

1 International Criminal Court
2 Appeals Chamber
3 Situation: Republic of Côte d'Ivoire
4 In the case of the Prosecutor v. Laurent Gbagbo and
5 Charles Blé Goudé - ICC-02/11-01/15
6 Presiding Judge Chile Eboe-Osuji, Judge Howard Morrison,
7 Judge Piotr Hofmański, Judge Luz del Carmen Ibáñez Carranza and
8 Judge Solomy Balungi Bossa
9 Appeals Chamber Judgment - Courtroom 3/Interactio
10 Wednesday, 31 March 2021
11 (The hearing starts in open session at 3:18 p.m.)
12 THE COURT USHER: [15:18:35] All rise.
13 The International Criminal Court is now in session.
14 Please be seated.
15 PRESIDING JUDGE EBOE-OSUJI: [15:18:53] Thank you very much.
16 Court officer, please introduce the matter for the day.
17 THE COURT OFFICER: [15:19:09] Good afternoon, Mr President.
18 The situation in the Republic of Côte d'Ivoire, in the case of the Prosecutor
19 versus Laurent Gbagbo and Charles Blé Goudé, ICC reference 02/11-01/15.
20 And we are in open session.
21 PRESIDING JUDGE EBOE-OSUJI: [15:19:27] Thank you very much.
22 My name is Eboe-Osuji. I'm the Presiding Judge in the appeal arising from
23 the case of the Prosecutor versus Mr Gbagbo and Mr Blé Goudé.
24 The record will reflect that my fellow judges, comprising the full bench in the
25 appeal, are joining or have joined the proceedings and are with us virtually.

1 They are Judge Howard Morrison, Judge Piotr Hofmański, Judge Luz Ibáñez,
2 Judge Solomy Bossa.

3 As some of you who follow the life of the Court would have known, between
4 the last time we were here hearing appeals on this matter and today, there have
5 been a few significant changes in the life of the Court, and we now have a new
6 President, who is or always is a member of the Appeals Chamber and his first
7 Vice-President also is a member of the Appeals Chamber. So ordinarily that
8 will result in the change in precedence, and also two judges whose terms have
9 expired, but for purposes of consistency, we will keep the order of names of the
10 judges on the record as they've always been.

11 With those little details out of the way, may I take the appearances now,
12 beginning with the Prosecution.

13 MS BRADY: [15:21:14] Good afternoon, your Honours. Appearing on behalf
14 of the Prosecution are myself, Helen Brady, senior appeals counsel, and with
15 me today are Mr Reinhold Gallmetzer, appeals counsel and Ms
16 Priya Narayanan, appeals counsel. Thank you.

17 PRESIDING JUDGE EBOE-OSUJI: [15:21:35] Thank you.

18 Then the Defence team for Mr Gbagbo.

19 May I have appearances for the Defence team for Mr Gbagbo.

20 MS NOURI: [15:22:07](Interpretation) Your Honour, Mr Altit --

21 MR ALTIT: [15:22:08](Overlapping speakers) *Bonjour Monsieur -- Bonjour*
22 *Monsieur le President --*

23 MS NOURI: [15:22:10] Ah, Mr Altit coming in remotely.

24 PRESIDING JUDGE EBOE-OSUJI: [15:22:17] Yes, please proceed, Mr Altit,
25 we can hear you.

1 MR ALTIT: [15:22:18](Interpretation) Good afternoon, your Honour. The
2 Defence team today is made up of Ms Baroan from Abidjan; Laurine Chereau
3 in the premises of the Court; Ms Naouri and Mr Jacob, who are alongside
4 Mr Gbagbo; and myself, I am Emmanuel Altit, lead counsel.

5 PRESIDING JUDGE EBOE-OSUJI: [15:22:55] *Merci, Monsieur.*

6 And then counsel for the Defence team of Mr Blé Goudé.

7 MR KNOOPS: [15:23:00] Good afternoon, Mr President.

8 The Defence of Charles Blé Goudé is today represented by myself, Alexander
9 Knoops, counsel; and Mr Serge Gbougnon, legal assistant; and Mr Blé Goudé is
10 present here in the courtroom. Thank you.

11 PRESIDING JUDGE EBOE-OSUJI: [15:23:24] Thank you very much.

12 Can we then go to the office of -- to the representatives of the victims in the
13 case.

14 MS MASSIDDA: [15:23:31] Good afternoon, Mr President. The victims in
15 these proceedings are represented by myself, Paolina Massidda. In the
16 courtroom today, Ms Ludovica Vetrucchio and Mr Enrique Carnero Rojo.
17 Following from Abidjan, Mr Brahim Sako. Thank you.

18 PRESIDING JUDGE EBOE-OSUJI: [15:23:58] Thank you very much.

19 I note for the record that Mr Gbagbo and Mr Blé Goudé are in the courtroom.
20 The Appeals Chamber is delivering today its judgment in the Prosecutor's
21 appeal against the decision of Trial Chamber I rendered on 15 January 2019,
22 with reasons issued on 16 July 2019, in which the Trial Chamber granted the no
23 case to answer motions of Mr Gbagbo and Mr Blé Goudé and acquitted them of
24 all charges.

25 I shall begin by summarising the background to the appeal.

1 The case arose out of the 2010-2011 post-election violence in Côte d'Ivoire.

2 Under the Prosecutor's theory of the case, the violence, following the election,
3 occurred against victims perceived as the then President-elect Ouattara's
4 supporters on the basis of their Muslim faith, ethnicity or regional affiliation.

5 It was argued that outgoing President Gbagbo, who lost the election, and his
6 inner circle, to which Mr Blé Goudé allegedly belonged, controlled the State
7 security forces, militia and mercenaries that carried out attacks allegedly aimed
8 at allowing Mr Gbagbo to remain in power.

9 In the circumstances, Mr Gbagbo was charged with crimes against humanity
10 for acts allegedly committed between 16 December 2010 and 12 April 2011.

11 Mr Blé Goudé, the former Minister of Youth during Mr Gbagbo's presidency,
12 was charged with crimes against humanity regarding most of the same events
13 that underlie the charges against Mr Gbagbo, and one additional incident
14 between 25 and 28 February 2011.

