in the judgment explained in detail, paragraph 1889.

Thus no reasonable chamber could find - and that was the proper standard applied by Judge Henderson - could find that there existed a (inaudible) pattern of criminal conduct that even could support an inference of such a policy.

The fundamental weakness of the case, based on a proper standard applied by the Judges, also is to be seen in paragraphs 1929 till 1942 of the majority judgment.

None of the five charged incidents, Mr President, none of the five, were supported by sufficient evidence so that a reasonable chamber could conclude. Again you find the proper standard here, could conclude that there was indeed a case of indirect perpetration under Article 25. These are just a few examples, Mr President, of the many.

So, in other words, if the Prosecution admits that the standard was applied correctly by the majority, there's no discussion whatsoever about any errors.

PRESIDING JUDGE EBOE-OSUJI: [15:37:36] Mr Knoops, time check. Five minutes. I hope you can finish at that time.

MR KNOOPS: [15:37:47] By the way, I just got a correction: I mentioned the 7th arrondissement, but it's the 16th arrondissement. The commissioner of the 16th arrondissement, he came to the Court.

Mr President, we already mentioned earlier during our submissions that out of the six examples the Prosecution is relying on, examples 1, 2 and, in part, example 3, that is

the incidents in Abobo, refer to incidents for which the Prosecution itself ask the charges against Charles Blé Goudé to be dismissed. These examples, as mentioned, are therefore not relevant in any way for the assessment of the appeal.

Prosecution dedicates 42 pages in its Document in Support of the Appeal analysing these examples, but not once in these 42 pages, your Honours, the name of Charles Blé Goudé is mentioned. Not once the Prosecution argues that there was indeed evidence to convict him. Simply because, indeed, these are -- examples are fully unrelated to the acts and conduct of Mr Charles Blé Goudé.

Mr President, the Chamber correctly concluded, therefore, that no reasonable chamber could find Mr Charles Blé Goudé guilty or could find that he made a contribution to the crimes in the sense of Article 25, simply because, as Judge Tarfusser stated in his opinion in paragraph 14, there was no evidence.

Finally, Mr President, the Prosecution concluded its submission by saying, behind the curtains the victims are crying. But does the Chamber realise that behind the curtains there is a family of a defendant crying for years, an innocent man who was brought here from his home country? That family is also crying.

And are we going to wait, Mr President, till the Prosecution is satisfied with its burden of proof by allowing them a mistrial? This whole case was built on vague and suggestive inferences without any direct evidence, and that is why the Chamber did what it had to do, it determined those inferences on the basis of the correct standard of proof.

And finally, Mr President -- and that's also for the integrity of this Bench and for everyone, with all due respect for the Prosecution, but it's my submission that it's quite easy to put the blame on a bench when a party doesn't get what it wants, namely a conviction. And I remind the Bench strongly to paragraph 5 of the

introductory remarks of Judge Henderson where he said that this whole case was a result of a partial, unbalanced and ultimately unpersuasive portrayal of what allegedly occurred in the run-up as well as during the fateful months of 2010 and 2011.

It's therefore not to blame the Bench, it's to blame the Prosecution, Prosecution has something to explain to the victims. They presented, and not the Bench, a totally unprofessional dossier to the Bench. And Judge Henderson left no doubt about how he thought about the quality of the material which was presented. And therefore it was totally justified that this was the only reasonable outcome, procedurally justice, but moreover justice on the merits.

Thank you.

PRESIDING JUDGE EBOE-OSUJI: [15:42:29] Thank you very much, Mr Knoops. And this brings to us the end of the submissions. The Chamber will rise in a minute. But before I do I want to thank all of you counsel for your very able and helpful submissions that will help us in our work. Ordinarily I don't do gratitudes at the end of proceeding because I know everyone will take it for granted that we are grateful, but on this occasion I think I should particularly express how grateful we are to the Registry staff for making this first experience happen. The technical support staff who facilitated the process. As always, interpreters for helping us very ably with making each other understood, even in these unusual settings that we have now got used to, two days, three days now. And the court reporters as well. We are also grateful for the assistance everyone has given us.

And the Court is now adjourned.

THE COURT OFFICER: [15:43:58] All rise.

(The hearing ends in open session at 3.43 p.m.)

"the credibility and admissibility of its evidence" is corrected to
"the authenticity and credibility of its evidence in most cases"
Page 14 line 20:
"the background" is corrected to "a back seat"
Page 36 line 17
"to request" is corrected to "to order"
Page 36 lines 11-13:
"Madam Brady says that one can require of the appellant that they present factual errors, it is true, but in the absence of any such alleged errors, and as we have just noted, the Prosecutor does not challenge the factual findings."
Is corrected to
"Madam Brady says that one cannot require the appellant to present factual errors, it is true, but in the absence of any such alleged errors, one should note that the Prosecutor does not challenge the factual findings."
Page 40 line 21:
", so under such condition," is corrected to
"And that is why, under such conditions,"
Page 66 lines 5-6:
"those involved and of the legal procedure and have shown themselves to be the best service of justice." Is corrected to
"those involved and of procedural logic, and have shown themselves to be the best stewards of justice."
Page 66 lines 12-14:
"As for the Prosecution, or the Prosecutor, she has little to complain about, having been able to present the entirety of her evidence in the manner she deemed

appropriate, according to the highest standard of beyond all reasonable doubt."is corrected to

"As for the Prosecution, or the Prosecutor, in actual fact, she has nothing to complain about, having been able to present the entirety of her evidence in the manner she deemed appropriate, according to the highest standard of beyond reasonable doubt."