15 On 23 November 2011, Pre-Trial Chamber III issued an arrest warrant for
16 Mr Gbagbo, and on 30 November 2011, he was surrendered into the Court's
17 custody. On 21 December 2011, Pre-Trial Chamber III issued a warrant of
18 arrest for Mr Blé Goudé and he was surrendered into ICC custody on 22 March
19 2014.

20 On 12 June 2014, Pre-Trial Chamber I, by majority, confirmed the charges
21 against Mr Gbagbo. On 11 December 2014, Pre-Trial Chamber I confirmed the
22 charges against Mr Blé Goudé; Judge Van den Wyngaert dissenting.

23 On 11 March 2015, the Trial Chamber joined the cases against Mr Gbagbo and
24 Mr Blé Goudé, and their trial commenced on 28 January 2016.

25 On 19 January 2018, the Trial Chamber held the last hearing in the Prosecutor's

1 presentation of her evidence against Mr Gbagbo and Mr Blé Goudé.

2 On 9 February 2018, the Trial Chamber issued an order on the further conduct
3 of the proceedings, inviting the Prosecutor to file a trial brief illustrating her
4 case and detailing the evidence in support of the charges. It also directed the
5 Defence teams to indicate whether or not they wished to make any submission
6 of a no case to answer motion or, in any event, whether they intended to
7 present any evidence in the case.

8 On 19 March 2018, the Prosecutor filed her mid-trial brief, and, on 23 April
9 2018, counsel for Mr Gbagbo and Mr Blé Goudé filed their observations,
10 indicating, amongst other things, the suitability of no case to answer
11 proceedings and their intention to trigger that proceeding.

12 On 4 June 2018, the Trial Chamber issued a second order on the conduct of the
13 proceedings, ordering counsel for Mr Blé Goudé and Mr Gbagbo to file
14 submissions addressing the issues for which, in their view, the evidence
15 presented by the Prosecutor is not sufficient to sustain a conviction. The
16 Trial Chamber declared that the presentation of the evidence for the Prosecutor
17 was closed.

18 On 23 July 2018, counsel for Mr Gbagbo and Mr Blé Goudé filed their no case
19 to answer motions, and on 10 of September 2018, the Prosecutor and the Office
20 of Public Counsel for Victims, OPCV, filed their responses.

21 The Trial Chamber held hearings on the issue in October and November 2018.

22 On 10 December 2018, the Trial Chamber, by majority, scheduled a hearing on
23 the continued detention of the accused persons. The hearing took place on 13
24 December 2018.

25 On 15 January 2019, the Trial Chamber, by majority, rendered a decision in

1 open court, acquitting Mr Gbagbo and Mr Blé Goudé of all charges, and
2 indicated it would provide its full and detailed reasons as soon as possible.

3 Six months later, on 16 July 2019, the Trial Chamber filed the written reasons
4 for the decision rendered on 15 January 2019, and appended to those three
5 opinions: The reasons of Judge Henderson, the opinion of Judge Tarfusser
6 and the dissenting opinion of Judge Herrera Carbuccion.

7 The Trial Chamber decided, by majority, Judge Herrera Carbuccion dissenting,
8 to grant the Defence motions for acquittal from all charges against Mr Gbagbo
9 and Mr Blé Goudé.

10 Today's judgment by the Appeals Chamber addresses the appeal of the
11 Prosecutor against the acquittals of both Mr Gbagbo and Mr Blé Goudé.

12 In her brief, the Prosecutor raises two grounds of appeal. Under her first
13 ground of appeal, she argues that the Trial Chamber erred by acquitting
14 Mr Gbagbo and Mr Blé Goudé in violation of the mandatory requirements of
15 Article 74(5) of the Rome Statute; or alternatively erred in the exercise of their
16 discretion by doing so. In her view, convictions and acquittals must comply
17 with specific legal requirements to be found in Article 74(5). She alleges that
18 the Trial Chamber failed to comply with those requirements. The alleged
19 failure came in the manner of an unreasoned and uninformed oral acquittal on
20 15 January 2019, the Prosecutor argued. According to her, the decision was
21 unlawful and cannot produce the effect of an acquittal, and its deficiencies
22 were not cured by the documents filed on 16 July 2019.

23 In her second ground of appeal, the Prosecutor contends that the
24 Trial Chamber erred in law or procedure or both by acquitting Mr Gbagbo and
25 Mr Blé Goudé without properly articulating and consistently applying a clearly

1 defined standard of proof and indicating a clear approach to assessing the
2 sufficiency of the evidence. In her view, the rules for the no case to answer
3 procedure were not clear to the parties, participants or within the Chamber
4 itself. The Prosecutor further brings six examples, alleging they show that the
5 Trial Chamber was equivocal and sometimes contradictory as to the
6 evidentiary standards and approaches it followed in assessing the sufficiency
7 of the evidence at the no case to answer stage. According to the Prosecutor,
8 the proceedings were effectively ruptured, and, through the acquittal decision,
9 the Prosecutor, victims and public were prejudiced.

10 Let me now turn attention to procedural -- certain procedural and preliminary
11 issues.

12 The Appeals Chamber unanimously determined certain procedural and
13 preliminary issues in the first part of the judgment. These include the scope
14 of the observations of the Office of Public Counsel for Victims in these appeal
15 proceedings, which had been the subject of submissions, in particular, from
16 counsel for both Mr Gbagbo and Mr Blé Goudé. In that regard, the
17 Appeals Chamber reaffirms its previous jurisprudence and considers that the
18 OPCV can raise arguments that relate to issues that affect the victims' personal
19 interests, and, importantly, remain within the ambit of the Prosecutor's
20 grounds of appeal. The Appeals Chamber has taken into consideration the
21 submissions of the OPCV to the extent that they comply with those criteria.
22 Now, on the first ground of appeal, the Prosecutor's first ground of appeal,
23 beginning with applicability of Article 74(5) of the Rome Statute.
24 The Prosecutor's first ground of appeal alleges that the Trial Chamber violated
25 the requirements of Article 74(5) of the Statute. The first issue that the

1 Appeals Chamber needs to decide is whether Article 74(5) applies at all in this
2 case. Namely, whether it applies to the decision taken further to the no case
3 to answer proceedings which resulted in the acquittal of both accused persons
4 who are now acquitted persons. It may be noted that Article 74(5) of the
5 Rome Statute provides as follows with respect to judgments of the
6 Trial Chamber, quote:

7 "The decision shall be in writing and shall contain a full and reasoned
8 statement of the Trial Chamber's findings on the evidence and conclusions.
9 The Trial Chamber shall issue one decision. When there is no unanimity, the
10 Trial Chamber's decision shall contain the views of the majority and the
11 minority. The decision or a summary thereof shall be delivered in open
12 court." Unquote.

13 The parties and participants make opposing submissions about this issue.
14 The Prosecutor and the OPCV submit that it does apply, that is, the provision
15 does apply. For their part, counsel for both Mr Gbagbo and Mr Blé Goudé
16 dispute that this provision applies.

17 The Appeals Chamber notes that counsel for Mr Blé Goudé emphasises that
18 there are two consequences of his argument that the Trial Chamber was not
19 bound by the requirement of Article 74(5). First, he argues that this appeal is
20 inadmissible in the first place and should be summarily dismissed because the
21 Prosecutor cannot bring this appeal pursuant to Article 81 of the Rome Statute,
22 as she has done, given that the decision to acquit is not one that falls under
23 Article 74.

24 Now what makes that point remarkable is that Article 81(1) provides that an
25 appeal may be brought as of right against a decision under Article 74 of the

1 Statute, rather than with permission or with leave, to use the legal terminology.
2 The Prosecutor, the argument goes, has brought this appeal under Article 81(1).
3 In the circumstances of the decision of 15 January 2019, the decision could not
4 have been taken under Article 74. Any appeal of it would therefore require
5 the leave of the Trial Chamber, under the necessary provision of the Rome
6 Statute, in order for the appeal to be brought before the Appeals Chamber.
7 Yet the Prosecutor did not seek any such leave to appeal in the present case,
8 and it goes without saying that none was granted.

9 Second, counsel for Mr Blé Goudé argues that, as there was no legal
10 requirement for the Trial Chamber to render its decision under Article 74, the
11 requirements of Article 74(5) could not have been breached because those
12 requirements were not binding upon the Trial Chamber. That interpretation
13 would have resulted in the complete dismissal of the first ground of the
14 Prosecutor's appeal, which entirely depends on the application of Article 74.

15 At this juncture in our proceedings today, the Appeals Chamber recalls and
16 reiterates its previous judgment in the case of Ntaganda, an interlocutory
17 judgment rendered on 15 September 2017- not the one of yesterday - in which
18 the Appeals Chamber held that the Court's legal framework permits the no
19 case to answer procedure.

20 This is fully consistent with established procedures in the administration of
21 international criminal justice. The no case to answer procedure is a necessary
22 adjunct to two of the most fundamental principles of criminal law: One is that
23 the defendant enjoys a presumption of innocence; the other is that the burden
24 of displacing that presumption always rests on the prosecution to be
25 discharged on a standard of proof beyond reasonable doubt.

1 The Ntaganda judgment determined that Article 64 was the legal basis for
2 deciding to conduct no case to answer proceedings at the ICC. However, that
3 decision did not address which of the Court's provisions apply to a decision
4 that acquits the accused person further to such no case to answer proceedings.
5 For the reasons explained in today's judgment, the Appeals Chamber finds that
6 judgments of a trial chamber for a full acquittal of the defendant - following
7 a no case to answer motion - fall entirely within the purview of Article 74 of the
8 Statute.

9 This is primarily because that provision is intended to regulate the Trial
10 Chamber's final judgment that puts an end to the trial, either by way of
11 a conviction or by way of an acquittal. It is true that an unsuccessful motion
12 of no case to answer does not, as such, contemplate a conviction of the
13 defendant, and thus does not bring a case to a final conclusion. However, the
14 incidence of the motion is different in the event of a full acquittal of the
15 defendant, following a successful no case to answer motion.

16 The case is brought to conclusion, and the plea of double jeopardy – or, *ne bis in*
17 *idem*, to use a Latin expression - fully attaches. For that reason, such
18 judgments of acquittal fall entirely within the ambit of Article 74 and they are
19 to be fully regulated accordingly in the same manner as a judgment resulting
20 from a plenary trial.

21 The Appeals Chamber therefore rejects the submissions of counsel for
22 Mr Gbagbo and Mr Blé Goudé.

23 The conclusion of the Appeals Chamber as to the applicability of Article 74(5)
24 is unanimous, but Judge Ibáñez and Judge Bossa disagree with some of the
25 reasoning used to reach this conclusion for reasons set out fully in their

1 separate opinions.

2 The remainder of this judgment is taken by the majority of the
3 Appeals Chamber, with Judge Ibáñez and Judge Bossa dissenting for reasons
4 given in their dissenting opinions filed with the judgment.

5 I begin with the requirements of Article 74(5).

6 The Prosecutor alleges several breaches of Article 74(5). She argues that the
7 Trial Chamber did not comply with Article 74(5) because, first, the
8 Trial Chamber failed to render a decision in writing; secondly, the
9 Trial Chamber failed to provide a full and reasoned statement of its findings on
10 the evidence and conclusions; third, the Trial Chamber failed to deliver its
11 decision or a summary of it in open court; and fourth, that the Trial Chamber
12 failed to issue one decision in that the separation of reasons from the verdict
13 breached the principle of one decision, and the manner of issuance of the
14 reasons consisting of three separate opinions, one by each trial judge, in July
15 2019, breached the principle of one decision.

16 In making her arguments, the Prosecutor views the decision of 15 January 2019
17 as a stand-alone decision, and argues that it cannot be read together with the
18 reasons filed in July 2019. However, it is clear to the Appeals Chamber that
19 the Trial Chamber did not intend for its verdict delivered on 15 January 2019 to
20 stand alone. It was intended to be complemented by full and detailed reasons
21 to follow.

22 The Appeals Chamber has assessed whether the Trial Chamber's decision is, on
23 this basis, consistent with Article 74(5) of the Rome Statute. The
24 Appeals Chamber rejects the Prosecutor's argument that the Trial Chamber
25 erred by announcing its verdict on 15 January 2019 with reasons to follow.