Page 67 lines 3-4:

"pursuant to" is corrected to

"in accordance with the spirit of "

Page 67 line 11:

"the rights of the people involved," is translated and added.

Page 67 line 17:

"is unfocused. It"is deleted.

Page 68 lines 3-6:

"And this trial, as we have said, would seem to us to be a remedy reserved for situations where the Prosecutor found that her ability to present her evidence was profoundly affected by external factors, as found by the Judges in the Ruto case."

Is corrected to

"And a mistrial, as we have said, would seem to us to be a remedy reserved for situations where the Prosecutor found that her ability to present her evidence freely was profoundly affected, for example, by the existence of external factors, as found by the Judges in the Ruto case."

Page 68 lines 9-14:

"In using the idea of a mistrial, even though none of its arguments support such a turn of events, the Prosecutor seems to want at all cost to obtain a sort of carte blanche from the Chamber whereby she would be cleared of her defeat and could lay the

blame at the Judges' door without taking the risk of venturing on to the more tenuous terrain of a more complex appeal or responsibility, for example, that she would be incapable of arguing."

Is corrected to

"In using the idea of a mistrial, even though none of its arguments support such a possibility, the Prosecutor seems to want at all cost to obtain a sort of carte blanche from the Chamber whereby she would be cleared of her failure and could lay the blame at the Judges' door without taking the risk of venturing on to the terrain of a more serious appeal, an appeal concerning responsibility, for example, that she would be incapable of arguing."

Page 69 line 2:

"solely"and "allegedly"are translated and added.

Page 69 lines 6-8:

"A declaration of mistrial would free the Prosecutor from having to face up to the choices she made during the trial and enable her to avoid any discussion on her investigation and the manner in which she presented her case."

Is corrected to

"A declaration of mistrial would free the Prosecutor from having to face up to the choices she made during the trial and enable her to evade responsibility by avoiding any discussion on her investigation and the manner in which she presented her case."

Page 69 lines 10-13:

"How can one then go about convincing anybody on the basis of such tenuous legal elements in the oral decision of January 2019 that there has been a mistrial? "

Is corrected to

"How can one then go about convincing anybody on the basis of such tenuous legal

elements that perhaps there had been a so-called error in an oral decision… in the oral decision of January 2019? How can one convince anybody that there may have been a mistrial?"

Page 70 lines 4-5:

"Your Honours, it is quite simply, quite simply that the Prosecutor is expressing her disagreement"

Is corrected to

"Your Honours, it is quite simply --- and no more than --- a disagreement. The Prosecutor is expressing her disagreement"

Page 70 lines 13-17:

"The Prosecutor had presented the entirety of their case at the end of the trial in February 2018, so play is over for her, because had the Defence chosen not to present their case, it would have been on the basis of her case that the Judges would have reached a determination."

Is corrected to

"The Prosecutor had presented the entirety of their case at the end of the trial in the spring of 2018. That is the reality. So the match is over for her, because had the Defence chosen not to present their case, it would have been on the basis of her case in its existing form that the Judges would have reached a determination."

Page 70 lines 18-19:

"if the trial had continued to the very end,"is translated and added.

Page 70 lines 21-23:

"The idea that the Prosecutor could have presented a better case whilst she was able to investigate unimpeded for several years with the help of the Ivorian authorities is hardly practicable .." Is corrected to

"The idea that the Prosecutor could have found better evidence whilst she was able to investigate unimpeded for several years with the help of the Ivorian authorities is inconceivable."

Page 70 line 24:

"presenting" is corrected to "finding"

Page 70 line 25:

"the" is corrected to "such"

Page 71 line 7:

"its" is corrected to "her"

Page 71 lines 10-11:

"whether or not you decide that there has been a mistrial, revisiting the findings" is translated and added.

Page 71 lines 16-17:

"a stage towards a retrial would also disappear. Their argument would be unfounded. Thank you." Is corrected to

"a step towards a retrial would also disappear. Thank you."

SECOND CORRECTIONS REPORT

The following corrections, marked with an asterisk and not included in the audio-visual recording of the hearing, are brought into the transcript.

Page 17 line 23:

"(inaudible)" is corrected to "conducted"

Page 18 line 16:

"uniformed"is corrected to "uniform"

Page 20 line 6:

"submission-schemed" is corrected to "submission-scheme"

Page 20 line 25:

“stuck”is corrected to “stark”

Page 21 line 10:

“I“is corrected to “they”

Page 29 line 13:

“had”is corrected to “have”

Page 29 line 18:

“the” is deleted

Page 56 line 6:

“instance” is corrected to “incidents”

Page 62 line 4:

“would”is corrected to “could”