1 Whilst trial chambers should ideally deliver both verdicts and reasons
2 concurrently, the very fact that a delay is encountered between the issuance of
3 a verdict and its reasons cannot necessarily invalidate an entire trial process or
4 indeed breach Article 74(5).

5 There may, on the contrary, be clear justification for such separation in the
6 particular circumstances of a case; most obviously, when the liberty of an
7 acquitted defendant is at stake. The Trial Chamber in this case, having
8 definitively arrived at its decision to acquit, and -- could not countenance
9 unnecessarily maintaining Mr Gbagbo and Mr Blé Goudé in detention for the
10 time it would take to issue the reasons for the verdict. The Trial Chamber
11 correctly found that the need to pronounce the verdict and thereby release
12 Mr Gbagbo and Mr Blé Goudé outweighed the formal requirements of Article
13 74(5), in any expectation that the verdict of acquittal and the reasons for that
14 verdict must always be delivered together.

15 As to the Prosecutor's argument that the Trial Chamber erred by failing to issue
16 the 15 January 2019 decision in writing, the Appeals Chamber finds that all the
17 components of Article 74(5) of the Statute must be issued in writing, both the
18 operative part, being the verdict, and the reasons.

19 Although the judges of the Appeals Chamber comprising the majority diverge
20 on the question of whether or not the verdict delivered on 15 January 2019 met
21 this requirement, the Appeals Chamber finds that whether or not the decision
22 was in writing, is, in the instant case, patently incapable of materially affecting
23 the decision of the Trial Chamber.

24 As to the Prosecutor's argument regarding the inadequacies of the summary
25 given by the Trial Chamber on 15 January 2019, the Appeals Chamber finds

1 that nothing in the Rome Statute strictly commands the content of any
2 summary to be issued at the same time of announcement of the verdict. What
3 the Statute requires is that the trial chamber issue a fully reasoned judgment.
4 Whilst the Trial Chamber's summary in this case was certainly brief, it
5 contained the most important parts of the reasoning.

6 As to the timing of issuance of the reasons of 15 January 2019, the Prosecutor
7 argues that the unity of the decision was broken by the lapse of six months
8 between rendering the verdict and issuing the reasons, or by the fact that the
9 time for the delivery of written reasons was not given, or by both
10 considerations. However, Article 74(5) of the Statute does not include a time
11 limit within which a decision issued pursuant to that provision should be
12 provided following a trial.

13 Concerning the Prosecutor's argument that the Trial Chamber breached the one
14 decision principle in Article 74(5) because the three judges of the
15 Trial Chamber issued their own individual opinions as opposed to a reasoned
16 statement of the majority, the Appeals Chamber rejects this argument on its
17 facts, the Appeals Chamber by majority.

18 Judge Tarfusser and Judge Henderson wrote clearly in concurrence as the two
19 judges that formed the majority of the Trial Chamber. Further, the reasons
20 issued in July were set out in one document, signed by all three judges and
21 formally satisfied the basic understanding of the requirement to issue one
22 decision.

23 Furthermore, contrary to the Prosecutor's argument, the Trial Chamber was not
24 prevented by internationally recognised human rights law from taking the
25 approach it did. It ensured that no prejudice was caused to the parties, the

1 victims or indeed the public by suspending the time limits for appealing the
2 acquittals until the written reasons had been provided and sufficiently keeping
3 the public abreast of developments in the proceedings.

4 To conclude on ground 1, the Appeals Chamber by majority finds that to the
5 extent that any error had been found under this ground of appeal as to whether
6 the verdict issued on 15 January 2019 was filed in writing, this error is patently
7 incapable of materially affecting the decision in this case; Judge Ibáñez
8 dissented from that finding of the Appeals Chamber.

9 The verdict was pronounced in open court, followed by both a written
10 transcript and written press release, and it was later filed in July 2019. It is
11 self-evident that the verdicts of acquittal would have been the same had the
12 Trial Chamber taken the additional step of filing them on 15 January 2019.

13 Moving on now to the Prosecutor's second ground of appeal.

14 Under the second ground of appeal, the Prosecutor argues that the
15 Trial Chamber failed to properly articulate and consistently apply a clearly
16 defined standard of proof or approach to assessing the sufficiency of evidence
17 at the no case to answer stage, before or during the proceedings or in the 15
18 January 2019 decision or the reasons for that decision. She argues that in
19 failing to do so, the Trial Chamber erred in law and in procedure.

20 The thrust of the Prosecutor's arguments within this second ground of appeal
21 concern the Trial Chamber's alleged failure to set out a clear and commonly
22 agreed upon standard of proof or approach to assessing the sufficiency of the
23 evidence at the no case to answer stage, before it actually did that evidential
24 assessment. In particular, the Prosecutor submits that by failing to direct itself
25 as to the relevant evidentiary standards, the Trial Chamber erred in law, and,

1 by failing to set out its approach as to how it would assess the evidence before
2 doing so, the Trial Chamber erred in procedure. As a consequence of the
3 above failures and of such an ambiguous and unclear approach, the Prosecutor
4 argues that the Trial Chamber made several inconsistent and incorrect
5 evidentiary assessments.

6 In particular, the Prosecutor argues that the Trial Chamber's alleged failure to
7 articulate and apply its evidentiary approach is illustrated in the following
8 three points:

9 First, by the procedural history of this case, which demonstrated what the
10 Prosecutor described as a flawed process; next, by Judge Henderson's
11 articulation and application of an overly rigid and unsupported approach to
12 corroboration - which is, in itself, a further error of law - without giving notice
13 to the parties; and, finally, by the Trial Chamber's incorrect and inconsistent
14 assessment of several factual matters as set out in six examples that the
15 Prosecutor submitted as illustrating those errors. According to the Prosecutor,
16 each example consists of multiple errors and/or inconsistencies that show that
17 the majority's approach was deeply flawed.

18 In light of the Prosecutor's argument, the Appeals Chamber first addresses in
19 the judgment the allegation that the Trial Chamber failed to set out and agree
20 upon the applicable standard of proof before assessing the evidence. In this
21 regard, the Appeals Chamber has identified the evidentiary standard against
22 which no case to answer motions should be assessed; Judge Ibáñez dissenting.
23 The Appeals Chamber then determined whether the judges of the majority
24 identified an evidentiary standard, whether it was the correct standard, and
25 whether the standard was commonly agreed upon between the two judges

1 forming the majority of the Trial Chamber.

2 The Appeals Chamber then considers the Prosecutor's argument that the
3 Trial Chamber erred procedurally, primarily by failing to give guidance to the
4 parties and to the OPCV as to the applicable evidentiary standard before
5 disposing of the no case to answer motions.

6 Finally, the Appeals Chamber considers the arguments of the Prosecutor
7 concerning corroboration as well as the other alleged errors in the assessment
8 of the evidence, which, according to the Prosecutor, resulted from the failure to
9 define and agree upon the applicable evidentiary standard and approach.

10 The Appeals Chamber has examined the Prosecutor's allegations under this
11 ground of appeal applying the standard of review for legal and factual errors.

12 Concerning the applicable standard at the no case to answer stage, in the event
13 of a motion of no case to answer, the test that guides the trial chamber's
14 decision may be expressed as follows:

15 Upon the conclusion of the evidence presented by the prosecution - and, on
16 behalf of the victims, as appropriate - the trial chamber shall acquit the
17 defendant or, as the case may be, dismiss one or more of the charges, where the
18 evidence thus presented is insufficient in law to sustain a conviction on the
19 concerned charge or charges.

20 The foregoing test is fully consistent with the classic test of the no case to
21 answer procedure as applied in both international and national jurisdictions.

22 A proper appreciation of the applicable test should make it wholly appropriate
23 and correct to articulate the standard of proof at the level of proof beyond
24 reasonable doubt and nothing less.

25 The Appeals Chamber relied on the test set out by the Appeals Chamber of the

1 ICTY in the Jelisić case, as well as the standard of proof indicated in Rule 130(3)
2 of the Rules of Procedure and Evidence of the Kosovo Specialist Chamber,
3 noting that this was further supported by important authority from national
4 jurisdictions.

5 The Appeals Chamber considers that it is only when the evidence has satisfied
6 the standard of proof beyond reasonable doubt that it can be said to have been,
7 quote, "sufficient to sustain a conviction", unquote, or quote, "capable of
8 supporting a conviction", unquote. Nothing less would do.

9 In the assessment of the evidence for purposes of a no case to answer motion,
10 the Trial Chamber is not precluded from sensibly weighing credibility and
11 reliability of the evidence thus far presented in order to satisfy the applicable
12 standard of proof. In those national jurisdictions, where there is a jury, an
13 agonizing debate is often encountered concerning the propriety of judges'
14 entering into assessment of credibility and reliability of evidence in the context
15 of the no case to answer procedure. That concern necessarily arises because of
16 the division of functions between judge and jury in an arrangement in which
17 assessment of credibility and reliability of evidence is the exclusive prerogative
18 of the jury, while the determination of no case to answer is the prerogative of
19 the judge.

20 But that concern does not arise in the circumstances of the ICC. There is no
21 similar separation of functions because there is no jury. Judges have the
22 prerogative of assessment of credibility and reliability of evidence at any point
23 in the proceedings when such an assessment falls to be made.

24 Indeed, a correct appreciation of the standard of proof applicable at the no case
25 to answer stage necessarily entails the assessment of credibility and reliability.

1 This is because no reasonable tribunal of fact, quote, "could properly convict",
2 unquote, on the basis of evidence the credibility and reliability of which could
3 not persuade the mind the guilt has been proven beyond reasonable doubt.
4 As to how the evidence should be assessed, the prosecution evidence should be
5 considered at its best or taken in its best light. These expressions do not mean
6 that the prosecution evidence must be taken at face value or be presumed to
7 have satisfied its forensic objective. The expressions only mean that the
8 evidential assessment will focus on the strength of the case for the
9 prosecution -- on the strength of evidence that the prosecution has tendered to
10 prove their case.

11 The Appeals Chamber will now turn to the question whether the Prosecutor is
12 correct when she alleges that the judges of the majority failed to set out and
13 agree upon the evidentiary standard that they would apply when assessing the
14 no case to answer motions.

15 The Appeals Chamber notes that the Prosecutor argues that the judges in the
16 majority did not set out, agree, and therefore direct themselves to the relevant
17 standard before they decided to acquit Mr Gbagbo and Mr Blé Goudé on

18 15 January 2019. According to the Prosecutor, Judge Henderson's
19 interpretation of the standard was contained only in his own reasons filed six
20 months later. The Prosecutor argues that Judge Henderson could not have
21 remedied this error by setting out an evidentiary framework six months later.

22 According to the Prosecutor, Judge Henderson's reasons contain mere
23 "afterthoughts", which were developed only after the 15 January 2019 decision
24 and did not demonstrate that the majority judges had that - or, indeed, any
25 standard in mind at the crucial time before 15 January 2019, when they decided

1 to acquit.

2 In order to determine whether the two judges in the majority of the
3 Trial Chamber defined the evidentiary standard and agreed upon it, the
4 Appeals Chamber has, in a highly technical legal exercise, reviewed and
5 analysed the reasons respectively appended by Judge Henderson and
6 Judge Tarfusser.

7 The Appeals Chamber has read it together with the 15 January 2019 decision
8 and has taken into account the relevant procedural history.

9 In the final analysis, the Appeals Chamber finds by majority, Judge Ibáñez and
10 Judge Bossa dissenting, there is no lack of clarity or failure of consensus
11 between the judges in the Trial Chamber majority as to how to approach the
12 evidence at that stage of the proceedings. They correctly assumed the
13 Trial Chamber -- that is, the Appeals Chamber correctly assumed that the
14 Trial Chamber at the no case to answer stage is not precluded from conducting
15 an in-depth analysis of the evidence, including an assessment of the credibility
16 and reliability of the evidence.

17 To the extent that there is any doubt whether the Trial Chamber adopted the
18 correct standard of proof, the Appeals Chamber by majority is satisfied that the
19 decision was not materially affected. By adopting the correct approach as to
20 how to assess the sufficiency of the evidence, as required at this stage of the
21 proceedings, and after a detailed analysis of the evidence, the judges in the
22 Trial Chamber majority found that the Prosecutor's evidence did not meet any
23 standard that could be considered as applicable in a criminal trial at that stage.
24 Ultimately, Judge Tarfusser and Judge Henderson concurred in their analysis
25 of the sufficiency of the evidence by concluding that the evidence against the

1 defendants was not only weak, but "exceptionally weak." In the view of the
2 Appeals Chamber majority, that determination is of great significance when
3 applying the test of sufficiency.

4 Now we turn our attention to the contention regarding lack of clarity in
5 approach.

6 As recalled earlier, the Prosecutor submits that the Trial Chamber erred in
7 procedure by failing to set out a clear approach on how it would assess the
8 evidence at the no case to answer stage before it actually did so. She submits
9 that this error is illustrated by the procedural history of this case, by
10 Judge Henderson's articulation and application of an overly rigid and
11 unsupported approach to corroboration without notice to the parties, and by
12 the Trial Chamber's incorrect and inconsistent evidentiary assessments as set
13 out in the six examples offered by the Prosecutor.

14 The Appeals Chamber understands that the main allegation of the Prosecutor
15 in this set of arguments is to be a general lack of clarity as to the conduct of the
16 no case to answer proceedings; in particular, as to the applicable evidentiary
17 standard, which is demonstrated mainly in the Trial Chamber's alleged failure
18 to provide guidance to the parties and to the OPCV during the proceedings
19 leading to the 15 January 2019 decision.

20 The Prosecutor alleges that the Trial Chamber resisted opportunities to
21 articulate the applicable standard and other evidentiary principles and
22 standards and that Judge Tarfusser, as single judge, declined to provide the
23 clarification when requested to do so.

24 The Appeals Chamber has assessed the various steps of the no case to answer
25 proceedings before the Trial Chamber, including the decision rejecting the

1 Prosecutor's request for clarification as to the applicable standard. The
2 Appeals Chamber notes that the parties and the OPCV were provided with
3 ample opportunity to make written and oral submissions on the applicable
4 standard and the approach to assessing the evidence as well as the evidence
5 itself.

6 The Appeals Chamber by majority considers that the parties and the OPCV
7 were therefore not, as alleged by the Prosecutor, prejudiced in the case.

8 The Appeals Chamber by majority further notes that the Prosecutor has not
9 explained what specifically she would have done differently if the

10 Trial Chamber had given the guidance that she had in mind. Following an
11 invitation from the Trial Chamber to file a trial brief illustrating her case and
12 detailing the evidence in support of the charges, the Prosecutor was allowed to
13 present her case in detail and explain it fully when filing her mid-term brief.

14 As mentioned above, the parties and the OPCV were provided with
15 opportunities to make submissions on the no case to answer motions, including
16 the applicable evidentiary standard and approaches to the assessment of the
17 evidence. In any event, the Prosecutor was, and is, at all times, aware that she
18 is required to prove her case beyond reasonable doubt and with credible
19 evidence during her turn to present her case.

20 In sum, the Appeals Chamber by majority, Judge Ibáñez and Judge Bossa
21 dissenting, rejects the Prosecutor's argument that the Trial Chamber's failure to
22 give guidance as to the evidentiary standard amounted to a procedural error.
23 The Prosecutor also made arguments concerning corroboration. With regard
24 to the Prosecutor's allegations of errors in the approach to the assessment of the
25 evidence, and, in particular, those concerning the approach to corroboration for

1 reasons fully explained in the judgment, the Appeals Chamber by majority,
2 Judge Ibáñez and Judge Bossa dissenting, finds no error in the Trial Chamber's
3 view on corroboration. It also finds that there was no need for the
4 Trial Chamber to provide notice of its understanding on corroboration to the
5 parties and to the OPCV.

6 The Appeals Chamber, having found by majority no error in the interpretation
7 of corroboration given by the Trial Chamber, does not consider it necessary to
8 review the Prosecutor's argument as to how the Trial Chamber applied
9 corroboration and -- when assessing the evidence. Although, in a separate
10 concurring opinion, I do make that assessment.

11 As further explained below, the Appeals Chamber does not find it necessary to
12 review the Prosecutor's allegations raised within the six examples, and, again, I
13 do enter that assessment in a separate concurring opinion.

14 Thus, the Appeals Chamber does not make any finding as to the correctness or
15 not of the Trial Chamber's approach to corroboration in these examples. In
16 any event, as noted below, the Prosecutor has failed to establish any link
17 between any such error and the Trial Chamber's alleged lack of a clear
18 approach to corroboration at the time it rendered its acquittal decision.

19 The Prosecutor also submitted that the lack of clarity and consensus on the
20 approach of the Trial Chamber majority to the assessment of evidence, led the
21 judges in the majority to make several other mistakes in their evidentiary
22 analysis. According to the Prosecutor, this is reflected in six examples
23 stemming from Judge Henderson's reasons.

24 In the six examples, the Prosecutor argues that the Trial Chamber, first, erred in
25 how it approached the question of corroboration of evidence; second, failed to

1 consider the evidence in its totality; third, adopted an unreasonable and
2 unrealistic view regarding the assessment of witness testimony; fourth,
3 unfairly subjected evidence of crimes of sexual violence to a heightened level of
4 scrutiny; and fifth, speculated on numbers and estimates outside the case
5 record when seeking to set an empirical benchmark to assess patterns of
6 criminality.

7 According to the Prosecutor, the six examples are one factor, amongst others,
8 illustrating the Trial Chamber's "flawed and unclear approach" to assessing the
9 sufficiency of the evidence. She submits that the Trial Chamber's unclear
10 approach led to inconsistent and incorrect findings and that those findings
11 simultaneously demonstrate both the errors and also their consequences.

12 The Appeals Chamber by majority is not persuaded by the arguments of the
13 Prosecutor in this regard; Judge Ibáñez and Judge Bossa dissenting.

14 To begin with, the Appeals Chamber by majority finds that when looking at
15 the relevant procedural history, there is neither lack of clarity nor disagreement
16 between the judges of the majority of the Trial Chamber as to the standard and
17 approach to the assessment of the evidence and the sufficiency of it.

18 In addition, in any event, the Prosecutor's submissions as to the link between
19 the factual examples in her submissions under this ground are unclear.

20 Finally, as regards the Prosecutor's submission that the errors that she alleges
21 in respect of the six examples could be assessed as factual errors, the

22 Appeals Chamber recalls that it would have been necessary for the Prosecutor
23 to advance arguments showing that no reasonable trial chamber would have
24 come to such a factual finding. The Prosecutor has chosen to base her appeal
25 on allegations of legal and procedural errors, rather than bringing the alleged

1 errors within the examples as factual errors.

2 At any rate, the Prosecutor failed to bring convincing arguments about how the
3 errors alleged within the six examples materially affected the decision. The
4 examples include errors and inconsistencies concerning a certain number of
5 factual matters, not all related to incidents that are relevant to both of the
6 accused persons in this case, or directly to their individual conduct.

7 The Appeals Chamber finds by majority, Judge Ibáñez and Judge Bossa
8 dissenting, that the Prosecutor failed to demonstrate that the Trial Chamber
9 erred in law or in procedure, and, therefore, the Prosecutor's second ground of
10 appeal is rejected.

11 The question of whether the Trial Chamber was fully informed.

12 As for her appeal, the Prosecutor argues -- as part of her appeal, the Prosecutor
13 argues that when the Trial Chamber issued the decision of 15 January 2019,
14 quote, "despite its assertion to the contrary" - that is, the Trial Chamber's
15 assertion to the contrary - "it apparently had not yet completed the necessary
16 process of making its findings on the evidence and reaching all its conclusions,
17 nor completed the written articulation of its findings and conclusions".

18 Unquote. That is a submission of the Prosecutor.

19 In that regard, the Prosecutor alleges that the following four issues illustrate
20 that the Trial Chamber's decision of 15 January 2019 was not fully informed:

21 One, the fact that it was not accompanied by summary reasons or a precise
22 timeline for issuing the reasons; two, the fact that the Trial Chamber had not
23 completed its assessment of the evidence or reached all conclusions; three, the
24 fact that there were substantive inconsistencies between the Trial Chamber's 15
25 January 2019 decision and Judge Henderson's reasons; and four, the fact that

1 there were inconsistencies in assessing the sufficiency of evidence at the no
2 case to answer stage within Judge Henderson's reasons.

3 The Appeals Chamber by majority, Judge Ibáñez and Judge Bossa dissenting,
4 finds that the Prosecutor has not substantiated her arguments in support of the
5 allegation that the decision of acquittal that the Trial Chamber rendered in
6 January 2019 was not fully informed.

7 The Prosecutor's allegations come close to alleging lack of propriety on the part
8 of the two judges comprising the majority of the Trial Chamber. The
9 Appeals Chamber is careful to note that during the hearing in this case, counsel
10 for the Prosecution expressly disavowed such an interpretation of their
11 position. It remains the case, however, that the Prosecution is alleging
12 that -- by their submissions that the two judges forming the majority of the
13 Trial Chamber entered a verdict of acquittal prematurely, without fully
14 informing themselves of the evidential considerations that must guide their
15 judgment, the allegation is, essentially, that these judges had entered verdicts
16 of acquittal before proper deliberations or considering the evidence presented.
17 If this were the case, it would be a grave error indeed, which would affect the
18 integrity and impartiality of the judges.

19 In this regard, judges of the ICC, as elsewhere, must be presumed to act with
20 integrity and impartiality. The Appeals Chamber would expect evidence of
21 a very clear nature to support such a serious allegation as was made.

22 Now, more to the substance of the allegation.

23 As part of her appeal, the Prosecutor makes certain arguments. She first
24 argues that the fact that the 15 January 2019 decision was not accompanied by
25 summary reasons or a precise timeline for issuing the written reasons show

1 that the majority's necessary reasoning process had not been completed by the
2 time of the 15 January 2019 decision. Simply put, the Appeals Chamber
3 considers that these allegations amount to pure speculation. As I already
4 explained in the present case, a summary of the decision was issued and the
5 fact that it was short does not mean that the Trial Chamber had not completed
6 its work. Similarly, the fact that the precise time frame for the issuance of the
7 written reasons was not given does not substantiate the serious allegation that
8 the Trial Chamber acquitted both defendants without having been fully
9 informed when doing so.

10 The Prosecutor's second argument is that the Trial Chamber was not fully
11 informed when it acquitted in January 2019, because it had neither completed
12 its assessment of the evidence nor reached all of its conclusions. She raises
13 several arguments in support of this contention.

14 The Appeals Chamber acknowledges that the Presiding Judge of the
15 Trial Chamber said certain things on 16 January 2019, that were not wholly
16 clear from the perspective of the duty to assess relevance, probative value and
17 prejudice. Notably, the Presiding Judge stated that all evidence that had been
18 submitted would be considered. He also noted that the majority had
19 conducted a more in-depth review of the evidence in this case. In addition,
20 the fact that the Trial Chamber did not make formal admissibility assessments
21 does not, in any event, inevitably mean that the judges were any less familiar
22 with evidence presented to them during the course of the trial. They stated
23 that they had considered the evidence and their ultimate conclusion was that
24 there was insufficient evidence on which to proceed.

25 Therefore, it is not possible to conclude from Judge Tarfusser's statement of 16

1 January 2019, that the decision of 15 January 2019 was not fully informed
2 because, as the Prosecutor argues, he had not properly assessed the evidence.
3 The Appeals Chamber by majority rejects the Prosecutor's argument for the
4 reasons explained fully in the judgment. The inference which the Prosecutor
5 urges the Appeals Chamber to draw is, quite simply, too strained and
6 speculative. Judges who have been conducting trials - in some cases, trials
7 lasting years - must be presumed to have developed their view of the case
8 based on the appropriate legal principles as the evidence unfolds. The
9 Appeals Chamber cannot accept the Prosecutor's premise that trial judges are
10 expected to begin evaluating the case only once the entire case has concluded.
11 Therefore, the Prosecutor has failed to demonstrate any error in this regard.
12 Accordingly, the Prosecutor has failed to provide any evidence that would
13 rebut the presumption of integrity and impartiality afforded to judges of the
14 Trial Chamber. The Appeals Chamber finds that the reasoning set out in the
15 written reasons issued in July 2019 was the basis for acquitting the two accused
16 persons in January 2019. Therefore, the Prosecutor's argument that the 15
17 January 2019 decision was not fully informed is rejected by a majority of the
18 Appeals Chamber, Judge Ibáñez and Judge Bossa dissenting.
19 Now, the appropriate relief.
20 In the present appeal, the Appeals Chamber by majority has found no error
21 that could have materially affected the decision of the Trial Chamber in relation
22 to either of the Prosecutor's two grounds of appeal. It therefore rejects the
23 Prosecutor's appeal and confirms the decision of the Trial Chamber.
24 Furthermore, the Appeals Chamber recalls that in its decision on Mr Gbagbo's
25 request for reconsideration of his conditions of release, the Appeals Chamber

1 reviewed and revised the conditions on the release of Mr Gbagbo and
2 Mr Blé Goudé, revoking some conditions and maintaining others. The
3 Appeals Chamber hereby revokes all remaining conditions on the release of
4 Mr Gbagbo and Mr Blé Goudé as a result of this judgment.

5 The Registrar is hereby directed, pursuant to Rule 185(1) of the Rules, to make
6 such arrangements as considered appropriate as soon as possible for the safe
7 transfer of Mr Gbagbo and Mr Blé Goudé to a State, or States, contemplated in
8 that rule, taking into account the views of the acquitted persons.

9 As previously stated, the Appeals Chamber's judgment is taken by majority,
10 with Judge Ibáñez and Judge Bossa dissenting for the reasons fully expressed
11 in their respective opinions filed today.

12 But by way of a very brief summary, Judge Ibáñez is of the view that the no
13 case to answer procedure has no place in the Court's applicable law. As to the
14 first ground of appeal, she is of the view that Article 74(2) and (5) contain
15 important guarantees of justice, which the Trial Chamber breached.

16 And as to the second ground, she is of the view that the majority of the
17 Trial Chamber applied an incorrect standard of proof and made other
18 significant errors in its appraisal of the evidence. It also failed to inform the
19 parties and participants of the applicable standard of proof. In her view, all
20 these were significant errors of law and fact.

21 And Judge Bossa agrees -- for her part, she agrees with the majority of the
22 Trial Chamber that the no case to answer procedure may be applied in trials
23 before the ICC. If a trial chamber decides to acquit an accused at this stage,
24 the decision has to comply with Article 74. She is of the view that the majority
25 of the Trial Chamber failed to comply with this provision.

1 Importantly, in relation to the Prosecutor's second ground of appeal, Judge
2 Bossa considers that the majority of the Trial Chamber failed to agree on the
3 applicability of the no case to answer procedure, how and whether to assess all
4 the evidence at this stage, and what the applicable standard of proof was.
5 Judge Ibáñez and Judge Bossa therefore would have granted the Prosecutor's
6 appeal and would have ordered a new trial.

7 I append a separate concurring opinion on grounds 1 and 2 of the appeal.

8 Judge Morrison appends a separate concurring opinion on ground 1 of the
9 appeal. Judge Hofmański appends a separate concurring opinion on ground
10 1 of the appeal. Judge Ibáñez appends a dissenting opinion on ground 1 and
11 ground 2 of the appeal. Judge Bossa appends to this judgment a dissenting
12 opinion on grounds 1 -- on ground 2 of the appeal.

13 That brings me to the end of the formal part of the proceeding. But as this is
14 my very last judicial function at the ICC, I must take the opportunity to express
15 the words of gratitude of all my colleagues of the Appeals Chamber and we do
16 so exclusively to the staff that we have relied upon to do our judicial work.

17 I'm talking about the interpreters, the court reporters in the booths, the
18 technicians who assist us to make things work, the security staff, the sanitary
19 staff and building management staff, staff of the transport section who ensure
20 movement of witnesses and defendants, the finance section who make sure
21 that defence counsel are paid their fees, and, so too, other people who work at
22 the Court. I could keep going on with a long list of those who make things
23 work, but in the end, it necessarily still would leave someone out unmentioned,
24 suffice to say, we are truly grateful.

25 When I served the Court as President, I often say that we cannot do this work

1 without you, the staff. But that is not merely a sentiment of pointless grace,
2 the experience of the past few days demonstrates how real that message truly
3 is, and it is in the experience of certain cadre of court staff that I have not
4 mentioned above. These are the staff who assist the judges in drafting
5 judgments. As I put it in a recent internal message, they moved mountains of
6 physical, emotional and electronic efforts to get us to the finish line in these last
7 two cases -- the one rendered yesterday, Ntaganda, and the one of today --
8 and they did so in spite of all odds.

9 And to be sure, those odds were myriad indeed in ways that many would not
10 know. For instance, in addition to everything else that the teams have had to
11 endure, SharePoint - SharePoint is the electronic shared drafting
12 platform - kept on freezing and crashing throughout yesterday. Even late into
13 the night, as drafts were being shared and exchanged, slowing down the
14 drafting process to a crawl and extremely frustrating pace.

15 I know this because I, too, suffered that experience with them in my capacity as
16 the leader of the drafting team. But I did so from the more privileged position
17 of dumping my own frustrations downstream for them to find solutions.

18 Rieko, Odo and Lucia had to put up politely with my frantic phone calls every
19 two minutes for someone to explain why the paragraph auto-numbering
20 function wasn't working; and why the review tab in Microsoft Word had
21 simply disappeared, along with it the track changes and the accept change
22 and reject change functions. And, for several hours yesterday, one member
23 of -- a key member of the drafting team was literally unable to draft because
24 the system crashed. That is to say, even the computer itself found it difficult
25 to cope. Of course, SharePoint would say: Don't blame me. Blame COVID

1 who made people work from the remote location rather than together so I can
2 function well.

3 But all through all that, the staff persevered well into the night, kept on
4 drafting. Still on COVID -- one, as he was leaving the office past 11 p.m.,
5 came by my office to make sure that I had the appropriate pass to show the
6 COVID patrol so they wouldn't arrest me on my way home.

7 That is all to say, we are extremely grateful, and that little story into the
8 backdrop of the -- the back story of what we do and go through, is simply
9 meant to illustrate the many, many ways in which staff of this Court make
10 things work without many knowing it.

11 Thank you.

12 Court is adjourned.

13 THE COURT USHER: [16:40:48] All rise.

14 (The hearing ends in open session at 4.40 p.m.)